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From: Watzman, Bruce [mailto:BWatzman@nma.org]
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To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB73

Attached are the comments and accompanying document submitted by the National Mining Association in response to the Notice of Proposed Rulemaking to amend 30 CFR Part 104, Pattern of Violations.

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AB73-COMM-73



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April 18, 2011

Ms. Roslyn Fontaine
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. Fontaine:

The National Mining Association (NMA) is pleased to offer the following comments to the Mine Safety and Health Administration (MSHA) concerning its Proposed Rule for Pattern of Violations under § 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. §§ 801, 814(e).

NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other organizations serving the mining industry. The issues discussed in this Proposed Rule are of extreme importance to NMA's members, as mining operations nation-wide are subject to the regulations promulgated pursuant to the Mine Act, and mine operators are significantly impacted by any alterations to the existing regulatory scheme.

NMA recognizes the importance of the pattern of violations (POV) sanction to the effective enforcement of the Mine Act and 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 mine operators 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.

I. The Proposed Regulation Violates the Principles of Due Process and Fundamental Fairness

a. The Current POV Process

Currently, 30 C.F.R. § 104.3(b) states that only citations and orders that have become final shall be used to identify mines with a potential pattern of violations. The proposed rule changes this approach, which has been followed since 1991, and instead allows POV determinations to be based on "violations issued." For purposes of POV calculations, an operator will now be presumed guilty as soon as an inspector accuses him of violating an MSHA regulation, and regardless of whether or not the presumed violation has any correlation to injuries or illnesses that have occurred at the mine.¹ The proposed rule also deletes those provisions granting prior warning to mine operators before the issuance of a pattern notice, and fails to prescribe a means by which operators can present mitigating factors and, where possible, develop a plan with MSHA to avoid the imposition of this onerous sanction. MSHA claims that these changes are necessary in light of the large backlog of contested violations pending before the Federal Mine Safety Health Review Commission (Review Commission), as well as the fact that, according to MSHA, only a fraction of such contested violations get vacated or modified to non-significant and substantial (S&S). MSHA argues that because of this backlog, the final order and notice provisions contained in the current rule hinder enforcement and do not allow the agency to review a mine's complete recent compliance history.

As an initial matter, NMA disagrees with MSHA's characterization of the current POV process, as well as its rationale for changing the criteria upon which POV status may be based. It is well understood in administrative law that federal agencies at different times exercise executive, legislative and judicial powers. In other words, federal agencies can at times act as the judge, jury and executioner in the promulgation and enforcement of federal regulations. Given this powerful leverage that MSHA has over mine operators, it seems particularly unfair for MSHA to then bypass legitimate challenges to alleged citations and impose admittedly the most onerous enforcement sanction under the Mine Act before a finding of guilt is made. Indeed, MSHA's primary justification for this change is the agency's need to circumvent the normal adjudicatory process to in order to consider backlog cases as part of a mine's history for POV purposes. This is a strawman argument that points fingers at both the independent Review Commission and at operators who choose to exercise their rights of due process as the two sources of the problem. The

¹ ICF Consulting, Mine Inspection Program Evaluation, Sept. 2003 ("...data indicate that the numbers and types of days lost injuries occurring over the past 5 to 10 years are not well correlated either quantitatively or qualitatively with the citations issued through inspection enforcement activities").

unfortunate reality, though, is that MSHA itself has been the primary contributor to the backlog by issuing substantially more citations and orders, of questionable validity, over the last few years while at the same time eliminating the conference process, thereby leaving operators with no recourse in contested cases other than to undergo a formal hearing process before the commission. Indeed, in testimony before the House Education and Labor Committee, Assistant Secretary Joseph Main recognized that inconsistent enforcement is a contributing factor to the dramatic increase in citations and orders.² Given this understanding, it is therefore difficult to see any justification for MSHA responding to the slow operation of the adjudicatory system by denying mine operators their fundamental right to be heard before being sentenced.

Furthermore, MSHA's claim that only a fraction of contested violations are vacated or modified is both inaccurate and irrelevant. According to information released by MSHA's Office of Assessments on Jan. 31, 2011, almost 20 percent of violations issued as S&S, which were litigated in fiscal years 2009 and 2010 and vacated or modified to "non-S&S" as a result of the litigation process. Similarly, when § 104(d) violations, which alleged an "unwarrantable failure" to comply, were litigated in the same period and almost 33 percent of those violations were either vacated or modified to a § 104(a) violation. Important to note is the fact that these are industry averages. POV sanctioning, however, is based on an individual operation's record, and at least some of those individual operators will likely have an even higher number of citations improperly designated as S&S or unwarrantable. Such operations are clearly at risk of being erroneously placed in the front of the POV line, especially as MSHA is proposing to base POV review on a relatively short time span where the misapplication of the S&S criteria by an inspector will have a potentially heavy impact on the total number of citations issued at a mine. Clearly, then, relying on "violations issued" to impose the punitive sanction of § 104(e) of the Mine Act could well result in erroneous application of the pattern enforcement mechanism. Moreover, as discussed in greater detail below, because the proposal is silent as to the number of violations that it will take to establish a POV, it is likely that almost any margin of error could result in multiple mines being erroneously subjected to this stringent penalty. MSHA's reliance on this statistic, therefore, does not address the serious concern of mines being mistakenly placed on the pattern of violations list.

There is also a very real possibility of MSHA erroneously tabulating a mine's inspection history. The Office of Inspector General at the U.S. Department of Labor (OIG) recently reported on the accuracy of MSHA's efforts to screen mines for POV sanctions. During the five POV screenings performed from 2007-2009, MSHA district managers sent potential POV letters to 68 mines. Following the completion of the evaluation period provided by the current 30 C.F.R. Part 104, those same district managers recommended that nine mines be given a POV notice. However, upon further evaluation of the underlying violations by MSHA attorneys or review by

² Testimony of Joseph A. Main, Assistant Secretary for Mine Safety and Health before the Committee on Education and Labor, U.S. House of Representatives, February 23, 2010.

MSHA staff, the agency determined that six of the nine mines (66 percent) did not meet the POV criteria.

