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**From:** Callaghan, Beth (Rago) [mailto:BCallaghan@PattonBoggs.com] **On Behalf Of** Chajet, Henry

2011 MAR 25 P 3: 21

**Sent:** Friday, March 25, 2011 2:03 PM

**To:** zzMSHA-Standards - Comments to Fed Reg Group

**Cc:** hchajet@pattonboggs.com

**Subject:** RIN 1219-AB73

Attached are the Mining Awareness Resource Group's (MARG) comments on the Proposed Pattern of Violations Rule. If you have any questions, please contact me.

Regards,  
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AB73-COMM-11

March 23, 2011

Henry Chajet  
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The Honorable Joseph Main  
Assistant Secretary of Labor for Mine Safety  
and Health  
c/o The Office of Standards, Regulations, and  
Variances  
U. S. Department of Labor  
1100 Wilson Boulevard  
Room 2350  
Arlington, Virginia 22209-3939

Re: Pattern of Violations RIN: 1219-AB73

Dear Assistant Secretary Main:

The Mining Awareness Resource Group (MARG), a coalition of mining companies, is writing to alert you to the agency's failure to propose a transparent and comprehensible rule for the use of its most severe penalty and enforcement tool: closure orders resulting from a "pattern of significant and substantial (S & S) violations." 76 FR 5719 (February 2, 2011).

We endorse the use of proper rulemaking if the current regulations (30 CFR Part 104) are to be amended, but we believe the proposed rule is contrary to law and must be re-proposed because:

- The proposed rule withholds for future web posting the actual criteria the agency will use for pattern determinations, thereby preventing analysis of its impact and a meaningful opportunity to comment on the proposal.
- The proposed rule violates the Administrative Procedures Act (APA) and Mine Act rulemaking mandates, and exceeds the Secretary's specific authority regarding patterns, by not disclosing the criteria while simultaneously adopting rules to "establish criteria for determining when a pattern...exists," under Section 104(e)(4) of the Act.

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- 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 Review Commission and judicial review of the alleged pattern identification “notice,” prior to closure orders imposed by MSHA inspectors.
  
- The proposed rule will deny employers Mine Act Section 105 citation and penalty contest rights, and due process of law, by using contested, alleged violations to impose closure order penalties, using the pattern of violation provisions of the Mine Act.
  
- The proposed rule will impose requirements for the submission of “safety and health management programs,” for MSHA approval, to gain MSHA consideration of “mitigating circumstances” in the future that might prevent pattern closure order issuance. By so doing, the proposed rule imposes a new pattern penalty and requirement, not authorized by the Mine Act, before any pattern has been formally identified by MSHA.
  
- The safety and health management program submission requirement, as a pattern mitigation trigger, circumvents Mine Act and APA rulemaking mandates for the adoption of mandatory standards. The separate rulemaking both OSHA and MSHA announced to determine if such safety program mandates are warranted and, if so, what program mandates should be included, demonstrates this “end run” around proper rulemaking procedures.

Mr. Secretary, we understand the need for fair and equitable use of MSHA enforcement tools when necessary to achieve safety, as well as the need to reform the MSHA troubled enforcement system. We do not believe, however, that this flawed proposal will enhance safety since it denies the regulated community the opportunity to comprehend its application and submit meaningful comments, while circumventing mandatory procedures aimed at fostering transparent and accountable government. We urge you to revoke, revise and re-propose this rule to address the flaws described above.

Sincerely,



Henry Chajet  
Counsel for MARG