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VOLUME I - THE 1977 ACT
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INTERPRETATION AND GUIDELINES ON
ENFORCEMENT OF THE 1977 ACT

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Section 3 **Definitions**

I.3-1 Definitions of "Operator" and "Mine"

Section 3(d) of the Act expands the definition of "operator" to include independent contractors. Regulations governing independent contractors are found in Part 45 of Title 30 CFR. MSHA policy regarding independent contractors is set forth in this Manual in Volume III, Parts 45 and 50.

Section 3(h)(1) of the Act defines the term "mine" and includes related milling operations within that definition. Mine development, rehabilitation activities, and exploration work at an established mine are within the Act's scope. All types of mining, including placer, dredge, and hydraulic operations must be inspected. Government owned or operated mines and mills, whether federal, state, county, or other, are included within the jurisdiction of the Act. All such operations located anywhere in the United States, as well as in any of its territories, protectorates, or commonwealths, must be inspected.

I.3-2 Jurisdiction Over Mine Roads

Section 3(h)(1)(B) of the Act defines MSHA's authority to assume jurisdiction of mine roads which pass through federal land administered by agencies that do not have responsibility for health and safety on those roads. The criteria or factors listed below will be used for determining jurisdiction. The presence of any of these factors should each weigh in favor of inclusion of the road under MSHA jurisdiction.

1. The road is owned by the mine operator;
2. The road is maintained by the operator;
3. The operator has the legal right to bring the road into compliance with MSHA regulations;
4. The road is used exclusively to provide access to the mine, or to other mines of the operator;
5. The road provides an exclusive or a major means of access for mine vehicles; or
6. The road was built by or for (by contractor) the mine operator.

I.3-3 Jurisdiction Over Alumina Refining Facilities

The United States District Court for the District of Columbia ruled in 1975 in Alumina Company of America v. Morton that the alumina refining process is milling. As such, it is subject to MSHA jurisdiction under Section 3(h)(1) of the Act.

I.3-4 Jurisdiction Over Coal Loading Facilities

Sections 3(h)(2) and 3(i) of the Act address coal loading facilities over which MSHA asserts jurisdiction. These facilities will be examined to determine the nature and purpose of the work that takes place there. If the facility prepares coal according to any specifications for benefit of either the operator or the consumer, MSHA will inspect the facility. MSHA will not inspect facilities where coal is prepared solely to facilitate loading and not to meet specifications or to render the coal for any particular use. Local OSHA authorities should be informed by MSHA district personnel of any determination to terminate jurisdiction over a loading facility.

I.3-5 Jurisdiction Over Coal Preparation Plants

Section 3(i) of the Act addresses jurisdiction over private or custom preparation plants and other related surface coal facilities not directly associated with a single mine or group of mines.

Section 4 Mines Subject to the Act**I.4-1 MSHA/OSHA Interagency Agreement**

MSHA and OSHA have entered into an agreement to delineate certain areas of inspection responsibility, to provide a procedure for determining general jurisdictional questions, and to provide for coordination between the two agencies in areas of mutual interest. MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral.

MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral. Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:

1. key cuts in dam construction (not on mining property or used in mining);
2. public road and highway cuts;
3. tunnels
 - a. railroad
 - b. highway
 - c. water diversion, etc.; and
4. storage areas
 - a. gas
 - b. petroleum reserves
 - c. high and low level radioactive waste.

The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed.

I.4-2 Jurisdiction Over Refractory Mills

The MSHA/OSHA Interagency Agreement provides that OSHA shall have jurisdiction over "brick, clay pipe, and refractory plants" (Section B.6.b). In these operations, both milling and manufacturing occur. The effect of Section B.6.b. is to grant to OSHA jurisdiction over plants that include a manufacturing process resulting in a product such as bricks, clay pipe, insulators, or other finished forms of refractories.

I.4-3 Jurisdiction Over Borrow Pits

Section 6(b)(7) in the MSHA/OSHA Interagency Agreement states:

'Borrow Pits' are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction.) 'Borrow Pit' means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time basis or intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

Thus, if earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc., and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. The scalping screen can be either portable or stationary and is used to remove large rocks, wood, and trash. In addition, whether the scalping is located where the material is dug, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, as long as it meets the other criteria.

District managers should contact headquarters regarding any questionable operations before final determinations are made.

Section 103 Inspections, Investigations and Recordkeeping**I.103-1 Assaulting, Intimidating or Impeding Inspectors**

Section 111 of Title 18 of the United States Code makes it a federal crime to forcibly assault, resist, oppose, impede, intimidate or interfere with any person designated in Section 1114 of Title 18 while such person is engaged in, or on account of, the performance of his/her official duties. It is a crime to assault, intimidate or impede MSHA employees who are assigned to perform investigative, inspection, or law enforcement functions. Thus, any person who assaults, intimidates or impedes an MSHA inspector, while the inspector is engaged in, or on account of, the performance of his/her official duties, is subject to investigation and arrest by the FBI, prosecution by the U.S. Attorney in the federal courts, and to a fine and/or imprisonment.

MSHA policy requires the inspector to leave the scene where a confrontation appears to be developing into a situation where an apparent violation of Section 1114 or 111 is about to occur. In order to avoid a confrontation, the inspector should inform the person(s) that an attack on an MSHA inspector is a federal crime, and that the person(s) may be subject to investigation and arrest by the FBI. If an inspector(s) believes that he/she may be subject to physical harm or assault, the inspector should leave the property immediately and promptly notify his/her supervisor.

If an inspector encounters harassment or delays during a mine inspection, the inspector should attempt to complete the inspection without further provoking the operator. Afterwards, the inspector's supervisor should be contacted.

In the event of an assault, intimidation, harassment, or the impeding of an inspection, the supervisor is responsible for collecting all the facts, reducing them to writing, and contacting the district or assistant district manager. Where the assistant district manager is contacted, the assistant district manager must then immediately contact the district manager. The district manager will notify the Technical Compliance and Investigations Office (TCIO) for further instructions. If the inspection is not the result of an imminent danger complaint, no inspection personnel should return to the mine without approval from headquarters. If it is an imminent danger complaint, an inspector and a supervisor should again attempt to conduct the inspection. No less than two inspection personnel should be sent to the mine property at this time.

I.103-2 Company Release Forms

An inspector shall not sign a responsibility release form when entering a mine to perform his duties. An inspector may sign a check-in and check-out book located at the mine, provided that it does not involve release of liability. Denial of "right of entry" for not signing a release shall be reported in accordance with Section 108 of the Act.

I.103-3 Performance of Work Other Than Inspections and Investigations

Other than providing technical or safety and health educational assistance, the inspector shall not assist any mine employee or official in the performance of work. An inspector's work at a mine shall include health and safety discussions related to the inspection.

I.103-4 Respirable Dust and Noise Sampling

Each underground coal mine operator develops a respirable dust control plan for maintaining compliance with the 2.0 milligram or lower standard. MSHA reviews and tests the operator's respirable dust control plan by taking samples in accordance with MSHA's Health Inspection Procedures Handbook. Once the plan is approved, inspectors measure the engineering parameters during each inspection to assure that all of the plan's elements are followed. If the plan is not being followed, the appropriate citation/order is issued. Respirable coal mine dust samples are collected during the four annual coal mine underground inspections for each active sampling entity.

Respirable coal mine dust samples are collected at surface mines in accordance with the Health Inspection Procedures Handbook. These samples will be collected during the two annual surface mine/facilities inspections for each active sampling entity.

Noise samples will be collected at locations in accordance with the Health Inspection Procedures Handbook. Noise samples will be collected one time per year on each active coal mine (surface/facilities and underground).

I.103-5 Reporting and Investigating Blocked Passage Through the Tailgate Side of Longwall Mining Operations in Coal Mines

See Part 50 in Volume III of this Manual.

103(a) Mandated Inspections

Section 103(a) of the Act requires a minimum of four inspections a year for underground mines and a minimum of two inspections a year for surface mines. Consistent with Section 103(a) of the Act, the

procedures for conducting the inspection of an underground mine in its entirety at least four times a year and surface mines and facilities at least twice a year are set forth in the respective General Inspection Procedures Handbooks for Coal and Metal and Nonmetal.

