FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 2014-82-R, et al.[1]
BRODY MINING, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

These consolidated contest proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), are before us on interlocutory review. At issue in this case of first impression is the validity of a pattern of violations rule promulgated by the Department of Labor's Mine Safety and Health Administration ("MSHA") at 30 C.F.R. Part 104, which implements section 104(e) of the Mine Act, 30 U.S.C. § 814(e).[2] We conclude that the rule is facially valid, and that it was not applied

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[1] The relevant docket numbers involved in this proceeding are listed in Appendix A, attached to this decision.

[2] Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), provides:

> (1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized

in an impermissibly retroactive manner to Brody Mining, LLC. For the reasons discussed below, we affirm the Chief Administrative Law Judge's interlocutory order upholding the rule, and remand the case for further proceedings. 36 FMSHRC 284 (Jan. 2014) (ALJ).

I.

Statutory and Regulatory Background

Section 104(e) sets forth provisions regarding the issuance and termination of a pattern of violations ("POV") notice. Section 104(e)(1) provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. If, within 90 days following issuance of the POV notice,

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> representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
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> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.
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> (3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.
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> (4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

an inspector cites the operator for a significant and substantial ("S&S") violation,[3] then MSHA may issue a withdrawal order under section 104(e) of the Act. 30 U.S.C. § 814(e)(1).

The operator will thereafter be subject to additional withdrawal orders for each new S&S violation subsequently discovered until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e)(2). These withdrawal orders "cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated." 30 U.S.C. § 814(e)(1).

In enacting section 104(e), Congress explicitly recognized that the provision was necessary to "provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations." S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (*Legis. Hist.*), at 620 (1978). Congress explained that MSHA's then-existing enforcement scheme was unable to address the problem of mines with an inspection history of recurrent violations, and that some of the recurrent violations were tragically related to mining disasters:

> The need for such a provision was forcefully demonstrated during the investigation . . . of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed 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. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.

Id. Congress stated its view that a POV notice indicates "to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards." *Id.* at 621.

Despite its inclusion in the Mine Act from enactment, the pattern of violations sanction has only recently been employed by the Secretary as an enforcement tool. Regulations implementing section 104(e) were not promulgated until 1990 ("the 1990 rule"). *See* 55 Fed. Reg. 31,128 (July 31, 1990). Under the 1990 rule, MSHA engaged in an annual initial screening process, which included reviewing information regarding a "mine's history of [S&S] violations."

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[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

30 C.F.R. § 104.2(a)(1) (1990). Section 104.3 identified information that MSHA used to identify mines with a "potential" POV ("PPOV"). Section 104.3(b) provided that only citations and orders that had become final orders were used to identify a mine with a PPOV. 30 C.F.R. § 104.3(b) (1990). When notified of a PPOV, an operator had an opportunity to engage in remedial measures, including the submission of a corrective action program. 30 C.F.R. § 104.4(a) (1990). If the MSHA District Manager continued to believe that a pattern of violations existed at the mine, he submitted a report to the appropriate MSHA Administrator, who issued a decision as to whether the mine was to be issued a POV notice. 30 C.F.R. § 104.4(b) (1990). The POV notice was terminated when an inspection of the entire mine revealed no further S&S violations or if no section 104(e)(1) withdrawal order was issued within 90 days of the POV notice. 30 C.F.R. § 104.5 (1990).

It was not until after the disasters at the Sago, Darby, and Aracoma mines in early 2006 that MSHA developed a Pattern of Violations Screening Criteria and Scoring Model, which was initiated in mid-2007. 76 Fed. Reg. 5719, 5720 (Feb. 2, 2011). The screening criteria and procedures were later revised in 2010. *Id.* MSHA used the screening criteria and scoring model to generate lists of mines with a PPOV. *Id.*

In 2010, the U.S. Department of Labor's Office of the Inspector General ("OIG") audited MSHA's POV program. *See* 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013). On September 29, 2010, the OIG published its audit report entitled, "In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority." *Id.* The OIG Report stated that during the 32 years since passage of the Mine Act, MSHA had only once issued a POV notice to an operator. Rep. No. 05-10-005-06-001 at 2.[4] In that one instance, the Commission subsequently modified some of the citations and orders on which the POV notice was based, and, as a result, MSHA did not enforce the order. *Id.* at 4. The report included several recommendations, the first of which was: "Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority." *Id.* at 24.

MSHA adopted this recommendation in revisions to the 1990 Rule, which became effective on March 25, 2013 ("current rule"). 78 Fed. Reg. 5056-74 (Jan. 23, 2013). The current rule implemented two major changes from the 1990 rule: (1) it eliminated the PPOV notice and review process; and (2) it eliminated the requirement that MSHA could consider only final orders in its POV review. *Id.* at 5056. In addition, section 104.2(a) of the current rule provides that at least once each year, MSHA will review the compliance and accident, injury and illness records of mines to determine if any mines meet the POV screening criteria. The review to identify

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[4] We take judicial notice of the OIG Report, which is referred to in the preamble of the final POV Rule (78 Fed. Reg. at 5058). *See Sec'y of Labor on behalf of Acton v. Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985) (noting that the Commission may take judicial notice of public documents of MSHA).

mines with a pattern of S&S violations will include eight listed elements.[5] Section 104.2(b) provides that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2(b).

The 2013 POV screening criteria posted on MSHA's website include two sets of criteria that are used to perform the review under section 104.2. *See* App. B. The first set pertains to numbers and rates of S&S citations and orders (some with considerations of negligence ratings of high or reckless disregard), rate of issuance of "elevated citations and orders [issued under sections 104(b); 104(d);104(g); or 107(a) of the Mine Act]," and a comparison of "injury severity measure" (the number of lost workdays per 200,000 employee-hours). B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1. The alternative set of criteria sets forth greater rates of issuance of S&S citations and orders and elevated citations and orders. *Id.* The criteria provide that "[m]ines must meet [all] the criteria in either set to be further considered for exhibiting a pattern of violations." *Id.*

The numerical criteria in the 2013 POV screening criteria are identical to the numerical screening criteria that were in effect under the 1990 rule in 2012, prior to promulgation of the current rule. *See* App. C; S. Mem. Supporting S. Mot. for Partial Summ. Dec. at 5-6 & Ex. 2. However, consistent with section 104.3(b) of the prior rule, the 2012 screening criteria, unlike the 2013 screening criteria, also provided, "For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became *final orders* of the Commission during the most recent 12 months *OR* at least two S&S

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[5] The eight listed elements include:

> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that 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.

30 C.F.R. § 104.2.

unwarrantable failure violations that became *final orders* of the commission during the most recent 12 months." S. Mem. Supporting Mot. for Partial Summ. Dec., Ex. 2 at 2 (emphasis in the original); App. C.

MSHA has available on its website a Monthly Monitoring Tool for Pattern of Violations. MSHA's online Monthly Monitoring Tool provides mine operators with a statement of their performance with respect to the screening criteria. 78 Fed. Reg. at 5057, 5059.

MSHA also provides a POV Procedures Summary on its website. *See* B. Mem. Supporting Appl. for Temp. Relief, Ex. 11. Regarding the issuance of the POV notice, the summary provides in part that at least once each year, MSHA will review the violation and injury history of each mine to identify those that are exhibiting a pattern of violations. *Id.* at 1. The MSHA District Manager of a mine meeting the POV screening criteria performs a review to determine whether mitigating circumstances exist. *Id.* An MSHA POV panel subsequently reviews information provided by the District Manager, obtains any additional necessary information, and makes a recommendation regarding whether to postpone or not issue the POV notice. *Id.* The panel provides a report to the appropriate MSHA Administrator, who determines whether to issue the POV notice. *Id.* If so, the District Manager issues the POV notice. *Id.*

II.

Factual and Procedural Background

These consolidated proceedings arose from MSHA's application of the POV procedures to Brody's Mine No. 1. On October 24, 2013, MSHA issued a POV notice to Brody. MSHA made its POV determination based on a 12-month screening period extending from September 1, 2012, through August 31, 2013. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 9.

The POV notice issued to Brody states:

> Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Brody Mine No. 1 (ID 46-09086). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards[.]

Notice No. 7219154. The notice lists 54 citations and orders issued between October 9, 2012 and October 8, 2013, in groups regarding conditions and or practices that contribute to:

(1) ventilation and/or methane hazards; (2) emergency preparedness and escapeway hazards; (3) roof and rib hazards; and (4) inadequate examinations. The notice further states that, "These groups of violations, taken alone or together, constitute a pattern of violations . . . ." *Id.* The citations and orders listed in the POV notice were either contested or in the penalty assessment process, but no citations or orders had become final Commission orders. 36 FMSHRC 284, 293 (Jan. 2014) (ALJ).

On October 30, 2013, Brody notified the Secretary that it was contesting the POV notice, and the contest was docketed as WEVA 2014-81-R. Chief Administrative Law Judge Lesnick dismissed the docket, holding that no provision of the Mine Act or the Commission's Procedural Rules authorized him to adjudicate a "notice." 36 FMSHRC 284, 287 (Jan. 2014) (ALJ). Brody has not sought review of the Judge's dismissal of this contest.

After the issuance of the notice, MSHA issued four section 104(e) withdrawal orders to Brody, and Brody contested those orders. B. Mem. Supporting Appl. for Temp. Relief at 8. Since that time, MSHA has issued numerous additional section 104(e) withdrawal orders, which Brody has also contested.

On November 4, 2013, Brody filed an application seeking temporary relief from the POV notice and withdrawal orders. Appl. for Temp. Relief at 3 ¶ 7. Brody's application was denied by an Administrative Law Judge because Brody failed to establish that granting temporary relief would not adversely affect the health and safety of miners. Unpublished Order dated Nov. 21, 2013, at 4-5. Brody has not sought review of that decision. *See* S. Br. at 5 n.7.

Brody subsequently filed a Motion for Summary Decision, and the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody's motion. Among other issues, the parties disputed whether in the current rule MSHA properly eliminated: (1) the 1990 rule's PPOV notice and review process and (2) the requirement that MSHA could only consider final orders in its POV review.

On January 30, 2014, the Chief Judge issued an order denying Brody's motion and granting the Secretary's motion. 36 FMSHRC at 286. In granting the Secretary's motion, the Judge upheld the facial validity of the current rule against three lines of attack made by the operator. First, the Judge concluded that nothing in the Mine Act requires MSHA to rely on issuances that have become final orders in determining whether a mine operator should be considered for further evaluation and potentially issued a POV notice. *Id.* at 298-301. In so holding, he concluded that the term "violation," as used in section 104(e) of the Act, is ambiguous, and that the Secretary's interpretation of the term was reasonable and entitled to deference. *Id.* at 301.

Second, the Judge concluded that the Secretary's promulgation of the POV rule was not arbitrary, capricious, or an abuse of discretion in violation of section 706(2)(A) of the Administrative Procedures Act ("APA"). *Id.* at 301-04.

Third, the Judge concluded that the POV rule does not violate the Due Process Clause of the Fifth Amendment. *Id.* at 304-08. The Judge reasoned that the government's significant interest in the timely protection of public health and safety, particularly in light of an operator's opportunity for expedited post-deprivation review, justified the deprivation of the property interest associated with uninterrupted mine production, which Brody had "overstated." *Id.* at 305.

The Judge further concluded that the POV screening criteria are a valid statement of agency policy, and, as such, were not subject to notice-and-comment rulemaking requirements. *Id.* at 308-12. He reasoned that the criteria were not legislative rules because they did not bind or circumscribe MSHA's discretion in determining whether a POV notice should be issued. *Id.* at 311-12. Finally, the Judge rejected Brody's argument that MSHA applied the POV rule retroactively. *Id.* at 312-15.

On the same day that he issued his order, the Judge certified the order for interlocutory review. We granted interlocutory review of the following questions: (1) whether the POV rule is valid; (2) whether MSHA's screening criteria are invalid because notice-and-comment rulemaking was required; and (3) whether MSHA impermissibly applied the POV rule retroactively. We also instructed the parties to address whether the Commission has jurisdiction to rule upon the validity of the current rule.

III.

Disposition

A. The Commission's jurisdiction to rule on the validity of the current rule

Section 101(d) of the Mine Act vests exclusive jurisdiction over challenges to the validity of mandatory safety and health standards promulgated by the Secretary with the U.S. Courts of Appeals.[6] Thus, if the POV rule were a "mandatory health or safety standard," the Commission

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[6] Section 101(d), 30 U.S.C. § 811(d), provides in part:

> Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard . . . . The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.

would lack jurisdiction to consider its validity.[7]

Section 3(l) of the Mine Act defines a "mandatory . . . safety standard" as "the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter." 30 U.S.C. § 802(l). Subchapters II and III set forth interim mandatory standards, while Subchapter I contains sections 101 through 116 of the Mine Act. Section 101 provides the procedures for the development, promulgation and revision of mandatory safety and health standards by the Secretary. Section 101(d) explicitly confers exclusive jurisdiction in the U.S. Courts of Appeals of challenges regarding "a mandatory health or safety standard *promulgated under this section.*" 30 U.S.C. § 811(d).

The Commission and courts have generally distinguished mandatory health or safety standards promulgated under section 101 from regulations promulgated under other sections of the Mine Act. *Drummond Co.*, 14 FMSHRC 661, 673 (May 1992); *UMWA v. Dole*, 870 F.2d 662, 668 (D.C. Cir. 1989) ("Regulations promulgated pursuant to § 508 alone do not establish 'mandatory health or safety standards' for the purposes of § 101(a)(9)'s no-less protection rule."); *see also Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 43-44 & n.2 (D.C. Cir. 1999) (holding that a violation of 30 C.F.R. § 50.11(b) could not be designated as S&S because the regulation was promulgated under section 508 rather than section 101). *Cf. Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011) (holding that a violation of a safeguard notice could be S&S because section 314(b) constitutes an interim mandatory standard and falls within section 3(l)'s definition).

The POV rule was not promulgated pursuant to section 101 of the Mine Act. Rather, the POV rule was promulgated pursuant to section 104(e)(4) and section 508, 30 U.S.C. § 957,[8] of the Mine Act. *See* 78 Fed. Reg. at 5073. Therefore, we conclude that the POV rule is not a "mandatory safety and health standard" subject to exclusive court review.

We further conclude that we have the authority to consider the validity of the POV rule. The Commission is authorized pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), to adjudicate contested orders, such as the section 104(e) withdrawal orders at issue in these proceedings. In exercising our jurisdiction, we may address Brody's challenge to the validity of the POV rule underlying the withdrawal orders in order to fully dispose of the case. *See Drummond*, 14 FMSHRC at 674 ("[W]here the statute creates Commission jurisdiction, it

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[7] The Court of Appeals for the Sixth Circuit recently held that the POV rule is not a mandatory health or safety standard and that it lacks jurisdiction to consider an initial challenge to the validity of the rule. *Nat'l Min. Ass'n v. Sec'y of Labor*, Nos. 13-3324 & 13-3325. 2014 WL 4067861 (6th Cir. Aug. 19, 2014).

[8] 30 U.S.C. § 957 provides, "The Secretary . . . [is] authorized to issue such regulations as [he] deems appropriate to carry out [a] provision of this chapter."

endows the Commission with a plenary range of adjudicatory powers to consider issues . . . to dispose fully of cases committed to Commission jurisdiction.").

B. Facial validity of the current rule

Section 104(e)(4) of the Mine Act grants the Secretary the authority to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814(e)(4). In the rules under review, the Secretary explains that he will determine whether a pattern exists by considering cited violations designated as S&S, regardless of whether a citation has been contested by the operator. Brody challenges the Secretary's reliance on these "non-final citations" which, according to Brody, are merely unproven assertions or allegations of a violation.

In considering the validity of the Secretary's approach, we bear in mind that, in cases such as this one where "there is an express delegation of authority to the agency . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Brody submits that applying that standard here would require us to invalidate the current rule. It argues that, by its ordinary usage, the term "violations" in section 104(e) must be restricted to final orders, that is, violations cited by MSHA that were either unchallenged by the operator or upheld by the Commission. Had Congress intended POV sanctions to apply to "patterns of citations and orders," Brody contends that it would have said so. Furthermore, Brody notes that the Secretary, when considering an operator's "history of previous violations" for purposes of assessing a penalty under section 110(a), includes only those violations for which a penalty has been paid or which have been upheld in final orders of the Commission. B. Br. at 11. Finally, Brody relies on MSHA's request to Congress to amend the Mine Act to permit it to issue POV sanctions based on non-final citations, a request, which it argues would have been unnecessary if such action was already permissible.

