

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)	
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent,)	
)	
v.)	Docket Nos. KENT 2002-42-R
)	KENT 2002-43-R
MARTIN COUNTY COAL CORP.)	KENT 2002-44-R
)	KENT 2002-45-R
and)	KENT 2002-251
)	KENT 2002-261
GEO/ENVIRONMENTAL ASSOCIATES,)	KENT 2002-262
)	
Petitioners.)	

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

This case involves citations issued by MSHA to Martin County Coal Corp. ("MCC") and Geo/Environmental Associates ("Geo") following the failure of MCC's Big Branch Slurry Impoundment near Inez, Kentucky. In September 1999, the water flowing from the South Mains Portal of MCC's underground mine increased significantly from the flow during the previous five years. Although the unusual increase in the water flow indicated a possible impoundment leak, the increase in flow was not reported to MSHA and continued for approximately one year until the impoundment failure. On October 11, 2000, the impoundment failed and released over 300 million gallons of

water and coal refuse into an adjacent underground mine. MCC's failure to report the unusual increase in flow from the South Mains Portal contributed to the impoundment failure, which caused extensive damage to the neighboring community and placed miners' safety at risk.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge correctly found that MCC violated 30 C.F.R. § 77.216(d) because MCC failed to report an unusual change in the water flow from the South Mains Portal as required by the approved impoundment sealing plan, and that MCC was negligent in doing so.

2. Whether the judge correctly found that Geo violated 30 C.F.R. § 77.216-4(a)(7) because the annual report submitted by Geo to MSHA on behalf of MCC failed to include a certification by a registered professional engineer that the underground seals were constructed and maintained in accordance with the approved impoundment sealing plan.

STATEMENT OF THE CASE

A. The Facts¹

MCC is the operator of a surface and underground coal mine and the Big Branch Slurry Impoundment near Inez, Kentucky. GX-

¹ The facts set forth in this response brief pertain to the issues addressed in this brief. The facts are set forth more fully in the Secretary's opening brief.

1. Geo is an independent contractor hired by MCC to inspect the impoundment and to prepare annual certifications of compliance with regulatory requirements pertaining to the impoundment.

Ibid. The impoundment was built by MCC for the storage of coarse and fine coal refuse and solid waste by-products of the coal cleaning process. GX-1. The impoundment was located adjacent to a preparation plant and two underground mines.

Ibid. The 1-C mine employed six underground miners and two surface miners. Ibid.

In response to an impoundment failure on May 22-23, 1994, an impoundment sealing plan was developed on May 23, 1994, by MCC personnel in cooperation with MSHA. GX-2, 5. The May 23, 1994, plan included both short-term and long-term remedial measures. The short-term measures included provisions requiring MCC to monitor the South Mains Portal of the underground 1-C Mine and to examine the First Left Seals. GX-5.

On August 10, 1994, MCC submitted to MSHA for approval an additional impoundment sealing plan which specifically addressed "additional remedial work" as required by the long-term measures of the May 23, 1994, plan. GX-1, 2, 2a, 2b (emphasis added). The plan was prepared by MCC's engineering consultant, Ogden Environmental & Energy Services Company ("Ogden"). Tr.I 56, 60; GX-1, 2, 2a, 2b. The plan was revised by Ogden and approved by MSHA on October 20, 1994. Ibid. The plan required that the

water flowing from the South Mains Portal of the underground 1-C Mine be monitored daily until remedial work at the 1994 breakthrough point was completed, and that thereafter monitoring be done during the weekly impoundment inspections. GX-1, 2, 2a, 2b. The plan also required construction of an underground hydraulic cement seal to provide protection against subsequent breakthroughs in areas under the impoundment. Ibid.

On September 7, 1995, MCC proposed modifications to the plan with respect to the construction of the hydraulic cement seal. GX-7. Rather than constructing one cement seal, MCC proposed to strengthen the existing mine seals by constructing new seals made from one-foot-thick steel reinforced gunite material. Tr.I 434-36; GX-7. The new seals were to serve as a barrier to protect miners working in the active areas of the underground mine from water coming from the inactive areas of the mine in the event of an impoundment breakthrough. Tr.I 432, 446-47; GX-7. On September 29, 1995, the modified plan was approved by MSHA. Tr.I 436-39; GX-7. Because the construction of the seals was part of the impoundment sealing plan, a certification that the seals were constructed and maintained in accordance with the approved plan needed to be included in the impoundment annual report. Tr.I 464-65.

In February 1996, MCC hired Geo, an independent contractor, to take over Ogden's engineering consultant role and perform

weekly impoundment monitoring, evaluate and modify the impoundment sealing plan, and prepare annual reports and certifications concerning the impoundment. Tr.II 45, 53, 162, 167-68, 214-16, 684-85, 693-95, 756-57, 762-63; GX-1. As part of Geo's monitoring responsibilities, Geo examiners were to measure and record the water flow at the South Mains Portal. Tr.I 130, 501-03, 857-58; Tr.II 214-16, 748-50, 757; GX-1. Any unusual change in the quantity or quality of flow was to be reported to the MSHA District Manager. GX-1, 5. In addition, Geo was to submit annual reports containing a certification by a registered professional engineer that construction was in accordance with the impoundment sealing plan. Tr.I 507-10; 587; GX-7, 9. See also Tr.II 464-70.

MCC monitored the water flow from the South Mains Portal on a weekly basis, but never notified MSHA of an unusual change in the flow rate that first occurred in September 1999. Tr.II 223, 226, 247; GX-1 at p.26. From 1994 to September 1999, the average flow was 5.5 inches, but in September 1999, the average flow rose to 8.6 inches. GX-1 at p.26 and fig. 38. The increase in flow was an "unusual" change because it represented a 56 percent increase in the flow depth and a 235 percent increase from the original flow quantity. Tr.I 241-43, 321, 502-03, 811-12, 816, 845, 859, 981-82; GX-1 at p. 26 and fig.

38. The increase in flow was an indication of a possible impoundment leak. Tr.II 1000-03.

On October 11, 2000, the impoundment, which contained approximately 2 billion gallons of water and slurry, failed. GX-1. Over 300 million gallons of water and slurry were released through the mine openings, including the South Mains Portal. Ibid. A miner was in the underground 1-C Mine, at the 2 North Main belt line area, about fifteen minutes before the breakthrough and was exposed to the potential of injury. Tr.I 872. In addition, other miners routinely worked in other areas that were or could have been affected by the breakthrough. GX-1. Although no one was seriously injured or killed by the breakthrough, no one disputed that the release of over 300 million gallons of water and slurry had the potential to cause serious injury or death. Tr.I 869.

