FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 6, 2010

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDINGS
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. LAKE 2010-769-E
	:	Citation No. 7563769; 06/04/2010
	:	Wildcat Hills Mine-Underground
v.	:	Mine ID 11-03156
	:	
	:	Docket No. LAKE 2010-770-E
PEABODY MIDWEST MINING, LLC,	:	Citation No. 7563800; 06/04/2010
Respondent	:	Francisco Mine-Underground Pit
	:	Mine ID 12-02295

DECISION

Appearances: Lynne B. Dunbar, Esq., and Tracy B. Agyemang, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me on Referrals of Emergency Response Plan Disputes by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 876(b)(2)(G) (the "Mine Act"), as amended by the Mine Improvements and New Emergency Response Act of 2006 ("MINER Act"). At issue are two citations issued on June 4, 2010, charging Peabody Midwest Mining, LLC ("Peabody") with violations of section 316(b) of the Mine Act at the two mines. The citations allege that Peabody failed to develop, adopt, and submit emergency response plans ("ERPs") that provided electronic tracking capability sufficient to adequately protect miners on the working sections in the mines. An evidentiary hearing was held on June 21, 2010, in St. Louis, Missouri, and the parties presented closing arguments and filed post-hearing briefs.

Although the two citations were issued at different mines, they are the same in all material respects. As a consequence, I do not discuss the citations separately. Both mines utilize conventional mining techniques using continuous mining machines. Each mine has at least one "super section" in which two continuous mining machines are cutting coal in a single working section. The parties entered into stipulations prior to the hearing in which they agreed that the citations were issued after the district manager concluded that the parties had reached an impasse

following lengthy discussions. (Stip. 21). They also agreed that the parties had negotiated the issues, as set forth in the Secretary's referral, in good faith. (Stip. 27). The issue before me is whether Peabody was properly cited by MSHA for failing to submit revised ERPs for the two mines that can be approved under section 316(b)(2)(C) of the Mine Act.

I. BACKGROUND

Section 316 of the Mine Act requires underground coal mine operators to develop and submit an ERP for MSHA approval and periodic review. 30 U.S.C. § 876(b)(2)(A). The goal of an ERP is to provide for the evacuation of miners who are endangered by a mine emergency and to assure the survival of miners who are trapped underground because they are not able to evacuate the mine. Within three years of enactment of the MINER Act, each underground coal mine operator was required to develop and submit an ERP that includes, among other provisions, a system for wireless, two-way communications and the electronic tracking of miners underground. 30 U.S.C. § 876(b)(2)(E) & (F)(ii). The MINER Act also provides that if the mine operator believes that "such provisions cannot be adopted," the ERP must state the reasons why and must "set forth the operator's alternative means of compliance." 30 U.S.C. § 876(b)(2)(F)(ii). This alternative means must "approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system." *Id.* In order to obtain MSHA approval, any ERP submitted by an operator after June 15, 2009, must satisfy these requirements. The legislative history of this section of the MINER Act states that the intent "is for operators to use the most advanced technology available that works best in their particular mine, to provide a means for the [ERP] to be continuously adapted to changes in the mine or in the commercial technical equipment market, and to avoid the 'behave only to the letter of the standard' syndrome that stifles innovation and delays the implementation of new methods or equipment." S. REP. 109-365, at 13 (2006) ("S. REP.").

The present cases only involve the electronic tracking requirements of the MINER Act. Peabody developed a revised ERP that contained electronic tracking provisions for each mine and, after continuing discussions with MSHA, submitted several revisions of the plan. (Exs. JX-B, JX-C, JX-F, JX-G, JX-J, and JX-K). The final revised plans were submitted to MSHA on or about May 21, 2010. (Exs. JX-J, and JX-K). These plans are identical with respect to electronic tracking.

MSHA rejected these final plans and issued the subject citations on June 4. In letters dated June 4, 2010, Hubert Payne, District Manager for MSHA District 8, stated that Peabody's ERPs failed to provide that its "tracking system will be installed in such a manner such that it effectively can be used to assist miners on the working section during an emergency." (Exs. JX-L and JX-M). Peabody proposed to use a tracking system at each mine that would be capable of identifying the miners who are on a working section, but the system would not be installed in such a manner that surface personnel would be able to determine the location of the miners on a working section "with an acceptable degree of precision." *Id.* The letters go on to state that the ERPs fail to set forth valid reasons for not providing "acceptable tracking capability on the

working sections." *Id.* Most importantly, Payne stated in each of these letters that District 8 representatives "have discussed the ERP's electronic tracking provisions with Peabody representatives, explained the deficiency in the ERP, and explained [his] rationale for believing that the capability to track miners to within 200 feet of their actual locations on the working sections is necessary to adequately protect miners and rescuers given mine-specific conditions and circumstances likely to exist in an emergency." It is this 200-foot guideline that is at the crux of the dispute in these cases.

