

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 104

RIN 1219-AB73

Pattern of Violations

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule; notice of close of comment period.

SUMMARY: The Mine Safety and Health Administration (MSHA) is proposing to revise the Agency's existing regulation for pattern of violations (POV). MSHA has determined that the existing regulation does not adequately achieve the intent of the Federal Mine Safety and Health Act of 1977 (Mine Act) that the POV provision be used to address operators who have demonstrated a disregard for the safety and health of miners. Congress included the POV provision in the Mine Act so that operators would manage safety and health conditions at mines and find and fix the root causes of significant and substantial (S&S) violations to protect the safety and health of miners. The proposal would simplify the existing POV criteria, improve consistency in applying the POV criteria, and more adequately achieve the statutory intent. It would also encourage chronic violators to comply with the Mine Act and MSHA's safety and health standards.

DATES: MSHA must receive comments by midnight Eastern Standard Time on April 4, 2011.

ADDRESSES: Comments must be identified with "RIN 1219-AB73" and may be sent to MSHA by any of the following methods:

- *Federal E-Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Electronic mail:* zzMSHAcomments@dol.gov. Include

"RIN 1219-AB73" in the subject line of the message.

- *Facsimile:* 202-693-9441. Include "RIN 1219-AB73" in the subject line of the message.

- *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939.

- *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

Information Collection Requirements: Comments concerning the information collection requirements of this proposed rule must be clearly identified with "RIN 1219-AB73" and sent to both the Office of Management and Budget (OMB) and MSHA. Comments to OMB may be sent by mail addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for MSHA. Comments to MSHA may be transmitted by any of the methods listed above in this section.

FOR FURTHER INFORMATION CONTACT: April E. Nelson, Acting Director, Office of Standards, Regulations, and Variances, MSHA, at nelson.april@dol.gov (e-mail); 202-693-9440 (voice); or 202-693-9441 (facsimile).

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I. Introduction

Availability of Information

Public Comments: MSHA will post all comments on the Internet without change, including any personal information provided. Access comments electronically at <http://www.msha.gov/reginfo.htm>. Review comments in person at the Office of Standards,

Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

E-mail notification: MSHA maintains a list that enables subscribers to receive e-mail notification when the Agency publishes rulemaking documents in the **Federal Register**. To subscribe, go to <http://www.msha.gov/subscriptions/subscribe.aspx>.

Information Collection Supporting Statement: A copy of the information collection package can be obtained from the Department of Labor by electronic mail request to Michel Smyth at smyth.michel@dol.gov or by phone request to 202-693-4129.

II. Background and Regulatory History

A. Statutory Provision

In enacting the Mine Act, Congress included the pattern of violations (POV) provision in section 104(e) to provide MSHA with an additional enforcement tool to protect miners when the operator demonstrated a disregard for the safety and health of miners. The need for such a provision was forcefully demonstrated during the investigation of the Scotia Mine disaster, which occurred in 1976 in Eastern Kentucky. (S. Rep. No. 181, 95th Cong., 1st Sess. at 32.) As a result of explosions on March 9 and 11, 1976, caused by dangerous accumulations of methane, 23 miners and three mine inspectors lost their lives. The Scotia Mine had a chronic history of persistent, serious violations that were cited over and over by MSHA. After abating the violations, the operator would permit the same violations to recur, repeatedly exposing miners to the same hazards. The accident investigation showed that MSHA's then-existing enforcement program was unable to address the Scotia Mine's history of recurring violations.

The Mine Act places the ultimate responsibility for ensuring the safety and health of miners on mine operators. The legislative history of the Mine Act emphasizes that Congress reserved the POV provision for mine operators with a record of repeated S&S violations. Congress intended the POV sanction to attain remedial action from operators "who have not responded to the Agency's other enforcement efforts." (55 FR 31129) The legislative history states that Congress believed that the existence of a pattern would signal to both the

mine operator and the Secretary that “there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.” (S. Rep. No. 181, *supra* at 33.)

The Mine Act does not define “pattern of violations,” but section 104(e)(4) authorizes the Secretary to establish criteria for determining when a pattern of violations of mandatory safety or health standards exists. Congress provided the Secretary with broad discretion in establishing pattern criteria, recognizing that MSHA may need to modify the criteria as experience dictates.

B. Regulatory History

MSHA first proposed a POV regulation in 1980 (45 FR 54656). That proposal included: Purpose and scope, initial screening, pattern criteria, issuance of notice, and termination of notice. Commenters were generally opposed to the 1980 proposal. They stated that the proposal was complex, too statistically oriented, overbroad, and vague. In addition, they stated that the rulemaking was untimely because of litigation then pending before the Federal Mine Safety and Health Review Commission (Commission) concerning MSHA’s interpretation of the S&S provisions of the Mine Act. Commenters also stated that review of the Agency’s then pending regulation for assessment of civil penalties could affect the POV proposal.

On February 8, 1985 (50 FR 5470), MSHA announced its withdrawal of the 1980 proposed rule and issued an advance notice of proposed rulemaking (ANPRM) that addressed many of the concerns expressed about the 1980 proposal. In the 1985 ANPRM, MSHA stated that it intended to focus on the safety and health record of each mine rather than on a strictly quantitative comparison of mines to industry-wide norms. In the ANPRM, MSHA stated that the Agency envisioned simplified criteria, focusing on two principal areas:

(1) Were S&S violations common to a particular hazard or did S&S violations throughout the mine represent an underlying health and safety problem, and

(2) Is the mine on a section 104(d) unwarrantable failure sequence, indicating that other enforcement measures had been ineffective.

MSHA requested suggestions for additional factors the Agency should use in determining whether a POV exists and requested ideas on administrative procedures for terminating a pattern notice.

MSHA published a second proposed rule on May 30, 1989 (54 FR 23156), which included criteria and procedures for identifying mines with a pattern of S&S violations. The 1989 proposal included procedures for initial identification of mines developing a pattern of violations; criteria for determining whether a pattern of violations exists at a mine; notification procedures that would provide both the mine operator and miners’ representative an opportunity to respond to the Agency’s evaluation that a pattern of violations may exist; and procedures for terminating a pattern notice. The 1989 proposal addressed the major issues raised by commenters. Commenters’ primary concerns were MSHA’s policies for enforcing the S&S provisions of the Mine Act, the civil penalty regulation, and MSHA’s enforcement of the unwarrantable failure provision of the Mine Act. MSHA held two public hearings and issued a final rule on July 31, 1990 (55 FR 31128).