Additionally, the same Inspector General's report found that MSHA's POV computer application used from 2007-2009 generated unreliable results on each of the five occasions it was used to screen for POV status. For example, the OIG found that on all five occasions, the MSHA application contained a value that could have caused a vacated citation to be counted as a valid final citation. As a result, the program could have over-counted citations for a specific mine. Similarly, citations and orders that had been issued to a prior owner of a mine could be associated with the current owner, resulting in an over-count of citations. The program was also found to incorrectly sum two columns that represented "unwarrantable failure" orders in such a manner as to incorrectly include a mine that did not meet the screening criteria for S&S § 104(d) final orders.

Finally, in the absence of any independent review, the risk of an erroneous application of the pattern notice and resulting withdrawal orders may be increased by MSHA's failure to provide its journeyman inspectors with periodic retraining. Lack of periodic retraining reduces the assurance that MSHA mine inspectors are adequately trained to conduct their duties and properly apply classifications, such as S&S and "unwarrantable failure," to violations they encounter. According to the OIG, 56 percent of MSHA journeyman inspectors did not attend the required refresher training in FY 2006 or 2007.³ Moreover, MSHA training records show that 65 percent of the MSHA journeyman inspectors who failed to attend the required retraining sessions in FY 2006 or 2007 had still not completed retraining by the end of fiscal year 2009.⁴ More than 27 percent of the 264 journeyman inspectors who responded to the OIG's survey stated that MSHA did not provide them with the technical training they needed to effectively perform their duties.⁵

The information above indicates that the POV rule should not be altered in the manner proposed, as MSHA has shown no adequate justification for these substantial changes. Not only does MSHA point to operational issues of a third party hearings system as reason to deny notice and meaningful opportunity to be heard to mine operators, but it also bases its changes on the false assumption that citations are rarely issued in error, and that contested violations are infrequently overturned or modified. Inspectors are not always right. Indeed, the above data belies MSHA's publicly articulated belief that some mine operators contest enforcement actions to avoid pattern notices. There are clearly a number of legitimate legal reasons to administratively challenge enforcement actions, which is a statutory right granted by the Mine Act, and those challenges have frequently met with success. For these reasons alone, MSHA should not adopt the proposed changes to the POV rule.

³ *Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining*, DOL OIG Report, Mar. 10, 2010, p. 6.

⁴ *Id.* at p. 7.

⁵ *Id.* at p. 3.

b. The Fifth Amendment's Guarantee of Due Process of Law

Perhaps even more importantly, the proposed rule clearly runs afoul of the constitutional right to due process. The Fifth Amendment of the U.S. Constitution guarantees, in relevant part, that "[n]o person shall be...deprived of life, liberty, or property, without due process of law..." The use of "violations issued" to trigger the POV punitive sanctions absent a meaningful opportunity for prior independent review or hearing, as well as the proposed rule's elimination of notice provisions, denies mine operators this constitutional right to notice and the opportunity to be heard.

When considering due process issues, courts "must determine whether [a party] was deprived of a protected interest, and, if so, what process was his due..."⁶ It is clear in the case of the POV sanction that shutting down a mining operation amounts to a substantial deprivation of property – both physical property as well as the economic benefits that accrue from mining operations – deserving of Fifth Amendment protections.⁷ Mine operators therefore must be afforded due process protections in the adopted regulatory POV scheme.⁸

In determining what process is sufficient to satisfy the due process guarantee of the Fifth Amendment, courts have routinely held that "there can be no doubt that at a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."⁹ The Supreme Court has also stated that "process which is mere gesture is not due process,"¹⁰ and that "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest."¹¹ Although the exact procedure needed to satisfy due process changes

⁶ See, e.g., *Logan v. Zimmerman*, 455 U.S. 422, 428.

⁷ Licenses of multiple types have been held to constitute property warranting due process protections by the courts. See, e.g., *Bell v. Burson*, 402 U.S. 535 (Supreme Court held that the state violated a motorist's due process rights by denying him a meaningful prior hearing before suspending his driver's license); *Dixon v. Love*, 431 U.S. 105 (Supreme Court held that a truck driver could have his license suspended or revoked prior to an administrative hearing where that revocation was based on final convictions of traffic offenses and where a full administrative hearing was available within 20 days of the revocation).

⁸ See, e.g. *Goss et al. v. Lopez et al.*, 419 U.S. 565, 575-576 ("In determining 'whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake'...the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive on the basic right' to a hearing of some kind. The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.")

⁹ *Mullane v. Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306, 313. See also *Grannies v. Ordean*, 234 U.S. 385, 394 ("The fundamental requisite of due process of law is the opportunity to be heard").

¹⁰ *Mullane v. Central Hanover* at 315.

¹¹ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), 105 S. Ct. 1487, 1493. Cited by the U.S. Court of Appeals for the Sixth Circuit in striking down a provision of the Mine Act in *Southern Ohio Coal Company v. Raymond Donovan*, Sec. of Labor et al., 774 F.2d 693, 704 ("Indeed, the Supreme Court's most recent

with context, the Supreme Court has held that the extent of the prior evidentiary hearing required before a deprivation of property occurs is determined by three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used; and 3) the government's interest.¹²

As discussed above, the private interest affected in this instance is the operation and economic viability of a mine – a property interest that is impinged upon by the constant closure orders that accompany POV status. MSHA itself acknowledged this fact when it published the final version of the current rule, stating that “the Agency realizes that the statutory requirements for terminating a pattern of violations sequence place a great burden on the operator of the mine. An inspection of the entire mine, particularly a large underground mine, that reveals no violations of a significant and substantial nature may be difficult to achieve.” 55 Fed. Reg. 31128, 31129 (July 31, 1990). In other words, MSHA admitted that once a mine is placed on POV status, it is virtually impossible to avoid a withdrawal order. Therefore, the interest at stake is a substantial one which, under the proposed POV regulations, MSHA would be permitted to deprive operators of without *any* prior hearing.