Where the plain meaning of statutory language indicates that Congress has directly spoken to the precise question at issue, "'that intention is the law and must be given effect' in the regulation." *Coal Employment Project v. Dole,* 889 F.2d 1127, 1131 (D.C. Cir. 1989) (quoting *Chevron,* 467 U.S. at 843, n.9) (other citations omitted). However, the Mine Act does not define "violation" or "pattern of violations." As such, Congress has not clearly addressed whether the term "violations" in section 104(e) refers only to final orders, but has instead expressly delegated to the Secretary responsibility for determining when a pattern of violations exists.

1. Meaning of the term "violations"

When statutory language is silent or ambiguous, we generally defer to an interpretation proffered by the Secretary "so long as it is reasonable, consistent with the statutory purpose, and

not in conflict with the statute's plain language." *Coal Employment Project,* 889 F.2d at 1131 (citations omitted); *Chevron*, 467 U.S. at 843 n.9. Thus, any ambiguity arising from the Act's omission of a definition for "violations" must be resolved in favor of a reasonable construction adopted by the Secretary.

As the Secretary points out, various provisions of the Mine Act allow enforcement actions based on the occurrence of a "violation" where the term can only reasonably refer to conditions that, in the inspector's determination, amount to a violation and warrant a citation, whether or not that determination has been subjected to review by the Commission. *See, e.g.*, 30 U.S.C. § 814(a) (providing that an operator must abate a "violation" within the time fixed in the citation); 30 U.S.C. § 814(b) (stating that an operator who fails to abate a "violation" within the time fixed in the citation for abatement can be issued an order requiring the withdrawal of miners from the affected area of the mine until the violation is abated). The ability of MSHA to compel immediate compliance and to issue such orders does not depend on the finality of MSHA's determination that a violation exists.

The legislative history of the Mine Act indicates that the POV provisions of section 104(e) were intended to parallel the unwarrantable failure provisions contained in section 104(d).[9] That provision empowers an inspector to issue a withdrawal order if he or she determines that a "violation" caused by an operator's unwarrantable failure to comply with a cited standard has occurred within ninety days of a prior violation determined to be both S&S and unwarrantable. 30 U.S.C. § 814(d)(1). The predicate "violation" may occur during the same inspection as the "violation" that is the basis for the withdrawal order. In such case, neither the predicate citation nor the subsequent withdrawal order would be based on determinations of violations that had been subjected to additional review.

Section 104(e), like subsections 104(a), (b), and (d), provides enforcement authority to ensure compliance with the Act. It is intended to be applied to repeat violators who have been undeterred by MSHA's other enforcement tools. It would indeed be anomalous if withdrawal orders directed to repeated serious violations were restricted to violations deemed "final" while other section 104 withdrawal orders need only be based on prior cited conditions.

We further observe that Congress recognized that the POV sanction was necessary to address mines with an "*inspection history* of recurrent violations." *Legis Hist.* at 620 (emphasis added). The use of the phrase "inspection history" demonstrates Congress' expectation that POV determinations would be based on violations found during inspections regardless of whether such violations had achieved a final status.

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[9] The Senate report states that the section 104(e) "sequence parallels the current unwarrantable failure sequence of the Coal Act, and the unwarranted failure sequence of Section 10[4(d)] of the bill." *Legis. Hist.* at 621.

The legislative history supporting the Secretary's interpretation may be traced back to the Mine Act's antecedents, which clearly evince an intent to effectively address recurrent violations. The issuance of a section 104(b) withdrawal order is derived from section 203 of the Federal Coal Mine Safety Act of 1952, which authorized a representative of the Bureau of Mines to issue a withdrawal order if an operator had failed to abate a non-imminent condition and an extension of abatement time was not permitted. Pub. L. No. 82-552, 66 Stat. 692, 694-95. Section 203 of the 1952 Act was amended in 1966 to add a provision that is the basis for section 104(d) withdrawal orders. Pub. L. No. 89-376, 80 Stat. 85. The legislative history of the Federal Coal Mine Safety Act Amendments of 1966 reveals that the purpose of the revision was to provide inspectors "with increased powers to deal with recurrent or repeated violations." H. Rep. No. 89-181, at 7 (1965).

When these provisions were "unable to address" the problem of recurrent violations, Congress developed the POV sanction. *Legis. Hist.* at 620. Throughout this development, Congress provided the enforcement tool of a withdrawal order without requiring finality for the violation underlying that order. Thus, the Secretary's interpretation of the term "violation" is consistent with the language, structure and history of the Act.

Brody notes that section 110(i) of the Act – which sets forth criteria for the assessment of civil penalties – includes "the operator's history of previous violations" as one of the criteria to be considered. 30 U.S.C. § 820(i). Brody further notes that the Secretary's regulations implementing this provision interprets the language to include "only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission." 30 C.F.R. § 100.3(c). Brody contends that this definition of "previous violations" is necessarily binding on the Secretary in the context of section 104(e). B. Br. at 11. However, the statutory language of section 110(i) differs from the language in section 104(e). Section 110(i) uses the phrase "history of previous violations," which suggests past actions, while section 104(e) addresses an operator that "*has* a pattern of violations," which, in addition to past actions, suggests present and continuing actions. 30 U.S.C. § 814(e)(1) (emphasis added). The use of the word "violations" in section 104(e) is much more closely related to its use in sections 104(a), (b) and (d) where, unquestionably, "violations" does not require the administrative finality of the "previous violations" referred to in section 110(i). The fact that the Secretary made a policy choice in his penalty regulations to define "history of previous violations" to encompass only paid violations and final orders does not change our view that the phrase "pattern of violations" in section 104(e) may permissibly be interpreted to encompass non-final orders.

Brody also asserts that Congress and MSHA itself have agreed that the phrase "pattern of violations" in section 104(e) is limited to violations that have become final after review by the Commission. In support of this argument, Brody describes various bills relating to pattern of violations that have been proposed in Congress, and cites testimony before Congress by Assistant Secretary for Mine Safety and Health Joseph A. Main. According to Brody, Assistant Secretary Main stated that MSHA's POV authority was too limited in that MSHA "did not have the authority to issue a POV notice based on non-final citations and orders." B. Br. at 13-14. This

argument places undue weight on Congressional inaction, and grossly mischaracterizes Assistant Secretary Main's testimony. The fact that Congress did not amend section 104(e) does not indicate Congressional intent. As the Supreme Court stated in *Cent. Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164, 187 (1994), "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." As for Assistant Secretary Main's testimony, the statement relied on by Brody was a statement in which the Assistant Secretary said that MSHA had been working on regulations to change the POV system – the regulations at issue in this case – since his confirmation, and that the proposed legislation "will expedite that needed reform." House Comm.on Education and Labor, Hearing on H.R. 5663, Miner Safety and Health Act of 2010, July 13, 2010, at 13, *reprinted in* Jt. App., Brody Ex. 7, at 218. This was in no way an admission that MSHA lacked authority to make this change itself through notice-and-comment rulemaking, as Brody alleges.

2. Determination of a "pattern of violations"

Brody next asserts that the Secretary's promulgation of the POV regulations was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A). Brody argues that, in adopting a rule that bases a pattern determination on non-final S&S citations, MSHA failed to adequately consider that S&S determinations are overturned at a significant rate upon review. The operator also contends that the agency failed to consider the increased safety and compliance that had been afforded by the prior PPOV process.

In determining whether the Secretary acted arbitrarily and capriciously in issuing the current rule, we must consider whether the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Supreme Court has stated that an agency rule is arbitrary and capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not [possibly] be ascribed to a difference in view or the product of agency expertise.

Id.

Brody's argument is unpersuasive. MSHA expressly considered evidence that S&S citations and orders may be subsequently changed to delete their S&S designations. 76 Fed. Reg. 5719, 5722 (Feb. 2, 2011). While the parties dispute the relevant figure regarding the rate at which S&S designations are altered in adjudication, they appear to agree that approximately 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S in 2009-2010. *See*

B. Br. at 16 ("In fiscal 2009 and 2010, nearly 20% of contested S&S violations were vacated or modified to non-S&S."); S. Br. at 13 n.13 ("MSHA represents that the 2009-2010 data show that just under 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S.").[10]

Even assuming that approximately 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S in 2009-2010, the fact remains that more than 80% of S&S designations remained unchanged after litigation. In this case, MSHA relies on 54 alleged S&S violations in four different categories. If 20%, or even 33%, of those citations and orders lose their S&S designation after litigation, it would still leave a significant number of S&S violations on which a pattern of violations could be found. We are thus satisfied that MSHA did not "entirely fail[] to consider an important aspect of the problem," and we find no abuse in the Agency's decision to rely on non-final issuances even though some S&S designations may later be changed in adjudication. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43.

Moreover, MSHA extensively addressed its decision to eliminate the final order requirement in the current rule's preamble, setting forth relevant data and articulating a satisfactory reason for its action. 78 Fed. Reg. at 5059-61. MSHA explained that the final order requirement had proven to be an impediment in MSHA's use of section 104(e) as contemplated by Congress. *Id.* at 5059. Because of delays that occur when citations and orders are litigated before the Commission, by the time finality is reached, a passage of months or years may have occurred, and conditions at the mine may no longer reflect the same conditions that existed when a hazard was originally identified and cited. *Id.* In sum, the prior rule prevented MSHA from basing POV determinations on an operator's recent compliance history. *Id.* at 5060.

MSHA's determination that POV status should be based on an operator's recent compliance history is consistent with Congress' intent that the agency have an effective tool for dealing with recurrent violations, "some of which were tragically related to . . . disasters," such as the one that occurred at the Scotia mine. *Legis. Hist.* at 620. In the preamble to the current rule, MSHA observed that, despite having "an egregious record of noncompliance," the Upper Big Branch mine avoided being placed on a POV under the prior rule, and that the conditions at the mine led to a disastrous explosion on April 5, 2010, in which 29 miners were killed and two were injured. 78 Fed. Reg. at 5057; 36 FMSHRC at 307.

Turning to Brody's argument that MSHA failed to consider the safety improvements afforded by the prior PPOV process, MSHA explicitly acknowledged comments pointing out that a majority of operators who received the PPOV notice reduced their S&S citations below the

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[10] Brody also alleged that 33% of S&S violations in 2011 were vacated, dismissed or modified. B. Br. at 16. MSHA said that it could not confirm this claim. S. Br. at 13, n.13. In any event, these percentages only relate to S&S citations and orders which were contested. If one were to consider the universe of S&S citations and orders that are issued – those contested and those not contested – the percentage of S&S citations and orders that were later changed would be lower.

national average for similar mines. 78 Fed. Reg. at 5058. However, MSHA explained that, "Experience has shown that the existing PPOV provision created the unintended consequence of encouraging some mine operators to achieve short-term improvements instead of adopting systemic, long-term improvements in their health and safety management culture." *Id.* at 5059.

As noted by commentators on the proposed rule who favored elimination of the PPOV procedures, the PPOV process contained "the incentive for mine operators to make just enough short-term improvements to get off the PPOV list, but then backslide and wait for MSHA to issue the next PPOV notice." 78 Fed. Reg. at 5058. MSHA statistics established that in the period June 2007 through September 2009, a large majority of mines which received PPOV letters significantly reduced their rate of S&S citations and orders. However, compliance at 21% of the mines which received PPOV letters deteriorated enough over approximately a 24-month period to warrant a second PPOV letter. *Id.*[11] Moreover, 39% of the mines which received a PPOV letter experienced an increase in the number of injuries in the second year following receipt of the PPOV letter compared to the first year. *Id.* at 5069.

In contrast, MSHA asserts that the changes implemented in the current rule will result in more sustained improvements. *Id.* at 5058. Enforcement based on real time status creates an incentive for operators to use the online Monthly Monitoring Tool, a program that allows them to continually monitor their compliance to ensure they are not in jeopardy of a POV designation. Operators are able to evaluate their performance and respond accordingly, including instituting voluntary efforts to improve compliance. *Id.* at 5059, 5061. Such an approach appropriately places responsibility on operators to ascertain whether they are at risk of a POV designation and, if so, determine what action they will take to avoid that result. As MSHA found, this

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[11] Commissioners Young and Cohen believe that this deterioration is dramatically illustrated by the history of the Upper Big Branch Mine before the April 5, 2010 explosion, a history that exemplifies the Secretary's contention that the short-term improvements tolerated by the PPOV process were ineffective in protecting miners from routine exposure to deadly hazards. As Brody's counsel acknowledged at the oral argument, in 2007 MSHA put Upper Big Branch on a PPOV because its S&S rate was 11.6 per 100 inspection hours. The mine then got an improvement plan, and lowered its S&S rate to 5.6. Since this was greater than a 30% reduction, MSHA withdrew the POV threat. With the threat gone, the mine's S&S rate went back up. In the next screening cycle, Upper Big Branch would have received another PPOV notice except for an MSHA computer error. Oral Arg. Tr. 22-23; U.S. Dep't of Labor, Internal Review of MSHA's Actions at the Upper Big Branch Mine-South, Performance Coal Co., at 56-57 (Mar. 6, 2012) (http://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf). Thus, Upper Big Branch management evaded a POV by bringing down its number of S&S violations after receiving a PPOV so as to be removed from that status. It then committed an excessive number of S&S violations again after the POV threat was lifted. If management had the ability to dramatically reduce the rate of S&S violations, it obviously had the ability to maintain a reduced level. It chose not to do so, and thus endangered the lives of miners. If the current rule had been in effect, the Upper Big Branch disaster might have been averted.

incentivizes long-term compliance rather than short-term avoidance of POV. *Id.* at 5059.

In sum, we conclude that MSHA's regulation is not arbitrary, capricious, or an abuse of discretion, but rather is a reasonable approach consistent with the language and purpose of the Mine Act.

3. Procedural Due Process requirements

Compliance with the language of section 104(e) does not fully resolve Brody's challenge to the current rule. The Judge concluded that it is not until a withdrawal order is issued that an operator has the opportunity for a hearing in which it may contest the 104(e) order and the underlying POV notice.[12] 36 FMSHRC at 305. Brody argues that this process resulting in interruptions in its mining operations without a prior hearing violates the Fifth Amendment's provision that no person shall be deprived of property without due process of law.

As the Supreme Court has held, "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Id.* (citations omitted).

Adequate post-deprivation procedures are sufficient to satisfy due process in some circumstances. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) ("It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."). In considering whether due process requires an evidentiary hearing prior to the deprivation of a property interest, even if such a hearing is provided thereafter, we must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

Considering the first factor, we conclude that Brody has a significant property interest in continuing its mining operations without withdrawing miners. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993). The POV sanction is one of the most severe enforcement tools that MSHA may use, indicating a specific Congressional intent that "the

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[12] Brody has not challenged that holding before us.

Secretary use the POV enforcement tool as a last resort when other enforcement tools . . . fail to bring an operator into compliance." 78 Fed. Reg. at 5060.

Thus, we do not agree with the Judge's conclusion that Brody's description of the impact on its property interest is "overstated." 36 FMSHRC at 305. A withdrawal order may affect only a part of a mine or a piece of equipment until the S&S violation is abated. However, the significant impact on Brody's property interest comes from remaining on the "chain" of withdrawal liability until the chain is broken by a clean inspection. *See generally Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987) (recognizing the "threat" of being placed on a withdrawal order chain as an incentive for operator compliance).

The third factor is also readily apparent. MSHA has a compelling interest in considering non-final S&S violations in making POV determinations. As the Supreme Court stated in *Hodel v. Va. Surface Mining & Reclamation Ass'n*, "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action." 452 U.S. 264, 300 (1981). The Court observed that, in fact, "deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Id.* (citations omitted).

