From: Harman, Thomas [mailto:tharman@cement.org]
Sent: Thursday, July 28, 2011 1:17 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB73

2011 JUL 28 P 4:49

Please see subject comments attached.

Best regards,

Thomas (Tom) Harman
Regulatory Affairs
Portland Cement Association
500 New Jersey NW, 7th Floor
Washington, DC 20001
Phone office 202-408-9494
Phone mobile 202-870-2548
email tharman@cement.org
web www.cement.org

AB73-Comm-84

PCA
Portland Cement Association

July 28, 2011

Ms. Roslyn B. Fontaine, Acting Director
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
Room 2350
1100 Wilson Boulevard
Arlington, Virginia 22209-3939

Dear Ms. Fontaine:

Re: Supplemental Comments of Portland Cement Association re RIN 1219-AB73; *Pattern of Violations*

Enclosed are the supplemental comments of Portland Cement Association (PCA) in response to the above-referenced proposed rulemaking and the Mine Safety and Health Administration (MSHA) published in the *Federal Register* on May 4, 2011, to announce the re-opening of the comment period. 76 Fed. Reg. 25277.

PCA submitted comments previously to this docket, in response to the earlier Notice of Proposed Rulemaking (NPRM) that MSHA published in the *Federal Register* on February 2, 2011, at 76 Fed. Reg. 5719. PCA's comments were posted in the docket on April 18, 2011 and assigned the identification number AB73-COMM-65. PCA reiterates those comments here, especially as they relate to addressing the final order requirement when determining history for pattern of violations enforcement, and to retaining the standard for sending a potential POV notification letter to mine operators.

These supplemental comments are offered in response to MSHA's May 4th notice, which, among other things, requested the mining industry to submit comments, with supporting documentation, suggesting alternatives to the key pattern of violation (POV) provisions that MSHA had proposed in its February 2, 2011 NPRM. The focus of our supplemental comments is on one particular "key" provision; specifically, the criteria that MSHA uses for determining whether a mine operator has established a pattern of significant and substantial violations at a particular mine.

MSHA's official POV criteria are set forth in 30 C.F.R. § 104.2. However, the MSHA's implementation of the codified criteria is based upon "initial screening criteria" that MSHA issued in 2010 to explain and clarify when a particular mine will have met the official § 104.2 POV criteria. As we explain below, PCA believes a number of changes need to be made to MSHA's informal initial screen criteria. PCA also believes that the majority of our concerns and recommendations can be adequately and effectively addressed with modifications to the initial screening criteria, without the need for MSHA to amend § 104.2 and codify the modifications to the informal initial screening criteria.

A. MSHA needs to explain the basis for each initial screening criterion. Currently, MSHA has two distinct sets of initial screening criteria. The two sets have been set forth by MSHA in the alternative. In other words, if a mine's performance meets either set of criteria it will be "further considered for exhibiting a potential pattern of violations."

The first set consists of four criteria. The second set consists of two criteria. However, the basis for each set of criteria, *i.e.*, the rationale of the specific criteria under each set, has never been explained by MSHA.

For example, the first criterion of the first set requires that a mine have "[a]t least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months." Each of the remaining criteria under both sets likewise establishes a minimum threshold. PCA is not suggesting that the setting of minimum thresholds is in-and-of-itself unreasonable. However, because of MSHA's failure to explain why each specific threshold was selected, it can only be assumed that the Agency's selections were arbitrary.

Therefore, PCA's first recommendation is that MSHA provide an explanation of the rationale for each of its initial screening criteria. At the same time, before MSHA explains its initial screening criteria, there is also a need for MSHA to modify its initial screening criteria in order to make them more reflective of mining operations and thus more effective in terms of achieving the NPRM's stated objective "to protect miners when the operator demonstrated a disregard for the safety and health of miners." 76 Fed. Reg. 5719.

B. MSHA's initial screening criteria need to be augmented to better, or more equitably, reflect mine operations. Currently, MSHA's initial screening criteria apply "one-size-fits-all" thresholds. Regardless of what may have been MSHA's intent, the result of this is that the current thresholds unfairly discriminate against larger mines, by effectively giving smaller mines the benefit of a presumption of safety that might not be warranted.

Under the current system, because of a particular mine operation's scope and size, a larger mine has a greater potential to receive more citations/orders, as well as be the subject of 100 inspection hours, than would a small mine, under the first set of screening criteria. Thus larger mines are more likely to meet the citations/orders and inspection hour thresholds than would smaller mines, or, at the very least, larger mines are more likely to meet the thresholds sooner than a small mine would, especially during a 12-month period. Because the second set of criteria also applies a 12-month timeframe, smaller mines are also favored under the second set of criteria.

Therefore, PCA's second recommendation is that MSHA modify its current initial screening criteria thresholds to take into account a mine's size and operations.

While PCA is not going as far in these comments to recommend any specific threshold(s) that may be appropriate and therefore should be adopted for mine sizes and categories, we believe that, at the very least, MSHA should have two size categories ("large" and small") and, therefore, at least two different minimum threshold levels based on the size of a mine. At the same time, it may be more reasonable, and practical, to establish three size categories ("large," "medium," and "small"), each with its own thresholds.

