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Comment from Laura Patrino, EP Minerals, LLC

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General Comment

See attached file(s)

EP Minerals, LLC supports the position paper submitted by IMA-NA regarding the Proposed Rule. (copy attached)

Attachments

MSHA-2011-0001-DRAFT-0020.1: Comment from Laura Patrino, EP Minerals, LLC

AB73-COMM-16



March 28, 2011

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

RE: Proposed Rule, Pattern of Violations, RIN 1219-AB73

Dear Sir or Madam:

The Industrial Minerals Association – North America (IMA-NA) appreciates the opportunity to comment on the Mine Safety and Health Administration’s (MSHA) proposed rule on Pattern of Violations (“POV”) (76 FR 5719 et seq.; February 2, 2011).

IMA-NA is a Washington, DC-based trade association created to advance the interests of North American companies that mine or process minerals used throughout the manufacturing and agricultural industries. Its producer membership is comprised of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. In addition, IMA-NA represents associate member companies that provide equipment and services to the industrial minerals industry. Additional information on IMA-NA can be accessed through the following hyperlink: <http://www.ima-na.org>.

IMA-NA and its members recognize that the first priority and concern of all in the mining industry must be the health and safety of its most important and precious resource – the miner. Since its inception in 2002, IMA-NA has sought to work cooperatively with MSHA to continuously improve safety in the mining industry. IMA-NA appreciates the past and present opportunities and efforts to work with MSHA on our mutual goal of achieving a mining industry in the United States that is as safe as possible for all who work in and around mines.

General Comments on the Proposed Rule

IMA-NA supports MSHA’s expressed intent to improve the POV program to “simplify the existing POV criteria, improve consistency in applying the POV criteria, and more adequately achieve the statutory intent...[for] the POV sanction to attain remedial action from operators ‘who have not responded to the Agency’s other enforcement efforts.’” (76 FR 5719, February 2, 2011).

The POV program is among the most potent sanctions that MSHA has under the Federal Mine Safety and Health Act of 1977 (“Mine Act”)(30 USC § 801 et seq.). It therefore is particularly important that the POV program be carefully crafted so that it effectively protects the safety of workers where mine operators repeatedly have failed to live up to their obligations to provide miners with a safe place to work, while at the same time providing assurance of fair treatment and due process to mine operators and their employees whose jobs and livelihood depend on continued mine operations.

Reaching that balance is not simple. It is worth recognizing that the Senators who initially included the POV provision in the 1977 Mine Act debated at length how such a provision could be crafted so as to achieve their goal of targeting the “bad apples” without unfairly jeopardizing the “good apples,” and finally gave the task to MSHA to determine how to target a POV program. (See, e.g., Senate floor debate, *Legis. Hist.* at 1068-1082).

IMA-NA supports MSHA’s effort to develop an accessible, effective and transparent POV program. However, IMA-NA is concerned that there are significant gaps in the proposed rule, as discussed below. Therefore, IMA-NA requests that MSHA re-propose the rule to address these gaps and to allow operators and other stakeholders a fair opportunity to comment on the proposed POV program as a whole.

Specific Comments on the Proposed Rule

MSHA needs to provide the criteria for POV so that others may adequately assess the rule.

It is obvious that one of the most important aspects of the POV program is what criteria will be used to determine whether a POV exists. Yet, MSHA asks for comments on the program without having disclosed these criteria, except in very general terms. (Section 104.2). It is thus very difficult, if not impossible, for commenters on the proposed rule, including IMA-NA, to be able to thoroughly understand and assess the impact and appropriateness of the proposed program. We believe that MSHA should -- in fact it must under accepted principles of administrative law¹ -- re-propose the rule to include the criteria it proposes to use in determining that a POV exists in order to give the affected parties adequate notice and opportunity to comment on the rule.

In the preamble to the proposed rule, MSHA “requests comments on how the agency should obtain comment during the development of, and periodic revision to, the POV screening criteria.” (76 FR 5720; February 2, 2011). We welcome and appreciate MSHA’s expressed desire for comments on the screening criteria. This is a major step in the right direction given the significance of the criteria to the proposed rule. However, merely committing to a process for comments regarding yet un-disclosed criteria is vague and inadequate. Moreover, IMA-NA believes it is insufficient as a matter of law.

Based on past iterations, the POV screening criteria is not interpretive, is not a statement of policy, and does not constitute a “logical outgrowth” of the proposed rule. Instead, promulgation

¹ See, e.g., *National Mining Assn v. MSHA*, 116 F.3d 520, 531, (D.C. Cir. 1997).

of these criteria constitutes rulemaking of general application necessitating formal notice and comment under the Administrative Procedure Act (5 USC § 551 et seq.). Therefore, failure to publish the screening criteria as part of the proposed rule and failure to subject the screening criteria to full notice and comment constitutes improper rulemaking. We appreciate MSHA's expressed intention to "obtain comment" for the screening criteria in the future. However, it is not clear if MSHA envisions this as full notice and comment or something short of the proper rulemaking process. It is unclear why, if MSHA plans to use notice and public comment to develop screening criteria, those criteria should not be included in the proposed rule now so that commenters can assess the entire program in the same rulemaking. We urge the agency to re-propose the rule and include the criteria it proposes to use in determining that a POV exists and give the affected parties adequate notice and opportunity to comment on the entire rule.

IMA-NA appreciates and supports MSHA's proposal to eventually provide the POV criteria on MSHA's website in an accessible format that will allow mine operators to determine how a particular mine's record compares with the POV criteria. However, promising to make the criteria available later and potentially committing to "obtain comment" does not substitute for putting the criteria in the rule and allowing notice and public comment on the criteria along with the rest of the rule of which the criteria are an integral part. Furthermore, there needs to be an opportunity for commenters to see how those criteria were developed, and the basis for them, in order to fully evaluate the proposal.