MSHA has asserted that the major changes in the current rule were necessary to protect miner safety and health. The magnitude of the problem addressed by the current rule is fully described in the OIG Report, which recommended elimination of the final order requirement and the PPOV process, and was summarized there as follows:

> In summary, during the 32 years that MSHA has had Pattern of Violations authority, it has never successfully used it against a mine operator. MSHA allowed the rulemaking to stall as stakeholders argued differing views on implementation. Moreover, for many years after the regulations were in place MSHA relied on District personnel to interpret and carry out those regulations. Only during the past few years had MSHA used a standardized method based on quantitative data for identifying potential POV mines. However, these analyses have proven to be complex and unreliable. Moving forward, it is imperative for MSHA to ensure that POV criteria and procedures are transparent and well reasoned.

Rep. No. 05-10-005-06-001, at 14. As discussed above, elimination of the PPOV process was intended to prompt operators to adopt "systemic, long-term improvements in their health and safety management culture" rather than just short-term improvements. 78 Fed. Reg. at 5059. The elimination of the final order requirement in the current rule was designed to "protect[] miners working in mines operated by habitual offenders whose chronic S&S violations have not been deterred by the Secretary's other enforcement tools." *Id.* at 5060. This is a clear and paramount governmental interest.

We disagree with our dissenting colleague's assertion that "the balance between property rights and an immediate public interest tilts very sharply toward the property rights affected by a POV Notice" because the POV rule does not address a "situation of urgency." Slip op. at 56. Just as the Judge understates the impact of the POV rule on the operator's property interest, our dissenting colleague understates the public interest in mine safety embodied in the POV rule.[13] As recognized by Congress and evident in disasters since enactment of section 104(e), miners are placed in a situation of urgency when working in mines where the operator has "demonstrate[d] [a] disregard for the health and safety of miners through an established pattern of violations." *Legis. Hist.* at 620. Indeed, the legislative history establishes that Congress created the pattern of violations provision because of the explosions at the Scotia Mine which took the lives of 23 miners and three Federal inspectors:

> The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed 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.

Id. at 592, 620. Thus, we disagree with our dissenting colleague that "section 104(e) is not intended to deal with present or recently past hazards." Slip op. at 52. Congress considered an operator which has "demonstrate[d] [a] disregard for the health and safety of miners" to constitute a present hazard. *Legis. Hist.* at 620.

Significantly, as described *supra,* at 11, Congress intended the pattern of violations provision to parallel the provision for withdrawal of miners from an area of a mine based on repeated unwarrantable failure violations contained in section 104(d) of the Mine Act. *Id.* at 621. Neither section 104(e) nor (d) contains any provision for a hearing or other due process protection prior to the withdrawal of miners from the area in question. Thus, Brody's complaint of due process deprivation is not with the Secretary's POV rule but rather with Congress's enactment of section 104(e) itself.

Our holding thus turns on the second factor, the risk of erroneous deprivation under the POV rule's procedures. Weighing this risk with the other two factors, we conclude that the current rule adequately addresses the potential for erroneous deprivation and satisfies procedural

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[13] Our dissenting colleague has characterized the public interest in safety reflected in the POV rule as a "spasm of pain and fear" which would "unnecessarily sacrifice basic rights." Slip op. at 52 n.16. On the contrary, just as the original POV provision in the Mine Act represented a rational response to the problem of repeated disregard of the Act's other enforcement approaches, the current POV rule may be seen as a rational response to the ineffectiveness of previous attempts to address the problem.

due process. We reach this conclusion based on the pre-deprivation and post-deprivation protections afforded operators. *See Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predreprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a reasonable governmental official warrants them to be.").

Before an operator is formally notified that it is in a pattern of violations, MSHA's on-line Monthly Monitoring Tool provides operators with an opportunity to monitor notice of their status for the possibility that they might be subject to consideration for issuance of a POV notice. 78 Fed. Reg. at 5061. Operators can present information to support mitigating circumstances to the MSHA District Manager at any time.[14] *Id.* at 5063. Operators also have the opportunity at any time to implement a corrective action program to reduce S&S violations. *Id.* at 5063-64.

If MSHA's Monthly Monitoring Tool reveals that an operator has satisfied the screening criteria set forth on MSHA's website, MSHA also conducts a review to determine whether a POV notice should not be issued or should be postponed after considering any mitigating circumstances and other information.[15] *Id.* at 5063. MSHA considers an operator's effective

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[14] MSHA has stated that "[t]he types of mitigating circumstances that could justify a decision not to issue a POV notice, or to postpone the issuance of a POV notice to reevaluate conditions in the mine, may include, but are not limited to . . . [a]n approved and implemented corrective action program . . . accompanied by positive results in reducing S&S violations; a bona fide change in mine ownership that resulted in demonstrated improvements in compliance; and MSHA verification that the mine has become inactive." 78 Fed. Reg. at 5063.

[15] As noted in the preamble to the current rule, MSHA has promulgated a Pattern of Violations (POV) Procedures Summary which is contained in the POV Single Source Page on MSHA's website. 78 Fed. Reg. at 5059. The POV Summary describes the procedures to be followed when an operator satisfies the POV screening criteria:

> The Administrators will issue a memorandum to each District Manager who has mines within the district that meet the POV screening criteria with instructions for reviewing the designated mines for mitigating circumstances (see Appendix A – Mitigating Circumstances). Each memorandum will include the criteria and detailed data supporting a POV designation. The District Manager will, by memorandum to the Administrator, report facts relevant to whether there are mitigating circumstances that justify postponing or not issuing a POV notification.
>
> . . . .
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> An MSHA POV panel will review the information

implementation of an MSHA-approved corrective action program as a mitigating circumstance in its POV review. *Id.*

In addition, operators can discuss citations and orders with the inspector during the inspection and at the closeout conference.[16] 78 Fed. Reg. at 5061. At any time after the issuance of an S&S citation or order, an operator may contest the citation or order and request an expedited hearing, particularly if MSHA's Monthly Monitoring Tool reveals that the operator may be approaching consideration for a POV notice.[17] *See* 29 C.F.R. §§ 2700.20, 2700.52.

> provided by the District Manager. Within seven calendar days of receipt of the District Manager's memorandum, the panel will review the information, obtain any additional necessary information, and make a recommendation as to whether any of the mines meeting the screening criteria for a Pattern of Violations should be excluded from POV notification or have their POV notification postponed due to mitigating circumstances. The panel will provide a report of its findings to the Administrators, with a copy provided to the Assistant Secretary, Deputy Assistant Secretaries, the Director of Office of Assessments, Accountability, Special Enforcement and Investigations, and the Associate Solicitor for Mine Safety and Health.
>
> The Administrators will determine whether to issue a POV Notice and notify the appropriate District Managers of the mines that meet the criteria and have no mitigating circumstances warranting postponement or non-issuance of a POV Notice. The District Managers will issue the POV Notices.

B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 1. The present case illustrates that MSHA followed these procedures in a thorough manner. As more fully described *infra*, slip op. at 25, the MSHA POV Review Panel reviewed potentially mitigating circumstances pertaining to Brody's Mine No. 1, including a change in ownership and a corrective action plan, before recommending to the Administrator that a POV notice be issued.

[16] Operators can request a conference with the MSHA field office supervisor or the District Manager to review citations and orders and present any additional relevant information. 78 Fed. Reg. at 5061. Whether such a request is granted is within MSHA's discretion, however. *See* 30 C.F.R. § 100.6(a).

[17] We note that in *Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1127-28 (Dec. 2008) (ALJ), although the Judge denied the motion for expedited review of 23 citations alleging S&S violations, the Judge provided a hearing less than a month after the case was assigned to him and approximately two months after the contests were received in the Commission's Docket Office. At oral argument in this case, the Secretary's counsel agreed that, as demonstrated in

As for post-deprivation procedures, after a withdrawal order is issued under section 104(e), an operator may seek expedited temporary relief under section 105(b)(2) of the Act, 30 U.S.C. § 815(b)(2). *See also* 29 C.F.R. §§ 2700.46, 2700.47. *See Hodel*, 452 U.S. at 298-302 (holding that summary post-deprivation procedures satisfied due process). In addition, operators may seek expedited proceedings on contests of section 104(e) withdrawal orders.[18] *See* 29 C.F.R. §§ 2700.20, 2700.52.

Given these procedures, the relative cost of the alternative proposed by Brody is too high. Requiring MSHA to wait to issue a POV notice until the notice can be based on final orders would deprive MSHA of the ability to base POV determinations on an operator's recent compliance history. Moreover, elimination of the PPOV process does not deprive operators of adequate notice given the ongoing notice provided by MSHA's Monthly Monitoring Tool.

Brody's due process argument is a facial attack on the pattern of violations regulations contained in 30 C.F.R. Part 104. "To prevail in such a facial challenge, [Brody] 'must establish that no set of circumstances exists under which the regulation would be valid.'" *Reno v. Flores,* 507 U.S. 292, 301 (1993) (citations omitted). Brody has failed to establish such a basis for its due process challenge to the current rule. In sum, we conclude that the term "violations" in section 104(e) of the Mine Act permits MSHA to include non-final citations/orders in a pattern of violations. The Secretary's interpretation of the term "violations" in section 104(e) reasonably carries forth Congress' intent and is consistent with the express delegation in section 104(e) of the Act. We further hold that MSHA's adoption of the current rule was not arbitrary, capricious or an abuse of discretion. Finally, we conclude that the current rule satisfies procedural due process. Accordingly, we uphold the facial validity of the current rule.

C. Use of POV screening criteria not promulgated through notice-and-comment rulemaking

Section 104.2 of the POV rule sets forth the criteria included in MSHA's review to identify mines with a pattern of S&S violations. In promulgating current section 104.2, MSHA combined sections 104.2 and 104.3 of the 1990 rule. 78 Fed. Reg. at 5058. In so doing, the

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Rockhouse, if an operator became aware from MSHA's Monthly Monitoring Tool that it was in danger of receiving a POV notice, it could request an expedited hearing on S&S citations and orders which had been contested. Oral Arg. Tr. 88-89, 98-101.

[18] Operators also have an opportunity to meet with District Managers for the purpose of correcting any discrepancies after MSHA has conducted its POV screenings and has issued a POV notice. 78 Fed. Reg. at 5065. Such discrepancies include, but are not limited to, "citations that are entered incorrectly or have not yet been updated in MSHA's computer system, . . . Commission decisions rendered, but not yet recorded, on contested citations, and citations issued in error to a mine operator instead of an independent contractor at the mine." *Id.*; B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 1-2.

current rule eliminated the PPOV process and the requirement that MSHA consider only final orders when evaluating mines for a POV. *Id.* Current section 104.2(b) newly provides that MSHA will post specific pattern criteria on its website, and section 104.2(a) lists eight factors which include mitigating circumstances, that MSHA considers in making its POV determination.

MSHA uses the specific numerical criteria posted on its website as an initial screening to narrow the more than 14,000 mines within its jurisdiction to those mines that are suitable for further consideration for a POV notice. S. Br. at 26; Oral Arg. Tr. 43, 90. After that initial screening, MSHA applies the criteria set forth in section 104.2(a) in its determination of whether to issue a POV notice to a mine. S. Br. at 26-27.

Brody argues that the specific pattern criteria posted on MSHA's website are invalid because they are, in effect, legislative rules and should have also been the subject of rulemaking. We disagree.

Section 104(e)(4) of the Mine Act authorizes the Secretary to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814(e)(4). Congress stated its "intention to grant the Secretary in Section 10[4(e)](4) broad discretion in establishing criteria for determining when a pattern of violations exists." *Legis. Hist.* at 621. Section 104(e)(4) does not explicitly require the Secretary to engage in rulemaking to establish POV criteria. Rather, the Secretary must "make such rules as he deems necessary to establish criteria."

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation. 5 U.S.C. § 553. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Legislative rules are subject to notice-and-comment requirements, while general statements of policy are not. 5 U.S.C. § 553(b)(3)(A); *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (citations omitted). The Secretary asserts that the POV screening criteria constitute a general statement of policy.

The Commission has recognized that the agency's own label of its action is indicative but not necessarily dispositive in classifying the type of action taken. *Drummond Co.*, 14 FMSHRC 661, 683 (May 1992) (citations omitted). Rather, "it is the 'substance of what the [agency] has purported to do and has done which is decisive.'" *Id.* (citations omitted).

In delineating the difference between legislative rules and general statements of policy, courts consider whether the agency action establishes a binding norm. *Nat'l Mining Ass'n*, 589 F.3d at 1371. The "key inquiry" is the "extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow that general policy. . . or whether the policy so fills out the statutory scheme that upon application one need only determine whether a given

case is within the rule's criterion." *Id.* (internal quotations and citation omitted). Courts have explained that "[a]s long as the agency remains free to consider individual facts in the various cases that arise, then the agency in question has not established a binding norm." *Id.*

In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538 (D.C. Cir. 1986), another case where the issue was whether MSHA's enforcement documents required notice-and-comment rulemaking, the Court held that MSHA's "Enforcement Policy and Guidelines for Independent Contractors" was a non-binding agency policy statement. The Court emphasized that the policy pertained to the agency's exercise of enforcement discretion "an area in which the courts have traditionally been most reluctant to interfere." *Id.* at 538. The Court stated that an agency action is not deemed a binding norm "merely because it may have 'some substantive impact,' as long as it 'leave[s] the administrator free to exercise his informed discretion.'" *Id.* at 537 (citation omitted). Moreover, courts look at the language of an agency's pronouncement for indications that the agency may exercise its discretion. *See, e.g., id.* at 537-38 ("We have, for example, given decisive weight to the agency's choice between the words "may" and "will").

In a subsequent case, the D.C. Circuit similarly ruled that Department of Health and Human Services' communications implementing peer review policies for hospitals did not require notice and comment because they were procedural rules. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1041 (D.C. Cir.1987). The Court declared that the directives "establish a frequency and focus of [peer] review, urging . . . enforcement agents to concentrate their limited resources on particular areas where HHS evidently believes . . . attention will prove most fruitful." *Id.* at 1050. In finding that these procedures were exempt from notice-and-comment rulemaking, the Court noted that "[f]ar from imposing a new substantive burden on hospitals, the agency's decision to focus its resources on such likely problem areas gives more full effect to the intent of the congressional framers of the peer review amendments" (*id.* at 1052), and that "agency decisions on where to concentrate enforcement efforts within a universe of valid targets need not be prefaced by notice and comment procedures" (*id.* at 1056).

After considering the 2013 POV screening criteria posted on MSHA's website, we conclude that the screening criteria are a general statement of policy. As with the peer review policy at issue in *American Hospital Association*, the screening criteria assist MSHA in ascertaining how it will "concentrate enforcement efforts" regarding POV enforcement. *Id.* Moreover, the screening criteria set forth language that indicates that even if a mine meets the criteria, MSHA still exercises discretion in determining whether a POV notice should be issued to the mine. For instance, the screening criteria provide, "All non-abandoned mines . . . are reviewed to determine if a pattern of violations *may* exist." B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1 (emphasis added). The screening criteria also provide, "The following two sets of screening criteria are used to perform the review required under 30 CFR § 104.2. Mines must meet the criteria in either set *to be further considered* for exhibiting a pattern of violations." *Id.* (emphasis in original omitted and emphasis added).

Rather than automatic inclusion of all operators who meet the screening criteria, MSHA has provided a process for further review. As described *supra,* slip op. at 5-6, 19-20 n.15, after the screening criteria weed out the vast majority of mines,[19] an MSHA Pattern of Violations Review Panel considers mitigating circumstances, and makes a recommendation to the Administrator. Our dissenting colleague's opinion gives the impression that MSHA's hands are tied when considering mitigating circumstances, because such circumstances are limited to three conditions. Slip op. at 33-34 & n.5. This is wrong. As we noted earlier, slip op. at 19, n.14, the preamble to the POV rule lists several types of mitigating circumstances that could justify a decision not to issue a POV notice, but explicitly states that such circumstances are not limited to those that were articulated. 78 Fed. Reg. at 5063. Appendix A of MSHA's Pattern of Violations Procedures Summary also states explicitly that the conditions in the mine that may justify such a decision may include but are not limited to, the conditions cited in the Appendix. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 3. Consequently, our colleague's statement that "[i]f an operator meets the specific pattern criteria, it is in POV status subject only to a separate decision that it has recently mitigated its history of violations by change of ownership or adoption of a previously-approved MSHA approved corrective action program" is incorrect. Slip op. at 49. Thus, MSHA's discretion in this regard is far broader than our colleague has acknowledged.

