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2011 APR 18 P 3:54

Sent: Monday, April 18, 2011 2:21 PM

To: zzMSHA-Standards - Comments to Fed Reg Group; Fontaine, Roslyn B - MSHA

Subject: Comments on Pattern of Violations Proposed Rule (RIN 1219-AB73)

Importance: High

Please find attached the comments of BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy (the "Companies") on MSHA's proposed revision of 30 C.F.R. Part 104, Pattern of Violations, RIN 1219-AB73. On behalf of the Companies, we appreciate the opportunity to provide you with these comments.

Sincerely,

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AB73-COMM-74



April 18, 2011

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1100 Wilson Boulevard, Room 2350
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Re: Comments of BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy on MSHA's Proposed Rule on Pattern of Violations: RIN 1219-AB73

Dear Ms. Fontaine:

Introduction and Overview

Please find below the comments of BHP Billiton, Murray Energy Corporation, and Peabody Energy (hereinafter "the Companies") on MSHA's Proposed Rule on Pattern of Violations (30 C.F.R. Part 104), published in the Federal Register for February 2, 2011. 76 Fed. Reg. 5,719.

By way of introduction of the Companies, BHP Billiton ("BHP") is the world's largest diversified natural resources company, with more than 100 operations in approximately 25 countries throughout North and South America, Africa, Asia, and Australia. In the United States, BHP's New Mexico Coal Operations, located in the Four Corners area of Northwestern New Mexico, are comprised of two coal mines: (1) the Navajo Mine, a large surface coal mine located within the boundaries of the Navajo Reservation; and (2) the San Juan Mine, an underground longwall operation. About 65% of the salaried and hourly workforce of 1,000 employees of BHP New Mexico Coal is comprised of Native Americans. The two mines produce about 15 million tons of coal annually and are the sole suppliers of coal for the Four Corners and San Juan Generating Stations, which furnish electricity to New Mexico, Colorado, Utah, Arizona, and California. BHP's approach to miners' safety and health is grounded on compliance with the requirements of federal and state law and a systematic risk-based program comprised of detailed safety process components and a safety process matrix to address identified risks.

Murray Energy Corporation ("MEC") is the largest privately-owned coal company in America, producing approximately 30 million tons of bituminous coal annually that provides affordable energy to households and businesses across the country. MEC's subsidiaries operate eight underground and surface mining operations in Southern Illinois and Southern Ohio,

Western Kentucky, and Utah, plus 40 subsidiary and support companies. Transporting coal via truck, rail, and waterways, MEC operates the second-largest fleet of longwall mining units in the country. With a support team of 3,000 hard-working, dedicated, and talented employees in six states, MEC's affordable high-quality coal is mined safely and efficiently, and is supplied to leading producers of electricity, both domestically and abroad.

Headquartered in St. Louis, Missouri, Peabody Energy ("Peabody") is the world's largest private-sector coal company. Peabody's operations are geographically diverse within the United States and around the world, with locations on five continents. In the United States, Peabody operates 17 coal mining complexes, employing more than 8,200 miners, and is the leading coal producer in the Powder River Basin, the Southwest, the Illinois Basin, and Colorado, with U.S. coal production of 189 million tons, fueling 10 percent of U.S. electricity generation. Peabody's employees are the company's most highly-valued resource and their safety and health is a core value that is integrated into all areas of Peabody's business.

The Companies appreciate MSHA's recognition that its pattern of violations ("POV") regulations are in need of revision. We support the appropriate use of this targeted enforcement sanction against mine operators who flout the law. The Companies, however, must tell you in the strongest terms possible that MSHA's proposed approach is terribly misguided, taking needed reform in a totally wrong direction, and for fundamentally flawed reasons. Accordingly, as set forth in more detail below, the Companies respectfully urge MSHA to withdraw this proposed rule and re-propose it in a fashion that incorporates these comments. In short, we believe the proposal:

- violates the Federal Mine Safety and Health Act of 1977 (the "Mine Act") and the Administrative Procedure Act (the "APA") by failing to publish in the Federal Register and seek public comment on the "specific" pattern criteria that will be used by MSHA as the basis for issuing POV notices—and instead deciding that MSHA will merely post those criteria on the Agency's website;
- violates the Mine Act and constitutional due process protections by eliminating the requirement that only final, adjudicated citations and orders be considered for POV review;
- imprudently takes away an operator's chance to correct its safety and health performance before being placed on POV status by eliminating the existing right to receive notice of a *potential* POV and the opportunity to take corrective action to avoid POV status;
- will result in too many mines being placed on POV status because of failure to consider the interplay with other proposed rules and differences in mine characteristics; and
- fails to consider the real compliance costs.

Below, we provide a more thorough discussion of each of these flaws. In addition, as members of the National Mining Association ("NMA"), the Companies also wish to endorse the NMA's comments on this proposed rule and we incorporate those comments by reference herein as though fully set forth.

The Proposal Would Violate the Mine Act and the APA by Failing to Publish in the Federal Register and Seek Public Comment on the “Specific” Pattern Criteria that Will Be Used by MSHA as the Basis for Issuing POV Notices

Structurally, the new Part 104 regulations will combine the provisions of current sections 30 C.F.R. 104.2 (initial screening) and 104.3 (pattern criteria). As they currently exist, the “screening” criteria are used to narrow down the pool of mines subject to further POV scrutiny; then, out of that pool, mines that meet the “pattern” criteria are issued a notification of a *potential* pattern of violations (“PPOV”).