The citations, which are identical, contain the same allegations. Each citation states, for example, that District 8 representatives "have discussed the ERP's electronic tracking provisions with Peabody representatives, explained the deficiency in the revised ERP, and explained the district manager's rationale for believing that the capability to track miners to within 200 feet on the working section is necessary to protect miners and rescuers given mine-specific conditions and circumstances likely to exist in an emergency." (Exs. JX-L and JX-M). Each citation goes on to state that "Peabody has refused to modify the ERP to provide such tracking capability on the working section or to provide justification for alternative tracking capability that would meet the Mine Act's electronic tracking requirement." *Id.*

The requirement that Peabody install an electronic tracking system that can track miners to within 200 feet on the working sections comes from MSHA's Program Policy Letter P09-V-01 (the "PPL"), that became effective on January 16, 2009. (Ex. G-5). This PPL is entitled "Guidance for Compliance with Post-Accident Two-Way Communications and Electronic Tracking Requirements of the Miner Improvement and New Emergency Response Act (MINER Act)." With respect to electronic tracking systems, the PPL states that "[w]hile operators and District Managers must consider mine-specific circumstances in determining an appropriate electronic tracking system, this guidance outlines features MSHA believes would provide the protection contemplated in the MINER Act in many underground coal mining environments." (Ex. G-5, p. 6). The key provisions in the PPL related to tracking systems as relevant in these cases are as follows:

> 2. Performance
>
> a. While the required capabilities of a particular tracking system will depend on mine-specific circumstances, an effective electronic tracking system generally should be capable of:
>
> i. Determining the location of miners on a working section to within 200 feet.
>
> ii. Determining the location of miners in escapeways at intervals not exceeding 2000 feet.
>
> iii. Determining the location of miners within 200 feet of strategic areas. Strategic areas are those locations where miners are normally required to work or likely to congregate in an emergency and can include belt drives and transfer points, power centers,

loading points, SCSR caches, and other areas identified by the District Manager. . . .

iv. Determining the direction of travel at key junctions in escapeways.

v. Determining the identity of miners within 200 feet of refuge alternatives.

Id.

Peabody's ERP plans provide that its electronic tracking systems will be capable of "[d]etermining the identity of miners on each working section" and it does not represent that its system is capable of tracking miners within 200 feet of their actual location. (Ex. JX-J and JX-K). The tracking plans submitted by Peabody meet all of the other elements listed in the PPL for electronic tracking systems.

Peabody has chosen an electronic tracking and two-way communications system offered by a company called Mine Site Technologies ("MST"). This system has been approved by MSHA. The tracking system works in a manner that is not dissimilar to cell phone systems. A series of devices called nodes or sensors are attached to the mine roof at strategic locations. These nodes are connected to the surface by fiber optic cables which carry data to and from a computer system on the surface and also provide AC power to the nodes. The nodes also have rechargeable back-up batteries. Directional antennae can be attached to these nodes that provide it with greater coverage along entries and crosscuts. Each miner then wears a tag that emits a signal. The signal identifies the particular miner. The signal is picked up by one or more nodes. The computer program on the surface takes the information and attempts to determine the miner's location by comparing the signal strengths at each node that detects the miner's signal. Under the plan it submitted to MSHA, Peabody will place about three or four of these nodes in each working section. These nodes will generally be parallel to the belt feeder (tailpiece) for that section. (Ex. JX-J, pp. 20-26). In this manner, the electronic tracking system can easily determine who has entered each working section and who has left the working section. The system would not be able to determine where any particular miner is within the working section. As stated above, Peabody also proposes to place nodes at other strategic locations, such as at SCSR caches and at refuge chambers. MSHA has estimated that, in order to determine where each miner is within 200 feet in a working section, Peabody would need to install an additional eight to ten nodes per working section. These nodes are large round boxes that will be affixed to the roof of the mine in or near intersections.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary argues that the district manager, after careful consideration of Peabody's position, did not act arbitrarily or capriciously in refusing to approve Peabody's ERPs for the two mines. Sec'y Br. 2-3, 9. She contends that she provided adequate notice of MSHA's expectations for the ERPs and of the Secretary's general interpretation of the MINER Act's requirements. The

Secretary argues that she notified Peabody through "letters, emails, and discussions that its revised ERPs lacked features critical to the protection of miners . . . [including] that its ERPs failed to provide electronic tracking capability sufficient to protect miners on working sections." *Id.* at 3. In spite of that notice, Peabody failed to offer alternative tracking capability or an explanation as to why MSHA's recommendations could not be adopted. *Id.*

In rejecting the ERPs submitted by Peabody, the district manager properly relied on his own extensive experience, consultations with a number of other MSHA personnel, information specific to the mines, and guidance from the PPL. *Id.* at 4-5, 9. The Secretary argues that the district manager properly applied the PPL as guidance and not as a binding rule. Further, MSHA's authority to issue the PPL may not be considered in the hearing, as such challenges must necessarily be made to a United States District Court of Appeals. *Id.* at 4.

The Secretary argues that Peabody's proposed setup of the MST tracking system fails to provide the necessary precision of the locations of miners underground. *Id.* at 6. Limited visibility, unsupported roof, post-accident fires/explosions, and lethal mixes of noxious gases are potential conditions in an underground mine environment following an emergency event. *Id.* at 6-7. Knowing the locations of miners with a greater degree of specificity helps to limit the exposure of rescuers, and facilitate quicker rescue. Additionally, it allows boreholes to be accurately drilled, through which food and water can be lowered to the miners, while at the same time providing a source of fresh air, light, and means of communication. *Id.* at 6-7. The Secretary contends that MST's tracking system, when properly manufactured, installed and maintained, is technologically feasible, MSHA approved, and not an ignition source. *Id.* at 7-8. However, Peabody's proposed ERP implementation of the MST system would not sufficiently determine the location of miners in a hazardous, post-accident, underground environment. *Id.* at 8. Further, Peabody failed to provide an explanation in response to the district manager's inquiry as to "how rescue operations could be conducted effectively and efficiently with lesser tracking capability," i.e., not following the 200-foot recommendation set forth in the PPL. *Id.* at 9.