Furthermore, as already shown in detail above, the risk of erroneous deprivation of that property interest is significant given the potential for mistaken issuance of citations and POV calculations, and it could be made even worse by the vague and potentially ever-changing pattern criteria proposed in the rule (discussed below).¹³ The absence of any conference or hearing procedures before imposition of a sanction further complicates the matter, as the U.S. Supreme Court has stated that “some opportunity for [a party] to present his side...is recurringly of obvious value in reaching an accurate decision.”¹⁴ This risk is also exacerbated by the fact that even a relatively small number of mistakes on the part of MSHA inspectors may result in mines being erroneously placed on POV status.

The final factor utilized in determining what process is required to satisfy procedural due process is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would impose. Unquestionably, the government has a

pronouncement concerning due process requirements, *Cleveland Board of Education v. Loudermill*...strongly supports the mine operators' arguments that the Secretary should provide them at least some kind of *pre-deprivation* hearing”).

¹² *Matthews v. Eldridge*, 424 U.S. 319, 332-335.

¹³ *See also, e.g., Goss et al. v. Lopez et al.*, 419 U.S. 565, 579-581 (In addressing a school disciplinary process, the Supreme Court stated that “...the concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, this is not the case...the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against...The [Due Process] Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct...”).

¹⁴ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), 105 S. Ct. 1487, 1494 (referring to the rights of employees to present their side of a case in dismissal actions).

substantial interest in seeing that the enforcement scheme found in § 104(e) of the Mine Act is successfully implemented. However, even in the face of such a compelling government interest, due process must be afforded to those parties directly affected by government action. Indeed, Congress, while routinely recognizing the importance of MSHA's mission, nevertheless established an enforcement scheme in the Mine Act that specifically grants mine operators the right to contest the issuance of any citation, order or proposed civil penalty within 30 days of its issuance before an independent tribunal. The proposed rule, while not actually depriving the operator of the right to contest a citation at the Review Commission (which it cannot, since that right is guaranteed under the Mine Act), nonetheless vitiates the review process by granting MSHA the authority to impose the most severe enforcement tool provided under the Mine Act long before the mine operator has a chance to be heard. Such a system does not afford adequate procedural protections to mine operators.

MSHA's actions are particularly unwarranted given the fact that the POV sanction is not a tool intended by Congress to address emergency situations. While it is true that courts have found exceptions to the general requirement of prior notice and a hearing in emergency situations where a significant government interest justifies delay of a hearing until after the seizure of property rights, no such exception exists in the case of POV violations. Congress has empowered MSHA with ample authority to protect the health and safety of miners in emergencies under the Mine Act. Section 107(a) gives MSHA authority to close a mine by ordering the withdrawal of miners without a prior hearing whenever an "imminent danger" exists. These imminent danger orders remain in effect until the "...condition or practice which caused such imminent danger no longer exist[s]." 30 U.S.C. § 817(a). In addition, MSHA already takes the position that it can seek a temporary restraining order, temporary injunction and permanent injunction in the appropriate federal district court whenever "...the Secretary believes that the operator...is engaged in a pattern of violation of the mandatory health or safety standards of this Act, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of the miners." Mine Act § 108(a)(2); 30 U.S.C. § 818(a)(2). In light of such ample existing authority to stop operations at dangerous mine sites without resorting to the POV sanction, there is no basis for MSHA to dispense with the notice and hearing procedures of the § 104(e) POV process in a manner contrary to due process and the statutory enforcement scheme of the Mine Act. It is just stacking the deck – clear and simple.

The important private interest at stake, the high likelihood of erroneous deprivation of that property interest and the compelling but non-emergency government interest involved all lead to the conclusion that MSHA must provide notice and a hearing to mine operators before imposing a POV sanction. To do otherwise would violate the Fifth Amendment's guarantee of due process under the law.

II. The Final POV Rule Must Ensure that Mine Operators Receive Adequate Notice and a Fair Opportunity to be Heard

a. POV Sanctions Should be Based Only on Final Orders, and MSHA Should Retain the Notice Provisions Contained in the Current POV Rule

NMA finds MSHA's own previous due process considerations during the POV rulemaking process informative on the issue of what notice and hearing provisions should be included in the POV regulations. In the publication of the current version of the POV Final Rule, MSHA stated that "in order to avoid inequities regarding which mines are placed on a pattern, *the Agency must make ample provision for due process* when applying the broad framework established by Congress...MSHA will consider *only final citations and orders* when identifying mines with a potential pattern of violations." 55 Fed. Reg. 31128, 31132 (July 31, 1990, emphasis added).

Additionally, MSHA reasoned that "the initial screening factors are coupled with procedures affording parties *full and fair notice* of the agency's initial determination that a potential pattern may exist at a mine. Application of these procedures will ensure that operators are made aware well in advance of the circumstances giving rise to the issuance of a pattern notice and will have a *reasonable opportunity to address these circumstances*.... A number of commenters stated that fairness requires prospective application of the initial screening process. MSHA agrees." *Id.* at 31131.

The current assistant secretary himself, when he served as administrator for the Department of Occupational Health and Safety at the United Mine Workers of America (UMWA), commented on the importance of the notice provisions contained in the current POV Rule. In his letter to MSHA regarding the proposed version of the current POV Rule, Assistant Secretary Main stated that "all mines which are under review for potential pattern of violations...shall be given notice to that effect by the Agency...This notice is designed to give operators the opportunity to take concrete actions to improve the citation history at the mine and to implement a remedial plan. MSHA should evaluate these [and] similar company efforts to correct a pattern of violations when the pattern notice conference is held." He further stated that "when MSHA determines that a mine under review is subject to a pattern notice, the Agency should inform the operator...of the Agency's intent to issue a pattern notice. The letter...should specify the basis for the determination and should give the operator...15 calendar days after receipt to request a conference. At the conference there should be a review of the citation history..." A copy of Main's letter is attached to this document.

