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April 4, 2011

Ms. April E. Nelson
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

Re: RIN 1219-AB73: Comments on MSHA's Proposed Rule for Pattern of Violations

Dear Ms. Nelson:

Coal Operators & Associates, Inc. (COA) is pleased to offer the following comments to the Mine Safety and Health Administration (MSHA or "Agency") concerning its Proposed Rule for Pattern of Violations under § 104(e) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801, 814(e).

COA is a trade association in Eastern Kentucky that includes the producers of most of the regions coal; the manufacturers of mining processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. The issues discussed in this Proposed Rule are of extreme importance to COA's members, as our member companies are subject to the regulations promulgated pursuant to the Mine Act, and mine operators are significantly impacted by any alterations to the existing regulatory scheme.

COA recognizes the importance of the pattern of violations (POV) sanction to the effective enforcement of the Mine Act, and supports the goal of improving transparency and simplifying the POV process both in terms of agency implementation and stakeholder understanding. However, as proposed, this rule would instead make the POV process less transparent and more complex while

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depriving mining companies of their right to due process under the law. In light of the fact that the POV sanction is among the most potent enforcement tools that MSHA has under the Mine Act, the Agency must utilize it so as to protect the health and safety of miners while still ensuring that mine operators receive fair treatment and due process.

I. The Proposed Regulation Violates the Principles of Due Process and Fundamental Fairness

a. The Current POV Process

Currently, 30 C.F.R. § 104.3(b) states that only citations and orders that have become final shall be used to identify mines with a potential pattern of violations. The proposed rule changes this approach, which has been followed since 1991, and instead allows POV determinations to be based on “violations issued.” For purposes of POV calculations, then, an operator will now be presumed guilty as soon as an inspector accuses him of violating an MSHA regulation. The proposed rule also deletes those provisions granting prior warning to mine operators before the issuance of a pattern notice, and fails to proscribe a means by which operators can present mitigating factors and, where possible, develop a plan with MSHA to avoid the imposition of this onerous sanction. MSHA claims these changes are necessary in light of the large backlog of contested violations pending before the Federal Mine Safety Health Review Commission (“Commission”), and, according to MSHA, only a fraction of such contested violations get vacated or modified to non-significant and substantial (S&S). MSHA argues that because of this backlog, the final order and notice provisions contained in the current rule hinder enforcement and do not allow the Agency to review a mine’s complete recent compliance history.

As an initial matter, COA disagrees with MSHA’s characterization of the current POV process, as well as its rationale for changing the criteria upon which POV status may be based. It is well understood in administrative law that federal agencies at different times exercise executive, legislative and judicial powers. In other words, federal agencies are the judge, jury and executioner in the promulgation and enforcement of federal regulations. Given this powerful leverage MSHA has over mine operators, it seems particularly unfair for MSHA to then bypass legitimate challenges to alleged citations and impose admittedly the most onerous enforcement action under the Mine Act before a finding of guilt is made. Indeed, MSHA’s primary justification for this change is the Agency’s need to circumvent the normal adjudicatory process to permit the Agency to consider backlog cases as part of a mines history for POV purposes. Unfortunately, the Agency has contributed to the backlog by eliminating the conference process and leaving operators with no choice other than the formal hearing process before the Commission. Given this understanding, it is therefore difficult to see any justification for MSHA responding to the slow operation of the adjudicatory

system by denying mine operators their fundamental right to be heard before being sentenced.

Furthermore, MSHA's claim that only a fractional number of contested violations are vacated or modified is both inaccurate and irrelevant. According to information released by MSHA's Office of Assessments on January 31, 2011, almost 20 percent of violations issued as S&S, which were litigated in fiscal years 2009 and 2010, were vacated or modified to "non-S&S" 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 percent of those violations were either vacated or modified to a § 104(a) violation. Clearly, then, 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 mechanism. Moreover, as discussed in greater detail below, because the proposal is silent on the number of violations that it will take to establish a POV, it is likely that almost any margin of error could result in multiple mines being erroneously subjected to this stringent penalty. MSHA's reliance on this statistic, therefore, does not address the serious concern of mines being mistakenly placed on the pattern of violations list.