MSHA's interpretation is that this requirement applies to full-time producing mines operating for the entire fiscal year period. For mines which started operating in the middle of the fiscal year, fewer inspections are required. MSHA's policy for these mines is based on an average of one inspection every quarter for underground mines and an average of one inspection every six months for surface operations. Underground mines in an inspectable status for 45 days or more in a quarter require an inspection, and surface operations in an inspectable status for 90 days or more in a six month period require an inspection.

For intermittent and nonproducing mines, MSHA's policy for metal and nonmetal mines requires two inspections a year for underground operations and one inspection a year for surface operations. This same policy applies for intermittent coal mines.

If a coal mine has an ongoing re-opening inspection under 303(x) of the Mine Act, the number of days from the start date to the end date of that inspection will be excluded from the calculation of the time available for a regular inspection.

If a mine has received an Attempted Inspection (Denial of Entry) event during the inspection period, no inspection is required for that period.

If the status of a mine changes to abandoned, abandoned sealed, or temporarily idle before the end of the inspection period and remains in one of those statuses, no inspection is required. Inspection requirements for previous inspection periods remain in effect.

103(a) Authority to Inspect - Authorization for Representatives
Inspections and investigations under the Federal Mine Safety and Health Act of 1977 shall be conducted only by persons who have been authorized by the Secretary to conduct such inspections or investigations. The inspector's authorization shall be available during inspections and investigations.

103(a) Authority to Conduct Special Investigations - SI
Credentials

Section 103(a) of the Act authorizes MSHA to conduct special investigations as an integral part of the Agency's enforcement program. The Technical Compliance and Investigation Divisions (TCID) are responsible for overall administration and management of the special investigations program. In order to promote the consistent application and management of the program, TCID will develop statistical and management information based on special investigations activities in the field. This includes evaluating the effectiveness of each district's special investigation program, monitoring district compliance with national policies and procedures, and providing periodic updates on the status of cases. As part of the Agency's accountability program, accountability reviews of the special investigations program will be conducted by the national office on a recurring basis. TCID has responsibility for the following sections of the Act:

1. Section 105 complaints of discrimination filed by miners and other protected persons;
2. Section 108 injunctive actions; and
3. Section 110 civil and criminal violations of the Mine Act and/or mandatory safety and health standards.

The special investigations program does not have responsibility for nor does it conduct internal investigations. Any allegations of employee misconduct, including advance notification of inspections, should be referred to the appropriate Administrator.

Investigations of discrimination complaints and possible knowing and/or willful violations shall be conducted only by persons who have been authorized by the Secretary to conduct special investigations. Special investigator (SI) credentials will be issued by the Assistant Secretary for MSHA to those persons who have completed the specified investigator training. SI credentials will be carried at all times when conducting special investigations. Improper use or failure to safeguard SI credentials may result in disciplinary action. Only MSHA approved SI credentials may be used in the performance of any special investigation and may only be used by the authorized representative to whom the SI credentials have been issued.

103(a) Advance Notice

Section 103(a) of the Mine Act prohibits giving advance notice of inspections conducted by an authorized representative (AR) of the Secretary of Labor.

If an AR discovers that an operator, contractor, or any other person has given advance notice of an impending inspection, the AR shall issue a citation under Section 104(a) of the Act alleging a violation of Section 103(a) of the Act. As usual, inspector observations and notes (including the identity of who gave the advance notice, how the notice was provided, and any physical conditions of the mine or practices that may have been recently changed) will help support a citation.

Consistent with established agency policy, advance notice includes subtle forms of communication (such as coded references, like "company is here," or "visitors are on site") intended to disguise an announcement of MSHA's presence at a mine. Communications warning of pending inspection activity after a multi-day inspection has begun also constitute advance notice. All persons need to be aware of their legal obligations under the Mine Act. An individual or an operator does not have to be warned explicitly against providing advance notice for them to be found in violation of the Mine Act's advance notice provisions.

Advance notice has an inherent tendency to interfere with an inspection. Thus, to establish an advance notice violation, an AR need not demonstrate that mine conditions or practices were altered based on advance notice.

An implied exception to the prohibition against advance notice exists in Section 103(g)(1) of the Act. When a miner or miners' representative reports what is believed to be an imminent danger, the operator or agent must be notified "forthwith." Such notifications will usually have the effect of indirectly giving notice of an inspection. Likewise, the establishment of a date and time for abatement of a violation may provide indication of an impending inspection activity. This too is an implied exception to the prohibition against advance notice.

When MSHA personnel are engaged in inspection activities, it may be necessary to make arrangements with personnel at the mine when certain preparations are essential to carry out enforcement activities. In such situations, approval should be obtained from the inspector's supervisor before advance notice is given. Most important, unless the arrangement or notice is essential to carry out an enforcement activity; it is considered "advance notice" of inspection activity and prohibited by Section 103(a) of the Act. Examples of on-site activities requiring advance notice to mine operators and/or miners' representatives are described below:

1. When an inspector intends to include a routine second- or third-shift inspection or conduct personal health sampling, it may be necessary to designate a time and meeting place so representatives of the operator and miners can be given an opportunity to accompany the inspector and/or to enable miners to participate in sampling activities. Pre-selected meeting sites should not reveal the specific areas to be inspected. However, it is recognized that the normal progression of an inspection may, by process of elimination, reveal remaining areas to be inspected.
2. When preparations are needed during an inspection for an examination of a mine's power system, the inspector may arrange for the inspection of the electrical system during scheduled down time.
3. If it is necessary to interrupt an inspection for any cause, the inspector may inform the operator and, if applicable, the miners' representative, that the inspection is interrupted and will be resumed at the discretion of the inspector.
4. Advance notice may be given when a coal mine operator is afforded an opportunity to adjust respirable dust control measures and establish conditions that will prevail during a respirable dust technical inspection, which has the primary purpose of determining the adequacy of the operator's dust control plan.

The Act does not prohibit advance notice of investigative activities. However, notice of investigative activities shall only be given when such notice promotes an important investigative goal. Clearance and direction must be obtained from the investigator's and/or the inspector's supervisor before notice is given for investigative activities. Investigative activities include:

1. Obtaining information for health and safety research;
2. Technical assistance, including field certifications;
3. Obtaining information for petitions for modification;
4. Section 110 investigations;
5. Criminal investigations;
6. Education and training;
7. Investigation of miner discrimination complaints;
8. Accident investigations;
9. Preparation for health sampling activities during an ongoing inspection;
10. Demonstrations of research or prototype equipment; and
11. Investigations of hazard complaints.

The advance notice prohibition also applies to MSHA personnel

involved in inspection activities. As provided in the Mine Act, no advance notice shall be provided to any person concerning inspection activities undertaken to determine whether an imminent danger exists or to determine whether there is compliance with a mandatory health or safety standard or with any citation, order or decision issued pursuant to the Mine Act.

103(a) Denials of Entry

Any authorized representative of the Secretary shall have the right of entry to, upon or through any mine for the purpose of making any inspection or investigation under the provisions of the Act. In the event an inspector is refused entry to a mine, or is threatened or harassed while making an inspection, the inspector must be familiar with the terms, definitions and actions to be taken, as described below.

Denials of entry can be either: (a) direct denials involving confrontation; or (b) indirect denials involving interference, delay and/or harassment.

Upon being denied right of entry, the inspector should first attempt to determine the reason for the denial. Was it direct or indirect? Specific actions must be taken for the different types of denials:

1. Direct: Direct denials are those in which an operator or the operator's agent informs an inspector that an inspection of the mine will not be permitted.

The following situations are the most common reasons for direct denial: (1) the operator refuses to permit inspection based on the belief either that MSHA does not have the right or authority to inspect because the mine is not subject to the Act, or that a search warrant is required; (2) the operator chooses to be selective by denying entry to a specific inspector. The latter is to be considered a denial of entry to MSHA as a whole.

- a. Denials Not Involving MSHA's Statutory Authority
When the operator informs an inspector that an inspection of the mine will not be permitted, and no challenge is made concerning MSHA jurisdiction, the following actions should be taken if the inspector can safely do so:

- 1) The inspector should explain to the operator the mandatory inspection requirements in Section 103(a) of the Act and that a citation

will be issued and a penalty assessed for the denial of entry.

