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**From:** Harman, Thomas [mailto:tharman@cement.org]

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**Sent:** Monday, April 18, 2011 4:30 AM

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

**Subject:** RIN 1219-AB73

The comments on the subject pattern of violations proposal are attached.

Best regards,

Thomas (Tom)

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AB73-COMM-65



Portland Cement Association

April 18, 2011

Ms. April Nelson, Acting Director  
Mine Safety and Health Administration  
Office of Standards, Regulations, and Variances  
1100 Wilson Boulevard  
Room 2350  
Arlington, Virginia 22209-3939

Dear Ms. Nelson:

Re: Proposed Rule, 30 CFR Part 104, RIN 1219-AB73, Federal Register Vol.76, No. 22,  
Pattern of Violations

The Portland Cement Association (PCA) appreciates the opportunity to comment on this proposed rule. PCA is a trade association representing companies that produce portland cement in the United States and Canada. PCA's U.S. membership consists of twenty-five (25) companies operating ninety-seven (97) plants in thirty-six (36) states and distribution centers in all fifty (50) states servicing nearly every Congressional district. PCA members account for slightly more than ninety-seven percent (97.1%) of cement-making capacity in the United States and one hundred percent (100%) in Canada. PCA's members employ more than thirteen thousand (13,000) individuals at cement plants, and the industry is interested in the subject collection of information and its potential impact on cement company operations.

Portland cement is an essential construction material and a basic component of our nation's infrastructure. It is utilized in numerous markets, including the construction of highways, streets, bridges, airports, mass transit systems, commercial and residential buildings, dams, and water resource systems and facilities. The universal availability of portland cement ensures that concrete remains one of the world's most essential and widely used construction materials.

PCA believes that the pattern of violations (POV) enforcement action may be an effective tool for MSHA to use to correct and restore compliance with mandatory mine safety and health standards at operations identified as POV violators. However, the subject proposal fails to

provide enough information for mine operators to make an objective assessment of how regulated facilities would be affected by the rule if it is finalized.

The key points that PCA discusses in these comments are summarized in the following.

1. MSHA claims that the existing regulation incentivizes operators to avoid pattern of violations (POV) enforcement by contesting citations (*FR* p 5722<sup>1</sup>); however, there is an indisputably positive correlation between increased civil penalties and increased operator contests since MSHA finalized its Title 30 Code of Federal Regulations Part 104 (30 CFR 104) standard.
2. The searchable database that mine operators can regularly access to monitor compliance at facilities, as well as to compare individual facility compliance with some currently unstated threshold POV criteria, must be maintained with up-to-date, accurate enforcement and accident data. There is ample evidence to suggest that the logic errors in MSHA's previous POV computer application "*resulted in mine operators and the public having an incorrect understanding of the screening criteria being used by MSHA to identify mines with a potential POV.*"<sup>2</sup>
3. The proposal states that mine operators may be required to submit a safety and health management plan to the agency to avoid placement in POV status. While the agency may intend in the proposal for the programs to aid operators in restoring compliance and therefore avoid POV enforcement, the discretionary nature of "mitigating circumstances" that the agency would maintain with such a requirement is arguably too broad.
4. The proposal removes the potential pattern of violations notification (PPOV). The PPOV currently provides an opportunity for mine operators to discuss, in a detailed manner, the enforcement actions that led to the PPOV notification. Removing the PPOV requirement and immediately enforcing POV may lead to unwarranted shutdowns if MSHA's enforcement data is not accurate.
5. The estimates regarding how much time operators will spend monitoring the POV database and the amount of lost revenues and increased expenses POV-identified operators will incur fail to take into account several factors one must consider when making such determinations. Consequently, the economic analysis significantly underestimates the true economic cost of the rule.
6. MSHA's proposal to consider *non-final* citations and orders as a contribution to a pattern of violations (POV) would be unconstitutional, and is inconsistent with the Mine Act as MSHA claims.

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<sup>1</sup> The Federal Register, Vol. 76, No. 22, p 5722

<sup>2</sup> U.S. Department of Labor, Office of Inspector General, MSHA's Pattern of Violations Authority, Report No. 05-10-005-06-001, September 29, 2010, p 18.