There is also a very real possibility of MSHA erroneously tabulating a mine's inspection history. The Office of Inspector General of the U.S. Department of Labor (OIG) recently reported on the accuracy of MSHA's efforts to screen mines for POV sanctions. During the five POV screenings performed from 2007-2009, MSHA district managers sent potential POV letters to 68 mines. Following the completion of the evaluation period provided by the current 30 C.F.R. Part 104, those same district managers recommended that 9 mines be given a POV notice. However, upon further evaluation of the underlying violations by MSHA attorneys or review by the Federal Mine Safety and Health Administration, the Agency determined that 6 of the 9 mines (66 percent) no longer met the POV criteria.

Additionally, the same Inspector General's report found that MSHA's POV computer application used from 2007 to 2009 generated unreliable results on each of the five occasions it was used to screen for POV status. For example, OIG found that on all five occasions the MSHA application contained a value which could have caused a vacated citation to be counted as a valid final citation. As a result, the program could have over-counted citations for a specific mine. Similarly, citations and orders which had been issued to a prior owner of a mine could be associated with the current owner, resulting in an over-count of citations. The program was also found to incorrectly sum two columns that represented "unwarrantable failure" orders in such a manner as to incorrectly include a mine that did not meet the screening criteria for S&S § 104(d) final orders.

Finally, in the absence of any independent review, the risk of an erroneous application of the pattern notice and resulting withdrawal orders may be

increased by MSHA's failure to provide its journeyman inspectors with periodic retraining. Lack of periodic retraining reduces the assurance that MSHA mine inspectors are adequately trained to conduct their duties and properly apply classifications, such as S&S and "unwarrantable failure," to violations they encounter. According to the OIG, 56 percent of MSHA journeyman inspectors did not attend the required refresher training in FY 2006 or 2007.¹ Moreover, MSHA training records show that 65 percent of the MSHA journeyman inspectors who failed to attend the required retraining sessions in FY 2006 or 2007 had still not completed retraining by the end of fiscal year 2009.² Over 27 percent of the 264 journeyman inspectors who responded to the OIG's survey stated that MSHA did not provide them with the technical training they needed to effectively perform their duties.³

The information above indicates that the POV rule should not be altered in the manner proposed, as MSHA has shown no adequate justification for these substantial changes. Not only does MSHA point to operational issues of its own hearings system as reason to deny notice and meaningful opportunity to be heard to mine operators, but MSHA also bases its changes on the false assumption that citations are rarely issued in error, and that contested violations are infrequently overturned or modified. Inspectors are not always right. Indeed, the above data belies the publicly articulated belief of the Agency that some mine operators contest enforcement actions to avoid pattern notices. There are clearly a number of legitimate legal reasons to administratively challenge enforcement actions, which is a statutory right granted by the Mine Act, and those challenges have been frequently met with success. For these reasons alone, MSHA should not adopt the proposed changes to the POV rule.

b. The Fifth Amendment's Guarantee of Due Process of Law

Perhaps even more importantly, the proposed rule clearly runs afoul of the Constitutional right to due process. The Fifth Amendment of the U.S. Constitution guarantees, in relevant part, that "[n]o person shall be...deprived of life, liberty, or property, without due process of law..." The use of "violations issued" to trigger the POV punitive sanction absent a meaningful opportunity for prior independent review or hearing, as well as the proposed rule's elimination of notice provisions, deny mine operators this Constitutional right to notice and the opportunity to be heard.

When considering due process issues, courts "must determine whether [a party] was deprived of a protected interest, and, if so, what process was his due..."⁴ It is clear in the case of the POV sanction that shutting down a mining

¹ *Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining*, DOL OIG Report, Mar. 10, 2010, o. 6.

² *Id.* at p. 7.

³ *Id.* at p. 3.

