

MAJORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA, *Chairwoman*

JOE WILSON, SOUTH CAROLINA
DUNCAN HUNTER, CALIFORNIA
DAVID P. ROE, TENNESSEE
GLENN "GT" THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
BRETT GUTHRIE, KENTUCKY
TODD ROKITA, INDIANA
LOU BARLETTA, PENNSYLVANIA
LUKE MESSER, INDIANA
BRADLEY BYRNE, ALABAMA
DAVID BRAT, VIRGINIA
GLENN GROTHMAN, WISCONSIN
ELISE STEFANIK, NEW YORK
RICK W. ALLEN, GEORGIA
JASON LEWIS, MINNESOTA
FRANCIS ROONEY, FLORIDA
TOM GARRETT, JR., VIRGINIA
LLOYD K. SMUCKER, PENNSYLVANIA
A. DREW FERGUSON, IV, GEORGIA
RON ESTES, KANSAS
KAREN HANDEL, GEORGIA
JIM BANKS, INDIANA



COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

MINORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
Ranking Member

SUSAN A. DAVIS, CALIFORNIA
RAÚL M. GRIJALVA, ARIZONA
JOE COURTNEY, CONNECTICUT
MARCIA L. FUDGE, OHIO
JARED POLIS, COLORADO
GREGORIO KILILI CAMACHO SABLÁN,
NORTHERN MARIANA ISLANDS
FREDERICA S. WILSON, FLORIDA
SUZANNE BONAMICI, OREGON
MARK TAKANO, CALIFORNIA
ALMA S. ADAMS, NORTH CAROLINA
MARK DeSAULNIER, CALIFORNIA
DONALD NORCROSS, NEW JERSEY
LISA BLUNT ROCHESTER, DELAWARE
RAJA KRISHNAMOORTHY, ILLINOIS
CAROL SHEA-PORTER, NEW HAMPSHIRE
ADRIANO ESPALLAT, NEW YORK

September 21, 2018

The Honorable David Zatezalo
Assistant Secretary for Mine Safety
Mine Safety and Health Administration
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Dear Mr. Zatezalo:

We are writing to inquire into the legal basis for the Mine Safety and Health Administration's (MSHA) decision to enter into a settlement agreement to terminate the Pattern of Violations (POV) Notice regarding the Affinity Mine operated by Pocahontas Coal located in Raleigh County, West Virginia. Specifically, this letter requests information necessary for the Committee to assess whether MSHA's actions to terminate the POV exceeded its statutory authority and whether the Department of Labor (DOL) acted properly in this matter.

As provided by Section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act), a POV Notice will terminate if, upon an inspection of the entire mine, MSHA finds no significant and substantial (S&S) violations of mandatory safety and health standards.¹ According to MSHA data, that precondition has not been met, as there have been numerous S&S violations at the Affinity Mine this year and those violations have persisted right up to the date the settlement was finalized on August 28, 2018.

In particular, a dissent included in the Federal Mine Safety and Health Review Commission's (FMSHRC) August 28, 2018 Order vacating a Petition for Discretionary Review by Pocahontas Coal states, in part:

Although Pocahontas Coal Company's motion to the Commission nominally seeks merely to withdraw the operator's appeal of this matter and gain dismissal of the proceedings, the parties' filings make clear that Pocahontas's request is part of a broader agreement in which the Secretary of Labor seeks to unilaterally relieve Pocahontas's Affinity Mine of its pattern of violations designation. Such a settlement is directly contrary to the express language of the Mine Act and the Secretary's own regulations, and

¹ An "S&S" violation is a serious violation which is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

approving the settlement only provides cover for an unlawful agreement by the current administration.² (emphasis added)

Legislative History and Intent of the Pattern of Violations Provision in the Mine Act

