

### *Pattern of Violations Screening Criteria - 2011*

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.<sup>1</sup>

*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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<sup>i</sup> 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 2006-2010 are:

Mine Type and Classification	Severity Measure (SM) CY 2006-2010
Facility Coal	163.4
Facility M/NM	189.1
Surface Coal	172.1
Surface M/NM	157.1
Underground Coal	576.6
Underground M/NM	294.8

## PATTERN OF VIOLATIONS (POV) PROCEDURES SUMMARY

At least once each year, in accordance with 30 CFR sections 104.2 and 104.3, the Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI) will review the violation and injury history of each mine under MSHA's jurisdiction to identify those that are exhibiting a potential Pattern of Violations (PPOV).<sup>1</sup> The OAASEI will document the criteria and data used to conduct the review.

The OAASEI will transmit by memorandum the list of mines identified as exhibiting a PPOV, along with the criteria and data used, to the Administrators for Coal and Metal and Nonmetal (MNM) Mine Safety and Health (Administrators). The Assistant Secretary, the Deputy Assistant Secretaries, the Director of Program Evaluation and Information Resources (PEIR), and the Associate Solicitor for Mine Safety and Health (Associate Solicitor) will be copied on the memorandum.

The memorandum will include: a list of all PPOV candidates; the criteria and data associated with the list; and the number, by standard, of repeated violations that became final orders of the Federal Mine Safety and Health Review Commission (Commission) during the review period. Additional mines may be added to the list after verification of the accuracy and completeness of injury data.

The Administrators will issue a memorandum to each District Manager who has a candidate(s) within the district with instructions for reviewing the designated mines. Each District Manager will respond within seven days, reporting facts about the designated mines relevant to whether there are extraordinary mitigating conditions that meet the criteria in **Appendix A - Mitigating Circumstances** for postponing or not issuing a PPOV notification. The role of the District Manager is to collect and report relevant facts, not to make a decision or recommendation to postpone or not issue a PPOV notification.

The District Manager must provide detailed information about any possible mitigating circumstances relevant to the decision to postpone or not issue a PPOV notification. Additional guidance is contained in Appendix A.

A POV panel consisting of personnel from Coal, MNM, and PEIR will review the information provided by the District Manager. Within 10 days, the panel will review the information, obtain any additional necessary information, and

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<sup>1</sup> Implementation of the POV sanction will provide MSHA with a means to gain remedial action from operators "who have not responded to the Agency's other enforcement efforts." 55 FR 31129

determine whether any of the mines listed as exhibiting a potential Pattern of Violations should be excluded from PPOV Notification or have their PPOV notification postponed due to mitigating circumstances. The panel will provide a report of its findings to the Assistant Secretary and the Administrators. PEIR will be responsible for providing administrative services to the panel and ensuring consistency in the application of the policy and adequate documentation of decisions to postpone or not issue a PPOV notification.

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The Administrators will notify the appropriate District Managers of the mines that meet the criteria and have no extraordinary mitigating circumstances. These mines will be issued a PPOV notification.

The District Managers will issue a written PPOV notification to each operator identified to receive the notification. A copy of the notification will also be provided to the Assistant Secretary, the Deputy Assistant Secretaries, the Director of Assessments, Accountability, Special Enforcement and Investigations, the Associate Solicitor, and the representative(s) of the miners at the mine, if applicable. The notification will specify the basis for identifying the mine as having a PPOV and give the operator a reasonable opportunity, not to exceed 20 days from the date of the notification, to take the following steps:

1. Review all documents upon which the pattern of violations evaluation is based and provide additional information;
2. Submit a written request for a conference with the District Manager (the District Manager shall hold any conference within 10 days of a request); and/or
3. Submit a corrective action program to be implemented at the mine to avoid repeated significant and substantial (S&S) violations.

A timeline of the PPOV/POV process is provided at Appendix C.

The mine operator can choose to submit to MSHA a corrective action program with benchmarks for reducing S&S violations. MSHA will establish S&S violation rate goals for each mine as described below. Mines that do not choose to implement a corrective action program will be required to achieve the prescribed goals within 50 days of receiving a PPOV notification. Mines that implement a corrective action program will be required to meet the prescribed goals within a maximum of 110 days of receiving PPOV notification, depending upon when a corrective action program is submitted to MSHA.