Of great concern to the Companies in this proposal is MSHA’s continued unwillingness to publish in the Federal Register for comment the “specific” pattern criteria that it will use to determine whether to issue a POV notice. This is not a change from how the system currently works, but it is a fundamental flaw in the proposal and, frankly, a missed opportunity to improve upon an existing deficiency. It also severely undermines MSHA’s claim that its new POV regulations will be more transparent. Precepts of administrative law, as well as the requirements of the Mine Act itself, mandate that specific pattern criteria should be contained in the text of the rule itself.

To explain further, currently, Part 104 lists, as noted above, screening and pattern criteria, but these criteria are very general and vague. The *proposed* rule makes these general criteria even vaguer. For example, under proposed new section 104.2(7), the wording of current rule section 104.2(b)(3) will be expanded from simply consideration of “An accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine” to consideration of “*Other information* that demonstrates a serious safety or health management problem at the mine *such as* accident, injury, and illness records” (emphasis added). 76 Fed. Reg. 5,728. “Other information” appears to be a catchall provision, and the preamble to the proposed rule specifically refers to non-POV enforcement measures at a mine; evidence of a lack of good faith in correcting problems leading to repeated significant and substantial (“S&S”) violations; repeated S&S violations of the same standard or related to the same hazard; and “any other relevant information.” *Id.* 5,721. The “other information” change thus seemingly affords MSHA almost limitless discretion to consider *any* other relevant information. MSHA’s discretion is not so limitless.

In the current rule, these general criteria do not identify with specificity what quantity of any particular type of event (*e.g.*, number of repeated S&S violations of the same standard) might trigger a POV notification. Rather, those specific criteria are posted on MSHA’s website. MSHA follows this approach with the new proposed rule. While posting specific criteria on the Agency’s website is certainly better than keeping them completely hidden from view, as was the case in previous years,¹ it is not the same as treating them as an integral portion of the

¹ For many years, of course, the entire Part 104 program was more or less dormant, but in light of the 2006 Sago, Aracoma, and Darby Mine accidents and the MINER Act, the program received

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regulations themselves and not only subjecting them to public scrutiny and comment, but also making certain that they are published as part of the rule itself. Posting these specific criteria on MSHA's website, even in the age of the internet and instantaneous electronic communications is simply not a substitute for the fundamental protections afforded by proper notice-and-comment rulemaking. And in the case of these specific criteria, they cry out for Mine Act and APA notice-and-comment rulemaking.

Failure to include specific pattern criteria in the rule itself, and to expose them to the rigorous discipline of public scrutiny, does not comport with Congress' mandate in the Mine Act that "The Secretary shall make such *rules* as [s]he deems necessary to establish *criteria* for determining *when* a pattern of violations of mandatory health or safety standards exists." Mine Act § 104(e)(4) (emphasis added). The proposed rule is nothing more than a skeleton of factors (akin to a topical outline) to consider in developing the actual pattern criteria. There is no way for an operator to read the proposal and understand the circumstances for when, how, or why MSHA will deem a POV to exist at a mine. This vagueness in the proposed rule exists despite the fact that Congress empowered the Secretary to "make such *rules* as [she] deems necessary" to determine when a POV exists.² (Emphasis added.) More importantly, this vagueness undermines the very efficacy of the entire rulemaking – the agency is essentially asking for comments on nothing more than a broad outline without giving the public any opportunity to comment on the actual substantive "guts" of the program, the details of which will be of great importance and consequence to all mine operators.

Simply stated, when Congress directed the Secretary to promulgate "rules," it meant actual rules, not electronic website postings. In order for MSHA to satisfy its obligation to make rules for determining when a POV exists, it is critical that specific pattern criteria be thoroughly described and published as part of the rule itself, and the Agency must seek public comment on these criteria.

MSHA's failure to propose rules regarding the specific pattern criteria also violates the Administrative Procedure Act's requirements for notice-and-comment rulemaking. The specific criteria are at the very heart of the rule and have independent legal significance, so they should go through rulemaking. MSHA claims that the actual criteria posted on its website will be so complete, thorough, and precise that mine operators will be able to compare their compliance

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increased attention from Congress, which in turn put pressure on MSHA to revitalize the program.

² Although Congress gave the Secretary some latitude through the use of the phrase "as [she] deems necessary," the Secretary obviously, and correctly, deems more than what is in the proposed rule to be necessary to determine when a POV exists, or else there would be no need to develop more specific pattern criteria and post them on MSHA's website.

history to the criteria and in *five minutes* know whether or not they are close to being issued a POV notice. 76 Fed. Reg. 5,725 (Feb. 2, 2011). This observation buttresses our point, because it is hornbook law that where standards are imposed with “mathematical or technical” precision, “this typically requires the formal requisites of APA notice and comment.” Steven Ferrey, *Examples & Explanations: Environmental Law* 46 (5th ed. 2010). The specific pattern criteria, therefore, are legislative or substantive rules subject to notice and comment procedures, and not a general statement of agency policy.

The Proposal Would Violate the Mine Act and Constitutional Due Process Protections by Eliminating the Requirement that Only Final Adjudicated Orders and Citations are Considered for POV Review

One of the most wrong-headed, dramatic, and consequential changes contained in the proposal is the elimination of the requirement that only *final* citations and orders be used as part of the pattern criteria to identify mines with a potential POV. This change would allow the POV sanction to be invoked at the very early stage following the issuance of citations for alleged S&S violations of mandatory standards. Such a situation is analogous to allowing a driver’s license to be suspended merely upon the issuance of a traffic citation by a police officer.