## Issue 1: Impact of Changes to Civil Penalties on Contested Citations

PCA is dubious about the agency's claim that "[T]he final order provision in the existing regulation provides an incentive for operators to contest S & S violations to avoid being placed under a POV."<sup>3</sup> However, PCA presents in this comment the fact that there exists a direct and positive correlation between the number of contested cases before the Commission and the increase in civil assessment penalties after the Mine Improvement and New Emergency Response Act of 2006 (MINER Act) became law. Specifically, in 2005, which is the last full calendar year of citation and penalty data before the revised penalty framework became effective, there were 116,674 civil penalty assessments totaling \$24,850,248,<sup>4</sup> and there were 1,865<sup>5</sup> contest cases filed at the Commission. Then, in 2008, the first full calendar year after the revised penalty tables became effective, there were 198,700 citations with assessments totaling \$194.3 million,<sup>6</sup> and there were 9,473<sup>7</sup> contest cases filed at the Commission.

To summarize, when comparing CY 2005 and CY 2008, there was a 170% increase in the number of citations issued to mine operators and contractors; a 782% increase in assessment penalties from MSHA; and a 508% increase in cases filed at the Commission. These substantial increases occurred as direct consequences of the revised Title 30 CFR Part 100 standards. PCA encourages MSHA to recognize that an 8-fold increase in assessed penalties when the revised penalty protocol was adopted is the primary contributor to operator contests before the Commission.

In retrospect, MSHA assumed in the 2007 proposed rule to revise the criteria for civil penalty assessments that assessments across all mining sectors would increase to \$68.5 million from the real assessment of \$24.9 million if operators made no compliance response to improve performance. Therefore, a rise of \$43.6 million (68.5 – 24.9) translated to a 176%<sup>8</sup> increase from the baseline. As evidenced from the real increases in assessed penalties between 2005 and 2008, the agency significantly underestimated not only the effects on litigation before the Commission, but also the real assessment penalties.

A basis for operators to contest a citation is because of a disagreement with the Secretary or her designated [inspector] representative with the facts as stated in the citation, or because of the amount of the penalty as determined by the citation's gravity, which is most usually determined

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<sup>3</sup> The Federal Register, Vol. 76, No. 22, p 5722

<sup>4</sup> The Federal Register, Vol. 71, No. 174, p 53065

<sup>5</sup> Freedom of Information request, Federal Mine Safety and Health Review Commission, March 7, 2011

<sup>6</sup> Office of Assessments, Mine Safety and Health Administration, March 15, 2011

<sup>7</sup> <http://www.fmshrc.gov/new/docketreports.htm>, March 15, 2011

<sup>8</sup> *Ibid*, p 53067

by the facts stated in the citation. Items such as operator negligence and likelihood of event carry categorical designations from “no negligence” through “reckless disregard” and “no likelihood” through “occurred.” Each designation increases the penalty amount. The POV proposal theorizes that the current system allows mine operators to contest violations and therefore avoid POV enforcement; however, the claim ignores clear evidence that mine operators disagree with the facts in the citation as stated by the inspector and/or with the penalty amount.

Indeed, auditors in MSHA’s Office of Accountability reported that inspectors in 20 of 25 MSHA-audited field offices “*did not properly evaluate the gravity and negligence of mine operator safety and health violations.*”<sup>9</sup> Similarly, in the final rule that codified Part 104 in 1990, MSHA stated that it would continue to rely on prevailing case law as it related to ‘S & S’ and ‘unwarrantable’, and also acknowledged that “*the Agency has been working, and will continue to work with its inspectors toward a consistent application of principles for determining whether violations are S & S or unwarrantable.*”<sup>10</sup>

For more than twenty years after Part 104 was finalized, the same challenges appear to continue to exist among the MSHA inspectorate about how to consistently cite S & S violations. With S & S as the cornerstone of section 104(e) pattern enforcement, a central objective in POV enforcement must be for inspectors to be consistent in citing practices and conditions. This model of inconsistency in enforcement under which the agency has appeared to operate for some time underscores the fact that operators contest violations because of a disagreement with the Secretary or her designee, and also how extraordinarily important it is for MSHA to fix the lack of consistency among its inspectorate in citing S & S.

