

December 9, 2009

Mr. Jeffrey Zients
Executive Chair
Council of Inspectors General on Integrity & Efficiency
C/o OMB
Eisenhower Executive Office Building
1650 Pennsylvania Ave., NW
Washington, D.C. 20503

Mr. Kevin Perkins
Integrity Committee Chair
Council of the Inspectors General on Integrity & Efficiency
C/o FBI
J. Edgar Hoover Building
935 Pennsylvania Ave., NW
Washington, D.C. 20535

Dear Messrs. Zients and Perkins:

On behalf of Public Employees for Environmental Responsibility (PEER), I am submitting the following complaint concerning wrongdoing to the Council of the Inspectors General on Integrity & Efficiency (CIGIE) concerning the U.S. Department of Labor Office of Inspector General, its employees and contractors. This complaint is submitted pursuant to the Inspector General Reform Act of 2008 (PL 110-409).

Background

The facts that give rise to this complaint are the following:

On October 11, 2000, a large Martin County coal impoundment, owned by Massey Coal Co., and under the jurisdiction of the Mine Safety and Health Administration (MSHA), failed and caused the largest environmental disaster in the eastern United States. The release of toxic oil slurry was larger than the *Exxon Valdez* oil spill.

Shortly after the Martin County impoundment failure, the Clinton administration assigned a team within MSHA to investigate. That team was reconfigured by the Bush administration before it could complete its work. One of its members, Jack Spadaro, filed whistleblower complaints that were investigated by the Labor Inspector General (IG).

The complaint concerned the handling of the accident investigation by MSHA and what was alleged to be the early termination of the investigation. Two employees--Jack

Spadaro, who initiated the IG investigation, and Tony Oppegard--both confirmed that MSHA was prepared to issue at least 14 citations, yet actually only issued three.

Attempts to obtain a copy of the completed Labor IG Memorandum of Investigation (MOI or “report”) on the Spadaro-Martin County allegations have yielded uneven results. In response to a 2003 Freedom of Information Act (FOIA) request, a highly redacted version of the report was released. In response to a 2009 FOIA request, a slightly less redacted version was released but the basis for withholding changed – even for what were in many cases identical sections.

Finally, a nearly complete version of the MOI was released on December 3, 2009 in response to a FOIA appeal of the 2009 denial. The final sentence of the released IG report reads:

“No evidence was uncovered to substantiate any allegations relating to MSHA’s Martin County Coal accident investigation.”

However, the report contains evidence that clearly support the allegations, including that:

- Charges against Massey Coal, the parent company of the Martin County impoundment operator, were watered down and narrowed. Many of the most serious charges were nixed by Bush appointees. One of the only two surviving charges was thrown out and the other had the penalty reduced to \$5,500. Significantly, the Obama administration is still withholding a crucial 3-page segment of the report concerning the most serious remaining charge brought against Massey;
- MSHA officials ignored warnings that the impoundment was unsafe. After the failure, MSHA specialists and an engineering firm were pressured to water down findings of agency complicity; and
- During the MSHA investigation, the investigative files were kept away from investigators who were asked to sign a report before being allowed to read it.

Summary of Request for Investigation

PEER is requesting that the CIGIE undertake three related inquiries;

1. Whether the Labor IG Memorandum of Investigation constituted an accurate and good faith account of the evidence assembled and whether the investigators interviewed all appropriate relevant witnesses.
2. Whether the decisions to withhold portions of the MOI complied with the Freedom of Information Act.
3. Whether the employment of individuals connected with the subject matter of the MOI as contractors reviewing the releasability of the MOI was appropriate.

Specific Allegations

1. Whether the Labor IG Memorandum of Investigation constituted an accurate and good faith account of the evidence assembled and whether the investigators interviewed all appropriate relevant witnesses.

The IG conclusion appears at odds with much of the evidence that it had gathered or that was readily available.

For example, one of Spadaro's main complaints was that MSHA District Manager Tim Thompson ended the evidence-gathering phase of the investigation early. Thompson told the IG he believed he was wrapping up when he took over from Opegard. However, Opegard told *Mine Safety and Health News* that when Thompson took over "We had only interviewed about half of the witnesses that Ronnie Brock [an MSHA investigator] and I had targeted for interview."

This statement by Opegard clearly conflicts with statements made by Tim Thompson, who is now a mining industry consultant. The IG report shows that it never questioned the lead investigator into the impoundment failure – Tony Opegard – who headed the investigation team until the day Bush was inaugurated.

Another of Spadaro's allegations to the IG was that a district manager was moved after complaints by operators.

The current Assistant Secretary of Labor for Mine Safety and Health, Joe Main, told the IG that Marvin Nichols, who headed MSHA's coal division at the time, told Main that Jesse Cole, the former district manager of MSHA's District 6, was removed from his position "because there were a lot of complaints from the coal operators about plans taking too long for approval under Cole's supervision." Nichols denied making this statement to Main. Either Nichols, or the current head of MSHA was not telling the truth, and the IG failed to determine who was making a truthful statement, or re-interview the witnesses to make a credibility determination.

