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Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

RE: Proposed Rule, Pattern of Violations (RIN 1219-AB73)

The National Lime Association (NLA) is pleased to present its comments on the proposed Pattern of Violations (POV) rule. NLA is the trade association for manufacturers of calcium oxide and calcium hydroxide, collectively referred to as "lime." NLA's members operate both surface and underground mines under the jurisdiction of MSHA.

NLA commends MSHA for its efforts to make the POV process more transparent and effective. We strongly feel that this program should be carefully crafted so it targets those mine operators who repeatedly fail to live up to their obligations to provide miners with a safe place to work. As explained below, we believe that although the proposed rule (along with other measures MSHA has already taken) takes several important steps in achieving this goal, there are a number of significant improvements that must be made to the rule before it is finalized.

Comments

The Rule Should Not Be Finalized Without an Opportunity for Comments on the New POV Criteria

MSHA proposes to list new criteria for POV status on the Agency's website at some future date, but not to include the criteria in the rule itself, nor are the the new criteria specified in the preamble. The preamble asks for

specific comments on how the agency should obtain comment during the development of, and periodic revision to, the POV screening criteria. MSHA also requests comments on the best methods for notifying mine operators of changes to these criteria.

76 FR 5720. The POV criteria should be specified in the rule itself, and changes should be made through notice and comment rulemaking. These criteria are not simply guidance, but are binding, and determine whether mines are subject to substantially increased enforcement scrutiny. Especially if operators are expected to monitor their own performance to avoid POV

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status, it is essential that the criteria should not be a moving target. Stakeholders should have a full and fair opportunity to comment on changes to the criteria, and this can best be provided through rulemaking, subject to standard rules and practices.

MSHA's current POV rules do not contain specific criteria. Instead, the numerical criteria are published on MSHA's website. There is no documentation available, as far as NLA is aware, of why the numerical thresholds were chosen—something that should be provided if stakeholders are to comment effectively. A rulemaking with a reviewable docket would address this concern.

At the very least, MSHA's new POV criteria should be published, made available online, and included in the docket before comments are closed for this rulemaking. There are numerous elements of the proposed rule that cannot be adequately evaluated without an understanding of the criteria. For example, MSHA asks for comments on its projections of the number of mines likely to be subject to POV status under the new rule, and what the projected costs to the mining industry might be. It is impossible to make such estimates without knowing what the POV criteria will be. Obviously, the criteria will be different from the current criteria (which include final orders), but MSHA has not revealed what the new criteria will actually be. As a result, the cost estimates in the proposed rule appear to be entirely speculative.

MSHA Should Retain the PPOV Step

While NLA applauds MSHA's plan to make the POV criteria transparent and to have POV data available on MSHA's website, NLA believes that the Potential POV notification step should be retained.

First, NLA believes that MSHA has overestimated the degree to which mine operators will be able to determine if they are "close" to POV status. As explained in a later section of these comments, the current POV criteria (and presumably, the new criteria), can be triggered by even one problematic inspection. While all mine operators should be monitoring their compliance status and working to improve, MSHA's rule contemplates that operators will take special actions to avert POV status, such as submitting safety and health management programs to MSHA for approval. NLA believes that the PPOV notification serves a useful purpose as a clear trigger for these special actions.

Second, the current PPOV step includes an opportunity for a mine operator to confer with MSHA about whether PPOV (and POV) status is actually warranted. This valuable opportunity—for both the operator and for MSHA—would be eliminated under the proposal.

Finally, the current approach, with the PPOV step, can be effective as long as it is consistently and actively pursued by MSHA. If a mine operator receives a PPOV notice, and takes active steps to rectify the problems identified, the outcome of avoiding full POV status should be viewed as a success for this approach, not a failure. If some operators "backslide" after making those changes, this is an argument for continued monitoring of their progress, not for an abandonment of the approach.

The POV Criteria Should Be Clear and Easy to Access

NLA strongly agrees with MSHA's proposal to provide clear, transparent, and accessible POV criteria. Each mine should be able to immediately determine its potential POV status by viewing publicly available information on MSHA's website. We recommend that this information be collected in a single location, and that mine operators (and other interested parties) be able to view all of the relevant information at once by entering the mine ID number. (We note that only such a centralized process could justify MSHA's estimate that monitoring of this information will only take 5 minutes. 76 FR 5725.)

This will require the creation of a computer program that can properly compile and display this information. We strongly urge MSHA to pilot any such program with the assistance of mine operators and other stakeholders, to ensure that the information and calculations it provides are accurate, timely, and usable. MSHA should also review the data quality control measures it uses for its data retrieval system, to ensure that the data provided are of sufficient accuracy (and timeliness) to allow mine operators and others to depend on the results. Under MSHA's proposal, these data can have significant consequences for operators, and thus accuracy is essential.

We note that the necessity for accurate information also makes it unlikely that monitoring of this information will take only 5 minutes, because operators will likely review their own records and other MSHA data to verify it, especially if it suggests that POV status is imminent.

POV Status Should Only Result from Repeated Violations

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." NLA is concerned that the proposed rule (and MSHA's current screening criteria) do not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Rather, MSHA's current criteria are based on *multiple* violations, as opposed to *repeated* violations. Thus, a mine 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.