## Issue 2: Problems with POV Database

The searchable database that MSHA has developed can result in unintended consequences because of unreliable data. Faced with the possibility of shutdown, mine operators, MSHA, industry employees and the public must have confidence that POV determinations are based on reliably accurate data. Public misinformation contained in the database will have detrimental effects for mine operators and their employees as well as for MSHA. A program that MSHA has previously used to determine POV eligibility was criticized in a Department of Labor report for the significant logic errors<sup>11</sup> contained in the program. Even though the Labor Department’s Inspector General (IG) noted that MSHA did not intend to use the current system in future analyses,<sup>12</sup> one cannot ignore the fact that the IG report explicitly stated that: “4 of 46 sub-queries in Basic query of the Repeat category contained a value that could have caused a vacated citation to be counted as if it were a valid, final citation;” “5 of 46 sub-queries in the Basic query

<sup>9</sup> Ward, Ken Jr., “Report Details MSHA’s Lapses Prior to [UBB] Disaster”, The Charleston Gazette, March 2, 2011

<sup>10</sup> The Federal Register, Vol. 55, No. 147, p 31130

<sup>11</sup> *Op cit*, U. S. Department of Labor, Office of Inspector General, p 17

<sup>12</sup> *Op cit*, U. S. Department of Labor, Office of Inspector General, p 16

were missing a value that could have caused citations and orders associated with a prior owner of the mine to be counted;” “the electronic spreadsheet formula intended to provide the total number of S & S 104(d) final orders at each mine for the 24-month review period incorrectly sums two columns that represent the 104(d) final orders that may contain 104(d) orders that are not S & S.”<sup>13</sup> With this level of significant errors in MSHA’s former POV program database, it is difficult to see how the agency can develop a framework that provides factual, accurate up-to-date information about enforcement history at the approximately 14,500<sup>14</sup> mining facilities regulated by MSHA.

PCA strongly recommends that MSHA undertake a pilot program before making it publically available should the agency move forward with using the current database. The pilot program should be in effect for at least one year, and should include a review by impacted stakeholders from all mining sectors. The objective of the program must be to ensure data accuracy so that information contained in the database is reliable and will not lead to unwarranted POV claims and facility shutdowns.

### Issue 3: Potential Imposition of Safety and Health Management Plans

The proposal does not list parameters for safety and health management plans that operators may develop and file with the agency to avoid a POV action. Although a set of guidelines would remove the guesswork that causes uncertainty within the regulated community about what should be included in the plans, mine operators still do not know how to measure the effects of such a mandate unless they know which elements would be required by the agency. Elements contained in the plans may differ to some degree, but all plans contain some common elements. For example, a common provision is a statistical measurement of accident rates, like the non fatal days lost (NFDL) rate that MSHA monitors and maintains. Similarly, employee education is a common element, but safety observation may be unique to just a few.

The discretionary nature of safety and health management plans that MSHA proposes in the POV rule carries uncertainty about what may be required of operators. In September 2010, MSHA published a notice to hold public hearings to collect information about “Safety and Health Management Programs for Mines.” The notice listed four organizations that provide guidelines for these types of programs, and these guidelines contain typical safety and health management program elements – i.e. statistics, education and training, health surveys, and so on.

In addition, Section 202 of the “Robert C. Byrd Miner Safety and Health Act of 2010,” lists requirements for “mitigating circumstances,” and a “remediation order.” The remediation

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<sup>13</sup> *Op cit*, U. S. Department of Labor, Office of Inspector General, p 17

<sup>14</sup> Testimony of Assistant Secretary Joseph Main, Subcommittee on Education and the Workforce hearing, March 4, 2011

order contains a requirement for filing a safety and health management program approved by the Secretary, including “*the employment of safety professionals, certified persons, and adequate numbers of personnel for the mine, as may be required by the Secretary.*”<sup>15</sup> The guidelines for safety and health management plans that operators will follow must be clearly specified in the notice and comment period. If MSHA plans to include a requirement to hire additional personnel in safety and health management plans, then stakeholders like PCA must know this before a standard is finalized, and be given the opportunity to provide comment. The agency must state specifically what it will require operators to include in management plans.

#### Issue 4: Removal of PPOV process

Another noteworthy (and negative) provision in the POV proposal has to do with removing the PPOV notification to operators; this elimination is directly connected to the database accuracy issue. For example, in the current Part 104 protocol, which includes a PPOV notification letter, operators have an opportunity to analyze the accuracy of the data presented by the agency in its historical review and clear any erroneous data from operator records. Consequently, if MSHA relies on inaccurate data as part of its historical review, the incorrect data is made accurate, and the operator’s record is corrected. Eliminating the PPOV operator notification can result in the unintended consequence of stopping production based on erroneous data which could have been discovered upon closer scrutiny.