Although the conditions underlying the citations that MSHA inspectors issue must, in most cases, be abated by mine operators, the Mine Act provides for appeals of citations to the independent Federal Mine Safety and Health Review Commission (“Review Commission”). In spite of this statutory appeals process, as MSHA states it in the preamble, the Agency believes consideration of non-final citations and orders for POV criteria is not only consistent with the Mine Act, but also its experience with enforcement of Mine Act § 104(e) has led MSHA to conclude that elimination of the final order requirement is necessary. As the primary rationale for this proposal, MSHA points to the huge backlog of Review Commission cases and takes the position that, in light of the backlog, the final order provision does not allow MSHA to review the complete, recent compliance history of mines when assessing whether a POV exists. MSHA even asserts that the current requirement for final adjudication of citations and orders actually provides an incentive for operators to contest S&S violations to delay or avoid being issued a POV notice. 76 Fed. Reg. 5,722. There are two overarching problems with this analysis.

First, there is no empirical data to support the assertion that operators, following the perverse incentive articulated by MSHA, are the cause of the Review Commission backlog. If anything, the passage of time and witnesses’ faded memories of events actually hurt operators when cases are finally heard. The real reason for the significant uptick in contested citations and orders that has led to the backlog is that MSHA has for several years (due in large part to the MINER Act) been issuing many more citations and orders than it has historically. During this same period, MSHA – to the great consternation and bewilderment of the industry – has largely eschewed the informal conferencing process that for years provided an effective means of addressing grievances without the need for litigation. Making matters worse is the fact that many of the citations and orders that have been written over this time period have been “overwritten” (*e.g.*, arbitrarily alleging S&S when there is no realistic likelihood of injury) by inexperienced and insufficiently trained mine inspectors.

Second, for at least the past year, since the horrible tragedy at the Upper Big Branch Mine, the industry has been on the receiving end of what can only be described in kindest terms as a relentless, non-stop campaign of misinformation and disingenuousness by MSHA and various anti-mining (and largely anti-coal mining at that) spokespersons (or, the so-called mine safety and health “experts” as dubbed by the media reporting on the issue) about operators’ motives for contesting citations and orders. It is galling to the Companies that what was once properly understood as “due process” is now described by Secretary Main and others as a “loophole”: to wit, the right to contest a violation and/or a proposed penalty before a neutral tribunal. Overlooked in this one-sided conversation about workplace safety and health at our nation’s mines is the fact that Congress established the independent Review Commission so as to remove the taint of housing the enforcement agency and review tribunal in the same agency, as had been the case under the Coal Act.

Foregoing the hearing process and jumping straight to POV status based on allegations alone is no less repugnant to traditional notions of fairness and due process than imprisoning a criminal defendant based on a grand jury indictment alone because the court system is too backed up with other criminal matters to give his case any attention. Fair process is not always efficient but, under our system of laws, it is always due, and no less than MSHA recognized this when it promulgated the current POV regulations in 1990, pointing out at the time that it “must make ample provision for due process” when applying the harsh § 104(e) penalty “in order to avoid inequities.” 55 Fed. Reg. 31,129 (July 31, 1990).³

A. As Proposed, the Rule Violates the Mine Act

Regardless of MSHA’s frustration with delays before the Review Commission, this proposed change violates the text of the Mine Act. There is a significant difference between a citation and a final order of the Review Commission. By themselves, citations (and MSHA orders) are nothing more than the allegations of a single mine inspector. *See, e.g., Wyoming Fuel*, 14 FMSHRC 1282, 1289 (Aug. 1992) (“Section 104(a) citations are essentially ‘complaints’ by the Secretary alleging violations of mandatory safety standards.”). While it has long been recognized that, in most cases, operators must abate alleged violations prior to obtaining impartial review, there is no reason to believe that such post-hoc due process should be countenanced with regard to an operator’s placement on POV status.

Mine Act § 104(e)(1) requires that an operator “be given written notice that such pattern exists” when “an operator *has a pattern of violations* of mandatory health or safety standards in the coal or other mine.” Congress used the phrase “has a pattern of violations,” not, “has a

³ Even within the current POV scheme, which does not require MSHA to consider only final orders when determining whether an operator who has already been given notice of a PPOV should be placed on POV status, there is recognition that a pre-POV hearing on the merits of the alleged S&S violations is desirable. *See, e.g., Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1131 (Dec. 2008)(ALJ).

pattern of *alleged* violations.” In Mine Act § 104(a), Congress used that alternate terminology of “allegations” and “beliefs” to describe the citations that authorized representatives of the Secretary issue. This difference in terminology is critical. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (stating that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”). If Congress had wanted to impose the harsh operational constraints on operators that flow from being on POV status to mere alleged violations, it would have used language similar to that used in § 104(a). Congress knew the difference.