As a result, the Secretary argues that, for the foregoing reasons, the district manager did not act arbitrarily or capriciously in refusing to approve the ERPs and, therefore, Peabody must submit compliant ERPs to the district manager.

B. <u>Peabody.</u>

Peabody asserts that plan approval is a unique process for creating requirements/rules for mine operators without the need for notice and comment. Peabody Br. 2-3. However, given the lack of notice and comment, limitations are placed on the Secretary. Specifically, Peabody argues that "[t]he Secretary may not unilaterally impose terms on operators when rendering approval decisions" or "impose binding norms that would apply to all mines," and instead, the Secretary must base her approval of a plan on "mine-specific factors." *Id.* at 3.

Peabody argues that MSHA impermissibly based its ERP approval decisions in these matters on the PPL and, in turn, violated the requirement that plans be mine specific. Peabody contends that MSHA will not approve an ERP without a provision in the plan that specifies that the tracking system can identify the location of miners in the working section within 200 feet. *Id.* at 5-6. Therefore, the PPL, which was not subject to notice and comment rulemaking, is being applied as a binding rule and is, therefore, "violative of the 'individualized approach to ERPs and miner safety that is directed in the MINER Act.'" *Id.* at 5 (*quoting Twentymile Coal Co.*, 30 FMSHRC 736, 771-772 (Aug. 2008) (opinion of Chairman Duffy and Commissioner Young)).

Peabody contends that the Secretary's characterization of the PPL as "not binding" is not itself dispositive, and that the "actual language and effects of her pronouncements" are of much more importance in determining whether the PPL may qualify as an exception to the Administrative Procedure Act's ("APA") notice and comment rulemaking requirements. Peabody Br. 7. Peabody believes that the PPL does not qualify as an exception, and may not be applied as a binding rule in the absence of notice and comment rulemaking. *Id.* at 7-9. By improperly applying the PPL as a binding rule, the Secretary has abused her discretion and acted in an arbitrary and capricious manner. *Id.* at 9.

Finally, Peabody argues that the Secretary has failed to satisfy her burden of proof, which requires a showing that the plan provision proposed by the operator is unsuitable for this particular mine. *Id.* at 10 (*citing Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996)). The plans submitted by Peabody took into account that "tracking readers" were potential ignition sources which should be limited and that the particular system chosen had significant problems when additional "tracking readers" were added. *Id.* at 10-11. Further, there remains some question as to the technical feasibility of MST system's ability to satisfy the PPL's 200-foot requirement. *Id.* at 12. As a result, the plans submitted by Peabody were consistent with the MINER Act's requirements, and therefore suitable for the conditions at the mines in question. Peabody asks that the citations be vacated and that MSHA be ordered to approve the plans.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The requirement that mine operators include post-accident tracking in their ERPs is contained in section 316(b)(2)(F)(ii) of the Mine Act, which states, in part:

> Not later than 3 years after the date of enactment of the [MINER Act], a plan shall, to be approved, . . . provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as

> possible, the degree of functional utility and safety protection provided by the . . . tracking system referred to in this subpart.

30 U.S.C. § 876(b)(2)(F)(ii). Section 316(b)(2)(E)(ii) describes in more detail what the tracking system should be able to achieve. This provision states:

> Consistent with commercially available technology and with the physical constraints, if any, of the mine, the plan shall provide for above ground personnel to determine the current, or immediately pre-accident, location of all underground personnel. Any system so utilized shall be functional, reliable, and calculated to remain serviceable in a post-accident setting.

30 U.S.C. § 876(b)(2)(E)(ii).

The process for approving ERPs is set forth in section 316(b)(2)(C), as follows:

> The [ERP] . . . shall be subject to review and approval by the Secretary. . . . Approved plans shall –
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> (i) afford miners a level of safety protection at least consistent with existing standards, including standards mandated by law and regulation;
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> (ii) reflect the most recent credible scientific research;
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> (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
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> (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. § 876(b)(2)(C).

A. <u>Discussion of the Evidence</u>.

The evidence establishes that District Manager Payne rejected Peabody's ERPs because the plans did not provide that Peabody's tracking systems would be able to locate miners to within 200 feet of their actual location in the working sections. The ERPs also did not provide an alternative, except to state that Peabody's tracking systems would be able to determine who was in any given working section at the mines. As stated above, Peabody's tracking system provisions for other areas of the mines were approved by MSHA.

District Manager Payne testified that an accurate tracking system is important for a number of reasons. If, during an emergency, the tracking system proposed by Peabody showed that all of the miners passed by the tracking nodes installed at the entrance of the working section on their way out of the section, then the rescue team on the surface would know that they did not need to search the working section to find injured or incapacitated miners. (Tr. 65). Likewise, if the nodes at or near a refuge chamber showed that all of the miners who had been in the working section were at that location, the rescue team would know to rescue them at the chamber or, if that were not possible at that time, to drill a bore hole at that location to provide fresh air, water, food, and communication devices if the built-in system were no longer functioning. If, on the other hand, one or more miners were unaccounted for and the nodes at the entrance to the working section did not indicate that these miners had left the working section, the mine rescue team would not know where they were within the working section under Peabody's proposed tracking system. He testified that the area inby the belt feeder for a working section can involve over four miles of entries and crosscuts at the two subject mines depending on the areas being mined. (Tr. 64-65). On that basis, Payne testified that he could not approve the ERPs submitted by Peabody. One of the primary purposes of the tracking requirements in the MINER Act is to provide rescue teams with as much information as possible regarding the location of miners trapped underground following a mine explosion, mine fire, innundation, roof fall, or other accident ("accident").

