ISSUE SUMMARY

The pattern of violations (POV) final rule from the Mine Safety and Health Administration (MSHA) was published on January 23, 2013, with an effective implementation date of March 25, 2013. The POV withdrawal order is an enforcement tool that MSHA uses when the agency believes that other enforcement actions have been ineffective in causing mine operators to reduce the number of “significant and substantial” (S & S) citations at a facility.

Background

Following the Sago Mine disaster in West Virginia in 2006, there were calls from Congress and others to strengthen Section 104(e) of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Section 104(e) requires facilities that exhibit a pattern of non-compliance with the Mine Act to be placed on POV status. Portland cement manufacturing facilities are negatively impacted by the rule, because if issued a POV order, all persons must be withdrawn from the affected areas of facilities, and no work may be performed, thereby stopping all production in these locations.

The Mine Safety and Health Administration developed criteria, which includes primarily citation history and accident history, for how facilities become pattern violators. The criteria are not standardized, and therefore can be revised as frequently as annually. Because there is no quantitative measure for how the criteria thresholds are chosen, MSHA can change the thresholds “at will.” The rule requires all violations issued by MSHA (as opposed to only final orders) to be included in POV enforcement, and furthermore allows MSHA to arbitrarily choose and change, without notice and comment, the thresholds for the criteria that the agency uses to determine facilities that are affected by the rule. Plant operators have no recourse, such as review by the Federal Mine Safety and Health Review Commission (the ‘Commission’), for challenges to violations to be heard before being issued a POV order. Going forward, cement plant operators must be vigilant about tracking their POV histories to ensure that plants can continue to operate without interruption.

The aspects of particular concern in the final POV regulation are: the lack of specific criteria that will determine pattern violators; the use of “issued” versus “final” enforcement actions in the determination; and the elimination of the potential pattern notice to provide an opportunity to avoid being placed on POV.

PCA Position and Desired Approach

PCA opposes the approach that the agency has undertaken in the final rule to revise POV, which is to remove due process for operators regarding the adjudication of enforcement orders. There are three approaches to remedy the rule.

• Administratively, PCA would like MSHA to withdraw and then re-propose the rule to address the three primary concerns of the rule (noted above).
• PCA may also formally challenge the rule because it denies operators’ due process protections of the Constitution, the Administrative Procedures Act, and the Mine Act. If vacated or remanded back to the agency, MSHA must make the changes to remedy these legal shortcomings.
• PCA plans to advocate that funding to implement the final POV rule be removed by placing a rider amendment in the Labor Appropriations bill.