The Secretary’s position in the preamble that Congress did not intend to limit POV status to be based on final orders, 76 Fed. Reg 5,721, is misinformed, placing undue (and nonsensical) emphasis on the reference in the legislative history to the “inspection history” at the Scotia mine. The rather general phrase “inspection history” was followed by a reference to “recurrent violations.” Those “recurrent violations” were presumably final. Indeed, when the Commission assesses civil penalties based on “the operator’s history of previous violations,” the Commission only considers final violations. Mine Act § 110(i). The preamble goes on to note that the “Senate Report noted similarities between sections 104(d) and 104(e) of the Mine Act and stated that the POV ‘sequence parallels the current unwarrantable failure sequence.’” This assertion takes the legislative history out of context. Overlooked is that the Senate Report went on to state that the “sequence” referred to was the “sequence of the issuance of orders.” S. Rep. No. 95-181, at 34 (1977). The sequence of the issuance of withdrawal orders is different from and *follows* the POV determination. Thus, the legislative history does not support the Secretary’s conclusion that “This reflects Congress’s intent that POV *determinations*, like section 104(d)(1) and (d)(2) determinations, need not be final orders.” 76 Fed. Reg. 5,721 (emphasis added).

Similarly, the Secretary misconstrues the legislative history when she cites the “Committee’s intention that the Secretary or his authorized representative [] have both [Section 104(d) and Section 104(e)] enforcement tools available, and that they [] be used simultaneously if the situation warrants,” as support for the Secretary’s conclusion that the “proposal to consider non-final citations and orders to *identify* mines with a POV is consistent with the Mine Act.” *Id.* (emphasis added.) We say this because the next sentence of the Senate Report following the sentence quoted in the preamble states: “For example, where an operator *has been given* a [unwarrantable failure] citation and a [POV] notice, and *thereafter* an inspection discloses a violation of a ‘significant and substantial’ nature and which is also ‘unwarranted’, the operator will be issued both an order under [the unwarrantable failure provision] and an order under [the POV provision].” S. Rep. No. 95-181, at 34 (1977) (emphasis added). Thus, the use of the words “an operator has been given” and “thereafter” indicate that the Senate Report was addressing the possibility of simultaneous unwarrantable failure and POV withdrawal order chains *after* an operator has already been placed on those respective statuses. The Senate Report does not support the Secretary’s conclusion that the prior step of *identifying* mines with a POV status can use non-final citations and orders in the same manner as identifying mines to be placed on an unwarrantable failure chain.

Furthermore, the analogy to § 104(d) is overstated. As written in the Mine Act, § 104(d) builds upon the procedures of § 104(a), and no one can seriously doubt that the enforcement documents issued under § 104(d), no less than those issued under § 104(a), requires the inspector to state the standard *allegedly* violated. While § 104(d) does not expressly refer to the standard “alleged to have been violated” as does § 104(a), the procedure an MSHA inspector follows in filling out Form 7000-3 is the same for both (except to the extent the § 104(d) documentation is alleged to be the result of an unwarrantable failure to comply with the cited standard). *See generally* MSHA Handbook PH08-I-1, “Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines,” Ch. 4. The text of the Mine Act supports this conclusion, because it says the unwarrantable failure chain shall be triggered if “upon any inspection of a coal or other mine, an authorized representative of the Secretary *finds* that there has been a violation” Mine Act § 104(d)(1) (emphasis added). The use of the word *finds* means that an inspector need only be *convinced* that an unwarrantable failure violation occurred – similar to *believing* that a violation has occurred under Mine Act § 104(a). *See Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm’n*, 863 F.2d 51, 54 (1988). That only a *single inspector* need be *convinced* that an unwarrantable failure violation occurred depicts a far different type of scheme than the one created by Congress for issuing an operator POV notice, which can only occur “[i]f an operator *has* a pattern of violations.” Mine Act § 104(e)(1) (emphasis added).

Moreover, § 104(e), in contrast to both § 104(a) and § 104(d), is not concerned with individual alleged violations, but with an entirely different status placed on a mine as a result of a *pattern* – a status that by its imposition changes the regulatory effect of standard fare S&S citations by an order of magnitude. The distinction is highlighted by the mandates of § 104(d) to issue withdrawal orders “forthwith” and “promptly,” 30 U.S.C. § 814(d)(1), (2), whereas § 104(e) mandates notice and further inspection before a POV status determination is made. *Id.* § 814(e). Congress clearly intended the “pattern” determination to be more deliberate than the individual violation determinations.

Lastly, it is presumed that Congress writes statutes with a construction in mind that is compatible with the Constitution. *See, e.g., Edward J. DeBartalo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988). As discussed below, the statutory construction of Mine Act § 104(e) on which MSHA bases this proposed change would violate fundamental principles of fairness and due process. It is far more reasonable to presume that Congress intended Mine Act § 104(e) to require final violations than a construction that would lead to constitutional doubt.

B. As Proposed, the Rule Violates Due Process Guarantees

Imposing POV status on an operator prior to some type of review will deprive an operator of a property interest without due process of law. A procedural due process claim requires: (1) a deprivation; (2) of life, liberty, or property; (3) without due process of law. The federal government violates the due process rights guaranteed by the Fifth Amendment to the United States Constitution when it deprives a company of protected property or liberty interests without due process of law. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

A POV notice effects a deprivation of constitutionally protected property interests. Section 104(e) is an *enforcement* provision and a POV notice dramatically changes a mine operator's allocation of resources, forcing these resources to be dedicated to preventing future withdrawal orders – indeed, that is the main point of POV status.⁴ In addition to requiring a massive overhaul in the allocation of resources, being in POV status changes the effects of S&S citations, inasmuch as they serve as withdrawal orders. The withdrawal orders result in lost production and idle miners – directly affecting an operator's bottom line, potentially significantly so. Moreover, given the difficult operational constraints such status would impose, the affected operator will likely need to commit substantial capital up front to fend off alleged S&S violations. Either way, the resource and capital commitment will be great.

