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April E. Nelson, Acting Director
Office of Standards, Regulations & Variances
U.S. Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, VA 22209-3939

RIN: 1219-AB73

Dear Ms. Nelson:

These comments are submitted by Arch Coal, Inc. (Arch). Arch is the second largest coal producer in the United States with corporate offices in St. Louis, Missouri. We have approximately 4,700 employees and operate both underground and surface mines in Colorado, Utah, Kentucky, Virginia, West Virginia and Wyoming.

These comments are submitted in response to the Proposed Rule issued by the Mine Safety and Health Administration (MSHA) on February 2, 2011 titled *Pattern of Violations (Proposed Rule)*. As stated in the announcement, the Proposed Rule is intended to revise the existing regulation for Pattern of Violations (POV). MSHA has determined that the existing POV regulation fails to adequately achieve the intent of the Federal Mine Safety and Health Act of 1977 (Mine Act).

The Agency's request for comments on the Proposed Rule states that the purpose of the POV as framed by the Mine Act is intended to be used as a tool to address operators who have demonstrated a disregard for the health and safety of miners. Section 104 (e) (1) of the Mine Act specifically states that --- **"If an operator has a pattern of violations of mandatory health and safety standards in the coal or other mine which are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health and safety standards, he shall be given written notice that such a pattern exists."**

Section 104 (e) The Mine Act continues by describing the enforcement consequences for an operator if they are assigned POV status. It also defines the general requirements for terminating POV status. The consequences of being assigned POV status are significant. Being designated a POV operation can have a critical impact on the ability of a mine to

continue to operate. These consequences are so significant that many view POV status as a “death sentence,” particularly with regard to a large underground mine.

Congress intended the POV requirement to serve as an enforcement mechanism to identify and re-direct “bad actors.” The POV requirements are intended to target mine operators whose practices demonstrate a disregard for the health and safety of miners. This is a worthy objective. It’s an objective that Arch supports. “Bad actors” not only pose a threat to the miners who work for them, they also tarnish the image of the Mining Industry.

From a safety standpoint, the Mining Industry has made significant strides to improve performance. Injury incident rates have continued to improve over time. In addition, the Mining Industry’s safety performance compares favorably to other industrial sectors. While the Mining Industry’s safety accomplishments are significant, they are largely overshadowed in the eyes of regulators, politicians, and the media by the poor performance of a few “bad actors.” This is unfortunate. It has contributed to regulations being written for the “worst-of-the-worst.” Regulations that focus on the worst performers tend to inhibit the ability of “good actors” to take the proactive steps necessary to continually improve performance.

In our view, the Proposed Rule falls into this trap. It fails to focus on how the Mining Industry’s safety performance can be improved. It is an attempt to build a better enforcement mousetrap to catch “bad actors.” Unfortunately, the proposed POV “mouse trap” is constructed in a manner likely to ensnare “good” along with “bad” actors.”

Arch supports the POV’s objectives. We think the Industry would benefit from identifying and re-directing the safety performance of operators who disregard safety. We maintain, however, that the Proposed Rule falls short of the mark. It falls short because it:

- Lacks transparency;
- Eliminates due process;
- Eliminates the initial POV screening step that has helped to rehabilitate some operators;
- Threatens to have an unfair impact on large mines;
- Is supported by a questionable cost-benefit analysis; and
- Fails to utilize holistic performance indicators that truly measure a mine’s safety performance.

The Proposed POV Regulation Lacks Transparency

The current administration has stressed the importance of government acting in a transparent manner when developing and implementing regulations. It has also stressed the importance of engaging stakeholders when developing new regulations. In fact, a recent Executive Order issued by President Obama stressed both of these concepts.

The Proposed Rule falls short in regard to both principles. It is neither transparent, nor is it based on input gathered from the stakeholders. The National Mining Association, the Mining Industry's Trade Association, made numerous attempts to discuss how to revise the POV criteria with MSHA. On several occasions in 2010, the Industry attempted to discuss a holistic POV model designed by Dr. Larry Grayson from Penn State University. This model, which is referred to as the Safety Performance Index (SPI) is based on equal measures of enforcement and injury prevention criteria. In our opinion, it would serve as an effective tool for identifying legitimate "bad" actors. Despite these proactive efforts, MSHA proceeded to develop the Proposed Rule without input from the Industry.

