

MSHA Response to Draft Report

U.S. Department of Labor

Mine Safety and Health Administration  
1100 Wilson Boulevard  
Arlington, Virginia 22209-3939



SEP 27 2010

MEMORANDUM FOR ELLIOT P. LEWIS

Assistant Inspector General of Audit

FROM:

JOSEPH A. MAIN *Joseph A. Main*  
Assistant Secretary of Labor for  
Mine Safety and Health

SUBJECT:

Response to OIG Draft Audit Report No. Report No. 05-10-005-06-001, "In 32 years MSHA has never Successfully Exercised its Pattern of Violation Authority"

Thank you for the opportunity to review your draft audit report. The Mine Safety and Health Administration (MSHA) will use the audit results to help the Agency improve its pattern of violations (POV) enforcement authority—both the regulations and the administrative implementation process. As you know, we agree that the POV and potential pattern of violations (PPOV) process discussed in your report was flawed and needs to be fixed. The fact that no mine has ever been subject to the full provisions of the POV statute that has been in the Mine Safety and Health Act for over 32 years is a testament to that. I have given high priority to this issue, not only in my Congressional testimony, but also by placing the POV regulations on MSHA's regulatory agenda for revision and undertaking a revision of the POV criteria and implementation before the next mandated POV screening. We are fully committed to correcting the problems in this process. We welcome your audit recommendations which will help us improve the process already underway at MSHA. Our efforts are focused on ensuring that future PPOV and POV determinations are used as an effective part of MSHA's enforcement strategy in a manner that advances the Congressional intent that operators find and fix the root causes of violations before they become a hazard to miners.

As previously announced, MSHA will implement new procedures and criteria for the next round of PPOV/POV decisions under the existing regulations. We also intend to propose new POV regulations in order to, among other things, simplify the criteria for placing mines on a POV notice and make the POV system a more effective tool in identifying problem mines and changing the behavior of the operators who run those mines. In addition, we will continue to provide assistance as Congress develops legislation to fix to the POV system.

Although we welcome the independent analysis provided by the OIG, we do wish to correct several inaccuracies in your report. The draft report stated that "MSHA's responsibility is to assure that mine operators protect all workers from mining hazards at all times..." and that "...MSHA's exclusion of certain mines from POV analysis ... potentially placed workers at risk."

You can now file your MSHA forms online at [www.MSHA.gov](http://www.MSHA.gov). It's easy, it's fast, and it saves you money!

Simply put, Congress gave mine operators the primary responsibility to prevent unsafe conditions and practices in mines. We are concerned that your articulation of MSHA's responsibilities obscures the proper placement of that critical legal and moral responsibility to keep miners safe. MSHA cannot be in every mine, every day, on every shift. That is why miners are safest when employers take responsibility for anticipating, recognizing, and eliminating or controlling hazards. Operators cannot simply wait to correct hazards until after MSHA cites them for violations of regulations. Operators' failure to recognize and eliminate or control hazards – whether MSHA cites them or not -- is what puts miners at risk. A more accurate description of MSHA's responsibility is to enforce the law as effectively as possible by using all the enforcement tools at our disposal, including an improved POV system, in order to promote safe and healthful working conditions for our nation's miners.

Below are specific responses to your recommendations. We look forward to responding in more detail in our 60-day response to your final report. If you have any questions, please contact Brent Carpenter at (202) 693-9782.

**OIG Recommendation No 1:** *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.*

We agree with this recommendation. MSHA's concerns regarding its POV regulation pre-dated the Office of the Inspector General's (OIG's) review. Reforming the POV process was one of the first priorities established by Assistant Secretary for Mine Safety and Health, Joe Main, upon his confirmation. As the OIG stated in its report, in testimony before the U.S. House Committee on Education and Labor on February 23, 2010, Assistant Secretary Main made public his commitment to reforming the POV process:

We are...reviewing the current pattern of violation criteria contained in [regulations]...considering a review of the pattern of violation process to determine whether our current approach is the best one for providing timely protection for miners.

In addition to internal meetings to discuss improvements in the process within the current regulatory restrictions, MSHA took the first step forward in making good on that commitment in the Department of Labor's Spring Semi-Annual Regulatory Agenda, posted on April 26, 2010, in which MSHA announced its intention to issue a proposed rule by January 2011 to simplify the pattern criteria, improve the process, and improve consistency in the application of the POV notice. MSHA recognizes that the POV regulation has not been effective in stopping chronic violators and reducing the risk of recurring hazardous conditions. During the development of the proposed rule, MSHA will evaluate all issues pertaining to the POV regulation, including whether to continue the use of only final orders in determining POV status and the issuance of a warning notice prior to exercising POV authority.

**OIG Recommendation No 2:** *Seek stakeholders' input (e.g., miners, miner representatives, mine operators, etc.) in the development of POV screening criteria, but assure that the process, including any rulemaking, is not stalled or improperly affected because of competing viewpoints.*

We concur with the intent of this recommendation and plan to request stakeholder input in future development of POV screening criteria. Consistent with the Federal Mine Safety and Health Act of 1977 and the Administrative Procedures Act, MSHA will seek stakeholder input by engaging in notice and comment rulemaking, including public hearings. MSHA is considering appropriate methods for obtaining stakeholder input in the development of POV screening criteria.