For the same reasons, PCA also recommends that MSHA discontinue its current approach of treating all mine operations as though they are the same and thus present the same level of risk and safety exposure. MSHA's initial screening criteria should therefore be modified to recognize at least two categories of mines ("underground" and "aboveground"), with two different thresholds for each category of mine operation. In fact, the precedent for the initial screening criteria to distinguish between mine types for POV purposes already exists. Although MSHA's current initial screening criteria do not go as

far as PCA is recommending here, the appropriateness of distinguishing between mine types, albeit in a limited form, is already recognized and embraced by the 12-month Injury Severity Measure.[1]

C. MSHA needs to retain its issuance of PPOV letters. MSHA's proposed elimination of the potential pattern of violations (PPOV) notification to operators is misguided and, if adopted, will jeopardize miners' safety and health.

The sole reason MSHA has provided to support its proposed elimination of the current PPOV notification is that, during the three-year period June 2007 through September 2009, six of 62 operators (21 percent of the total) who received a PPOV letter received more than one PPOV letter. 76 Fed. Reg. at 5722. The NPRM further explained: "These mine operators temporarily reduced their S&S violations, but reverted back to allowing the same hazards to occur again and again without addressing the underlying problem." *Id.* MSHA ignored, however, that the vast majority of those operators who did receive a PPOV letter during that period of time – 79 percent – engaged in the corrective action which the letter had intended when they were issued. Sadly, MSHA's section-by-section analysis' justification seems to have ignored this, and also ignored the following additional impressive results that the same PPOV letters also triggered; results which the NPRM's preliminary regulatory economic analysis did acknowledge:

> After receiving the notification letter, of the mines that remained in operation to the next evaluation, 94 percent reduced the rate of S&S citations and orders by at least 30 percent and 77 percent reduced the rate of S&S citations and orders to levels at or below the national average for similar mines.

76 Fed. Reg. at 5723. For MSHA to ignore its own statistics demonstrating the overwhelming benefits that have resulted from issuing PPOV letters, and instead eliminate their issuance solely because a substantial minority of operators failed to act more aggressively, is clearly arbitrary and capricious.

What is especially troubling about the proposed elimination of the PPOV letters is MSHA's belief that it would be sufficient to expect "that operators would continually monitor their performance and, *if they believe that they are approaching a POV*, would take action to improve their safety and health performance." 76 Fed. Reg. at 5724 (emphasis supplied). However, MSHA does not explain how such self-monitoring would prevent from occurring the very same reactions of the six operators MSHA cited as its reason for eliminating the PPOV letter; or why self-monitoring will incent those operators to now act when they were not sufficiently motivated to act after receiving a PPOV letter.

Neither has MSHA taken into account the fact that, after monitoring their data, operators will not always reach the same conclusions as MSHA would. In fact, the likelihood of this occurring is supported by the statistical data that MSHA cited in the NPRM. As the NPRM acknowledged, during the five-year period 2006 through 2010, MSHA vacated 3,400 citations and modified 6,000 others from S&S to non-S&S. While the NPRM appears to assert that these are insignificant numbers in relation to the 700,000 violations assessed penalties, from the vantage point of operators, especially those whose citations were vacated or reduced, these are substantial statistics. If nothing else, MSHA's statistics demonstrate that MSHA inspectors do make mistakes when issuing citations. Thus, when operators have good faith reasons to believe that an inspector's particular citations were improperly issued, it is reasonable to

[1] The fourth of MSHA's first set of initial screening criteria states: A 12-month Injury Measure (SM) for the mine that is greater than the overall Industry SM *for all mines in the same mine type and classification* over the most recent five years." (Emphasis supplied.)

conclude that those operators might also have good reason ***not*** to "believe they are approaching a POV" after monitoring their data because the data may, in fact, be erroneous.

In other words, the weak link in MSHA's proposed reliance on self-monitoring in lieu of issuing PPOV letters is how each operator will interpret its data compared to MSHA. MSHA's proposed elimination of the PPOV letter ignores the fact that, as long as MSHA and operators can and often do, in fact, reach different conclusions based upon the same data, MSHA's reliance on self-monitoring is problematic, because those same operators are also likely to exclude those citations from consideration when analyzing its data.

MSHA's issuance of a PPOV letter, on the other hand, eliminates the possibility of this from happening as a practical matter, by advising the operator in no uncertain terms that MSHA believes the operator is approaching a POV. The operator's difference of opinion will effectively not matter. At the same time, however, if a disagreement does exist, under the current framework there would still be an ample opportunity for the operator and MSHA's agents to discuss the issue and resolve the disagreement. The PPOV letter therefore takes away the prospect of subjecting operators to the "guessing game" that self-monitoring would otherwise promote, even if unintentionally.

MSHA also ignores another benefit of PPOV letters. Upon their receipt of a letter, the vast majority of operators – 79 percent according the NPRM – will initiate timely remedial actions. Self-monitoring, on the other hand, is likely to result in even the most conscientious of operators refraining from initiating the remedial actions that a PPOV letter would have triggered, due to the fact that, after monitoring their data, they ***do not*** "believe they are approaching a POV."

Clearly, these are consequences that MSHA would not want to occur. Clearly also, MSHA can prevent them from happening by continuing its current practice of issuing PPOV letters rather than doing away with such letters as MSHA has proposed.

Respectfully submitted,

Robert A. Hirsch
Director, Regulatory Affairs

Thomas Harman
Director of Regulatory Affairs