Under section 104.4, the District Manager may allow a mine operator that submits a corrective action program an additional period, not to exceed 90 days, for determining whether the program effectively reduces the occurrence of

significant and substantial violations at the mine. In order to receive this additional time, any corrective action program should: contain concrete, meaningful measures that can be reasonably expected to reduce the number of S&S violations at the mine; be tailored to the specific compliance problems at the mine; and contain benchmarks that will be achieved. Corrective action programs that do not appropriately address the root causes of the mine's S&S violation history will not be grounds for receiving additional time under section 104.4. MSHA will monitor the operator's implementation of the corrective action program against the program's benchmarks. Failure to submit an appropriate program or meet the program's benchmarks will require the mine to achieve the goals established for it within 50 days of receiving the PPOV notification.<sup>2</sup>

The PPOV notification sent to each mine operator will include guidance on what constitutes a meaningful and acceptable corrective action program to avoid repeated S&S violations. Additional guidance describing what constitutes an appropriate corrective action program is contained in Appendix B.

The District Manager will evaluate the compliance history of mines identified in the screenings to determine if additional examinations, as described in 30 C.F.R. should be required in order to avoid repeated S&S violations. The District Manager may require examinations for hazardous conditions or violations of mandatory health or safety standards both during and after the PPOV and POV periods where the Mine Act or MSHA standards provide such authority. During the corrective action period, MSHA will conduct a complete inspection of the mine. This complete inspection will commence after the operator's corrective action program has been implemented and be completed within 90 days from the date that the operator submitted the corrective action program to MSHA.

When the mine operator does not implement an appropriate program to reduce S&S violations, MSHA will conduct a complete inspection within 50 days from the date of the issuance of the PPOV notification.<sup>3</sup> The District Manager will analyze the results of this complete inspection and other on-site enforcement

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<sup>2</sup> The preamble states that "the final rule allows the District Manager to set the evaluation period based on the circumstances at each mine, and periods shorter than 90 days can be specified as necessary. Also, the period of evaluation can be terminated at any time by the District Manager if the program is not achieving its purpose." 55 FR 31133

<sup>3</sup> In order to prevent any mine operator from avoiding being issued a Pattern of Violations notice by temporarily closing the mine during the corrective action period, the 50/110 day timeframes may be suspended during periods of inactivity and resume when the mine reverts to an active status.

activities during the corrective action period to evaluate whether the mine operator has reduced the violation frequency rate for S&S violations.

In order to avoid receiving a POV notice, mines that do not implement an appropriate corrective action program must reduce the S&S frequency rate per 100 inspection hours:

- by 70 percent from the mine's rate during the 12-month review period (provided such reduction is below the national rate for all mines of similar type and classification during the 12-month review period).

*Or*

- to a rate within the top 35% for all mines of similar type and classification (as established during the 12-month review period), which MSHA will calculate and provide.

In order to avoid receiving a Pattern of Violations notice, mines that do implement an appropriate corrective action program must reduce the S&S frequency rate per 100 inspection hours:

- by 50 percent from the mine's rate during the 12-month review period

*Or*

- to a rate within the top 50% for all mines of similar type and classification (as established during the 12-month review period), which MSHA will calculate and provide.

For any mines that have implemented a corrective action program, but have failed to achieve the established violation frequency reduction rates, the District Manager will submit an evaluation report to the appropriate Administrator and the Director of Assessments, Accountability, Special Enforcement and Investigations within 120 days from the issuance of the potential pattern notification to the operator. In cases where the operator failed to achieve the established violation frequency reduction rates and no program to reduce S&S violations has been implemented at the mine, the District Manager will submit the evaluation report to the Administrator and the Director of Special Enforcement and Investigations, Accountability, and Assessments no more than 60 days from the issuance of the potential pattern notification to the operator.

In the report, the District Manager should identify any circumstances that affected the operator's implementation of the corrective action program, if applicable, and detail any factors that should be considered in determining whether to issue a POV notice. Additional guidance that describes the types of factors that should be considered is contained in Appendix A. When a District Manager identifies mitigating circumstances that should be considered, the Administrator will submit the District Manager's report to the POV panel for the panel's review and recommendation.

Regardless of whether the operator implemented a corrective action program, a copy of the evaluation report will be provided to the operator and the representative(s) of the miners, where applicable, 10 days before the report is sent to the Administrator. Both the operator and the miners' representative(s), where applicable, will have 10 days from the receipt of the report to submit written comments to the Administrator.

Within 30 days of receipt of a report from the District Manager to the Administrator, and following a recommendation of the POV panel on any mines reviewed for mitigating circumstances, the Administrator will issue a decision as to whether the mine is to be issued a Notice of Pattern of Violations.<sup>4</sup> A copy of the decision will be provided to the Assistant Secretary, the Deputy Assistant Secretaries, the Director of Assessments, Accountability, Special Enforcement and Investigations, the operator, the representative(s) of the miners (where applicable), the District Manager, and the Associate Solicitor for Mine Safety and Health. The Administrator's decision will describe the POV Panel's recommendations, the Administrator's concurrence with or rejection of the Panel's recommendations, and if applicable, the reasons for not concurring with the Panel's recommendations. The District Manager will notify the mine operator and the representative(s) of miners of the decision.