If the tracking system survives the accident, in full or in part, the information provided to the computers on the surface can help the rescue team determine where to look for survivors and where to attempt to drill a bore hole to provide aid to trapped miners. If a mine has an array of nodes within a working section and some of them are destroyed in the accident, the remaining nodes may be able to provide important information to the rescue team in the event that not all of the miners were able to escape out of the working section. If the nodes within the working section are totally destroyed in the accident, the nodes by the refuge chamber and along the escapeway will provide information that is useful to the mine rescue team. In such a situation, if some miners are unaccounted for, the rescue team might not know where the miners are within the working section or where they moved to after the accident, but the team will know that they did not escape and will know where they were immediately before the accident.

Tracking the locations of miners serves two important functions when there has been an accident. First, it helps the mine rescue team do its job in a more efficient manner and with more precision. The team will have a better idea where to search for any trapped miners and where to drill a borehole near their location, if necessary. Second, an effective tracking system reduces the exposure of the rescue team members to the hazards found in the mine after the accident. If the team knows the approximate location of miners, the team members will not expose themselves to hazards looking in other areas of the mine. The testimony at the hearing established that miners in emergency situations often do not behave in a rational manner. They sometimes split up and go in different directions. They sometimes believe that they are in one location in the mine when, in fact, they are in a totally different area of the mine. A tracking system helps rescue efforts and reduces the exposure of team members.

District Manager Payne testified that the process of searching in the working section can be slow, especially if the area is filled with smoke or if there have been roof falls or if methane is found. Ronald Hixson, a staff assistant in MSHA District 2 with extensive mine rescue experience, testified that it can be a real "struggle to go in there and locate" injured miners. (Tr. 174). I credit this testimony.

I find that the evidence clearly establishes that the more precisely a tracking system is able to identify the location of a miner, the more likely he will be able to be rescued following an accident, assuming he is unable to travel down an escapeway and exit the mine. Knowing that the miner is still in the working section following an accident is helpful information. All other things being equal, knowing a miner's whereabouts within a working section is better than knowing that he is somewhere in the working section. I base this finding on the testimony of the Secretary's witnesses. As stated in the MINER Act and the Senate Report, the intent is that ERPs should incorporate the latest developments in mine safety while remaining technologically feasible. With respect to tracking systems, the goal is to require that mines install tracking systems that identify the location of miners as accurately as possible using current technology. Congress chose to use the plan approval process to implement the tracking requirement so that the ERP could be adapted to changes in the "commercial technical equipment market, and to avoid the 'behave only to the letter of the standard' syndrome that stifles innovation and delays the implementation of new methods or equipment." S. REP. at 13.

Juliette Hill testified for the Secretary. She is a mining engineer who works in MSHA's certification and approval center in Tridelphia, West Virginia. (Tr. 106; Ex. G-7). She currently works in the electrical safety division. She has reviewed, for approval and certification, components of post-accident communication and tracking systems. (Tr. 108). More importantly, she was a member of the emergency communications and tracking committee that was established by MSHA in 2006 (the "committee"). The first responsibility of the committee was to determine what was available in the commercial market that would be suitable for an underground coal mine. On January 25, 2006, MSHA issued a request for information ("RFI") in the Federal Register and received about 100 responses.[1] (Tr. 109). The committee chose six or seven manufacturers and had them test their equipment at an underground mine in April 2006 to see how the systems might work in an underground environment. The committee drafted a formal report on its findings. The committee then met with potential vendors of this type of equipment to learn about the capabilities of their systems and to explain MSHA's approval and certification process to them. *Id.*

Ms. Hill testified that the committee began drafting the PPL in the summer of 2008. (Tr. 109-110, 112). MSHA decided to "pursue a policy letter as opposed to rule making" because of the deadline of June 2009 imposed by the MINER Act and because of the state of technology for

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[1] Underground Mine Rescue Equipment and Technology; Proposed Rule, 71 Fed. Reg. 4223 (Jan. 25, 2006), *available at* http://www.msha.gov/regs/fedreg/proposed/2006prop/06-722.asp.

use in underground mines. (Tr. 112-113). It would have been difficult for MSHA to "pursue a rule making effort for technologies that for the most part didn't have any track record so to speak in the underground mining environment." (Tr. 113). The committee based the framework for the PPL on the underground demonstrations, the interactions with vendors, the state of technology that existed at the time, and the language of the MINER Act. *Id.* The MINER Act requires that the "above-ground personnel be able to determine the current or immediately pre-accident location of all underground personnel." (Tr. 115). When the committee reviewed the term "immediately pre-accident" in the MINER Act, it determined that Congress "meant working section; because immediately prior to an accident, most miners are going to be in the working section." *Id.* Thus, on working sections, the guidance in the PPL had to provide some definition of accuracy. The committee reasoning was that, "in a post-accident situation, you've got a much broader area to provide coverage" in a working section than in an escapeway. (Tr. 116). The committee decided that, given the state of technology, it would be difficult for mine operators to provide continuous communications throughout the working section but that it was important to provide specific guidance for tracking miners within working sections. (Tr. 117).

The committee originally had 500 feet in its draft document but it was changed when it "went around for review." (Tr. 134, 142-143). Kevin Stricklin, MSHA's Administrator for Coal Mine Safety and Health, and Richard Stickler, the former Assistant Secretary for Mine Safety and Health, attended a meeting with the committee at a facility of the National Institute of Occupational Safety and Health. The distance was changed to 200 feet at that meeting, but Ms. Hill was not in attendance. (Tr. 134-135). Hill testified that the 200 feet number was based on "recent disaster[s], mine rescue activities, and what would have helped." (Tr. 135). The recent disasters referred to are the accidents at the Sago Mine and the Crandall Canyon Mine.