⁴ *See, e.g., Logan v. Zimmerman*, 455 U.S. 422.

operation amounts to a substantial deprivation of property – both physical property as well as the economic benefits that accrue from mining operations – deserving of Fifth Amendment protections.⁵ Mine operators, therefore, must be afforded due process protections in the adopted regulatory POV scheme.⁶

In determining what process is sufficient to satisfy the due process guarantee of the Fifth Amendment, courts have routinely held that “there can be no doubt that at a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”⁷ The Supreme Court has also stated that “process which is mere gesture is not due process.”⁸ Although the exact procedure needed to satisfy due process changes with context, the Supreme Court has held that the extent of prior evidentiary hearing required before a deprivation of property occurs is determined by three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used; and 3) the government’s interest.⁹

As discussed above, the private interest affected in this instance is the ability of a mine operator to manage a mine free from interference by federal officials. This is a substantial interest which, under the proposed POV regulations, MSHA would be permitted to deny without *any* prior hearing. Furthermore, as already shown in detail above, the risk of erroneous deprivation of that property interest is significant given the potential for mistaken issuance of citations and POV calculations.¹⁰ This risk is exacerbated by the fact that even a relatively small number of mistakes on the part of MSHA inspectors can result in mines being erroneously placed in POV status.

⁵ Licenses of multiple types have been held to constitute property warranting due process protections by the courts. *See, e.g.,* Bell v. Burson, 402 U.S. 535 (Supreme Court held that the state violated a motorist’s due process rights by denying him a meaningful prior hearing before suspending his driver’s license); Dixon v. Love, 431 U.S. 105 (Supreme Court held that a truck driver could have his license suspended or revoked prior to an administrative hearing where that revocation was based on final convictions of traffic offenses and where a full administrative hearing was available within 20 days of the revocation).

⁶ *See, e.g.,* Goss et al. v. Lopez et al., 419 U.S. 565 (“In determining ‘whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake’...the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, ‘is not decisive on the basic right’ to a hearing of some kind. The Court’s view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.”)

⁷ *Mullane v. Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306. *See also* *Grannies v. Ordean*, 234 U.S. 385, 394 (“The fundamental requisite of due process of law is the opportunity to be heard”).

⁸ *Mullane v. Central Hanover at* _____.

⁹ *Matthews v. Eldridge*, 424 U.S. 319.

¹⁰ *See also, e.g.,* Goss et al. v. Lopez et al., 419 U.S. 565 (In addressing a school disciplinary process, the Supreme Court stated that “...the concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, this is not the case...the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against...The [Due Process] Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct...”).

The final factor utilized in determining what process is required to satisfy procedural due process is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would impose. Unquestionably, the government has a substantial interest in seeing that the enforcement scheme found in § 104(e) of the Mine Act is successfully implemented. However, even in the face of such a compelling government interest, due process must be afforded to those parties directly affected by government action. Indeed, Congress, while routinely recognizing the importance of MSHA's mission, nevertheless established an enforcement scheme in the Mine Act that specifically grants mine operators the right to contest the issuance of any citation, order or proposed civil penalty within 30 days of its issuance. The proposed rule, however, while maintaining the right to contest a citation, grants the Agency authority to impose the most severe enforcement tool provided for under the Act long before the mine operator has a chance to be heard. Such a system cannot possibly afford adequate procedural protections to mine operators.

MSHA's actions are particularly unwarranted given the fact that the POV sanction is not a tool designed to address emergency situations. While it is true that courts have found exceptions to the general requirement of prior notice and a hearing in emergency situations where a significant government interest justifies delay of a hearing until after the seizure of property rights, no such exception exists in the case of POV violations. Congress has empowered MSHA with ample authority to protect the health and safety of miners in emergencies under the Mine Act. Section 107(a) gives MSHA authority to close a mine without a prior hearing whenever an "imminent danger" exists. These imminent danger orders remain in effect until the "...condition or practice which caused such imminent danger no longer exist[s]." 30 U.S.C. § 817(a). In addition, MSHA can seek a temporary restraining order, temporary injunction and permanent injunction in the appropriate federal district court whenever "...the Secretary believes that the operator...is engaged in a pattern of violation of the mandatory health or safety standards of this Act, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of the miners." § 108(a)(2); 30 U.S.C. § 818(a)(2). In light of such ample authority to stop operations at dangerous mine sites, MSHA may not then dispense with the notice and hearing procedures during the § 104(e) POV process in a manner contrary to due process and the statutory enforcement scheme of the Mine Act.

