

My name is Truman Chidsey and I am the Director of Corporate Safety Services for Vulcan Materials Company. I appreciate the opportunity to provide comments concerning the proposed rule on the Pattern of Violations.

Vulcan Materials, based in Birmingham, Alabama, is the nation's largest producer of construction aggregates, a major producer of other construction materials including asphalt and ready-mixed concrete and a leading producer of cement in Florida. Vulcan currently operates 255 MSHA-regulated facilities across the country.

Although Vulcan fully supports the position that mine operators who repeatedly violate mandatory safety and health standards should face appropriate sanctions, MSHA's proposed rule contains modifications to the existing regulations which we find objectionable.

MSHA has done a commendable job of creating a POV single source page on its website whereby an operator can view the current Potential POV (PPOV) criteria as well as view an evaluation of a mine's potential of being considered for a PPOV. However, Vulcan believes that the specific POV criteria to be used for selecting operators for POV should be detailed in the proposal itself. These criteria are not simply guidance, but are intended to be binding criteria that will determine whether mines are subject to substantially increased enforcement. It is essential that the criteria not be a moving target especially if operators are expected to monitor their own performance to avoid POV status.

Vulcan does not support the proposed rule in which the current provision allowing for Potential POV notification of a facility has been deleted. This notification allows an opportunity for remedial steps to be taken, as well as an opportunity for the operator to meet with a district manager to review the basis for a potential POV designation. If there are inaccuracies, irreparable harm can come to operators erroneously placed into a pattern when their operation's citation history doesn't warrant it.

As MSHA notes, Congress intended for the POV program to apply to "mine operators with a record of repeated S&S violations. . . who have not responded to the Agency's other enforcement efforts." Vulcan is concerned that the proposed rule does not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Rather, MSHA's criteria are based on multiple violations. Thus, under the current proposal, a facility can be placed into PPOV status as a result of a single inspection with multiple citations, or as a result of one or two inspections with few citations, followed by one with a large number of citations. However, a facility is not currently placed into full POV status unless it fails to improve its performance over a period of time. If there is to be no official PPOV status under the

proposed rule, the problem is that it may be difficult, if not impossible, for a mine operator to determine if a facility is threatened with POV status. This is clearly not the Congressional intent for the POV tool, and a revision of the rule should squarely address this problem.

The most objectionable aspect of the proposed rule is the elimination of existing requirements that only citations and orders that have become final are to be used to identify mines with a potential POV. Vulcan understands MSHA's preference to base POV status on citations and orders issued, as opposed to final orders, because there can be a substantial delay in the final determination of a citation or order challenged by an operator. This delay hampers MSHA's ability to use POV as a timely tool to address current problems. However, it is essential to note that, if actions are to be based upon non-final orders, they may not be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment prohibits the federal government from depriving citizens of liberty or property without due process of law, and this means that actions that are punitive cannot be taken without appropriate access to review.

In seeking to strengthen their justification to eliminate final orders, MSHA cites statistical evidence that "fewer than one percent of citations are reversed," based on 700,000 citations issued between 2006-2010. What MSHA does not provide, however, is the percentage of *contested* citations that are vacated or modified. The number of citations that are vacated or modified as a percentage of the total number of violations assessed has much less relevance to this process than the number of those that are reversed or modified as a percentage of the number contested. MSHA further neglects to take into account the number of citations that are threatened and/or issued, only to be informally vacated or otherwise dismissed at the MSHA Field Office level, which is a regular occurrence throughout MSHA's regions.

While there is substantial evidence that MSHA is not always correct in their interpretation of the regulations, MSHA wishes to change the regulations in such a way that does in fact assume that all citations are correctly issued. The potential for mine operators to be placed on a pattern of violations based on citations that may be vacated or modified at a later date should cause any reasonably prudent person to conclude that this change to the existing regulation is unjustified and unreasonable.

In summary, while Vulcan Materials Company fully supports all efforts to improve the safety and health of miners in this country, we feel that MSHA already has the necessary tools at its disposal to identify operators with a pattern of violations and to address the pattern with appropriate enforcement action. The proposed rule only increases the potential for a mine to be placed on a pattern of violations without sufficient justification for doing so, rather than improving the safety and health of our miners.

Thank you for this opportunity to provide comments on this proposed rule.