MSHA conducted an investigation after the impoundment failure on October 11, 2000. MSHA issued two citations to MCC alleging two "S&S" and "unwarrantable failure" contributory violations of 30 C.F.R. § 77.216 consisting of MCC's failure to comply with the requirements of the approved impoundment plan. JX-4a, 4b. MSHA also issued five citations to MCC and four citations to Geo alleging five non-contributory violations. JX-4c, 4d, 4e, 4f, 4g, 4h.

The Secretary's opening brief addressed the judge's determinations that were appealed by the Secretary. This response brief addresses the judge's determinations that were appealed by MCC and Geo.

The citations issued by MSHA that are discussed in this brief are:

(1). A citation to MCC alleging an "S&S" and "unwarrantable failure" contributory violation of 30 C.F.R. § 77.216 consisting of MCC's failure to report an unusual change in the water flow quantity from the South Mains Portal to MSHA as required by the approved impoundment sealing plan. JX-4a.²

(2). A citation to Geo alleging a violation of 30 C.F.R. § 77.216-4(a)(7) because the annual report did not include a report certified by a registered professional engineer that the reinforced seals were constructed and maintained in accordance with the approved impoundment sealing plan. JX-4e.³

² 30 C.F.R. § 77.216(d) provides:

The ... construction and maintenance of all ... slurry impoundments ... shall be implemented in accordance with the plan approved by the District Manager.

³ 30 C.F.R. § 77.216-4(a)(7) provides:

... [E]very twelfth month ... the person owning, operating, or controlling a ... slurry impoundment ... shall submit to the District Manager a report containing ... [a] certification ... that all construction ... was in accordance with the approved plan.

B. The Judge's Determinations That Were Appealed by MCC and Geo

The judge affirmed the violation of Section 77.216(d) consisting of MCC's failure to report changes in the water flow quantity from the South Mains Portal beginning in September 1999 as required by the impoundment plan. 26 FMSHRC at 46-47. The judge found that MCC made no effort to evaluate data regarding the large increase in flow before the impoundment failure. 26 FMSHRC at 47. The judge further found that the failure to evaluate the flow data contributed in some measure to the magnitude and timing of the impoundment failure, but that MCC's negligence was moderate and not indicative of an "unwarrantable failure." 26 FMSHRC at 47, 49.

The judge also affirmed the violation of Section 77.216-4(a)(7) because Geo, the independent contractor responsible for submitting the annual report, failed to include an engineer's certification that the construction of the underground seals was in accordance with the impoundment plan. 26 FMSHRC at 48.

ARGUMENT

I. THE JUDGE CORRECTLY FOUND THAT MCC VIOLATED SECTION 77.216(d) BECAUSE MCC FAILED TO COMPLY WITH THE WATER FLOW MONITORING PROVISION IN THE APPROVED IMPOUNDMENT SEALING PLAN, AND THAT MCC WAS NEGLIGENT IN DOING SO

A. The Secretary's Interpretation That Monitoring was Required Under the Impoundment Sealing Plan In Effect In 1999 and 2000 Is Reasonable and Entitled to Deference

In response to an impoundment failure on May 22-23, 1994, an impoundment sealing plan was developed on May 23, 1994, by MCC personnel in cooperation with MSHA. GX-2, 5. The May 1994 plan included short-term and long-term remedial measures. The monitoring provision pertaining to the South Mains Portal was placed under the heading "Short Term Plan" and stated:

Flow from the South Mains entry will be monitored daily until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections after that. Any unusual change in flow quantity or quality that would indicate possible impoundment leakage will be reported immediately to MSHA and the appropriate mine management. All necessary remedial measures will be implemented.

GX-5 (emphasis added).

On August 10, 1994, MCC submitted an additional impoundment sealing plan for MSHA approval. GX-2. The August 1994 plan was developed by Ogden and addressed "additional remedial work" required by the long-term measures of the May 1994 plan. Ibid. (emphasis added). The August 1994 plan explicitly included the

May 1994 plan as Appendix I and was approved by MSHA on October 20, 1994. GX-2, 5. MSHA understood that, under the impoundment plan in effect at the time in question, MCC was required to monitor the flow from the South Mains Portal on a weekly basis. Tr.I 215-24, 304-06, 327, 616-17; Tr.II 146-52.

MCC monitored the flow from the South Mains Portal on a weekly basis, almost without interruption, between the summer of 1994 and the fall of 2000. GX-6. MCC claims, however, that the plan in effect at the time in question did not include a monitoring requirement because the August 1994 plan did not mention a monitoring requirement, and that MCC continued monitoring only as a precautionary measure. MCC Brief at 15-16. Therefore, MCC urges the Commission not to inquire into MCC's failure to report the unusual increase in flow quantity from the South Mains Portal to MSHA. MCC Brief at 15-17. As we show below, the Secretary's interpretation that the plan in effect in 1999 and 2000 required weekly monitoring of the water flowing from the South Mains Portal is reasonable, and MCC failed to comply with the Secretary's reasonable interpretation.⁴

⁴ Once an impoundment plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. See UMWA v. Secretary of Labor, 870 F.2d 662, 671 (D.C. Cir. 1989) (roof plan). If the meaning of a provision contained in the plan is plain, the provision must be enforced in accordance with that meaning unless such enforcement would lead to absurd results. See Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (standard); Lodestar Energy, Inc., 24

Courts use the traditional tools of statutory construction, including the text, the history, the overall structure and design, and the purpose of the provision, in determining whether the meaning of a provision is plain. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000) (Clean Air Act). See also Consolidation Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993) (applying traditional tools of interpretation to ascertain a standard's plain meaning). In this case, the plain meaning of the monitoring provision can be discerned using the traditional tools of interpretation. Even if the meaning of the monitoring provision is not plain, the Commission should defer to the Secretary's interpretation because that interpretation is reasonable, *i.e.*, it is consistent with the plan's language, structure, and purpose. See, *e.g.*, Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463 (D.C. Cir. 1994).

FMSHRC 689, 693 (July 2002) (standard). See also Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002) (ERISA plan); Local Union 47 v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991) (collective-bargaining contract).

If the meaning of a provision is ambiguous, deference must be given to the reasonable interpretation of the government agency vested with the authority to administer and enforce the provision. See Excel Mining, 334 F.3d at 7; Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463 (D.C. Cir. 1994); Energy West Mining Co., 17 FMSHRC 1313, 1317 and n.6 (Aug. 1995) (ventilation plan). The agency's interpretation is reasonable as long as it is not inconsistent with the language and the purpose of the provision. Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 535-36 (D.C. Cir. 2004).