The important private interest at stake, the high likelihood of erroneous deprivation of that property interest and the compelling but non-emergency government interest involved all lead to the conclusion that MSHA must provide notice and a hearing to mine operators before imposing a POV sanction. To do otherwise would violate the Fifth Amendment's guarantee of due process under the law.

II. The Final POV Rule Must Ensure that Mine Operators Receive Adequate Notice and a Fair Opportunity to be Heard

a. POV Sanctions Should be Based Only on Final Orders, and MSHA Should Retain the Notice Provisions Contained in the Current POV Rule

COA finds MSHA's own previous due process considerations during the POV rulemaking process informative on the issue of what notice and hearing provisions should be included in the POV regulations. In the publication of the current version of the POV Final Rule, MSHA stated that "in order to avoid inequities regarding which mines are placed on a pattern, *the Agency must make ample provision for due process* when applying the broad framework established by Congress...MSHA will consider *only final citations and orders* when identifying mines with a potential pattern of violations." 55 Fed. Reg. 31129, July 31, 1990 (emphasis added).

Additionally, MSHA reasoned that "the initial screening factors are coupled with procedures affording parties *full and fair notice* of the Agency's initial determination that a potential pattern may exist at a mine. Application of these procedures will ensure that operators are made aware well in advance of the circumstances giving rise to the issuance of a pattern notice and will have a *reasonable opportunity to address these circumstances*...A number of commenters stated that fairness requires prospective application of the initial screening process. The Agency agrees." *Id.*

The Assistant Secretary himself, in his capacity as Administrator for safety and health at the United Mine Workers of America (UMWA), commented on the importance of the notice provisions contained in the current POV Rule. In his letter to MSHA regarding the proposed version of the current POV Rule, Asst. Sec. Main stated that "all mines which are under review for potential pattern of violations...shall be given notice to that effect by the Agency...This notice is designed to give operators the opportunity to take concrete actions to improve the citation history at the mine and to implement a remedial plan. MSHA should evaluate these [and] similar company efforts to correct a pattern of violations when the pattern notice conference is held." He further stated that "when MSHA determines that a mine under review is subject to a pattern notice, the Agency should inform the operator...of the Agency's intent to issue a pattern notice. The letter...should specify the basis for the determination and should give the operator...15 calendar days after receipt to request a conference. At the conference there should be a review of the citation history..."

It is clear, then, that MSHA included the current notice and procedural safeguards, including basing POV decisions only on final orders, to ensure

fairness to mine operators. Deleting those provisions without establishing alternative measures denies operators that fundamental fairness, and violates the Fifth Amendment. Nothing has occurred to warrant these changes other than the Agency's need to develop a political response to the tragic events of 2010 that shields itself from its failure to use the tools Congress previously provided.

MSHA also acknowledged, in the current rule, the potentially substantial loss of property that a POV violation can entail when drafting the current rule. Importantly, MSHA stated that "the Agency realizes that the statutory requirements for terminating a pattern of violations sequence place a great burden on the operator of the mine. An inspection of the entire mine, particularly a large underground mine, that reveals no violations of a significant and substantial nature may be difficult to achieve." MSHA itself therefore admitted that, once a mine is placed on POV status, it is virtually impossible to avoid a withdrawal order. As previously mentioned, MSHA has ample authority to shut down mines and protect miners in emergency situations. There is thus no adequate justification for MSHA to streamline the POV process in such a way as to eliminate all procedural safeguards for mine operators.

b. At a Minimum, Notice and a Hearing Are Required Before a Mine Operator Can be Deprived of His Property