The existing rule established MSHA’s criteria and procedures for identifying mines with a POV. The existing rule reflected MSHA’s belief that Congress intended the POV sanction to be directed at restoring mines to a safe and healthful condition.

Until mid-2007, POV screening was decentralized and lacked a consistent, structured approach. MSHA District offices were responsible for conducting the required annual POV screening of mines. Following the accidents at the Sago, Darby, and Aracoma mines in early 2006, MSHA began developing a centralized, quantifiable POV screening process. MSHA initiated its newly developed *Pattern of Violations Screening Criteria and Scoring Model* in mid-2007 and updated and revised the screening criteria and procedures in 2010. MSHA uses a computer program based on this screening criteria and scoring model to generate lists of mines with a potential pattern of violations (PPOV).

III. Section-by-Section Analysis

MSHA is proposing the following changes to its existing pattern of violations regulation.

A. Section 104.1 Purpose and Scope

Proposed § 104.1 would provide the purpose and scope of the proposal and is unchanged from the existing provision.

B. Section 104.2 Pattern Criteria

Proposed § 104.2 would combine existing §§ 104.2 and 104.3. It would specify the general criteria that MSHA

would use to identify mines with a pattern of violations. MSHA would review compliance, accident, injury, and illness records. MSHA believes that the proposed rule would simplify the process for determining whether a mine has a pattern of violations and would more accurately reflect the statutory intent. Consistent with the Mine Act, the proposed rule would eliminate all references to initial screening criteria.

Proposed § 104.2(a) would provide that the specific criteria (e.g., number of S&S violations issued in the previous year) used in the review to identify mines with a pattern of S&S violations would be posted on MSHA’s website at <http://www.msha.gov>. MSHA requests specific comments on how the agency should obtain comment during the development of, and periodic revision to, the POV screening criteria. MSHA also requests comments on the best methods for notifying mine operators of changes to these criteria. Under the proposal, MSHA would review:

- (1) Citations for significant and substantial violations;
- (2) Orders under section 104(b) of the Act for not abating significant and substantial violations;
- (3) Citations and withdrawal orders under section 104(d) of the Act, resulting from the operator’s unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Act;
- (5) Orders under section 104(g) of the Act requiring withdrawal of miners who have not received training and who the inspector declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
- (8) Mitigating circumstances.

MSHA believes that posting the specific criteria and compliance data that the Agency would use on the website would allow mine operators to monitor their compliance record against the proposed POV criteria. Some mines have personnel who, currently, are requesting this information from MSHA. This website would reduce the effort for these mine operators. Access to this information through a searchable database would provide operators an opportunity to evaluate their record and determine whether they are approaching proposed POV criteria levels. This would enable operators to proactively implement measures to improve safety and health at their mines and to bring

their mines into compliance. Posting the specific pattern criteria on MSHA's website will promote openness and transparency and encourage operators to examine their compliance record more closely, ascertain whether they have any recurring problems, and enhance the safety and health of miners. MSHA believes that sharing this information facilitates a more proactive approach to safety and health on the part of all involved with miner safety and health. In addition, MSHA believes that the ready availability of compliance data will eliminate the need to inform operators of a potential pattern of violations (PPOV). MSHA believes that this is an improvement over the existing process because it allows operators to continually evaluate their compliance performance.

Under proposed § 104.2(a)(1), like the existing provision, MSHA would consider a mine's S&S violations.

Like the existing provision, proposed § 104.2(a)(2) would require MSHA to consider closure orders issued under section 104(b) of the Mine Act that resulted from S&S violations.

Proposed § 104.2(a)(3), like existing § 104.3(a)(3), would require MSHA to consider unwarrantable failure citations and withdrawal orders issued under sections 104(d)(1) and (d)(2) of the Mine Act. Unwarrantable failure citations and orders often constitute S&S violations that are the types of serious, repeated violations that Congress intended to address in a POV regulation.

Proposed § 104.2(a)(4), like existing § 104.2(a)(3), would require MSHA to consider imminent danger withdrawal orders issued under section 107(a) of the Mine Act.

Proposed § 104.2(a)(5), derived from existing § 104.2(b)(1), would require MSHA to consider orders issued under section 104(g) of the Act.

Proposed § 104.2(a)(6), like existing § 104.2(b)(1), would require that MSHA consider enforcement measures other than section 104(e) of the Act, which have been applied at the mine.

Proposed § 104.2(a)(7) would clarify MSHA's intent that the proposed POV criteria include consideration of operations with serious safety and health management problems. It is derived from the existing regulation and the legislative history of the Mine Act.¹ It would require MSHA to consider other information, such as accident, injury, and illness records, that may reveal a serious safety or health

management problem at a mine. This other information may also include: Enforcement measures, other than POV, applied at the mine; evidence of the operator's lack of good faith in correcting the problem that results in repeated S&S violations; repeated S&S violations of a particular standard; repeated S&S violations of standards related to the same hazard; and any other relevant information. This is essentially the same information addressed in existing §§ 104.2(b)(2) to (b)(3) and 104.3(a)(1) and (a)(2). In addition, in making a determination under this aspect of the proposal, MSHA would consider: knowing and willful S&S violations; citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and S&S violations of safety and health standards that contribute to the cause of accidents and injuries. MSHA data and experience show that violations of approval, training, or recordkeeping regulations, for example, can significantly and substantially contribute to safety or health hazards. This is especially true where the mine operator allows similar violations to occur repeatedly.

Under proposed § 104.2(a)(8), like existing § 104.2(b)(4), MSHA would consider mitigating circumstances. Under this proposed provision, MSHA would consider the causes of repeated violations that may be beyond the operator's control, such as changes in mine ownership or mine management, and whether conditions at the mine show a trend of significant improvement.

Under this proposed provision and consistent with the legislative history, MSHA would allow operators to take proactive measures to bring their mines into compliance. For example, operators who compare their compliance record with the POV criteria and determine that they are approaching a pattern of violations level may work with MSHA to bring their mines into compliance to avoid a POV notice. Under the proposal, an operator may submit a written safety and health management program to the District Manager for approval. To obtain approval, operators should structure safety and health management programs so that MSHA can determine whether the program's parameters would result in meaningful, measurable, and significant reductions in S&S violations. The operator should develop a process and program with measurable benchmarks for abating specific violations that could lead to a POV and addressing these hazardous conditions at their mines. Using these benchmarks,

operators would be able to use the MSHA database accessible through the Agency's Web site to monitor their safety and health record. Under the proposal, MSHA would consider an operator's effective implementation of an MSHA-approved safety and health management program as a mitigating circumstance.

