



2011 APR -5 P 3:00

**U.S. Silver Corporation  
FAX COVER SHEET**

DATE: April 5, 2011

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FROM: Executive Assistant  
Heather Bailey-Foster

TO: Roblyn B. Fontaine,  
Chief, Regulatory Dev. Division

COMPANY NAME:  
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COMPANY NAME:  
MSHA.

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MESSAGE:

"RIN-1219-AB73"  
(Comments on MSHA Proposed Rule of Pattern of Violations)  
Thank you.



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April 4, 2011

**BY US MAIL**

Ms. April E. Nelson  
Acting Director  
Office of Standards, Regulations, and Variances  
Mine Safety and Health Administration  
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:

U.S. Silver – Idaho, Inc. (“U.S. Silver”) offers the following comments to the Mine Safety and Health Administration (MSHA or “Agency”) concerning its Proposed Rule for Pattern of Violations under § 104(e) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”), 30 U.S.C. §§ 801, 814(e).

U.S. Silver owns and operates the Galena Mine and Mill, the Coeur Mine and Mill and the Caladay Project in the historic silver valley of North Idaho. The Galena Mine has a history dating back to 1887. The issues discussed herein are extremely important to U.S. Silver, as our mines could be significantly impacted by any alterations to the existing regulatory scheme.

U.S. Silver supports the goal of improving transparency and simplifying the POV process both in terms of agency implementation and stakeholder understanding. However, as proposed, this rule would instead make the POV process less transparent and more complex while depriving mining companies of their right to due process under the law. In light of the fact that the POV sanction is among the most potent enforcement tools that MSHA has under the Mine Act, the Agency must utilize it so as to protect the health and safety of miners while still ensuring that mine operators receive fair treatment and due process. Therefore, U.S. Silver requests that MSHA re-

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propose the rule to address these issues, and allow operators a fair opportunity to comment on the fully proposed POV program, as a whole.

Moreover, U.S. Silver endorses the use of proper rulemaking if the current regulations (30 CFR Part 104) are to be amended, but we believe the proposed rule is contrary to law and must be re-proposed because:

- The proposed rule withholds for future web posting the actual criteria the agency will use for pattern determinations, thereby preventing analysis of its impact and a meaningful opportunity to comment on the proposal.
- The proposed rule violates the Administrative Procedures Act (APA) and Mine Act rulemaking mandates, and exceeds the Secretary's specific authority regarding patterns, by not disclosing the criteria while simultaneously adopting rules to "establish criteria for determining when a pattern...exists," under Section 104(e)(4) of the Act.
- The proposed rule will result in closure orders issued against employment sites, before the employer has an opportunity to:
  - (1) discuss the alleged pattern with the agency;
  - (2) contest the validity of alleged citations or orders used to identify a pattern;
  - (3) address the accuracy of agency data used for pattern identification; or
  - (4) obtain Review Commission and judicial review of the alleged pattern identification "notice," prior to closure orders imposed by MSHA inspectors.
- The proposed rule will deny employers Mine Act Section 105 citation and penalty contest rights, and due process of law, by using contested, alleged violations to impose closure order penalties, using the pattern of violation provisions of the Mine Act.
- The proposed rule will impose requirements for the submission of "safety and health management programs," for MSHA approval, to gain MSHA consideration of "mitigating circumstances" in the future that might prevent pattern closure order issuance. By so doing, the proposed rule imposes a new pattern penalty and requirement, not authorized by the Mine Act, before any pattern has been formally identified by MSHA.
- The safety and health management program submission requirement, as a pattern mitigation trigger, circumvents Mine Act and APA rulemaking mandates for the adoption of mandatory standards. The separate rulemaking both OSHA and MSHA announced to determine if such safety program mandates are warranted and, if so, what program mandates should be included, demonstrates this "end run" around proper rulemaking procedures.

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Of particular concern to U.S. Silver are two matters: PPOV status and whether POV status will be based on final orders. As MSHA notes, Congress intended for the POV program to apply to "mine operators with a record of repeated S&S violations" "who have not responded to the Agency's other enforcement efforts." We are concerned that the proposed rule does not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Under the current proposal, a facility can be placed into PPOV status as a result of a single inspection with multiple citations, or as a result of one or two inspections with few citations, followed by one with a large number of citations. This is clearly not the Congressional intent for the POV tool, and a revision of the rule should squarely address this problem. In contrast, under the current rule and criteria, a single inspection with multiple citations and orders can place a mine into PPOV status. However, a facility is not currently placed into full POV status unless it fails to improve its performance over a period of time. While this still does not necessarily capture mines that are repeated violators, it at least means that POV status is based on a series of inspections.

If there is to be no official PPOV status under the proposed rule, the problem is that it may be difficult, if not impossible, for a mine to determine if it is threatened with POV status. The preamble discussion imagines that a facility will be able to tell if it is close to POV status by reviewing MSHA's data. If POV status can be triggered by a single inspection, then no mine operator can feel confident that it is not threatened with POV status.

Moreover, determination of an operator's POV status must be based solely on those citations that are fully adjudicated. U.S. Silver understands MSHA's preference to base POV status on citations and orders issued, as opposed to final orders, because there can be a substantial delay in the final determination of a citation or order challenged by an operator. It is essential to note, however, that if actions are to be based upon non-final orders, they may not be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment prohibits the federal government from depriving citizens of liberty or property without due process of law—and this means that actions that are punitive cannot be taken without appropriate access to review. For example, U.S. Silver is currently litigating several ground control citations that it believes have no merit – and this belief has been confirmed by outside experts with advanced degrees in mine engineering and numerous years of rock mechanics experience. Were U.S. Silver subject to POV status based on those meritless citations, it would be subject to that status without due cause. MSHA's proposal could easily lead to a situation where the alleged violations that lead to placing a mine on POV status could be vacated or modified after the mine has already been placed into the POV process without any mechanism to remove the mine from



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POV status after that has occurred. The net result would be to continue to take punitive action against a mine that has ultimately been found not to have been a pattern violator after all.

This does not mean that MSHA can take no actions prior to a final order. Certainly it can take actions designed to protect miners from harm, and it certainly has the discretion to increase its level of scrutiny of a mine with repeated citations or orders. Such measures are not punitive. U.S. Silver understands the need for fair and equitable use of MSHA enforcement tools when necessary to achieve safety. This proposal, however, will not enhance safety since it denies the regulated community the opportunity to comprehend its application and submit meaningful comments, while circumventing mandatory procedures aimed at fostering transparent and accountable government. We urge you to revoke, revise and re-propose this rule to address the flaws described above.

Thank you for your consideration.

Sincerely,

Thomas Parker  
President and CEO