If MSHA will not continue its current practice of only basing POV decisions on final orders and citations, MSHA must at an absolute minimum promulgate a POV rule that provides mine operators with sufficient notice and an opportunity to be heard before a POV order may be issued.¹¹

COA understands MSHA's concerns regarding the current backlog of cases and slow-moving adjudication process. However, altering the POV process in the manner proposed is neither an appropriate nor a fair response. Rather, MSHA and the Federal Mine Safety and Health Review Commission should adopt, through notice and comment rulemaking, formal measures allowing expedited considerations of those cases involving mines at risk of being placed on POV status. A formal mechanism to consolidate and expedite issued violations being contested by potential POV operators would allow MSHA to review a mine operator's entire recent violation history within a reasonable timeframe, while still affording mine operators adequate opportunity to contest potentially erroneous citations before becoming subject to stringent penalties. In other words, MSHA would have a means to penalize the "bad actors" in the system without violating the due process rights of ALL mine operators. Additionally, this could be accomplished easily within the framework of the existing adjudicatory system.

¹¹ Mathews v. Eldridge, 424 U.S. 319, 333 ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society").

It is clear that the Due Process Clause of the Fifth Amendment requires MSHA to put procedural mechanisms in place in any Final POV Rule that provides mine operators with adequate notice and an opportunity to be heard. While the current POV rule ensures fairness and the right to be tried before being convicted, the proposed rule takes out nearly every single procedural protection contained in the current rule. Instead, mine operators can be issued withdrawal orders when an inspector merely alleges a safety infraction, and are given no prior notice of a potential POV sanction. Such a system is in clear violation of the law. Rather than change the POV process, MSHA should instead address the underlying issue – a backlog of cases causing prolonged adjudicatory periods – by formalizing a procedure to expedite the full and fair hearing of cases ripe for POV review. Alternatively, should MSHA make changes to the POV Rule, MSHA must retain adequate notice provisions and establish a pre-sanction hearing process in which mine operators are given a fair opportunity to present their case to an independent reviewer. To do otherwise would violate the due process rights guaranteed by the Fifth Amendment.

III. POV Criteria Should be Subject to Notice and Comment Rulemaking Procedures

MSHA is seeking comment 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). Simply put, all such criteria should be published in the Federal Register and be subject to the notice and comment provisions of the Administrative Procedures Act and the Mine Act. Section 104.2 of the proposed rule lists only generic categories of information that will be reviewed, without quantifying or explaining how such data will be applied to issue a pattern notice. The proposed rule also seems to anticipate that POV criteria will be fluid and subject to change without any established method for notice and comment rulemaking. While it is impossible to comment on POV criteria that have not yet been listed in the proposal, COA strongly objects to this suggested criteria method, as it is neither transparent nor simple. Rather, the proposed rule blatantly fails to inform stakeholders of what is expected of them to avoid a pattern notice, and offers no opportunity for comment on specific criteria before the rule becomes effective. Given the serious consequences stemming from being placed on a POV, this lack of transparency is extremely troubling.

While the Secretary of Labor has broad discretion to establish criteria for determining when a pattern of violations exists, that discretion does not extend to establishing POV criteria without notice and comment rulemaking. Section 104(e)(4), 30 U.S.C. § 814(e)(4), requires that the “...Secretary shall make such *rules* as he deems necessary to establish criteria for determining when a pattern of violations...exists” (emphasis added). The Office of Inspector General has also specifically recommended that MSHA seek stakeholder input on the POV screening criteria in its report dated September 29, 2010, pages 3, 24. MSHA has clearly not adopted this approach in the proposed rule. Rather, by not

identifying or publicizing any specific criteria in a Final POV Rule, and by instead providing for the periodic development and revision of specific criteria, MSHA is granting itself the ability to constantly change the rules of the POV process with no public notice or comment period. Such an approach is not only fundamentally unfair, but it also blatantly lacks the very transparency MSHA seeks to achieve with this rule revision. MSHA should remedy this issue by adopting a formal rulemaking process by which POV criteria must be established.