The text by itself is sufficient to establish that the meaning of the monitoring provision is plain. Although the monitoring requirement was placed among measures labeled "Short Term Plan," MSHA interpreted the statement that monitoring that was to be done "during regular impoundment inspections after that" as representing a long-term requirement because the phrase "after that" referred to the period after remedial work at the 1994 seepage point was completed. Tr.I 215-24, 304-06, 327, 607, 616-17. In addition, MSHA Engineer John Fredland testified that the weekly monitoring requirement was part of the plan's long-term measures because the plan had been through several modifications and revisions but the weekly monitoring requirement was never removed from the plan and MCC continued to conduct weekly monitoring. Tr.I 223, 305-06. MSHA Inspector Bellamy also testified that monitoring was a continuing requirement under the plan and that that was why he spoke to Geo about several missing monitoring reports between April and September 1999. Tr. 592, 600; GX-6.

The judge agreed with MSHA's interpretation. The judge found that the critical language of the weekly monitoring provision pertaining to the South Mains Portal appeared in the plan as it was submitted the day after the impoundment failure of May 22, 1994. 26 FMSHRC at 38. The judge further found that

the monitoring provision was a long-term requirement of the plan. The judge reasoned that:

The critical phrase is "after that." After what? Obviously, after the completion of remedial work at the seepage point. That completion of work is the end of the short term measures. After the short term measures came the long term measures. Hence, monitoring of the flows at the South Mains entry on a weekly basis is a part of the long term measures. Since the monitoring requirement has never been removed from the Impoundment Sealing Plan, the requirement is still present. The requirement for weekly monitoring of the flow from the South Mains Portal is, and has been since 1994, a part of the Big Branch Impoundment Sealing Plan. Almost without interruption between Summer 1994 and Fall 2000, the flows from the South Mains Portal was monitored, recorded and reported as a part of the weekly impoundment inspection.

26 FMSHRC at 38-39.

The structure and design of the plan also establishes that weekly monitoring of the South Mains Portal was plainly meant to be required under the plan in effect at the time in question. The impoundment plan consisted of several documents: the plan developed on May 23, 1994, and the additional requirements submitted by MCC on August 10, 1994. The August 1994 plan explicitly stated that "monitoring of the area around the 'breakthrough' ... has continued" and that there was "continued monitoring of the impoundment and mine." GX-2 at 6, 7. The foregoing documents establish that the monitoring requirement in

the May 1994 plan remained in effect because it was never amended or repealed. Indeed, it was explicitly referred to in the August 1994 plan as Appendix I.⁵

The Secretary's interpretation is also consistent with the purpose of the monitoring provision. MCC knew that all the provisions of the impoundment plan were developed, in response to the impoundment failure that occurred in May 1994, to prevent another impoundment failure. Tr.II 55, 75, 84-5, 115, 161-63, 167, 211, 1174-75, 1311-13. Geo Project Engineer Scott Ballard correctly testified that monitoring is a key component to detecting hazards early before they become major problems. Tr.II 211. See U.S. Steel Mining Co., Inc., 15 FMSHRC 1541, 1544 (Aug. 1993) (periodic examination of electrical equipment to detect and correct safety defects was consistent with preventive objective of the Mine Act). Here, monitoring of the South Mains Portal, unlike monitoring of other points that were not included in the plan, was a critical component of the plan because, without it, there would not have been any means of

⁵ Further revisions and additions to the plan, which addressed the seepage barrier and mine seal provisions, were submitted to MSHA on October 5, 1994. GX-2a. Additional revisions concerning the mine seals were submitted to MSHA on September 21, 1995. GX-7.

detecting unusual changes in flow from the impoundment through the South Mains Portal. Tr.I 612, 1084; Tr.II 601-02; GX-2.⁶

MCC argues that the monitoring provision set forth in the May 1994 plan cannot be found to have been part of the "Long Term Plan" because it was placed under the heading "Short Term Plan." MCC Brief at 15-16. It is established law, however, that a provision's placement or heading is not controlling and cannot overcome the provision's plain meaning. National Center for Mfg. Sciences v. Department of Defense, 199 F.3d 507, 511 (D.C. Cir. 2000); United Transp. Union-Illinois Legis. Board v. Surface Transportation Board, 169 F.3d 474, 479-80 (7th Cir. 1999); United States v. Norman, 129 F.3d 1393, 1400-01 (10th Cir. 1997). The monitoring provision's meaning is plain: the monitoring was to be conducted after the remedial work at the seepage point was completed. Indeed, the monitoring provision's placement was perfectly logical: because the monitoring was a measure to be taken after the "short-term" measures were completed, it made sense to discuss the monitoring immediately after discussing the "short-term" measures.

⁶ Assuming arguendo that the plan was ambiguous with respect to monitoring of the South Mains Portal, the Secretary's interpretation is reasonable and entitled to deference because (1) the requirements of the May 1994 plan did not expire when the August 1994 plan was approved, (2) the August 1994 plan explicitly stated that monitoring of the South Mains Portal was continuing, and (3) the Secretary's interpretation is consistent

MCC's assertion that there was no monitoring provision in the plan in effect in 1999 and 2000 because the monitoring requirement was to cease at "the next staged submittal" (MCC Brief at 15-16), adds language to the monitoring provision that does not appear in the plan and that contradicts the plain language stating that monitoring was to be done on a weekly basis after remedial work at the seepage point was completed. Furthermore, MCC's assertion is contradicted by the fact that MCC continued monitoring after it was advised to do so by the MSHA inspector who discovered that MCC failed to monitor the South Mains Portal from April to September 1999. Tr.II 592; GX-6. MCC did not disagree with the inspector's advice; instead, it resumed monitoring. Tr.II 146-52, 214-16, 748-50, 755; GX-6.

The fact that the MSHA inspector never issued a citation does not, as suggested by MCC (MCC Brief at 17), compel a contrary interpretation. See RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 598 (D.C. Cir. 2001). Nor does the inspector's conduct establish a lack of fair notice or estop the agency from proceeding under an interpretation of the standard that it concludes is correct. Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (Sept. 2000); U.S. Steel Mining Co., 15 FMSHRC at 1546-47. In any event, although courts do not review and defer

with the purpose of the plan, to protect miners from the hazards associated with an impoundment failure.

to the interpretations of lower-level agency employees, see, e.g., Bigelow v. Dept. of Defense, 217 F.3d 875, 880-81 (D.C. Cir. 2000) (deferring to the authoritative interpretation of the agency itself), the inspector's interpretation -- that the plan in effect at the time in question required weekly monitoring of the South Mains Portal (Tr.II 592) -- was consistent with the Secretary's interpretation.⁷

Finally, MCC's interpretation is unreasonable because it ignores the purpose of the monitoring provision -- to provide continued assurance of early detection of another breakthrough. Providing such continued assurance was particularly important because MCC had already experienced a breakthrough of this unique and permeable impoundment in 1994.