On December 18, 2008, the Secretary published the PPL in the Federal Register to get feedback from interested persons.[2] The comment period ended on January 8, 2009. The Secretary issued the PPL without any change to the 200-foot guideline with an effective date of January 16, 2009. The comments received from mine operators were negative and they suggested that tracking systems should only be required to indicate who has entered or exited working sections. (Tr. 117, 147). MSHA responded to the comments received on April 29, 2009.[3] This document states that mine operators generally replied that the 200-foot tracking coverage on working

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[2] Wireless Communications and Electronic Tracking Systems Guidance, 73 Fed. Reg. 77069 (Dec. 18, 2008), *available at* http://www.msha.gov/regs/fedreg/notices/2008misc/e8-29943.asp.

[3] MINE SAFETY AND HEALTH ADMINISTRATION, RESPONSE TO COMMENTS ON THE PROGRAM POLICY LETTER (PPL) CONCERNING GUIDANCE FOR COMPLIANCE WITH POST-ACCIDENT TWO-WAY COMMUNICATIONS AND ELECTRONIC TRACKING REQUIREMENTS OF THE MINE IMPROVEMENT AND NEW EMERGENCY RESPONSE ACT (MINER ACT) OF 2006 (Apr. 29, 2009), *available at* http://www.msha.gov/regs/complian/ppls/2009/responseppl09vi.pdf (hereinafter "PPL Response").

sections is unreasonable and lacks justification. PPL Response at 7. They also questioned the reliability of "micro-tracking" in working sections.[4] *Id.* In response, MSHA stated that "[b]ased on MSHA's experience in previous mining emergencies and rescue efforts, the Agency believes that the distances in the PPL meet the intent of the MINER Act given currently available technology." *Id.* at 8. "Tracking of miners in the working section is technologically feasible and provides important information to rescuers." *Id.*

Hill also testified that the MST nodes and other devices to be used in its tracking system are intrinsically safe, which means that there is not enough energy in the circuits to ignite an explosive mixture of air and methane. (Tr. 119, 125-126). The MST system would also be safe following an accident assuming that the components were not damaged. She recommended that the nodes be protected from such damage by the mine operator. (Tr. 127). The MST system is designed to provide both communications and tracking. On working sections, the nodes can be placed at or near intersections and, by using coaxial cables with antennae attached, sensors can extend out from the nodes in four directions. (Tr. 233-235). She estimated that the nodes are about 18-inches square with a height of about 6 inches. (Tr. 122). The tags that the miners carry send out a signal that the nodes pick up. Any phones in use on the section also communicate through the nodes and their locations can be identified on the surface. Hill testified that MST representatives told her that, if configured appropriately, the system could identify miners to withing 200 feet of their actual location. (Tr. 130). MST has installed systems at mines outside the United States, but she had no information as to how accurately these systems can track individual miners. MSHA enforcement personnel have tested other systems at underground coal mines in this country and have said that they seem to work. (Tr. 132, 146).

Hill testified that Peabody, in order to meet the 200-foot guideline in the PPL, would need to install eight to ten additional nodes in each working section beyond those shown in the ERPs for the two mines. (Tr. 139). The nodes would have to be moved when the belt is moved up. (Tr. 139-140). This would require moving the optic cables, the coaxial cables, and the antennae.

David Beerbower, Peabody Energy's Vice President of Safety, testified at the hearing. He stated that Peabody wants to use advanced technology that can serve as both a communications system and a tracking system. (Tr. 182, 186). Based on his review of MST's system, he believes that it will be the most reliable and effective. He also testified that if part of the system is damaged, the communications and tracking system can be reactivated by dropping a node down a borehole. (Tr. 196). He doubts that this system, or any other system, is capable of tracking miners within 200 feet of their actual location in a working section. He communicated his concerns to MSHA. (Tr. 201-202). Up to 14 miners work in the mines' working sections during a shift. Beerbower does not believe that the tracking system could accurately identify the location of these people if an array of nodes was installed in the working section as required by the citation. Each tag for each miner would be picked up by three of four nodes and the system would

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[4] Copies of all the comments filed can be found at http://www.msha.gov/REGS/Comments/E8-29943/twowaycommo.asp.

communicate this information to the computers on the surface. As a consequence, people looking at the computer monitors on the surface would likely see this miner at multiple locations or his location would be vague. (Tr. 194-95). With 14 people on the section walking around and operating mobile equipment, as well as the presence of stoppings and other impediments, the location of miners presented on the computer screens would be hazy at best. (Tr. 195). Beerbower is also concerned about placing all of these electrical components in the working section. The nodes are easily damaged by shuttle cars and, during an accident, it is likely that some of the nodes would be damaged. (Tr. 202). Beerbower testified that the MST chief executive officer told him that he cannot guarantee that a node could not become an ignition source if it were damaged. *Id.* Lithium batteries can also be an ignition source.