We also observe that section 104.2(a)(7) states that MSHA will consider whether there is other information that demonstrates a serious safety or health problem at the mine which warrants POV enforcement. The preamble states that under this rule, the information may *include, but is not limited to*, the following:

- Evidence of the mine 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 or standards related to the same hazard;
- 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 health and safety standards that contribute to the cause of accidents and injuries.

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[19] At oral argument, the Secretary's counsel stated that "the Secretary has devised these numerical criteria to act as a screening device that will eliminate 99 percent or more of the mines and will identify only this small number of mines that are most likely to have a pattern of violations." Oral Arg. Tr. 90.

78 Fed. Reg. at 5062 (emphasis added).[20] The application of section 104.2(a)(7) demonstrates an exercise of discretion similar to that exercised under the prior rule. *See* 30 C.F.R. §§ 104.3(a)(1) & (2) (1990). Thus, the dissent is incorrect in asserting that MSHA does not retain discretion in its POV determination.

In this case, the Review Panel considered two potentially mitigating circumstances, a change in ownership and a corrective action plan. The Panel noted that a change in Brody's controlling entity occurred on December 31, 2012, that there were subsequent "wholesale" changes in company officers and mine management, and that Brody implemented a corrective action plan in January 2013 and an updated and revised corrective action plan in March 2013. The Panel further noted that the rate of S&S issuances had declined during the first part of 2013. However, the rate of S&S issuances climbed back to its previous level in July and August 2013. The Panel further noted an increase in unwarrantable failure issuances in June and July 2013, and the issuance of training and imminent danger orders in August. Hence, the Panel concluded that the changes in personnel and the corrective action plan did not achieve "measurable improvements in compliance." S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 8. The Panel also "considered the fact that Brody does not accurately report injury and employment information." *Id.* at 11. Based on this review, the Panel recommended issuance of a POV notice to Brody Mine No. 1. *Id.* at 8-12. The process for further review in this case illustrates that the Administrator is free to exercise his informed discretion in the issuance of a POV notice, despite the existence of the numerical screening criteria.

Accordingly, we conclude that the screening criteria posted on MSHA's website amount to a general statement of policy and are not subject to notice-and-comment rulemaking requirements.

D. Application of the current rule to violations occurring before its effective date

Finally, Brody argues that the Secretary impermissibly included 24 citations in the POV notice that had been issued prior to the March 25, 2013 effective date of the current rule, and that such inclusion is improper because it gives retroactive effect to the rule. It asserts that if the 24 citations were not included, it would not have satisfied the initial screening criteria.

Agencies have the power to issue legislative rules only to the extent Congress has conferred that power. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). A statutory grant of legislative rulemaking power will not be understood to encompass the power to

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[20] We note that the POV notice issued to Brody pared down the number of violations considered in the numerical screening to 54, and grouped the violations into four categories of "[r]epeated S&S violations of a particular standard or standards related to the same hazard." 78 Fed. Reg. at 5062. MSHA also considered Brody's failure to accurately report its injury rate. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 11-12. Thus, it appears that MSHA applied section 104.2(a)(7) separately from the numerical screening criteria.

promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Id.*; *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 158 (2d Cir. 1999).

It is recognized that "a law is not retroactive merely because it is applied to conduct before the law was passed or upsets expectations based in prior law." *Durable Mfg. Co. v. DOL*, 578 F.3d 497, 503 (7th Cir. 2009) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)). "Rather, a law has retroactive effect if it 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* To determine whether a rule is retroactive, a court must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

We hold that the inclusion of the 24 citations that pre-dated the current rule's effective date in the POV notice issued to Brody was not a retroactive application of the rule. Application of the rule to include those citations did not increase Brody's liability for past conduct. As the Secretary argues, section 104(e) may be analogized to "repeat offender" provisions under which an enhanced penalty is not an "additional penalty for the earlier crimes," but rather was a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948). Inclusion of the citations in the POV notice is not retroactive because it alters the present situation, not "'the past legal consequences of past actions.'" *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).

Nor does inclusion of the citations in the POV notice take away or impair vested rights that Brody had under the prior rule. The current rule does not affect Brody's right to contest the 24 citations after their issuance or affect any penalty assessed. By including the citations, MSHA is considering Brody's past inspection history without affecting Brody's right to contest the citations. *Cf. Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (holding rules not retroactive that permit past default rates to be basis for termination for eligibility in student loan program where default rates were permissible under prior law).

Considerations of fair notice, reasonable reliance, and settled expectations do not alter our conclusion. Brody has not alleged that if it had known that the 24 citations would be included in the POV notice, it would have engaged in different conduct. Brody contested the 24 citations, just as it would have if they had been issued after the effective date of the rule. Indeed, the incentive for operators to contest S&S citations was, if anything, greater before the effective date of the current rule because, under the prior rule, a contest of an S&S citation would delay the time it would become final, and thus eligible for consideration toward a POV notice.

Even before the current rule took effect, Brody knew that certain conduct could constitute an S&S violation and that, under section 104(e), a pattern of S&S violations could trigger POV sanctions. In fact, MSHA had sent Brody a PPOV letter on March 1, 2013, prior to the effective

date of the current rule. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 10. As discussed above, nothing in the Mine Act requires that the violations in a pattern notice be final orders. *See Tarver v. Shinseki*, 557 F.3d 1371, 1375 (Fed. Cir. 2009) (considering whether claimant could point to anything she would have done differently in analysis of retroactivity).[21]

In addition, the numerical portion of the 2013 POV screening criteria applied to Brody was the same as the numerical criteria posted by MSHA in 2012 under the prior rule, and both used data collected over 12 months.[22] The proposed rule also referred to the screening criteria on MSHA's website and indicated that it would eliminate the final order requirement. 76 Fed. Reg. at 5720, 5721; *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 164 (D.C. Cir. 2010) (concluding that notice of proposed rulemaking provided notice of agency's likely approach). Thus, Brody knew before the effective date of the rule that the numerical criteria would use data that covered an entire year, based on the date that MSHA chose to run its screening criteria.

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[21] We are not persuaded by Brody's contention that elimination of the PPOV process was retroactively applied to it. Brody has failed to make allegations to support its claim. In any event, the information provided by a PPOV was available to Brody online through MSHA's Monthly Monitoring Tool.

[22] MSHA issued a press release and posted the screening criteria on its website in September 2010. www.msha.gov/MEDIA/PRESS/2010/NR100928.pdf. The numerical criteria of the 2010 screening criteria are the same as the numerical criteria applied to Brody. MSHA's Monthly Monitoring Tool became available in April 2011. 78 Fed. Reg. at 5059; www.msha.gov/MEDIA/PRESS/2011/NR110406.asp.

IV.

Conclusion

For the reasons discussed above, we conclude that the current rule is facially valid and consistent with the requirements of procedural due process, that MSHA's screening criteria were not required to be the subject of notice-and-comment rulemaking, and that the current rule was not applied in an impermissibly retroactive manner to Brody. Accordingly, we affirm the Judge's interlocutory order and remand for further proceedings.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Althen, dissenting:

Part 104 of the regulations of the Mine Safety and Health Administration (MSHA) governs "Pattern of Violations" (hereinafter "POV"), pursuant to section 104(e) of the Mine Act, 30 U.S.C. § 814(e). 30 C.F.R. § 104. Section 104.2, entitled "Pattern criteria," establishes criteria for determining the existence of a pattern of "significant and substantial," or "S&S," violations of the Mine Act. 30 C.F.R. § 104.2. Subsection (a) of section 104.2 states that at least once each year MSHA will determine if any mine meets the pattern of violations criteria and identifies a number of criteria relevant to POV status. Subsection (b) of section 104.2 establishes use of specific numerical pattern criteria and states that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2(b).

In upholding the regulations as validly issued, the majority here permits issuance of specific binding pattern criteria without compliance with the notice-and-comment requirements of the Administrative Procedure Act (APA). In so doing, it wholly disregards the binding effect of the specific pattern criteria upon MSHA and accepts MSHA's assurance that the specific pattern criteria are only "screening criteria."

The majority also accepts MSHA's claim that it may enforce a POV Notice severely impacting property rights of mine operators before rather than after any form of hearing even though such issuance of a POV Notice requires more than a year of analysis and MSHA has many other enforcement weapons to deal with current, recent, or ongoing violations of its regulations. In light of MSHA's enforcement tools, old and new, and MSHA's official definition of a POV as stated in this litigation, that decision is plainly wrong. MSHA can provide meaningful due process procedures to operators before issuance of POV Notice. The Commission should require it to do so.

I.

APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT

A. The Determination of POV Status

1. 30 C.F.R. § 104

Although Section 104(e) of the Mine Act was enacted in 1977, MSHA did not adopt regulations implementing Section 104(e) of the Mine Act until 1990. 55 Fed. Reg. 31,128-01 (July 31, 1990). Those regulations set forth a two-step process for issuance of POV Notice. Original section 104.2, entitled "Initial screening," identified criteria for selecting mines that would then be further reviewed for possible issuance of a POV Notice under "pattern criteria" set forth in original section 104.3 of the regulation. The screening criteria listed included the mines' compliance records; enforcement measures taken by MSHA at the mine other than under section 104(e) of the Mine Act; the extent of a lack of good faith on the part of the operator in addressing

the conditions that were leading to repeated S&S violations; the mine's history of accidents and injuries; and any mitigating circumstances. 30 C.F.R. § 104.2 (1990).

Later, MSHA eventually posted two sets of "Initial Screening Criteria" on its website. Under the prior regulations, if a mine met either set of these screening criteria, the mine was then further reviewed under "Pattern Criteria" set forth in section 104.3 of the regulations. The pattern criteria were used to determine if the operator "habitually" allowed the recurrence of S&S violations, for the purpose of deciding whether there was a "pattern" to such violations. The pattern criteria identified in original section 104.3(a) of the regulations were: (1) a history of repeated S&S violations of a particular standard, (2) a history of repeated S&S violations of standards related to the same hazard, or (3) a history of repeated S&S violations caused by an unwarrantable failure to comply. Under original section 104.3(b), these criteria were applied only to citations/orders that had become final. 30 C.F.R. § 104.3 (1990).

MSHA adopted the revised regulations at issue here on January 23, 2013, with an effective date of March 25, 2013. 78 Fed. Reg. 5056, 5073-74 (Jan. 23, 2013). The revised regulations substantially changed the process for issuance of a POV Notice.

First, the former section 104.3 setting forth pattern criteria linking POV Notices to "habitual" S&S violations related to particular standards or hazards or unwarrantable failures was eliminated and not replaced.[1] Although not couched in terms of a "definition" of a POV, the former section 104.3 essentially defined the "pattern" aspect of a POV by referring to habitual S&S violations and based such habitual pattern on repeated violations of a particular standard or standards related to the same hazard or to unwarrantable failures. Although the revised regulation deleted section 104.3, it did not fashion a replacement definition of the "pattern" of conduct that would result in POV status.

Second, the pre-deprivation procedures set forth in section 104.4 were eliminated and not replaced. In responding to comments regarding the elimination of such procedures, MSHA stated that it would allow operators to request a conference with the field office supervisor or district manager regarding particular S&S citations, for the limited purpose of discussing discrepancies and/or errors in data such as incorrectly entered citations. 78 Fed. Reg. at 5065-66.

In response to criticism by commenters that the deletion eliminated due process protections, MSHA cited a new enforcement tool provided on its website that allows an operator

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[1] The preamble to the revised regulation inaccurately states that the revised regulation "combines existing §§ 104.2 and 104.3 into a single provision." 78 Fed. Reg. at 5058. In fact, the revised regulations simply changed the prior screening criteria at section 104.2 into "pattern criteria" and added the new subsection establishing the specific numerical pattern criteria. A specific reference to unwarrantable failures that had not expressly appeared in the prior section 104.2 was added but undoubtedly was within the scope of other "enforcement measures" in prior section 104.2.

to undertake continuing evaluation of its performance against the specific pattern criteria referred to in the regulation. 78 Fed. Reg. at 5066. In doing so, MSHA guaranteed operators that they would not be subject to a POV Notice if they avoided coming within the limits of the specific pattern criteria. MSHA stated that, because operators not falling within those specific criteria would not be subject to receipt of a POV Notice, the enforcement tool, along with the possibility for expedited post-deprivation hearings, provided due process. Thus, MSHA bound itself to the specific pattern criteria — operators are assured that if they do not fall within the specific pattern criteria they will not be issued a POV Notice. 78 Fed. Reg. at 5064.

A third change in the rules was the elimination of the limitation that POV Notices could be issued only on the basis of final citations and orders. MSHA stated that it was not feasible to issue POV Notices on the basis of final violations and that orders under other provisions of the Mine Act could be issued on the basis of non-final citations and orders. 78 Fed. Reg. at 5060.

Fourth, section 104.2 was rewritten. As demonstrated in Table 1 below, the "Initial Screening Criteria" in the prior regulation were converted into "Pattern Criteria" at section 104.2(a). Second, and more importantly for present purposes than the conversion of "screening criteria" into "pattern criteria," a new subsection (b) was added to the regulation. It provides: "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2(b). Therefore, subsection (b) plainly creates "specific pattern criteria" but provides for their posting on MSHA's Website.[2]

Table 1

New Section 104.2 – "Pattern Criteria"	**Prior Section 104.2 "Initial Screening"**
At least once each year, the compliance and accident, illness, and injury records of mines are reviewed to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:	At least once each year, MSHA shall review the compliance records of mines. MSHA's review shall include an examination of the following:
104.2(a)(1) History of S&S citations	104.2(a)(1) History of S&S citations
104.2(a)(2) Closure orders under Mine Act section 104(b)	104.2(a)(2) Closure orders under Mine Act section 104(b)

[2] Perhaps, MSHA was attempting to "split the baby" by establishing the existence of specific criteria in the regulation and making that available by notice for comment while posting the actual numerical specific criteria on its website to permit changes without compliance with the APA. Such gamesmanship is contrary to the APA.

104.2(a)(3) Citations and orders under Mine Act section 104(d)	104.2(b)(1) and (2) Enforcement measures other than 104(e); evidence of lack of good faith through repeated S&S violations
104.2(a)(4) Imminent danger orders	104.2(a)(3) Imminent danger orders
104.2(a)(5) Orders under Mine Act section 104(g)	104.2(b)(1) and (2) Enforcement measures other than 104(e); evidence of lack of good faith through repeated S&S violations
104.2(a)(6) Enforcement measures other than 104(e)	104.2(b)(2) Enforcement measures other than 104(e)
104.2(a)(7) History of accident, illnesses, injuries	104.2(b)(3) History of accident, illnesses, and injuries
104.2(a)(8) Mitigating circumstances	104.2(b)(4) Mitigating circumstances
New Section104.2(b) **"MSHA will post the specific pattern criteria on its Web site."**	**No comparable provision**

The screening criteria posted on MSHA's website under the prior rule identified two sets of criteria with numerical specifications for screening. The introduction to the criteria was entitled Initial Screening Criteria and stated that "[t]he following two sets of screening criteria are used to perform the initial screening required under 30 C.F.R. § 104.2. Mines must meet the criteria in either set to be further considered for exhibiting a potential pattern of violations." S. Mem. Supporting Mot. for Partial Summ. Dec., Ex. 2 at 1 (emphasis omitted).

In promulgating the revised regulations, MSHA utilized the same specific numerical criteria that had been on the website under the prior regulation. However, they were now issued as "specific pattern criteria" in accordance with the establishment of specific pattern criteria in the regulation in section 104.2(b). MSHA also modified the introductory language to confirm the criteria as the specific pattern criteria referenced in the regulation itself. The outcome determinative importance of the specific pattern criteria created in the regulation itself and then posted on the website was emphasized in the preamble to the final POV: "Final § 104.2(b), proposed as § 104.2(a), provides that MSHA will post, on its Web site at http://www.msha.gov/POV/POVsinglesource.asp, the specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations." 78 Fed. Reg. at 5064. The introduction to the specific criteria confirmed the numerical specific criteria as "Pattern

Criteria"[3] and provided: "The following two sets of screening criteria are used to perform the review required under 30 C.F.R. § 104.2. Mines **must** meet the criteria in either set to be further considered for exhibiting a potential pattern of violations." B. Mem Supporting Appl. for Temp. Relief, Ex. 10 at 1 (emphasis added).