When the Administrator decides that the issuance of a Notice of Pattern of Violations is not justified, the District Manager will notify the mine operator and the representative(s) of miners (where applicable) of the decision.

When the Administrator decides to issue a Notice of Pattern of Violations, the District Manager will send, by certified mail or hand delivery, the Notice of Pattern of Violations to the operator. A copy of the notice will also be provided

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<sup>4</sup> The legislative history of the Mine Act indicates Congress intended the Pattern of Violations process to be reserved for repeat violators that have not responded to other enforcement measures. "The committee reports and floor debates . . . make it clear that congress directed the POV enforcement provisions at the few mine operators who repeatedly violate the law. In particular, Congress focused its attention on mines where citations or orders are issued for S&S violations which are abated but continue to recur without mine management taking effective preventive measures." 55 FR 31130.

to the representative(s) of miners (where applicable), the Assistant Secretary, the Deputy Assistant Secretaries, the Director of Assessments, Accountability, Special Enforcement and Investigations, Accountability, and Assessments, the Administrator, and the Associate Solicitor for Mine Safety and Health.

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

If 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 safety or health hazard during an inspection conducted while a mine is subject to a POV notice, the inspector will issue an order requiring the operator to withdraw all persons in the area affected by the violation except those persons listed in section 104(c) of the Mine Act. All persons except as listed in section 104(c) of the Mine Act shall also be prohibited from entering that area until the inspector determines that such violation has been abated.

#### TERMINATION OF PATTERN OF VIOLATIONS NOTICE

A Notice of Pattern of Violations shall be terminated when an inspection of the entire mine finds no S&S violation of a mandatory health or safety standard.

The operator may request an inspection of the entire mine or portions of the mine. No advance notice of the inspection shall be provided, and the scope of each inspection will be determined by MSHA. Partial inspections that in combination cover the entire mine within the 90-day period will constitute an inspection of the entire mine for the purposes of termination of a POV notice.

Mines that have received PPOV notifications or POV notices and met the applicable requirements to terminate those notices shall be considered for further PPOV/POV actions and may be subject to enhanced inspections.<sup>5</sup>

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<sup>5</sup> The preamble to the final rule addresses the concern that an operator may reduce the number of repeated S&S violations by implementing a program, but return to the pattern after a determination is made not to issue a pattern notice. On this issue, the preamble states: "If an operator resumes the practice that gave rise to the issuance of the original notification of a pattern of violations, a new notice could be issued to the operator based on the circumstances that resulted in the original notice, as well as the operator's **most recent** conduct. 55 FR 31133.



## Appendix A - Mitigating Circumstances

### PPOV Determinations

There may be extraordinary occasions when a mine meets the screening criteria by which mines are identified as exhibiting a potential pattern of violations but there are mitigating circumstances that make a potential pattern notification inappropriate. Examples of situations that would be necessary to justify not issuing a PPOV notification are:

- Recent bona fide changes in mine ownership or management; or
- Reductions in S&S citations/orders during the final quarter of the screening review
  - to at or near the 70% reduction goal for mines receiving a PPOV notification, or
  - to at or near the 50% reduction goal for PPOV mines that implement a corrective action programs if mine management has made identifiable health and safety program improvements that achieve the objectives of **Appendix B - Guidelines for Corrective Action Programs**.

Postponement of a PPOV notice would be appropriate where there has been a verified change in the status of the mine to an inactive state.

District Managers should provide the POV panel with detailed information relevant to making these determinations, including verification of any information provided by mine operators that is used in deciding whether mitigating circumstances exist. Successful reduction of S&S violations while under a previous PPOV notification shall not be considered a mitigating factor in subsequent PPOV screenings.

### POV Determinations

In general, a recommendation to not issue a mine operator a POV notice when the mine has not met the established quantitative goals under the PPOV notice will be based on qualitative information. The types of situations that would be necessary to justify a recommendation that a mine not receive a Pattern of Violations notice or have the notice delayed to reevaluate the conditions in the mine include:

- A bona fide change in ownership;

- A bona fide change in mine management that brought significant improvements in compliance;
  - The operator does not meet S&S reduction benchmarks due to conditions outside of the operator's control and despite significant improvements in compliance due to implementation of an effective corrective action program; or
  - Upon review of facts and evidence, generally occurring after the violations are contested, there are S&S violations that are modified to non-S&S, after which the operator meets the established S&S rate goals.
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## Appendix B - Guidelines for Corrective Action Programs

The identification of a mine as exhibiting a potential pattern of violations is evidence of a failure in the mine's health and safety program. Changes are needed in the mine's health and safety management program to improve compliance and protect miners. Under section 104.4, if a mine operator submits a corrective action program, a District Manager has the discretion to allow an additional period, not to exceed 90 days, for determining whether the program effectively reduces the occurrence of significant and substantial (S&S) violations at the mine.