More troubling is the lack of transparency in the process used to develop the Proposed Rule. The Proposed Rule only references the "general" criteria the Agency will use to determine which mines are assigned POV status. It states that MSHA will design (without direct input from stakeholder) and post the "specific" POV criteria on the Agency's web site. The Agency requests comments on how it should develop and periodically revise the specific POV criteria.

Arch strongly objects to this approach. There are significant consequences for a mine assigned POV status. Because of these consequences it is critical that the "specific" POV criteria be clearly defined in the Final Rule. These criteria should be holistic in nature. They should provide equal weight to a mine's injury prevention, as well as their enforcement performance. While MSHA mentions injury and illness performance as general POV criteria, it is only one of the eight general factors listed in the Proposed Rule.

The Agency says in the Proposed Rule that they will publish POV criteria and related information on its web site. While we agree with this concept, we don't think it goes far enough. We feel that MSHA should identify and publicize the "specific" criteria in the Final Rule. Mine operators should know exactly what the POV rules consist of at the start of the game. MSHA should not be able to develop and revise the specific rules after the game starts. This would be tantamount to giving a referee at a sporting event the authority to make up rules as the game progresses. This is fundamentally unfair, lacks transparency, and contradicts our country's basic principles.

The Proposed POV Regulation Eliminates Due Process

Due process is a fundamental principle in this country. The Agency's Proposed Rule eliminates "due process" by eliminating "final orders" as a determining factor and replaces this factor with citations/orders "issued." From a POV standpoint, an operator will now be guilty when an inspector accuses him/her of violating the MSHA regulations. Under this proposal, an operator will be deprived of their right to challenge unwarranted citations or orders or defend the level of negligence alleged by the MSHA inspector, for purposes of avoiding POV consequences. Such a process is out of step with the fundamental rights we enjoy in all areas of law enforcement in our country and is patently unfair.

Since 2006, the Agency has been increasingly aggressive in their approach to the inspection process. In our opinion, inspectors are writing more citations as S&S that are not S&S. They are assigning higher degrees of negligence to violations than seems warranted. In addition, we are seeing more unwarrantable violations for factual circumstances that were not previously viewed as unwarrantable.

We are concerned about these overly aggressive enforcement trends. We are also concerned that violations issued under the “Rules to Live By” seem to be automatically categorized as high level enforcement actions, regardless of whether the underlying facts support these claims. In addition, we are concerned that many types of violations that fall into the “repeat” category occur under broad regulations like 75.400 and 75.403 that are very subjective in nature. Whether they are actual violations (and the degree to which they are serious) varies greatly from inspector to inspector. These inconsistent enforcement patterns make it paramount that MSHA retain due process in the Final Rule.

Eliminating “due process” in this type of enforcement atmosphere is troubling. This concern is exacerbated by the elimination of the Conference Process. This informal process not only served as an effective means of resolving many types of enforcement disputes but also provided an effective feedback and teaching tool for both inspectors and mine operators. Moreover, the conference tool helped to promote consistency in enforcement and assisted mine operators to better understand the Agency’s enforcement expectations. Unfortunately, this means of resolving disputes is not currently available.

MSHA states in the Preamble of the Proposed Rule that only 1% of the violations mine operators contest get reversed. This may be true, but how many of the violations “issued” are modified? How many are reduced from S&S to non-S&S? How many unwarrantable violations are reduced to 104 (a) citations?

Since 2006, our subsidiary operations have gradually increased the number of violations they contest by 4-5%. They currently contest about 12% of the total violations issued. This is partly a result of MSHA being more aggressive in the inspection process. It is also due to the demise of the conference process. It should be noted that a very high percentage of our contested violations get modified. They are reduced to lower levels of negligence, modified from S&S to non-S&S; and/or changed from an elevated enforcement action to a less serious action.