⁷ In the event that by arguing that the judge should have accorded controlling weight to the inspector's conduct (or, more precisely, to the inspector's inaction) as though it constituted MSHA's interpretation of the plan, MCC is claiming that the inspector's inaction should estop MSHA from enforcing the Secretary's interpretation, such an approach is legal error. The inspector's conduct cannot estop the Secretary because there has been no affirmative misconduct by the inspector. See Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); Linkous v. United States, 142 F.3d 271, 277-78 (5th Cir. 1998); Frillz, Inc. v. Lader, 104 F.3d 515, 518 (1st Cir.), cert. denied, 522 U.S. 813 (1997). See also OPM v. Richmond, 496 U.S. 414, 421-22 (1990).

B. Substantial Evidence Supports the Judge's Finding That MCC Failed to Report an "Unusual" Change in the Water Flow Quantity from the South Mains Portal That Indicated Possible Impoundment Leakage

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion. Martin Marietta Aggregates, 22 FMSHRC 633, 639-40 (May 2000). "Under the substantial evidence test, the Commission may not substitute a competing view of the facts for the view an ALJ reasonably reached." Ibid. (citation and internal quotation marks omitted). In this case, the judge found that MCC violated the monitoring provision because a "large increase in flow [] occurred approximately a year prior to the October 2000, [] impoundment failure" and the unusual change in flow was not reported to MSHA. 26 FMSHRC at 47. The judge further found that "the record is clear" that MCC made no effort to evaluate the South Mains Portal flow data, which would have provided valuable warning information to MCC as to the "magnitude and timing of the impoundment failure." Ibid. Substantial evidence supports the judge's findings.

"Unusual" is commonly defined as "being out of the ordinary" or "deviating from the normal." Webster's Third New International Dictionary at 2514 (1993).⁸

⁸ When examining the text of a provision, words are presumed to have their ordinary, dictionary meaning. See Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S.

Under the ordinary definition, the flow from the South Mains Portal that began in September 1999 was an "unusual" change from the flow during the previous five years. From 1994 to September 1999, the average flow was 5.5 inches. In September 1999, the average flow rose to 8.6 inches. GX-1 at p.26 and fig. 38. The increase in flow was an "unusual" change because it represented a 56 percent increase in the flow depth and a 235 percent increase from the original flow quantity. Tr.I 241-43, 321, 502-03, 811-12, 816, 845, 859, 981-82; GX-1 at p. 26 and fig. 38.⁹ The increase in flow was far above the 1 to 1.5 inch increase or the 30 to 50 percent increase that MSHA expert witness Richard Almes would have considered to be usual, particularly because of the drought conditions that existed during 1999 and 2000. Tr.II 333-36.¹⁰

The foregoing testimony establishes an "unusual" change in flow from the previous five years under the ordinary dictionary definition of "unusual." It also establishes an "unusual"

380, 388 (1993); Ohio Valley, 359 F.3d at 535; Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1081 (10th Cir. 1998); Island Creek Coal Co., 20 FMSHRC 14, 19 (Jan. 1998).

⁹ Geo Impoundment Examiner Frank Howard took weekly water outflow measurements at the South Mains Portal by using a ruler to measure the depth of the water flowing through an 18-inch diameter pipe. Tr.II 223, 226, 247; GX-1 at p.26.

¹⁰ MSHA Engineer Harold Owens testified that the rainfall at Inez, Kentucky, and Wolf Creek revealed drought-like conditions. Tr.I 812-13, 1067-71, 1119-21; GX-6b.

change under the definition of "unusual" asserted by MCC, i.e., a "sustained increase in quantity that was a marked departure from what had been seen at that location." MCC Brief at 10 (citing Tr.II 75-78).¹¹

MCC's assertion that the judge found no unusual change in water flow and found no violation of the reporting requirement lacks merit. MCC Brief at 6-7. The judge's finding that there was a "large increase in flow" which provided a warning of an impoundment failure falls comfortably within the definition of an "unusual" change. 26 FMSHRC at 47.

MCC further asserts that there was no unusual change in water flow because MCC Supervisor Larry Muncie and Geo Impoundment Inspector Edward Howard did not discern any unusual change during examinations of the impoundment prior to the failure. MCC Brief at 8. Under the Mine Act's safety-promoting scheme, however, whether a violation occurred depends on whether a violative condition existed -- not on whether a violative condition was detected. See Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148, 155 (2d Cir. 1999). This is so because a

¹¹ MCC's claim that substantial evidence does not support the judge's finding of a violation because the Secretary's witnesses disagreed as to when MCC should have recognized the unusual increase in flow is misplaced. The violation was established because there is no dispute that the unusual increase in flow was never reported to MSHA, and instead was permitted to continue for over one year, from September 1999 until the impoundment failure in October 2000. Tr.I 884-86, 1060-61.

contrary approach "might create an incentive for mine operators to avoid gaining knowledge of the existence of [violative conditions]." Ibid. That principle is illustrated by MCC's conduct in this case.

MCC's failure to detect an unusual change in water flow can reasonably be attributed to MCC's complete failure to make any effort to look closely at the monitoring results under circumstances that should have prompted it to take a closer look. Those circumstances include the following: (1) the impoundment was constructed of permeable rock; (2) there was a prior impoundment failure; (3) there was increased hydraulic pressure in the impoundment due to the continually rising impoundment level; and especially (4) the flow rate essentially remained constant at an average of 5.5 inches for five years and then suddenly rose to 8.6 inches during a period of little rainfall and remained at that level for approximately one year. Under such circumstances, a closer look at the water flow data was warranted and would have made the unusual change obvious. See GX-1, fig. 38. See also Tr.I 242-46, 608-10, 625-26, 811, 815, 885-86, 980-981, 1004; Tr.II 329-35.¹² No closer look was ever made or attempted.

¹² MCC's reliance on the testimony of Geo Engineer Ballard and MCC expert witness Lewis that there was no indication of a problem because the flow was not discolored is misplaced. MCC Brief at 10. The unusually large increase in flow is not, as

MCC's assertion that it had flow data from other points, particularly the mine opening at the right abutment, which did not indicate any cause for concern does not establish that there was no unusual change in flow at the South Mains Portal. MCC Brief at 11. MCC designated the South Mains Portal as the monitoring point to detect possible impoundment leakage. MSHA Engineer Owens testified that the dramatic change in the flow level at the South Mains Portal in September 1999, which remained at a significantly high level for approximately one year, established the possibility of an impoundment leak regardless of the flow level at other monitoring points. Tr.II 1000-03.