Our concern with the failure of the proposal to establish a rulemaking process for POV criteria is exacerbated by the fact that the proposed rule eliminates any potential for discussion of how the specific criteria should be applied to a mine before the issuance of a pattern notice. Section 104.3. Rather, it appears that the rule anticipates an “automated” process for the issuance of a pattern notice based on a mine operator’s monitoring of criteria posted on MSHA’s website. Furthermore, no specific procedure is described for consideration of mitigating criteria prior to the issuance of the notice. In other words, operators could be subjected to immediate withdrawal orders in non-emergency situations without having had any opportunity to discuss the underlying violations, application of the POV criteria (let alone the initial listing of such criteria) or means in which the operator might avoid the imposition of the sanction.

COA urges MSHA to reissue its proposal, and to include in that proposal the criteria to be used in the POV process, as well as an established mechanism by which mitigating circumstances are discussed prior to any issuance of a pattern notice. Such a proposal would be efficient, transparent and consistent with the Agency’s and industry’s goal of protecting the safety and health of miners.

IV. Economic Analysis

A review of MSHA’s cost/benefit analysis in the proposed rule also indicates that the Secretary has both overestimated the presumed benefits and underestimated the costs associated with the rule.

The stated benefits of the proposed rule are based on the premise that specific POV criteria will be posted on MSHA’s webpage, and that MSHA will develop a searchable database of compliance information which will then be used to determine whether a mine is approaching proposed POV criteria levels. Similarly, the estimated costs are based upon an unrealistic estimate of the time it will take for a mine operator to evaluate its enforcement history and extrapolate forward to the end of the POV cycle. The proposed rule further significantly understates the costs to a mine placed on a POV.

MSHA has the ability to more accurately estimate both the cost and the benefits of the proposed rule. In the interest of transparency, and in light of

President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," it must do so.

a. Benefits

MSHA's estimation of benefits is based upon the supposition that mine operators who see that their mine is approaching a POV will institute an MSHA-approved safety and health management program to lessen the probability of being placed on a POV. MSHA estimates that implementation of such a plan will result in approximately 50 mines per year averaging three fewer nonfatal injuries in the first year after implementation of the MSHA-approved plan. Utilizing a "willingness-to-pay" methodology, MSHA calculates that the proposed rule will result in monetized benefits of approximately \$9.3 million per year.

MSHA's analysis is flawed in that it is based upon an assumption that the specific criteria for issuance of a POV notice will only be applied prospectively. However, the proposed rule does not limit MSHA to prospective application of the specific criteria, and historically MSHA has consistently applied POV specific criteria *only retroactively*. For example, in the most recent POV cycle, MSHA announced the specific POV criteria on September 28, 2010 and applied it retroactively over a 12-month period ending August 31, 2010.

The failure of the proposed rule to limit retroactive application of specific POV criteria renders MSHA's estimate of benefits meaningless. It is based upon a premise which is not stated in the proposed rule and which is contrary to MSHA's historical practice.

Additionally, the proposed rule speculates that MSHA will successfully develop a searchable database of compliance information which can be used by mine operators to determine whether their mine is approaching proposed POV criteria levels. Historically, MSHA has had problems bringing computer programs online on a reliable schedule. The repeated delay in implementation of the MSHA Standardized Information System, for example, demonstrates MSHA's inability to fulfill promises of timely, reliable computer development. It is simply inappropriate for MSHA to base its estimation of benefits on a speculative promise to develop a computer program that will allow mine operators to track their exposure to the specific POV criteria.

