

ESSAY

MSHA's Pattern of Violations Authority: Reviving An Untapped Resource of Enforcement Power

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INTRODUCTION

On April 5, 2010, a deadly combination of methane gas and coal dust ignited Massey Energy's Upper Big Branch coal mine in West Virginia.¹ The explosion instantly killed twenty-nine miners and became the deadliest mining disaster to occur in nearly forty years.² Prior to this tragedy, the Upper Big Branch mine had a long history of safety violations.³ In the year 2009 alone, the mine received more than 500 citations for various violations of safety standards and was issued close to \$900,000 in civil penalties.⁴ Joseph A. Main, the Assis-

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¹ Dan Froomkin, *West Virginia Mine Explosion Leads to More Enforcement and Disclosure*, HUFFINGTON POST (last updated Oct. 27, 2010), http://www.huffingtonpost.com/2010/08/27/west-virginia-mine-explosion-enforcement-disclosure_n_697556.html.

² *Id.*

³ Sandy Smith, *A "Massey"ive Catastrophe*, EHS TODAY, May 2010, at 8, 8.

⁴ *Id.*

tant Secretary of Labor for the Mine Safety and Health Administration (“MSHA”), stated that the Upper Big Branch mine had received more “unwarrantable failure” orders for safety violations resulting from conduct characterized as “reckless disregard” than any other mine in the country.⁵ Furthermore, during the months preceding the deadly explosion, the mine was evacuated on three separate occasions for ventilation problems relating to a dangerous buildup of methane gas.⁶

Despite the Upper Big Branch mine’s repeated pattern of violating safety standards, the mine continued to operate and produce coal.⁷ Congress granted MSHA powerful enforcement tools to prevent mining disasters by specifically targeting mines that generate a history of recurring violations.⁸ Under section 104(e) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”),⁹ Congress mandated that if a mine operator demonstrated a “pattern of violations” of safety standards that are of such a serious nature that could have “significantly and substantially” contributed to health and safety hazards, the operator “shall be given written notice that such pattern exists.”¹⁰ Once an operator is given notice that the mine has been placed on a pattern of violation (“POV”) status, if a federal inspector finds a violation of “significant and substantial” (“S&S”) nature within ninety days, the inspector shall issue a closure order requiring the operator to shut down the mine until the violation has been abated.¹¹

Although Congress intended to give MSHA an effective enforcement mechanism to control mine operators who continually disregard mandatory health and safety standards, the Agency has never successfully used this important enforcement tool.¹² In fact, in the thirty-two years since Congress enacted section 104(e), the POV provision,

⁵ Froomkin, *supra* note 1; *see also* News Release, Mine Safety and Health Admin., Hazard Complaints Result in Surprise Inspections at 3 Massey-Owned Mines (Apr. 27, 2010), *available at* <http://www.msha.gov/media/PRESS/2010/NR100427.pdf> (describing unwarrantable failure as “aggravated conduct constituting more than ordinary negligence and is characterized by such conduct as reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care” (internal quotation marks omitted)).

⁶ Smith, *supra* note 3.

⁷ *Id.*

⁸ *See* 30 U.S.C. § 814(e) (2006).

⁹ *Id.*

¹⁰ *Id.* § 814(e)(1).

¹¹ *Id.*

¹² *See* OFFICE OF AUDIT, U.S. DEP’T. OF LABOR, REPORT NO. 05-10-005-06-001, IN 32 YEARS MSHA HAS NEVER SUCCESSFULLY EXERCISED ITS PATTERN OF VIOLATIONS AUTHORITY 2 (2010).

MSHA has never used its authority to place a single mine on POV status.¹³

Instead, MSHA promulgated rules that diminish the effectiveness of the Mine Act by allowing the Agency to send written notification to mine operators informing them that their mines' compliance records have demonstrated a *potential* POV.¹⁴ The notification instructs the mine operators to develop a corrective action plan in order to avoid being issued an official notice of POVs in accordance with section 104(e) of the Mine Act.¹⁵ As long as the operator submits a corrective action plan to reduce S&S safety violations, MSHA will not place the mine on POV status.¹⁶ Surprisingly, there are no formal requirements to ensure that the mine operator is complying with the new corrective plan.¹⁷ Furthermore, a recent report analyzing the effectiveness of MSHA's enforcement policies revealed that MSHA does not monitor or enforce the implementation of these corrective action plans.¹⁸