These modifications in violations “issued” are the result of the operator exercising the right of due process. Modification in violations “issued” may mean the difference between a mine being assigned, or not being assigned, POV status. The 1% of violations that MSHA acknowledges they vacate could also determine whether an operator is assigned POV status. Given the seriousness of the POV consequence, access to “due process” could legitimately determine whether a mine stays in business and its miners stay employed.

MSHA has not proposed a remedy for a mine assigned POV status because of an improperly issued violation. The Agency has not assigned a remedy for a mine assigned

POV status if an inexperienced inspector gets overly aggressive. There is no compensation proposed if an operator is later vindicated by an Administrative Law Judge or the Federal Mine Safety & Health Review Commission. The inspector is not always right. That's why due process is so important.

We acknowledge that some operators take advantage of the system. The Proposed Rule fails to address this problem directly. The Agency's solution, eliminating the use of "final" orders, will only create a bigger problem. If a few operators are "gaming the system" by contesting all of the violations they are issued, we need to deal with that specific problem. The Agency should address that particular abuse in a manner that preserves due process for the vast majority of mine operators. The actions of a few should not be used as justification to eliminate the rights of the majority.

Eliminating the Initial Screening Criteria Compounds the Due Process Issue

The Proposed Rule eliminates the initial POV screening criteria. It also removes the "fair warning" step of designating a mine as Potential POV candidate. When you couple elimination of the "fair warning" step with the elimination of due process (i.e., eliminating the use of final orders) the result is an enforcement tool excessive in nature.

The objective of assigning a mine POV status is to identify operators in need of safety improvement. This should be coupled with a legitimate opportunity for the designated mine to improve. We do not believe that Congress intended POV as a means to drive operators out of business and miners out of work.

The POV process should include a "fair warning" step designed to put designated mine operators on notice of the need to improve. MSHA acknowledges in the Preamble of the Proposed Rule that very few operators who received the Potential POV notice received a second notice. As a consequence, it would appear that most mines given "fair notice" of their deficiency respond by attempting to improve. From that perspective, it would appear that the initial screening criteria are somewhat effective.

In our view, the existing POV process fell short by not requiring Potential POV mines to make fundamental safety process changes as part of the corrective action required by the Agency. Instead of insisting that these mines make changes in the way they managed their safety process, MSHA was satisfied if they adopted "safety awareness" programs. As a general rule, safety awareness programs do not have a long-term impact. They tend to produce short term results. Long term continuous safety improvement requires fundamental changes in an organization's culture, performance processes, and safety leadership. These are the types of long-term changes Potential POV mines should be encouraged to adopt.

MSHA should not implement regulations with the potential effect of unfairly forcing operators out of business. Operators should be given "fair notice" of Potential POV status, and the opportunity to improve their performance. If they fail to respond, the

consequences should be greater. Recalcitrant operators should face the POV consequences outlined in the Mine Act.

The Proposed POV Regulation Will Have an Unfair Impact on Larger Mines

It goes without saying that a large mine has more area to maintain than a small mine. A large underground mine has more belt line, travelways, escapeways, equipment, etc. to examine and maintain. They also have more territory inspected by MSHA. A large mine sees more inspector shifts and enforcement activity than a small mine. As a result, it stands to reason that a larger mine with the same safety standards as a small mine will see more violations issued by MSHA.

The common sense of this situation dictates that all criteria used to determine POV status should be normalized. The existing criteria used by MSHA to determine Potential POV and POV status includes certain factors based on the total number of S&S citations/orders issued, the number of elevated enforcement actions, etc. We disagree with these types of whole number criteria. MSHA should normalize all POV measures to level the playing field for all operators (i.e., large, medium, and small).

In the current enforcement environment, it would be devastating for a large underground mine to be assigned POV status. Once designated as a POV mine, it would be virtually impossible for a large underground mine to be relieved of POV status. I can't imagine a large underground operation working a complete inspection without a single S&S violation. Given the Agency's current overly-aggressive enforcement posture, POV status could well be a "death sentence" for a large underground mine.