The proposed rule would eliminate the existing requirement in § 104.3(b) that only citations and orders that have become final are to be used to identify mines with a potential pattern of violations. This proposal is consistent with the language of section 104(e), the legislative history of the Mine Act, and the purpose of section 104(e). In explaining the need for the POV enforcement tool, Congress pointed out that "the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address." (S. Rep. No. 181, 95th Cong., 1st Sess. at 32.) The use of the phrase "inspection history" indicates Congress' intent that POV determinations be based on inspection histories, *i.e.*, violations found by MSHA during inspections, rather than only on final citations and orders.

The Senate Report specifically noted similarities between sections 104(d) and 104(e) of the Mine Act and stated that the POV "sequence parallels the current unwarrantable failure sequence." (S. Rep. No. 181, *supra*, at 33.) This reflects Congress's intent that POV determinations, like section 104(d)(1) and (d)(2) determinations, need not be final orders. In addition, the Senate Report stated that it was " * * * the Committee's intention that the Secretary or his authorized representative [] have both [Section 104(d) and Section 104(e)] enforcement tools available, and that they [] be used simultaneously if the situation warrants." (*Id* at 34.) The proposal to consider non-final citations and orders to identify mines with a POV is consistent with the Mine Act.

The existing provision limiting MSHA's consideration of citations and orders to those that are final restricts MSHA's ability to achieve the purpose of the POV provision, consistent with Congressional intent. As stated in the Mine Act and its legislative history, the Secretary is given broad discretion to "make such rules as [she] deems necessary to establish criteria for determining when a pattern of violations" exists. (30 U.S.C. 814(e)(4)) Congress stated that the Secretary should "continually evaluate and modify the pattern of violations criteria as she deems necessary." (S. Rep. No.

¹ The Committee views the 105(d)(1) [now 104(e)] notice as indicating to both the mine operator and the Secretary that there exists at mine a serious safety and health management problem. (Legislative History, Committee Report, p. 620).

181, *supra* at 33.) MSHA's experience with enforcing section 104(e) has led the Agency to conclude that it is necessary to modify the final order criteria in its existing POV regulation.

In November 2010, there was a backlog of approximately 88,000 contested violations pending before the Commission. For cases disposed during November, 2010, it took, on average, 518 days for contested violations to become final. For a mine with contested citations and orders that have not become final, the final order provision does not allow MSHA to review the mine's complete recent compliance history when assessing whether a POV exists and hinders MSHA's ability to effectively enforce section 104(e) of the Mine Act. It can allow chronic violators to avoid or delay the POV sanction and to continue their repeated pattern of noncompliance with health and safety standards, without correcting the underlying problem. The final order provision in the existing regulation provides an incentive for operators to contest S&S violations to avoid being placed under a POV.

The fact that the Mine Act requires an operator to abate a hazard prior to contesting a violation provides further support for the proposed rule. Mine operators must correct the hazardous condition within the time set by the MSHA inspector, even if they challenge the violation. The proposal to eliminate the existing requirement that only final orders be used for POV determination would greatly enhance safety and health of miners. Fewer than one percent of citations are reversed. Over 700,000 violations were assessed civil penalties that became final orders during the five-year period 2006 through 2010, with 3,400 vacated after they were contested. During the same timeframe, 6,000 of the contested violations were modified from S&S to non-S&S.

Proposed § 104.2(b) would increase the frequency of MSHA's review of a mine for a POV from at least once per year under the existing regulation to at least twice per year. MSHA determined that an annual review would not adequately allow the Agency to identify mines with recurring S&S violations. The increased frequency of review would allow MSHA to more promptly identify mines with recurring S&S violations and take appropriate action. This proposal would also encourage operators to more closely examine their compliance records to determine whether greater efforts are necessary to comply with the Mine Act and MSHA's standards and regulations.

C. Section 104.3 Issuance of Notice

Proposed § 104.3, renumbered from existing § 104.4, would simplify the requirements for issuing a POV notice.

Proposed § 104.3(a) is similar to existing § 104.4(a). The proposal would provide that, when a mine has a POV, the District Manager will issue a POV notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of the POV notice to the representative of miners. The proposed provision would delete all references to a PPOV; otherwise it is essentially unchanged from the existing requirement.

MSHA believes that this proposed action would allow the Agency to more effectively implement the POV provision in the Mine Act, consistent with legislative intent. MSHA's experience and data reveal that over the past 3 years, mine operators who received a PPOV letter reduced their S&S violations by at least 30 percent. In this same period, 6 of 62 operators received more than one PPOV letter. These mine operators temporarily reduced their S&S violations, but reverted back to allowing the same hazards to occur again and again without addressing the underlying causes.

Proposed § 104.3(b), essentially the same as existing § 104.4(d), would require that the mine operator post a copy of the POV notice on the mine bulletin board and that the notice remain posted until MSHA terminates the POV notice. Existing § 104.4(d) requires the operator to post all notifications issued under 30 CFR part 104 at the mine. The proposal would clarify that the operator post notifications issued under this part on the mine bulletin board.

Proposed § 104.3(c) is a new provision that would restate the intent of the Mine Act when a POV notice is issued. It essentially restates section 104(e)(1) of the Mine Act and would require MSHA to issue an order withdrawing all persons from the affected area of the mine if an authorized representative of the Secretary finds any S&S violation within 90 days after the issuance of the POV notice. No one would be allowed to enter the area affected by the violation until the condition has been abated, except those persons referred to in section 104(c) of the Mine Act who must enter the affected area to correct the violation.

Proposed § 104.3(d) is a new provision that would specifically restate the intent of the Mine Act when a POV notice is issued. It would provide that

if a withdrawal order is issued under proposed § 104.3(c), any subsequent S&S violation will result in an order withdrawing all persons from the affected area of the mine until the authorized representative of the Secretary determines that the violation has been abated, except those persons identified in section 104(c) of the Mine Act.