- 2) If, after explaining MSHA's position to the operator, the inspector is still denied entry to the mine, the inspector shall issue a 104(a) citation citing a violation of Section 103(a) and establishing a reasonable time for abatement. Suggested abatement time is 30 minutes unless circumstances necessitate other limits.
- 3) If, upon conclusion of the abatement period, the operator withdraws the denial and permits the inspection, the inspector should terminate the citation. However, if the operator still denies entry to the mine, the inspector should issue an order of withdrawal (define the area affected by the order as "no area affected") and notify the immediate MSHA supervisor so that an injunctive action may be considered.

b. Denials Involving MSHA's Statutory Authority

When the operator refuses to permit an inspection upon the belief that MSHA does not have the right or authority to inspect the mine, the inspector should explain to the operator the mandatory inspection requirements under Section 103(a) of the Act, and that there will be a citation and penalty assessed for the denial of entry. The inspector should first carefully note the operator's response as to why the operator believes that the mine is not subject to the Act, and then proceed as listed in a. above, "Denials Not Involving MSHA's Statutory Authority."

2. Indirect: Indirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. However, a locked gate or other means of blockage, in and of itself, does not necessarily constitute a denial of entry. Mine management may have only closed the mine for the day and blocked the mine access road to prevent vandalism. However, when a locked

gate is accompanied by continued production and deliberate avoidance of communication with the inspector, the mine operator is denying MSHA right of entry to the mine property. Other examples are listed below. The list is not meant to be all-inclusive, and reference is made only to some of the situations that may constitute an indirect denial.

- a. Refusal to furnish available transportation on mine property when it is difficult or impossible to inspect on foot;
- b. Refusal to provide information regarding, or to accompany inspectors into, areas considered unsafe to travel without specific knowledge of the subject mine (e.g., knowledge of on-shift blasting schedules in metal mines);
- c. Withdrawing mine personnel when the inspector arrives;
- d. Removing power from the mine or the mine ventilation system when an inspector arrives (before or after production);
- e. Denying access to equipment or the immediate work area;
- f. Deliberately withholding vital information (ownership, responsible person, name of operator, disposition of product, ownership of equipment, etc.); and
- g. Denying entry for failure to have a search warrant. The Supreme Court, in the 1981 case of Donovan v. Dewey and Waukesha Lime and Stone Company, upheld the authority of MSHA to conduct warrant-less inspections.

When the mine has an I.D. number and the operator is known and present and does not verbally refuse right of entry, but takes indirect action to prevent inspection of the mine, the inspector should explain the particular actions which are considered to be a denial of entry, and then should proceed in accordance with the above instructions pertaining to Section 103(a) of the Act, Denials of Entry.

When a mine has an I.D. number and the operator is known but not

present, and access to the mine is indirectly denied, the inspector should return to the office, notify his/her immediate supervisor, issue a 104(a) citation for a violation of Section 103(a), and mail the citation to the operator by certified mail, return receipt requested. The inspector shall return to the mine site at the conclusion of the abatement period and terminate the citation if an inspection is allowed. If entry is still denied, the inspector shall issue a 104(b) order of withdrawal and notify the MSHA supervisor of the action taken so that injunctive action may be considered.

When a mine does not have an I.D. number and the operator is unknown, and access to the mine is indirectly denied, the inspector should return to the office, notify the supervisor, and assist in identifying the mine property and property owner in order to determine jurisdiction. When the property is identified and jurisdiction has been established, the inspector and the supervisor should meet with the operator or agent and request access.

The operator or the agent must be informed that he has been identified as the operator, owner, lessee, etc., and that MSHA has evidence that the operation is under the jurisdiction of the Act. The operator must be given a description of the circumstances which prevented access. The inspector should then explain the statutory right of entry and again attempt to gain entry to the mine property. Should a denial of entry again occur, the inspector and the supervisor should take appropriate action depending upon the nature of the denial, as previously discussed.

103(f) Rights of Participation in Inspection Activity

The intent of Congress was to provide an opportunity for both the representative(s) of the miners and the representative(s) of the operator to accompany inspectors during the physical inspection of a mine for the purpose of aiding enforcement and to participate in the pre-inspection and post-inspection conferences held at the mine. Accordingly, every reasonable effort is to be made to provide both parties with an opportunity to participate in the physical inspection of the mine and in all pre-inspection and post-inspection conferences. Additional information on the scope of miner's representatives' participation in inspections under Section 103(f) of the Act is published in an Interpretive Bulletin printed in the Federal Register on April 25, 1978 in Vol. 43, No. 80.

Miners' representatives have the right to accompany inspectors on any type of 103(a) inspection involving direct enforcement activities such as: regular inspections; spot inspections;

inspections conducted at the request of miners or their representatives; inspections of especially hazardous mines; and, inspections made in conjunction with accident investigations.

To carry out an orderly and thorough inspection, the inspector should not allow unusual conditions, such as unavailability of a miner representative or a representative of an operator, to delay the start of an inspection. An inspector may limit the number of participants in the inspection party and may require individuals with conflicting claims to reconcile their differences among themselves and to select a representative. The inspector shall determine the scope and number of participants which is reasonable during an inspection.

Representatives authorized by the miners who wish to exercise their rights under Section 103(f) of the Act are not required to meet the requirements of 30 CFR Part 40, Representative of Miners. If there is no authorized representative of miners, or if the inspector is unable to determine who is the representative, the inspector shall consult with a reasonable number of miners concerning matters of safety and health at the mine. These miners should be selected at random and should represent the various phases of mining operations at the mine. The inspector may accept anyone designated by the operator as the operator's agent. The review of citations and orders at the mine under 30 CFR 100.6(a) is covered under Section 103(f) of the Act. These reviews are an integral part of MSHA's mine inspections and constitute post-inspection conferences held at the mine. Section 103(f) of the Mine Act provides for the participation of a representative of the miners in safety and health inspections of the mine. This section also requires that the miners' representative participating in pre- and post-inspection conferences at the mine be compensated for the period of participation. However, this section limits the protection against loss of pay to one representative of miners who is "an employee of the operator."

When multiple operators are present at the mine and the work or activities of one operator may affect the safety and health of the miners of the other operator(s), representatives of miners of more than one operator have the right to accompany an MSHA inspector under Section 103(f). One representative of the miners of each operator is entitled to compensation for the time spent accompanying the MSHA inspector during the inspection. The inspector shall determine the scope and number of participants that is reasonable. This is consistent with the purpose of Section 103(f), which encourages miner participation in inspections, and which provides that a representative of miners

"...shall suffer no loss of pay during the period of his participation in the inspection"

103(g) Referrals of Hazardous Condition Complaints

This MSHA policy covers referrals of hazardous condition complaints to other federal and state agencies. It is intended to ensure the confidentiality of the identity of miners who seek our assistance.

Other state and federal agencies exercise concurrent jurisdiction with MSHA in matters of safety and health at mines. In addition, these agencies regulate them for other purposes. It is in the public interest that we be aware of these agencies and their responsibilities and that we share information with them to assist in achieving statutory goals. Unless a referral would interfere with ongoing MSHA activities, a miner's complaint which raises issues which are also within the province of another state or federal agency should be referred to that agency.

In situations where we find it appropriate to refer a miner's complaint to another agency for their potential action, we need to ensure, to the extent possible, that the receiving agency has a policy treating the identity of complainants with the same confidentiality we provide. Therefore, the referring MSHA office should consult with the receiving agency to ensure that agency's willingness to protect the name and identity of the complainant, unless disclosure is necessary in the course of litigation. If the confidentiality of the complainant's identity cannot be ensured by the receiving agency, the referring MSHA office may either refer the matter with the identity stricken (with a note of explanation) or it should advise the complainant that he/she may wish to bring the matter directly to the attention of the other agency.

103(g) Special Complaint Inspections

See Part 43 in Volume III of this Manual.

103(i) Required Hazardous Spot Inspections

Section 103(i) of the Act defines the conditions in mines under which spot inspections at various time intervals are to be conducted. Such a spot inspection shall not constitute a part of any other category of inspection, and the inspection is to be directed specifically to the problems, hazards, or conditions under which the mine was classified as a Section 103(i) mine. However, this does not prevent another category of inspection or investigation from being conducted during the same visit to the mine.