The text of the introduction continues to use the term "screening criteria." However, the language no longer refers to use for an "initial screening" but rather for the "review required under 30 C.F.R. § 104.2" – namely, the pattern criteria. More importantly, MSHA demonstrates the actual use of the specific pattern criteria in its POV Procedures Summary. A mine satisfying either set of specific pattern criteria is in POV status and will receive a POV Notice unless MSHA separately decides that the mine has mitigated its tendency toward S&S citations/orders/violations.[4]

2. Process for Designation of POV Status

MSHA provides a Pattern of Violations (POV) Procedures Summary on its website. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11. If a mine does not meet the specific pattern criteria, it is not in POV status and no consideration of issuance a POV notice is given to it. On the other hand, when an operator meets the specific pattern criteria MSHA considers it in POV status and moves only to a consideration of possible mitigation.

At that point, MSHA headquarters seeks input from the appropriate District Manager, but not with respect to any of the Pattern Criteria, but rather with regard to three described and narrowly-drawn "mitigating circumstances" – namely, the mine has been deactivated, mine ownership has changed to an operator less likely to incur S&S violations, or the operator has adopted a corrective action plan approved by MSHA. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 3. Upon receipt of the District Manager's report on mitigating circumstances,

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[3] "Words have power and names have meaning." Unknown author. The majority persists in incorrectly referring to the "pattern criteria" established in section 104.2(b) and on MSHA's website as "screening criteria." The change from "screening criteria" to "pattern criteria" is not outcome determinative but neither is it inconsequential. It demonstrates the substantive change in section 104.2 with the elimination of the prior section 104.3.

[4] Here, we are concerned with whether meeting the specific pattern criteria for POV status means the operator is in POV status and receives a POV notice subject only to a separate mitigation review. Because the 104.2(a) criteria are virtually identical to the specific criteria, but without numerical targets, and the process calls for a review only of mitigation factors after the operator is in POV status, an operator is in POV status after it falls within the specific pattern criteria.

an "MSHA POV panel" is to review the mitigation information provided by the District Manager.[5] *Id.* at 1.

3. Panel Recommendation Leading to POV Notice

The POV Panel recommendation related to Brody is dated October 22, 2013, and comports with the Procedures Summary. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A. After an introduction in which the specific numerical pattern criteria (and only the specific numerical pattern criteria) are quoted, the Panel memorandum focuses exclusively on, and rejects, possible mitigation. In Section 1, the Panel discusses and rejects a change of ownership as a possible reason for mitigation. *Id.* at 8-10. In Section 2, the Panel discusses and rejects Brody's corrective action program as a possible reason for mitigation. *Id.* at 10-11. Finally, in Section 3, the Panel discusses and rejects inactivation as a possible reason for mitigation. *Id.* at 12.

Thus, POV status was established to the satisfaction of MSHA by the specific pattern criteria and was then subject to a separate review of narrow mitigation circumstances. No discretionary consideration appears on the record to have been exercised by MSHA regarding the POV status once the specific criteria were met; instead, the only discretionary element was the determination whether MSHA should postpone issuance of a POV Notice on the basis of a mitigating factor.

The process flowed from the specific pattern criteria, to an inquiry to the District Manager regarding mitigation, to Panel review of mitigation, to issuance of a POV notice. Although 253 unproven citations/orders were the basis for Brody's POV status, the POV Notice cited 54 citations/orders for S&S violations grouped in four categories of alleged violations in

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[5] The majority asserts that the mitigating circumstances are not limited to the three types of mitigation identified in the POV Procedures Summary because the Appendix uses the stock phrase "may include, but are not limited to." Slip op. at 24. Nowhere in the POV Procedures Summary, the proposed regulation, or the final regulation does the Secretary discuss or give any other example of a possible mitigating circumstance. Further in the Panel recommendation leading to the POV Notice to Brody, the Panel discusses and dismisses each, and only each, of the three possible reasons for mitigation. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 8-12. Even more importantly, as discussed at length in the text *infra,* consideration of mitigation comes after an operation is evaluated as being in POV status under the specific pattern criteria on the website. Therefore, although consideration of mitigation may bear at a later stage upon issuance of a POV Notice, it is not relevant to the determination under the specific pattern criteria that an operator is in POV status. Therefore, it is not a discretionary consideration with respect to whether the operator has reached a number of S&S citations/orders/violation to be in POV status. Nor does it bear upon whether the operator may not be considered to be in POV status because it has not reached the outcome determinative number of citations/orders/violations.

categories of related hazards. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 9; Notice No. 7219154. The groupings ranged from seven to 20 citations/orders.[6] Notice No. 7219154.

4. Definition of Pattern of Violations

MSHA's regulation does not define a pattern of violations. However, in this litigation, the Secretary has now defined a "pattern of violations." Citing Black's Law Dictionary, the Secretary defines the word "pattern" to mean "[a] mode of behavior or series of acts that are recognizably consistent." S. Br. at 19-20. MSHA does not elaborate upon the meaning of "recognizably consistent."

Then, the Secretary provides specificity as to the number of S&S violations that will constitute a "series" or "pattern" stating that: "Courts interpreting the term 'pattern' as used in other federal statutes have held that as few as two instances may suffice . . . The risk of an erroneous POV determination should be measured against that low threshold. . . . [A]s discussed above, a POV notice may lawfully be predicated on as few as two or three S&S violations." S. Br. at 19, 22 (citations omitted).

Therefore, the Secretary's interpretation of a "pattern of violations" within the meaning of Section 104(e) of the Mine Act effectively comes down to a "mode of behavior or series of acts [meaning at least two or three S&S violations] that are recognizably consistent." The definition does not include any notion of elevated violations, high degree of negligence, or accident or injury rate, etc.[7]

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[6] Three of the citations/orders occurred after the end of the review period of September 2012 to August 2013, an anomaly that MSHA was not able to explain at oral argument. *See* Notice No. 7219154; Oral Arg. Tr. 55-56.

[7] While this definition has been submitted in briefs before us, the reasonableness of this definition was not certified to the Commission and was not briefed by the parties. Therefore, whether this definition is a reasonable interpretation of section 104(e) of the Mine Act is not before the Commission. Not only is the issue not before us but also MSHA does not further define the meaning of "recognizably consistent." Nonetheless, it should be noted that asserting that a "series" of two or three S&S violations constitutes a POV within the meaning of section 104(e) appears perilously close to being plainly inconsistent with MSHA's own recognition in the preamble to the final regulations that POV status is aimed at a small number of recalcitrant operators. According to "MSHA's Key Indicators Report, Citations and Orders Issued Report, All Coal 10/01/2010 - 09/30/2011," the number of just coal mine 104(a) citations that were designated S&S averaged 32,616 annually for the four years from 2008 through 2011. Consequently, a definition of a POV as two or three S&S violations in a series that are recognizably consistent would appear to put every mine in the mining industries in POV status at MSHA's election. Only the specific numerical pattern criteria not considered "substantive" by

The Secretary applies its definition to Brody. The POV Notice divides the 54 alleged violations in Brody's POV Notice into four categories. One of those categories consists of seven citations/orders citing conditions and/or practices that allegedly contribute to inadequate examinations. The Secretary asserts that, separate and apart from other citations identified in the POV Notice, proof of those seven citations/orders (or some unidentified lesser number but presumably diminishing to two or three) would suffice to prove a pattern of violations. S. Br. at 22.

The Secretary contends that the statement of specific pattern criteria which is provided for at 30 C.F.R. § 104.2(b) and published on MSHA's website is a statement of policy. Brody characterizes them as substantive (also referred to as "legislative" rules) requiring notice and comment. Therein rests the APA notice and comment dispute.

B. The Distinction Between Statements of Policy and Substantive Rules

The importance of notice and comment to transparent and principled governance needs no elaboration. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir 1987); *Batterton v. Marshall*, 648 F.2d 694, 700-02 (D.C. Cir. 1980); *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Nor is it necessary to recite from the litany of cases noting the difficulty encountered in distinguishing among substantive rules, interpretive rules, and statements of policy. *Am. Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Cmty Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Finally, by way of preamble, although the APA provides exemptions from its notice-and-comment requirements, such exemptions must be narrowly construed. *Am. Hosp. Ass'n v. Bowen,* 834 F.2d at 1044 ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in [section] 553 to swallow the APA's well-intentioned directive.").

Our recourse, of course, is to the case law that determines the fate of the parties' arguments. Are the specific pattern criteria established at 30 C.F.R. § 104.2(b) and published on MSHA's website merely a statement of policy or are they a substantive rule? If the specific pattern criteria are merely a statement of policy, then "[t]he agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).[8] If the specific pattern criteria constitute a substantive rule then MSHA may not

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the Secretary stand in the way of such industry-wide application.

[8] The Secretary has not argued that the specific pattern criteria are an interpretive rule. In *American Mining Congress v. Mine Safety and Health Administration*, the District of Columbia Circuit Court distinguished between statements of policy and interpretive rules for purposes of analyzing whether the promulgation is a substantive rule. It first concurred with the application

implement the specific pattern criteria without following the notice-and-comments requirements of the APA. 5 U.S.C. § 553.

Citing *Drummond Co.*, 14 FMSHRC 661, 686 (May 1992), the Secretary describes the distinction between a statement of policy and a rule as based upon a two-fold test of whether the agency's action: (1) "acts prospectively, *i.e.*, 'does not impose any rights or obligations,'" and (2) "leaves the agency and its decision-makers free to exercise discretion." S. Br. at 25. Brody takes only a longer route to reach the same test. It first recites in a more general fashion the general distinction between substantive rules and statements of policy as set forth in *Pacific Gas & Electric Co. v. FPC*, 506 F.2d at 38, and then urges the same test as MSHA, quoting from the same page of the same case relied upon by the Commission in *Drummond* – namely, *American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). B. Br. at 31.

As an initial step in differentiating statements of policy from substantive rules, it is useful to examine the agency's basis for its promulgation. Is the agency exercising statutory authority to supply substance for vague or open-ended statutory guidance? If so, the agency's action is likely to be viewed as legislative or substantive. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir.1997) ("If the statute or rule to be interpreted is itself very general, using terms like 'equitable' or 'fair,' and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation."); *see also United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989). Although *Paralyzed Veterans* involved an interpretive regulation, the importance of its analysis applies equally well to a promulgation establishing binding enforcement parameters for an open-ended statute such as section 104(e) that instructs MSHA to develop, by rule, "criteria" for a wholly undefined "pattern of violations." 30 U.S.C. § 814(e)(4).

Moreover, an agency's creation of a numerical prescription by which it will exercise its authority is especially needful of notice and comment. In *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010), the District of Columbia Circuit Court described the relationship between an agency's establishment of numerical targets and rulemaking:

> We too have recognized that "numerical limits cannot readily be derived by judicial reasoning, ..." *Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 4 (D.C. Cir. 2000). Our statement in *Missouri*

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of a two-step test in cases involving statements of policy. *Id.* at 1111 (citations omitted). With respect to interpretive rules, the Circuit Court applied a "legal effect" test consisting of "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority; or (4) whether the rule effectively amends a prior legislative rule." *Id.* at 1112. Given the Secretary's position and the nature of the specific pattern criteria, we need not concern ourselves with that test in this case.

> *Public Service* relied on *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996). *Hoctor* held that an agency performs a legislative function when it makes "reasonable but arbitrary (not in the 'arbitrary or capricious' sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense."

Id. at 495 (footnote omitted).

In *Hoctor*, 82 F.3d at 167-68, the Department of Agriculture established a minimum height for fences enclosing dangerous animals. The minimum height requirement was established through an interpretation of the agency's valid regulation governing the structural strength of enclosures for housing animals. The height requirement was arbitrary – again in the sense that a different height could have easily been selected. Thus, not only was the interpretation binding, but also public comment was especially useful and important. The Circuit Court found the numerical requirement constituted a substantive rule that could be issued only after notice and comment.[9] *Id.* at 171-72.

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[9] The *Hoctor* Court expresses especially eloquently the importance of notice and comment when rights are affected by numerical limits arbitrarily established by the agency:

> There is no process of cloistered, appellate-court type reasoning by which the Department of Agriculture could have excogitated the eight-foot rule from the structural-strength regulation. The rule is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose. But this does not make the rule a matter of indifference to the people subject to it. There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences and build new, higher ones at great cost. The concerns of these dealers are legitimate and since, as we are stressing, the rule could well be otherwise, the agency was obliged to listen to them before settling on a final rule and to provide some justification for that rule, though not so tight or logical a justification as a court would be expected to offer for a new judge-made rule. Notice and comment is the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislating agency.

Id. at 171.

Indeed, in *Hoctor*, the Seventh Circuit effectively intertwined the likelihood that an agency pronouncement effectuating a vague statutory instruction is legislative with a finding that a numerically based rule binding the agency in the course of implementing a statute is almost inevitably substantive: "[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes (or requires – it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency." *Id.* at 169; *see also Mission Grp. Ks., Inc. v. Riley*, 146 F.3d 775, 782-84 (10th Cir. 1998).

Consequently, promulgation of arbitrary numerical criteria pursuant to a statutory directive to implement vague statutory terms creates a strong appearance of legislative type action. Nonetheless, it is still necessary to apply the acid test, the "rubber meets the road test," cited by the parties to determine whether the promulgation is a statement of policy or substantive rule.

Although the test is described as two-fold, it may aptly be thought of as two sides of a common coin. *See McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988 ("In practice, there appears some overlap in the *Community Nutrition* criteria; the second criterion may well swallow the first."). If the agency binds itself or others to a set of criteria, then, as the *Hoctor* Court expressed, it is vital for the public to have a right to comment.[10]

The Commission recognized this principle in *Drummond*, when it cited *Batterton v. Marshall*. In *Batterton*, the Circuit Court reviewed a new methodology for determining unemployment statistics issued by the Department of Labor without following the notice-and-comment procedures of the APA. The new methodology adversely affected payments to the State of Maryland under the Comprehensive Employment and Training Act. Maryland filed an action seeking to vacate the new methodology. Concluding that the new formula constrained discretion, the Circuit Court found the methodology constituted a substantive rule requiring notice and comment.[11] 648 F.2d at 696-97, 711.

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[10] In *General Electric Company v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002), the District of Columbia Circuit noted that separate standards had developed for differentiating statements of policy from substantive rules. One is the two-step test cited in *Drummond*, 14 FMSHRC at 686, and by the parties; the other a three-step test described in *Molycorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). The Court found the tests overlapped at the step "in which the court determines whether the agency action binds private parties *or the agency itself*." 290 F.3d at 382 (emphasis added).

[11] In doing so, the Circuit Court cited *Pickus v. U. S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir 1974), in which the Circuit Court set aside criteria for determining the granting of parole, issued by the U.S. Board of Parole without notice and comment. The Circuit Court found that the challenged rules greatly impacted the chances for parole and thus substantially affected the rights of persons subject to the regulations. *Id.* at 1112-13. In *Batterton*, *supra*, *Pickus*, and here, the rules are "formulalike" and are binding both with respect to operators that are not in POV

Voluminous precedent establishes that action by an agency that binds the agency, the affected public, or both, is a substantive rule. *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 7 (D.C. Cir. 2011) ("Our cases 'make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.'") (citation omitted); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) ("[B]ecause the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule."); *CropLife Am. v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003) ("EPA has enacted a firm rule with legal consequences that are binding on both petitioners and the agency. . . ."); *Gen. Elec. v. EPA*, 290 F.3d at 382 ("[T]he court determines whether the agency action binds private parties or the agency itself"); *Syncor v. Shalala*, 127 F.3d at 94 ("The primary distinction between a substantive rule . . . and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position."); *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234-35 (D.C. Cir. 1994) ("[W]e have said repeatedly that it turns on an agency's intention to bind itself to a particular legal policy position. . . . [T]he Commissioner has sought to accomplish the agency hat trick – avoid defense of its policy at any stage."); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (Rule "substantially curtails EPA's discretion in delisting decisions and accordingly has present binding effect."); *Cmty. Nutrition v. Young*, 818 F.2d at 948 ("[A]gency's own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that they set a precise level of aflatoxin contamination that FDA has presently deemed permissible.").