The House Education and Labor Committee released a list of 48 mine facilities in April 2010, and the press release stated that if not for the number of contested citations, then these 48 operations would be POV violators.<sup>16</sup> The published list contained at least one error that misidentified an operator as being POV-eligible, when in fact, the operator was not in jeopardy of being a POV violator. This inaccuracy was likely caused by a lack of review, and the review would have occurred if the listed operator had an opportunity to analyze the data during a PPOV notification process.

PCA encourages MSHA to include a notification of PPOV in any final rule the agency may adopt. Fair and adequate notice from the agency should be a cornerstone of the POV framework. The extraordinary nature of the POV enforcement action requires this. The prospective application of a set of PPOV guidelines provides operators with an opportunity to restore compliance with standard. Removing the PPOV notification as determined by an initial screening process while at the same time eliminating the requirement that only final orders be considered create an untenable circumstance for cement plant operators.

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<sup>15</sup> 111<sup>th</sup> Congress, 2<sup>nd</sup> Session, Amendment in the Nature of a Substitute to H.R. 5663, Offered by Mr. George Miller, p 21, lines 12 – 16

<sup>16</sup> U. S. House of Representatives Education and Labor Committee, 111<sup>th</sup> Congress, 2<sup>nd</sup> Session, *Chair Miller Releases List of Dangerous Mines Escaping Tighter Scrutiny*, April 14, 2010

### Issue 5: Proposal Understates the Rule's Cost

The proposal understates compliance costs and the overall economic effects on facility operations. The agency estimates in the proposal that “*it will take a supervisor an average of 5 minutes each month to monitor each mine's performance using the Agency's website.*” Multiple individuals working at cement plants, including production managers, safety and health personnel, and individuals on the safety committee, will monitor the database with greater frequency than once a month for five minutes. In addition to lost production revenue, facilities will incur associated amortization and depreciation costs.

### Issue 6: Legal Status of Non-Final Citations

MSHA's proposal to consider *non-final* citations and orders to identify mines with a pattern of violations (POV) would be unconstitutional, and is also clearly not consistent with the Mine Act as MSHA claims. The NPRM proposes to eliminate MSHA's current requirement in 30 CFR 104.3(b) which provides “that only citations and orders that have become final are to be used to identify mines with a potential pattern of violations.” 76 Fed. Reg. at 5721. The NPRM further explains that the proposed change “is consistent with the language of section 104(e), the legislative history of the Mine Act, and the purpose of section 104(e).” *Id.* PCA disagrees with MSHA's claims of the legitimacy and lawfulness of its proposed action, and we are opposed to the revision that MSHA is proposing to section 104.3(b).

The NPRM's claim that the proposed change is “consistent with the language of section 104(e),” is based entirely on MSHA's reliance on section 104's legislative history and, in particular, a selective reading of that legislative history. However, MSHA's claims are unfounded, and its reliance on legislative history to explain and support its interpretation of section 104(e) is at odds with Supreme Court decisions addressing the reliability of legislative history for construing statutory language.

In the latter instance, the Supreme Court's decision in *Exxon Mobile Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005) (*Allapattah*) is extremely instructive in its admonishment of legislative history:

As we have *repeatedly held*, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is

itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends." See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

545 U.S. at 568-69 (emphasis supplied). While the Court, in *Allapattah*, went on to say, “[w]e need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances,” *id.*, the Court’s conclusion in that case, “that in this instance both criticisms are right on the mark,” *id.* at 569, is equally applicable here, as we demonstrate below.

First and foremost, while asserting the need to look to the legislative history of the Mine Act to understand the meaning of section 104(e), MSHA has provided no explanation whatsoever in the NPRM to demonstrate why such a need is necessary in the first place.<sup>17</sup> As the Court, in *Allapattah*, made clear, “the authoritative statement is the statutory text.” 545 U.S. at 568. It is only when a statute’s text has been demonstrated to be ambiguous that the resort to extrinsic materials, including legislative history, should even be considered, let alone relied upon.