If a mine has experienced an ignition or explosion of methane or other explosive gases that resulted in a fatality or in a permanently disabling injury as defined under 30 C.F.R. § 50.20-6(b)(3)(i) or § 50.20-6(b)(3)(ii) at any time during the previous five years, the mine shall be placed in Section 103(i) status as directed by the Act regardless of total liberation, and a minimum of one Section 103(i) spot inspection of all or part of the mine during every five working days at irregular intervals shall be conducted. For example, a mine that is not in Section 103(i) status or a mine that has been on 10- or 15-day spot inspections at irregular intervals will be placed on 5-day spot inspections at irregular intervals if it experiences an ignition or explosion that results in a fatality or in a permanently disabling injury. A mine that is already on 5-day spot inspections at irregular intervals due to liberation will continue on the same 5-day spot inspection frequency.

The mine will remain in this status until five years have elapsed without recurrence of an ignition or explosion that results in a fatality or in a permanently disabling injury. Upon completion of five years without such recurrence, the Section 103(i) spot inspection frequency may revert back to that which is required by the Act for the liberation of methane or other explosive gases per 24 hours at the mine.

The District Manager will have discretion as to when a mine should be placed in Section 103(i) status for "some other especially hazardous condition" at the mine. Conditions in this context are generally related to natural conditions found in the mining environment. Such conditions may not require a specific Section 103(i) spot inspection if addressed through plan approvals, by operator actions to address the condition, or during regular inspection activities.

103(j) Mine Accident and Rescue, Recovery and Preservation of Evidence

In the event of a mine accident where rescue and recovery work is necessary, Section 103(j) of the Act grants the authorized representative broad authority to take whatever action, including the issuance of orders, that the representative deems appropriate to protect the life of any person. Where appropriate, the authorized representative(s) may supervise and direct the rescue and recovery activity.

Immediately upon arrival at the mine accident site, or later as mine rescue operations develop, the authorized representative may determine that direct control, either entirely or partially, is necessary, particularly in situations where a less hazardous

rescue procedure is desirable, instead of the planned or ongoing actions or procedures. Because of this broad authority, discretion and good judgment on the part of the authorized representative are imperative.

The term "accident" is defined in 30 CFR part 50.2(h). Under Sections 103(j) and 103(k) of the Act, the inspector can issue such orders as he/she deems appropriate to protect the life and/or insure the safety of any person. In addition, under Section 103(k), the operator is required to obtain the authorized representative's approval of any plan to recover any person in a mine or to recover the mine, or in order to return affected areas of the mine to normal.

When it is determined by the authorized representative that an order is appropriate to protect the life of any person or to preserve evidence, or that supervision and direction of rescue and recovery activities is appropriate, an authorized representative should issue a Section 103(j) order over the phone, including initial instructions, as soon as possible in the context of a mine emergency when he or she is not physically present at the mine. The order, including any instructions, should be reduced to writing and transmitted to the operator as soon as practicable. The order should be written so as to protect all persons engaged in the rescue and recovery operation, as well as any other persons onsite.

The order should also require the operator to prevent the destruction of evidence at the accident site. In the event that a mine accident is not a mine emergency (i.e. there are no ongoing rescue and recovery efforts), MSHA may issue a Section 103(j) order prohibiting activity at the accident site so as to prevent the destruction of evidence which would assist in investigating the cause or causes of the accident. Although 30 CFR 50.12 requires the operator to take appropriate measures to not alter an accident site or an accident related area (with certain exceptions applying), the use of a Section 103(j) order to preserve evidence may also be warranted, as it allows MSHA to restrict access to the accident site, thereby helping to ensure that the accident scene is not altered.

Upon MSHA's arrival on-site and following assessment of conditions, MSHA may modify the Section 103(j) order, including all instructions, to reflect that MSHA is now proceeding under the authority of Section 103(k) of the Mine Act. MSHA should inform parties on-site that any activities that are rescue or recovery related will be permitted through subsequent modifications of the Section 103(k) order.

Section 104 Citations and OrdersI. 104-1 Flagrant Citations and Orders

The Mine Improvement and New Emergency Response Act of 2006 (MINER Act) provides for the assessment of a significant civil penalty for a flagrant violation. The MINER Act defines a flagrant violation as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

Only violations of mandatory health or safety standards may be classified as flagrant. While most sections of the Mine Act are not mandatory health or safety standards, violations of interim mandatory health and safety standards found in Titles 2 and 3 of the Mine Act, which are not superseded by mandatory health and safety standards, may be classified as flagrant.

Any violation that meets either the reckless failure or the repeated failure screening criteria below must be evaluated for possible classification as a flagrant violation.

Reckless failure criteria:

1. Citation/order is evaluated as significant and substantial (S&S)
2. Expected injury/illness is evaluated as at least permanently disabling
3. Citation/order is evaluated as unwarrantable failure
4. Negligence is evaluated as reckless disregard

Repeated failure criteria:

1. Citation/order is evaluated as significant and substantial (S&S)
2. Expected injury/illness is evaluated as at least permanently disabling
3. Citation/order is evaluated as unwarrantable failure
4. Two prior "unwarrantable failure," S&S violations of the same health or safety standard were cited within the past 15 months. This includes violations cited previously on the same day or during the same inspection. Prior violations must be of the same subsection of the standard cited (e.g.

56/57.14201(a). However, the prior violations need not cite the same distinct hazard. For example, an order asserting a violation of 75.220(a)(1) because entries were driven at widths exceeding the roof control plan minimum distance may be considered for flagrant classification with two prior 75.220(a)(1) violations cited because roof bolts were not inserted at distances specified in the roof control plan.

District Managers may recommend violations that do not meet the reckless or repeated failure criteria above, but which meet the broader statutory definition of a flagrant violation, for classification as flagrant.

104(a) Citations and Orders

Section 104(a) is a major tool for obtaining compliance with the Act, and the mandatory health or safety standards, rules, orders, or regulations. Violations shall be cited by the inspector, giving the operator time for abatement of the violation(s). The citations shall be issued under Section 104(a) or, as appropriate, under Section 104(d) of the Act. After the inspection, the inspector shall meet with the operator or his agent to discuss the violation.

Separate citations shall be issued for: violations of separate standards on one piece of equipment; violations of separate standards in a distinct area of a mine; identical violations on separate pieces of equipment; and, identical violations in distinct areas of a mine. For example, if two haul trucks each have the same violation, there will be two separate violations cited. Likewise, if two distinct areas of a mine have loose rock in the roof or back, there will be two separate violations cited.

However, where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation, and one citation should be issued. For example, "Loose roof or ground was observed in four places along the haulage-way between 3 switch and No. 4 x-cut" or, "At the crusher power control panel, insulated bushings were not provided where insulated wires entered five of the metal switch boxes."

When an inspector issues a Section 104(a) citation, the time for abatement should be determined, whenever practical, after a discussion with the mine operator or the operator's agent. The degree of danger to miners is the first consideration in determining a reasonable time for abatement. Upon expiration of the time fixed for abatement, the inspector should review the circumstances, and if circumstances so justify, extend the abatement period. If no extension of time is justified, and the violation is unabated, the inspector shall issue a withdrawal order under Section 104(b). Upon abatement of the violation, the 104(b) withdrawal order will be terminated.

The filing of a petition for modification by an operator shall be a consideration in determining the reasonableness of the time fixed for abatement of any violation which relates to the safety standard sought to be modified. However, when a petition for modification is found to be the appropriate basis for an extension of an abatement period, the inspector must expressly state in the extension the condition(s) under which the abatement period has

been extended.

If an operator does not comply with an order, the inspector shall issue a Section 104(a) citation citing the appropriate section of the Act violated (e.g., 104(b), 107(a), 104(d)(1), 104(d)(2), 104(e)(1), etc.).

Actions to be taken in the case of a denial of entry (Section 103(a) of the Act) where a citation and order have been issued because of the denial are discussed in this Manual under Section 103(a).

104(d) Unwarrantable Citations and Orders

In 1988, the Federal Mine Safety and Health Review Commission adopted new language to describe operator conduct which constitutes an unwarrantable failure to comply for purposes of Section 104(d) of the Mine Act. The Commission held that a violation is caused by an unwarrantable failure if the operator has engaged in "aggravated conduct constituting more than ordinary negligence."