It is clear that MSHA included the current notice and procedural safeguards, such as basing POV decisions only on final orders, to ensure fairness to mine operators. Nothing has occurred to warrant the proposed changes, aside from MSHA's desire for administrative convenience in the face of a growing number of

cases at the independent Review Commission. Just as courts and prosecutors are not permitted to suspend the rights of litigants when they get overloaded with cases, so too must MSHA refrain from punishing mine operators who are merely exercising their rights under the law, particularly in light of the interests at stake in the POV process and MSHA's abandonment of procedures that allowed cases to be more efficiently managed. Eliminating all procedural safeguard provisions without establishing alternative measures will undoubtedly deny mine operators their right to fundamental fairness and violate the Fifth Amendment.¹⁵

Furthermore, while not adopting a specific time period for consideration of pattern criteria in the current rule, MSHA previously noted that "the Agency believes that, in practice, most violations considered under the pattern criteria will normally have been issued within the preceding 2 years." 55 Fed. Reg. 31128, 31133. The current backlog of cases before the commission has led to the pending resolution of a large number of longstanding cases for many mining operators. These cases tend to be decided or settled en masse, which leads to citations issued over the course of several years becoming final all at once. While NMA understands that MSHA did not want to "unduly restrict" its ability to consider cases relevant to a POV determination in the previous rulemaking, in light of this change in circumstances, MSHA should include in the new rule a set timeframe for consideration of citations of only those issued within the previous two years. This limitation would allow MSHA to consider relevant citations without exposing mine operators to the risk of having the effects of their compliance efforts grossly skewed by a POV calculation that could include citations issued four to five years prior. Again, NMA stresses that such a time limitation in the new rule is necessitated by the slow operation of the adjudication system, for which mine operators should not be penalized.

b. At a Minimum, Notice and a Hearing Are Required Before a Mine Operator Can be Deprived of His Property

If MSHA will not continue its current practice of only basing POV decisions on final orders and citations, MSHA must, at an absolute minimum, promulgate a POV rule that provides mine operators with sufficient notice and a comment opportunity

¹⁵ See, e.g., *Blackhawk Mining Company, Inc. v. Cecil D. Andrus, Secretary, Dep't of the Interior*, 711 F.2d 753 (6th Cir., July 20, 1983) (The U.S. Court of Appeals for the 6th Circuit upheld a provision of the Surface Mining Control and Reclamation Act requiring prepayment of proposed penalty assessments into escrow as a condition for formal review, but only because the "procedural safeguards in connection with the...escrow requirement" were sufficient to satisfy the demands of due process, particularly in light of the fact that there was only a "slight" potential deprivation of property and risk of erroneous deprivation given the procedural safeguards. Specifically, in determining that due process had been met, the court pointed to the right of a mine operator to have a public hearing before the Secretary determines whether a violation of the Act has occurred, the right of a mine operator to submit relevant information to the Office of Surface Mining's Assessment Office within ten days of service of a Notice of Violation which the Assessment Office must consider, and the right of a mine operator to have an informal conference – without any prepayment prerequisite – to review the amount of a proposed penalty within 15 days of receipt of a Notice of Proposed Assessment wherein an operator may be represented by counsel. All of these safeguards are implemented before imposition of the ultimate sanction under the SMCRA regulatory scheme.)

before a POV order may be issued.¹⁶ Indeed, courts have previously held that a provision of the Mine Act was unconstitutional because it failed to provide mine operators with a pre-deprivation hearing before the imposition of sanctions.¹⁷ Importantly, the U.S. District Court for the Southern District of Ohio, Eastern Division noted that “it is only where the nature of the potential deprivation does not indicate a likelihood of serious loss, and where procedures followed in reaching a decision to act are sufficiently reliable that the risk of erroneous deprivation is minimal that government may act without ‘some kind of hearing’ prior to the time a person is deprived of his property interest.”¹⁸ As previously discussed in detail, such is not the case with the POV penalty.

NMA understands MSHA’s concerns regarding the current backlog of cases and slow-moving adjudication process. However, altering the POV process in the manner proposed is neither an appropriate nor a fair response. Rather, MSHA and the Review Commission should adopt, through notice and comment rulemaking, formal measures allowing expedited considerations of those cases involving mines at risk of being placed on POV status. A formal mechanism to consolidate and expedite issued violations being contested by potential POV operators would allow MSHA to review a mine operator’s entire recent violation history within a reasonable timeframe, while still affording mine operators adequate opportunity to contest potentially erroneous citations before becoming subject to stringent penalties. In other words, MSHA would have a means to penalize the “bad actors” in the system without violating the due process rights of *all* mine operators. Additionally, this change could be accomplished easily within the framework of the existing adjudicatory system.

The due process clause of the Fifth Amendment requires MSHA to put procedural mechanisms in place in any final POV rule that provides mine operators with adequate notice and an opportunity to be heard. While the current POV rule ensures fairness and the right to be heard at the commission before being placed

¹⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society”). *See, e.g.*, the POV process in the Surface Mining Control and Reclamation Act (SMCRA), enforced by the Office of Surface Mining Reclamation and Enforcement (OSM). Under the SMCRA POV process, OSM must issue a show cause order to a mine operator if the agency determines that a mine has demonstrated a POV. 30 CFR Sec. 843.13; 43 CFR Sec. 4.1193. After the show cause order is issued, a mine operator can then request a hearing to contest an imposition of the POV sanction. At such a hearing, OSM is first required to establish a prima facie case for suspension or revocation of a permit based on a POV, which the mine operator can then contest. A written decision must be given as to whether a pattern of violations exists within 60 days after the hearing.

¹⁷ *Southern Ohio Coal Company v. Raymond Donovan et al.*, 774 F.2d 693 (Oct. 2, 1985) (The U.S. District Court for the Southern District of Ohio, Eastern Division – later upheld by the U.S. Court of Appeals for the Sixth Circuit – concluded that a section in the Mine Act allowing for *ex parte* reinstatement of a miner under the Act’s whistleblower protection provisions violated the 5th Amendment right to due process. Applying the *Mathews v. Eldridge* factors, the court found that the compelling interest of a mine operator in not being required to employ a discharged man, small administrative burden of a pre-hearing, and lack of reliability in *ex parte* administrative investigations supported the requirement of an evidentiary hearing “prior to adverse administrative action”).