The decision to allow this additional time should be based on whether it appears that the corrective action program is likely to be effective in reducing S&S violations. For this reason, it is important that the program contain concrete, meaningful measures that can reasonably be expected to reduce the number of S&S violations at the mine; the measures should be specifically tailored to the compliance problems at the mine; and the measures should contain achievable benchmarks and milestones for implementation.

MSHA expects that most effective programs would address at least the following general subject areas, with the specific implementing details for each general subject determined by particular conditions and practices at the mine<sup>6</sup>:

- Corrective actions the operator intends to take, including benchmarks and milestones, to reduce the frequency of S&S violations.
- Specific changes the operator will make to improve the quality and/or increase the frequency of examinations conducted by qualified and competent personnel, including examinations for violations of health and safety standards, and the methods by which hazardous conditions will be timely abated.
- The specific actions the mine management (superintendent/ mine manager and mine foreman) will take to provide greater attention in the

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<sup>6</sup> "The Committee views the 105(d)(1) [now 104(e)] notice as indicating to both the mine operator and the Secretary that **there exists at that mine a serious safety and health management problem**. The existence of such a pattern should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient." Leg. Hist. (Committee Report, p. 620).

review of the examination books and records and discuss the examination results with examiners each day.

- The frequency with which mine management (mine superintendent / mine manager and mine foreman) will conduct unannounced examinations of the mine to audit mine examinations and compliance with health and safety standards.
- The additional health and safety staff that will be added to the mine to assist in the daily auditing of compliance performance and a description of the authority they will be delegated to halt production / work when violations are identified.
- Specific training which miners will receive on miners' rights to report hazards and unsafe conditions and on protection against retaliation.
- Training the mine operator will conduct for mine officials, mine examiners, competent persons and miners to address each of the conditions that caused the unacceptable levels of citations and orders issued during the screening period.
- Planned modifications or additions to engineering and/or administrative controls to address specific conditions or practices.
- Identification of the personnel who will be responsible for implementing and monitoring the corrective action program.
- Milestones and benchmarks for implementation of each component of the program, including dates by which they will be achieved.
- How the operator intends to ensure the corrective action program's milestones are achieved and the method by which the operator will update the District Manager on the program's progress. These updates should occur as often as possible, ideally, on a weekly or bi-weekly basis.

The broad purpose of corrective action programs is to improve mine operators' compliance with existing regulatory requirements under the Mine Act. It is MSHA's intent that mine operators not abandon these corrective action programs after their short-term goals are met. Mine operators' corrective action programs should establish long-term goals for reducing violations beyond the goals established for them by MSHA under the POV enforcement measures. MSHA will monitor the results of the corrective action programs during the corrective action period established under the POV regulations, but will also monitor each mine's violation history after the corrective action period to determine if the mine operator is making a good faith effort to eliminate violations. Abandonment of corrective action programs after meeting the short-

term POV goals will be a qualitative factor considered in later POV screenings and enhanced enforcement activity.

## APPENDIX C

### Timeline for Potential Pattern of Violations (PPOV)

	PPOV Actions	Regulation Timeframes
Day 0	Notification letter sent to mine operator exhibiting Potential Pattern of Violations	
Day 20	Last date for operator to: Review documents upon which PPOV designation based Provide additional information Submit written request for conference with district manager Institute a program to avoid repeated S&S violations	20 days from notification letter (§104.4(a))
Day 30	Last date to hold operator/district manager conference	within 10 days of request for conference (§104.4(a)(3))
<b>If operator chooses not to implement a program to avoid repeated S&amp;S violations:</b>		
Day 50	District Manager evaluation report due to mine operator	10 days before evaluation report due to Administrator (§104.4(b))
Day 60	District Manager evaluation report due to Administrator Last date for operator or miners' representative to submit written comments to the Administrator	60 days after operator receives PPOV notification (§104.4(b)) 10 days after receipt of district manager evaluation (§104.4(b))
Day 90	Last date for Administrator's decision to issue a Pattern of Violations Notice	within 30 days of receipt of District Manager report (§104.4(c))
<b>If operator chooses to implement a program to avoid repeated S&amp;S violations:</b>		
Day 110	District Manager evaluation report due to mine operator	up to 90 days after S&S reduction program implemented (§104.4(a)(4))
Day 120	District Manager evaluation report due to Administrator Last date for operator or miners' representative to submit written comments to the Administrator	120 days after PPOV notification (§104.4(b)) 10 days after receipt of district manager evaluation (§104.4(b))
Day 150	Last date for Administrator's decision to issue a Pattern of Violations Notice	within 30 days of receipt of District Manager's report (§104.4(c))