The Commission pointed out that its statement of the standard of conduct for unwarrantable failure "is fully consistent with the manner in which the Secretary enforces the Mine Act." Accordingly, violations caused by a high degree of operator negligence or reckless disregard should continue to be evaluated by inspectors for findings of unwarrantable failure to comply. However, evidence of moderate negligence will generally not support unwarrantable failure findings.

Factors to look for when making an unwarrantable-failure-to-comply determination include the amount of time the violation has been left uncorrected, whether the hazard created by the violation is particularly serious thus warranting increased attention from the operator to prevent or correct it, whether the violation is repetitious of a previous violation, whether the violation was a result of deliberate activity by the operator, or whether the operator knew or had reason to know that its action(s) violated a mandatory standard. Citations and orders should clearly document the facts relied upon by the inspector in making the determination. Any one of the circumstances above may constitute sufficient grounds for an unwarrantable failure citation or order.

If an operator at a certain mine is under the 104(d) unwarrantable sequence, and if that operator sells that mine, the new mine owner does not normally inherit the previous owner's unwarrantable sequence. This is true for all cases, except where there has been a change in name only or where the ownership change is merely a

paper change. If the new owner/operator is essentially the same as the previous owner/operator, then the unwarrantable sequence is to remain in effect.

104(d)(1)/(e)(1) Guidelines for Determining "Significant and Substantial" Violations

A violation of a mandatory health or safety standard is significant and substantial (AS&S@) if the violation "significantly and substantially contributes to the cause and effect of a coal or other mine safety or health hazard...."

The Federal Mine Safety and Health Review Commission (Commission) has held that to establish that a violation of a mandatory safety or health standard is AS&S@ the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety or health standard; (2) a discrete safety or health hazard -- that is, a measure of danger to safety or health -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury or illness; and (4) a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. All four of these findings must be made before a violation can be designated as AS&S.@

Finding 1: An Underlying Violation of a Standard

The first finding required by the Commission=s AS&S@ test, i.e., the underlying violation of a mandatory safety or health standard, is satisfied whenever there is a violation of a safety or health standard. Only violations of standards (requirements promulgated under 30 U.S.C. 811), as opposed to violations of regulations (requirements promulgated under 30 U.S.C. 957), can be designated as AS&S.@ Violations of 30 CFR Parts 46, 47, 48, 49, 56, 57, 58, 62, 70, 71, 72, 75, 77, and 90 are violations of standards that can be designated as AS&S.@

Finding 2: A Discrete Safety or Health Hazard

The second finding required by the AS&S@ test, i.e., a discrete safety or health hazard, that is, a measure of danger to safety or health contributed to by the violation, is generally satisfied whenever there is a violation of a standard.

Finding 3: A Reasonable Likelihood of Injury or Illness

The third finding required by the "S&S" test, i.e., a reasonable likelihood that the hazard contributed to will result in an injury or illness, is more difficult to establish. Factors such as the fatality and injury or illness frequency associated with the violation in the general industry are relevant but must be tied to an evaluation of the particular circumstances surrounding the violation at the mine in question.

If no miners were exposed to the hazard at the time of the violation, the violation still might be "S&S" if a miner was exposed to the hazard before the inspector observed the violation or if it was reasonably likely that a miner would be exposed to the hazard if normal mining operations were allowed to continue.

For violations involving the hazards of ignition or explosion, the Commission has developed an analytical approach for determining whether there is a "reasonable likelihood" of injury or illness. There must be a "confluence of factors" to create a reasonable likelihood of injury or illness. The Commission has upheld a judge's finding that a permissibility violation was not "S&S" because there was no reasonable likelihood that the low levels of methane detected would ever reach the explosive range.

In 1995, a court of appeals held that the presence of safety measures to deal with a fire, including a fire suppression system, did not mean that fires do not pose a serious safety risk to miners and rejected an argument that the presence of such redundant safety features negated an "S&S" finding. Since 1995, the Commission has adopted the reasoning in that case and has rejected an argument that an accumulations violation was not "S&S" because there was fire-fighting and fire detection equipment in the cited area.

Thus, it is doubtful that redundant safeguards should be considered in the "S&S" analysis -- particularly when analyzing fire and explosion hazards.

Finding 4: A Reasonable Likelihood of Serious Injury or Illness

The fourth finding required by the "S&S" test, i.e., a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature, requires an independent determination that the injury or illness in question would be reasonably serious in the inspectors' judgement. A determination that the injury or illness is reasonably likely to result in lost workdays or restricted duty and/or be permanently disabling or fatal is consistent with an "S&S" determination.

Except for violations of 30 CFR 56/57.5005 involving listed nuisance particulates and silver metal (other than soluble compounds of silver) between 0.01 mg/m³ and 0.1 mg/m³, violations of health standards establishing a threshold limit value or exposure limit are presumptively "S&S". However, when miners are not actually exposed to excessive concentrations because they are utilizing personal protective equipment in accordance with applicable MSHA standards, the violation usually should be considered Anon-S&S unless there is a reasonable likelihood that other miners were exposed, or would have been exposed in the future if the citation had not been issued and those miners were not, or would not have been, wearing personal protective equipment in accordance with applicable MSHA standards.

Specific Guidelines. A citation which involves a violation of the Act, and an order under the Act or a regulation, and not a mandatory health or safety Standard, cannot be designated as "S&S".

The plain language of Section 104(d)(1) of the Act indicates that only a violation of a "mandatory health or safety standard" can be designated as "S&S". Because Section 3(1) of the Act defines a "mandatory health or safety standard" as "the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of [the] Act," there is no statutory authority for violations of provisions of the ACT other than interim standards or violations of regulations to be designated as "S&S". See Cyprus Cumberland Resources v. FMSHRC, 195 F. 3d 43, 45-46 (D.C. Cir. 1999) (holding that an "S&S" finding is permissible only in a citation charging violation of a mandatory safety or health standard, and not in a citation charging a violation of a regulation). See also Lexicon, Inc. d/b/a/ Schueck Steel Co., slip op, FMSHRC Docket Nos. CENT 2001-370-M, 2002-49-M, 2001-13-M (ALJ) affirming a violation of Section 103(k) but finding that because this was "a violation of the Act" and not of a mandatory health or safety standard, it could not be designated "S&S").

MSHA Form 7000-3

If an inspector determines that a violation is "S&S," that determination should be given consistent with information recorded on the Inspector's Evaluation Section of MSHA Form 7000-3, Mine citation/Order form.

Finding that an injury or illness has occurred is consistent with an "S&S" finding as long as the injury or illness is the result of the violative condition. If it is not, the inspector must make an

independent judgement as to the reasonable likelihood of an injury or illness resulting from the violative condition.

Finding that an injury illness is "highly likely" to occur or "reasonably likely" to occur is consistent with designating the violation as "S&S."

Finding that the injury or illness can be reasonably be expected to result in "lost workdays or restricted duty," and/or be "permanently disabling" or "fatal" is consistent with designating the violation as "S&S."

If an injury or illness has occurred but it is less serious than that which could reasonably be expected to occur as a result of the violation, the inspector may still determine that the violation is "S&S." the inspector must make an independent judgement as to whether the violation was reasonably likely to result in a serious injury or illness, even though it did not in this particular case.

104(d)(2) Unwarrantable Failure Orders

Section 104(d)(2) of the Act refers to unwarrantable failure withdrawal orders and requires that an inspection with no similar violations (clean inspection) be conducted before the 104(d)(2) order sequence is terminated. This "clean inspection" may be accomplished within the framework of a regular inspection of the mine in its entirety and/or within the framework of any other inspection conducted for enforcement purposes where there are no 104(d)(2) violations. The Federal Mine Safety and Health Review Commission has stated that when 104(d)(2) orders are issued, the burden of establishing that an intervening "clean inspection" has not occurred rests with MSHA.

104(f) Respirable Coal Dust Citations

All citations for exceeding the applicable limit on the concentration of respirable dust are issued under Section 104(a), Section 104(d), or Section 104(e) of the Act, as applicable.

104(g)(1) Orders of Withdrawal - Untrained Miners

Section 104(g)(1) of the Mine Act provides for the withdrawal of untrained miners from a mine until they receive the minimum training required by Section 115 of the Mine Act and 30 CFR Part 48. The purpose of a Section 104(g)(1) order is to eliminate the hazard that untrained or inadequately trained miners pose to themselves and others.