MSHA should restrict or delete the provision whereby POV status is based on issued citations rather than final orders.

IMA-NA believes that the imposition of punitive sanctions based on "issued" citations for which the operator has not been given an opportunity to have independent review or hearing before the sanctions are imposed would constitute a denial of an operator's constitutional right to due process.

We understand MSHA's concern that delays in the adjudicative process on individual citations may hamper MSHA's ability to use POV as a timely tool to address current problems, particularly in light of the backlog of cases at the Federal Mine Safety and Health Review Commission in recent years. Certainly we do not support any operator hiding behind delays in the adjudicative process to avoid making necessary corrections to assure safe working conditions for miners. We do not believe that that is the reason why, in the vast majority of cases, operators decide to contest citations. We believe that MSHA has tools currently available to it to assure that miners' safety is protected, without violating operators' due process rights. Furthermore we, along with others, have suggested steps that we believe that MSHA could and should take to address the backlog issue.

The proposed rule not only removes the due process protection that requires that only final orders are counted in determining a POV, but also deletes the current provision for "proposed" POV notification that allows the mine operator to sit down with a District Manager and review the basis for the proposed POV. Under the rule as proposed, there is no assurance that a mine operator would not suffer the punitive sanctions of POV status based upon citations that have not

been subject to any opportunity for a hearing or other procedural protections required by due process considerations.

It is certainly clear to our members, and we assume that it also is clear to MSHA, that inspectors are not infallible when they write citations. It should not be necessary here to give examples of citations that were written as “S&S” or as an elevated action under section 104(d), section 104(b), section 104(g), or section 107(a) of the Mine Act that subsequently were vacated or reduced in severity or negligence upon further review either by MSHA or by the Commission. Depending again on the criteria that MSHA would use to determine POV, a single “bad” inspection could trigger a closure order of a portion or all of a mine under POV for an extended period of time, without the operator having had any opportunity to contest the validity of the citations or their alleged seriousness.

MSHA should clarify the proposed rule’s provisions on mitigating circumstances.

One of the reasons that IMA-NA believes it is necessary to include the actual criteria for POV in the proposed rule is that, as currently written, the proposed rule is unclear and confusing about how much discretion MSHA would retain in deciding whether a given mine is subject to POV sanctions, and what, if any, objective factors would guide that discretion.

The proposed rule (Section 104.2 (a)) lists seven items that would be taken into account in determining the criteria for POV, all of which, it appears, will (when MSHA develops the actual criteria) be expressed numerically. The proposed rule also states an eighth factor: “mitigating circumstances.” Our concern with that factor being included would be less but for the discussion of what MSHA intends by that term in the preamble to the proposed rule: “Under the proposal, MSHA would consider an operator’s effective implementation of an MSHA-approved safety and health management program as a mitigating circumstance.” (76 FR 5721; February 2, 2011).

MSHA has, of course, embarked on a separate rulemaking regarding “safety and health management programs.” MSHA Fall 2010 Regulatory Agenda, RIN: 1219-AB71. MSHA does not explain how it intends the two rulemakings to intersect. MSHA has not, to our awareness, determined what it considers “effective implementation” of a health and safety management program, or how it would prevent decisions to approve or disapprove a management program from being made arbitrarily at the District level.

The proposed rule also is confusing in that regulatory text reads as though POV status would be “automatic” if criteria (to be published on the MSHA website) are met. Section 104.3 states that “[w]hen a mine has a pattern of violations, the District Manager *will* issue a pattern of violations notice....” [Emphasis added]. However, the last criteria, and the discussion about it in the preamble to the proposed rule, suggests discretion on the part of MSHA (the District Manager?) to consider other factors before determining whether a POV notice is necessary.

A less confusing, more straightforward approach would be to retain the current POV program’s “two step” process of notifying mine operators of “proposed” pattern of violations, and then, as is currently the case, providing an opportunity for the mine operator and MSHA to consider mitigating circumstances, including agreement on a remedial plan. We would encourage MSHA

not to eliminate the current two-step process for those mines meeting whatever numerical criteria for POV are eventually established.

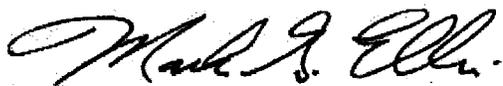
As the proposal now stands, the agency can make a unilateral decision based on unknown and arbitrary criteria to place a mine under POV, without any procedural protections in place to allow an operator to seek review or reconsideration of such decision. This is simply unacceptable.

Conclusion

We commend MSHA on embarking on an effort to improve the POV program. However, by not including the criteria for POV in the proposed rule, and eliminating all procedural safeguards against erroneous or arbitrary imposition of POV findings, MSHA has made it impossible for our association and our members to assess and be able to comment on or support the program as a whole. We request that MSHA re-propose the rule and include the criteria that it plans to use. We also request that MSHA address the concern about the lack of due process that may occur under the rule as proposed. Finally, we request that MSHA re-institute the "proposed" POV under the new rule in order both to clarify the procedure and to allow the mine operator an opportunity to show mitigating circumstances before POV sanctions automatically would go into effect.

IMA-NA is pleased to have had the opportunity to comment on MSHA's proposed rule on Pattern of Violations and it stands ready to assist in developing an effective rule in a constructive manner. Please do not hesitate to contact me should you have any questions, comments or suggestions regarding this matter.

Sincerely,



Mark G. Ellis
President