The Proposed Rule's Cost-Benefit Analysis is Questionable

Arch views the Agency's cost-benefit analysis as seriously flawed. From a benefit standpoint, we believe that the savings are overstated. Our perspective is that increased enforcement does not equate to improved safety performance. Improved safety performance occurs when organizations develop strong safety cultures that encourage miners to do the right thing. Improved safety performance and fewer injuries are byproducts of strong safety leadership and creating performance structures that encouraging problem solving and employee involvement. Improved safety performance does not come from merely putting more "cops on the beat" with "bigger night sticks." While enforcement helps operators achieve safety standards at minimum levels, it does not foster continuous improvement.

The Agency's cost estimates for developing effective safety programs are also underestimated. From Arch's experience, we know that developing and implementing an effective safety process occurs over time. It involves a lot more time, money, management leadership, and employee involvement than outlined in the Preamble of the Proposed Rule. We would welcome the opportunity to discuss this issue with MSHA in more detail. Another alternative would be to review Arch's comments to the MSHA

Panel on effective management safety systems at the Omni - William Penn Hotel in Pittsburgh, PA on October 10, 2010.

MSHA Should Adopt a Holistic Approach to Identify Potential POV Candidates

Compliance indicators alone are not good predictors of safety performance. In developing criteria to identify Potential POV candidates, a mine's injury performance measures should be provided the same weight as enforcement measures. In identifying Potential POV mines, the Agency should attempt to obtain a holistic snapshot of a mine's overall safety profile. This can't be done by looking at enforcement statistics in a vacuum.

One good example that enforcement does not equate to safety is our Sufco mine in Utah. In 2010, Sufco made the Agency's "Impact Inspection" list because of a "Rules to Live By" violation. For some reason totally unrelated to safety, an MSHA press release publicized the fact that they made this list. Despite this negative publicity, the employees at Sufco (a large underground longwall mine), worked the entire year without a reportable injury. They had zero medical and zero lost time incidents for the entire year.

In our view, a mine's injury performance should play a larger role in determining whether an operator achieves POV status. At Arch, preventing injuries is the primary focus of our safety process. Our goal is "Home Safely! Everyone! Every Day! MSHA compliance is an important part of our process, but injury prevention is a core value. We feel the Proposed Rule should reflect a similar emphasis on injury prevention. This process shouldn't be about how many violations a mine operator is issued. It should be about how well they return people home safely everyday.

The current criteria for POV assignment uses a mine's Injury Severity Measure (SM) as one determining factor. This factor is important, but it should be balanced by also considering a mine's lost time injury and reportable injury rates. A small or medium-sized mine with a good overall injury prevention rate could have their SM skewed by one serious injury. We encourage the use of a set of balanced, holistic, and normalized safety performance indicators to determine which mines are assigned POV status.

The Safety Performance Index (SPI) or Grayson Model is one viable POV model that MSHA should consider. It uses injury prevention and enforcement criteria in equal measures. It normalizes the criteria and provides a holistic view of a mine's safety performance that is predictive in nature.

Closing

We appreciate the opportunity to share our views on this important safety issue. In our opinion, a properly designed POV regulation could be as a valuable tool to identify "bad actors" and improve overall safety performance. In order to be effective, however, the Final Rule needs to be transparent. It needs to afford mine operators due process. In addition, operators need to be provided "fair notice" and the opportunity to improve.

An effective POV Rule should be developed through a cooperative effort involving input from all stakeholders. The POV selection criteria should be transparent and based on holistic, normalized indicators. From a remedial standpoint, targeted operators should be encouraged (and where necessary assisted) to adopt safety process initiatives capable of producing long-term, continuous improvement. This should be a performance improvement tool that punishes recalcitrant operators when necessary. The overriding emphasis, however, should be on how we all get better at returning all miners home in the same condition as when they reported to work.

Sincerely,

Anthony S. Bumbico

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Vice President of Safety

Arch Coal, Inc.