Sections 48.5, 48.6, 48.7, 48.8, and 48.11 are the only sections of Subpart A that may be cited under 104(g) for untrained miner violations occurring at underground mines. Sections 48.25, 48.26, 48.27, 48.28, and 48.31 are the only sections of Subpart B that may be cited under 104(g) for untrained miner violations occurring at surface mines and surface areas of underground mines.

Citations will not be issued in lieu of Section 104(g)(1) orders except if the miner cannot be trained because, for example, the miner is no longer employed at the mine, or the miner was fatally injured.

When miners have been trained, but there are violations, for example, involving training plans, cooperative training programs, records of training, compensation for training, or untimely training, an order of withdrawal is inappropriate.

The number and type of citations or orders to issue are as follows:

1. For Violations Involving More Than One Miner
When more than one untrained miner is to be withdrawn from a mine, a single 104(g)(1) order will be issued, provided that the training violation is the same for all of the miners. Where multiple miners are involved and different violations of the training requirements have occurred, separate orders of withdrawal will be issued. For example, if eight different underground miners did not receive requisite safety training, (three did not receive new miner training, two were not task trained, and three missed annual refresher training), three separate Section 104(g)(1) orders would be issued, one citing 30 CFR 48.5, one citing 30 CFR 48.7, and one citing 30 CFR 48.8. If all eight miners missed annual refresher training, a single 104(g)(1) order would be issued.
2. For Violations Involving Only One Miner
If only one miner is involved but two or more sections of Part 48 have been violated, the violations would be written under one order. For example: one underground miner was not task trained and also missed annual refresher training. One Section 104(g)(1) order would be issued citing 30 CFR 48.7 and 30 CFR 48.8. Two violation evaluations must be made; one to evaluate the task training violation and one to evaluate the annual refresher violation.

3. For Violations Involving Employees of Independent Contractors

An order will be issued under Section 104(g)(1) of the Act to the direct employer of any miner who has not received the required training. Care should be taken when issuing a Section 104(g)(1) order to an independent contractor when several contractors or subcontractors are present at the mine. If uncertainty exists as to whom the direct employer is, the order would be issued to the operator with the greatest physical presence at the mine. Any discrepancies that may arise after the miner has been withdrawn may be resolved through subsequent modification action.

Independent contractors may comply with the Part 48 requirements by either making arrangements to have their employees trained under an existing approved training plan and program, or by filing and adopting their own approved training plan.

Citations will not be issued in conjunction with Section 104(g)(1) orders for the same violation except in instances of overlapping compliance responsibility. This overlapping compliance responsibility means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and the production-operator. For instance, if an untrained miner was the employee of an independent contractor and the production-operator had agreed to provide the training in accordance with the mine's approved training plan but failed to do so, a Section 104(g)(1) order would be issued to the independent contractor to withdraw the untrained miner and a citation under Section 104(a) or (d)(1) or an order under Section 104(d)(1) or (2), as appropriate, will be issued to the production-operator.

104(h) and 107(d) Vacating Citations and Orders

Care must be taken when issuing citations and orders so that subsequent corrective action by MSHA is seldom necessary. However, citations or orders are occasionally issued in error and must be modified or vacated by either inspectors or district officials. Sections 104(h) and 107(d) of the Act state the legal authority of inspectors or their supervisors, acting in their capacity as authorized representatives of the Secretary, to modify or vacate citations and orders.

Section 104(h) authorizes modifying or vacating citations and orders issued under Sections 104(a), 104(b), 104(d)(1), 104(d)(2), 104(e)(1), 104(e)(2), 104(f), and 104(g) for violations of the Act, mandatory health or safety standards, rules, orders, and regulations. Section 104(h) provides:

"Any citation or order issued under this section [104] shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to Section 105 or 106."

Section 107(d) authorizes inspectors or their supervisors, acting in their capacity as authorized representatives of the Secretary, to modify, vacate or terminate imminent danger orders issued under Section 107(a). Section 107(d) provides:

". . . Any order issued pursuant to subsection (a) may be modified or terminated by an authorized representative of the Secretary. Any order issued under subsection (a) or (b) shall remain in effect until vacated, modified or terminated by the Secretary, or modified or vacated by the Commission pursuant to subsection (e), or by the courts pursuant to Section 106(a)."

Section 107(b) orders, however, are not to be issued, modified, terminated or vacated by inspectors or district officials without strict coordination with the appropriate Administrator for Coal or Metal and Nonmetal. Section 107(b) provides unique enforcement procedures and requirements to contend with the unusual circumstances of dangerous conditions that cannot be effectively abated through the use of existing technology. Accordingly, inspectors and district officials shall not take any action under Section 107(b) before consulting the Office of the Administrator.

When vacating a citation or order, Form 7000-3a must be completed, stating the reason for vacating the prior enforcement action. If possible, the authorized representative who issued the citation or order should be the person to issue the subsequent corrective action. Both the inspector and the supervisor must file, with the inspection report, notes which describe in detail the reasons and circumstances involved. Copies of the citation or order, along with the subsequent corrective action and notes, shall be sent to the appropriate district manager.

To ensure proper coordination and documentation, the vacating of all imminent danger orders shall be approved in writing by the appropriate district manager, and a copy of the approval shall be attached to the inspection report.

Section 105 Procedures for Enforcement105(b) Additional Penalties for Failure to Abate Violations
Within Permitted Time

Section 110(b) of the Federal Mine Safety and Health Act of 1977 states:

"Any operator who fails to correct a violation for which a citation has been issued under Section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$1,000 for each day during which such failure or violation continues."

Section 105(b)(1)(A) and (B) of the Mine Act provides:

"If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under Section 110(b) by reason of such failure ..."

"In determining whether to propose a penalty to be assessed under Section 110(b), the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

As set forth above, MSHA is authorized to propose a civil penalty of not more than \$1,000 for each day that a failure to abate a cited violation continues after the time allotted to correct it has expired. The actual amount proposed will be determined by MSHA's Office of Assessments, Accountability, Special Enforcement and Investigations, based upon a consideration pursuant to the criteria in Section 105(b)(1)(B) of the Act which are the same criteria used to calculate Section 110(a) penalties.

It is MSHA's policy to implement Section 105(b)(1) of the Act against operators that fail to correct violations (cited pursuant to Section 104 of the Act) within the reasonable time permitted for such correction. Therefore, where an operator has failed to correct a cited violation within the time permitted for abatement, MSHA district managers may invoke the additional penalty procedure available under this Section, after consultation with the appropriate Administrator. However, it should be noted that the vast majority of cited violations are corrected within the time allowed for abatement. In those circumstances, Section 105(b) procedures cannot be utilized, and an additional penalty under Section 110(b) will not be assessed. The following are examples of some of the situations where it may be appropriate to propose additional penalties pursuant to Section 105(b)(1):

1. Where the imposition of a withdrawal order is ineffective to correct existing violations. For example, where an operator that has abandoned a mine has been issued a citation for failure to seal (or properly seal) it, and the operator has permitted the abatement time to expire without making any effort to properly seal the mine.
2. Operating in the face of an order. Where an operator refuses to comply with a valid Section 104(b) order (i.e., an order issued for failure to abate a Section 104(a) citation within the specific time allowed for abatement), a penalty may be proposed. Also, if the operator fails to comply with an order issued pursuant to Section 103(k), 104(d), 104(e), or 107(a), a penalty under Section 105(b)(1) may be proposed.
3. Unabated violation of Title I of the Act where time permitted for correction should not be extended. The district manager shall evaluate the situation and make a determination as to whether an action under Section 105(b)(1) should be initiated for the purpose of assessing a penalty under Section 110(b).

Section 105(b)(1)(B) of the Act specifies that in determining whether to propose the assessment of a penalty under Section 110(b), the Secretary shall consider six criteria. These are the same criteria used in the assessment process under Section 110(a).

Therefore, the district manager must consider these criteria before recommending this action, and he must submit his findings to the Administrator.

Mine operators will be given a "notice of intention" that MSHA is recommending that the Secretary propose additional penalties in accordance with Section 105(b)(1). This notice will be issued only by a district manager and not by individual mine inspectors. The Administrator's Office shall be informed prior to the issuance of this notice to the mine operator. The proposed penalty will begin to accrue from the day following receipt of this notice. When MSHA receives notification of abatement from the operator, the inspector should endeavor to determine the date of abatement as reported by the operator. If there is no evidence to dispute the operator's reported abatement date, that date should be the abatement date.

