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Sent: Friday, July 29, 2011 12:47 PM

To: zzMSHA-Standards - Comments to Fed Reg Group

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Subject: RIN 1219-AB73

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AB73-COMM-86

Wyoming Trona Producers

Dear Sir or Madam:

The Wyoming Trona Producers appreciate the opportunity to comment on the Mine Safety and Health Administration's (MSHA) proposed rule on Pattern of Violations ("POV") RIN 1219-AB73, 76 FR 5917.

We share with MSHA a genuine concern for the safety of our miners. Each of our companies in Southwest Wyoming have multi-pronged approaches to enhance the safety and health of miners and their work place. We respectfully request that the agency revoke the current rulemaking and a full, detailed rule be opened for comment. Following are specific comments on the current proposed rule.

Comments on the Proposed Rule

We support MSHA's expressed intent to improve the POV program to "simplify the existing POV criteria, improve consistency in applying the POV criteria, and more adequately achieve the statutory intent of the POV sanction against mine operators who have not responded to the Agency's other enforcement efforts.

However, the Trona producers seek a transparent and fair rule for the use of MSHA's most severe civil enforcement tool: closure orders resulting from a "pattern" of S&S violations. Transparency has been touted as a cornerstone of this administration. Unfortunately, the proposed rule is neither transparent nor fair, is contrary to law and must be re-proposed as this rulemaking excludes the specifics for POV determination.

Section 104.2 states it would "specify the general criteria" that MSHA would use to identify mines with a pattern of violations. MSHA has asked for comments on how the agency should obtain comment during the development of and periodic revision to the POV screening criteria. Obviously this tells us the Agency expects the POV regulation to be a moving target. Since the latest "retooling" of the criteria, it is difficult to believe that the agency doesn't already have a desired criteria formula in mind. The current rule has specific benchmarks in each category. If the agency intends to adjust those numbers and formulas, there should be a public comment period and rulemaking process prior to any and all adjustments.

The fundamental problem with the MSHA proposal is that it withholds "for future web posting", the actual criteria the agency will use for pattern determinations. By not disclosing, proposing and adopting the criteria through notice and comment

rulemaking, MSHA prevents a full analysis of the rule's impact and a meaningful opportunity for interested parties to comment on the proposal.

As a result, we believe that the proposed rule violates the Administrative Procedures Act (APA) and Mine Act rulemaking mandates. For example, Section 104(e) (4) of the Mine Act authorizes the Secretary to: "*make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.*" By not disclosing the criteria and publishing them for comment, MSHA exceeds its authority and violates its Mine Act mandate.

If adopted, the proposed rule will result in closure orders issued against employment sites before the employer has an opportunity to:

- (1) Discuss the alleged pattern with the agency;
- (2) Contest the validity of alleged citations or orders used to identify a pattern;
- (3) Address the accuracy of agency data used for pattern identification; or
- (4) Obtain judicial review of alleged violations constituting a pattern.

As far as pattern of violation of the same standard is concerned; these large underground metal / non metal operations' largest citation category is 56/57.14100(b) which is a catchall standard for machinery, tools and equipment. A quick glance by the standard numbers might indicate a pattern of repeat violations. However, if you drill down and read the description of each violation, they are nearly all written for totally different conditions. This application of the above standards could be considered a pattern of violation, when in all reality it is not.

The proposed rule, if adopted, will deny mine operators Mine Act Section 105 citation and penalty contest rights and due process of law, by permitting the use of contested violations to impose pattern closure orders. The contest provisions of the Act provide critical protections against improperly issued citations. MSHA's elimination of contest rights and the protection they provide is not authorized by the Mine Act. The elimination of Mine Act Section 105 due process is in direct conflict with the 5th Amendment to the Constitution of the United States of America which prevents individuals from being deprived of life, liberty or property without due process.

