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# Fax

<b>To:</b> Mine Safety & Health Administration	<b>From:</b> Linda Raisovich-Parsons, UMWA
<b>Fax:</b> 202-693-9441	<b>Pages:</b> 12 (including cover)
<b>Phone:</b> 202-693-9440	<b>Date:</b> April 15, 2011
<b>Re:</b> RIN 1219-AB73	<b>cc:</b>

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• **Comments:** Attached are the comments of the United Mine Workers of America on the Proposed Rule for Pattern of Violations. Please forward these comments to the appropriate persons in your Agency for consideration. I also forwarded a copy by Electronic Mail but because we receive no confirmation when sent by email, I am also faxing a copy just to make sure they have been received. I thank you in advance for your cooperation in this matter.

AB73-COMM-63

**Linda Parsons**

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**From:** Linda Parsons [lparsons@umwa.org]  
**Sent:** Friday, April 15, 2011 1:20 PM  
**To:** 'ZMSHAcomments@dol.gov'  
**Cc:** 'Judy Rivlin'; 'Dennis ODeil'; 'umwarbowersox@yahoo.com'; 'dkane@umwa.org';  
'rairhart@umwa.org'; 'croberts@umwa.org'; 'bscaramozzino@umwa.org'  
**Subject:** RIN 1219-AB73  
**Attachments:** RIN 1219-AB73 UMWA's Comments on the Proposed Rule for Pattern of Violations.pdf

Dear Sir/Madam,

Attached for the record are the comments of the United Mine Workers of America on the Proposed Rule for Pattern of Violations. Please forward these comments to the appropriate persons in your Agency for consideration. I thank you in advance for your cooperation in this matter.

Sincerely,  
Linda Raisovich-Parsons, Deputy Administrator  
UMWA Department of Occupational Health and Safety

**United Mine Workers of America  
Comments on the  
Mine Safety and Health Administration's  
Proposed Rule:  
Pattern of Violations  
RIN 1219-AB73**

*The United Mine Workers of America (UMWA or Union) is pleased to have the opportunity to offer these comments on the Mine Safety and Health Administration's (MSHA or Agency) Proposed Rule on Pattern of Violations.*

*The UMWA generally supports the Rule proposed by MSHA and reported in the Federal Register, Vol. 76, No. 22; pp. 5719-5729, February 2, 2011. However, we have certain concerns about the proposal, which are set forth below.*

*By way of background, the Pattern of Violations (POV) enforcement tool has been in Section 104 (e) of the Mine Act since 1977, yet MSHA's use of it was essentially nonexistent until very recently. We believe the POV mechanism represents an important means for protecting miners' health and safety. Accordingly, we encourage MSHA to maintain a POV procedure that is easy for both the regulated community to understand and appreciate, and for MSHA to utilize when operations demonstrate extraordinarily unsafe or unhealthy conditions. Further, the post-disaster records of the recent past (including Sago, Aracoma, Darby, Crandall Canyon, and Upper Big Branch) reveal that the Agency long-suffered from inconsistent and inadequate enforcement: unless that changes on an on-going basis, even these suggested improvements will not make enough of a difference.*

*For purposes of this document, we will first set forth MSHA's newly proposed language, and then offer our comments on the proposals.*

**Section 104.1 Purpose and scope.** This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the safety and health of miners. The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines.

Comment:

*This section, as proposed, includes no changes.*

*We generally agree with the stated purpose, but also note that the plain language of the Mine Act, in Section 104(e), does not limit the use of this POV enforcement tool to an operation's record of S & S violations. Rather, the Act speaks of a pattern of any/all violations that could significantly and substantially contribute to mine health or safety hazards. Most often S&S violations provide a reliable indicator of*

*the kind of significant hazards that warrant use of the POV enforcement tools. However, MSHA need not limit its analysis to only S&S violations.*

**Section 104.2 Pattern criteria.** (a) Specific pattern criteria will be posted on MSHA's Web site at <http://www.msha.gov> and used in the review to identify mines with a pattern of S&S violations. The review will include:

- (1) Citations for significant and substantial violations;
- (2) Orders under section 104(b) of the Act for not abating significant and substantial violations;
- (3) Citations and withdrawal orders under section 104(d) of the Act, resulting from the operator's unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Act;
- (5) Orders under section 104(g) of the Act requiring withdrawal of miners who have not received training and who the inspector declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine such as accident, injury, and illness records; and
- (8) Mitigating circumstances.

