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**To:** zzMSHA-Standards - Comments to Fed Reg Group

**Subject:** RIN 1219-AB73

Please find attached my comments on the proposed Pattern of Violations rule.

Mark O. Eslinger

AB73-COMM-25

## **MSHA RIN 1219-AB73**

### **Pattern of Violations**

**The following comments are submitted by:**

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#### **Sec. 104.1 Purpose and scope.**

This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the safety and health of miners. The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines.

#### **Sec. 104.2 Pattern criteria.**

(a) Specific pattern criteria will be posted on MSHA's Web site at <http://www.msha.gov> and used in the review to identify mines with a pattern of S&S violations. The review will include:

- (1) Citations for significant and substantial violations;
- (2) Orders under section 104(b) of the Act for not abating significant and substantial violations;
- (3) Citations and withdrawal orders under section 104(d) of the Act, resulting from the operator's unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Act;
- (5) Orders under section 104(g) of the Act requiring withdrawal of miners who have not received training and who the inspector declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine;
- (7) Other information that demonstrates a serious safety or

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health management problem at the mine such as accident, injury, and illness records; and

(8) Mitigating circumstances.

*Comment: Stating that the "Specific pattern criteria will be posted on MSHA's Web site" gives no indication of what the criteria will be. This proposed section does list things that will be considered but does not give any indication of what criteria an operator will be judged against. The specific criteria need to be part of the proposed rule so that mine operators will be afforded the opportunity to comment on the proposed criteria. An operator must know what criteria the mine is being judged against. Additionally, if the criteria only need be posted on MSHA's website, the criteria can change any time that the Mine Safety and Health Administration (MSHA) wishes to change the criteria. Thus, the rule can change without MSHA going through the proper rule making process. The rule is open ended.*

*Citations and orders used in determining the whether a mine should be put on a Pattern of Violations (POV) must be final. A mine operator must be afforded the opportunity to contest citations and orders that the operator deems invalid before being considered in deciding whether the operator should be put on a POV.*

(b) At least two times each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the criteria posted on MSHA's Web site.

**Sec. 104.3 Issuance of notice.**

(a) When a mine has a pattern of violations, the District Manager will issue a pattern of violations notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of this notice to the representative of miners.

(b) The mine operator shall post a copy of the notice on the mine bulletin board. The notice shall remain posted at the mine until it is terminated under Sec. 104.4 of this part.

(c) If, on any inspection within 90 days after issuance of

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the pattern notice, an authorized representative of the Secretary finds any S&S violation, he shall issue an order for the withdrawal of all persons from the affected area, except those persons referred to in section 104(c) of the Act, until the condition has been abated.

(d) If a withdrawal order is issued under paragraph (c) of this section, any subsequent S&S violation will result in a withdrawal order that shall remain in effect until the authorized representative of the Secretary determines that the violation has been abated.

**Sec. 104.4 Termination of notice.**

(a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations, or if no withdrawal order is issued by MSHA in accordance with section 104(e)(1) of the Act within 90 days of the issuance of the pattern notice.

(b) The mine operator may request an inspection of the entire mine or portion of the mine. No advance notice of the inspection shall be provided, and the scope of inspection shall be determined by MSHA. Partial mine inspections-covering the entire mine within 90 days shall constitute an inspection of the entire mine for the purposes of this part.

*Comment: If termination of a section 104(e)(1) pattern of violations notice occurs only when an MSHA inspection of the entire mine finds no S&S violations it will be almost impossible to get off the POV. Very few, if any, large underground coal mines go through an entire E01 Regular Inspection and receive no Significant and Substantial Violations.*