Consequently, mines similar to Massey Energy's Upper Big Branch mine that have demonstrated a recurring pattern of S&S violations are not placed on POV status and are not subject to enhanced oversight as Congress intended. This Essay argues that MSHA's regulations that determine whether a mine should be placed on POV status should be set aside as invalid because the regulations are manifestly contrary to the purpose of section 104(e) of the Act. As such, this Essay proposes that MSHA should promulgate new regulations that utilize MSHA's POV authority as a compulsory enforcement tool. MSHA's current policy of designating mine operators with repeated S&S violations as *potential* POV-status mines and giving the operators an opportunity to avoid POV status is an impermissible construction of the statute.¹⁹

This Essay begins by discussing the history of mine safety legislation and the requirements of the Mine Act in Part I. In Part II, this Essay explores the creation of MSHA and analyzes its scope of authority in enforcing the Mine Act. Here, the Essay explains MSHA's enforcement scheme. Next, in Part III, this Essay explains section 104(e)'s POV authority and how it applies to mine operators with a

¹³ *See id.*

¹⁴ 30 C.F.R. § 104.4 (2010).

¹⁵ *Pattern of Violations Single Source Page*, MINE SAFETY & HEALTH ADMIN, <http://www.msha.gov/POV/POVsinglesource.asp> (last visited Jan. 18, 2011).

¹⁶ *Id.*

¹⁷ *See* 30 C.F.R. §§ 104.1–104.5.

¹⁸ OFFICE OF AUDIT, *supra* note 12, at 14–15.

¹⁹ *See* 30 U.S.C. § 814(e) (2006).

history of violations. Part IV analyzes whether MSHA's regulations for determining POV status are invalid under traditional *Chevron* principles. Finally, Part V proposes a solution that makes designating mine operators with repeated S&S violations as POV status a mandatory enforcement tool. Specifically, this Essay proposes that MSHA should promulgate new regulations that require MSHA to use its POV enforcement authority on all mine operators who demonstrate a pattern of violations that are of an S&S nature.

I. THE ROAD TO MINE SAFETY LAWS IS PAVED WITH TRAGEDIES

Although the mining industry has never been regarded as safe, it is a necessary component of American life. In fact, coal fuels more than fifty percent of the electricity generated in the United States.²⁰ Nevertheless, mining is still considered one of the most dangerous occupations in the nation.²¹ Unfortunately, protecting the lives of America's coal miners can conflict with the goal of massive coal production.

Sadly, most of the mine safety laws were enacted in response to mining disasters that poignantly illustrated the need for stronger protection of miners.²² Congress passed the first federal statute governing mine safety in 1891.²³ By 1907 there were 18 major mining disasters,²⁴ and the fatality rates of miners increased to 2000 deaths per year by 1910.²⁵ Congress responded by creating a new agency, the Bureau of Mines, within the Department of Interior.²⁶ At that time, the Bureau of Mines was established merely as a research agency to conduct reports on how to reduce the number of coal mining acci-

²⁰ *Electricity From: Coal*, POWER SCORECARD, http://www.powerscorecard.org/tech_detail.cfm?resource_id=2 (last visited May 30, 2011).

²¹ See J. Davitt McAteer, *The Federal Mine Safety and Health Act of 1977: Preserving A Law That Works*, 98 W. VA. L. REV. 1105, 1110 (1996) ("In 1993, mining had the highest death rate of any industry, except agriculture.").

²² *Id.* at 1111.

²³ Shari Ben Moussa, Note, *Mining for Morality at Sago Mine: Big Business and Big Money Equal Modest Enforcement of Health and Safety Standards*, 18 U. FLA. J.L. & PUB. POL'Y 209, 213 (2007).

²⁴ *Id.*

²⁵ Jay Lapat & James P. Notter, *Inspecting the Mine Inspector: Why the Discretionary Function Exception Does Not Bar Government Liability For Negligent Mine Inspections*, 23 HOFSTRA LAB. & EMP. L.J. 413, 415 (2006).