These costs of compliance resulting from a POV notice and the damages associated with withdrawal orders are constitutionally protected property interests. *See Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010) (an EPA unilateral administrative order enforcement regime “implicates constitutionally protected property interests by imposing *compliance costs* and threatening fines and punitive *damages*”).⁵ POV status thus results in a deprivation of an operator's constitutionally protected property interests.

In addition to a POV notice depriving an operator of constitutionally protected property interests, being placed on POV status would likely deprive an operator of constitutionally protected liberty interests. Due process is required when there is harm to reputation if it is accompanied by a tangible detriment, such as loss of employment. *Owen v. City of Independence*, 445 U.S. 622, 661 (1980). A POV notice does both. It may harm an operator's reputation in the public's eye, making the operator a pariah and lessening the operator's ability to raise funds in the capital markets,⁶ and it has the direct tangible detriments discussed above in terms of increased resources devoted to fending off or addressing more frequent withdrawal orders. Thus, the harm to reputation accompanied with tangible detriment resulting from POV status would also deprive an operator of constitutionally protected liberty interests.

⁴ S. Rep. No. 95-181, at 32 (1977) (“The Committee's intention is to provide an effective enforcement tool to protect miners . . .”).

⁵ Unlike in *GE*, however, the proposed POV rule provides no mechanism for POV recipients to obtain a pre-deprivation hearing by refusing to comply with a POV and forcing MSHA to sue to enforce the POV notice. *Id.* at 115.

⁶ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1503, 124 Stat. 1376, 2218-20 (2010) requires publicly traded mine operators or companies with mine operator subsidiaries to file a current report on Form 8-K upon receipt of written notice from MSHA that the mine has a pattern of violations, or a potential pattern of violations.

To be clear, the Companies are not suggesting that these tangible detriments would never be justified and thus have to be borne by the operator – it is our position, though, that they should only be borne after the affected operator has had a fair opportunity to be heard, should it so desire. Because a POV notice deprives an operator of constitutionally protected property and liberty interests, the Fifth Amendment requires the government to provide prior due process of law to challenge the basis for that deprivation. Included in due process of law are procedural protections.

[P]rocedural protections are required under the due process clause when there is a possible issue about *how the law applies to a specific person*. . . . In other words, procedural due process must be provided when (a) there is a deprivation of life, liberty, or property; and (b) *potential factual issues exist* concerning a particular individual or group. Procedural due process issues generally are not present when there is a challenge to the constitutionality of a statute or regulation and the issue is not the *fairness of the process* being followed. These challenges are commonly brought under substantive due process or under the specific constitutional right at issue.

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 556-57 (2d ed. 2002) (emphasis added). When a POV notice is issued, “potential factual issues exist” concerning whether the particular operator actually exhibits a pattern of *violations*. Moreover, the “fairness of the process being followed” to place an operator on POV status is at the heart of the problem with MSHA’s new approach. While MSHA can enact generally applicable POV regulations, those enforcement regulations cannot be applied to severely clamp down on a particular operator without due process protections.

“[C]ourts have enormous discretion in evaluating each of [these] three factors and especially how to balance them.” Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 559 (2d ed. 2002). While there may be some discretion on the Secretary’s part to determine in the first instance how best to effectuate the due process owed to a mine operator before placing it on POV status based on unproven allegations, such protections cannot be outright ignored. Discussed below are some suggested approaches that involve use of Department of Labor ALJs and appeal to federal courts of appeal from there.

By Eliminating PPOV and Going Directly to POV, the Proposal Would Imprudently Take Away Operators’ Chance to Fix Their Mines Before Being Placed on POV Status

One of MSHA’s purported intents with the proposed rule is to make POV criteria information continually available to operators (and others) so that they can police themselves to avoid falling into a POV situation. To that end, a searchable compliance database, available to the public, will be placed and maintained on MSHA’s website to allow operators and the public to monitor every mine’s compliance record and determine whether it is approaching POV criteria levels. The proposed rule contemplates that operators approaching a POV level may work with MSHA to bring their mines into compliance to avoid a POV notice. Under the proposal, an operator may submit a written safety and health management program to the District Manager

for approval.⁷ The program would be required to have measurable benchmarks. Effective implementation of the program will be considered a mitigating circumstance that could spare a mine from being issued a POV notice. Thus, in spite of the Agency's limited resources in terms of both the numbers and qualifications of its personnel, MSHA is proposing one more intrusion into the management prerogatives of mine operators in an area where it arguably possesses scant expertise.

This aforementioned searchable database is one justification for MSHA eliminating the existing PPOV notification process.⁸ Under the proposed rule (section 104.3), when a mine triggers the specific pattern criteria within a rolling 12-month look-back window, the District Manager will issue a written POV notice to the operator. *See* 76 Fed. Reg. 5,728. The onus will therefore be on operators to continually self-evaluate their performance.⁹

There are better ways to craft a legitimate POV program without short-circuiting due process. The explanation in the preamble of the enormous lag time between issuance of citations and orders and their final adjudication by the Review Commission, aggravated by the backlog of cases at the Review Commission, may warrant a change in how the POV program is structured, but surely not at the expense of notice and due process. Eliminating the PPOV and going directly to POV, with its draconian consequences of withdrawal orders for each S&S citation, is not the optimal, or even a decent, solution. Under the current Part 104 scheme, MSHA cannot "cock the pistol" until a "pattern" of finally adjudicated enforcement actions exists. The proposal, however, would allow the hammer to be cocked and dropped, and the pistol to be fired so quickly that there is no opportunity to dodge an errant bullet, with grave consequences for

⁷ During a conference call on January 31, 2011, MSHA Deputy Assistant Secretary for Operations Patricia Silvey stated in response to a question that the "management program" contemplated by the proposed POV rule is different from the "management program" that would be developed pursuant to a separate MSHA rulemaking addressing "Safety and Health Management Programs for Mines" (RIN 1219-AB71). *See* discussion *infra* for proposals to harmonize these programs.