The remaining task regarding the APA dispute, therefore, is to determine whether the specific pattern criteria established in 30 C.F.R. § 104.2(b) and identified on the website are binding on MSHA or are binding upon members of the public.

C. Specific Pattern Criteria Established at 30 C.F.R. § 104.2(b) and Published on MSHA's Website Constitute a Substantive Rule Requiring Notice and Comment.

The problem for the Secretary here is that the specific pattern criteria are not actually "screening" procedures; they are outcome determinative specific numerical standards for POV status. Indeed, the Secretary relies upon the binding effect of the specific pattern criteria for its due process defense. Further, although the Secretary claims MSHA exercises discretion in deciding upon POV status after application of the specific pattern criteria, the procedures used by MSHA and the facts of this case compellingly demonstrate otherwise.

With respect to the claimed exercise of discretion, review of the limited mitigation circumstances occurs after an operator is in POV status under the specific pattern criteria. The limited mitigation opportunities do not relate to whether the operator is in the POV status. There

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status and operators that are in POV status. Indeed, the criteria in *Pickus* were not outcome determinative, and therefore, had less of a binding effect upon decision making than the specific pattern criteria.

is no further discretionary consideration of that issue. Only if an operator meets a separate mitigation procedure may POV status be avoided. Finally, if the mine does not meet the specific pattern criteria, it is assured by MSHA that it is not in POV status.

1. The Specific Criteria Are Issued Pursuant to a Statutory Directive to Issue Rules Implementing Section 104(e) of the Mine Act and Identify Specific Numerical Criteria for the Determination of POV Status.

In *Drummond*, the Commission noted the limited significance of an agency's classification of its action, recognizing that the agency's label might be "indicative" but certainly is not "dispositive." 14 FMSHRC at 683. "[I]t is the substance of what the [agency] has purported to do and has done which is decisive." *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (internal quotations and citation omitted); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (D.C. Cir. 1986). In determining the substance of what MSHA has done, we look not just at the wording of the promulgation but also its source and purpose, the methodology used, and most importantly its binding effect upon MSHA and the public.

Section 104(e) of the Mine Act provides for the issuance of POV Notices, but does not define a pattern of violations. Instead, Congress gave MSHA the authority and duty to issue rules determining when a pattern of violations exist. Indeed, the statute provides that "[t]he Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814(e)(4).

In issuing the rules defining and governing patterns of violations, MSHA performs essentially a "legislative" function delegated to it by Congress. *Paralyzed Veterans*, 117 F.3d at 588. Further, MSHA has implemented numerical criteria as "specific pattern criteria." Obviously, the criteria are "arbitrary" in the sense of being "impossible to give a reasoned distinction between numbers just a hair on the OK side of the line and ones just a hair on the not-OK side." *Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 5 (D.C. Cir. 2000). The ratio of S&S citations/orders per 100 inspection hours could have been 7.0, 7.5, 8.5, 9, etc., but MSHA chose 8.0. Perhaps that is a reasonable number but, regardless, it is arbitrary. MSHA, therefore, has identified with arbitrary numerical specificity the specific criteria to be used in establishing whether operators are, or are not, in the POV status broadly created by Congress – a classic legislative function.

Further, the use of the specific pattern criteria is established in the rule itself at 30 C.F.R. § 104.2(b). MSHA apparently recognized it was necessary to use substantive rulemaking to establish specific pattern criteria. However, it then decided to place the enumeration of the specific criteria on a website away from notice and comment by the public. It gave public notice of, and right to comment upon, the ghost of specific pattern criteria but the substance remained shielded from public comment.

It is oxymoronic to establish the use of specific pattern criteria in the rule itself but then establish the specific pattern criteria that contain both numerical and durational specifications on a website immune from public notice or comment. If MSHA may take such an approach here, there is little to constrain MSHA from creating other standards in the body of the regulations while placing the substantive terms on its website where they will be sheltered from the APA.[12] If MSHA may create the existence of criteria by rule but shuffle off the actual substance of the criteria to a website away from public notice and comment, little is left of the APA.

2. The Specific Criteria of Section 104.2(b) and Published on the Website are Binding upon MSHA. The Public Was Entitled to Comment Upon Specific Criteria Eliminating Mines from POV Status.

The Secretary argues that "the screening [specific pattern] criteria do not narrowly circumscribe MSHA's discretion." S. Br. at 26. That statement is clearly false with regard to a determination that an operator is not in POV status. The specific criteria fully circumscribe MSHA's discretion regarding finding operators that are not POV violators.

Recall, while an agency's characterization of its pronouncement should be given some weight, the language of the agency pronouncement is far more important. In *American Bus Association v. United States*, the District of Columbia Circuit gave decisive weight to the Interstate Commerce Commission's use of the word "will." Use of "will" rather than "may" demonstrated that the pronouncement was not a statement of policy. 627 F.2d at 532. In this case, MSHA's specific pattern criteria assures operators that "[m]ines ***must*** meet the criteria" to be considered for POV status. B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1 (emphasis added). Use of the imperative "must" demonstrates compellingly that the agency has bound itself to not find an operator in POV status if it does not meet the specific criteria.

Indeed, in MSHA's promulgation of the revised regulation and even in its defense of the regulation, the Secretary has assured operators that the specific criteria will be the final determinant that they are not in POV status if they stay below the numerical limits for POV status established in the specific criteria. In the preamble to the final rule, MSHA stated that it was posting the specific criteria on its website and that such posting constitutes the

> specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations. MSHA has

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[12] In the preamble to the regulation, MSHA offered a nonbinding promise that it will notify the public of impending changes to the specific pattern criteria and offer a chance for comment. 78 Fed. Reg. at 5064. Having not given the public a chance to comment upon the institution of the specific pattern criteria established in section 104.2(b), there seems little reason to accept as meaningful in any way an informal MSHA assurance that it will want, invite, or listen to public comments in the future. In any event, the APA does not envision promised invitations as a substitute for legal rights.

> determined that posting the specific criteria on its Web site, together with each mine's compliance data, will allow mine operators to monitor their compliance records to determine if they are approaching POV status.

78 Fed. Reg. at 5064.

Thus, the agency reaffirms that an operator not meeting the specific criteria will not be found in POV status. Without doubt, section 104.2(b) serves as a binding commitment by MSHA that it will not assert POV status against any operator not meeting the specific pattern criteria provided for in section 104.2(b) of the regulation and amplified upon on the website. Because the Secretary has defined a POV as two or three S&S violations in a series that is recognizably consistent, almost every mine in the mining industries could be issued a POV Notice absent the assurance provided by MSHA through use of the specific criteria to limit the number of mines reaching POV status.[13] Therefore, not only are the specific criteria binding on MSHA but that binding status upon MSHA provides an important assurance to operators that POV status will be used not as a typical "enforcement" tool but rather, as intended, only as an severe weapon directed at those few operators that have demonstrated over a long period a repeated disregard for the health and safety standards issued under the Mine Act. 78 Fed. Reg. at 5058. At the same time, it positively precludes MSHA from issuing a POV Notice to an operator that has a pattern of recognizably consistent significant and substantial violations of even the most important safety standards, if the entirety of the operator's record remains within the "safe zone" of the specific pattern criteria.

Perhaps the Secretary simply misperceived that only operators that might be designated for POV status have an interest in, or right to comment upon, numerical specific pattern criteria for establishing POV status. If so, MSHA forgets the far broader public that has an interest in such standards. Those in the public, the many safe and responsible operators, miners, miners' representatives, safety societies, and others were not given any chance to comment on the specific pattern criteria positively eliminating operators from POV status.

The right to notice and opportunity to comment upon threshold levels for exclusion from POV status is as important as the right to comment upon threshold levels for inclusion. Notice and comment must be available not only to those who may claim the standards are too strict but also to those who may believe the standards are too lenient. Self-evidently, broad public sectors had a right to comment upon these substantive specific pattern criteria that exclude operators from POV status.

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[13] Just as an example, according to MSHA's Key Indicators Report, Citations and Orders Issued Report, All Coal 10/01/2010-09/30/2011, the average number of coal mine 104(a) citations that were designated S&S averaged 32,616 annually for the four years from 2008 through 2011.

3. The Specific Criteria of Section 104.2(b) and Published on the Website Effectively are Used by MSHA to Determine POV Status and, Therefore, are Binding upon Mine Operators with Respect to POV Status.

Given the clarity of the APA that MSHA is required to grant the industry, miners, and public an opportunity to comment upon specific criteria binding upon MSHA in finding an operator is **not** in POV status, we could perhaps forego discussing whether the specific pattern criteria also are the substantive bases for finding an operator is in POV status. However, the desire for those with power to have "flexibility" in the exercise of that power is a common affliction. It is a danger against which the APA is intended to safeguard.

It is vital, therefore, to constrain unlawful reaches for flexibility by Federal agencies. So, we must also determine whether MSHA's stretch for "flexibility" by setting the table for specific pattern criteria by rule 104.2(b) but then putting all the food off the table without permitting comment by the public is lawful or instead creates a template for an ever broadening host of website criteria that "flexibly" impose duties and penalties without APA notice-and-comment procedures. This case illustrates the phenomenon observed by the District of Columbia Circuit in *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000):

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 48 Admin. L. Rev. 59, 85 (1995). The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Id. at 1020 (footnote omitted).

The decision as to whether a purported policy statement effectively circumscribes discretion is not a mechanical test. *Am. Bus Ass'n v. U.S.*, 627 F.2d at 529-30. A close examination is required of the language of the pronouncement, its intended effect, and the effect upon the regulated community.

a. Comparison of 104.2(a) and 104.2(b)

Here, the only commonsense reading of section 104.2 is that operators failing the specific criteria are in POV status. Thus, they will receive a POV Notice unless MSHA makes a separate, later finding of mitigation under one of three narrow circumstances.

As demonstrated by the table set forth as Table 2 below, the criteria of section 104.2(a) merely duplicate the specific criteria of section 104.2(b) except the section 104.2(a) criteria do not identify numerical standards for POV status.

Table 2

POV Pattern Criteria Established and Listed in 30 C.F.R. § 104.2(a)	POV Pattern Criteria Established in 30 C.F.R. § 104.2(b) and Listed on Website
(1) Citations for S&S violations; (2) Orders under section 104(b) of the Mine Act for not abating S&S violations; (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply; (4) Imminent danger orders under section 107(a) of the Mine Act; (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others; (6) Enforcement measures, other than section 104(e) of the Mine Act, that 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	(1) At least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months. (2) A rate of eight or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months OR the degree of negligence for at least 25 percent of the S&S citations/orders issued during the most recent 12 months is "'high" or "reckless disregard." (3) At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] issued per 100 inspection hours during the most recent 12 months. (4) An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months. OR (1) At least 100 S&S citations/orders issued in the most recent 12 months.

(8) Mitigating circumstances.	(2) At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] issued during the most recent 12 months.

Section 104.2(a)(1) duplicates section 104.2(b)(1) and (2) but with less specificity. Sections 104.2(a)(2)-(6) duplicate sections 104.2(b) (2) and (3). Section 104.2(a)(7) essentially duplicates section 104.2(b)(4) but again with less specificity.

The Secretary asserts the criteria are not duplicative relying entirely upon 104.2(a)(7) as the basis for its purported exercise of discretion in deciding upon POV status. In doing so, he cites the preamble to the regulation asserting "other factors listed" in the 104.2(a) criteria that are supposedly not addressed in the specific pattern criteria. S. Br. at 26-27. The cited passage of the preamble provides that these "other factors" are:

> • Evidence of the mine 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 or standards related to the same hazard;
>
> • 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 health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. at 5062.

Of course, a commonplace rule of construction is the "specific governs the general." *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) ("When the conduct at issue falls within the scope of both provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general."). Although not directly applicable here, the principle illuminates that the Secretary's assertion that MSHA exercises discretion based on generalized "other factors" fails to explain how MSHA could apply section 104.2(a) criteria to find an operator not to be in POV status once an operator meets the specific pattern criteria for POV status. Although MSHA lists "other factors" in the preamble, the Secretary has not suggested how these factors are (1) not subsumed within the specific criteria; (2) how or when, under MSHA's procedures, MSHA reviews these factors to possibly find that an operator that meets the specific pattern criteria for POV status actually is not in POV status; or (3) when such criteria were examined with respect to Brody.

The first "other factor" suggested by MSHA is "lack of good faith." Because the operator has already met the specific criteria for POV status, it is impossible to see how a further demonstration of the absence of good faith could cause MSHA to determine the operator is not in POV status; it only adds fuel to the POV status fire. It cannot mean an exercise of "good faith" because MSHA expressly limits a "good faith defense" to a request for mitigation under the strictly limited basis of an MSHA-approved Corrective Action Program. MSHA's intent not to consider "good faith" is completely encompassed by the limited and specific mitigation opportunities.

The second "other factor" is repeated S&S violations affecting the same standard or hazard. Surely, the Secretary cannot be asserting seriously that it may find an operator that, under the numerical specific criteria, must have exceeded the national average for S&S violations by at least two hundred and fifty percent is not in POV status because the S&S violations are spread over a wide variety of standards or hazards. This is especially true as MSHA states in the same section of the preamble that its "data and experience show that violations of approval, training, or recordkeeping regulations, for example, can significantly and substantially contribute to health or safety hazards, and may be a contributing cause of an accident." 78 Fed. Reg. at 5062-63. Thus, MSHA expanded the range of citations/orders meriting POV status across the entire gamut of its regulations to training and recordkeeping. Finally, the third, fourth, and fifth "other factors" are duplicative of the specific criteria for elevated citations/orders and the Injury Severity Measure of the specific pattern criteria.

It defies logic to credit the Secretary's suggestion that a review of section 104.2(a) factors, other than the separate and subsequent consideration of mitigation, could remove an operator from POV status after a finding by MSHA that the operator meets the numerical specific pattern. The case for POV status under section 104.2 can only be made stronger by the so-called "other factors" because the specific criteria are minimum thresholds for POV status.[14] We must apply here the District of Columbia Circuit Court's caution related to another Federal agency: "EPA's claim to have been open to consideration of other factors does not make the VHS model any less of a rule." *McLouth Steel Prod.*, 838 F.2d at 1322.[15]

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[14] Although the revised rule has been in effect only since March 25, 2013, MSHA conceded at oral argument that, to this point, all operators that have met the specific regulatory criteria have been issued POV notices.

[15] The majority cites two cases in support of treating the specific pattern criteria as a statement of policy. Neither case supports the majority's position. In *Brock v. Cathedral Bluffs*, 796 F.2d at 538, the Circuit Court emphasized the Secretary's warning that nothing in the Appendix altered production-operators' responsibilities. Moreover, nothing whatsoever constituted a binding norm on the agency to take or refrain from taking any action. Indeed, the Court emphasized the substantive difference between suggestive words such as "may" and determinative words such as "will." *Id.* (In this case, the key word is "must"). Further, the Court noted the *Attorney General's Manual on the APA* and found that it had elaborated on it so

b. MSHA's Procedures and Panel Review Accept the Specific Pattern Criteria as Outcome Determinative

The Pattern of Violations (POV) Procedures Summary states that a District Manager is only to "report facts relevant to whether there are mitigating circumstances that justify postponing or not issuing a POV notification." B. Mem. Supporting Appl. for Temp. Relief, Ex. 11, at 1. Nowhere is there so much as a hint that the District Manager with the most direct knowledge and information related to the operator is asked for advice or information related to the 104.2(a) or 104.2(b) pattern criteria, except the narrow and separate possibility for mitigation unrelated to determining POV status in the first instance.

Again, MSHA's own statement of procedures circumscribes such review by requiring that the POV panel's task is only to make a recommendation whether the mine "should be excluded from POV notification or have their POV notification postponed due to mitigating circumstances." *Id.* at 1. So, when the procedures call for the POV panel to consider the information provided by the District Manager, the call is for a review only of information related to possible mitigation rather than the already met specific criteria for POV status.

In sum, after Brody fell within the specific pattern criteria, MSHA asked the District Manager for information about, and only about, possible mitigation. The Panel then considered

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that "a general statement of policy, on the other hand, does not establish 'a binding norm.'" *Id.* at 537.