MSHA has failed to demonstrate, let alone even discuss in the NPRM, any ambiguity in the language of section 104(e). Instead, the NPRM cites to the phrase “inspection histories” used in S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 32, as evidencing “Congress’ intent that POV determinations be based on inspection histories, *i.e.*, violations found by MSHA during inspections, rather than only on final citations and orders.” 76 Fed. Reg. at 5721. Perhaps MSHA’s citation to and reliance upon this specific phrase in the legislative history would be justified, had MSHA first demonstrated why it is even relevant. However, not only does section 104(e) *not* include the phrase “inspection histories,”<sup>18</sup> the use of that term in the Senate Report still does not demonstrate the conclusion that MSHA has reached, *i.e.*, that POV determinations can be based solely on inspections rather than final citations and orders.

In fact, the language of section 104(e)(1) is clear and straight forward:

If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as *could have* significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that

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<sup>17</sup> It is significant and noteworthy that the NPRM does not claim that MSHA has no means to address operators that demonstrate an indifference to regulatory compliance *unless* the proposed rule is adopted. Rather, the NPRM merely asserts, albeit erroneously, that “the existing regulation does not adequately achieve the intent of the Mine Act.” Fed. Reg. at 5719.

<sup>18</sup> Neither does section 104(d), which the NPRM also cites, contain this phrase. According to the NPRM, the Senate Report specifically noted “similarities between section 104(d) and 104(e) of the Mine Act,” 76 Fed. Reg. at 5721.

such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which *could* significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(Emphasis supplied.) In other words, section 104(e) directs that *after* a pattern of violations *has been determined to exist* based on citations and orders which have become “final,” either because they were not contested or the Review Commission found that the challenge(s) had no merit, can MSHA rely upon an alleged violation arising from an inspection to impose the shut-down penalty authorized by section 104(e).<sup>19</sup>

Under the statutory construction that MSHA is now proposing to adopt, MSHA’s proposed elimination of the need for a POV to be established only after citations and orders have “finalized” would effectively deprive mine operators of their due process rights. Among other things, MSHA’s statutory interpretation would result in a presumption of a mine operator’s guilt, *i.e.*, a presumption of a pattern of violations based entirely on an inspector’s allegations, and in so doing would shift the evidentiary burden from the government to prove violations, onto the mine operator to disprove that the pattern of violations had occurred. Under the Constitution, however, a law must presume innocence and the government has the burden to prove that violations have occurred. MSHA’s statutory interpretation would also deprive mine operators of their rights to an impartial jury and to confront their accuser.

In conclusion, PCA recommends the following:

1. Maintain the current framework that requires final orders from the Commission to be used in identifying potential POV violators.
2. Maintain the requirement that MSHA identify potential POV violators, and issue PPOV notifications.
3. Conduct a year-long pilot program to ensure that accurate enforcement and accident data is maintained in the searchable POV database.

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<sup>19</sup> MSHA’s 1990 final rule effectively acknowledged that section 104(e) was intended to be used “at mines with a record of repeated S&S violations *and* where the other enforcement provisions of the statute have not been effective in bringing the mine into compliance with Federal health and safety standards.” 55 Fed. Reg. 31128 (emphasis supplied). In other words, the 1990 final rule acknowledged that the penalties imposed under each successive subsection of section 104 were not only designed to be more severe than the preceding subsection, but also that the subsections were intended to be applied sequentially, *i.e.*, from the least severe to the most severe, thereby giving purpose and functionality to each subsection 104. Under the statutory construction that MSHA is now proposing to adopt, however, MSHA’s proposed elimination of the need for a POV to be established before citations are made final by the Commission would effectively also eliminate the need for section 104(d) to even exist.

4. Provide more detail to the public about the elements in a safety and health management plan that the agency will require mine operators to include as part of correcting and restoring compliance.
5. Conduct a thorough economic analysis of the effects the rule would have on each major sector (coal and metal/non metal).
6. Withdraw and re-propose the POV rule to address the issues raised herein.

PCA appreciates the agency's consideration of PCA's perspectives on this proposal. Please do not hesitate to contact me, [tharman@cement.org](mailto:tharman@cement.org), if you have questions.

Very truly yours,



Thomas Harman  
Regulatory Affairs  
Portland Cement Association

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Robert Hirsch, Esquire  
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