
From: Annie Bessert [mailto:Annie.Bessert@Newmont.com]
Sent: Tuesday, March 29, 2011 3:46 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: Richard Matthews
Subject: RIN 1219-AB73

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

Re: **RIN 1219-AB73**
Comments on MSHA's Proposed Rule for Pattern of Violations

Dear Ms. Nelson:

Newmont USA Limited is pleased to offer the following comments to the Mine Safety and Health Administration concerning its Proposed Rule for Pattern of Violations ("POV") under § 104(e) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801, 814(e). The proposed regulation was published at 76 *Fed. Reg.* 5719 (Feb. 2, 2011).

Newmont USA Limited ("Newmont") is a subsidiary of Newmont Mining Corporation. Newmont operates six underground mines and four major open pit mines in Northern Nevada, employing 3,450 people in the process. Newmont operations represent vital economic relief to a state with the highest unemployment rate in the country.

Newmont recognizes the significance of the POV sanction to the effective enforcement of the Mine Act and supports transparency and the simplification of this process to achieve the mutual goal of effectively protecting the health and safety of the miners. To this end, Newmont is supportive of the proposal. However, there are provisions in the proposal that Newmont would seek further reform and clarification on as follows:

1. The proposed rule should include specific criteria for POV status.

This proposal contains only generic criteria for determining POV status at Section 104.2. The actual screening criteria are not included in the proposal. Rather, the proposal speaks to seeking comment on how it should develop and periodically revise the POV criteria. 76 *Fed. Reg.* 5719, 5720 (February 2, 2011). This does not appear to comport with notice and comment rulemaking under the Administrative Procedures Act, the Mine Act, and is inconsistent with transparency that the agency has represented it will provide to stakeholders. Newmont respectfully requests that the proposal be reissued with screening criteria included so that meaningful comment and dialogue can be held. It is impossible to comment on criteria that have not been shared in the proposal. The Office of Inspector General of the U.S. Department of Labor ("OIG") also specifically recommended that MSHA seek stakeholder input of the POV screening criteria in its report dated September 29, 2010, pages 3, 24. MSHA has not

accomplished this in its proposal and anticipating a system that continuously changes screening criteria creates a barrier to stakeholders in understanding the conduct required of the regulated community in order to avoid enforcement under this provision. The process anticipated by MSHA appears to run afoul of minimal notice and due process requirements.

2. The proposed rule should include a meaningful opportunity to address mitigation before a notice is issued.

Section 104.3 of the proposal contemplates the automatic issuance of a pattern notice and eliminates the opportunity to address the potential for a pattern before it is issued. At the same time, it references consideration of “mitigating” criteria which appears to be an approved safety and health program to address deficiencies. It would be more appropriate to reinstate the opportunity to discuss avoiding a pattern notice so that mitigation has meaning. Consideration of mitigation before the notice is issued based on unspecified and potentially changing criteria compounds the vagaries of the proposal. The safety and health of miners would not be adversely affected by providing an opportunity to implement corrective measures that effectively address safety issues.

Newmont urges MSHA to reissue its proposal to provide a period for discussing mitigating circumstances prior to an automatic issuance of a pattern notice

3. The proposed rule should base the issuance of POV status on final orders.

Currently, 30 C.F.R. § 104.3(b) states that only citations and orders which have become final shall be used to identify mines with a potential pattern of violations. The proposed regulation changes this approach to base the pattern notice review on “violations issued” to make POV determinations.

The risk of an erroneous deprivation of the property interest such as a withdrawal order affecting a mine or parts thereof is significant. According to information released by MSHA’s Office of Assessments on January 31, 2011, almost 19% of the violations issued as “significant and substantial,” which were litigated in fiscal years 2009 and 2010, were vacated or modified to “non-significant and substantial” as a result of the litigation process.

Similarly, when § 104(d) violations, which alleged an “unwarrantable failure” to comply were litigated in the same period, almost 33% of those violations were either vacated or modified to a § 104(a) violation. Clearly, relying on “violations issued” to impose the punitive sanction of § 814(e) of the Mine Act could well result in erroneous application of the pattern enforcement.

There is also a very real possibility of MSHA erroneously tabulating a mine’s inspection history when considering the risk of an erroneous deprivation. The OIG recently reported on the accuracy of MSHA’s efforts to screen mines for POV sanctions.

For the five POV screenings performed from 2007-2009, MSHA district managers sent potential pattern of violations letters to 68 mines. Following the completion of the evaluation period provided by the current 30 C.F.R. Part 104, those same district managers recommended that 9 mines be given a POV notice. However, upon further evaluation of the underlying violations by MSHA attorneys or review by the Federal Mine Safety and Health Administration, MSHA determined that 6 of the 9 (66%) mines no longer met the POV criteria. *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority*, DOL OIG Report dated September 29, 2010, page 13. Therefore, in the absence of meaningful review of the underlying violations, it is more likely than not that any mine placed on a POV will be sanctioned when such action is not authorized by 30 U.S.C. § 814(e).

In addition, the same OIG's report found that MSHA's POV computer application used from 2007 to 2009 generated unreliable results on each of the five occasions it was used by MSHA to screen for POV status. For example, the OIG found that on all five occasions, the MSHA application contained a value which could have caused a vacated citation to be counted as a valid final citation. As a result, the program could have over-counted citations for a specific mine. *Id.* at p. 17. Similarly, citations and orders which had been issued to a prior owner of a mine could be associated with the current owner and have resulted in an over-count of citations for a specific mine. *Id.* And finally, the program was found to incorrectly sum two columns that represented "unwarrantable failure" orders in such a manner as to incorrectly include a mine that did not meet the screening criteria for "significant and substantial" § 104(d) final orders. *Id.*

Finally, in the absence of some independent review of an inspectors exercise of discretion while issuing enforcement actions, the risk of an erroneous application of the pattern notice and resulting withdrawal orders may be increased by MSHA's failure to provide its journeyman inspectors with periodic retraining. Lack of periodic retraining reduces the assurance that MSHA mine inspectors are adequately trained to conduct their inspection duties and to properly apply classifications, such as "significant and substantial" and/or "unwarrantable failure", to violations they encounter. According to the OIG, 56% of MSHA journeyman inspectors did not attend the required refresher training in FY 2006 or 2007. *Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining*, DOL OIG Report dated March 10, 2010, page 6. Moreover, MSHA training records show that 65% of the MSHA journeyman inspectors who failed to attend the required retraining sessions in FY 2006 or 2007 had still not completed retraining by the end of fiscal year 2009! *Id.* at p. 7. Over 27% of the 264 journeyman inspectors who responded to the OIG's survey stated that MSHA did not provide them with the technical training they needed to effectively perform their duties. *Id.* at p. 3.

This data reinforces the notion that challenges to erroneously issued or characterized enforcement action, either in severity or gravity, are not baseless efforts to avoid more severe sanctions. The Mine Act provided a mechanism for appeal through the Federal Mine Safety and Health Review Commission in order to ensure due process and to avoid unreviewable agency

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action. The informal conferencing process under Part 100 has been all but eliminated by MSHA over the past three years, and a backlog of cases has developed that makes fundamental due process difficult to obtain in the system.

For these reasons, Newmont urges that the Secretary reconsider her proposal to use "issued violations" as the basis for determining the existence of a pattern notice.

Sincerely,

A handwritten signature in cursive script, appearing to read "Randy Squires".

Randy Squires
Newmont USA Limited
Regional Manager, Safety Relations