The date that the operator was notified by certified mail of its failure to correct the violation, the established date that the violation should have been corrected, the date the operator notifies MSHA of abatement, and the dates of any follow-up inspections, should be recorded in the district office.

If the violation is found to have continued for a period of more than 15 calendar days beyond the date that a letter of notice is sent, the Administrator's Office should be notified so that consideration may be given to the appropriateness of further enforcement proceedings. However, nothing in these instructions precludes the district manager from implementing these procedures while concurrently requesting other enforcement action, such as injunctive relief. Moreover, in appropriate cases, such concurrent action may be necessary to fully protect the health and safety of the miners.

105(c) Investigation and Processing of Discrimination Complaints

Under the provisions of Section 105(c)(1) of the Federal Mine Safety and Health Act (Mine Act), miners, representatives of miners and applicants for employment are protected from retaliation for engaging in safety and/or health related activities, such as identifying hazards, asking for MSHA inspections, or refusing to engage in an unsafe act. To encourage miners to exercise their rights under the Mine Act and maximize their involvement in monitoring safety and health conditions, MSHA vigorously investigates discrimination complaints. Particular attention is given to those operators who have repeatedly discriminated against miners. MSHA will seek more substantial civil penalties for discrimination violations as a deterrent to future instances of illegal discrimination.

Section 105(c)(2) provides that discrimination complaints are to be filed with the Secretary of Labor within 60 days of the alleged act of discrimination. The investigation, required to be conducted by the Secretary, is to commence within 15 days of receipt of a complaint. Discrimination complaints requesting temporary reinstatement will be investigated immediately.

Section 105(c)(3) provides that within 90 days of receipt of a complaint, the Secretary is to make a written determination as to whether a violation has occurred.

To meet these timeframes, MSHA policy is to complete the field investigation of a complaint of discrimination and submit a final report to TCIO within 45 days of the date of receipt of the complaint.

In order to comply with these timeframes and expedite the processing of discrimination complaints, all MSHA enforcement personnel shall be familiar with the provisions of Section 105(c) so they may receive complaints and handle them properly. In most circumstances, a designated person (complaints processor) will be available in each district and field office to receive complaints and respond to questions concerning Section 105(c). A signed document alleging discrimination must be received before an investigation of a discrimination complaint may begin. (For further guidance, see Special Investigations Procedures Handbook, Chapter 2, Section B.1.)

105(d) Handling of Contests of Citations and Orders

Section 105(d) of the Act provides that a mine operator is to notify the Secretary if he or she intends to contest a citation, order, or proposed assessment, or to contest the reasonableness of the length of abatement time. The Secretary, in turn, is then required to immediately advise the Commission of such notification.

Although not expressly provided by the Act, mine operators who wish to contest citations or orders within 30 days of issuance of such citations or orders should mail their notification of intent to contest directly to the Mine Safety and Health Review Commission, 601 New Jersey Avenue, N.W., Ste. 9500, Washington, D.C. 20001, 202-434-9900, email address is: info@fmshrc.gov (see 29 CFR 2700.18(b)), and mail a copy to the Office of the Solicitor, Division of Mine Safety and Health (MSH), 22nd floor, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939. In addition, a copy should be given to all known representatives of miners at the affected mine.

When a district office receives an immediate contest of citations/orders (within 30 days of issuance) which has not been mailed directly to the Commission, the district manager should immediately contact the MSH Counsel for Trial Litigation in the Office of the Solicitor, telephone (202) 693-9333. A copy of the contest should be retained in the district office for future reference, and the original mailed to the MSH Counsel via express mail or special delivery. The MSH Counsel will advise the Commission of the mine operator's intention to contest, as required by Section 105(d) of the Act. In addition, the operator should be notified that future immediate contests of citations/orders are more properly filed with the Mine Safety and Health Review Commission.

The procedural rules of the Mine Safety and Health Review Commission concerning applications for review of citations and orders are published in 29 CFR 2700. Mine operators, miners, or miners' representatives requesting information on general rules applicable to proceedings before the Commission and its Administrative Law Judges should be referred to the Code of Federal Regulations or to the Office of the Solicitor.

Contests of proposed assessments are accomplished by following the procedures set forth in 30 CFR 100.7.

Section 107 Imminent Danger107(a) Imminent Danger

"Imminent danger" is defined in the Act as "the existence of any condition or practice in a mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The two important elements of an imminent danger are:

1. the existence of a condition or practice which could reasonably be expected to cause death or serious physical harm; and
2. the imminence of the danger is such that it may cause death or physical harm before it can be abated.

An imminent danger withdrawal order usually involves a violation of one or more mandatory standards, but such an order could also arise from natural or other causes without violation of a standard. The imminence of danger is a judgement to be made in light of all relevant circumstances. If the violative condition or practice is not an imminent danger, the proper action by the inspector is to issue a citation or order for the violation of the Act, mandatory health or safety standard, rule, order, or regulation(s), and to fix a time for abatement (if applicable).

In the absence of an imminent danger, an inspector cannot use Section 107(a) orders for "control purposes." The Act and applicable legal decisions spell out the need for an imminent danger to justify the issuance of a Section 107(a) order.

107(d) and (e) Vacating Imminent Danger Orders

See Section 104 of this Manual, Vacating Citations and Orders.

Section 108 Injunctions108 Injunctive Actions

Under the provisions of Section 108 of the Mine Act, the Secretary of Labor is authorized to initiate civil action (in United States District Court) for relief, including permanent and temporary injunctions, restraining orders, or any other appropriate order, for the following violations:

1. violating or refusing to comply with an order or decision issued under the Mine Act;
2. interfering with, hindering, or delaying the carrying out of provisions of the Mine Act;
3. denying entry onto a mine property;
4. refusing permission to conduct an inspection of a mine, or investigation of an accident or occupational disease occurring on a mine property;
5. refusing to provide information or reports requested in carrying out the provisions of the Mine Act; or
6. refusing to permit access to the mine property for the purpose of copying records determined to be necessary in carrying out the provisions of the Mine Act.

When any of these violations occur, appropriate enforcement action as prescribed in the General Inspection Procedures Handbook and in the Special Investigations Procedures Handbook shall be followed to cause compliance. If compliance does not occur after enforcement action, the district manager or their designee will notify TCIO immediately. This notification will contain all of the available facts pertaining to the violation.

TCIO will coordinate and facilitate as necessary the notification of the appropriate Regional Solicitor's Office to seek advice in proceeding with injunctive action. Each violation will be evaluated on the sufficiency of the available facts and the nature of the offense.

If injunctive action is sought, instructions will be provided by the Regional Solicitor's Office and the U.S. Attorney on securing injunctive action. Once injunctive relief has been granted by the Federal District Court, provisions of the court order will be followed as stated together with instructions from the U.S. Attorney and the Regional Solicitor.

Section 110 Penalties**110(c) Enforcement Problems or Hazardous Conditions
Identified During Special Investigations**

The Agency's special investigations workforce consists primarily of persons who are Authorized Representatives (AR) of the Secretary of Labor. If a hazardous condition, such as an imminent danger, is observed by a special investigator while on mine property, the special investigator is to initiate appropriate enforcement action. If the investigator is not an AR, the supervisory special investigator and the appropriate field office supervisor are to be contacted immediately and informed of the condition.

Information indicating an ongoing hazardous condition or enforcement problem may also come to light while interviewing witnesses. In such instance, the special investigator is to promptly notify the supervisory special investigator and the appropriate field office supervisor. As an integral part of the enforcement program within each district, the supervisory special investigator is to ensure that the district manager is promptly notified. A determination can then be made regarding the need for further enforcement action.

Likewise, if a review of a special investigation case file indicates that an ongoing enforcement problem may exist at a mine, the supervisory special investigator is to promptly bring the matter to the attention of the district manager.

Special investigation case files are also reviewed at headquarters by the Technical Compliance and Investigation Office (TCIO). If an ongoing enforcement problem is identified during the review of a case file, the matter should promptly be brought to the attention of the Assistant Director for TCIO. The Assistant Director will determine whether to refer the matter to the district manager, and to the Safety Division or Health Division, if appropriate.