In addition, MCC's assertion that water flowing from the South Mains Portal could be attributed to several sources, such as natural filtration from the impoundment, natural drainage from the mine itself, the rising pool level, or rainfall, does not establish that the unusual increase in flow could not be attributed to possible impoundment leakage. MCC Brief at 9-10,

MCC suggests, dependent on a change in water color. Water discoloration may be indicative of a change in water quality, but it is not indicative of the violation at issue here, which involves an unusual change in water quantity. In addition, there was no discoloration in the South Mains discharge because any fines would have settled out after flowing through 4000 feet of the mine and into a settling pond. Tr.I 132-34, 289-90.

12-13.¹³ Typical impoundment seepage or natural mine drainage flowed from the South Mains Portal at a fairly constant rate, around 5.5 inches, with some temporary fluctuations due to rainfall. Tr.I 243-45, 981-84, 1101; GX-1, fig.38. In addition, the gradual increase in the pool's elevation resulted in only a small gradual increase in flow from the South Mains Portal. Tr.I 131, 258, 1007-09; Tr.II 412. The sudden and sustained large increase in water flow from September 1999 to October 2000, however, did not parallel the gradual increase in the pool level or the relatively constant flow attributable to natural drainage or typical seepage from the impoundment. Rather, the dramatic increase in flow occurred suddenly, during a period of little rainfall, and remained at an elevated level. Tr.I 811, 815, 982; Tr.II 336; GX-1, fig. 38.

Moreover, MSHA Engineer Owens and Expert Witness Almes testified that the increase in flow could not be attributed to the slight amount of rainfall that did occur because rainfall would only cause a temporary flow increase, and here the flow increased and never returned to the 5.5 inch average. Tr.I 815, 982, 1064-66; Tr.II 335-36. Geo Impoundment Engineer Scott

¹³ MCC's argument that it is "virtually impossible" to determine what flow from the South Mains Portal is attributable to impoundment leakage is disingenuous because MCC chose the South Mains Portal as the monitoring point for impoundment leakage. In any event, as shown above, the sudden increase in

Ballard testified that a large increase in water flow would cause concern during a period of little rainfall. Tr.II 150-52. Ballard's testimony is consistent with the testimony of MSHA Engineers John Fredland and Harold Owens and MSHA expert witness Almes, who all testified that there was little rainfall between September 1999 and October 2000 when the average flow rate increased dramatically. Although the flows from the South Mains Portal came from several sources, the foregoing evidence demonstrates that the unusual change in flow that occurred suddenly and remained high for approximately one year established possible impoundment leakage which, under the plan, should have been reported to MSHA.

Although MCC asserts that the MSHA inspector did not note any unusual change in flow and never issued a citation to MCC (MCC Brief at 8-9, 12), the evidence establishes that an unusual change in flow did occur. The fact that the inspector may not have observed the unusual change in flow, and the fact that the inspector did not issue a citation, do not compel an interpretation that is different from the agency's interpretation, and cannot "undermine the correct enforcement of [the plan]." Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) (citation and internal quotation

flow at a sustained level for approximately one year established possible impoundment leakage under the plan.

marks omitted); RAG Cumberland, 272 F.2d at 598. See also Nolichuckey, 22 FMSHRC at 1063-64.

C. MCC Was Negligent

Despite the unusual and indeed dramatic change in flow from the South Mains Portal beginning in September 1999 and continuing until the impoundment failure in October 2000, MCC did not report any change in conditions to MSHA. MCC's claim that there was nothing unusual about the flow and that there was no warning of an impoundment failure (MCC Brief at 13-14), amounts to a claim of self-imposed ignorance that cannot be a mitigating factor in determining the level of MCC's negligence. See Douglas R. Rushford Trucking, 24 FMSHRC 648, 650 (July 2002). MCC monitored the flow from the South Mains Portal, but as the judge found, made "no effort" to evaluate the flow data. 26 FMSHRC at 47. Had MCC looked closely at the outflow data, the sudden and sustained dramatic change in water flow would have been apparent. Instead, MCC chose to remain ignorant of any unusual change in flow quantity from the South Mains Portal. MCC demonstrated a complete lack of attentiveness to an otherwise obvious danger.

For the foregoing reasons and the reasons discussed in the Secretary's opening brief (Sec'y Brief at 44-46), MCC demonstrated negligence. Indeed, as argued in the Secretary's

opening brief (ibid.), the judge should have found that MCC demonstrated high negligence.

II. THE JUDGE CORRECTLY FOUND THAT GEO VIOLATED SECTION 77.216-4(a) (7) BECAUSE GEO FAILED TO INCLUDE A CERTIFICATION IN THE ANNUAL REPORT THAT THE MINE SEALS WERE CONSTRUCTED IN ACCORDANCE WITH THE APPROVED IMPOUNDMENT SEALING PLAN

A. Two of Geo's Arguments Should Not Be Addressed by the Commission

The citation alleged, and the evidence showed, that Geo violated Section 77.216-4(a) (7) because Geo did not submit, for all reporting periods after mine seal work was completed in March 1996, a report certified by a registered professional engineer that the reinforced seals in the First Left Section off the No. 2 North Mains of the 1-C Mine were constructed and maintained in accordance with the approved impoundment plan. Tr.I 468; GX-9; JX-4e. Geo does not dispute that it did not submit the required certification with regard to the construction of the mine seals in the annual report. Geo Brief at 9. Rather, Geo claims that the judge erred in finding a violation of Section 77.216-4(a) (7) because (1) the standard does not apply to independent contractors such as Geo, (2) the construction of the mine seals was not part of the approved impoundment sealing plan and therefore did not have to be included in the annual report, (3) the Secretary abused her enforcement discretion in citing Geo for the violation, and (4)

the decision to cite Geo for the violation is unfair and constitutes bad public policy. Geo Brief at 6-21. The Commission should not address two of Geo's arguments because Geo failed to raise them before the judge.

Geo argues that Section 77.216-4(a) only applies to "the impoundment owner or operator" and does not apply to Geo because, like other contractors, Geo is not a "person owning, operating, or controlling" an impoundment. Geo Brief at 15. Geo also argues that the Secretary abused her enforcement discretion in citing Geo for the violation of Section 77.216-4(a)(7), and that the Commission retains the right to review the Secretary's enforcement discretion under W-P Coal Co., 16 FMSHRC 1407 (Jul. 1994). Geo Brief at 20. The Commission should not address the foregoing arguments because Geo failed to raise them before the judge. See Beech Fork Processing, Inc., 14 FMSHRC 1316, 1320-21 (August 1992); 29 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). In any event, we show below that Geo's arguments are unpersuasive.