(b) At least two times each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the criteria posted on MSHA's Web site.

Comment:

*This section combines what has been in subsections 2 and 3 of the regulation.*

*The UMWA agrees with eliminating initial screening criteria that MSHA has used to provide an operator with an advanced written warning about an operation being vulnerable to imposition of the pattern of violations procedures. Operators should have an on-going awareness about their own health and safety practices and experience, and shortcomings in these regards. They should know when problems with their health and safety programs require more resources and/or attention. Accordingly, there should be no need for the government to provide a specific advance warning about an operation's substandard health and safety record and the heightened enforcement attention that may follow. We thus support eliminating what is now in 104.3, the provisions for determining which operations meet a Potential Pattern of Violation (PPOV).*

*We are aware of evidence that some operations made reasonably quick improvements to their health and safety programs upon receiving an MSHA notice of PPOV; some commenters suggest that kind of PPOV evidence indicates that the PPOV notice alone can serve to improve the "worst" actors' health and safety programs, such that the PPOV may be all that's needed in most cases. We disagree. If MSHA will stop providing PPOV notices then all operations will have a greater incentive to become*

*more pro-active about their health and safety practices on an on-going basis. Further, there is evidence that some of those that received a PPOV improved their health and safety programs in the very short term -- just enough to satisfy the immediate goal of getting off the POV list -- but then slipped back to their inadequate practices, again jeopardizing miners' health and safety. Making the proposed change (to eliminate the PPOV step) should serve to effect greater improvements: for more miners, at more operations, and on a longer-term basis. Operators will no longer be able to sit back and wait for MSHA to advise them that they have been targeted for special enforcement action, as all operations will be equally accountable and vulnerable if and when their practices warrant greater enforcement.*

*We also agree with simplifying the POV procedures and making them more transparent. We support, among other things, posting on the web (or any comparable publicly accessible system) both an operation's particular MSHA enforcement experience, and information that would allow an operator to compare its own experience with MSHA's POV screening criteria. MSHA's recent launch of its on-line monitoring tool for POV serves as a user-friendly tool that will allow all operators to monitor their own records vis-à-vis MSHA's records and to determine how close an operation may be to meeting MSHA's criteria, which would lead to MSHA's application of its heightened POV enforcement tools. With MSHA's monthly updating of these records, operators will be able to regularly identify any significant changes or trends; it will also allow them to communicate with the Agency if their respective records differ from MSHA's so any such discrepancies can be resolved promptly, before any unwarranted POV action would be initiated. Having this information made available by MSHA during this comment period helps to alleviate concerns and uncertainty about how the site works: parties can now see that elimination of the PPOV would not actually leave them in the dark about the likelihood an operation would meet the POV criteria.*

*Another critical change that would be accomplished by this proposed language concerns the removal of the current limitation that MSHA only consider "final" orders for purposes of POV. Under this proposal, citations and orders would be considered for possible POV enforcement during the review period after the citations and orders are issued, but while any legal challenges remain pending. The problem with the current system that limits a POV analysis to only final orders is that it can take years to resolve a contested citation. And by the time such a citation becomes final, the health and safety conditions at the mine may bear no relationship to what they were when the hazard was identified and citation first issued. Meanwhile, miners may be exposed to extraordinarily unhealthy or unsafe mine conditions by a chronic and persistent violator of MSHA regulations.*