As demonstrated above, the specific pattern criteria clearly establish a binding norm for what does not constitute a Pattern of Violations as well as what does constitute a Pattern of Violations. *Am. Hosp. Ass'n*, 834 F.2d at 1051, not only is not helpful to the majority, but actually reinforces the need for notice and comment. The standards under review only asked that HHS examine a greater share of operations in given medical areas. On the other hand, the Court stated: "Were HHS to have inserted a new standard of review governing PRO scrutiny of a given procedure, or to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment, as well as close scrutiny to insure that it was consistent with the agency's statutory mandate. *See, e.g., Pickus.*" *Id.*

Indeed, the Court cited and distinguished the guidelines before it from the case of *Pickus v. U.S. Board of Parole*, 507 F.2d at 1112–13, where, similarly to the Secretary's actions in this case, the parole board established "guidelines establishing specific factors for determining parole eligibility that were "'calculated to have a substantial effect on ultimate parole decisions.'" *Am. Hosp. Ass'n*, 834 F.2d at 1046; *see also Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014). Here, the actions by the Secretary established specific binding norms for operators that would and would not be in POV status. Further, by deleting the prior section 104.3 and inserting the specific binding pattern criteria established in section 104.2(b) and published on the website, the Secretary effectuated a change in an existing rule thereby requiring notice and comment.

the information supplied by the District Manager, rejected mitigation, and recommended issuance of the POV notice. Thus, the process flowed smoothly, as intended, from specific pattern criteria, to District Manager notice, to Panel review, to issuance of a POV notice.

POV status was determined by Brody's failure under the specific pattern criteria. There is no inkling, let alone evidence, that MSHA considered in any meaningful way factors under 30 C.F.R. § 104.2(a) that could only have strengthened the case for POV status. Operators failing under the specific criteria are for all practical and legal purposes in POV status thereby facing a POV Notice, subject only to a consideration of mitigation.

c. The Revised Regulation Converted "Screening" Criteria into "Pattern Criteria Demonstrating Their Binding Effect.

The prior regulation contemplated and provided for a further actual review after evaluation of what were then "Initial Screening Criteria" in section 104.2. Nothing in the present regulation, procedures, or actions of MSHA demonstrates anything approaching a discretionary analysis of pattern factors bearing on POV status after an operator meets the specific pattern criteria. The prior regulation not only contemplated but also actually provided for a discretionary review; the revised regulation does not. If an operator meets the specific pattern criteria, it is in POV status subject only to a separate decision that it has recently mitigated its history of violations by change of ownership or adoption of a previously MSHA-approved corrective action program.

Without the notice-and-comment period required by the APA, MSHA in its discretion may change the numerical or durational (e.g. review every three, four, five, etc. months) requirements of the specific pattern criteria. The specific pattern criteria are substantive. They deserve and require public notice and comment.

II.

DUE PROCESS PROCEDURES

The parties focus much of their attention upon MSHA's use of non-final citations/orders for issuance of a POV Notice. Brody contends that "violations" as used in Section 104(e) of the Mine Act may only reasonably mean final actions. Thus, according to Brody, MSHA's use of non-final citations/orders to issue a POV Notice fails to reflect proper consideration of the change from the prior rule and violates the Constitution by depriving Brody of a pre-deprivation hearing.

The Secretary contends that other sections of the Mine Act use the term "violations" to mean non-final citations/orders. He further argues that using final actions for issuance of a POV Notice is impractical and would frustrate the very safety purpose of the statute.

While the Secretary agrees that a valid POV Notice requires the Secretary to prove a pattern of significant and substantial violations, he asserts that proof of final violations may await a contest by an operator of a subsequently issued withdrawal order. Consequently, the critical issue considered below is the point at which MSHA must prove final violations to sustain a POV Notice – before or after issuance of the POV Notice and the resultant deprivation of property rights.

A. Due Process

The first principle of due process is that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."). Due process ordinarily requires an opportunity for that hearing before the deprivation at issue takes effect. *E.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U. S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). This is the "root requirement" of the due process clause. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Secretary concedes that Brody has a property interest in uninterrupted mining activities. S. Br. at 15. That concession brings the due process clause into play. *Boddie v. Connecticut*, 401 U.S. at 378-379. Of course, application of the due process clause is "intensely practical." *Goss v. Lopez*, 419 U.S. 565, 578 (1975). Whether a governmental interest justifies postponing the hearing until after the deprivation is judged by application of the familiar three factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

B. Private Interest that will be Affected

The parties diverge on the magnitude of effect a POV will have upon Brody. Brody asserts that its right to operate its mine, including ownership rights and revenues constitute significant property rights subject to due process protections. *See James Daniel Good Real Prop.*, 510 U.S. at 48-49. It further asserts that a POV Notice will cause a perpetual series of temporary shut-downs of portions of its mines resulting in serious harm to its property interests. It cites Commission cases in which the severe consequences of a POV notice were noted. *Aracoma Coal Co.*, 32 FMSHRC 1639, 1641 (Dec. 2010) (Opinion of Chairman Jordan affirming ALJ's decision); *Rockhouse Energy Mining*, 30 FMSHRC 1125, 1128 (Dec. 2008) (ALJ).

The Secretary concedes that an operator has a property interest in continuing its mining operations without withdrawing miners and that such interest is adversely affected by the POV rule "because a withdrawal order reduces an operator's control over its property and imposes costs on the operator to regain control." S. Br. at 15-16. However, the Secretary asserts Brody's "property rights" are weak because of the large number of citations that have been issued to it and that, in any event, Brody exaggerates the disruption caused by a withdrawal order.

MSHA's position is undercut by its own preamble to the final POV. In its analysis of compliance costs, MSHA states: "Withdrawal orders issued under the final rule can stop production until the condition has been abated. The threat of a withdrawal order provides a strong incentive for mine operators to ensure that S&S violations do not recur." 78 Fed. Reg. at 5070.

For this reason, all Commissioners agree that Brody "has a significant property interest in continuing its mining operations without withdrawing miners." Slip op. at 16.

C. The Safety Interest

Given the significant harm to property rights and the much preferred right to a pre-deprivation hearing, the constitutionality of MSHA's failure to develop or utilize pre-deprivation procedures for issuance of a POV notice rests in very large measure upon whether the Secretary has identified circumstances that warrant bypassing the constitutionally-preferred pre-deprivation hearing. In due process cases, the Supreme Court focuses upon whether the circumstance "falls under this emergency situation exception to the normal rule that due process requires a hearing prior to deprivation of a property right" and is one of those "situations in which swift action is necessary to protect the public health and safety." *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 300-01 (1981).

In their work lives, miners have a right to a safe and healthful life, not a life shortened or diminished by carelessness or violations of law by their employer. When there is an imminent danger to the safety or health of a miner, immediate governmental intervention is required and

constitutionally justified. The Secretary cites the events at Upper Big Branch (UBB) mine in April 2010, a horrific tragedy claiming the lives of 29 miners. After such tragedy, there inevitably arise a host of speculative "what if" questions. What if MSHA had issued UBB a final POV notice rather than a Potential POV notice? What if MSHA's computers had not failed to identify UBB as a continuing violator that deserved a final POV Notice?

It does no disservice to these inevitable concerns to require a dispassionate review of whether the POV rule is aimed at situations permitting MSHA to override the basic constitutional right to pre-deprivation due process. Especially in the aftermath of tragedy, there is a need for clear-eyed reflection lest we unnecessarily sacrifice basic rights to a spasm of pain and fear. If section 104(e) were aimed at imminent safety and health hazards, then MSHA's failure to implement it for 37 years would be reason for a scathing rebuke of MSHA and a galling monument to government ineptitude. In fact, an objective review demonstrates that section 104(e) of the Mine Act is not aimed at immediate, current, or even recent hazards; instead, it is a vaguely worded direction for an extreme remedy taken after lengthy deliberation in order to change the long-term culture at those few mines that habitually disregard health and safety standards in a significant and substantial way.[16] MSHA has acknowledged:

> [T]he majority of mine operators are conscientious about providing a safe and healthful work environment for their miners. The POV regulation is not directed at these mine operators. Consistent with the legislative history, it is directed at those few operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards issued under the Mine Act.

78 Fed. Reg. at 5058.

MSHA, therefore, has found that section 104(e) is not intended to deal with present or recently past hazards. Instead, its remedial purpose is to change the culture of operators that are

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[16] Contrary to the majority's contention (slip op. at 18 n.13), I do not characterize the public interest in safety reflected in the POV rule as a "spasm of pain and fear." I have only cautioned that after natural or man-made disasters there is a natural tendency to overreact, sometimes at the cost of constitutional rights and privileges. I would have thought the truth of that observation obvious to any reader of American history of the 20th or 21st centuries, let alone those of us who have lived through part of that history. There are over 10,000 S&S citations/orders issued in the mining industry each year. *See* slip op. at 35 n.7. Each responds to a situation allegedly creating a situation reasonably likely to result in a reasonably serious injury. Yet, I do not think any Commissioner would suggest that operators may be found presumptively to have committed an S&S violation without a chance to defend. The alleged commission of S&S violations does not justify deprivation of basic constitutional rights.

habitually significant and substantial violators of mandatory safety and health rules and to serve as a warning to any operator that may become lax in adhering to those standards.

Pursuant to the binding specific pattern criteria, practically speaking, MSHA cannot issue a POV Notice for at least 14 months from the beginning of the period during which a pattern of violations is found to exist. It does not diminish the longer term importance of section 104(e) to acknowledge that the POV rule does not deal with any recent mine hazard. A POV Notice is not issued in response to day-to-day or even month-to-month violations.[17]

A partial summary of MSHA's more immediate enforcement powers under the Mine Act includes:

1. Section 103(a) – Requires "frequent" inspections; underground mines must be completely inspected at least four times each year in their entirety and other mines must be inspected in their entirety at least twice each year.

2. Section 103(i) – Requires spot inspections of methane liberating mines every five, ten, or fifteen days depending upon amount of methane liberated.

3. Section 103(j) – Requires operators to notify MSHA of any accident and requires that such notice be provided within 15 minutes for fatal accidents or an injury or entrapment of an individual which has a reasonable potential to cause death. Section 110(a)(2) provides for a penalty for failure to provide a required 15 minute notice of up to $65,000.

4. Section 104(a) – MSHA may issue citations to operators for any violation of any mandatory health or safety standard, rule, order, or regulation and set a mandatory abatement period. Section 110(a)(1) provides for penalties up to $70,000 for violations depending upon penalty criteria set forth in section 110(i) of the Mine Act.

5. Section 104(b) – MSHA may issue a withdrawal order requiring withdrawal of miners from areas in which a citation has not been abated within the time specified by MSHA. Section 110(b)(1) provides for a penalty of up to $7,500 for each day of failed abatement.

6. Section 104(d)(1) – If, during an inspection, an inspector finds a S&S violation of a mandatory safety or health standard by an unwarrantable failure and during that same inspection or any other inspection within 90 days finds another unwarrantable failure, the inspector shall issue a withdrawal order for the area affected by the violation. Section 110(a)(3)(A) provides for a minimum penalty of $2,000 for a 104(d)(1) violation.

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[17] The majority euphemistically refers to this 14-month period as "recent compliance history." Slip op. at 21.

7. Section 104(d)(2) – If an inspector issues a withdrawal order under 104(d)(1), a withdrawal order shall promptly be issued upon a finding in any subsequent inspection of the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph section 104(d)(1) until such time as an inspection of such mine discloses no similar violations. Section 110(a)(3)(B) provides for a minimum penalty of $4,000 for a 104(d)(2) violation.

8. Section 107 – An inspector shall issue a withdrawal order if the inspector finds an imminent danger – that is, any condition or practice which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated results in a withdrawal order.

9. Section 108 – Provides for an injunction action in Federal court as a result of various actions by an operator, including a violation of, or failure to comply with, an order or decision.

10. Section 110(b)(2) – MSHA may seek a penalty of up to $242,000 for any "flagrant" violation of the Act.

11. Section 110(c), (d), (e), (f), (g), (h) – These sections provide circumstances under which civil and criminal penalties may be imposed upon officers, directors, agents of a corporate operator, and others for violations.

12. Higher penalties under the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") – The average penalty has increased substantially since passage of the MINER Act. Further, penalty points are assessed on the basis of both the history of violations and repeat violations. *See* 30 C.F.R. § 100.3. Therefore, the sort of conduct that may cause POV trouble for an operator far more quickly results in greatly enhanced penalties.

13. Impact Inspections – In April 2010, MSHA began to conduct especially intensive inspections, called "impact" inspections, at mines it determines merit increased attention due to such matters as numerous violations or withdrawal orders, failures in plan compliance, inadequate examinations, roof issues, and accidents, injuries, or illnesses. MSHA Press Release No. 14-1376-NAT, July 24, 2014.

Impact inspections deserve particular attention with respect to the interplay with the POV rule. Because MSHA tracks violations by operators on a monthly basis, it flags operators with actually recent disturbing violation trends for impact inspections. As of July 2014, MSHA had conducted 780 intensive impact inspections resulting in 12,627 citations, 1,170 orders, and 54 safeguards. *Id.*

The enhanced penalty amounts together with the intensity of impact inspections, means that MSHA can and does deal immediately with recalcitrant operators in a very real and targeted manner. Indeed, the Assistant Secretary for Mine Safety and Health has stated recently that "[a]

review of mines receiving impact inspections between September, 2010 and September 30, 2013 that have had at least one follow-up inspection also shows that these inspections have made a real difference." Remarks of Joseph A. Main, Assistant Sec'y of Labor for MSHA, NSSGA Meeting, March 5, 2014; https://www.msha.gov/MEDIA/SPEECHES/2014/NSSGAremarksfinal.pdf.

The working conditions at mines are by their very nature difficult and hazardous. Tragically, fatalities and injuries continue to occur despite the best efforts of MSHA, operators, and miners. However, there is a significant array of regulatory weapons at MSHA's disposal to deal with current and recent hazards. Section 104(e)'s purpose is different; it is a long-term weapon aimed at culture rather than specific hazards.

D. Risk of Erroneous Deprivation and Value of Additional Safeguards

Having recognized the "significant property interest" at stake for Brody and, realistically knowing that the POV rule is not aimed at circumstances of immediate or even current harm, the only conceivable ground upon which to base a denial of a fundamental constitutional right is that there is no risk of erroneous deprivation so the due process rights are insignificant.[18]

The *Mathews v. Eldridge* test is a balancing test of the three factors. However, "balancing" does not mean assigning a 33.33% share to each of the three factors. The factors must be balanced holistically. The potential for immediate severe harm to the public interest may play a greater role than the other two factors. Conversely, the seriousness of the property rights involved may affect the view taken of the other elements, especially if the contemplated government action is not in response to immediate or recent circumstances.

That understanding is important here because the property rights of Brody and the "safety" element are not in equipoise. While the Secretary now disputes the high value of Brody's property right to continued operation of its mine, as we have seen, even MSHA in the

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[18] In this respect, the majority finds the property interest and the safety interest to be in equipoise thereby allowing it to assert that Brody's due process rights depend solely on its analysis of the adequacy of pre- and post-deprivation procedures. The majority also incorrectly has analogized the deprivation of any pre-hearing procedure under the Secretary's POV rule with the issuance of withdrawal orders under section 104(d). The sections are not similar in any manner relevant to due process rights. First, section 104(d) deals with a chain of immediate "unwarrantable failures" in which at the very point of issuance an operator must have demonstrated "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). Therefore, this is a situation in which the allegation of immediate operator faults rises to a high level. Further, the chain of withdrawal orders may be broken by avoiding for the requisite period any additional unwarrantable failures. For section 104(e), however, the operator must go through an entire mine inspection without an alleged S&S violation rather than an unwarrantable failure.

preamble to the rule asserted that a POV Notice is "severe." Indeed, there is little challenge to Brody's assertion that issuance of POV Notice may result in the demise of an operation.

Further, the POV rule does not address a situation of urgency or even recency.[19] The POV rule deals with long-term conduct rather than any immediate, current, or even recent violation or danger. As it takes more than a year to reach the point of considering a POV Notice, there is no immediate safety concern counterbalancing the destruction of property interest. Therefore, the balance between property rights and an immediate public interest tilts very sharply toward the property rights affected by a POV Notice.