B. Geo's Arguments Are Unpersuasive

1. The Secretary's interpretation that Section 77.216-4(a) applies to independent contractor operators such as Geo is reasonable and entitled to deference

Section 77.216-4(a) requires "the person owning, operating, or controlling ... [an] impoundment" to submit an annual report to MSHA. The statutory basis and the overall structure and

design of Section 77.216-4 indicates that the standard applies to contractors such as Geo. First, Section 3(f) of the Mine Act defines a "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 802(f). Section 3(d) of the Mine Act defines an "operator" as including an "independent contractor performing services" at a mine. 30 U.S.C. § 802(d). Section 3(h)(1)(C) of the Act defines a "mine" as "property including impoundments." 30 U.S.C. § 802(h)(1)(C). Because Geo was an "operator" at a mine under the statute, it was a "person" "operating" a "mine" under the standard. "It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute." Florida Bankers Ass'n v. Board of Governors of the Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir. 1986) (citing 1A Sutherland, Sutherland on Statutory Construction § 20.08 at 88 (4th ed. 1985)). The same precept should be applied here in construing the standard. If the Secretary had intended to write into the standard a different concept of "operator" than the concept stated in the statute, she could have done so. See NMA v. Department of Labor, 292 F.3d 849, 869 (D.C. Cir. 2002). She did not.

Second, Section 77.216-4(b) provides that an annual report is not required "when the operator provides the District Manager with a certification by a registered professional engineer that there have been no changes under paragraphs (a) (1) through (a) (6) of this section to the impoundment or impounding structure." 30 C.F.R. § 77.216-4(b) (emphasis added). Reading Section 77.216-4 in its entirety indicates that the standard was intended to apply to all statutory "operators," including independent contractor operators such as Geo.

Third, the history of Section 77.216 demonstrates that the standard was meant to apply to independent contractor operators. The preamble to Section 77.216 states that the rule "reduces the information collection burden imposed on mine operators" 57 Fed. Reg. 7468 (Mar. 2, 1992) (emphasis added). The preamble also states that the standard "enhances the ability of the operators to focus on potentially unsafe situations." 57 Fed. Reg. at 7469-70 (emphasis added). Again, the Secretary's use of the word "operator" indicates that the Secretary was referring to all statutory "operators," including independent contractors such as Geo.

Finally, the Secretary's interpretation is consistent with the purpose of the standard: to require operators to take measures that protect miners from the hazards of an impoundment failure that can flood and devastate a mine and cause severe

injury or death. Geo assumed a responsibility to take such measures at the impoundment when it contracted to perform weekly impoundment monitoring, evaluate and modify the impoundment sealing plan, and prepare annual reports and certifications concerning the impoundment. In addition, Geo acted as if it were covered by Section 77.216-4(4) by submitting to MSHA an annual report for the impoundment for the years 1995 to 2000. GX-9.

In sum, the Secretary's interpretation is consistent with the plain language and meaning of the standard. If, however, the standard is ambiguous, the Secretary's interpretation is reasonable and entitled to deference because, as shown above, the Secretary's interpretation is consistent with the language and the purpose of the standard. See Ohio Valley, 359 F.3d at 535-36; Excel Mining, 334 F.3d at 7; Energy West, 40 F.3d at 463; Energy West, 17 FMSHRC at 1317 and n.6.

2. The provision pertaining to the construction of six underground mine seals was part of the approved impoundment sealing plan

Geo's claim that the judge erred in finding a violation of Section 77.216-4(a)(7) because the evidence does not support a finding that the provision regarding the construction of mine seals was part of the approved impoundment sealing plan must fail. Geo Brief at 7-11. As we show below, MSHA explicitly approved the construction of six underground mine seals as

modifications to the "previously approved impoundment seal plan." Tr.I 436-39; GX-7.

The plan developed on May 23, 1994, in response to the impoundment failure on May 22, 1994, included a short-term provision requiring "examination of the 1st Left Seals" and a long-term provision requiring a "thorough analysis of the relationship of the mine workings ... to determine if additional remedial work is needed." GX-2, 5. Additional remedial work was specified in the plan submitted on August 10, 1994, which included a provision requiring the construction of a hydraulic cement mine seal across all six entries in the "1st Left section of the #2 North Mains." GX-2; Tr.I 434.

On September 9, 1994, MSHA notified MCC that the additional remedial measures could not be approved and, with respect to the construction of the new mine seal, provided two reasons: (1) the new mine seal appeared to require three portals at the South Mains to remain open, and (2) a separate plan to breach the existing seals needed to be submitted and approved before the hydraulic seal could be constructed. GX-2a. Relying on MSHA's second reason, Geo asserts that MSHA either "removed" the mine seal construction provision from the plan or "abandoned" the impoundment sealing plan. Geo Brief at 8. MSHA did no such thing. MSHA's second reason did nothing more than state MSHA's concern with the plan's failure to address underground stability

with respect to breaching the existing seals during construction of the hydraulic cement seal -- and MSHA's concern was

satisfactorily addressed by Ogden on October 3, 1994. GX-2a.

On October 3, 1994, Ogden modified the configuration of the seal so that a separate plan to breach the existing seals would not need to be submitted. Ibid. On October 5, 1994, MSHA notified MCC that the modifications were acceptable and that the plan, as modified, was approved. Ibid.

The hydraulic cement seal was never constructed. Tr.I 433-34. Instead, on September 7, 1995, MCC submitted a modification to the plan to strengthen the existing mine seals by constructing new seals made from one-foot-thick steel reinforced gunite material. Tr.I 434-36; GX-7. The new seals were to be "constructed against the existing seals" and were to serve the same purpose as the previously proposed hydraulic cement seal: to prevent an inundation of slurry from the impoundment into the mine in the event of an impoundment failure. GX-7. See also GX-2, 2a.¹⁴ On September 29, 1995, MSHA approved the

¹⁴ Geo's assertion that the construction of the gunite seals was not part of the impoundment sealing plan because the existing seals were underground ventilation seals and there is no regulatory requirement to certify ventilation seals is misplaced. Geo Brief at 12 n.7. The gunite seals, which were to be constructed against the existing ventilation seals, were explicitly included in the impoundment sealing plan because the seals served as additional protection against water and slurry entering the mine in the event of an impoundment failure similar to the 1994 failure. Therefore, a certification of the

construction of the gunite seals and explicitly referred to the seals as modifications to the "previously approved impoundment seal plan." Tr.I 436-39; GX-7.