Beerbower believes that the "picket fence" system it proposes to use would accurately track the location of miners and provide the level of protection mandated by the MINER Act. (Tr. 203-204). This system would not place as many nodes in the working section, would be easy to maintain and move, and would be less likely to become damaged. It would accurately and affirmatively tell those on the surface who is on a particular working section and who has left that working section. When he discussed the ERP with District 8 personnel, he was told that the plan had to locate miners within 200 feet on working sections. (Tr. 204). They exhibited no flexibility with regard to this requirement. He also talked to MSHA personnel at MSHA headquarters in Arlington, Virginia. They made some suggestions concerning how to better cover rooms in working sections that are off the main entries, but they were inflexible about the 200 feet requirement. (Tr. 207; Ex. P-1). Beerbower testified that he was also told that if he put 200 feet into the plan then "we'll work with you." (Tr. 209). This gave him the impression that this 200-foot requirement was being imposed by Arlington and that it was "chiseled in concrete." (Tr. 210). Beerbower testified that he did not feel comfortable putting any specific distance in the ERPs because he would not know if it could be met until it was installed.

Peabody takes the position that knowing whether miners are still in the working section after an accident or whether they safely left the working section is all the information that a mine rescue team needs. Beerbower testified that once a rescue team reaches the working section of a mine, it only takes 15 to 20 minutes to search all the entries and crosscuts to see if there are any injured or incapacitated miners. (Tr. 219).

B. <u>Analysis of the Issues</u>.

The framework for resolution of ERP disputes has been established by the Commission. *Emerald Coal Res. L.P.*, 29 FMSHRC 956, 965 (Dec. 2007); *Twentymile Coal Co.*, 30 FMSHRC 736, 747 (Aug. 2008).

> One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7

> FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).
>
> While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of ... plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("Peabody II"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Emerald, 29 FMSHRC at 965.

The Secretary must show that the district manager did not abuse his discretion when he determined that Peabody's tracking systems must be able to locate every miner on each working section within 200 feet of their actual location and display that information at the computer center on the surface. The Secretary must establish that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plans.

District Manager Payne relied upon the PPL when insisting on this 200-foot requirement. Payne had never been in either of the two mines at issue in these cases. Indeed, he only became the district manager on or about May 17, 2010, less than three weeks before he rejected Peabody's ERPs. (Tr. 57, 61). Prior to becoming district manager, he worked in a different MSHA district. He testified that he "sought information from coal mine inspectors who were at the mine the previous quarter" as well as other MSHA employees. (Tr. 72). Based on his review of the conditions in the mines, he concluded that Peabody's tracking system must have the capability to track miners to within 200 feet of their actual locations on working sections. He stated that he used the PPL for guidance only, but he admitted that he "has always enforced 200 feet." (Tr. 74-

76). He believes that 200 feet is an appropriate number but he does not "know how [MSHA] got to that number." (Tr. 76).

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager were arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC at 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. <u>The PPL as Rulemaking.</u>

As stated above, Peabody contends that the Secretary is applying the 200-foot tracking guideline in the PPL as a binding norm and that she was required by the APA and section 101 of the Mine Act to go through notice and comment rulemaking. The Secretary argues that she is not using the PPL to circumvent notice and comment rulemaking requirements because she is not applying the PPL as a binding norm. She also contends that this issue is not before me in this expedited proceeding.

The Secretary correctly states that, pursuant to Commission Procedural Rule 24(e)(2)(iii), 29 C.F.R. § 2700.24(e)(2)(iii), "the scope of [an ERP dispute] hearing is limited to the disputed plan provision or provisions." Relying on that language, as well as two Commission cases, the Secretary argues that the authority to issue a PPL may not be considered in this matter and, therefore, Peabody may not challenge the PPL as an illegal act taken by MSHA in violation of the obligation to conduct notice and comment rulemaking. In essence, the Secretary asserts that the Commission does not have jurisdiction to hear the issue.

While I find no legitimate support for the Secretary's argument in either of the cases cited, I agree that the courts of appeals have exclusive subject matter jurisdiction over challenges to

mandatory standards.[5] 30 U.S.C. § 811(d). However, the question whether the PPL is a mandatory standard, and the subsequent potential challenge of such, need not be addressed in this matter. For the reasons discussed below, I find that the PPL itself is not at issue; rather, this case turns on the actions of the district manager in making his decision regarding the ERPs at issue.

National Mining Association v. Sec'y of Labor, 589 F.3d 1368 (11th Cir. 2009) is instructive. In that case the court addressed whether a Procedural Instruction Letter ("PIL") issued by MSHA functioned as a mandatory standard and, if so, whether MSHA violated the APA and the Mine Act by not following standard notice and comment procedures. *Id.* at 1371. In the decision, the court stated:

> We have previously delineated the difference between a legislative rule, to which notice and comment requirements apply, and a general statement of policy, to which they do not:
>
> > Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only to determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a binding norm.
>
> *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (quotation marks and internal citations omitted). Additionally, in determining whether an agency has issued a binding norm or a policy statement, courts have looked at : (1) the agency's expressed intentions as reflected by its characterization of the statement, (2) whether the statement was published in the Federal Register or the Code of Federal Regulations, and (3)

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[5] In *Emerald*, the Commission acknowledged that there was no requirement in the MINER Act that mandated the use of notice and comment rulemaking in the particular matter that was at issue. 29 FMSHRC at 970 (Dec. 2007). Further, the Commission cited with approval that courts have granted broad discretion to administrative agencies in deciding whether to address issues through either rulemaking or adjudication. *Id.*

> whether the action has binding effects on private parties. *Center for Auto safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

Id. The court, in finding that the PPL was not a binding norm or mandatory standard, relied heavily on the "advisory and permissive language" of the document, as well as the fact that any action taken pursuant to the PIL was contingent on facts particular to each case. *Id.*

All the Secretary's witnesses denied that the 200-foot tracking guideline is an absolute rule. In addition, the Secretary presented the declarations of Kevin Stricklin and Charles Thomas, the Acting Deputy Administrator for Coal Mine Safety and Health, who both stated that adhering to the guidance in the PPL is not a condition for approving any operator's ERP. (Exs. G-9 and G-10). Peabody argues that the characterization of the document by the Secretary, as well as the Secretary's view of the nature of her actions, should not be accorded as much weight as the actual language and effect of the Secretary's pronouncements. *Brock v. Cathedral Bluffs Oil Shale Co.*, 796 F.2d 533 (D.C. Cir. 1986).

