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**Sent:** Thursday, June 23, 2011 5:34 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** Comments of Rep. George Miller on MSHA's Proposed Rule (RIN 1219-AB73)

To Whom It May Concern:

Please find attached: The statement of Rep. George Miller, Senior Democratic Member on the Committee on Education and the Workforce, U.S. House of Representatives on MSHA's Proposed Rule Concerning Pattern of Violations (RIN 1219-AB73).

Please contact Richard Miller on the staff of the Committee on Education and the Workforce at [Richard.Miller@mail.house.gov](mailto:Richard.Miller@mail.house.gov) or at (202) 225 – 3725 with any questions or concerns.

Please confirm receipt of this email message and attachment.

Thank You,

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AB73-COMM-82

**Statement of George Miller**  
**Senior Democratic Member**  
**Committee on Education and the Workforce**  
**U.S. House of Representatives**  
**On MSHA's Proposed Rule Concerning Pattern of Violations (RIN 1219-AB73)**  
**June 24, 2011**

**Introduction**

The Upper Big Branch mine disaster in Montcoal, West Virginia, which took the lives of 29 miners in a massive blast on April 5, 2010, revealed a broken Pattern of Violations (POV) process which allowed Massey Energy to escape being placed on the POV despite an egregious record of non-compliance, including 515 violations and 48 unwarrantable failure orders in 2009. Hearings before the House Education and Labor Committee in 2010 revealed that a number of mine operators who chronically violate the Mine Act are able to game the current system to evade being placed on a Pattern of Violations.

Following the issuance of new civil penalty rules under 30 CFR Part 100 in 2007 and MSHA's decision to initiate POV screening in 2007, many mine operators decided to contest many or all of the citations for penalties. The contest rate for significant and substantial (S&S) violations skyrocketed from 9% to 46% between 2004 and 2009 (a 500% increase). Today, the backlog of contested cases has grown so large that even with a major increase in funding provided to the Federal Mine Safety & Health Review Commission (FMSHRC) and the Solicitor of Labor, final orders for citations will not be issued for two and sometimes three years. Given that the current POV rule requires final orders for S&S violations before past history can be considered for placing a repeat violator on POV, the delays caused by the backlog allows POV sanctions to be postponed or evaded altogether.

Under the current POV regulation mine operators who are serial recidivists can keep placing miners at unacceptable risk for years on end, while MSHA is handcuffed in placing chronic violators on the POV in a timely manner. Hearings before our Committee revealed an urgent need for legislative reforms to deal with repeat violators, and MSHA is to be commended for working to fix a broken system using the legal authorities currently provided in the Mine Act. However, this regulatory reform is not a substitute for legislative reforms needed to change the culture and incentives of chronic violators who repeatedly endanger miners.

**MSHA's Proposed Regulation is Consistent with the Mine Act and Solves a Major Problem**

The proposed POV regulation would eliminate the existing requirement in 30 CFR §104.3(b) which requires that only citations and orders that have become final are to be used to identify mines with a potential pattern of violations. In its place, MSHA would use citations as a basis

for evaluating the history of non compliance for purposes of POV. The rule also eliminates the existing provisions for a *potential* POV notice.<sup>1</sup>

As a member of the House Education and Labor Committee when House-Senate hearings were held on the 1976 Scotia Mine Disaster and Congress adopted legislative reforms, including the Pattern of Violations provision, it is my view that the proposed MSHA Pattern of Violations regulation published on February 2, 2011 is squarely in line with the language and intent of Section 104(e) of the Federal Mine Safety and Health Act of 1977.

In explaining the need for POV enforcement tool during the passage of the Federal Mine Safety Act in 1977, Congress pointed out that “the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disaster which the existing enforcement scheme was unable to address.”<sup>2</sup> The use of the phrase “inspection history” indicates Congress’ intent that POV determinations be based on inspection histories such as violations found by MSHA during inspections, rather than only on final citations and orders.