Geo's reliance on the testimony of Senior Project Engineer Scott Ballard to support its assertion that the construction of the mine seals was taken out of the impoundment plan is misplaced. Geo Brief at 8. As established above, the explicit wording of the impoundment sealing plan contradicts Ballard's testimony that the construction of the mine seals was not part of the impoundment sealing plan. See GX-2, 2a, 5, 7.

In addition, even though the MSHA inspector never inspected the underground gunite seals, that does not establish, as Geo asserts, that the construction of the seals was not part of the impoundment sealing plan. Geo Brief at 9-11. MSHA Inspector Bellamy testified that he considered the gunite seals to be part of the plan and that he did not inspect the seals because he was never notified that the seals were being constructed. Tr.II 587. Had the inspector been told about the construction of the seals, either he or another inspector would have inspected the seals. Tr.II 587-588. In any event, inspector's conduct cannot compel an interpretation that is different from the agency's interpretation. See RAG Cumberland, supra.

construction of the seals needed to be included in the annual report.

Because the construction of the mine seals was explicitly referred to as part of the impoundment sealing plan, there is no merit to Geo's argument that it did not have fair notice in this case. Geo Brief at 15-19. See Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (plain language of MSHA standard provided fair notice of what it required). See also Lodestar, 24 FMSHRC at 694.¹⁵ Section 77.216-4(a)(7) plainly required that the annual report include a certification by a licensed professional that construction was in accordance with the approved plan, and the approved plan plainly included a provision pertaining to the construction of mine seals. Geo received notice of the agency's interpretation in the most obvious way of all: by the plain language of the plan.

The enforcement conduct of MSHA inspectors does not, as suggested by Geo (Geo Brief at 16-19), establish a lack of fair notice and cannot estop the agency from proceeding under an interpretation of the standard it concludes is correct. Nolichuckey, 22 FMSHRC at 1063-64; U.S. Steel Mining, 15 FMSHRC at 1546-47. In any event, although courts do not review and defer to the interpretations of lower-level agency employees, see, e.g., Bigelow, 217 F.3d at 880-81 (deferring to the

¹⁵ Because the plain language of the provision provided Geo with fair notice of the Secretary's interpretation, this case is distinguishable from all the cases on which Geo relies. Geo Brief at 17-18.

authoritative interpretation of the agency itself), the inspector's interpretation -- that the construction of the seals was part of the impoundment plan (Tr.II 571-74) -- was consistent with the Secretary's interpretation.¹⁶

3. Substantial evidence supports the judge's finding that Geo was properly cited for the violation of Section 77.216-4(a)(7)

Geo's assertion that the Secretary abused her enforcement discretion in citing Geo for the violation of Section 77.216-4(a)(7), and that the Commission retains the right to review the Secretary's enforcement discretion under W-P Coal Co., 16 FMSHRC 1407 (Jul. 1994), is misplaced.¹⁷ Geo Brief at 20. W-P Coal is distinguishable from this case because, as we show below, this case, unlike W-P Coal, involves an independent contractor being cited for a violation which the contractor itself committed.¹⁸

¹⁶ In the event Geo is claiming that the inspector's inaction should estop MSHA from enforcing the Secretary's interpretation, such an approach is legal error. See footnote 7, supra.

¹⁷ MSHA issued a citation to MCC for a violation of the same standard. The judge affirmed both violations because neither MCC nor Geo reported the construction of the mine seals in the annual report. 26 FMSHRC at 48. MCC did not appeal the judge's finding.

¹⁸ The Secretary continues to maintain that the exercise of her prosecutorial discretion whether to cite the mine operator, the independent contractor, or both, is not susceptible to review by the Commission or the Courts under the principles articulated in Heckler v. Chaney, 470 U.S. 821 (1985), and its progeny. See, e.g., Public Citizen, Inc. v. EPA, 343 F.3d 449, 464-65 (5th Cir. 2003).

On July 15, 1996, Geo submitted an "Annual Report and Certification" to MSHA, which it prepared on behalf of MCC. Tr.II 142-43, 154, 167-69; GX-9. The annual report did not include an engineer's certification that the underground seals were constructed and maintained in accordance with the approved plan. GX-9. As the judge held, Geo was properly cited for the violation of Section 77.216-4(a)(7) because Geo was the entity that filed the annual report on behalf of MCC. 26 FMSHRC at 48.

The judge's finding that Geo was hired to submit the annual report to MSHA on behalf of MCC is supported by substantial evidence. Geo undertook the responsibility to comply with Section 77.216-4(a)(7) by preparing and submitting the annual report on behalf of MCC for the years 1995 through 2000. 26 FMSHRC at 48. See GX-9. The reports Geo submitted did not indicate that they covered only limited contractual activities; they were presented as complete reports. GX-9. Each report covered "recent construction" and included an engineer's certification. No report, however, contained a certification with regard to the underground seals. GX-9. Because the evidence established that Geo was responsible for preparing and submitting the annual report, the judge correctly found that Geo was required to comply with all of the requirements of Section 77.216-4(a), including providing the required certification (or, at the very least, providing a notice that the seals were

excluded from a submitted certification so that a supplement could be supplied by someone else). 26 FMSHRC at 48.

Geo claims that the judge erred in holding Geo liable for failing to include the underground seal certification in the annual report because Geo was not hired to supervise or certify the construction of the seals and, under Commission case law there was "no element of control or functional nexus" between Geo and the failure to include the certification in the annual report. Geo Brief at 11-14. Geo's claim is unpersuasive. Whatever the precise terms of Geo's contractual arrangements with MCC, Geo should not be permitted to avoid liability by relying on those details -- especially because the evidence establishes that Geo routinely prepared and submitted annual reports containing certifications of construction and impoundment changes for six years. The Commission's "focus is on the actual relationships between the parties, and is not confined to the terms of their contracts." Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996) (quoting Joy Technologies, Inc., 17 FMSHRC 1303, 1306 (Aug. 1995)). See also Cyprus Indus. Minerals Co. v. FMSHRC, 664 F.2d 1116, 1120 (9th Cir. 1981) (statutory operators cannot evade Mine Act liability by contractual arrangement). Having undertaken to prepare and submit annual reports on behalf of MCC -- and having in fact done so for six years -- Geo was not

entitled to select which requirements of the standard governing such reports it would honor and which it would ignore.