²⁶ *History of Mine Safety and Health Legislation*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/mshainfo/mshainf2.htm> (last visited May 30, 2011).

dents.²⁷ The Agency had neither regulatory powers nor the authority to inspect mines.²⁸

As a result, the Agency's limited power did little to actually prevent mining disasters.²⁹ In 1940, mine explosions led to the deaths of 226 miners.³⁰ The following year, Congress passed the Federal Coal Mine Health and Safety Act of 1941.³¹ Under this Act, Congress granted federal inspectors the right to enter and inspect mines, but the inspectors still lacked the authority to promulgate and enforce safety regulations.³² Ten years later, a mine explosion in Illinois killed 119 miners, and Congress again responded with new legislation the following year.³³ The Federal Coal Mine Safety Act of 1952³⁴ mandated annual inspections of certain, but not all, underground coal mines, and empowered the Bureau of Mines to issue citations for safety violations as well as withdrawal orders to shut down mines when conditions presented imminent danger.³⁵ In 1968, 78 coal miners were killed in a mining accident in West Virginia.³⁶ Following this tragedy, Congress sought to pass a more comprehensive and stringent legislative scheme by enacting the Federal Coal Mine Health and Safety Act of 1969.³⁷

The 1969 Act expanded the scope of coverage under the previous scheme to include all underground coal mines and surface mines, regardless of the size or the number of employees.³⁸ Thus it "cover[ed] two-person sand and gravel pits as well as large underground coal mines and processing plants."³⁹ The 1969 Act also increased the enforcement authority of the Bureau of Mines by mandating four annual inspections of all underground coal mines and two annual inspections of all surface mines.⁴⁰ Furthermore, the 1969 Act included procedures for developing mandatory health and safety standards, required that

²⁷ *Id.*

²⁸ *Id.*

²⁹ McAteer, *supra* note 21, at 1113.

³⁰ *Id.*

³¹ Federal Coal Mine Health and Safety Act of 1941, Pub. L. No. 77-49, 55 Stat. 177 (codified as amended in scattered sections of 30 U.S.C.).

³² Moussa, *supra* note 23, at 214.

³³ McAteer, *supra* note 21, at 1113.

³⁴ Federal Coal Mine Safety Act of 1952, Pub. L. No. 82-552, 66 Stat. 692 (codified as amended in scattered sections of 30 U.S.C.).

³⁵ *History of Mine Safety and Health Legislation*, *supra* note 26.

³⁶ McAteer, *supra* note 21, at 1113.

³⁷ *History of Mine Safety and Health Legislation*, *supra* note 26.

³⁸ *Id.*

³⁹ *Mine Safety and Health*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT1.HTM> (last visited May 30, 2011).

⁴⁰ *History of Mine Safety and Health Legislation*, *supra* note 26.

monetary civil penalties be assessed for all violations, and provided criminal penalties for certain knowing and willful violations.⁴¹

Nevertheless, catastrophes and fatalities continued to plague the mining community. In 1972, 91 miners perished in a mine fire in Idaho, and that same year 125 people lost their lives when a coal company's dam burst, releasing a tidal wave of coal sludge and debris into West Virginia's Buffalo Creek.⁴² The very next year, the Mining Enforcement and Safety Administration was created as a separate agency to take over the Bureau of Mines' functions of regulating and enforcing safety in the coal mining industry.⁴³

Despite the advancements brought about by each new law, improvements were still needed to ensure the safety of coal miners. In 1976, twenty-three miners and three federal inspectors were killed in back-to-back mine explosions due to an accumulation of methane gas in Scotia, Kentucky.⁴⁴ The Scotia mine's inspection records showed a long history of repeated safety violations, including chronic conditions of inadequate ventilation plans.⁴⁵ This disaster revealed that the current statutory scheme was unable to effectively address mines with repeated safety violations.⁴⁶ Once again, Congress addressed the shortcomings of the current mine safety laws and in 1977 enacted the Mine Act which currently governs the mining industry.⁴⁷

The Mine Act consolidated all federal regulations regarding mining under one statutory scheme and transferred the responsibility for implementing and enforcing health and safety standards from the Department of the Interior to the Department of Labor, which created a new agency, MSHA, to carry out its enforcement scheme.⁴⁸ The Secretary of Labor, acting through MSHA, is vested with the authority to promulgate regulations establishing mandatory health and safety standards for the mining industry.⁴⁹ The Mine Act also created an independent agency, the Federal Mine Safety and Health Review

⁴¹ *Id.*; see also Moussa, *supra* note 23, at 214–15.

⁴² S. REP. NO. 95-181, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3404; McAteer, *supra* note 21, at 1113.

⁴³ *History of Mine Safety and Health Legislation*, *supra* note 26; see also Lapat & Notter, *supra* note 25, at 415.

⁴⁴ S. REP. NO. 95-181, at 4, reprinted in 1977 U.S.C.C.A.N. at 3404; McAteer, *supra* note 21, at 1113.