In 1989, MSHA held hearings on its proposed POV rule, and one of the issues is whether MSHA should place a mine on POV based on citations or final orders. The United Mine Workers Union repeatedly warned in its comments that if MSHA adopted a final order requirement, mine operators would “be strongly motivated to challenge every S&S citation, regardless of the merits of their position.” The UMWA pointed out that waiting for final orders would not be “workable,” because by the time the orders were final and appeals had been exhausted, “then MSHA will be trying to determine whether a pattern existed on conditions cited years previously.” UMWA’s comments concluded: “By restricting Section 104(e) enforcement to final citations, MSHA will be creating an effective loophole to avoid pattern notice.”<sup>3</sup>

At an MSHA field hearing, John Caylor, on behalf of Cypress Coal, countered the UMWA’s prediction that operators will contest all S&S violations in order to avoid a pattern. He said:

“Such a comment is not realistic. Even if an operator contested all S&S violations, the success rate of such contest is now in the neighborhood of only 20-30 percent. If an operator contests all S&S violations, that rate would decrease, making it unlikely any operator could avoid pattern by such device. Moreover a contest of an S&S citation

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<sup>1</sup> The *Federal Register* notice for this rule notes that MSHA now posts to its web site the specific criteria and compliance data that the Agency would use for placing a mine on POV; this allows operators to monitor each mine’s compliance record against the proposed POV criteria. This transparency effort assures ample advance notice that a mine’s history of violations or accidents is potentially placing them at risk of a POV sanction.

<sup>2</sup> S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 32.

<sup>3</sup> Post Hearing Comments of the United Mine Workers Union, December 21, 1989

usually takes less than a year, making it likely that contests violations would be available for consideration in a pattern where two years are considered.”<sup>4</sup>

That posture has been plainly discredited. Today, there is a massive and growing backlog of 19,000 contested mine safety enforcement cases; delays are endemic. The average unwarrantable failure violation took 841 days from issuance to final order in 2010, according to MSHA data. By the time a final order is issued, the conditions in the mine may bear no relationship to what the conditions might have been almost three years earlier. With extensive delays associated with securing final orders, MSHA cannot take timely action to protect miners.

In response to a Congressional request<sup>5</sup>, DOL Inspector General (DOL-IG) was tasked to find out what was wrong with MSHA’s POV processes. The DOL-IG’s report, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority*, found that the POV regulations MSHA implemented in 1990 created limitations on MSHA’s “authority that were not present in the enabling legislation, specifically, requiring only the use of final citations and orders in determining a POV, and creating a ‘potential’ POV warning to mine operators and a subsequent period of further evaluation before exercising the POV authority.”

The report made several recommendations one of which was that the Assistant Secretary for MSHA “evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority.”<sup>6</sup> These recommendations were accepted by Assistant Secretary Joe Main and the proposed POV regulation is the result.

Comments on MSHA’s proposed rule by mine operators and their trade associations contend that if citations are used instead of final orders, mine operators will suffer a deprivation of “due process rights,” because if mines are placed on POV based on citations, and such citations are subsequently vacated or reduced in gravity on appeal to FMSHRC, the mine’s placement on POV status would have been in error and the mine operator would suffer sanctions without the opportunity to first exhaust their appeal rights.

Some in the mine industry argue that they are at risk of erroneous enforcement actions causing them harm. According to MSHA data, 4% of citations are ultimately vacated/withdrawn, and 15% of the S&S citations are reduced in severity so the citations would not be counted for purposes of putting a mine on POV.<sup>7</sup> Stripped of its rhetoric, the nub of this industry objection is

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<sup>4</sup> Transcript of public hearing on MSHA’s proposed Pattern of Violation Rule, November 8, 1989, pp 21.

<sup>5</sup> Letter from U.S. Representatives George Miller, Lynn Woolsey and Nick Rahall to DOL Inspector General, April 13, 2010

<sup>6</sup> U.S. Department of Labor Office of Inspector General-Office of Audit, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violation Authority*, September 29, 2010.

<sup>7</sup> MSHA Statistics on Contested Penalties, “All S&S Penalty Cases Modified to non-S&S Disposed of in FY 2009 and 2010,” Submitted to staff of the Committee on Education and the Workforce, March 2011

not that there are no due process rights, but rather, that the opportunity for appeals should be fully exhausted before MSHA is able to count a violation for purposes of determining if there is a Pattern of Violations.

Beyond the policy justification for taking timely action, this objection is legally weak.

