
From: Ryan W. Ernest [mailto:R.Ernest@activeminerals.com]
Sent: Thursday, April 14, 2011 12:50 PM
To: zzMSHA-Standards - Comments to Fed Reg Group 2011 APR 14 P 1:01
Subject: Pattern of Violation Rule

Good morning,

I am a miner and a safety professional. I would like to offer the following comments regarding the subject rule and the proposed Pattern of Violations issue.

MSHA needs to provide the criteria for POV in order to adequately assess the rule.

It is obvious that one of the most important aspects of the POV program is what criteria will be used to determine whether a POV exists. Yet MSHA asks for comments on the program without having disclosed those criteria, except in very general terms. (Sec. 104.2) It is thus very difficult if not impossible for commenters on the proposed rule to be able to thoroughly understand and assess the proposed program. MSHA must re-propose the rule to include the criteria it proposes to use in determining that a POV exists, in order to give the affected parties adequate notice and opportunity to comment on the rule.

MSHA should restrict or delete the provision whereby POV status is based on issued citations rather than final orders, and should restore PPOV.

The imposition of punitive sanctions based on issued citations on which the operator has not been given an opportunity to have independent review or hearing before the sanctions are imposed, would constitute a denial of an operator's constitutional right to due process.

The proposed rule not only removes the protection that requires that only final orders are counted in determining a POV, but also deletes the current provision for "proposed" POV (PPOV) notification, which currently allows the mine operator to sit down with a District Manager and review the basis for the proposed POV. Under the rule as proposed there is no assurance that a mine operator would not suffer the punitive sanctions of POV status based upon citations that have not been subject to any opportunity for a hearing or other procedural protections required by due process considerations. MSHA can easily make mistakes in assigning an operator to POV, and there are no procedural safeguards in the proposed rule for a second look at POV status.

MSHA needs to explain how vacated citations/orders will affect POV status.

MSHA has not clarified in the proposal how it will deal with the situation where "issued" citations/orders that form the basis for a POV finding are subsequently vacated while the mine operator is still under POV status. There needs to be an expedited procedure to review POV status once triggering citations/orders are vacated by the agency in settlement or by litigation, and to remove operators from such status if - due to the vacating of citations/orders - they no longer meet the initial POV criteria.

MSHA should clarify the proposed rule's provisions on mitigating circumstances.

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As currently written, the proposed rule is unclear and confusing about how much discretion MSHA would retain in deciding whether a given mine is subject to POV sanctions, and what, if any, objective factors would guide that discretion. The proposed rule, section 104.2 (a) lists seven items that would be taken into account in determining the criteria for POV, all of which, it appears, will (when MSHA develops the actual criteria) be expressed numerically.

The proposed rule also states an eighth factor: "mitigating circumstances." Under the proposal, MSHA would consider an operator's effective implementation of an MSHA-approved safety and health management program as a mitigating circumstance. MSHA has, of course, embarked on a separate rulemaking regarding "safety and health management programs." MSHA Fall 2010 Regulatory Agenda, RIN: 1219-AB71 MSHA does not explain how it intends the two rulemakings to intersect. MSHA has not, to our awareness, determined what it considers "effective implementation" of a health and safety management program, or how it would prevent decisions to approve or disapprove a management programs from being made arbitrarily.

Thank You,

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