*Insofar as the Mine Act has always been dedicated primarily to miners' health and safety, the current POV procedure - limited to final orders - has completely derailed a primary enforcement tool Congress designed for MSHA. By limiting its POV procedures to only final citations and orders, the Agency got itself stuck in the morass of lengthy litigation processes, which does not serve, but harms, miners' health and*

*safety. In fact, in comments the UMWA submitted in 1989 when MSHA promulgated the current regulation, the Union warned MSHA against restricting itself to final citations and orders when identifying mines with a potential pattern because that would motivate operators to contest S&S violations (regardless of the merits) in order to escape liability under the POV system. As the UMWA predicted and the recent past demonstrates, with the 2 year window period MSHA now uses for analyzing POV, many contested citations and orders are caught up in the FMSHRC backlog preventing MSHA from applying this Sec. 104(e) POV tool to some operations that MSHA cited for very numerous S&S violations.*

*We now respond to the comments of those who claim it would not be fair to allow a POV system based on issued-but-contested citations and orders, and those who allege that operators' due process would be compromised by allowing MSHA to consider non-final citations and orders for POV determinations:*

*First and foremost, the plain language of the Mine Act does not require MSHA to consider only final citations and orders for it to use POV. Secondly, the Mine Act includes many sections that require an operator to immediately correct problems MSHA identifies without exhausting challenge procedures. Due process protections will still be included, just later in time through contest procedures. For example, a failure to abate order under Sec. 104(b), and an unwarrantable failure order under Sec. 104(d), are issued on the basis of previous citations, whether or not those citations have been challenged. Likewise, an operator that disputes an inspector's determination as to whether an imminent danger exists must immediately comply with the Sec. 107 order and withdraw miners, though it still has the right to challenge MSHA's issuance of the order.*

*Indeed, the legislative history supports not requiring final orders for POV purposes. In discussing the sequence for issuing a Sec. 104(e) order, the Senate Committee noted that the pattern order sequence "parallels the current unwarrantable failure sequence of the Coal Act, and the unwarranted failure sequence of sec. 105(c) of the bill."<sup>1</sup> If the pattern orders are based only on "final" citations, MSHA's enforcement cannot be said to "parallel" that of Sec. 104(d), as Congress intended.*

*The Senate Committee gave a fairly extensive comparison between the "unwarrantable" and the POV provisions. It explained that the violation setting into motion the unwarranted failure sequence "must be of a significant and substantial nature and must be the result of the operator's 'unwarranted failure' to comply." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 33. In comparison, it pointed out "there is no requirement that the violations establishing the pattern offense be a result of the operator's 'unwarranted failure,' only that they be of a 'significant and substantial' nature." *Id.* The Committee also described other ways in which the enforcement provisions parallel each other, including the 90-day period for issuance of the orders*

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<sup>1</sup> S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 33. The reference to Sec. 105(c) is a reference to the unwarrantable provision that was ultimately designated as Sec. 104(d) in the final bill.

*and the requirement that there be an intervening "clean" inspection before either order can be terminated.*

*The Senate Committee concluded its discussion by pointing out that "it is the Committee's intention that the Secretary or his authorized representative may have both enforcement tools available and that they can be used simultaneously if the situation warrants." (Emphasis added). Under MSHA's current rule -- with its need for finality -- Congress' intention has been thwarted. Indeed, the Secretary cannot use both enforcement tools simultaneously if an operator's challenge to the underlying citations effectively blocks implementation of this POV tool.*

*Further, courts reviewing due process issues balance the private interest of the party claiming a deprivation of due process against both a) the nature and importance of the government's interest and b) the risk of the government making a mistake when depriving due process and the consequences any such mistake would entail. When there is a compelling government interest at stake-- as miners' health and safety surely is, and as the Mine Act's first purpose unequivocally states -- the courts find that an after-the-fact hearing satisfies due process. Given the clear Congressional directive to protect miners' health and safety, the UMWA believes that any due process concerns are adequately protected by the FMSHRC and judicial review procedures. That said, we would suggest that MSHA include a provision stating that if any citations or orders MSHA used to impose a Sec. 104 (e) POV are later reduced (whether by settlement or litigation) to non-S&S, or vacated, those changes would constitute mitigating circumstances, which MSHA would consider (though such changes might not have any affect on the underlying POV determination).*