Under the current rule and the current criteria, a single inspection with multiple citations and orders can place a mine into PPOV status. However, a mine 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.

As noted above, if there is to be no official PPOV status under the proposed rule, 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 mine will be able to tell if it is close to POV status by

reviewing MSHA's data. But how close is close? 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.

NLA believes that the criteria for POV status should require a significant number of S&S citations or orders in the course of at least two inspections separated by a significant amount of time. For example, if one of the criteria for POV status is to be 50 S&S citations, the criterion could require that there be at least 25 S&S citations in each of at least two inspections separated by at least two months. This would mean, in this example, that a mine receiving 25 S&S citations in a single inspection should be considering the risk of POV status—while one receiving 10 would not. Under the present criteria (and apparently under the proposed rule), the mine with 10 citations could be swept into POV if a new inspection included 40 S&S citations, even if no previous inspection had revealed such a degree of problem.

Of course, it is difficult to comment on exactly how the criteria should reflect the need to address repeated violations, as opposed to multiple violations, without knowing what criteria MSHA proposes to apply.

If POV Status Is Not Based on Final Orders, Punitive Elements Violate Due Process Rights

NLA recognizes 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. This delay hampers MSHA's ability to use POV as a timely tool to address current problems.

However, it is important to note that if actions are to be based upon non-final orders, they cannot be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment to the Constitution 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.

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.

The preamble, however, shows some confusion about this, when it refers to the POV process as a "sanction" (76 FR 5722), and when it suggests that the closure orders authorized under section 104.3(c), are intended (at least in part) to impose punitive costs upon the operator in order to force compliance:

Closure orders can have a substantial impact on the ability of a mine to conduct its business. The threat of closure provides a strong incentive for operators to ensure that S&S violations do not recur. MSHA projects that few operators would risk such an occurrence.

76 FR 5724. This language is inappropriate, because it may suggest to inspectors and other MSHA personnel that the POV process is to be used to punish operators, and to use that punishment to coerce compliance. As noted above, this is not permissible under the Constitution if POV status is to be based upon citations or orders that have not become final orders. The preamble should make clear that measures taken under POV are to be protective only.

Accordingly, for example, MSHA should clarify that the removal orders described in proposed section 104.3(c) of “all persons from the affected area” must only apply to persons in the specific area potentially exposed to risk of harm from the particular cited violation. Thus (for example) if a catwalk lacked an adequate handrail, it would be appropriate to require miners to be removed from the area immediately around the catwalk, but not from the entire section of the mine containing the catwalk. Any wider exclusion would be punitive in nature, and cannot be imposed without violating due process rights.

POV Status Must Be Terminated If Underlying Citations or Orders Are Vacated

The proposed rule calls for terminating POV status only if an inspection of the entire mine reveals no S&S violations. However, because the proposal calls for basing POV status on non-final orders, POV status must also be terminated if enough citations or orders upon which the status is based are subsequently reversed, or reduced in severity, so as to drop the mine below the threshold levels for POV.

Remedial Plans Should Not Be Confused with Comprehensive Safety and Health Management Programs

MSHA indicates in the preamble that a mine operator finding that a mine is at risk of POV status may submit a “written safety and health management program” to MSHA for approval, and that such a program may serve as a mitigating circumstance that may avoid POV status. NLA does not object to the concept of a mine operator working with MSHA to develop a remedial plan to address problems that could lead to POV. However, NLA is concerned that the language in the preamble may suggest that MSHA will require comprehensive safety and health management programs that go beyond the particular concerns that underlie the potential for POV status. This impression is strengthened by language elsewhere in the preamble, such as the following:

Mines that have effectively implemented an MSHA-approved safety and health management program (to avoid being placed on a POV) would have procedures in place to continuously address hazardous conditions.

76 FR 5724. This wording does not suggest a remedial plan targeted at specific violations, but rather suggests a comprehensive program.

The POV process is not the appropriate mechanism to impose the requirement for comprehensive safety and health management programs. MSHA has announced that it intends to propose a rule requiring such programs, and the proposal will provide all stakeholders the opportunity to provide comments on the necessity for such a requirement, and for the contents of

such programs. MSHA should not circumvent that rulemaking with a “back door” requirement for these programs.

Accordingly, NLA suggests that if MSHA intends to use this approach, that it avoid confusion by using a different term, such as “targeted remedial plan” as opposed to “safety and health management program.”

We also note that while the preamble states that “under the proposal” operators may submit these plans for approval, there is no mention of this approach in the proposed rule language. Important elements of a rule should be included in the rule language itself, and not only in preamble language that may not be as readily accessible to interested parties.

Conclusion

The proposed rule, and MSHA’s other recent actions on POV, are a good start toward developing a program that will be transparent and effective. However, more work needs to be done. In addition to the general changes suggested above, MSHA should add the criteria it intends to use under the new rule to the rulemaking docket, along with background information explaining how those criteria were developed, and request that stakeholders provide comments on the criteria (and the costs) in this rulemaking. The comment period should be extended to accommodate the additional information and further comments.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

/s/

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