⁴⁵ See S. REP. NO. 95-181, at 4, 32, reprinted in 1977 U.S.C.C.A.N. at 3404, 3432.

⁴⁶ *Id.* at 32, reprinted in 1977 U.S.C.C.A.N. at 3432.

⁴⁷ Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801–965 (2006); *History of Mine Safety and Health Legislation*, *supra* note 26.

⁴⁸ 30 U.S.C. §§ 801–965; *History of Mine Safety and Health Legislation*, *supra* note 26.

⁴⁹ 30 U.S.C. § 811(a).

Commission, to review and adjudicate disputes arising under the Mine Act.⁵⁰

Finally, the most recent amendment to the Mine Act followed the Sago mine explosion in 2006 that killed 12 miners.⁵¹ The MINER Act of 2006⁵² improved emergency response standards by requiring mine operators to provide additional oxygen to miners and to notify MSHA of any potentially fatal accidents within fifteen minutes of the event.⁵³

Looking at the evolution of mine safety legislation, it is clear that Congress is concerned with improving the lives of miners and protecting them from unnecessary and avoidable risks. Tragedies often shed the most light on what protections are lacking and thus need to be reevaluated.

II. AN INSPECTION OF MSHA AND ITS METHODS OF ENFORCEMENT

The purpose of the Mine Act is clearly set forth in section 101, which states: “Congress declares that[] the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner.”⁵⁴ As such, the Mine Act seeks to regulate and enforce all aspects of miners’ safety and health.⁵⁵

The Mine Act granted the Secretary of Labor, acting through MSHA, the power to develop, promulgate, and revise mandatory health or safety standards to prevent injuries and protect lives.⁵⁶ In conjunction with MSHA’s authority to set forth safety standards, MSHA is also equipped with the power to ensure that each mine operator acts in compliance with such standards.⁵⁷

The Mine Act mandates that four inspections of underground coal or other mines be conducted each year and that two inspections of surface mines be performed each year.⁵⁸ Section 103(a) of the Mine Act explicitly confers upon MSHA inspectors the right to enter

⁵⁰ 30 U.S.C. § 823; *History of Mine Safety and Health Legislation*, *supra* note 26.

⁵¹ *See* Moussa, *supra* note 23, at 210, 216.

⁵² MINER Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 (codified in scattered sections of 29 and 30 U.S.C.).

⁵³ 30 U.S.C. §§ 813(j), 876(a)–(b); Moussa, *supra* note 23, at 216.

⁵⁴ 30 U.S.C. § 801(a).

⁵⁵ *See id.*

⁵⁶ *Id.* § 811(a).

⁵⁷ *Id.* § 801(g).

⁵⁸ *Id.* § 813(a).

any mine without any advance notice of an inspection.⁵⁹ Furthermore, the Supreme Court has also recognized that section 103(a) of the Mine Act grants MSHA inspectors the right to conduct warrantless inspections of any mine to ensure compliance with mandatory health and safety standards.⁶⁰ MSHA's authority to conduct unannounced inspections is one of the most important tools in regulating safety.

The Mine Act also authorizes MSHA to enforce compliance by issuing citations for violations of mandatory health or safety standards.⁶¹ Upon discovery of the safety violation, an MSHA inspector provides the mine operator with a written citation, which fully describes the nature and gravity of the violation and presents a reasonable amount of time for the violation to be abated.⁶²

For each violation of a mandatory health or safety standard, a mine operator is assessed a civil penalty.⁶³ The mine operator has an opportunity to contest any issued citations before administrative law judges with the Federal Mine Safety and Health Review Commission.⁶⁴ The operator is entitled to a hearing where an administrative law judge will assess the monetary civil penalties and either affirm, modify, or vacate MSHA's finding of a violation.⁶⁵

III. MSHA'S PATTERN OF VIOLATION PROVISION ENABLES A PATTERN OF AVOIDANCE WITHIN THE MINING INDUSTRY

A. MSHA's POV Status Has the Power to Curb Chronic Violators

When Congress enacted the Mine Act, it sought to provide MSHA with stronger enforcement tools to compel mine operators to follow mandatory safety standards.⁶⁶ As previously mentioned in Part II, the Committee on Human Resources was especially concerned with how to control operators who demonstrated a history of habitually violating safety standards in pursuit of coal.⁶⁷ The Committee believed that these dangerous conditions warranted enhanced oversight

⁵⁹ *Id.*

⁶⁰ *See* *Donovan v. Dewey*, 452 U.S. 594, 596, 603 (1980) (finding the mining industry to be a closely regulated business that justifies warrantless inspections by federal mine inspectors).