*Making the proposed change to allow the Agency to consider outstanding citations and orders and not just final ones, will help to correct the backlog problem that has hamstrung MSHA. There is a substantial backlog of cases at the FMSHRC that has even provoked Congressional hearings in 2010. Contested citations can easily take longer to resolve than is the entire two-year window period provided in the current POV structure. And the backlog problem is not going to disappear anytime soon. For example, under the current procedures, MSHA could confront the conundrum of whether it should place a mine in POV in 2011 based on citations it issued in 2009. This doesn't make sense and does not further the purposes of POV, which is to effect immediate changes when an operation's conditions are especially dangerous. If a mine experiences poor conditions in 2011 then that is the time when POV should apply, not years later. MSHA largely forfeited its use of this POV provision in the Act when it required finality, and the substantial backlog developed. By eliminating the "finality requirement," MSHA will be able to use its 104(e) POV procedure in a timely manner.*

*This proposal anticipates having MSHA periodically revise its POV criteria through informal, administrative action. We oppose that. Instead, we believe the Agency should collect and consider the suggestions and comments submitted in response to this proposed rule to set criteria for purposes of POV. The criteria should*

*then be fixed, at least until there is another opportunity for public discourse on any changes that may be warranted in the criteria. A subsequent notice and comment process to adjust the criteria could be utilized if MSHA later determines that changes to its criteria are warranted.*

*We recognize the legislative history quoted in the proposed rule indicates Congress granted the Secretary "broad discretion in establishing criteria for determining when a pattern of violation exists" S. Rep. at 33. However, there has been over 30 years since the Act first became law and MSHA has gained experience using different criteria. We suggest that MSHA has accumulated enough experience over the intervening time to now set criteria and still satisfy the discretion Congress reserved for the Secretary.*

*The eight criteria listed in the proposed rule represent appropriate factors for MSHA to consider for purposes of POV. We believe that the first seven items in subsection (a) represent meaningful ways to measure an operation's health and safety problems, but we recommend that these be further explained, and elaborated upon. For example, information about fatal and non-fatal accidents, and injury and illness data are important measures of the human costs of mining, and represent consequences of unsafe and unhealthy mining practices. How each of the seven negative factors will be considered or weighted should be established at the outset. There also must be an Agency commitment to apply the criteria in a consistent manner.*

*Consistent with the legislative history granting the Secretary certain discretion, no operator should be required or expected to have experience with each of the seven factors before coming under POV scrutiny. A cumulative record of unusually unsafe or unhealthy conditions/practices should suffice for MSHA to use this Sec. 104(e) POV enforcement procedure.*

*We also believe that absolute numbers should not control for the criteria. The records for large mines should not be compared with the records of small mines, and vice versa. For example, having a set number of elevated citations or orders alone should neither be required nor trigger a POV. Rather, the experiences of mines should be compared to those of comparable mines, and viewed according to comparable inspection hours, when evaluating their relative health and safety records.*

*Having criteria that is based on MSHA inspection hours helps bring some fairness to the system. Union-represented mines generally have better health and safety records (based, for example, on the number of fatal accidents), yet they often are issued a disproportionately large number of citations because the contractual protections serve to encourage miners to show inspectors any and all violations. This helps to find and correct problems before accidents occur. Also, a disproportionately high number of inspection hours are devoted to the large, unionized operations. It is important that such operations do not get unfairly targeted for POV procedures just because union miners and unionized operations may receive relatively large numbers of citations and orders, when they tend to be more attentive to their health and safety practices.*