Because a pre-deprivation hearing is constitutionally preferred, cases in which only post-deprivation procedures are found sufficient generally involve a threat of an imminent or immediate harm to an important public or governmental interest. This element of imminent harm is found in the cases cited by the majority. In *Ewing v. Mytinger & Casselbery, Inc.*, 339 U.S. 594 (1950), there was an immediate danger to public safety through the imminent distribution of mislabeled drugs. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court found an immediacy to the danger posed by drunk drivers. Finally, *Hodel*, 452 U.S. 264, involved the likelihood of significant, imminent mining disasters.

In *Hodel*, for example, the Court affirmed that "[o]ur cases have indicated that due process ordinarily requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." 452 U.S. at 299. However, the Court found the emergency situation of an imminent mine disaster justified a post-deprivation hearing summary administrative action stating: "[t]he question then, is whether the issuance of immediate cessation orders under § 521(a) falls under this emergency situation exception to the normal rule that due process requires a hearing prior to deprivation of a property right." *Id.* at 300. Citing *Mytinger*, the Court found an immediate cessation order responded "to situations in which swift action is necessary to protect the public health and safety. This is precisely the type of emergency situation in which this Court has found summary administrative action justified." *Id.* at 301.

Under the case law, therefore, the application of the factor of risk of erroneous deprivation of property rights in this case arises in the context that (1) due process ordinarily requiring a pre-deprivation hearing, (2) issuance of a POV Notice will be highly destructive of

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[19] The majority, much as its wrongfully characterizes my observation of the need to dispassionately consider the effect of government action upon constitutional rights after a disaster lest we let the disaster override constitutional rights, also wrongly seizes upon the word "urgency" in this sentence as if it is used in the sense of "importance" or "significant concern." Slip op. at 18. Obviously, the point is that the POV rule is not dealing with preventing or remedying an immediate danger. Congress found that dealing with operators engaged in a long-term ongoing pattern of numerous S&S violations is important, and it is. However, it is not a situation that requires the government to forego elementary and most important due process rights.

property rights, and (3) the POV Rule applies after a lengthy analysis to long-term situations and, thus, is not the type of situation justifying summary administrative procedures.

If the Secretary's definition of "pattern of violations" is sustained, which has not yet occurred, and if the Secretary is able to establish a "recognizable pattern" on the basis of two or three violations, which also has not been confirmed, it would seem likely that MSHA could cull a small number of provable S&S violations out of dozens or hundreds of unproven citations/orders. However, allegations of violations and citations are not based upon objective tests. They are issued by inspectors with all the possibilities for errors, misperceptions, and human emotions. Further, the Secretary agrees that a substantial number (perhaps 19%) are set aside in litigation.

Because the POV rule has been issued so long after passage of the Mine Act and the remedy provided by it is so severe, there may be an inclination that it is so "important" that it should benefit from some sort of special analysis or constitutional blessing. From a constitutional law perspective, the POV rule does not deal with an imminent, current, or recent hazard but rather longer term issues and, thus, does not justify deprivation of an owner's vital property interests without some kind of a pre-deprivation hearing.[20]

Under the POV rule there simply are no pre-deprivation procedures. An operator may contest individual S&S citations/order but it has no way of knowing whether those citations/orders would fit into the vaguely-defined notion of a "pattern of violations."[21] The Secretary contends that operators may request a conference with a field office supervisor but fails to mention that Brody requested five Part 100 conferences with District Managers involving 22 S&S citations/orders and a grand total of *zero* were granted. B. Br. at 3. Further, a meeting may be held with a District Manager before issuance of a POV Notice but only "for the purpose of correcting any discrepancies. 78 Fed. Reg. at 5061.

The on-line monitoring tool is a useful tracking tool for which MSHA deserves credit. However, issuance of S&S citations/orders are entirely within the discretion of MSHA inspectors and, especially in an era of targeted impact inspections based upon computerized tracking, it does not satisfy due process to assert that an operator may have access to tool that, if used, may help avoid receiving a POV Notice. The right to a hearing before imposition of a severe penalty in a

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[20] This is not a suggestion that the only form of pre-deprivation procedures satisfying due process rights would be litigation of each citation/order through to a final non-appealable order. The Secretary, acting through MSHA, should have considered a host of alternatives such as a pre-issuance notice sufficient to allow an operator to know the specific allegations upon which the POV Notice was based and for expedited review within a time frame and to an extent reasonably gauged as adequate from a constitutional perspective.

[21] The Secretary's suggestion for such challenges may result in greatly increased litigation and fewer settlements.

non-emergency context is not satisfied by an asserted opportunity to self-police oneself to foresee and avoid violations of governmental regulations.

Finally, the extent of citations/orders/violations asserted in a POV Notice is totally within the control of MSHA. The time it will take to make final determinations upon the citations/orders that must be proven to sustain a POV Notice ultimately depends upon the type and number of citations/orders upon which MSHA decides to base a POV Notice. MSHA has the same right to seek expedited hearings as operators. The Commission's procedural rules allow "any party" to file a motion for expedition of proceedings. 29 C.F.R. § 2700.52(a). Further, once an expedited hearing is requested, the length of time necessary to conduct such hearing does not depend upon which party requested it.[22]

MSHA uses computerized tracking capability of citations/orders for impact inspections. Therefore, MSHA may determine to seek expedited hearings on citations/orders issued to an operator approaching POV status under the specific pattern criteria.[23] Rather than filing a final POV Notice approximately 14 months after the beginning of the analysis period without any pre-deprivation due process procedure, MSHA could have proceeded promptly to an expedited hearing on citations/orders forming the basis for its POV Notice as it monitors its self-built tracking software.

Here, Brody met the specific pattern criteria on the basis of 253 citations/orders. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 9. The POV Notice asserted 54 violations in four categories, the smallest of which was seven citations. Notice No. 7219154. The Secretary asserts that under its definition of a POV, a hearing on those seven citations could suffice to prove a pattern of violations.

If MSHA had chosen to base the POV Notice on seven citations as it claims it could, it could have also expeditiously obtained a decision from an Administrative Law Judge on those seven citations. Even if MSHA concluded that it needed to cite more citations either for fear of rejection of its definition of a POV or as a matter of litigation strategy, the decision was entirely within MSHA's hands. It is ironic for the Secretary to say with one breath that it may prove a

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[22] MSHA can and does work on a POV case before making a "final" decision. Here, for example, the Panel Memorandum recommending that a POV Notice be issued is dated October 12. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A. The POV Notice was sent on October 24 listing 54 citations/orders. Notice No. 7219154. Obviously, therefore, MSHA was culling citations/orders for use and preparing the POV Notice for delivery before "final" approval.

[23] MSHA cannot seek an expedited hearing until a citation/order is contested and operators do not need to contest a citation/order until a penalty is assessed. However, as with all other aspects of the regulatory process, the timing of penalty assessments is wholly within the control of MSHA.

POV through proof of seven (or fewer) citations/order but in the next breath say that expedited hearings would take too long to provide the constitutionally required hearing. By deciding upon the number of citations/orders/violations necessary to prove the existence of a POV, MSHA determines the amount of time that will be required to prove its case and MSHA may seek expedited hearings at any time.

Even when the private party's odds of prevailing are small, the due process clause commands respect for constitutional rights. Observance of due process requirement for pre-deprivation hearings does not just protect property interests. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), Justice Frankfurter reflected upon due process as bedrock upon which our democracy is built:

> "[D]ue process," unlike some legal rules, is not a technical conception addressed with a fixed content unrelated to time, place and circumstances. Expressing, as it does in its ultimate analysis, respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.

Id. at 162-163.

Justice Frankfurter's words have not been lost. The Supreme Court often restates the principle that the due process clause not only protects the property interests of citizens, it also supports the conveyance of a feeling that the government is fair and just; that it does not take property at will; and that all the rights of citizens are respected. *See Carey v. Piphus,* 435 U.S. 247, 266-267 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Nelson v. Adams*, 529 U.S. 460, 468 & n.2 (2000).

From these considerations it is clear that: (1) 30 C.F.R. § 104 is an adjunct to a host of other powerful and immediate enforcement provisions dealing with current or recent alleged violations; (2) it minimally takes14 months to implement a POV Notice from the beginning of the relevant time period; (3) the number of citations/orders/violations supporting prosecution is controlled exclusively by MSHA; and (4) MSHA may initiate hearing processes, with expedited consideration, even before the end of the 12-month review period. Thus MSHA, rather than the operator, has virtually complete control over the timing of, and time required for, a hearing on citations/orders/violations underlying a POV Notice.

Due process is a flexible concept and may be tailored to the circumstances of the specific situation. *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). During rulemaking MSHA could and should have considered differing possibilities for affording some form of pre-deprivation impartial judicial type review of alleged violations upon which a POV Notice is to be based. This is a matter upon which MSHA should have reflected and acted seriously before dispensing with vital constitutional rights.

III.

CONCLUSION

Congress and Federal courts wisely have found that notice of and the opportunity to comment upon rules binding a Federal agency or members of the public are the foundation of fair and transparent government. In its rulemaking at issue here, MSHA bound itself and members of the public to arbitrary numerical and specific pattern criteria. In the name of "flexibility" it has deprived the public of any opportunity to comment upon such criteria. That is an unlawful failure to obey the Administrative Procedure Act and should be rejected.

Separately, the Secretary defines a pattern of violations to mean a minimal number of proven violations and, acting through MSHA, controls every aspect of the proceedings upon which issuance of a POV Notice is based from initial inspection through monitoring of violations to deciding upon the number and timing of prosecution of citations/orders. Further, MSHA has, and aggressively uses, a broad and forceful array of enforcement weapons to deal with violations likely to cause injury and operators that commit such violations. Under these circumstances, the conditions necessary to warrant denial of some form of a pre-deprivation due process do not exist.

I would vacate the judge's decision and not permit the Secretary to proceed with POV notices until he conducts a rulemaking consistent with this opinion.

William I. Althen, Commissioner

APPENDIX A

WEVA 2014-82-R
WEVA 2014-83-R
WEVA 2014-86-R
WEVA 2014-87-R
WEVA 2014-97-R
WEVA 2014-151-R
WEVA 2014-161-R
WEVA 2014-190-R
WEVA 2014-191-R
WEVA 2014-192-R
WEVA 2014-193-R
WEVA 2014-221-R
WEVA 2014-244-R
WEVA 2014-284-R
WEVA 2014-285-R
WEVA 2014-447-R
WEVA 2014-448-R
WEVA 2014-449-R
WEVA 2014-450-R
WEVA 2014-451-R
WEVA 2014-452-R
WEVA 2014-453-R
WEVA 2014-454-R
WEVA 2014-455-R
WEVA 2014-456-R
WEVA 2014-457-R
WEVA 2014-479-R
WEVA 2014-480-R

Pattern of Violations Screening Criteria - 2013

A computer-generated report is run that retrieves data for the most recent 12 months in which data are available for every mine under MSHA's jurisdiction. All non-abandoned mines (on the date the report is generated) are reviewed to determine if a pattern of violations may exist.

Pattern Criteria (30 CFR §104.2)

The following two sets of screening criteria are used to perform the review required under 30 CFR §104.2. Mines must meet the criteria in **either** set to be further considered for exhibiting a pattern of violations.

Mines meeting **all** of the following four criteria:

1. At least 50 citations/orders for significant and substantial (S&S) violations **issued** in the most recent 12 months.

2. A rate of eight or more S&S citations/orders **issued** per 100 inspection hours during the most recent 12 months **OR** the degree of negligence for at least 25 percent of the S&S citations/orders **issued** during the most recent 12 months is "'high" or "reckless disregard."

3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** per 100 inspection hours during the most recent 12 months.

4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.[1]

Or

Mines meeting **both** of the following criteria:

1. At least 100 S&S citations/orders **issued** in the most recent 12 months.

2. At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** during the most recent 12 months.

[1]Severity Measure is the number of lost workdays per 200,000 employee-hours. The Severity Measure formula is number of lost workdays x 200,000 divided by the number of employee hours. Office worker and contractor hours and lost workdays are excluded. Lost workdays consist of days away from work and days of restricted work activity, or statutory days charged as prescribed from a table of standard charges, e.g., 6,000 days for a fatality or permanent total disability. Only statutory days are used in the fatality and disability cases.

The Severity Measure for each mine is computed for all lost-workday accidents that occurred during the most recent 12 months for which injury and employee hour data (as reported under 30 CFR Part 50) is available. Each mine's severity measure is compared to the applicable severity measure for the six mine types and classifications over the most recent five years for which closed out data reported under 30 CFR Part 50 is available.

There are six mine types and classifications used to calculate the Severity Measure for pattern of violation screenings: underground coal mines; surface coal mines; surface coal facilities; underground metal and nonmetal mines; surface metal and nonmetal mines; and surface metal and nonmetal facilities. The Severity Measures for CY 2008-2012 are:

Mine Type and Classification	Severity Measure (SM) CY 2008-2012
Facility Coal	183.43
Facility M/NM	199.15
Surface Coal	131.72
Surface M/NM	142.51
Underground Coal	438.85
Underground M/NM	278.76

Pattern of Violations Screening Criteria - 2012

A computer-generated report is run that retrieves data for the most recent 12 months in which data are available for every mine under MSHA's jurisdiction. All non-abandoned mines (on the date the report is generated) are reviewed to determine if a potential pattern of violations may exist.

Initial Screening Criteria (30 CFR § 104.2)

The following two sets of screening criteria are used to perform the initial screening required under 30 CFR § 104.2. Mines must meet the criteria in **either** set to be further considered for exhibiting a potential pattern of violations.

Mines meeting **all** of the following four criteria are further screened to identify those that meet appropriate criteria, as specified in 30 CFR § 104.3, for a potential pattern of violations.

1. At least 50 citations/orders for significant and substantial (S&S) violations **issued** in the most recent 12 months.

2. A rate of eight or more S&S citations/orders **issued** per 100 inspection hours during the most recent 12 months **OR** the degree of negligence for at least 25 percent of the S&S citations/orders **issued** during the most recent 12 months is "'high" or "reckless disregard."

3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** per 100 inspection hours during the most recent 12 months.

4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.[i]

Or

Mines meeting **both** of the following two criteria are further screened to identify those that meet appropriate criteria, as specified in 30 CFR § 104.3, for a potential pattern of violations.

1. At least 100 S&S citations/orders **issued** in the most recent 12 months.

2. At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** during the most recent 12 months.

Pattern Criteria Screening (30 CFR § 104.3)

30 CFR § 104.3 requires that one of the following pattern criteria be met: (1) a history of repeated S&S violations of a particular standard; (2) a history of repeated S&S violations of standards related to the same hazard; or (3) a history of repeated S&S violations caused by unwarrantable failure to comply. Only citations and orders that are final may be considered in determining if these criteria have been met.

For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became **final orders** of the commission during the most recent 12 months **OR** at least two S&S unwarrantable failure violations that became **final orders** of the commission during the most recent 12 months.

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[i] Severity Measure is the number of lost workdays per 200,000 employee-hours. The Severity Measure formula is number of lost workdays x 200,000 divided by the number of employee hours. Office worker and contractor hours and lost workdays are excluded. Lost workdays consist of days away from work and days of restricted work activity, or statutory days charged as prescribed from a table of standard charges, e.g., 6,000 days for a fatality or permanent total disability. Only statutory days are used in the fatality and disability cases.

The Severity Measure for each mine is computed for all lost-workday accidents that occurred during the most recent 12 months for which injury and employee hour data (as reported under 30 CFR Part 50) is available. Each mine's severity measure is compared to the applicable severity measure for the six mine types and classifications over the most recent five years for which closed out data reported under 30 CFR Part 50 is available.

There are six mine types and classifications used to calculate the Severity Measure for pattern of violation screenings: underground coal mines; surface coal mines; surface coal facilities; underground metal and nonmetal mines; surface metal and nonmetal mines; and surface metal and nonmetal facilities. The Severity Measures for CY 2007-2011 are:

Mine Type and Classification	Severity Measure (SM) CY 2007-2011
Facility Coal	188.4
Facility M/NM	190.3
Surface Coal	155.3
Surface M/NM	144.2
Underground Coal	482.6
Underground M/NM	297.9

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