¹⁸ *Southern Ohio Coal Comp. v. Donovan*, 593 F.Supp. 1014, 1023 (referencing the U.S. Supreme Court case of *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19).

on the potential POV list, the proposed rule takes out nearly every procedural protection contained in the current rule. Instead, mine operators can be issued withdrawal orders when an inspector merely alleges a safety infraction, and they are given no opportunity to demonstrate that they should not be hit with the POV sanction. Such a system would be in clear violation of the law. Rather than gut the procedural protections in the current POV scheme, MSHA should address the underlying issues and: (1) reinstate and commit resources to the conference process; (2) make certain its inspectors are fully informed as to the legal standards for S&S and unwarrantable failure special findings; and (3) work with the commission to address the backlog of cases causing prolonged adjudicatory periods – for example, by formalizing through concurrent rulemaking with the commission a procedure to expedite the full and fair hearing of citations and orders ripe for POV review. Alternatively, should MSHA make changes to the POV Rule, MSHA must retain adequate notice provisions and establish a pre-sanction hearing process in which mine operators are given a fair opportunity to present their case to an independent reviewer. To do otherwise would violate the due process rights guaranteed by the Fifth Amendment.¹⁹

III. POV Screening Criteria Should be Subject to Notice and Comment Rulemaking Procedures

MSHA is seeking comment on “how the Agency should obtain comment during the development of, and periodic revision to, the POV screening criteria.” 76 Fed. Reg. 5719, 5720 (February 2, 2011). Simply put, all such criteria should be published in the *Federal Register* and be subject to the notice and comment provisions of the Administrative Procedures Act and the Mine Act.

Section 104.2 of the proposed rule lists only generic categories of information that will be reviewed, without quantifying or explaining how such data will be applied to issue a pattern notice. The proposed rule also seems to anticipate that POV screening criteria will be fluid and subject to change without any established method for notice and comment rulemaking. While it is impossible to comment on POV screening criteria that have not yet been listed in the proposal, NMA strongly objects to this suggested ever-changing criteria method, as it is neither transparent nor simple. Rather, the proposed rule fails to inform stakeholders of what is expected of them in order to avoid a pattern notice, and it offers no opportunity for comment on specific criteria before the rule becomes effective. Given the serious consequences stemming from being placed on a POV, this lack of transparency is extremely troubling.

While the secretary of labor has broad discretion to establish criteria for determining when a pattern of violations exists, that discretion does not extend to establishing POV screening criteria without notice and comment rulemaking. Section 104(e)(4), 30 U.S.C. § 814(e)(4), requires that the “...Secretary shall make such *rules* as he deems necessary to establish criteria for determining when a

¹⁹ See, e.g., *Southern Ohio Coal Company v. Ray Donovan, Sec. of Labor*, *id.*

pattern of violations...exists" (emphasis added). The Office of Inspector General has also specifically recommended that MSHA seek stakeholder input on the POV screening criteria in its report dated Sept. 29, 2010, pages 3, 24. MSHA has clearly not adopted this approach in the proposed rule. Rather, by not identifying or publicizing any specific criteria in a final POV rule and instead providing for the periodic development and revision of specific criteria, MSHA is granting itself the ability to constantly change the rules of the POV process with no public notice or comment period. Such an approach is not only fundamentally unfair, but it also blatantly lacks the very transparency MSHA purportedly seeks to achieve with this rule revision. MSHA should remedy this issue by adopting a formal rulemaking process by which POV screening criteria must be established.

NMA's concern with the failure of the proposal to establish a rulemaking process for POV screening criteria is exacerbated by the fact that the proposed rule eliminates any potential for discussion of how the specific criteria should be applied to a mine before the issuance of a pattern notice. Proposed Section 104.3. Rather, it appears that the rule anticipates an "automated" process for the issuance of a pattern notice based on a mine operator's monitoring of data posted on MSHA's website. Furthermore, no specific procedure is described for consideration of mitigating criteria prior to the issuance of the notice. In other words, operators could be subjected to withdrawal orders in non-emergency situations without having had any opportunity to discuss the underlying violations, application of the POV screening criteria (let alone the initial listing of such criteria), or the means by which the operator might avoid the imposition of the sanction.

NMA urges MSHA to reissue its proposal and to include in that proposal the criteria to be used in the POV screening process, as well as an established mechanism by which mitigating circumstances are discussed prior to any issuance of a pattern notice. Such a proposal would be more efficient, transparent and consistent with the mutual goal of the agency and industry in protecting the safety and health of miners.

IV. Economic Analysis

A review of MSHA's cost/benefit analysis in the proposed rule indicates that the secretary has both overestimated the presumed benefits and underestimated the actual costs associated with the rule.

The stated benefits of the proposed rule are based on the unproven premise that specific POV screening criteria will be posted on MSHA's website, and that MSHA will develop a searchable database of compliance information that will then be used to determine whether a mine is approaching proposed POV criteria levels. The estimated costs are based upon an unrealistic estimate of the time it will take for a mine operator to evaluate its enforcement history once MSHA has posted the data and extrapolate forward to the end of the POV cycle. The proposed rule also significantly understates the costs to a mine placed on a POV.

MSHA has the ability to more accurately estimate both the cost and the benefits of the proposed rule. In the interest of transparency, and in light of President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," it must do so.

a. Benefits

MSHA's estimation of benefits is based upon the supposition that a mine operator who sees that its mine is approaching a POV will institute an MSHA-approved safety and health management program to lessen the probability of being placed on POV status. MSHA estimates that implementation of such a plan will result in approximately 50 mines per year averaging three fewer nonfatal injuries in the first year after implementation of the MSHA-approved plan. Utilizing a "willingness-to-pay" methodology, MSHA calculates that the proposed rule will result in monetized benefits of approximately \$9.3 million per year.

MSHA's analysis is flawed in that it is based upon an assumption that the specific screening criteria for issuance of a POV notice will only be applied prospectively. However, the proposed rule does not limit MSHA to prospective application of the specific criteria, and historically, MSHA has consistently applied POV specific criteria *only retroactively*. For example, in the most recent POV cycle, MSHA announced the specific POV criteria on Sept. 28, 2010, and applied it retroactively over a 12-month period ending Aug. 31, 2010. The failure of the proposed rule to limit retroactive application of specific POV criteria renders MSHA's estimate of benefits meaningless. It is based upon a premise that is not stated in the proposed rule and is contrary to MSHA's historical practice.