D. Section 104.4 Termination of Notice

Proposed § 104.4, renumbered from existing § 104.5, addresses the termination of a POV notice and continues to provide that a POV notice will be terminated if MSHA finds no S&S violations during an inspection of the entire mine, or if no withdrawal order for S&S violations under section 104(e)(1) of the Mine Act has been issued within 90 days of the issuance of the POV notice. MSHA's Pattern of Violations (POV) Procedures Summary, posted on MSHA's website, also includes requirements for MSHA to conduct a complete inspection of the entire mine within 90 days of issuing the POV notice. The Procedures Summary states, in part, the following:

Following notification to the operator of the issuance of a Notice of Pattern of Violations, the District Manager shall initiate appropriate inspection activities to ensure that the mine is inspected in its entirety during the following 90-day period and each succeeding inspection cycle until the POV notice is terminated.

Proposed § 104.4(b), renumbered from existing § 104.5(b), is unchanged.

IV. Preliminary Regulatory Economic Analysis

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (E.O.) 12866, the Agency must determine whether a regulatory action is "significant" and subject to review by the Office of Management and Budget (OMB). Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients

thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

MSHA has determined that this proposed rule would not have an annual effect of \$100 million or more on the economy, and is not an economically "significant regulatory action" pursuant to section 3(f) of E.O. 12866. However, the proposed rule is a "significant" regulatory action because it would likely raise novel legal or policy issues. MSHA requests comments on the estimates of costs and benefits presented in this proposed rule.

MSHA has not prepared a separate preliminary regulatory economic analysis for this rulemaking. Rather, the analysis is presented below.

B. Industry Profile and Population at Risk

The proposed rule applies to all mines in the United States. MSHA divides the mining industry into two major sectors based on commodity: (1) coal mines and (2) metal and nonmetal mines. Each sector is further divided by type of operation, e.g., underground mines or surface mines. The Agency maintains data on the number of mines and on mining employment by mine

type and size. MSHA also collects data on the number of independent contractor firms and their employees. Each independent contractor is issued one MSHA contractor identification number, but may work at any mine.

For the 12 months ending January 2010, the average number of mines in operation was 14,100. These mines employed 297,000 miners, including contract workers and excluding office workers. There were 8,770 mine contractor firms with 88,000 employees, excluding office workers. Table IV-1 presents the total number of all mines and miners, by size of mine.

TABLE IV-1—AVERAGE 2009 NUMBER OF MINES AND EMPLOYMENT (EXCLUDING OFFICE EMPLOYEES), BY EMPLOYMENT SIZE

Size of mine	All mines	Employment at all mines, excluding office employees
1-19 Employees	11,816	56,489
20-500 Employees	2,234	123,181
501+ Employees	48	29,402
Contractors		87,740
Total	14,098	296,812

The estimated value of coal produced in U.S. coal mines in 2009 was \$35.7 billion of which \$18.5 billion was from underground coal and \$17.2 billion from surface coal. The value of coal was estimated from the amount of coal produced and the price of coal. MSHA obtained the coal production estimates from the Agency's MSIS system and the price per ton for coal from the Department of Energy (DOE), Energy

Information Administration (EIA), *Annual Coal Report 2009*, October 2010, Table 28.

The value of the U.S. mining industry's metal and nonmetal (M/NM) output in 2009 was estimated to be approximately \$57.1 billion. Metal mining contributed an estimated \$21.3 billion to the total while the nonmetal mining sector contributed an estimated \$35.8 billion. The value of production

estimates are from U.S. Department of the Interior (DOI), U.S. Geological Survey (USGS), *Mineral Commodity Summaries 2010*, January 2010, page 8.

The combined value of production from all U.S. mines in 2009 was \$92.8 billion. Table IV-2 presents the estimated revenues for all mines, by size of mine.

TABLE IV-2—REVENUES AT ALL MINES, BY EMPLOYMENT SIZE, IN 2009

Size of mine	Revenues at all mines (million dollars)
1-19 Employees	\$17,450
20-500 Employees	54,478
501+ Employees	20,856
Total	92,784

C. Benefits

Although MSHA does not have an historical basis from which to estimate the effects of placing a mine on a pattern of violations (POV), the Agency does have some experience with issuing potential pattern of violations (PPOV) notifications to operators. MSHA's data reveal that although most mine operators significantly improve health and safety conditions at their mines after receiving the PPOV notification, many later experienced both a decline

in health and safety and an increase in S&S violations.

During June 2007 through September 2009, MSHA made PPOV evaluations on an average of every six to nine months. During that period, MSHA sent 68 PPOV notification letters to 62 mine operators (6 operators received more than one notification). After receiving the notification letter, of the mines that remained in operation to the next evaluation, 94 percent reduced the rate of S&S citations and orders by at least

30 percent and 77 percent reduced the rate of S&S citations and orders to levels at or below the national average for similar mines. However, as discussed previously in the preamble, improvements at some mines declined over time. Of the 62 mine operators that received PPOV notification letters during the review period, 6 received a second PPOV notification letter. In addition to the 6 mines that received two letters, 7 mines were identified in more than one evaluation as meeting the

PPOV criteria but were only sent one letter generally due to mitigating circumstances. Compliance at 13 of the 62 mines that received PPOV notification letters (21 percent) deteriorated such that each of these mines either was sent or could have been sent a second letter.

Under the existing rule, MSHA identifies mines that meet the screening criteria for PPOV. MSHA conducts a review to determine if there are mitigating circumstances and issues PPOV notification letters as appropriate. The proposed rule would delete the screening process as well as all references to a PPOV.

The proposed rule would establish general criteria that MSHA would use to identify mines with a pattern of S&S violations. MSHA would post specific criteria that MSHA would use in making POV determinations, including a searchable database of mine operator compliance information, on the Agency's website. Operators would be able to use the specific criteria and the information in the database to continually monitor their safety and health performance and determine whether they are approaching proposed POV criteria levels.

Under the proposed rule, MSHA would allow operators to take proactive measures to bring their mines into compliance. MSHA would consider an operator's effective implementation of an MSHA-approved safety and health management program as a mitigating circumstance when it comes to placing a mine on a POV.

Under the proposed rule, MSHA projects that operators would continually monitor their performance and, if they believe that they are approaching a POV, would take action to improve their safety and health performance. MSHA projects that, under the proposed rule, most mine operators who see that their mines are close to a POV would institute an MSHA-approved safety and health management program to lessen the probability of being placed on a POV and the possibility of being issued closures. MSHA projects that this would result in more mines taking action than those issued PPOV notifications under the existing procedure.