⁸ During the January 31, 2011, conference call, in response to the question of whether mine operators will have an opportunity to identify and point out errors in MSHA's database prior to the issuance of a POV notice, Assistant Secretary Joe Main reiterated that "mitigating circumstances" can be taken into account to avoid issuance of a POV, and that operators can track their own compliance history online and should proactively let MSHA know of errors in the database at any given time. While the ability to continually let MSHA know of errors in its database may constitute an opportunity to be heard to a certain degree, it does not satisfy the due process requirements of notice and opportunity to be heard regarding the specific enforcement action of POV status.

⁹ And what is to become of the requirement of Dodd-Frank Wall Street Reform and Consumer Protection Act § 1503 requiring operators to include PPOV notices in their relevant SEC filings?

mine operators. Following are alternatives that could allow MSHA to swiftly “ready, aim” this powerful weapon, but not “fire” until the targeted mine operator has had an opportunity and a reasonable period of time to show MSHA that it should not have been, or should no longer be, placed in the bull’s-eye.

1. Enhanced and Expedited Conferencing

One alternative would be enhanced and expedited conferencing between MSHA and mine operators of citations and other enforcement actions factoring into the POV calculus. An important advantage of this concept is that it would actually come into play prior to any POV review. *By enhanced and expedited conferencing, we mean a process that would be transparent and independent of the District Manager and focused on those enforcement actions specific to the POV calculus that could be invoked in a timely manner to stay ahead of POV enforcement.* Transparency is critical so that all stakeholders and the public can have confidence in the process. Independence from the District Manager is important so that conference officers are not subject to pressure from the same MSHA managers who supervise the inspectors whose citations/orders are being conferenced. Possible approaches could be to have conference officers report to the respective Administrators of Coal Mine Safety and Health or Metal-Nonmetal Mine Safety and Health, or to dedicated experts within the Office of the Assistant Secretary (*e.g.*, the Office of Accountability).

This conferencing process would not preclude a subsequent right to review by the Commission, but would at least provide an up-front opportunity for the operator to review the issues with the appropriate agency official. Moreover, because the process would be interactive, it would be a substantial improvement over the proposal for MSHA to consider “mitigating circumstances” – a vaguely defined process which, from all appearances, does not necessarily even involve the operator.

2. POV Warning

A variation on the preceding alternative would be for the District Manager to issue an *informal POV warning* to the operator and provide the operator with a short, but reasonable number of days (something of shorter duration than the existing POV review period) to demonstrate to the appropriate ranking MSHA official in Arlington headquarters that the underlying violations are invalid or otherwise flawed for purposes of POV consideration, akin to responding to a show cause order. Because of the massive number of citations involved in a POV, the operator might have to select key violations for the ranking official’s review.

3. Expedited Review

Better still, to enhance the due process protections of either of the first two alternatives, if the designated agency official affirms the POV warning, the operator should be allowed to seek expedited review of the underlying alleged violations at the Review Commission. Although this alternative would require the Review Commission to promulgate a conforming rulemaking of its own, the Companies would willingly pursue a petition for rulemaking to that end if MSHA were

to embrace this concept. We might envision the Review Commission creating a “rocket docket” of sorts, pursuant to which a select number of the administrative law judges would be dedicated to POV expedited review. At the very least, the process could be modeled along the lines of the expedited review process currently in place for emergency response plan disputes.

4. Department of Labor ALJ Review

Another alternative would be to permit operators to appeal the *POV determination itself* to the Department of Labor’s Office of Administrative Law Judges, modeled on the procedures in Part 44 for adjudicating proposed petitions for modification, albeit in more expedited fashion.

5. Demonstration of Corrective Action

In addition to all of the review alternatives noted above, MSHA should also provide operators with an opportunity to present a prima facie case to the District Manager that the operator has or can implement immediately a corrective action plan to address the Agency’s concerns. In substance, this would be a lot like the corrective action plan already used under the existing POV scheme. We recognize MSHA’s position on this is that operators should be constantly monitoring their compliance and thus not need any additional time to take corrective action, but it is part and parcel to our due process concerns. Even assuming we Companies, for example, are tracking our compliance, we may well disagree with MSHA’s data or certain citations underlying the POV notice (or warning, if some warning system is adopted, as we propose). In addition to seeking some type of review of these citations, we would also want an opportunity to present our case to the District Manager that we have a corrective action plan in place and that it is working. Indeed, if nothing else, that would provide an opportunity to demonstrate to MSHA steps we have been taking that the Agency may well not be aware of because – if the proposed rule is implemented in its current form – it does not provide for any other opportunity for the Agency and the operator to come together to discuss the issues of concern.

The key point to be made is that, as proposed, POV status would turn on data crunching alone. There is nothing in the proposal that indicates MSHA is actually going to consult with an operator prior to placing it on POV status. Even the amorphous “mitigating circumstances” criterion is a black box, and Assistant Secretary Main’s largely non-responsive response on the January 31, 2011, conference call held on the proposed rule to the question of whether operators would have a right to question MSHA’s data did nothing to assuage our anxiety. As proposed, this POV rule would be a step in the wrong direction even from the existing regulations.