⁶¹ 30 U.S.C. § 814(a).

⁶² *Id.*

⁶³ *Id.* § 820(a).

⁶⁴ *Id.* § 820(i).

⁶⁵ *Id.*; *see also* *Mine Safety and Health Enforcement*, MINE SAFETY & HEALTH ADMIN. <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT4.HTM> (last visited May 30, 2011).

⁶⁶ 30 U.S.C. § 801(g)(1).

⁶⁷ *See* S. REP. NO. 95-181, at 4, 32 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3404, 3432.

and harsher sanctions.⁶⁸ Consequently, to combat these habitual violators, Congress bestowed upon MSHA its most powerful enforcement tool to date—the POV provision.⁶⁹

Section 104(e) states:

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 [MSHA inspector] 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 [inspector] shall issue an order requiring the operator to cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until [the inspector] determines that such violation has been abated.⁷⁰

Section 104(e) grants MSHA the authority to promulgate rules to “establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.”⁷¹ Nevertheless, the POV provision is clear that once MSHA determines that an operator has demonstrated a pattern of violations that are S&S in nature, the operator *shall* be given notice that the mine has been placed on POV status.⁷² Official POV status triggers an enhanced level of scrutiny and oversight.⁷³ Section 104(e) specifies that if an MSHA inspector finds any violation of a mandatory health or safety standard that is S&S in nature, the inspector shall issue a withdrawal order which requires a mine operator to remove all persons from the area of the mine affected by the violation until such S&S violation has been abated.⁷⁴ If upon any subsequent inspection, an MSHA inspector finds even one S&S violation in any part of the entire mine, another withdrawal order will be issued and will remain in effect until the inspector determines that the violation has been abated.⁷⁵

⁶⁸ *Id.*, reprinted in 1977 U.S.C.A.N. at 3404, 3432.

⁶⁹ *See* 30 U.S.C. § 814(e).

⁷⁰ *Id.* § 814(e)(1) (emphasis added).

⁷¹ *Id.* § 814(e)(4).

⁷² *Id.* § 814(e)(1).

⁷³ *See id.* § 814(e).

⁷⁴ *Id.* § 814(e)(1).

⁷⁵ *Id.* § 814(e)(2).

This process whereby each and every subsequent S&S violation warrants another withdrawal order to close down a part of the mine continues until the pattern of violations is officially terminated.⁷⁶ Shutting down even one part of a mine and forcing operators to halt production can cost mine operators millions of dollars.⁷⁷ Moreover, the subsequent S&S violations do not have to be similar to the violation that caused the initial withdrawal order and can be found in a different area of the mine.⁷⁸ The POV status shall be deemed to be terminated only if an MSHA inspector finds no S&S violations of any kind within any part of the entire mine.⁷⁹

By contrast, if the mine were not a habitual violator and were not placed on POV status, S&S violations alone would not warrant a withdrawal order.⁸⁰ If an MSHA inspector finds an S&S violation that was caused by an operator's "unwarrantable failure" to comply with safety standards, the inspector will include that finding in the citation given to the operator.⁸¹ If within ninety days another S&S violation due to unwarrantable failure is found, an MSHA inspector shall issue a withdrawal order until the violation has been corrected.⁸² Regarding non-POV-status mines, only violations that are similar in type and nature to the violation that caused the initial withdrawal order will trigger another subsequent withdrawal order.⁸³

Therefore, once an operator is notified that its mine has been placed on POV status, the sanctions become extreme. If the operator continues to commit any type of S&S violation, in any part of the mine, the affected areas will continue to be closed until the violation is corrected.⁸⁴ However, these sanctions are only applied to operators who continually disregard serious safety standards and put the lives of miners in jeopardy.⁸⁵ Congress intended these sanctions to be severe enough to deter these knowingly dangerous mine operators from cre-

⁷⁶ *Id.* § 814(e)(3).

⁷⁷ See Michael J. De La Merced, *Alpha to Buy Massey in \$7.1 Billion Deal*, N.Y. TIMES, Jan. 28, 2011, <http://dealbook.nytimes.com/2011/01/28/alpha-nears-deal-to-buy-massey-for-about-7-billion/> ("After the Upper Big Branch explosion, Massey tallied about \$150 million in related expenses.").