The PPL states that its purpose is to be a "general statement of policy that provides mine operators guidance in implementing . . . electronic tracking systems, . . . [as] required by the MINER Act." (Ex. G-5 at 1). The PPL goes on to state that "[w]hile the required capabilities of a particular tracking system will depend on mine-specific circumstances, an effective electronic tracking system generally should be capable of . . . [d]etermining the location of miners on a working section within 200 feet. *Id.* at 6. The district manager is free to exercise his discretion to follow or not follow the guidance in a particular case and, more importantly, he is instructed to make his decision based on the specific circumstances at each mine. The PPL does not require the district manager to apply the guideline to every underground coal mine in his district.

On April 29, 2009, MSHA issued an informational bulletin on the PPL, which is in question and answer format. (Ex. G-6). This bulletin, which was issued to provide information to mine operators, seems to advise operators that they should expect district managers to follow the PPL. For example, Question 22 states: "Would it be acceptable to install a reader [node] at the loading point, inby the loading point in any entry, or at the load center for each entry, to track the location of miners?" *Id.* at 3. In response, MSHA stated, in part: "Yes, if the electronic system determines a miner's location within 200 feet on the working section." *Id.* at 4. Another question asked whether the 200-foot tracking provision applies to a longwall face, to which MSHA replied in the affirmative. *Id.*

I find that MSHA, acting through its district managers, remains free to consider individual circumstances at a mine and to approve ERPs that do not include a 200-foot tracking capability in working sections. Although district managers may, as a matter of practice, rarely approve such plans, they remain free to do so in individual situations. Although the PPL was published in the Federal Register, this was done to give notice to interested persons and to provide a very brief comment period.

I find that, although the Secretary will likely require that the vast majority of ERPs include a provision for 200-foot tracking in working sections, district managers have the authority under the PPL to allow for tracking systems that do not have that capability. As a consequence, I hold that the 200-foot tracking guideline in the PPL is not a binding norm that is necessarily applicable to all underground coal mines and formal rulemaking under the APA was not required. Although I personally believe that notice and comment rulemaking would have been more appropriate and effective than issuing a PPL given the complexity of communication and tracking systems, I cannot order the Secretary to engage in a rulemaking. In a rulemaking, the regulated community, as well as other interested parties, would have had the opportunity to more formally participate in the process and to provide meaningful suggestions on how best to implement the MINER Act's tracking requirements. The MINER Act gave the Secretary three years to implement the communication and tracking provisions of the Act, which was sufficient time for notice and comment rulemaking. That decision, however, is committed to agency discretion.

2. <u>Abuse of Discretion.</u>

Based on the evidence presented at the hearing, I find that the 200-foot guideline contained in the PPL for tracking miners in the working sections was treated as a binding norm by the district manager in these cases. I find that the district manager abused his discretion when he imposed a 200-foot tracking requirement in the working sections of both mines based on the PPL because he mechanically applied the PPL to the two mines. His decision was arbitrary because he based that requirement, not on any particular conditions present at the mines, but on the language of the PPL. He did not know where the 200-foot tracking guideline originated or why that particular figure was used in the PPL. As discussed below, he stated that he always enforces the 200-foot tracking guideline. He had only been the district manager at District 8 for a few weeks and his knowledge of the conditions at the mines was based on a few discussions with MSHA inspectors and staff. The record establishes District Manager Payne has extensive experience in all facets of coal mine safety issues and that he has wide-ranging knowledge and experience in mine rescue. He reviewed the information provided to him but he simply concluded that a tracking system capable of locating miners within 200 feet of their actual location should be installed in all conventional mines with "square sets and square blocks." (Tr. 75).

It is important to understand that no explanation was provided at the hearing as to how the Secretary decided that tracking systems should generally have the capability to track miners to within 200 feet of their actual locations on working sections. District Manager Payne did not know where the number came from but he testified that he "has always enforced 200 feet." (Tr. 76). Ms. Hill testified that the committee started with 500 feet as a placeholder, and that upon subsequent review the 200-foot guideline was substituted. (Tr. 134, 142-143). Ms. Hill was not at the committee meeting when the change was made, but Mr. Stricklin and Mr. Stickler were present. She testified that the 200-foot figure was based on the Sago and Crandall Canyon disasters and what would have helped in the recovery efforts at those mines. (Tr. 135). The "Notice of Availability of Program Policy Letter" that MSHA published in the Federal Register on December 18, 2008, did not provide any explanation for the 200-foot guideline and MSHA's

response to the comments filed did not explain why that figure was used either. MSHA simply stated,

> Based on MSHA's experience in previous mining emergencies and rescue efforts, the Agency believes that the distances in the PPL meet the intent of the MINER Act given currently available technology. Tracking of miners in the working section is technologically feasible and provides important information to rescuers.

(PPL Response at 8). MSHA's response just sets forth its conclusion, but it does not provide the regulated community with any information as to how it reached this conclusion.

