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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: Proposed Rule: Pattern of Violations  
RIN 1219-AB73**

Dear Ms. Nelson:

The Appalachian Citizens' Law Center submits the following comments to the Mine Safety and Health Administration ("MSHA") regarding the proposed rule amending the "Pattern of Violations" regulation at 30 C.F.R. Part 104.

The Law Center is a non-profit law firm that represents miners and their families on mine safety and health issues. The Law Center is based in Whitesburg, Kentucky, which is centrally located in the Appalachian coalfields. At the Law Center, I operate the Mine Safety Project, which works to improve safety conditions for miners in the coalfields. Primarily, the Mine Safety Project represents miners that suffer workplace discrimination for making protected safety complaints. In addition to mine safety, we also focus on the area of miners' health where we represent disabled miners afflicted with black lung disease and miners' widows whose husbands have died from the disease.

The Law Center applauds MSHA's work on the proposed rule, which will finally bring the regulatory framework in line with the statutory intent of the pattern of violations provision of Section 104(e) of the Mine Act. This rulemaking is far too long overdue.

In response to the Scotia Mine Disaster in Letcher County, Kentucky, which killed 23 miners and 3 mine inspectors in 1976, Congress sought to address chronic and repeat violators and prevent operators from continually piling up citations for dangerous conditions. The result was section 104(e) of the Mine Act which substantially increased

the penalties for any operator that has a “pattern of violations.”<sup>1</sup> It’s clear from the legislative history that Congress believed the “pattern of violations” provision would be a strong enforcement tool to go after the worst violators:

Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster.... That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.<sup>2</sup>

They also believed it would send a strong signal:

The Committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The Committee views the [104(e)(1)] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. *The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.*<sup>3</sup> (emphasis added).

Finally, they felt that they provided flexibility, so a rigid standard wouldn't constrain the agency's use of the provision:

It is the Committee's intention to grant the Secretary in Section [104(e)(4)] broad discretion in establishing criteria for determining when a pattern of violations exists.... The Committee intends that the criteria make clear that a pattern may be established by violations of different standards, as well as by violations of a particular standards. Moreover... pattern does not necessarily mean a prescribed number of violations of predetermined standards.... As experience with this provision increases, the Secretary may find it necessary to modify the criteria, and the Committee intends

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<sup>1</sup> 30 U.S.C. § 814(e).

<sup>2</sup> S. Rep. No. 95-181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 36 (1977).

<sup>3</sup> S. Rep. No. 95-181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 36 (1977).

that the Secretary continually evaluate the criteria, for this purpose.

Yet, for 33 years and after more than a dozen mine disasters, MSHA had never issued a “pattern of violations” under the Mine Act.<sup>4</sup> The implementing regulation is currently framed so that it is nearly impossible for a repeat violator to be subjected to the enhanced enforcement intended in the statutory provision. Thus, the proposed rule is necessary if MSHA is to adequately address repeat violators and protect the nation’s miners against demonstrated disregard for their health and safety by outlaw operators.

#### **Section 104.1 Purpose and Scope**

As this section is unchanged from the current provision and it adequately addresses the purpose and scope of the proposed rule we are not opposed to its current form.

#### **Section 104.2 Pattern Criteria**

We support the combination and simplification of current sections 104.2 and 104.3 in the proposed section 104.2. Most importantly, we support the elimination of the existing requirement in section 104.3(b) that only citations and orders that have become final are to be used to indentify mines for pattern of violations status. The fact that, on average, a contested violation takes 518 days to become final irreparably impairs MSHA’s ability to adequately address repeat violators. Because only a statistically negligible number of contested violations are reversed or modified downward in the operator’s favor, the arguments from the industry against removal of this provision are not truly rooted in “due process,” but simply indicate their preference that MSHA return to the days when pattern of violations were never issued.<sup>5</sup>

We also support the increase in the frequency of MSHA’s review of a mine for a pattern of violations to at least twice per year. Frankly, we think the agency could devise a system of weekly or even daily review. Section 104.2(a)(1-6) reviews should be automated and adjusted essentially in “real-time.” We see little reason why Section 104.2(a)(7-8) reviews couldn’t occur on short notice, especially in response to an operator that has received an inordinate amount of citations and orders during an

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<sup>4</sup> In 2011, for the first time, MSHA issued two pattern of violations notices.

<sup>5</sup> Based on the logic of the industry argument, if a driver was issued a significant speeding ticket every single day, but the first ticket wasn’t “final” for 518 days, action shouldn’t be taken against the driver despite a horrendous record of repeat violations, because theoretically, the vast majority of the 518 citations “could” be overturned. This analogy isn’t hyperbole. The Ruby Energy Mine, MSHA ID 46-08808, amassed 584 S&S violations when the 24-month screening criterion was only 20. Incredibly, it also received 78 “elevated actions” [i.e. 104(b), 104(d), or 107(a)] when the screening criterion was only 2. See October 1, 2009 letter from Robert G. Hardman to Spartan Mining. Of course, the Ruby Energy Mine was not placed on a pattern of violations.

inspection, which may easily place the operator on a pattern of violations if a review were conducted. Obviously, two pattern of violations reviews is sufficient for most operators, but we hope the agency review process is nimble enough to respond immediately to chronic violators.

### **Section 104.3 Issuance of Notice**

We support the deletion of all references to a “potential” pattern of violations in the proposed rule. The plain language of the Mine Act, as well as its legislative history, mandates MSHA to notify an operator whenever a pattern of violation exists. The current regulation promulgated by MSHA – which merely **warns** the operator that it might be placed on a pattern if it doesn’t improve its safety performance – in our view, contradicts the plain language of the statute and, moreover, defeats the intent of the provision. By only **warning** an outlaw operator, MSHA is effectively telling the operator how to avoid being placed on a pattern of violations and thus how to avoid stricter scrutiny of its compliance with the law. We think it akin to an MSHA inspector observing a violation, but improperly warning the operator if the violation is not corrected in a designated period of time, that a citation will be issued. Thus, not only do we support removing any reference to a “potential” pattern of violations in the proposed rule, we think removal is required for MSHA to comply with the Mine Act.

Finally, we support the addition of Section 104.3(c) & (d), as they clearly state the intent of the Mine Act when a pattern of violations is issued. Since proposed Section 104.4 concerns the termination of a pattern of violations notice, the addition of proposed 104.3(c) & (d) properly balance the proposed regulation by also addressing the procedure under the notice.

### **Section 104.4 Termination of the Notice**

As this section is unchanged from the current provision, we are not opposed to its current form.

Sincerely,

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