
From: Arnolds, David M. (dmarnolds) [mailto:dmarnolds@chevron.com]

Sent: Thursday, March 10, 2011 5:02 PM

2011 MAR 10 P 5: 18

To: zzMSHA-Standards - Comments to Fed Reg Group

Cc: Premo, Mark G. (MPremo); Partridge, Dave; Knapp, Judith (JudithKnapp); Warkentin, Linda S.

Subject: RIN 1219-AB73 Chevron Mining Inc.'s Comments on Pattern of Violations proposed Regulations

Chevron Mining Inc. respectfully submits the attached comments to the Proposed Rules on Pattern of Violations.

DAVID M. ARNOLDS

Senior Counsel

dmarnolds@chevron.com

Chevron Mining Inc.

116 Inverness Drive East

Englewood, CO 80112

Tel: 303-930-4040 Fax: 303-930-4189

AB73-COMM-6

2011 MAR 10 P 5: 18

**COMMENTS OF
CHEVRON MINING INC.

TO THE
MINE SAFETY AND HEALTH ADMINISTRATION

ON THE
PROPOSED AMENDMENTS TO THE
PATTERN OF VIOLATIONS REGULATIONS

March 10, 2011**

E-Mailed to MSHA March 10, 2011 : zzMSHAcomments@dol.gov

Regulatory Information Number (RIN 1219-AB73)

Chevron Mining inc. (CMI) appreciates this opportunity to comment on the proposed amendments to the Pattern of Violations ("POV") regulations, 30 CFR Part 104, published February 2, 2011 in the Federal Register (Vo.76, No. 22 beginning at page 5719.)

CMI shares MSHA's concern for protecting the health and safety of all miners. CMI strives to improve mine safety for our employees and the industry. We support any initiatives by MSHA or the industry that will, in fact, enhance safety of our miners. We also recognize that there are some operators who do not share these values and will respond only to effective enforcement action. Congress established the Pattern of Violation provisions in order to enable MSHA to deal effectively with those very few operators.

CMI applauds MSHA's efforts to amend Part 104 in order to better implement Congress's intent in providing for the powerful enforcement tool of declaring a recalcitrant operator to have a POV. CMI further recognizes the challenges of implementing the POV provisions in an effective but fair manner. CMI

supports MSHA's proposals (1) to post individual mine history on the website and (2) to provide the opportunity for operators facing the possibility of a POV notice to submit a safety and health management program to the District Manager for approval.

CMI has three concerns with the proposed amendments. First, the proposed amendments fail to establish the criteria for finding a mine as having a POV. Second, the proposed amendments would allow MSHA to impose a POV on the basis of citations issued even though not final, apparently leaving the operator with no legal redress. Third MSHA has greatly underestimated the adverse impact of the POV imposition.

§ 104.2 Pattern Criteria

Lack of Criteria

Section 104.2 of the proposed amendments states in the first sentence:

- (a) Specific pattern criteria will be posted on MSHA's website at www.MSHA.gov and used in the review to identify mines with a pattern of S&S violations.

CMI understands this to mean that MSHA is not establishing any criteria at all in this rulemaking but, rather, is proposing to reserve the discretion to establish those criteria at any time and from time to time without public notice and comment. Clear criteria for what constitutes a POV are essential and a lack of them is defective and unconstitutional. MSHA's posting them on the MSHA website does not save this defect unless it is done through the formal rulemaking process under the Administrative Procedures Act.

Use of Issued Rather Than Final Citations & Orders

Section 104.2 further lists the categories of citations and orders MSHA will review to determine "if any mines meet the criteria posted on MSHA's website." MSHA makes clear in its discussion at page 5721 that MSHA will consider all issued citations and orders, not just those that are final. Although the huge backlog of contested enforcement actions has frustrated the use of the POV notice, the proposed amendments provide no opportunity for an operator to contest MSHA's action. An operator on a POV notice would likely suffer millions of dollars in lost revenue (as CMI address in the next comment) even if the underlying citations were to be subsequently vacated or reduced to non-S&S.

In its discussion at page 5722 MSHA noted that over 700,000 citations were assessed civil penalties that became final orders during the years of 2006 through 2010, with 3,400 vacated after they were contested and 6,000

modified from S&S to non-S&S. Thus, 9,400 would have been considered in imposing a POV even though they were subsequently found not to qualify. Further, the 700,000 number is misleading. The number of S&S citations that were issued during that time frame is relevant. During the period of 2000 through 2009 an average of 38 percent of all citations issued to coal mines were S&S. Applying that percentage, there would have been 245,000 S&S citations, of which 9,400 should not have qualified for consideration of a POV notice.

CMI submits that there must be some reasonable avenue of appeal to the imposition of a POV. CMI suggests that an operator have the right to an expedited contest proceeding in front of a Review Commission judge and have the right to contest both the imposition of the POV and any citations on which it was based. Through this procedure MSHA could impose the POV on the basis of issued citations without the delay until they become final, but the operator would have a right to prompt judicial review.

Estimated Cost Impact of a POV

The imposition of a POV results in closure orders for every violation deemed by an inspector to be significant & substantial. Employees must be withdrawn from the affected part of the mine until the alleged violative condition is abated. This will continue until the entire mine is inspected with no S&S closure orders issued, which is highly unlikely. MSHA stated at page 5725 that it has no historical basis from which to estimate the potential costs that would be incurred by a mine on a POV. However, MSHA then proceeded, with no stated basis, to project "that a typical mine would lose about 0.5 percent of revenue as a result of closures (about 1 or 2 days for a large mine and a day or less for a small mine)" MSHA then calculated that 0.5% of an average mine's revenue would be about \$218,000 in annual lost revenues.

CMI submits that MSHA has a plethora of historical data on which to estimate much more accurately the likely lost production time due to closure orders. Each citation and order MSHA issues has the date and time it was issued and terminated. This is the time a closure order would be in place. More directly, MSHA has over 30 years of history of issuing closure orders under section 104(d) of the Act, all of which have a record of the date and time of issuance and of termination.

Although abatement times vary depending on the specific conditions and circumstances, CMI estimates that the average time at its North River Mine is between 4 and 8 hours. CMI received 58 S&S citations in 2009 and 68 in 2010 at that Mine - an average of 63 per year. The Mine's idle time costs are about \$14,000 per hour, which would result in lost production revenue of between \$56,000 and \$112,000 per closure order, or about \$3,500,000 to \$7,000,000 per year. This is 16 to 32 times higher than MSHA's estimated

cost impact. Further, the North River Mine had a VPID rate of only 0.517 for the period of September 30, 2008 to December 31, 2009 and 0.455 during the period of September 30, 2009 to December 31, 2010, which is well below the industry average of about 1.0. Hence, other mines could be affected much more severely, especially those that have a POV and, therefore, by definition, have a large number of S&S citations.

Conclusion

CMI proposes that (1) MSHA establish the specific criteria for a POV, and change them, only through formal rulemaking and (2) MSHA provide for the right of an expedited hearing by an operator upon receipt of a POV notice. CMI also requests that MSHA revisit its estimate of an operator's likely cost of a POV notice.

CMI appreciates the opportunity to submit these comments and also supports the comments submitted by the National Mining Association.

Respectfully Submitted



Mark Premo
President
Chevron Mining Inc.