* * *

Finally, and importantly, any such process provided by MSHA should be proposed as part of the actual rule, reflecting the binding rights and obligations and ground rules for MSHA and operators alike. This is too important not to incorporate into the notice and comment process. We therefore urge MSHA to reconsider its current proposal, withdraw it, and re-

propose a newer iteration that provides for due process and an opportunity for the public to comment on the specifics of that proposal.

The Proposal Would Result In Too Many Mines Being Placed On POV Status, Because of Failure to Consider Interplay with Other Proposed Rules and Differences in Mine Characteristics

The Companies are also very concerned that the proposal would result in too many mines being placed on POV status, because of failure to consider interplay with other proposed rules. MSHA's Preliminary Regulatory Economic Analysis ("PREA") predicts that more POVs will likely occur under the new rule. MSHA's current prediction is to go from *zero to ten* POVs per year. 76 Fed. Reg. 5,724 (Feb. 2, 2011).¹⁰ While ten POVs is a lot after decades without any, MSHA fails to consider the interplay with other proposed rules that will result in even more POVs being issued.

Throwing the proposed respirable dust standards into the mix, for example, will likely result in even more POVs. 75 Fed. Reg. 64,412 (Oct. 19, 2010). If respirable dust compliance sampling goes to single shift and miners wear continuous personal dust monitors for various miner occupations/roles, there will likely be upwards of 250,000 to 300,000 new citations per year (see the National Mining Association's February 15, 2011, testimony on the proposed respirable dust standards). These respirable dust citations are also likely to be S&S, because they are health-related, which makes them automatically S&S unless the operator can prove that there was no actual exposure. The interplay between these new rules, therefore, will likely lead to many more mines being placed on POV status. Note, too, that this unprecedented number of citations may lead to another surge in the backlog at the Review Commission, just (as we understand it) as the upward curve of the backlog is beginning to slowly diminish. In addition, any uptick in the number of S&S citations issued will not only make it easier to fall into POV status, but much more difficult to get out of a POV status.

MSHA's proposed rule on "examinations of work areas in underground coal mines for violations of mandatory health or safety standards" will also likely result in even more POVs. The proposed rule would require operators to identify, record, and correct violations of mandatory health or safety standards found during preshift, on-shift, weekly, or supplemental examinations. 75 Fed. Reg. 81,165 (Dec. 27, 2010). Underground coal mine operators are

¹⁰ In accord with MSHA's overall theme of ratcheting up the number of POVs issued, MSHA proposes to revise current section 104.2(b) to increase the frequency of POV review from once per year to twice per year. The current rule already allows MSHA to screen twice per year. It states, "*At least* once each year, MSHA shall review the compliance records of mines." 30 C.F.R. § 104.2 (emphasis added). It is unclear why MSHA feels it necessary to change the rule to *require* itself to perform POV review "[a]t least two times each year," when MSHA has already not availed itself of that option. 76 Fed. Reg. 5,728.

concerned that if they record not just hazards, but all violations, in their exam books, MSHA will review the books and then issue legions of citations.

In addition to failing to consider the true cumulative effects, and the resulting costs, of other proposed rules, the proposal fails to consider the benefits of other proposed rules that would make the proposal less necessary. For example, the proposed rule's preamble does not say much at all about what should go into safety and health management programs used as a mitigating factor in POV review, other than "measurable benchmarks for abating specific violations that could lead to a POV and addressing these hazardous conditions at [the] mine[]." 76 Fed. Reg. 5,721.¹¹ Without more explanation of the requirements of safety and health management programs, the proposed rule suffers the fundamental flaw of being too vague both for purposes of giving operators a reasonable opportunity to comment on it and for its downstream enforcement as a mandatory standard.

There is also a parallel MSHA rulemaking presently underway on safety and health management programs. MSHA has not yet published a proposed rule, but has held public meetings to gather information about effective, comprehensive safety and health management programs at mines. 75 Fed. Reg. 54,804 (Sept. 9, 2010). MSHA's notice of public meetings included some guidelines for components of effective safety and health management programs:

1. Management Commitment;
2. Worker Involvement;
3. Hazard Identification (including workplace inspections for violations of mandatory health and safety standards);
4. Hazard Prevention and Control;
5. Safety and Health Training; and
6. Program Evaluation.

Id. 54,805. Inasmuch as the cursory guidelines listed in a simple notice of public meetings for a not-yet-proposed rule on safety and health management programs provide more detail than the description of safety and health management programs provided in the proposed POV rule, the proposed rule is woefully deficient on this score.

Moreover, in its notice of public meetings, MSHA proceeded to explain that:

Year after year, many companies experience low injury and illness rates and low violation rates. For these companies, preventing harm to their workers is more than compliance with safety and health requirements; it reflects the

¹¹ MSHA's current "POV Procedures Summary" also discusses the use of corrective action programs to reduce S&S violations being considered a mitigating circumstance. It is unclear whether the safety and health management programs discussed in the current rule are related to or meant to replace corrective action programs.

embodiment of a culture of safety – from the CEO to the worker to the contractor. This culture of safety derives from a commitment to a systematic, effective, comprehensive safety and health management program, implemented with the full participation of all workers. MSHA understands that many companies have developed and implemented effective safety and health management programs.

Id.