Geo's reliance (Geo Brief at 14) on Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871, 1876 (Aug. 1984), is misplaced: that decision was reversed on appeal. Secretary of Labor v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-39 (D.C. Cir. 1986) (MSHA's independent contractor enforcement guidelines do not constitute a binding, substantive regulation). In any event, this case is distinguishable from Cathedral Bluffs and from Commissioner Verheggen's concurring and dissenting opinion in Berwind Natural Resources, 21 FMSHRC 1284, 1335 (Sept. 1999), on which Geo also relies. Geo Brief at 12-13, 21. Geo's conduct -- omitting an engineering certification regarding the construction and maintenance of the mine seals from the annual report -- was inextricably related to Geo's activity at the impoundment, i.e., submitting the annual report for the impoundment on behalf of MCC. Thus, this case is similar to Calvin Black Enterprises, 7 FMSHRC 1151 (Aug. 1985), on which Geo relies (Geo Brief at 13, 21), because Geo had a "continuing responsibility" to submit an annual report for the impoundment that was in compliance with the requirements of the standard.¹⁹

¹⁹ Geo's reliance on Philips Uranium is also misplaced. Geo Brief at 20. The Commission itself noted in W-P Coal that Philips Uranium Corp., 4 FMSHRC 549 (Apr. 1982), involved "the Secretary's earlier policy of pursuing only owner-operators for

Finally, there is no merit to Geo's argument that the decision to cite Geo is unfair and constitutes "bad public policy." Geo Brief at 20-21. The service Geo undertook to perform and failed to perform properly -- preparing and submitting the required annual reports on behalf of MCC -- directly affected the safety of miners because the reports failed to include a certification that the seals were constructed and maintained in accordance with the approved plan. Because Geo prepared and submitted the impoundment annual report to MSHA on behalf of MCC, Geo was in the best position to prevent the violation of Section 77.216-4(a)(7) by submitting a report containing an engineering certification for the underground seals.²⁰

their contractors' violations." 16 FMSHRC at 1410 (emphasis added).

²⁰ As to "policy," Congress vested the authority to decide questions of policy under the Mine Act with the entity with whom it vested the authority to enforce the Mine Act: the Secretary. Secretary of Labor v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996).

CONCLUSION

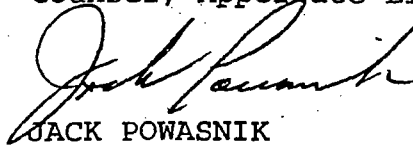
For all of the reasons discussed above, the Commission should, with one exception, affirm the judge's findings appealed by MCC and Geo.²¹

Respectfully submitted,

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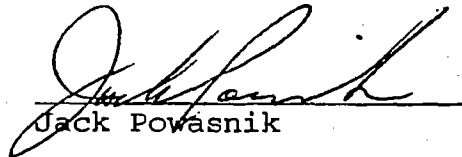
²¹ The exception is the judge's finding that MCC's violation of Section 77.216(d) involved moderate negligence. The judge should have found that the violation involved high negligence.

CERTIFICATE OF SERVICE

I certify that a copy of the Secretary's response
brief was sent by overnight delivery, on May 20, 2004, to:

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Jack Powasnik

U.S. Department of Labor

Office of the Solicitor
Division of Mine Safety & Health
1100 Wilson Boulevard
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June 15, 2004

By Federal Express

Richard L. Baker
Executive Director
Federal Mine Safety and Health Review Commission
601 New Jersey Ave. NW
Suite 9500
Washington, D.C. 20001-2021

Re: Secretary of Labor v. Martin County Coal Co. and
Geo/Environmental Associates, FMSHRC Docket Nos. KENT
2002-42-R, 2002-44-R, 2002-45-R, 2002-251, 2002-261,
and 2002-262

Dear Richard Baker:

I am enclosing the original and seven copies of the
Secretary's reply brief in the above case.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jack Powasnik".

Jack Powasnik
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cc: Marco Rajkovich, Esq.
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U.S. Department of Labor

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June 1, 2004

MEMORANDUM FOR MSH DIVISION ATTORNEYS AND
REGIONAL MSHA COUNSELS

FROM: W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation
Mine Safety and Health Division

WCS
✓

SUBJECT: Response Brief in Martin County Coal Corp.,
FMSHRC No. KENT 2002-42-R, etc.

Attached please find the response brief the Secretary filed in the above-captioned case on May 20, 2004. The case arose out of a highly-publicized impoundment failure in Kentucky in 2000. The brief contains material on the following issues:

- (1). The principles pertaining to plain meaning/agency deference analyses of statutory, regulatory, and plan provisions (pp. 11-14).
- (2). The principle that the placement or heading of a provision is not controlling and cannot overcome the plain meaning of the provision (p. 15).
- (3). The principles that courts review and defer to the authoritative interpretation of the agency, not the interpretation of agency employees, and that the action or inaction of agency employees cannot estop the agency (pp. 16-17, 24-25, 34-35).
- (4). The principle that, under the Mine Act, whether a violation occurred depends on whether a violative condition existed, not on whether a violative condition was detected (pp. 20-21).
- (5). The principle that a mine operator's level of negligence cannot be reduced by the operator's self-induced ignorance (p. 25).

(6). The principle that, when a statute defines a term, the statutory definition should be applied wherever the term appears (p. 28).

If you have any questions, please call Jack Powasnik or me at (202) 693-9333 or (202) 693-9350, respectively.

Attachment

U.S. Department of Labor

Office of the Solicitor
Division of Mine Safety & Health
1100 Wilson Boulevard
Arlington, Virginia 22209-2296



May 14, 2004

MEMORANDUM FOR MSH DIVISION ATTORNEYS AND
REGIONAL MSHA COUNSELS

FROM: W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation
Mine Safety and Health Division

WCS
✓

SUBJECT: Brief in Martin County Coal Corp.,
FMSHRC No. KENT 2002-42-R, etc.

Attached please find the opening brief the Secretary filed in the above-captioned case on April 16, 2004. The case arose out of a highly-publicized impoundment failure in Kentucky in 2000. The brief contains material on the following issues:

- (1). The circumstances in which a judge may grant a motion to dismiss before the completion of the plaintiff's case-in-chief (pp. 15-18).
- (2). The principles pertaining to plain meaning/agency deference analyses of statutory, regulatory, and plan provisions (pp. 18-32, 49-53).
- (3). The principle that the reasonableness of an agency's interpretation and the "reasonably prudent person" test for evaluating adequacy of notice represent separate and distinct concepts (pp. 32-35).
- (4). The principles that courts review and defer to the authoritative interpretation of the agency, not the interpretation of agency employees, and that the action or inaction of agency employees cannot estop the agency (pp. 35-36).
- (5). The principles pertaining to "unwarrantable failure" determinations (pp. 41-46).

If you have any questions, please call Jack Powasnik
or me at (202) 693-9333 or (202) 693-9350,
respectively.

Attachment