⁷⁸ See 30 U.S.C. § 814(e).

⁷⁹ *Id.* § 814(e)(3).

⁸⁰ *Mine Safety and Health Enforcement*, *supra* note 65.

⁸¹ 30 U.S.C. § 814(d)(1).

⁸² *Id.*; see also *Mine Safety and Health Enforcement*, *supra* note 65.

⁸³ 30 U.S.C. § 814(d)(1); see also *Mine Safety and Health Enforcement*, *supra* note 65.

⁸⁴ See 30 U.S.C. § 814(e)(1).

⁸⁵ *Mine Safety and Health Enforcement*, *supra* note 65.

ating a mining disaster that becomes yet another fatality statistic for the industry.⁸⁶

It is also important to note that an operator can only be placed on POV status for S&S violations. A violation is properly designated as S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.”⁸⁷ Therefore, in order to be placed on POV status, the mine must have a recurring pattern of violations that are serious in nature and are reasonably likely to cause substantial harm or death.⁸⁸

B. MSHA's Failure to Use Its POV Power

Although Congress empowered MSHA with this effective enforcement tool, shockingly, the Agency has never successfully placed a single mine on POV status.⁸⁹ Section 104(e) has not been used since it was enacted nearly thirty-three years ago despite the fact that there have been many recurring mining disasters and numerous mines with a compliance record establishing a pattern of repeated S&S violations.⁹⁰ Massey Energy's Upper Big Branch mine is a perfect example of a mine that should have been placed on POV status. In 2009 alone, MSHA issued more than 500 citations and 48 withdrawal orders against the Upper Big Branch mine for repeatedly violating safety regulations.⁹¹ Joseph A. Main, the Assistant Secretary of Labor for MSHA, stated that “Massey failed to address these violations over and over again until a federal mine inspector ordered it done. The mine's rate for these kinds of violations is nearly nineteen times the national rate.”⁹² Nevertheless, Massey was never placed on official POV status.

MSHA did not pass final regulations for the administration of POV authority until 1990; thirteen years after the enactment of the Mine Act and the POV provision.⁹³ “POV rulemaking [was] stalled as

⁸⁶ See S. REP. NO. 95-181, at 32 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3432.

⁸⁷ Sec'y of Labor v. Cement Div. Nat'l Gypsum Co., 3 FMSHRC 822, 825 (1981).

⁸⁸ See *id.*

⁸⁹ News Release, Mine Safety & Health Admin., Statement From U.S. Labor Department's MSHA Assistant Secretary Joseph A. Main on Ruling in Tiller No. 1 Mine Pattern of Violations Case, (June 8, 2010), available at <http://www.msha.gov/MEDIA/PRESS/2010/NR100608.asp>.

⁹⁰ OFFICE OF AUDIT, *supra* note 12, at 2.

⁹¹ Aliya Sternstein, *Senate Funds System to Speed Processing of Mine Safety Violations*, NEXTGOV (June 11, 2010), http://www.nextgov.com/nextgov/ng_20100611_1175.php.

⁹² *Id.* (internal quotation marks omitted).

⁹³ OFFICE OF AUDIT, *supra* note 12, at 2.

stakeholders argued differing views on implementation.”⁹⁴ When MSHA finally did promulgate regulations, it diminished its own authority by imposing restrictions on its own POV authority.⁹⁵ Specifically, MSHA promulgated regulations that require officials to notify mine operators who develop a record of repeated S&S violations that the mines are exhibiting a *potential* pattern of violations (“PPOV”).⁹⁶ Once the operators have been warned of their PPOV status, the regulations give the mine operators an opportunity to avoid being placed on official POV status by simply submitting a written corrective action plan identifying ways to reduce their number of S&S violations.⁹⁷

The regulations do not specify any means of overseeing these corrective action plans and MSHA does not verify the implementation or enforcement of these plans.⁹⁸ A recent report analyzing the effectiveness of MSHA’s enforcement policies found that MSHA failed to adequately monitor operators who had been warned of demonstrating a PPOV.⁹⁹

IV. DO MSHA’S REGULATIONS DESERVE DEFERENCE?

MSHA’s regulations should be set aside as invalid because MSHA’s creation of a PPOV warning to mine operators prior to exercising POV authority frustrates the underlying purpose of the provision. To determine whether MSHA’s regulations should be set aside as invalid or whether the regulations deserve deference in the event of a judicial challenge to their validity, it is necessary to review MSHA’s interpretation of the Mine Act’s POV enforcement provision in accordance with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁰ In *Chevron*, the Supreme Court laid down a two-step test to guide judicial review of an agency’s construction of a statute.¹⁰¹

Under the first step, the court must ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰² Under step two of the *Chevron* test, which the court

⁹⁴ *Id.* at 4.