*One problem we know is that the injury reporting data MSHA relies upon for comparing the health and safety records of various mines is unreliable. Injury reporting depends on operator reports, but we have long known about chronic under-reporting. Some employers maintain programs that serve to reduce the reporting of injuries. Some simply fail to report reportable accidents. One recent and public example arose in connection with the television show COAL on Spike TV. In its first episode a miner was injured and carried away by ambulance, obviously missing some work that subsequent episodes confirmed. While the accident should have been a reported time-lost accident, our review of the POV monitoring for Cobalt Coal does not show any such accidents were reported. Under-reporting is a frequent problem that demonstrates the problem with relying on accident reports to understand an operation's actual experience and measure for POV. We suggest that fatality rates should generally be weighted more heavily than injury rates.*

*As a component of this POV program, MSHA should also aggressively utilize its Part 50 audits to determine whether operators are maintaining records and reporting accidents, injuries, and illnesses, as required. When shortcomings are found, they should be weighted heavily for POV purposes. If MSHA learns that an operator is using uncertified personnel for pre-shift exams, as was recently publicized in connection with the Upper Big Branch investigation, these facts must also be considered within the POV criteria.*

*MSHA criteria should also heavily weigh any information that suggests an operator is covering up violations in an effort to mislead MSHA. Testimony of Gary Quarles after the 4.5.10 Upper Big Branch disaster, and the recent indictment of the head of security at Upper Big Branch for his allegedly encouraging the giving of advance notice of safety inspections indicate the problem of advance notice is a serious one.*

*Likewise MSHA's experience uncovering unusually large numbers of S&S violations during the impact inspections it has performed over the last year suggests that the Agency's routine inspections may not be providing a realistic view of all mines' health and safety practices. Thus, while our primary concern remains focused on miners' health and safety, it is not fair for operations trying to comply with MSHA requirements to have to compete against those using short cuts at the expense of miners' health and safety. Whenever inaccurate or incomplete accident and injury reports are discovered, including when MSHA learns that operators are not adequately training all miners, or any material information is inaccurately or incompletely conveyed to MSHA, the fact of such unreliability must be weighted most heavily to discourage the creation and remittance of misleading data.*

*We also need to know more about what mitigating factors MSHA will consider, and to what effect? This must be fully explained, and consistently applied. In the preamble (at p. 5721, middle column), several examples of mitigating factors are offered: changes in mine ownership or management, and when conditions at the mine*

*show trends of significant improvement. However, the Agency should only use for purposes of mitigation those circumstances that objectively demonstrate significant improvements to miners' health and safety can be expected in the very near future. A change in a mine's ownership or management should not relieve the operation from the enhanced POV enforcement, unless the changed ownership or management includes a significant and objective commitment to improvements in miners' health and safety. Such a significant and objective commitment to improvements in miners' health and safety could be met by an operator's creation of a safety and health management program involving management and miners alike that will effect "meaningful, measurable, and significant reductions in S&S violations," *Id.*, along with MSHA's initial approval of the program, and the operator's continuing adherence to such a program, as verified by MSHA. If the operation's conduct reverts to one of noncompliance, then the POV should quickly apply. Miners' health and safety must always be the top priority.*

*Questions that remain open are: how will the presence of mitigating factors remove an operation from POV status? If so, for how long? Does MSHA contemplate using any sort of probationary status? We think it should: if an operation is placed on POV but then meets certain benchmarks to get off POV, but its practices then deteriorate within a relatively short time – we suggest 18 months represents a fair time period for measuring whether improvements have staying power -- then there should be abbreviated criteria to reinstate POV. For if the operation has not successfully adopted and incorporated new procedures to operate the mine in a safe and healthful manner, then it should receive heightened enforcement attention from MSHA. During the 18-month post-POV monitoring period we are suggesting, we also recommend that the District Manager be available to oversee the monitoring: the District Manager should be aware of the base-line conditions and be prepared to mediate if an operator, for example, contends that different inspectors are citing things differently. The District Manager will be best equipped to observe any changes in the operation's health and safety practices. There should be relatively few operations on POV status at any time so this should not burden the District Manager, while also offering some relief to an operator complaining of uneven treatment when the POV consequences are substantial. Finally, whenever there are designated miners' representatives at operations placed on POV, the miners' representatives should be included in any meetings between the mine management and the District Manager.*