In all of the above situations, required notification and response will be documented by a memorandum to the appropriate Agency official, with a copy to the investigation case file.

On rare occasions, it is possible for knowledge of ongoing hazardous conditions to be first encountered after the case is referred to the Department of Justice U.S. Attorney's Office.

When this happens, the time, manner, and extent of disclosure must be approved by the U.S. Attorney's Office assigned to the case.

110(c) and (d) Investigations of Possible Knowing/Willful
Violations

The provisions of Sections 110(c) and 110(d) of the Mine Act are among the most stringent levels of enforcement action available to MSHA to ensure compliance with the Mine Act and related standards. Under these provisions, MSHA is authorized to propose the assessment of a civil penalty against a director, officer, or agent of a corporate operator who knowingly orders, authorizes, or carries out a violation of a mandatory safety or health standard, or to pursue criminal proceedings against an operator or a corporate director, officer, or agent who willfully violates a mandatory safety or health standard. MSHA conducts investigations under Sections 110(c) and 110(d) to establish the facts and circumstances surrounding certain violations of the Mine Act or of mandatory safety or health standards in order to determine whether the violations were knowing or willful in nature. The investigation of a possible Section 110 violation of the Mine Act is initiated at the request of the District Manager, usually as a result of one of the following circumstances:

- a. a mine accident;
- b. a complaint received, such as an allegation of a possible violation of Section 110(f) (false reporting), or 110(h) (equipment misrepresentation);
or
- c. reviewing citations/orders for possible knowing or willful violations.

The following types of citations and orders will be reviewed for possible further action:

- a. each 104(a) citation issued which contributed to the issuance of a 107(a) imminent danger order of withdrawal;

- b. each 104(d) citation or order which is identified as being significant and substantial (S&S) and the Negligence has been marked "high" or "Reckless Disregard"; and
- c. each citation issued for working in violation of an Order of Withdrawal.

Only a violation of a mandatory health or safety standard or order issued under the Mine Act shall be reviewed for possible further action. This includes violations of 30 CFR, Parts 46, 47, 48, 49, 56, 57, 58, 62, 70, 71, 72, 75, 77, and 90.

The district review of a possible knowing/willful violation will be expedited and conducted within 30 calendar days from the date of issuance of the citation or order. The review is the responsibility of the issuing inspector and his or her supervisor, the assistant district manager, and the supervisory special investigator. A determination will be made by the district manager, with the assistance of the supervisory special investigator, whether to initiate a special investigation or take no further action. Documentation will be maintained to support whatever action is taken.

Criminal investigations may also result from reports of alleged violations of Section 110(f) (false reporting) or Section 110(h) (equipment misrepresentation). This would include but not be limited to violations of 30 CFR, Parts 5 through 50.

The district manager is authorized to close Section 110 cases where the district manager determines, based on a thorough investigation, that a knowing or willful violation has not occurred and there is no merit in pursuing further action. The district manager will also be responsible for sending the notification letter that officially closes the investigation directly to the operator and/or contractor identifying the citation(s) and order(s) involved, and indicate that MSHA has decided not to pursue further action. A copy of the notification letter shall be sent to TCIO along with a memorandum briefly stating the reasons for the district's determination.

The goal is to complete comprehensive investigations as expeditiously as possible. It is anticipated that the majority

of investigative reports will be submitted to TCIO within 150 days from the date the subject citation or order was issued. In instances where the matter under investigation was identified without the issuance of a citation or order, i.e., falsification of records, the 150-day timeframe for case submission shall begin from the date that MSHA had actual notice of the subject incident. The 150-day timeframe applies to all Section 110 investigations. TCIO will monitor all special investigation cases to ensure compliance with the 150-day timeframe. When circumstances prevent the completion of the investigation within the 150-day timeframe, the maximum time for submission of the investigative report to TCIO is 365 days from the date of issuance of the citation or order or, if a citation is not issued, 365 days from the date when MSHA had actual notice of the subject incident. The 365-day timeframe allows for the timely assessment of 110(c) civil penalties and timely referral for criminal prosecution.

The district manager may, before submitting the investigative report to TCIO, offer the director, officer, or agent named in the investigative file an opportunity for a Part 100 safety and health conference (PPM Volume III, Part 100, "100.6 Safety and Health Conferences," and SI Handbook Chapter 7, Section C.2.b.).

Cases in which TCIO recommends either a civil penalty or criminal pursuit are referred to SOL for legal review and analysis must be done within 190 days to SOL-MSH from the date of the underlying violation.

SOL will independently review each case submitted for legal sufficiency and prepare a response to TCIO. This review and any consultations, discussions, or requests for additional information will be targeted for completion within a 30-day timeframe from the date SOL receives the case from TCIO.

On a case-by-case basis, review by the Department of Justice will also be sought in sensitive matters where there is agreement not to refer a matter for possible criminal prosecution.

When there is agreement that a 110(c) civil penalty will be pursued and the individual corporate agent has not yet been offered the opportunity for a safety and health conference

pursuant to Part 100, TCIO will send a memorandum to the appropriate district manager requesting that a conference be offered to the named agent (PPM Volume III, Part 100, "100.6 Safety and Health Conferences" and SI Handbook Chapter 7, Section C.2.b.). After completion of the conference, or receipt of documentation regarding the agent's refusal or non-response regarding same, the district manager shall send a memorandum to TCIO outlining the conference results and recommendations.

110(c) Referral of 110(c) Civil Penalty Cases to the Office of Special Assessments

Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued within 18 months from the date of issuance of the subject citation or order. However, if the 18 month timeframe is exceeded, TCIO will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

110(h) Use of Non-Approved Equipment

Compliance investigations conducted by the Quality Assurance Division on the Jabco Model JG107 Audio Alarm unit, Approval Nos. 9B-49-0 and 9B-49-1, revealed that the 8-track tape player approved for use in the alarm unit is being replaced by various types and models of 12-volt direct current tape players that are not approved for use in the formal approval. This situation is further complicated, since the original equipment manufacturer is no longer in business, and the 8-track tape player specified in the formal approval is no longer available for purchase. All JG107 Audio Alarm units equipped with a tape player other than the 8-track tape player specified in the formal approval must be removed from permissible service as they are no longer permissible. Compliance investigations also revealed that Model Jabco JG107 Audio Alarm units are in service bearing Approval No. 9B-49-2 which has never been issued. Therefore, all units bearing MSHA Approval No. 9B-49-2 must have the approval plates removed and be removed from permissible service.

To emphasize the importance of using only approved equipment in a mine, Section 110(h) of the Act provides penalties for the knowing distribution, sale, delivery, or introduction of

equipment into mines that is represented as approved but is not in approved condition. Also, in accordance with 30 CFR Parts 57 and 75, it is the responsibility of the mine operator to ensure that the approved/certified equipment is maintained in a permissible condition. Failure to remove altered units and units with MSHA Approval No. 9B-49-2 from permissible service will result in appropriate enforcement action. All Jabco Model JG107 Audio Alarms bearing MSHA Approval Nos. 9B-49-0 and 9B-49-1 that exist and are maintained to the formally approved design may remain in service as permissible signaling devices.

Section 111 Entitlement of Miners

Section 111 is the statutory remedy for compensation to miners when a mine or mine area has been idled or closed by MSHA order. Miners or miners' representatives having a claim under this section of the Act must file with the Federal Mine Safety and Health Review Commission.

Section 111 creates a statutory right protected under the provision of section 105(c). If a miner or representative of the miners believes that a discriminatory act, as described in section 105(c), has been committed by a mine operator or anyone in authority because compensation under section 111 has been sought, a discrimination complaint under the provisions of section 105(c) may be filed. Such complaint will be processed in accordance with the policies pertaining to section 105(c) and related instructions in the Special Investigations Procedures Handbook.

Section 203 Medical Examinations203(a) Chest X-rays

Congress gave the Department of Health and Human Services (HHS) the responsibility for setting up and carrying out the chest x-ray program. Thus, MSHA Coal Mine Safety and Health enforcement of Section 203(a) of the Act and 42 CFR 37 will normally be in response to specific requests from HHS. However, if an MSHA coal inspector, during his or her normal work, concludes (after a thorough inquiry) that there is noncompliance with Section 203(a) or with 42 CFR 37, the inspector must issue a citation. Citations will specify the relevant section of the Act or of 42 CFR 37.