⁹⁵ See 30 C.F.R. § 104 (2010).

⁹⁶ *Id.* § 104.4.

⁹⁷ *Id.*

⁹⁸ OFFICE OF AUDIT, *supra* note 12, at 15.

⁹⁹ *Id.* at 14–15.

¹⁰⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁰¹ *Id.* at 842.

¹⁰² *Id.* at 842–43.

undertakes when Congress has not clearly spoken on an issue, the court must ask “whether the agency’s answer is based on a permissible construction of the statute.”¹⁰³

The precise question at issue here is whether Congress intended MSHA to establish regulations that allow mine operators to avoid POV status when Congress granted the Agency the authority to determine when a pattern of violations exists. Section 104(e) simply states that MSHA “shall make such rules as [it] deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.”¹⁰⁴ The provision gives no further instruction about whether chronic violators should have an opportunity to evade POV status or whether exhibiting a pattern automatically triggers enhanced scrutiny. Therefore, under step one of the *Chevron* test, section 104(e) is ambiguous because Congress has not directly spoken on the precise issue. As a result, the analysis must continue under step two of the *Chevron* test.

The Mine Act is ambiguous regarding MSHA’s obligation under section 104(e) to place all mines exhibiting a recurring pattern of safety violations on official POV status without an opportunity to avoid section 104(e)’s increased sanctions.¹⁰⁵ Nevertheless, the regulations still fail under step two of the *Chevron* test because MSHA’s interpretation is an impermissible construction of the Mine Act’s POV enforcement provision.¹⁰⁶

As previously discussed, under step two of the *Chevron* test the court must ask “whether the agency’s answer,” i.e., MSHA’s regulations establishing PPOV notice, “is based on a permissible construction of the statute.”¹⁰⁷ An agency’s interpretation of the statute is permissible and deserves deference unless it is “arbitrary, capricious, or manifestly contrary to the statute.”¹⁰⁸ MSHA’s POV regulations are an unreasonable interpretation of the Mine Act’s POV enforcement provision because they are manifestly contrary to the statute and frustrate the underlying purpose of the enforcement provision.

Section 104(e) states that if an operator has a pattern of S&S violations, the mine operator *shall* be given written notice that such pattern exists, thereby issuing the official notice of POV status.¹⁰⁹

¹⁰³ *Id.* at 843.

¹⁰⁴ 30 U.S.C. § 814(e)(4) (2006).

¹⁰⁵ *See id.*

¹⁰⁶ *Chevron*, 467 U.S. at 843.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 843–44.

¹⁰⁹ 30 U.S.C. § 814(e)(1).

Although MSHA determines whether a pattern of violations exists, once this determination is made, the provision becomes compulsory and the operator must be placed on official POV status.¹¹⁰ When MSHA constructed a subcategory of PPOV mines to warn operators of their bad actions, the Agency essentially created a legal means of circumventing the requirements of section 104(e). By allowing PPOV mine operators to submit remedial action plans to avoid official POV status, MSHA is providing habitual violators with a way to evade enhanced scrutiny and increased sanctions, which was the intended purpose of section 104(e) of the Mine Act.

The legislative history surrounding the enactment of section 104(e) supports the proposition that Congress intended the POV provision to be used as a compulsory enforcement tool against chronic violators without an opportunity to avoid the harsh enforcement scheme of section 104(e).¹¹¹ Congress sought to empower MSHA with a powerful enforcement provision to address mine operators who habitually repeat serious safety violations and ignore the dangerous conditions they create for miners.

Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. 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. 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.¹¹²

Courts are not obligated to rubber-stamp an agency's rules that are inconsistent with the statutory mandate or that frustrate the pur-

¹¹⁰ *See id.*

¹¹¹ *See id.* § 814(e); S. REP. NO. 95-181, at 32 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3432.