MSHA intends to incorporate the findings in this OIG report into the development of new screening criteria. Because a POV screening must be conducted now in order to comply with the existing regulations, MSHA will not have time to seek stakeholder input before the next POV screening. MSHA is committed to securing stakeholder input before the following screening.

**OIG Recommendation No 3:** *Assure that POV selection criteria are sufficiently transparent to allow stakeholders to reasonably determine an individual mine's status at any point in time.*

We agree with this recommendation and will work to ensure that the new POV selection criteria are sufficiently transparent. For example, we plan to develop a service accessible through MSHA's Web site that will allow mine operators and other stakeholders to monitor each mine's inspection and violation data against the POV screening criteria. The data will be updated frequently so that mine operators and others will have the ability to identify troubling trends, and mine operators will have the opportunity to take timely remedial action.

**OIG Recommendation No 4:** *Assure that POV decisions are based solely on the health and safety conditions at each mine.*

We concur, as stated in MSHA's response to your Alert Memo. Future decisions about POV enforcement actions will be based solely on what is best for the safety and health of the miners, within legal and regulatory constraints.

**OIG Recommendation No 5:** *Implement a standard process for documenting all factors – both quantitative and non-quantitative - used to make POV decisions.*

We agree with this recommendation. MSHA will implement procedures in order to document the factors used in making each POV determination. The new POV process will analyze both quantitative and non-quantitative factors. As stated in our Alert Memo response, this process will involve the creation of a screening system that will identify mines that chronically fail to implement proper safety and health controls.

The mines that are screened into a pool for consideration will then be carefully examined in order to confirm the accuracy of the data used and to assure that their current conditions merit inclusion in this enhanced enforcement program.

**OIG Recommendation No 6:** *Establish guidance on the preparation, review, and monitoring of mine operators' POV corrective action plans.*

We agree with this recommendation. MSHA plans to establish and provide written guidance to the Agency's enforcement personnel and mine operators about what constitutes an appropriate corrective action program for POV purposes. In addition to monitoring the violation histories of each mine identified as exhibiting a potential pattern of violations under the existing regulation, MSHA will review the corrective action programs against established guidelines for these programs and monitor operators' progress in implementing the various components of each.

**OIG Recommendation No 7:** *Eliminate the requirement that mines be in an "active" status to be screened for a pattern of violations.*

MSHA agrees with this recommendation that all mines be considered in the initial screening process. Following the screening process, in determining which mines are actually placed on POV, however, we anticipate legitimate case-by-case situations where mine operators are not placed on a POV because of qualitative factors, possibly including a mine's nonproductive status. As stated in our Alert Memo response, it is critical that MSHA focus its POV enhanced inspection resources on those mine operators that have chronically failed to protect the safety and health of the miners and that continue to put miners at risk.

**OIG Recommendation No 8:** *Use system development life cycle techniques (analysis, design, test, implement, and maintain) to reduce the risk of errors in any POV related computer program.*

We agree with this recommendation. MSHA plans to use system development life cycle techniques to reduce the risk of errors in any POV-related computer application.

**OIG Recommendation No 9:** *Re-evaluate the performance standard for timely completion of laboratory tests on rock dust or any other samples that yield enforcement related data, including addressing workload fluctuations and resources needs.*

We agree that more timely testing results regarding the combustibility of coal mine dust in mines are needed to assess operator compliance with rock dusting standards. MSHA has already begun implementing improvements in this area that would also speed up the time to analyze the samples by adding new equipment and repairing an out-of-service robot that will be added to the existing robotic system.

Plans are also underway to upgrade the Mount Hope Lab to accommodate new ovens and other necessary components that will be purchased in order to keep pace with the robotics system. These steps will enable MSHA to increase testing capacity while, at the same time, implementing short-term programmatic and administrative improvements. Further, MSHA plans to contract for temporary personnel to staff the expanded laboratory. We expect significant improvements will be made to the sample turn-around times as a result of these actions.

Additionally, MSHA is encouraging actions through support of NIOSH research that will lead to use of Explosibility Meters (CDEM) by mine operators. These devices would provide immediate, on-site results on combustible content to help ensure that coal dust is kept below explosive levels.

**OIG Recommendation No 10:** *Examine its current process and metrics for monitoring the improvement of potential POV mines to increase the likelihood that improvements are not temporary.*

MSHA agrees with this recommendation. MSHA is considering both administrative and regulatory approaches to respond to this recommendation most effectively in order to assure that mines placed in PPOV or POV status have a sustained and productive focus on hazard control and elimination.

In summary, we appreciate the careful and comprehensive work done by the OIG in reviewing the PPOV and POV program. The program, and the miners the program is intended to protect, will be improved by the insights and recommendations the OIG has provided and by MSHA's response.