Closure orders can have a substantial impact on the ability of a mine to conduct its business. The threat of closure provides a strong incentive for operators to ensure that S&S violations do not recur. MSHA projects that few operators would risk such an occurrence.

MSHA projects that under the proposal, which would increase the

frequency of MSHA's review of a mine for a POV from once to twice per year, on average, approximately 50 mine operators per year would submit a safety and health management program to MSHA for approval as a mitigating circumstance. Under the proposed rule, MSHA would allow operators to take proactive measures to bring their mines into compliance with MSHA standards and regulations, reducing the probability of these mines being on a POV. MSHA further projects that an average of approximately 10 mines per year (*i.e.*, those that would not take proactive action, such as instituting an MSHA-approved safety and health management program) would be issued POV notifications. MSHA requests comments on these estimates which are likely to vary from year to year.

MSHA used the Agency's experience with PPOV notification letters to estimate the impact that the proposed mitigating circumstance provision (including the opportunity for operators to submit safety and health management programs) would have on the number of nonfatal injuries at mines. MSHA determined that 62 mines which received PPOV notification letters (6 received two notifications) during the June 2007 through September 2009 period experienced, on average, 11 nonfatal injuries during the year prior to receiving the letter and eight nonfatal injuries during the year after receiving the letter. MSHA used the one year period before and after PPOV notification as a basis for comparison because, as was previously noted, improvements at some mines declined over time and because a longer period was not available for some mines (*i.e.*, mines that were issued PPOV notifications in September 2009).

Based on the projection that 50 mines per year would average three fewer nonfatal injuries in the first year after implementing an MSHA-approved safety and health management program, MSHA projects that the number of nonfatal injuries would be reduced by a minimum of 150 (50 mines \times 3 nonfatal injuries per mine) per year. MSHA believes that this is a low estimate for the following reasons:

- It is likely that including measurable benchmarks for abating specific violations and addressing hazardous conditions in the MSHA-approved safety and health management programs would make these programs more effective than the measures that recipients of the PPOV notification letters have historically instituted.
- The estimate does not include any reductions in the number of fatalities. Because mine fatalities occur on a less

frequent basis than do injuries, the Agency does not believe that it has a reliable basis upon which to project a reduction in fatalities. However, the Agency believes that the implementation of an MSHA-approved safety and health management program would reduce fatalities.

- The estimate does not include any projected improvement at the 10 mines that would not institute an MSHA-approved safety and health management program and would be placed on a POV. However, due to the high threshold for getting off a POV under the proposed rule, there would likely be injury reductions for this category.

MSHA also anticipates longer lasting improvements under the proposed rule. Of the 62 mines that received PPOV notification letters from June 2007 through September 2009, 13 did not have a full second year of data following receipt of the PPOV notification letter. Of the 49 mines that had two full years of data following receipt of the PPOV notification letter, 19 (39%) experienced an increase in the number of injuries in the second year following receipt of the PPOV notification letter compared to the first. MSHA believes that, under the proposed rule, fewer mines will experience such increases. Mines that have effectively implemented an MSHA-approved safety and health management program (to avoid being placed on a POV) would have procedures in place to continuously address hazardous conditions. Mines that successfully get off of a POV would have increased incentive (see the cost analysis) to remain off and would likely institute continuing measures to minimize violations and address hazardous conditions.

MSHA based its estimates of the monetary values for the benefits associated with the proposed rule on relevant literature. To estimate the monetary values of the reductions in nonfatal injuries, MSHA performed an analysis of the imputed value of injuries avoided based on a willingness-to-pay approach. This approach relies on the theory of compensating wage differentials (*i.e.*, the wage premium paid to workers to accept the risk associated with various jobs) in the labor market. A number of studies have shown a correlation between higher job risk and higher wages, suggesting that employees demand monetary compensation in return for incurring a greater risk.

Viscusi & Aldy (2003) conducted an analysis of studies that use a willingness-to-pay methodology to estimate the imputed value of life-saving programs (*i.e.*, meta-analysis) and

found that the value of each lost work-day injury prevented was approximately \$50,000 in 2000 dollars. Using the GDP Deflator (U.S. Bureau of Economic Analysis, 2010), this yields an estimate of \$62,000 for each lost work-day injury avoided in 2009 dollars.

MSHA recognizes that willingness-to-pay estimates involve uncertainty and imprecision. Although MSHA is using the Viscusi & Aldy (2003) study as the basis for monetizing the expected benefits of the proposed rule, the Agency does so with several reservations, given the methodological difficulties involved in estimating the compensating wage differentials (see Hintermann, Alberini, and Markandya, 2008). Furthermore, these estimates pooled across different industries may not capture the unique circumstances faced by miners. For example, some have suggested that the models be disaggregated to account for different levels of risk, as might occur in coal mining (see Sunstein, 2004). In addition, miners may have few options of alternative employers and, in some cases, only one employer (near-monopsony or monopsony) that may depress wages below those in a more competitive labor market. In the future, MSHA plans to work with other agencies to refine the approach taken in this proposed rule.

Based on the estimated prevention of 150 nonfatal injuries per year, the proposed rule would result in monetized benefits of approximately \$9.3 million per year (150 nonfatal injuries \times \$62,000 per injury). MSHA believes that this is a low estimate for the total benefits of the proposed rule for the reasons stated above. MSHA solicits comments on the benefit estimates.

D. Compliance Costs

Proposed § 104.3(c) would require MSHA to issue an order withdrawing all persons from the affected area of the mine if any S&S violation is found within 90 days after the issuance of the POV notice. No one would be allowed to enter the area affected by the violation until the condition has been abated, except those persons who must enter the affected area to correct the violation.

Under proposed § 104.3(d), if a withdrawal order is issued under proposed § 104.3(c), any subsequent S&S violation would result in an order withdrawing all persons from the affected area of the mine until the authorized representative of the Secretary determines that the violation has been abated, except those persons

who must enter the affected area to correct the violation.

