

# Pattern of Violations

Jason Nutzman, Dinsmore & Shohl, Legal Counsel, presented **Pattern of Violations** to the West Virginia Mining Symposium.

MSHA's Pattern of Violations rule has a background of Section 104(e) of the Mine Act. If an operator has a Pattern of Violations that are S&S, it shall be given written notice that the possibility of a pattern exists. The operator then has a window of time to work through its history and show MSHA why it should not be on the pattern. However, if MSHA does put the operator on the pattern, any S&S citation found within 90 days, even a 104(a) S&S, will cause the issuance of a withdrawal order. Termination shall occur only when an inspection of the entire mine by MSHA finds no S&S violations or no withdrawal orders have been issued within 90 days of the issuance of a pattern notice.

Section 104(e) of the Mine Act

included the POV provision to provide MSHA with an additional enforcement tool. This provision was included following the Scotia mine disaster in 1976 after it was determined the operator had a chronic history of persistent and serious violations that were repeatedly cited by MSHA. Congress intended the POV provision for operators who failed to respond to the agency's other enforcement efforts.

MSHA issued a new final rule to require the mine operator to monitor its performance using MSHA's monthly monitoring tool. The goal was to simplify the existing POV criteria and improve consistency in applying the POV criteria to more effectively achieve the Mine Act statutory intent. The executive summary of the purpose of the new final rule says "safe and healthful conditions can be restored at non-compliant mines." It "strengthens MSHA's ability to focus on those mine



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operators who demonstrate a disregard for the health and safety of miners through a recurring pattern of significant and substantial (S&S) violations" and focus on the most troubling mines."

The major changes in the final rule include: MSHA will still review all mines for a POV at least once each year; eliminates initial screening and the PPOV notice and review process; eliminates existing requirement that MSHA can consider only final orders in

its POV review; general criteria will be identified and posted on its website; termination of POV will be the same; a monitoring tool will be available on the MSHA website; and the operator can request expedited temporary relief from a POV closure order.

Operations can do a number of things under the Final Rule with regard to pre-POV preventative issues. Operators can monitor compliance history and utilize the online monitoring tool. They can consider drafting a CAP program with specific details of concrete and achievable goals at the mine. These might include setting forth goals with due dates for compliance, describing how goals will be achieved, setting dates for additional training of all miners, including describing what additional training will be provided, and listing responsible facilitators of the additional training, and consider implementing auditing programs which are led by man-

agement officials of other mines who have no day-to-day contact at the subject mine. Operators can also consider what engineering controls can be amended or implemented. These might include: proximity detection, additional ventilation controls, cameras, additional equipment purchases, ventilation training, respirable dust control program, rock dust program, belt installation program, clean-up program, and safe workplace program.

The Final Rule went into effect on March 25, 2013 and there is an industry challenge in the Sixth Circuit. The Sixth Circuit have scheduled oral argument in Cincinnati, Ohio and a decision should be issued sometime in late fall of 2014.

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## Industry Challenge to Pattern of Violations

In his presentation to the West Virginia Mining Symposium, Jason Nutzman, Dinsmore & Shohl, described the **Industry Challenge in the Sixth Circuit**. The Final Pattern of Violations (POV) rule went into effect on March 25, 2013. On March 19, 2013, the National Mining Association (NMA), the National Stone, Sand, and Gravel Association (NSSGA), the Kentucky Coal Association, the Ohio Coal Association, and the Portland Cement Association filed a petition for review in the United States Court of Appeals for the Sixth Circuit. On March 20, 2013, Murray Energy Corporation filed a petition for review in the United States Court of Appeals for the Sixth Circuit. The industry challenge is often referred to collectively as the "National Coalition."

The National Coalition set forth the following issues for the Sixth Circuit to decide: the Final Rule inappropriately relies on non-final citations and orders that are allegedly S&S even though these

are mere allegations and not final orders of the Federal Mine Safety and Health Review Commission. The Final Rule eliminated the PPOV notification system which had resulted in improved safety and provided a constitutionally sound method to address potential government errors that would lead to improper closure order sanctions. The National Coalition set forth the following issues for the Sixth Circuit to decide. The Final Rule removed the procedural safeguards of the PPOV notification system which guarded against erroneous deprivation of property rights. The Final Rule failed to include in the Federal Register the criteria for determining when a mine has a Pattern of Violations. The Final Rule failed to include or support required economic and feasibility analyses and justifications in violation of federal regulatory mandates and the Mine Act. The Final Rule discarded the prior rule's successful incentives and opportunities to increase safety in favor of a new

rule lacking any basis to suggest that it would improve safety equally or better.

There were a number of interesting facts raised by the National Coalition in their opening brief. Congress adopted the Pattern of Violations tool to target operators with an established Pattern of Violations as a tool of last resort. MSHA recognized that its own inspectors "over-write" citations resulting in many unwarranted S&S citations that require judicial review. In 2009-2010, almost 20 percent of litigated S&S citations were vacated or modified to non-S&S. In 2011, 70 percent of all issued S&S citations were subject to formal contest and 33 percent were vacated, dismissed, or modified. This amounts to more than 11,300. In 2010-2011, Congress contemplated amending the Mine Act to expand MSHA's authority under Section 104(e) to consider non-final S&S citations and orders in POV assessments but ultimately rejected MSHA's request for expanded POV author-

ity.

There are specific arguments in the challenge. The POV rule exceeds the Secretary's authority under the Mine Act because Section 104 prohibits MSHA from making POV determinations based on non-final citations and orders. Essentially, a citation or order issued by an inspector – prior to judicial review – is only an allegation. If Congress meant POV sanctions to apply to "patterns of citations and orders," Congress would have said so in the Mine Act. MSHA's adoption of the POV rule was arbitrary and capricious. MSHA ignored record evidence during notice and comment rule-making regarding the error rate for S&S citations and orders. MSHA failed to explain why – with a 20%-33% error rate – the new POV criteria would not expose mine operators to closure orders based on invalid S&S determinations. The screening criteria were not subject to mandatory notice and comment procedures in violation of the Administrative

Procedures Act. MSHA claimed for itself the authority to issue and change the screening criteria unilaterally by simply posting the criteria on its website. The POV rule denies mine operators due process of law. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner". Essentially, a mine closure order is a property interest subject to due process protections. The Final Rule eliminates the Commission and its neutral fact-finding role between operators and MSHA.

The *Amicus Curiae* of the West Virginia Coal Association says that the post-deprivation review mechanism provides only a hollow remedy. The post-deprivation review impermissibly reverses MSHA's statutory burden of proof. The Final Rule will increase the backlog of cases pending before the Commission. The Final Rule violates the Administrative Procedures Act by failing to explain the Agency's reversal of