It is important to recognize that providing a tracking system that is capable of locating miners within 200 feet of their actual location in a working section is an extremely complex endeavor. Such a tracking system would also be very difficult to maintain in good order given the conditions that exist in underground coal mines. The nodes are rather large and, in the case of the two Peabody mines, it has been estimated that approximately 12 to 14 nodes will need to be installed in each working section. Optic cables will serve the nodes and coaxial cable will connect antennae to the nodes. When the belt feeder is moved forward as mining progresses, the network of nodes, cables, and antennae will need to be repositioned or reconfigured. Evidence of the frequency that the network will need to be repositioned was not presented at the hearing. During retreat mining, the network will also need to be repositioned as the pillars are mined. It is safe to say that a communication and tracking system will be one of the most complex and difficult installations to establish and maintain in underground coal mines. Determining whether such a tracking system should be required in a working section requires a comprehensive review of the specific physical characteristics of that mine and should take into consideration the type of tracking system being installed.

Peabody does not believe that the 200-foot tracking system that MSHA wants to require is necessary or suitable for its mines. It has raised questions as to whether such a tracking system will function correctly and whether it can be maintained in working order given the conditions in underground mines. The regulated community also raised these issues when commenting on the PPL. Peabody is concerned about adding so many electrically-powered components into the working sections of its mines. It is concerned that nodes will be damaged during an accident and these damaged nodes could ignite methane that is liberated. Beerbower stated that other operators have had difficulty keeping the nodes from being damaged by mobile equipment during normal operations.

Despite the complexity of these tracking systems, the district manager chose to simply require Peabody to amend its ERP to include a 200-foot tracking system in its working sections. An administrative agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices

made.' " *Twentymile Coal* at 754. The district manager did not do this in the present cases. His statement that he always enforces the 200-foot guideline confirms that he only superficially considers the specific conditions in the mines in his district, if at all, when reviewing ERPs.

It is important to understand the limits of my ruling. I am not holding that Peabody may implement the ERPs it submitted as if they have been approved by MSHA. I am not holding that the district manager cannot seek to establish tracking distances for working sections in Peabody's underground coal mines through negotiations with the operator. Because these cases involve mine plans, the parties must adopt ERPs that account for the specific physical characteristics of each mine. I am simply holding that the district manager cannot mechanically apply to Peabody's mines the 200-foot tracking guideline contained in the PPL. The parties are still obligated to negotiate and develop ERPs that are tailored to the conditions at the mines The district manager must be able to establish that, given the specific conditions present at the mines and the current state of technology, Peabody should be required to install tracking systems that can track miners within the working section with an acceptable degree of precision. The degree of accuracy must be negotiated between the parties. The district manager is not prohibited from considering the PPL, but he must explain to Peabody why the particular tracking distance he wants to include in the ERP is appropriate for these particular mines and he must seriously consider any objections or comments given by Peabody. "Use of a guideline does not *per se* make it suitable or unsuitable to a plan, nor does 'across the board' use of a policy automatically make it unsuitable for this particular mine." *Prairie State Generating Co.*, 32 FMSHRC ____, slip op. at 8 (May 21, 2010) (ALJ) (*Pet. for disc. rev. granted by Comm., June 30, 2010*).

My holding in this case is consistent with the Commission's decision in *Carbon County Coal Co.,* 7 FMSHRC 1367 (Sept. 1985). In that decision, the Commission determined that MSHA's insistence on a particular ventilation plan provision was "the result of a *rote application* of the . . . guideline and . . . was not based upon particular conditions at the . . . [m]ine." *Id.* at 1373 (emphasis added). The Commission stated that its decision was not based "upon the merits of the [ventilation provisions]," but rather upon the fact that MSHA was using the plan approval process to impose general rules applicable to all mines instead of provisions "based on particular circumstances at the . . . [m]ine." *Id.* at 1375. The Commission qualified its holding by stating that:

> This does not mean that the . . . [disputed provision at issue] may not be applied at the . . . [m]ine. If negotiations on the ventilation plan resume, MSHA may determine, and may be able to establish, that particular conditions at the mine warrant the inclusion of the . . . [disputed provision at issue] in the ventilation plan.

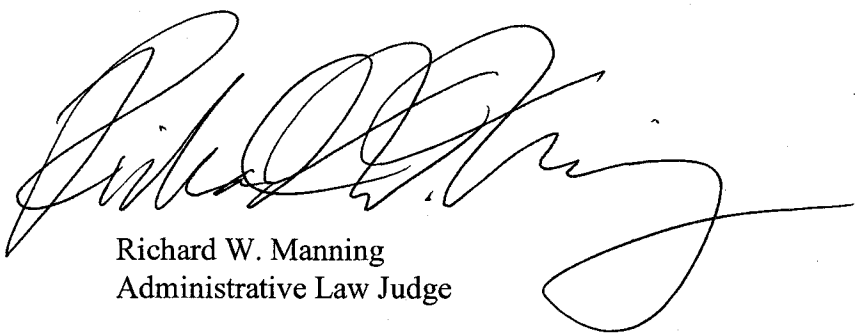
Id.

Based on the foregoing findings and conclusions, I find that the Secretary, acting through her district manager, abused her discretion and acted in an arbitrary and capricious manner, when

she, in rejecting Peabody's ERPs, demanded that the ERPs include a 200-foot tracking guideline without seriously considering the specific condition in the mines and the capabilities of the mines' chosen tracking systems. Whether this 200-foot tracking guideline should be required in the working sections of Peabody's mines has not been established. The two citations at issue in these proceedings were issued because the ERPs failed to include a 200-foot tracking provision. As a consequence, the citations are vacated.

IV. ORDER

For the reasons set forth above, Citation Nos. 7563769 and 7563800 are **VACATED** and these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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