

**Testimony of the Mining Awareness Resource Group**  
**(MARG) on the MSHA Proposed Pattern of Violations Rule**  
**June 2, 2011**

~~Good Afternoon.~~ <sup>MORNING</sup> My name is Mike Crum. I am employed by FMC Corporation as the Safety Team Leader at the FMC Westvaco Mine and I serve as Chairman of the Mining Awareness Resource Group (MARG). MARG is a coalition dedicated to protecting its employees and the environment. MARG members includes FMC, Cargill Salt, Detroit Salt, Morton Salt, Mosaic Potash, Tata Chemicals (formerly known as General Chemical), and other mining interests that support our efforts. MARG seeks to ensure that laws and regulations are feasible, effective, based on sound science and implemented and enforced fairly. MARG represents its members in select matters which impact the mining industry before the federal agencies, the Congress, and the courts. MARG also serves its members by providing a forum for communication and the exchange of information and by creating coalitions to assist in achieving common goals.

Today, I present MARG's comments on the MSHA proposed rule on Patterns of "Significant and Substantial" (S&S) Violations. MARG seeks 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. Unfortunately, the proposed rule is

neither transparent nor fair, and is contrary to law and must be re-proposed.

The first 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.*" (emphasis added). By not disclosing the criteria and publishing them for comment, MSHA exceeds its authority and violates its Mine Act mandate.

Second, 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. .

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.

In addition, the proposed rule will 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 will deny mine operators and their employees an opportunity to improve their performance, and thereby their safety record.

If adopted, the proposed rule also will require mine operators, if they wish to gain future MSHA consideration of "mitigating circumstances" prior to pattern closure

order issuance, to submit “safety and health management programs” to MSHA for approval. 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. Thank you for allowing me to testify on behalf of MARG.