Due process extends to all persons and corporate entities to protect against abuse of government authority. Our system of justice has always worked on the premise that a person is innocent until proven guilty! The past 235 year history of our country proves that it's been an extremely important part of our constitutional rights. By allowing an MSHA inspector to issue a citation or order without the possibility of due process as to validity of the citation or order, will allow the inspector to become the judge, jury and executioner for an operation that is nearing POV status.

MSHA must also consider the reasons for the large number of citations under contest. This could be due to “regulatory creep”. That is when inspectors in the field continue to stretch the reach of the regulation. The Wyoming Trona industry has done a good job over the years at eliminating hazards, injuries and violations, though the inspectors seem to feel a need or feel pressure to write more citations. Therefore, we observe a “stretch” of the true intent of a regulation in order to write citations. Inspectors are not right every time and are currently under considerable pressure to write more citations, more S&S citations and higher negligence. Specific examples of this ever-changing interpretation can be heard in many instances involving the Metal/Non Metal guarding standard application.

MSHA must reinstate the provision that only final orders be used in determination of a Pattern of Violation.

The proposed rule will also eliminate the current rule’s notice of a proposed pattern, and the established opportunities to demonstrate to MSHA that the proposed pattern is based on erroneous data, a common occurrence in the overloaded MSHA data base. This current system has proven critical to prevent inapplicable and incorrect pattern enforcement and invalid mine closure orders. Further, contrary to the purpose of the Mine Act, the proposed rule’s elimination of the notice of potential pattern of violation (PPOV) will deny mine operators and their employees an opportunity to improve their performance, and thereby their safety record.

Between November and December of 2010, the agency put 14 mines on a potential pattern of violation. 10 of those operations have made enormous improvements in their S&S rates. One operation had an 87% reduction. The least improved in this group showed an improvement of 39%. This is a tremendous success story! With these types of results, why wouldn’t MSHA want to keep this tool? Is MSHA’s mission to improve safety in our nation’s mines or is to close down mining operations? A large underground mine might well be handed a “death sentence” if not afforded the notice of the PPOV. Any inspector, on any given day, can find what they can effectively argue, a Significant and Substantial citation for loose ground; thereby keeping an underground operation in the pattern status.

MSHA has proven that notifying mining operations of their “potential” is extremely effective. The agency must keep the Potential Pattern of Violation notice in the toolbox. Although the current rule has some misgivings, it has recently proven its effectiveness.

If adopted, the proposed rule will also require mine operators to submit “safety and health management programs” to MSHA for approval, if they wish to gain future MSHA consideration of “mitigating circumstances” prior to pattern closure order issuance. By so doing, the proposed rule seeks to impose a new, substantive safety standard program mandate, bypassing the rulemaking provisions of the Act.

Separate and distinct rulemaking procedures have been announced at both OSHA and MSHA to determine if company safety program mandates should be required and, if so, what program mandates should be adopted through those separate rulemaking procedures. By seeking to adopt safety program mandates, through this unrelated Pattern rulemaking, MSHA engages in an “end run” around Mine Act Section 101 mandatory rulemaking for safety and health standards.

The very concept of determining whether there is a pattern of violations “which are of such nature as could have significantly and substantially contributed to the cause and effect of . . . mine health or safety hazards” requires the consideration of the circumstances surrounding the citations and possible hazards, including the impact of the safety program in place at the mine. Mandating MSHA advance approval of a safety program, as proposed in this pattern rulemaking, violates the agency’s duty to consider the mine’s safety program as a hazard “mitigating circumstance,” regardless of whether MSHA knew of the program – let alone approved it – in advance. MSHA does not have authority to attach such a pre-condition, with its associated mine operator burden, to the exercise of its statutory duty to evaluate the circumstances surrounding suspected violations, before issuing closure orders.

We understand the need for fair and equitable use of MSHA enforcement tools to achieve safety, as well as the need to reform the troubled MSHA enforcement system. We do not believe, however, that this flawed proposal will enhance safety nor comply with the mandates of the Mine Act, the APA and the due process protections of the Constitution. We urge you to revoke, revise and re-propose this rule. The Wyoming Trona Producers appreciates this opportunity to comment.

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