*Also, what if an operation indicates it will pursue certain mitigating practices, but then reneges? Again, MSHA should use this powerful enforcement mechanism to coerce compliance. Miners' health and safety demand this level and any doubts should serve to favor miners.*

*Relieving an operation from a POV determination based on modest short-term improvements in the first seven criteria, without an objective commitment to long-term changes aimed at improving miners' health and safety, should not constitute mitigating circumstances to remove the POV procedures for an operation otherwise targeted. This is because operators should not allow themselves to become vulnerable to POV scrutiny in the first place; therefore, relief should be sparingly afforded and doubts should*

*always fall on the side of stronger enforcement and more aggressive protections for miners.*

*We urge MSHA to use this rulemaking process to explain how it will weigh all eight of the listed factors for purposes of determining when a particular operation will be susceptible to, or relieved from, POV enforcement procedures.*

*Finally, we agree that the health and safety record of each operation should be reviewed vis-à-vis the criteria at least every six months to ensure that MSHA is keeping abreast of any material deterioration in health and safety conditions. We believe that quarterly reviews would be even better, but think that semi-annual reviews should be adequate given the other enforcement mechanisms also within MSHA's authority.*

**Sec. 104.3 Issuance of notice.** (a) When a mine has a pattern of violations, the District Manager will issue a pattern of violations notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of this notice to the representative of miners.

(b) The mine operator shall post a copy of the notice on the mine bulletin board. The notice shall remain posted at the mine until it is terminated under Sec. 104.4 of this part.

(c) If, on any inspection within 90 days after issuance of the pattern notice, an authorized representative of the Secretary finds any S&S violation, he shall issue an order for the withdrawal of all persons from the affected area, except those persons referred to in section 104(c) of the Act, until the condition has been abated.

(d) If a withdrawal order is issued under paragraph (c) of this section, any subsequent S&S violation will result in a withdrawal order that shall remain in effect until the authorized representative of the Secretary determines that the violation has been abated.

Comment:

*This is renumbered and replaces what has been in subsection 4.*

*Other than removing the PPOV references there are no substantive changes in this section, but it offers greater simplicity, which we favor.*

*Providing the operator with this notice is what Congress established in the statute, as opposed to the PPOV that some have suggested. Providing miners with specific notice of the POV and its consequences, both through the miners' designated representative and by posting on the mine bulletin board, is important for informing those most affected that their workplace exhibits substandard health and safety conditions. If miners see such a notice, they can be extraordinarily attentive to protect themselves and their fellow miners, and they will be able to better appreciate that the consequences can be weighty.*

**Sec. 104.4 Termination of notice.** (a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations, or if no withdrawal order is issued by MSHA in accordance with

section 104(e)(1) of the Act within 90 days of the issuance of the pattern notice.

(b) The mine operator may request an inspection of the entire mine or portion of the mine. No advance notice of the inspection shall be provided, and the scope of inspection shall be determined by MSHA. Partial mine inspections-covering the entire mine within 90 days shall constitute an inspection of the entire mine for the purposes of this part.

Comment:

*This section includes no substantive change from what has been in subsection 5.*

*As proposed this accurately states the statutory requirements, and we support this language.*

*We appreciate the opportunity to submit these comments and believe this regulatory change is critically important and necessary to restore to MSHA the powers Congress intended it to have in Section 104(e) of the Mine Act, but which section of the Act was rendered largely ineffective by virtue of the existing regulation.*