Lastly, and most importantly, the Agency provides no rational basis for its assessment that implementation of a safety and health management program will result in three fewer nonfatal injuries. MSHA has no basis to analyze the effectiveness of such programs as the Agency itself is still grappling with the very question of what constitutes an effective safety and health management program. Moreover, to assume that injury reductions at mines having received

PPOV letters were attributable to receipt of the PPOV letter is without basis and is not sufficient justification for calculating perceived benefit to be derived from the proposed rule.

b. Costs

MSHA's cost analysis is similarly flawed. MSHA estimates that the yearly cost for all mine operators to monitor their POV performance will be less than \$1 million per year. This was based upon the assumption that it will take a supervisor an average of 5 minutes per month to monitor each mine's performance using MSHA's website. Such an assumption is patently unrealistic. Five minutes would be the minimum time that it would take a person familiar with MSHA's webpage to access the relevant data. It would certainly take much longer for that individual to then study the data and extrapolate the potential impact of future MSHA inspections. At a minimum, MSHA should expect that accessing the MSHA database would only be the first step in a more involved analytical process which would consume a significantly greater amount of time than MSHA has assumed.

Another issue with MSHA's analysis is the assumption that such a monitoring process would only need to be performed monthly. For many underground mines MSHA enforcement activity occurs weekly, if not daily. It would be more reasonable for MSHA to assume that a mine operator would update his POV exposure analysis following any MSHA enforcement activity that occurs at the mine, given that they will no longer be afforded "due protection" rights before POV sanctions are implemented.

MSHA acknowledged that it "does not have an historical basis from which to estimate the potential costs that would be incurred by a mine on a POV." Nevertheless, MSHA has projected that a typical mine would lose about one-half of one percent of revenue as the result of closures resulting from placement on a POV by MSHA. MSHA stated that the closures would result in one or two days of closure for a large mine and one day or less for a small mine, and that as a result of these closures, "a typical mine would lose about 0.5 percent of revenue" which "is about \$218,000." Unfortunately the Agency has grossly underestimated the potential cost of the proposal.

MSHA's estimations also grossly understate the economic impact of the POV withdrawal order sanction. For example, in underground coal mines in 2010, the most frequently cited standard was 30 C.F.R §75.400, which typically involves an accumulation of combustible material along conveyor belt lines. MSHA issued 8,995 violations for §75.400 in 2010, and those violations were almost always marked as "significant and substantial." Withdrawal orders issued for violations of §75.400 would result in the loss of all production occurring on that beltline, the impact of which MSHA failed to adequately consider. Similarly,

many other frequently cited standards, including those contained in the Rules to Live By Enforcement Initiative in Metal/Nonmetal Mines and Coal Mines, are also virtually automatically listed as S&S, and could likewise result in a very costly withdrawal order. MSHA must take these considerations into account when assessing the costs of the proposed rule.

In comments submitted to MSHA on the proposed regulations to lower miner's exposure to respirable coal mine dust, E^xponent Engineering and Scientific Consultants valued the loss of 1-hour of production from an underground longwall mine at \$43,668. Applying this calculation, revenue loss at a mine would exceed more than \$1 million per day, almost 5 times the Agency's estimate of the revenue for an average mine. As such, one underground longwall coal mine closed for 2-days as a result of being placed on POV would incur revenue losses equal to the Agency's entire estimate for the 10 mines the agency projects will be placed on POV.

MSHA has also failed to contemplate the adverse economic impact that this proposal would inflict upon small mine operators subjected to the POV withdrawal order sanction. By their very size and nature of ownership such mines can ill afford the loss of production that would be imposed by MSHA. They oftentimes do not have the necessary financial resources in reserve to withstand such an interference with production. Additionally, many such operators would be at a loss to navigate the searchable database the proposal anticipates to determine their possible POV status

MSHA has the historical data available to provide stakeholders and the public with a much more accurate estimation of the effective cost of the planned POV sanction. It should do so before proceeding further.

V. Conclusion

We understand the need for regulation, and support MSHA using all of the enforcement tools Congress provided in the Mine Act when necessary to achieve safety. However, the proposed rule will do little to advance safety. COA believes there is a need for reform of the POV system but we cannot support reforms that deprive mine operators of the protections afforded them under the Constitution and circumvent mandatory procedures aimed at fostering transparent and accountable government. The proposed rule will worsen an already broken system and we urge the agency to revoke this proposal.

Sincerely,

David A. Gooch

President