Additionally, the proposed rule posits that MSHA can successfully develop a searchable database of compliance information that can be used by mine operators to determine whether a mine is approaching proposed POV criteria levels. While such a tool is now available, its accuracy and timeliness remain untested. Historically, MSHA has had problems bringing computer programs online on a reliable schedule. It is simply inappropriate for MSHA to base its estimation of benefits on an untested computer program that will allow mine operators to track their exposure to the specific POV criteria.

Lastly, and most importantly, MSHA provides no rational basis for its assessment that implementation of an agency-imposed safety and health management program will result in three fewer nonfatal injuries per year. MSHA has no basis upon which to analyze the effectiveness of such programs, as the agency itself is still grappling with the very question of what constitutes an effective safety and health management program. Moreover, to assume that injury reductions at mines receiving proposed POV letters were attributable to receipt of the PPOV letter is without basis and is not a sufficient justification for calculating perceived benefit to be derived from the proposed rule.

b. Costs

MSHA's cost analysis is similarly flawed. MSHA estimates that the yearly cost for all mine operators to monitor their POV performance will be less than \$1 million per year. This was based upon the assumption that it will take a supervisor an average of five minutes per month to monitor each mine's performance using MSHA's website. Such an assumption is patently unrealistic. Five minutes would be the minimum time that it would take a person familiar with MSHA's website to access the relevant data. It would certainly take much longer for that individual to then study the data and extrapolate the potential impact of future MSHA inspections. At a minimum, MSHA should expect that accessing the agency database would only be the first step in a more involved analytical process, which would consume a significantly greater amount of time than MSHA has assumed.

Another issue with MSHA's analysis is the assumption that such a monitoring process would only need to be performed monthly. For many underground mines MSHA enforcement activity occurs daily or weekly. It would be more reasonable for MSHA to assume that a mine operator would update his POV exposure analysis following any MSHA enforcement activity that occurs at the mine, particularly given that under MSHA's proposed rule mine operators will no longer be afforded notice before POV sanctions are implemented.

MSHA has also acknowledged that it "does not have an historical basis from which to estimate the potential costs that would be incurred by a mine on a POV." Nevertheless, MSHA has projected that a typical mine would lose about one-half of one percent of revenue as the result of closures resulting from placement on a POV by MSHA. MSHA stated that the closures would entail one or two days of closure for a large mine and one day or less for a small mine, and that as a result of these closures, "a typical mine would lose about 0.5 percent of revenue" which "is about \$218,000." Unfortunately, the agency has grossly underestimated the potential cost of the proposal.

In comments submitted to MSHA on the proposed regulations to lower miner's exposure to respirable coal mine dust, E^xponent Engineering and Scientific Consultants valued the loss of one-hour of production from an underground longwall mine at \$43,668. Applying this calculation, revenue loss at a mine would exceed more than \$1 million per day, almost five times the agencies estimate of the revenue for an average mine. As such, one underground longwall coal mine closed for two days as a result of being placed on POV would incur revenue losses equal to the agency's entire estimate for the 10 mines projected to be placed on POV.

MSHA's estimations also significantly understate the economic impact of the POV withdrawal order sanction. For example, in underground coal mines in 2010, the most frequently cited standard was 30 C.F.R §75.400, which typically involves an accumulation of combustible material along conveyor belt lines. MSHA issued 8,995 violations for §75.400 in 2010 and those violations were almost always

marked as "S&S." Withdrawal orders issued for violations of §75.400 would result in the loss of all production occurring on that beltline, the impact of which MSHA failed to adequately consider. Similarly, many other frequently cited standards, including those contained in the Rules to Live by Enforcement Initiative in Metal/Nonmetal Mines and Coal Mines, are also virtually automatically listed as S&S and could likewise result in a very costly withdrawal order. MSHA has also recently expanded the areas affected by withdrawal orders to include, in many cases, areas situated miles away from the cited location. MSHA must take these considerations into account when assessing the costs of the proposed rule.

MSHA has the historical data available to provide stakeholders and the public with a much more accurate estimation of the effective cost of the planned POV sanction. It should do so before proceeding further.

V. Conclusion

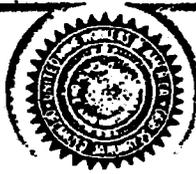
NMA understands the need for regulation, and it supports MSHA's utilization of all of the enforcement tools provided by Congress in the Mine Act when necessary to achieve our mutual goal of miner safety. However, the proposed rule will do little to advance safety. NMA is on record regarding the need for reform of the POV system, but it cannot support reforms that deprive mine operators of the protections afforded them under the Constitution and circumvent mandatory procedures aimed at fostering transparent and accountable government. The proposed rule will worsen an already broken system and NMA urges the MSHA to revoke this proposal. Given the import of the proposed rule, we also request that a series of public hearings be held regarding the proposed rule.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bruce Watzman".

Bruce Watzman
Senior Vice President, Regulatory Affairs
National Mining Association

United Mine Workers of America



TELEPHONE
AREA CODE (202) 642-7200

UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N. W.
Washington, D.C.
20005

May 6, 1985

HAND-DELIVERED

Ms. Patricia Silvey
U.S. Department of Labor
Mine Safety and Health Administration
Office of Standards, Regulations & Variances
4015 Wilson Boulevard, Room 631
Arlington, VA 22203

Dear Ms. Silvey:

This is in response to the notice published in the February 8, 1985, Federal Register. The United Mine Workers of America wholeheartedly supports MSHA's long overdue decision to develop regulations for implementing section 104(e) of the Federal Mine Safety and Health Act of 1977. Our comments are as follows:

I. Administrative Procedures

A. Initial Identification of Mines

The initial screening procedures employed by MSHA to identify potential pattern violators are critically important to the effective enforcement of section 104(e). The screening process must be broad enough to identify all recidivist violators of the Act. Not only must this process identify operators whose pattern of violations is based upon the receipt of numerous S&S citations, but it must also have the fine-tuned potential to pinpoint those operators who have committed repeated violations of a particular standard or who have a safety record which indicates a lack of attention to a particular area of mine safety or health. Accordingly, the UMWA proposes a bifurcated screening process:

1. Automatic Review

Every quarter those mines whose rate of significant and substantial violations (based upon man-hours worked) over the previous four quarters places them in the 75th percentile for all mines would be placed under review to determine if, based upon specified criteria, they should be subject to a pattern notice. Mines placed under automatic review will not necessarily receive the pattern notice. It is anticipated, however, that most pattern violators will be in the 75th percentile, and the automatic review process will aid in identifying them.