Closure orders can have a substantial effect on the ability of a mine to conduct its business. The threat of closure provides a strong incentive for operators to ensure that S&S violations do not recur. As was noted under benefits, MSHA anticipates that few operators would risk such an occurrence. Rather than risking a POV and the possibility of a closure, MSHA projects that mine operators would monitor their compliance record against the proposed POV criteria using the Agency's website. MSHA estimates that it will take a supervisor an average of 5 minutes each month to monitor each mine's performance using the Agency's website. Based on the average supervisory wage rate for all mining in 2009 of \$65.05 per hour, MSHA estimates that the yearly cost for all mine operators to monitor their performance would be about \$0.9 million (14,098 mines \times 5/60 hours per month \times 12 months per year \times \$65.05 per hour).

However, MSHA believes that this may be an overestimate. As was noted above, some operators are currently requesting this information from MSHA. Making the information available on the Agency's Web site would reduce the costs for these mine operators. MSHA requests comments on the burden that monitoring compliance record against the proposed POV criteria using the Agency's Web site would place on mine operators.

MSHA projects that approximately 50 mine operators each year would submit a safety and health management program to MSHA for approval as a mitigating circumstance. MSHA believes that it would take management working with miners to develop and implement an effective safety and health management program. MSHA projects that developing such a program with meaningful and measurable benchmarks would take about 80 hours of a supervisor's time and 80 hours of miners' time. MSHA projects that it would take an additional 40 hours of a supervisor's time and 40 hours of miners' time during the approval process and that the cost for copying and mailing the program and revisions would be about \$100. MSHA projects it will take 40 hours of a supervisor's time to implementing the program plus 120 hours of miners' time to run the program (based on an average size mine in terms of employment).

Although the proposed rule applies to all mining, based on the Agency's experience and due to the nature of the mining conditions, MSHA projects that

the proposed rule would have a greater impact on underground coal mining than any other mining sector. During the period June 2007 through September 2009, underground coal mine operators received nearly 80 percent of the PPOV notifications. Rather than using the wage rates for all mining as was done to estimate the costs for monitoring mine performance, MSHA used the 2009 underground coal mine hourly wage rates of \$84.70 for a supervisor and \$35.30 for a miner to estimate these costs. Since the hourly wage rates in underground coal mining are higher than those in surface coal and metal/nonmetal mining, this approach could overstate the estimated costs.

The average cost of developing and implementing an approved safety and health program at a mine would be approximately \$22,100 (160 hours of a supervisor's time \times \$84.70 per hour + 240 hours of miners' time \times \$35.30 per hour + \$100). MSHA anticipates that, each year, the projected 50 mines that would choose to implement an MSHA-approved safety and health management program would incur costs of approximately \$1.1 million.

Although MSHA does not have a historical basis from which to estimate the potential costs that would be incurred by a mine on a POV, MSHA determined that a good proxy for these costs would be the potential production lost during mine closures while the operators take the necessary actions to correct the safety and health violations. MSHA projects that a typical mine would lose about 0.5 percent of revenue as the result of closures (about 1 or 2 days for a large mine and a day or less for a small mine) and that lost revenue due to the closures would likely vary considerably among mines depending on the specific conditions in the mine. Some mines would likely incur greater than average losses while others would incur less than average losses.

As was noted above, based on the Agency's experience and due to the nature of the mining conditions, MSHA projects that the proposed rule would affect underground coal mining more than any other mining sector. MSHA, therefore, used the revenue in the underground coal sector to estimate potential production losses. The average number of underground coal mines in operation during a month in 2009 was 424. These mines generated an estimated \$18.5 billion in revenue in 2009, an average of approximately \$43.6 million per mine. One-half percent of an average mine's revenue is about \$218,000.

MSHA estimates that the projected 10 mines that would be on a POV each year

would potentially incur about \$2.2 million in production losses (10 mines \times \$218,000 per mine). Since the average revenue per underground coal mine is significantly higher than the average revenue produced by a mine in the entire mining industry (*i.e.*, \$6.6 million per mine = \$92.8 billion/14,098 mines), this approach could overstate the estimated costs.

MSHA estimates that the total yearly cost of the proposed rule would be \$4.2 million; \$0.9 million for monitoring the performance of each mine, \$1.1 million for 50 mines developing and implementing MSHA-approved safety and health management programs, plus \$2.2 million for 10 mines operating under a POV. MSHA's estimates do not include the cost of coming into compliance with the underlying regulatory requirements. Although these costs can be substantial, they were previously attributed to compliance with MSHA's existing regulations and are not new compliance costs resulting from the proposed rule. MSHA solicits comments on the cost estimates.

E. Net Benefits

This section presents a summary of the estimated net benefits of the proposed rule for informational purposes only. Under the Mine Act, MSHA is not required to use estimated net benefits as the basis for its decision to promulgate a rule.

Based on the estimated prevention of 150 nonfatal injuries per year, MSHA estimates that the proposed rule would result in monetized benefits of \$9.3 million per year (150 nonfatal injuries per year \times \$62,000 per injury) compared to estimated costs of \$4.2 million per year, for an estimated net benefit of approximately \$5.1 million per year. MSHA solicits comments on the net benefit estimate.

V. Feasibility

MSHA has concluded that the requirements of the pattern of violations proposed rule are technologically and economically feasible.

A. Technological Feasibility

MSHA concludes that this proposed rule is technologically feasible. The proposed rule is not technology-forcing. In order to avoid a POV, mine operators would have to comply with existing MSHA regulations, which have previously been determined to be technologically feasible.

B. Economic Feasibility

MSHA also concludes that this proposed rule is economically feasible. Mine operators can avoid the expenses

of being placed on a pattern of violations by complying with existing MSHA regulations, all of which have previously been found to be economically feasible. For those mine operators who are in danger of a POV, MSHA will consider the institution of an approved safety and health management program as a mitigating circumstance. MSHA expects few mines (about 10 per year) would incur the potential expenses associated with closures while on a POV.

MSHA has traditionally used a revenue screening test—whether the yearly compliance costs of a regulation are less than one percent of revenues—to establish presumptively that compliance with the regulation is economically feasible for the mining community. Based on this test, MSHA has concluded that the requirements of the proposed rule are economically feasible. The estimated annual compliance costs of the proposed rule to mine operators are \$4.2 million, which are insignificant compared to total annual revenue of \$92.8 billion for the mining industry (*i.e.*, significantly less than one percent of the mining industry's \$92.8 billion revenue, which is \$928 million). Even if all of the costs were borne by the underground coal industry, the estimated \$4.2 million cost of the proposed rule is about 0.02 percent of the underground coal industry's 2009 revenue of \$18.5 billion. MSHA, therefore, concludes that compliance with the provisions of the proposed rule would be economically feasible for the mining industry.

VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA)

Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by SBREFA, MSHA has analyzed the impact of the proposed rule on small businesses. Based on that analysis, MSHA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and made the certification under the RFA at 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is presented below.

A. Definition of a Small Mine

Under the RFA, in analyzing the impact of the proposed rule on small entities, MSHA must use the SBA definition for a small entity or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal**

Register for notice and comment. MSHA has not taken such an action and is required to use the SBA definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees.

In addition to examining small entities as defined by SBA, MSHA has also looked at the impact of this proposed rule on mines with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as "small mines." These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. The costs of complying with the proposed rule and the impact of the proposed rule on small mines will also be different. It is for this reason that small mines are of special concern to MSHA.

MSHA concludes that it can certify that the proposed rule would not have a significant economic impact on a substantial number of small entities that would be covered by this proposed rule. The Agency has determined that this is the case both for mines with fewer than 20 employees and for mines with 500 or fewer employees.

B. Factual Basis for Certification

Mine operators can avoid the expenses of being placed on a POV by complying with MSHA regulations. Under the proposed rule, MSHA will consider the institution of an approved safety and health management program as a mitigating circumstance for those mine operators who are placed on a pattern. MSHA expects few mines (about 10 per year) would incur the potential expenses associated with closure orders under a POV.

MSHA initially evaluates the impacts on "small entities" by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated compliance costs are less than one percent of the estimated revenues, the Agency believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. When estimated compliance costs exceed one percent of revenues, MSHA investigates whether a further analysis is required. Since it was not possible to accurately project the distribution of mines that would incur the estimated \$4.2 million to comply with the proposed rule by commodity and size, MSHA examined the impact using several alternative assumptions.

The average number of mines in operation during a month in 2009 with 500 or fewer employees was 14,050. These mines generated an estimated \$71.9 billion in revenue in 2009. Even if all of the costs were incurred by mines with 500 or fewer employees, the estimated \$4.2 million in compliance costs would be less than 0.006 percent of the revenue generated by all small mines according to the SBA's definition.

The average number of underground coal mines in operation during a month in 2009 with 500 or fewer employees was 412. These mines generated an estimated \$13.7 billion in revenue in 2009. Even if all of the costs were incurred by underground coal mines with 500 or fewer employees, the \$4.2 million in compliance costs would be about 0.03 percent of the revenue generated by small underground coal mines according to the SBA's definition.

The average number of mines in operation during a month in 2009 with 1–19 employees was 11,816. These mines generated an estimated \$17.4 billion in revenue in 2009. Even if all of the costs were incurred by mines with 1–19 employees, the estimated \$4.2 million compliance costs would be about 0.02 percent of the revenue generated by all small mines with fewer than 20 employees.

The average number of underground coal mines in operation during a month in 2009 with 1–19 employees was 81. These mines generated an estimated \$920 million in revenue in 2009. Even if all of the \$4.2 million in compliance costs were incurred by underground coal mines with 1–19 employees, the costs would be about 0.45 percent of the revenue generated by small underground coal mines with fewer than 20 employees.

Moreover, mine operators can avoid any costs associated with being on a POV simply by complying with the law. If an operator has trouble complying and is in danger of being on POV, under the proposed rule, the implementation of an approved safety and health management program would serve as a mitigating circumstance.

Accordingly, MSHA has certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

VII. Paperwork Reduction Act of 1995

A. Summary

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). MSHA estimates that under the proposed rule about 50 mines each year

would develop and implement approved safety and health management programs. This would impose information collection requirements related to mitigating circumstances under proposed § 104.2(a)(8).

MSHA expects that developing an approved program with meaningful and measurable benchmarks would take about 160 hours of a supervisor's time at an hourly wage of \$84.70 and 240 hours of miners' time at an hourly wage of \$35.30. Costs for copying and mailing the program and revisions are estimated to be \$100 per program.

The burden of developing and implementing an approved safety and health program is 400 hours per mine (160 + 240) and the average cost is approximately \$22,100 (160 hours of a supervisor's time × \$84.70 per hour + 240 hours of miners' time × \$35.30 per hour + \$100).

Burden Hours: 50 mines × 400 hours per mine = 20,000 hours.

Burden Costs: 50 mines × \$100 per mine = \$5,000.

B. Procedural Details

The information collection package for this proposed rule has been submitted to OMB for review under 44 U.S.C. 3504, paragraph (h) of the Paperwork Reduction Act of 1995, as amended (44 U.S.C. 3501 *et seq.*). MSHA requests comments to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Comments on the information collection requirements should be sent to both OMB and MSHA. Addresses for both offices can be found in the **ADDRESSES** section of this preamble. The regulated community is not required to respond to any collection of information unless it displays a current, valid, OMB control number. MSHA displays the OMB control numbers for the

information collection requirements in its regulations in 30 CFR part 3.

VIII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this proposed rule would not include any federal mandate that may result in increased expenditures by State, local, or tribal governments; nor would it increase private sector expenditures by more than \$100 million in any one year or significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further Agency action or analysis.

B. Executive Order 13132: Federalism

This proposed rule would not have "federalism implications" because it would not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Accordingly, under E.O. 13132, no further Agency action or analysis is required.

C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that this proposed rule would have no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children. This proposed rule impacts only the mining industry. Accordingly, MSHA certifies that this proposed rule would not impact family well-being.

D. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

The proposed rule would not implement a policy with takings implications. Accordingly, under E.O. 12630, no further Agency action or analysis is required.

E. Executive Order 12988: Civil Justice Reform

This proposed rule was written to provide a clear legal standard for affected conduct and was carefully

reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. Accordingly, this proposed rule would meet the applicable standards provided in section 3 of E.O. 12988, Civil Justice Reform.

F. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule would have no adverse impact on children. Accordingly, under E.O. 13045, no further Agency action or analysis is required.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule would not have "tribal implications" because it would not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." Accordingly, under E.O. 13175, no further Agency action or analysis is required.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action (*i.e.*, it adversely affects energy supply, distribution or use). MSHA has reviewed this proposed rule for its energy effects because the proposed rule applies to the coal mining sector. Because this proposed rule would result in annual costs of approximately \$4.2 million, most of which would be incurred by the coal mining industry, relative to annual coal mining industry revenues of \$35.7 billion in 2009, MSHA has concluded that it is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, under this analysis, no further Agency action or analysis is required.

I. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations.

MSHA has determined and certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

IX. References

- Hintermann, B., Alberini, A., Markandya, A. (2010). "Estimating the Value of Safety with Labor Market Data: Are the Results Trustworthy?" *Applied Economics*. 42(9):1085–1100. Published electronically in July 2008.
- Sunstein, C. (2004). "Valuing Life: A Plea for Disaggregation." *Duke Law Journal*, 54 (November 2004): 385–445.
- U.S. Bureau of Economic Analysis (2010). National Income and Product Accounts Table: Table 1.1.9. Implicit Price Deflators for Gross Domestic Product [Index numbers, 2005 = 100]. Revised May 27, 2010. <http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=13&Freq=Qtr&FirstYear=2006&LastYear=2008>.
- Viscusi, W. and Aldy, J. (2003). "The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World," *Journal of Risk and Uncertainty*, (27:5–76).

List of Subjects in 30 CFR Part 104

Administrative practice and procedure, Law enforcement, Mine safety and health, Reporting and recordkeeping requirements.

Dated: January 28, 2011.

Joseph A. Main,

Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977 as amended by the Mine Improvement and New Emergency Response Act of 2006, MSHA is proposing to amend chapter I of title 30 of the Code of Federal Regulations by revising part 104 as follows:

PART 104—PATTERN OF VIOLATIONS

Sec.

- 104.1 Purpose and scope.
104.2 Pattern criteria.
104.3 Issuance of notice.
104.4 Termination of notice.

Authority: 30 U.S.C. 814(e), 957.

§ 104.1 Purpose and scope.

This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the safety and health of

miners. The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines.

§ 104.2 Pattern criteria.

(a) Specific pattern criteria will be posted on MSHA's Web site at <http://www.msha.gov> and used in the review to identify mines with a pattern of S&S violations. The review will include:

- (1) Citations for significant and substantial violations;
- (2) Orders under section 104(b) of the Act for not abating significant and substantial violations;
- (3) Citations and withdrawal orders under section 104(d) of the Act, resulting from the operator's unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Act;
- (5) Orders under section 104(g) of the Act requiring withdrawal of miners who have not received training and who the inspector declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine such as accident, injury, and illness records; and

(8) Mitigating circumstances.

(b) At least two times each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the criteria posted on MSHA's Web site.

§ 104.3 Issuance of notice.

(a) When a mine has a pattern of violations, the District Manager will issue a pattern of violations notice to the mine operator that specifies the basis for the Agency's action. The District Manager will also provide a copy of this notice to the representative of miners.

(b) The mine operator shall post a copy of the notice on the mine bulletin board. The notice shall remain posted at the mine until it is terminated under § 104.4 of this part.

(c) If, on any inspection within 90 days after issuance of the pattern notice, an authorized representative of the Secretary finds any S&S violation, he shall issue an order for the withdrawal of all persons from the affected area, except those persons referred to in section 104(c) of the Act, until the condition has been abated.

(d) If a withdrawal order is issued under paragraph (c) of this section, any subsequent S&S violation will result in a withdrawal order that shall remain in effect until the authorized

representative of the Secretary determines that the violation has been abated.

§ 104.4 Termination of notice.

(a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations, or if no withdrawal order is issued by MSHA in accordance with section 104(e)(1) of the Act within 90 days of the issuance of the pattern notice.

(b) The mine operator may request an inspection of the entire mine or portion of the mine. No advance notice of the inspection shall be provided, and the scope of inspection shall be determined by MSHA. Partial mine inspections covering the entire mine within 90 days shall constitute an inspection of the entire mine for the purposes of this part.

[FR Doc. 2011-2255 Filed 1-31-11; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 156

[DOD-2008-OS-0160; RIN 0790-AI42]

Department of Defense Personnel Security Program (PSP)

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This rule would update policies and responsibilities for the Department of Defense (DoD) Personnel Security Program (PSP) in accordance with the provisions of current U.S. Code, Public Laws, and Executive Orders (E.O.).

DATES: Comments must be received by April 4, 2011.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301-1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available

for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT:

Stacey Jefferson, (703) 604-1236.

SUPPLEMENTARY INFORMATION: The Department of Defense Directive (DoDD) 5200.2, Personnel Security Program (PSP), codified at 32 CFR 156, was issued April 9, 1999. The Department is reissuing the DoD Directive as a DoD Instruction to update existing policy regarding the DoD Personnel Security Program and also incorporate new policy related to Homeland Security Presidential Directive-12 (HSPD-12).

This rule provides PSP policy fundamental to preventing unauthorized disclosure of sensitive and classified information that could cause irreparable damage to national security. The policy portion relating to HSPD-12 implements investigative and adjudicative policy for the Department's personal identity verification credential.

Updates to the policy reflect Joint Security and Suitability Reform Team efforts to incorporate the foundational policy changes needed to implement reform. The Intelligence Reform and Terrorism Prevention Act of 2004, E.O. 13467, E.O. 12968, E.O. 10865, and HSPD-12 are some of the current Federal laws, directives and statutes that impact the DoD PSP. Since this rule was last published, additional executive orders have been issued directing alignment of security, suitability and reciprocal acceptance of prior investigations and favorable determinations.

The procedural guidance for the DoD PSP is currently being updated and will subsequently be proposed as rule codified at 32 CFR part 154. The investigative and adjudication procedural guidance for the DoD Federal personal identity verification credential pursuant HSPD-12 is undergoing coordination and will also be proposed a separate rule.

E.O. 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 156 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this E.O.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 156 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 156 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 156 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

E.O. 13132, "Federalism"

It has been certified that 32 CFR part 156 does not have federalism implications, as set forth in E.O. 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 156

Government employees; Security measures.

Accordingly, 32 CFR part 156 is revised to read as follows.

PART 156—DEPARTMENT OF DEFENSE PERSONNEL SECURITY PROGRAM (PSP)

Sec.

- 156.1 Purpose.
- 156.2 Applicability.
- 156.3 Definitions.
- 156.4 Policy.
- 156.5 Responsibilities.
- 156.6 Procedures-sensitive positions, duties, and classified access.
- 156.7 Procedures—common access card investigation and adjudication.