¹¹² S. REP. NO. 95-181, at 32, reprinted in 1977 U.S.C.C.A.N. at 3432.

pose underlying the statute.¹¹³ The purpose underlying the POV provision was to hold repeat violators to a higher standard and subject them to harsher enforcement mechanisms in order to prevent avoidable disasters and deaths in the mining community.¹¹⁴ “[A] regulation is reasonably related to the purposes of the legislation to which it relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions.”¹¹⁵ The fact that MSHA has never placed a single mine on official POV status is evidence that MSHA’s regulations have enabled every mine operator to successfully circumvent the enhanced sanctions under section 104(e).¹¹⁶

MSHA’s regulations, which create an arbitrary category of potential violators, are unreasonable because they provide a legal avenue of avoiding section 104(e), thereby frustrating the purpose of the Mine Act: to protect the health and safety of miners. When MSHA notifies mine operators of their PPOV status, the Agency is essentially making a determination that a pattern exists without actually placing the operator on POV status and invoking section 104(e). MSHA’s creation of a potential pattern for chronic violators essentially inhibits the Agency from ever officially finding that a pattern exists, thereby nullifying the statute and frustrating Congress’s intent. Consequently, the regulations do not deserve deference and should be set aside as an impermissible construction of section 104(e) of the Mine Act.

V. A NEW ERA FOR MINERS: CHOOSING SAFETY OVER PRODUCTION

MSHA should promulgate new regulations that effectively interpret section 104(e)’s POV authority as a compulsory enforcement tool against mine operators that demonstrate a pattern of violations. MSHA should eliminate the PPOV warning given to operators with an elevated rate of S&S violations; instead, MSHA should simply place all habitual violators under POV authority and use the powers of section 104(e) to compel compliance and deter accidents. Although MSHA does have the authority to establish the criteria used in determining whether a POV exists, this power should not be used to circumvent the application of official POV status on seriously reckless mine operators with a history of violations.

¹¹³ See *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

¹¹⁴ See S. REP. NO. 95-181, at 32, reprinted in 1977 U.S.C.C.A.N. at 3432.

¹¹⁵ *Carpenter, Chartered v. Sec’y of Veterans Affairs*, 343 F.3d 1347, 1352 (Fed. Cir. 2003).

¹¹⁶ OFFICE OF AUDIT, *supra* note 12, at 2.

In light of the recent tragedy from Massey Energy's Upper Big Branch mine explosion, two things remain clear: (1) certain mine operators continually disregard safety laws, and (2) lives are at stake. MSHA has a duty to carry out Congress's mandate and use section 104(e) to place notice of official POV status on any and all mine operators who have demonstrated a pattern of S&S violations.

By promulgating new regulations that require MSHA to place a mine on POV status once the Agency determines that a pattern of S&S violations exists, MSHA will no longer be able to avoid the application of this powerful enforcement tool. If section 104(e) is applied to these dangerous mines, it will likely curb the operators' continued violations of S&S safety standards because the cost of closing off a portion of the mine for every subsequent S&S violation is likely to outweigh the cost of compliance. This will ensure that mines, such as Massey Energy's Upper Big Branch mine, that repeatedly disregard mandatory safety standards and foster a dangerous work place, will be placed on POV status and be subject to enhanced scrutiny and increased sanctions for continued violations.

CONCLUSION

Creating effective safety laws in the mining industry is an ever-evolving struggle that involves prioritizing the safety of miners above the production of coal. Congress bestowed an enormous power upon MSHA to curb the repeated and reckless conduct of mine operators who habitually violated health and safety standards. Unfortunately, MSHA chose to limit this power by promulgating regulations which have the effect of divesting the Agency of its greatest enforcement tool. Consequently, MSHA has repeatedly failed to impose increased sanctions on mine operators with a history of recurring S&S violations, thereby ignoring Congress's intent.

MSHA's failure to use its POV power can no longer be tolerated. MSHA's current regulations are ineffective at deterring mine operators from habitually and seriously violating health and safety standards. Moreover, the regulations are invalid because they frustrate the underlying purpose in enacting section 104(e) of the Mine Act. It is time for MSHA to eliminate the PPOV status, to restore the power of section 104(e), and to implement the notice of official POV provision as a compulsory enforcement tool to prevent future mining disasters. This solution would not only compel compliance with health and safety standards, but it would also uphold the original purpose of section 104(e)'s POV provision; for the first time, repeat violators will be

held accountable for their actions. This Essay's proposal that MSHA promulgate new regulations which implement section 104(e)'s POV provision as a mandatory enforcement tool seeks to fully implement the power provided by Congress to ensure the safety of miners and eliminate life-threatening hazards associated with the noble occupation of coal mining.