2. Selective Review

As the Senate Committee on Human Resources noted in its report, "pattern does not necessarily mean a prescribed number of violations of predetermined standards." S.Rep. 95-181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978), p. 621. Thus, in keeping with Congress' directive, the Secretary should develop a means for identifying potential pattern violators who do not rank within the 75th percentile for S&S violations. Accordingly, the UMWA proposes that mines be subject to quarterly selective review if they fall within any of the following categories:

- a. The mine was on a section 104(d) unwarrantable failure sequence during the previous quarter.^{1/}

^{1/}In the Secretary's advance notice of proposed rulemaking it is envisioned that a section 104(d) sequence will be a prerequisite to any pattern order issued under section 104(e). It would be a mistake, however, to limit pattern notices only to mines which have been on the section 104(d) sequence. Section 104(d) orders are issued when there have been repeated unwarrantable failure citations. Under section 104(e) there is no requirement that violations establishing the pattern be a result of the operator's "unwarrantable failure." Consequently, making the section 104(d) sequence a prerequisite for the 104(e) notice would run counter to the Legislative scheme. See Leg. Hist. at 621-622. Accordingly, while those mines on a section 104(d) sequence should be reviewed, other operations must be reviewed, as well.

- b. The mine was placed under a section 107(a) imminent danger order during the previous four quarters.
- c. The mine has a high accident rate for the previous four quarters.
- d. There has been a fatality at the mine during the previous four quarters.
- e. There is a high rate of citations and orders, including non-S&S violations, for the previous four quarters, based on man-hours worked.

These selective review criteria are chosen because they indicate that there is an underlying health and safety problem at the mine. Such mines should be scrutinized for possible pattern of offense despite the fact they may have an S&S rate below the 75th percentile.

B. Notice of Review

All mines which are under review for potential pattern of violations, whether automatic or selective, shall be given notice to that effect by the Agency. Notice shall also be sent to the representative of miners.

This notice is designed to give operators the opportunity to take concrete actions to improve the citation history at the mine and to implement a remedial plan. MSHA should evaluate these and similar company efforts to correct a pattern of violations when the pattern notice conference is held. See Part D, below.

C. Identifying Mines Subject to Pattern Notice

Those mines which are under review because they are high rate violators or meet selective review criteria will be identified as subject to a pattern notice if the review indicates one or more of the following:

1. A pattern of S&S violations of a particular standard over a period of time.
2. A pattern of S&S violations of standards of a similar nature, indicated by a history of violations over an extended period of time.

such that a continuing hazard in a particular area of mine safety and health, such as roof control, electrical, ventilation, respirable dust, and escapeways, has not been brought under control.

3. A mine-wide pattern of S&S violations which indicates an underlying health and safety problem throughout the mine.
4. If a mine which is under review was also under review one or more times during the previous 365 day period, and there has been no substantial improvement since the immediately previous review, then that mine will be subject to a pattern notice.

D. Letter of Intent and Pre-Notice Conference

When MSHA determines that a mine under review is subject to a pattern notice, the Agency should inform the operator and the miners representative of the Agency's intent to issue a pattern notice. The letter of intent should specify the basis for the determination and should give the operator and representative of miners 15 calendar days after receipt to request a conference. At the conference there should be a review of the citation history at the mine. A pattern of violation notice should be issued after the conference unless the operator establishes all of the following:

1. Specific actions were taken, following the notice of review, to improve the citation history;
2. There has been an improvement of the citation history at the mine following the notice of review, and
3. The operator submits a prepared plan to the Agency outlining the course it will follow to avoid future violations and improve its violation record for the long-term.

However, if a mine is identified as subject to a pattern notice more than once within a 365 day period, no conference will be held and the pattern notice will automatically be issued. The scheduling and location of the conference should accommodate the convenience of the miners representative who should be given notice of the conference and suffer no loss of pay for attending.

E. Termination of the Notice

Once a mine is placed on a pattern of violation notice, the notice should only be terminated if a regular inspection of the mine indicates that there are no S&S violations. The Agency has solicited comments on administrative procedures that could be adopted for the purpose of terminating pattern notices. The UMWA is reviewing procedural options and giving them serious consideration.

II. Miscellaneous Concerns

- A. State of mind of operator and extenuating circumstances should not be criteria upon which a pattern determination is based.

The UMWA urges the Secretary not to make an operator's state of mind or intent a factor to be considered prior to the issuance of a section 104(e) notice. The Senate Committee report clearly states Congress' wish that intent or state of mind of the operator not be criteria for determining when a pattern of violation exists. Leg. Hist. at 621. Accordingly, the operator's good faith, absence of negligence, knowledge and any extenuating circumstances should not be factored into the Agency's review. If a review of the citation history indicates a pattern of S&S violations, a notice should issue, regardless of mitigating factors. Certainly the issuance of a single S&S citation, not to mention a string of them, should be enough to alert an operator about a health and safety problem at his mine and present him with the need to take corrective action.

- B. Review by Arlington rather than by District Managers.

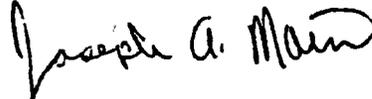
In order to ensure that a standard of review will be consistently and fairly applied to all mines, the quarterly review and the issuance of pattern notices should be performed by the Arlington office.

- C. Notice of Representative of Miners

Notice of any decisions or actions taken pursuant to section 104(e) should be provided to the representatives of miners.

If you have any questions or comments on any matters raised in this letter, please do not hesitate to call me.

Very truly yours,

A handwritten signature in cursive script that reads "Joseph A. Main". The signature is written in dark ink and is positioned above the typed name.

Joseph Main, Administrator
Department of Occupational
Health and Safety

REGULATIONS
PART
104

Friday
February 8, 1985

Part II

Department of Labor

Mine Safety and Health Administration

30 CFR Part 104

**Identification of Mines Having a Pattern
of Violations; Withdrawal of Proposed
Rule and Advance Notice of Proposed
Rulemaking**

MAR 13 1985

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 104

Pattern of Violations

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Withdrawal of proposed rule; advance notice of proposed rulemaking.