In enacting the POV provisions in the Mine Act, Congress provided MSHA with its most powerful “tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.”³ Congress directed that when a mine is in POV status, “a withdrawal order shall be issued” and miners removed from the area of the hazardous area of the mine until the violation is abated for “any violation of a mandatory health or safety standard” that is S&S.⁴ Congress intended the POV provision to be used for mine operators who have not responded to the Agency’s other enforcement efforts. The legislative history states that Congress believed that the existence of a pattern would signal to both the mine operator and the Secretary that “there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.”⁵ Following Congress’ intent, MSHA’s regulations implementing the POV provision are geared to “protecting miners working in mines operated by habitual offenders whose chronic S&S violations have not been deterred by the Secretary’s other enforcement tools.”⁶

MSHA Lacks Authority to Terminate POV due to Affinity’s Chronic S&S Violations

Since the issuance of the POV Notice on October 24, 2013, MSHA has cited the Affinity Mine 265 times for S&S violations.⁷ Although this mine operator has made progress in reducing its reported injury rates below the national average since 2013, there has not been a complete mine inspection free from S&S violations reflected in the public record. Indeed, MSHA issued 36 S&S violations so far this year, including one for the failure to maintain mobile and stationary machinery and equipment “in safe operating condition” a mere six days *before* this settlement was approved. Even more noteworthy, only eight days *after* FMSHRC approved the settlement, MSHA issued an S&S violation on September 5 for failure to provide protection from falls of roof, face and ribs—the same hazards that underpinned the basis for MSHA issuing the POV Notice in 2013.⁸ Two days later on September 10, another S&S citation was issued for failure to

² *The Mine Safety and Health Administration et al v. Pocahontas Coal*, Federal Mine Safety and Health Review Commission, Order vacating Petition for Discretionary Review by Pocahontas Coal for cases WEVA 2014-395-R, WEVA 2014-1028, WEVA 2015-854, Dissent of Commissioner Robert F. Cohen, Jr. (August 28, 2018).

³ Report of the Senate Committee on Human Resources, Subcommittee on Labor, Federal Mine Safety and Health Act of 1977, Report No. 95-181 (May 16, 1977)

⁴ Under Section 104(e)(1), a “withdrawal order” is an order issued by the MSHA inspector “requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.”

⁵ *Ibid.*

⁶ Preamble to Final Rule on Pattern of Violations, Federal Register, Vol. 78, No. 15, January 23, 2013, pp. 5060

⁷ Since the POV Notice was issued, MSHA has cited the Affinity Mine for 263 S&S violations and issued withdrawal orders under Section 104(e) as follows: 10 in 2013, 63 in 2014, 42 in 2015, 59 in 2016, 56 in 2017, and 33 through August 28, 2018. Source: Mine Data Retrieval System (accessed September 9, 2018).

⁸ Mine Data Retrieval System, Violations History for the Affinity Mine (accessed September 8, 2018)

provide protection from falls of roof, face and ribs. And a third S&S violation was written on September 18 for failure to maintain machinery in safe operating condition.

Once a POV Notice has been issued, MSHA's authority to withdraw a Notice is constrained by the prerequisites set in the Mine Act: Section 104(e)(3) states that before a POV Notice can be terminated, there must be an inspection of the entire coal mine where MSHA finds no S&S violations.⁹ MSHA's POV regulations mirror this requirement.¹⁰ Hence, under the Mine Act and MSHA's regulations, a mine cannot be removed from POV absent compliance with this statutory requirement. MSHA's prosecutorial discretion is unequivocally cabined by federal law and its own regulations.

The FMSHRC dissent further states:

The Secretary's response in support of Pocahontas's motion is similarly silent toward the law's plain requirement that Pocahontas pass an inspection free of any S&S citations before it can be relieved of the POV designation. There is no indication that Pocahontas's Affinity Mine has received such a clean inspection. Rather than providing a clear indication to the Commission that the parties are proceeding within the framework of the Mine Act, the parties attempted to shield their actions from the public by initially filing pleadings before us in secret (i.e., "under seal").

Secrecy in Efforts to Terminate POV Raises Red Flags

Although the pleadings in this case were subsequently unsealed following a FMSHRC demand that MSHA and Pocahontas show cause, it begs a number of questions: What justification was there for MSHA to file its motion under seal when there is no national security or business confidential information at issue? What is the purpose of shielding the settlement agreement from the public in a cloak of secrecy? Was there an effort to evade public scrutiny of what may be an unlawful arrangement with this operator by making its initial filing under seal?