- First, the Mine Act does not require MSHA to use “final orders” for POV. The “final order” requirement in MSHA’s current regulations was inserted in 1989, apparently at the urging of the mining industry. The DOL Inspector General, as noted above, found that using final orders instead of citations imposed limitations on MSHA’s authority “that were not present in the enabling legislation.”<sup>8</sup>
- Second, the Mine Act relies extensively upon citations as a predicate for elevated enforcement actions, including withdrawal orders. Elevated enforcement actions can be taken without waiting for a final order from FMSHRC. For example, a “failure-to-abate” order under Section 104(b) and an “unwarrantable failure” order under Section 104(d) both involve the withdrawal of miners—the same sanction that is provided under Section 104(e)-- and are issued on the basis of previously issued citations, whether or not those citations have been challenged. Due process is afforded in these elevated enforcement cases after the citations and withdrawal orders have been issued, through normal contest proceedings. The legislative history from the 1977 Act makes clear that MSHA should use the same approach for POV.
- Third, mine operators have the right under Section 105(b)(2) of the Mine Act to seek a “temporary order” suspending a POV designation in an expedited hearing before a FMSHRC administrative law judge, if the operator can show that (1) there is a “substantial likelihood” they will prevail in challenging the citations used to place them on a POV, and (2) can show that the health and safety of miners will not be adversely impacted by staying a POV designation.<sup>9</sup> Requests for temporary orders are reviewed within 72 hours and assigned to a judge as a matter of procedure, if the matter raises issues that require an expedited review. This expedited review cures the industry’s due process concerns because any potential deprivation of due process rights can be cured in a timely way, provided the operator meets the dual prongs of Section 105(b)(2).
- Fourth, courts reviewing due process issues must balance the private interests of the party claiming deprivation of due process against (a) the nature and importance of the

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<sup>8</sup> *In 32 Years MSHA has Never Successfully Exercised its Pattern of Violations Authority*, U.S. DOL-IG Audit Report No. 05-10-005-06-001, September 29, 2010.

<sup>9</sup> Section 105(b)(2) of the Mine Act authorizes the filing of petitions with FMSHRC for a temporary order. The FMSHRC ALJ may grant relief if a hearing was held in which all parties were given an opportunity to be heard; the applicant shows that there is a substantial likelihood that the findings of the Commission will be favorable; and such relief would not adversely affect the health and safety of miners.

government's interest, and (b) the risk of the government making a mistake when depriving due process and the consequences such mistake would entail. When there is a compelling government interest at stake--as miners' safety and health surely is, and as the Mine Act declares--the courts have found that an after-the-fact hearing satisfies due process.<sup>10</sup>

- For example, the Supreme Court has found that state highway safety laws which allow the state to take away a driver's license if they are suspected of operating under the influence of alcohol are Constitutional even though the driver had not had the opportunity for an evidentiary hearing before the license was removed. The Supreme Court found that the compelling interest in highway safety justifies making a summary suspension of a drivers license effective pending the outcome of a prompt post-suspension hearing.<sup>11</sup> MSHA's POV regulation parallels this framework, with prompt due process available under the Section 105(b)(2) of the Mine Act after the mine has been placed on elevated sanctions.
- Finally, mine operators have not offered an alternative to unacceptable status quo, where miners can be repeatedly exposed to dangers for years on end while operators litigate over whether certain violations can be counted for establishing a Pattern of Violations. Some mine operators have candidly conceded to our Committee that they will contest citations without regard to merit simply to try to avoid having violations that could count towards POV sanctions. This lawful gaming of the system needlessly endangers miners.

While the chance is 15% or less that an operator will be placed on a POV in error, to cure the due process concerns, we respectfully suggest that the temporary order procedures under §105(b)(2) of the Mine Act should be provided as a remedy for mine operators who believe MSHA has erred in issuing citations that could cause them to be erroneously placed on POV.

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<sup>10</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) states: "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

<sup>11</sup> *Mackey v. Montrym*, 443 U.S. 1, 2 (1979), which extends the principles of *Mathews v. Eldridge*, states: "When there are disputed facts, the risk of error inherent in the statute's initial reliance on the reporting officer's representations is not so substantial in itself as to require the Commonwealth to stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence." Further, "[T]he summary and automatic character of the [drivers license] suspension sanction available under the statute is critical to attainment of these objectives [highway safety]. A presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test and demand a presuspension hearing as a dilatory tactic. Moreover, the incentive to delay arising from the availability of a presuspension hearing would generate a sharp increase in the number of hearings sought and therefore impose a substantial fiscal and administrative burden on the Commonwealth." (at 19)

## **Conclusion**

I believe that MSHA's proposed regulation is well founded as a matter of law and policy, and is consistent with the legislative intent of the Mine Act. Due process concerns raised in industry comments can be fairly addressed in a timely manner through Section 105(b)(2) of the Mine Act. Thank you for providing an opportunity to comment on the proposed rule entitled "Pattern of Violations" (POV) to amend 30 CFR Part 104.