SUMMARY: The Mine Safety and Health Administration (MSHA) is considering rulemaking on criteria and procedures for identifying mines with a pattern of violations of mandatory standards that significantly and substantially contribute to safety and health hazards. On August 15, 1980, MSHA published a proposed rule to establish criteria for identifying mines having a pattern of violations (45 FR 54646). Commenters were generally opposed to the proposal, stating that it was complex, too statistically oriented, and vague. In addition, since that time, administrative litigation resulting in changes in Agency enforcement policies and a 1982 revision of the Agency's civil penalty procedures have affected key provisions of that proposal. The Agency now has experience with these changes and is considering resumption of rulemaking. This notice withdraws the 1980 pattern of violations proposal and outlines for public comment possible criteria and procedures for a new pattern of violations proposal.

DATES: This withdrawal is effective February 8, 1985. Comments on the Advance Notice of Proposed Rulemaking must be received by April 9, 1985.

ADDRESSES: Office of Standards, Regulations, and Variances, MSHA; Room 631 Ballston Tower No. 3; 4015 Wilson Boulevard; Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, (703) 235-1910.

SUPPLEMENTARY INFORMATION: Under section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Secretary of Labor is authorized to issue a notice to a mine operator if the operator's mine has a pattern of violations of mandatory safety or health standards which significantly and substantially contribute to health or safety hazards at the mine. Congress established this provision of the Mine Act to address the problem of mine operators who have recurring violations of health and safety standards.

Under the Mine Act, once a section 104(e) pattern of violations notice is issued, any subsequent inspection within 90 days which reveals another significant and substantial (S&S) violation of mandatory safety or health standards results in the issuance of a withdrawal order until the violation is abated. The Mine Act further provides for withdrawal orders upon any subsequent finding of S&S violations until a complete inspection of the entire mine reveals no S&S violations.

On August 15, 1980 (45 FR 54656), the Mine Safety and Health Administration (MSHA) published a proposal in the Federal Register which would establish criteria for identifying mines which have a pattern of violations. Commenters were generally opposed to the proposal, stating that it was complex, too statistically oriented, overbroad, and vague. In addition, numerous commenters stated that it was inappropriate of MSHA to establish pattern of violations regulations at that time because of litigation pending before the Federal Mine Safety and Health Review Commission (Review Commission) that involved the definition of S&S violations. At that time, MSHA cited all violations as S&S except technical violations and violations that posed only a remote or speculative risk of injury. In April 1981, the Review Commission narrowed the definition of S&S violations. The Review Commission defined S&S violations as those that have a reasonable likelihood of resulting in a reasonably serious injury or illness (*Secretary of Labor v. Cement Division, National Gypsum Co.*, 3 FMSHRC 822). MSHA adopted this revised definition in May 1981.

Commenters also stated that review of the Agency's then pending regulations for the assessment of civil penalties could affect provisions of the pattern of violations proposal. In May 1982, MSHA revised its regulations for the assessment of civil penalties (47 FR 22286).

In view of these developments, MSHA is withdrawing the 1980 pattern of violations proposal. However, the Agency has gained sufficient experience with both the revised definition of S&S violations and the changes made in the civil penalty regulations to reconsider rulemaking to establish procedures and criteria for issuance of a pattern notice.

During preliminary development of a new approach for implementing pattern of violations criteria and procedures, MSHA has been guided by the principle expressed in the Mine Act's legislative history that issuance of a section 104(e) pattern of violations notice should be an enforcement tool reserved for dealing

with chronic violators who do not respond to other efforts to bring their mines into compliance with health and safety standards. Congress made it clear that chronic violators demonstrate a disregard for the safety and health of miners by allowing the same work hazards to occur again and again without addressing the underlying problems.

At this point, MSHA believes that pattern of violations criteria should focus on the health and safety record of each mine rather than on a strictly quantitative comparison of each mine to industry-wide norms. In contrast to the 1980 proposal which relied on a statistically-oriented approach, the Agency envisions use of simplified criteria to identify the existence of a pattern of violations, coupled with procedures for fair and full notice. Review and appeal procedures would be the same as for any other citation or order issued under the Mine Act.

To implement this approach, MSHA is considering an enforcement concept which would incorporate the following elements: initial screening to identify any mines which may be developing a pattern of S&S violations; application of criteria to determine whether a pattern of violations exists at an identified mine; and notification to the mine operator of the potential for a pattern of violations notice with an opportunity to respond.

Initial identification of mines with a possible pattern of violations could occur through regular enforcement activities. Once a mine has been identified, MSHA would review conditions at the mine to determine whether or not a pattern of violations exists at the mine. At this point, MSHA envisions the use of two principal criteria. First, are the S&S violations common to a particular health or safety hazard or are there S&S violations throughout the mine which represent an underlying health or safety problem? Second, is the mine on a section 104(d) unwarrantable failure sequence, indicating the other enforcement measures have been ineffective? If these two criteria are met, MSHA would notify the mine operator that the operator's mine is subject to a section 104(e) pattern notice and state the reasons upon which such a determination was based. After allowing the operator an opportunity to respond, and absent a change in the health and safety conditions at the mine, MSHA would then issue a section 104(e) pattern notice. Once a mine is placed on a pattern of violations notice, the notice would be terminated upon an inspection

of the mine by MSHA in which no SAS violations are found.

MSHA considers early public participation in formulating criteria and procedures to be used for issuance of pattern of violations notices to be important. In particular, the Agency would like suggestions on what additional factors, if any, should be used for determining whether a pattern of

violation exists. These factors might include work practices or mining conditions at the mine or the mine's accident history. In addition, MSHA would like comments on whether a proposal should include administrative procedures for terminating a pattern notice. The Agency welcomes comments on these and all other issues of concern.

List of Subjects in 30 CFR Part 104

Mine safety and health.

Dated January 31, 1985.

David A. Zegser,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 85-2929 Filed 2-1-85, 2 43 pm]

BILLING CODE 4510-49-M