Despite a history of repeated S&S violations—which persisted in each and every year since the POV Notice was issued in 2013--and the Mine Act's unambiguous requirement under Section 104(e)(3) that a mine may not be removed from a POV absent a complete MSHA inspection free from S&S violations, MSHA has inexplicably terminated the POV Notice. For that reason, we are seeking information to better understand the legal basis for this decision and what transpired inside the DOL that led MSHA to take this unprecedented action.

Request for Information

⁹ Section 104(e)(3) states: "If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply." (emphasis added)

¹⁰ 30 CFR 104.4 states: "Termination of notice. (a) Termination of a section 104(e)(1) pattern of violations notice shall occur when an MSHA inspection of the entire mine finds no S&S violations or if MSHA does not issue a withdrawal order in accordance with section 104(e)(1) of the Mine Act within 90 days after the issuance of the pattern of violations notice." (emphasis added)

Pursuant to Rule X of the Rules of the House of Representatives, we request the following information and documents to be provided no later than October 5th, 2018:

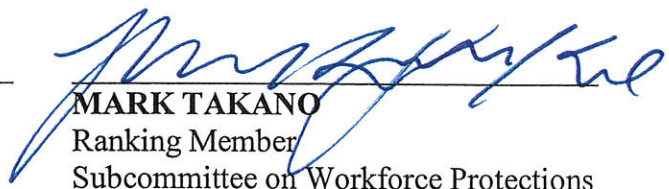
- 1) A copy of the settlement agreement, and any attachments to such agreement or memorandum of agreement or side letters between MSHA and Pocahontas Coal, (including its controlling entities United Coal Company (UCC), and Metinvest AB) regarding the termination of the POV Notice at the Affinity Mine.
- 2) The date(s) of a complete inspection of the Affinity Mine that yielded no S&S violations since the issuance of the POV Notice in October 2013.
- 3) If there has not been a complete inspection that yielded no S&S violations, then please provide the legal basis for removing the Affinity Mine from POV in light of the fact that MSHA continued to cite S&S violations during each complete inspection of the Affinity Mine since MSHA issued the POV notice.
- 4) All written communications between MSHA (and the DOL Solicitor's office) and Pocahontas Coal, UCC or Metinvest AB (and its counsel) regarding the removal of the Affinity mine from POV, including letters, e-mails and memos.
- 5) A list of all meetings and copies of minutes or memos summarizing such meetings between MSHA (and the DOL Solicitor's office) and Pocahontas Coal, UCC or Metinvest AB (and its counsel) regarding the removal of the Affinity Mine from POV between January 20, 2017 and the date of this letter.
- 6) A copy of all communications between MSHA (and its Solicitor) and Pocahontas Coal, UCC or Metinvest AB (and its counsel) regarding the decision to initially file pleadings with FMSHRC under seal with respect to terminating the POV at the Affinity Mine.
- 7) Who in the DOL's Solicitor's office authorized the filing of the government's pleadings under seal in this matter? Who reversed this decision?
- 8) A copy of internal DOL communications regarding the removal of the Affinity Mine from POV, including communications between personnel in the Office of the Secretary of Labor and MSHA, and communications between the MSHA District 4 Office and MSHA headquarters, for the time period between January 20, 2017 and the date of this letter.

We look forward to receiving this information within the time frame set forth above. Please contact Richard Miller, Labor Policy Director for the Committee on Education and the Workforce Democrats, at 202-225-3725 or richard.miller@mail.house.gov.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member



MARK TAKANO
Ranking Member
Subcommittee on Workforce Protections

The Honorable David Zatezalo

September 21, 2018

Page 5

cc: Nicholas Geale, Chief of Staff to the Secretary
Hon. Scott Dahl, Inspector General
Hon. Michael G. Young, Acting Chair, Federal Mine Safety and Health Review
Commission
Hon. Virginia Foxx, Chair, Committee on Education and the Workforce
Hon. Bradley Byrne, Chair, Subcommittee on Workforce Protections