As MSHA stated, many mining companies have already developed safety and health management programs.¹² To the extent that these programs are similar to what MSHA envisions for POV mitigation purposes, MSHA should allow companies to use their existing program, or modify it to more specifically apply to the POV criteria. A safety and health management program that satisfies this yet-to-be-proposed rule should also satisfy the proposed POV rule for purposes of mitigating factors. Moreover, development (or major modification) of safety and health management plans should operate as a bar to being placed on POV status. In summary, MSHA's POV proposal is extremely vague regarding the requirements of safety and health management programs, and fails to consider the benefits of the proposed safety and health management programs rule when considering whether a stricter POV rule is even necessary.

MSHA's failure to consider the interplay between the proposed POV rule and other proposed rules does not comport with the admonition of President Obama's new Executive Order ("E.O.") 13,563, "Improving Regulation and Regulatory Review," which stresses the desire of this Administration to regulate industry in the least burdensome manner and to take into account "the costs of *cumulative* regulations." See 76 Fed. Reg. 3,821 (Jan. 21, 2011) (emphasis added).

MSHA should also take mine size and type into consideration in crafting the POV review criteria. MSHA did so when it originally proposed its POV regulations in 1980. 45 Fed. Reg. 54,656 (Aug. 15, 1980). In that proposal, MSHA classified different mine sizes based on annual hours worked at metal/nonmetal mines and the annual tonnage of coal mines. MSHA further categorized different mine types (e.g. underground, surface, and preparation plant coal mine operations). Mines of similar size and type category were compared to each other and ranked numerically, based on each mine's average number of S&S violations cited per inspection day. Then, mines with the highest 10% of violations as compared to mines of similar size and type were considered to have a chronic recurrence of S&S violations. 45 Fed. Reg. 54,658 (Aug. 15, 1980).

Because the proposed rule is so vague, it is not clear MSHA intends to take mine size and type into consideration again. But it should re-propose the rule to do so expressly, and invite further comment.

¹² See mining company comments on their safety and health management programs at: <http://www.msha.gov/REGS/Comments/2010-22403/SafetyHealth.asp>.

The Proposal Fails to Consider the Real Compliance Costs

MSHA's Preliminary Regulatory Economic Analysis ("PREA") estimates that the proposed rule will cost industry a total of \$4.2 million annually. 76 Fed. Reg. 5,726. MSHA attributes \$900,000 to monitoring costs, \$1.1 million to an estimated 50 mines that would have to develop a safety and health management plan to mitigate away from being placed on POV status, and about \$2.2 million for an estimated 10 mines operating under a POV. *Id.* This cost analysis is much lower than can reasonably be expected.

Upon scrutiny, it is plain that MSHA's "Compliance Costs" analysis in the PREA is based on some absurdly low assumptions. For example: "Rather than risking a POV and the possibility of a closure, MSHA projects that mine operators would monitor their compliance record against the proposed POV criteria using the Agency's website. MSHA estimates that it will take a supervisor an *average of 5 minutes each month* to monitor each mine's performance using the Agency's website." 76 Fed. Reg. 5,725 (emphasis added). According to the language of the proposed rule, "Specific pattern criteria will be posted on MSHA's Web site [sic] at <http://www.msha.gov> and used in the review to identify mines with a pattern of S&S violations. The review will include" the eight review factors listed in the proposed rule, some of which are extremely broad, such as factors 6, 7, and 8.¹³

It is simplistic to think an operator will spend only five minutes per month to monitor its compliance with the POV criteria. If the MSHA website is to be truly informative on these important issues, then beyond the time it takes to review the data on the various criteria (more than five minutes in its own right), the operator will need to verify the data against its own records, process that information for internal review and discussion among management, and most importantly – make strategic management decisions based on the available information. This may very well be a worthwhile process, but it is nothing that can be accomplished meaningfully in five minutes, and MSHA should calculate the costs of this time accordingly. And while MSHA is to be credited with requesting comments on the true burdens of monitoring, we respectfully submit that it is impossible to make any specific, sensible comments when the criteria themselves remain so ill-defined.

Another absurdly low assumption in the PREA is: "MSHA projects that a typical mine [on POV status] would lose about 0.5 percent of revenue as the result of closures (about 1 or 2 days for a large mine and a day or less for a small mine)." *Id.* 5,725. One to two days a year is

¹³ (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. 76 Fed. Reg. 5,728. To further complicate the review process, the preamble to the rule indicates that "other information" in factor seven includes a bucket of possible considerations. *Id.* 5,721.

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not a realistic estimate of lost time as a result of a mine being placed on POV status. POV status will result in a withdrawal order being issued for any S&S violation, which order shall remain in effect until the condition is abated to the satisfaction of an MSHA inspector. *Id.* 5,728-29. While the Mine Act does not define S&S, over the years through MSHA interpretation and adjudication, the threshold for what constitutes an S&S violation has been set so low by MSHA that it is very common for any inspection to result in S&S citations. Thus if a mine were to fall into a POV status, emerging from it would be exceptionally difficult. Indeed, in the complex, dynamic industrial settings of mining, especially underground coal mines, it is virtually impossible to obtain a clean inspection. Moreover, a mine that has just been placed on POV status will likely have many S&S violations occurring and will, thus, likely lose far more than one to two days of production time as a result of closures.

CONCLUSION

The POV rule does indeed raise novel legal or policy issues, *id.* 5,723, and, if promulgated as written, will have enormous adverse effects bearing upon the entire mining industry. The Companies appreciate the opportunity to identify our major concerns with the proposal and to suggest some alternative solutions that, we believe, would make for a better rule.

Sincerely,



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