COMMENTS ON PROPOSED RULE ON PATTERN OF VIOLATIONS

This proposal does not contain specific criteria, but rather seeks comment on how the agency "should obtain comments on how the agency should obtain comment during the development of, and periodic revision to, the POV screening criteria." 76 Fed. Reg. 5719, 5720 (February 2, 2011). It is impossible to comment on criteria that have not been shared in the proposal. We believe that the agency must establish the POV criteria by notice and comment rulemaking. Section 104(e)(4), 30 U.S.C. § 814(e)(4), specifically requires that the "... Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations ... exists." The Office of Inspector General also specifically recommended that MSHA seek stakeholder input the POV screening criteria in its report dated September 29, 2010, pages 3, 24. MSHA has not effectively done that in the proposed rule.

Section 104.2 of the proposed standard lists only generic categories of information that will be reviewed, but does not quantify or explain how such data will be applied to issue a pattern notice. The proposed rule also apparently anticipates that the criteria will be fluid and subject to change without any established method for notice and comment rulemaking on the core of the rule which are the criteria. This approach totally fails to provide operators with notice of the criteria and apparently is intended to provide MSHA with the ability to change, or worse, ignore the criteria in some situations. It fails to inform stakeholders on what is expected to avoid a pattern notice and offers no comment on the specific criteria before the rule becomes effective.

The absence of the specific, critical criteria from the proposal is of particular concern since the proposed rule eliminates any potential for discussion of the application of the criteria to a mine before the pattern notice is issued to a mine operator. It appears that the rule anticipates an "automated" process for the issuance of the pattern notice based on a mine operators monitoring of the criteria on MSHA's website. I am comfortable, as an employee of a large operator that we can devote the resources to provide in-house monitoring provided the criteria are known and clear. I am not comfortable with accepting this approach. It is useful to be able to check the status of each operation on the MSHA website but the failure to promulgate the actual criteria that an operator needs to measure is a problem. It is difficult to reconcile this with the supposed consideration of "mitigating" criteria provided for in the proposed rule prior to the issuance of the notice. This would subject an operator to the immediate withdrawal orders without

any opportunity for discussion of any means to avoid the sanction or curtail its use prior to its application.

MSHA should reissue its proposal to include the criteria that will be used in its POV process in one rulemaking and to maintain a period for discussing mitigating circumstances prior to an automatic issuance of a pattern notice. This would be the most efficient and transparent process to employ and would not adversely affect the safety and health of miners. Rather, it would allow for a period to correct any deficiencies before subjecting a mine to this onerous sanction. For example, the current criterion relies on the number of inspection hours and we believe what those hours actually are must be defined. Discrepancies have been noted in the current round of POV letters.

In similar fashion, S&S rates need to be defined because in the latest round of POV letter one mine in its improvement plan had to go from a rate of 3.0 S&S/100 hours to 4.88. Yes, they had to go up. That obviously was an error but it highlights the need for promulgated criteria. Promulgation of the criteria itself would provide the transparency and simplicity that is consistent with the agency's and industry's goals.

Current 30 C.F.R. § 104.3(b) states that only citations and orders which have become final shall be used to identify mines with a potential pattern of violations. The proposed standard changes this approach that has been followed since 1991 to base the pattern notice review on "violations issued" to make future POV determinations.

The use of "violations issued" to trigger the POV sanction, absent a meaningful opportunity for prior independent review or a hearing, is of particular concern given the deletion in the proposed rule of any prior warning of the issuance of pattern notice and the failure to set out a proscribed process to avoid the issuance of the pattern notice by establishing a time frame within which to discuss mitigating factors referenced in the rules. As no proscribed criteria are articulated in the proposal, it is vague and fails to provide notice to stakeholders of how to avoid this onerous sanction. Coupling this vagary with the absence of any meaningful warning of the notice's impending issuance renders it basically impossible to avoid. Combining these disturbing short-comings with a pattern notice based on enforcement action issued, rather than final orders, denies stake-holders of due process and makes the imposition of the pattern notice prone to

error resulting in withdrawal orders and enforcement actions that may well be invalid.

The standard must provide an avenue for expedited hearings on contested citations that are used by the agency to list an operation as a Pattern of Violation mine. Ideally this expedited hearing provision would also be coupled with the re-start of meaningful Manager's Conferences for all operations. It is imperative that operators know that prior to being subjected to the most onerous enforcement tool in the MSHA tool bag they have a right to make their arguments concerning citations that the operator believes has been poorly evaluated.

I have carefully tracked the contests of my company's contested citations and I see the gravity routinely overwritten and I see resolutions where as many as 50% of the S&S designations we receive are deleted in litigation or settlement. That does not make one feel comfortable that relying on citations issued is acceptable. We agree with NMA's concerns expressed in their comments on the unreliability of the application of the criteria.

According to information released by MSHA's Office of Assessments on January 31, 2011, almost 19% of the violations issued as "significant and substantial" which were litigated in fiscal years 2009 and 2010 were vacated or modified to "non-significant and substantial" as a result of the litigation process.

Similarly, when § 104(d) violations, which alleged an "unwarrantable failure" to comply were litigated in the same period, almost 33% of those violations were either vacated or modified to a § 104(a) violation. Clearly, relying on "violations issued" to impose the punitive sanction of § 814(e) of the Mine Act could well result in erroneous application of the pattern enforcement.

Further, we believe that any criterion that takes into consideration Section 107(a) orders is inappropriate. First, imminent dangers may not be linked to the occurrence of violations. They often result from natural events that cannot be controlled.

In addition, the elimination of a process where an operator is given a chance to improve is contrary to any concept of fairness. It renders the POV solely one of punishment with no opportunity for redemption. No operator who gets the POV will get off in my view, absence closing the mine. That is not what the agency or the industry or labor should strive for.