While Cole may have applied for another position, the position he applied for was of a lesser rank than that of a district manager. Cole later became a district manager again for MSHA's District 4.

The IG never tried to sort out inconsistencies in witness testimony offered to the IG investigators. They did not credit one witness over another, or apparently go back to witnesses to ask why their testimony conflicted with other witnesses.

2. Whether the decisions to withhold portions of the MOI complied with the Freedom of Information Act.

This report was first requested under FOIA by *Mine Safety and Health News* in 2003. At that time the IG released a heavily redacted report. This report was shown to the nation on the TV news program “60 Minutes.”

A second request for the report by the same requestor was made on January 20, 2009. Kimberly Pacheco of DOL-OIG released a newly redacted report on January 23, 2009. The redactions are almost the same as the redactions in the 2003 version of the report, except several of the exemptions are different:

January 2009 Exemptions Not Listed in the 2003 Report

The redacted report sent in January 2009 to *Mine Safety and Health News* also has completely new FOIA exemptions that were not even presented in the 2003 redacted version of the report:

- Page 3: Information initially denied under (b)(2) and (b)(6) was later denied under (b)(7)(c).
- Page 4: Information first denied under (b)(2) and (b)(5) was later denied under (b)(7)(c), (b)(6) and (b)(5).
- Page 5: Information in paragraphs one and two was first denied under (b)(2) and (b)(6), and later denied under (b)(7)(c), (b)(6) and (b)(5). Information in paragraphs 5 and 6 was first denied under (b)(2) and (b)(5) and later denied under (b)(2), (b)(7)(c), (b)(6) and (b)(5).
- Page 6: Information was first denied under (b)(2), (b)(5) and (b)(6) and later denied additionally under (b)(7)(c).
- Page 7, page 8: this is the first time this information is being denied under (b)(7)(c).
- Page 9: In the fifth paragraph in the 2003 report, information was redacted with no corresponding number or bracket showing a redaction. In 2009, for the first time a redaction of information has been noted (under (b)(2)). Also on page 9, information was denied for the first time under (b)(7)(c) and (b)(5).
- Page 10: The first redaction was made in 2003 under (b)(6) but later the information was denied under (b)(5).
- Page 11: Information was withheld in 2003 under (b)(2) but in 2009 was denied under (b)(7)(c).
- Page 13: Information previously withheld under (b)(2) was later denied under (b)(7)(c) and (b)(5).
- Page 14: Information previously withheld under (b)(2) and (b)(5) was later withheld under (b)(6) and (b)(7).
- Page 15: Information previously withheld under (b)(2) and (b)(5) was later denied under (b)(6) and (b)(7).
- Page 16: Paragraph 2 was previously withheld under (b)(6) was later denied under (b)(5) and (b)(7)(c). Paragraph 5 was previously withheld under (b)(6) but was later withheld under (b)(2), (b)(5) and (b)(7)(c).
- Page 17: Paragraphs 2 & 3 was previously withheld under (b)(2) and (b)(5) but later withheld additionally under (b)(2). Paragraph 5 was previously withheld under (b)(2) but was later withheld under (b)(5) and (b)(7)(c).

- Page 18: Previously withheld under (b)(2), later withheld under (b)(5), (b)(6) and (b)(7)(c).
- Page 19: Previously withheld under (b)(2) and (b)(6), later additionally withheld under (b)(5) and (b)(7)(c).
- Page 20: This information was previously withheld under (b)(2) and (b)(6) but later withheld under (b)(5) and (b)(7)(c).
- Page 22: This information was previously withheld under (b)(6) but later withheld under (b)(5) and (b)(7)(c).
- Page 23: This information was previously withheld under (b)(2) and (b)(6) but later withheld under (b)(7)(c).
- Page 25: This information was previously withheld under (b)(2) and (b)(6) but later withheld under (b)(5) and (b)(7)(c).

These changes from 2003 to 2009 in the bases for exemption under FOIA suggest that most of these withholdings were arbitrary, inconsistent and not justified under the law.

December 2009 Report Shows prior Bases for Withholding Were Unjustified

Now that many of the previously withheld sections have been released, it appears that the claimed exemption did not apply.

First, the (b)(2) exemption that Ms. Pacheco cited were completely unjustified. The (b)(2) exemption does not cover matters of greater public interest. It is unquestionable (given the news coverage it has attracted, if for no other reason) that the Martin County IG report was of high public interest. Moreover, the material is contained in an IG report, not in an internal MSHA.

In addition, Ms. Pacheco made 39 redactions under the authority of (b)(5) (many of which were initially made under (b)(2) in 2003). The (b)(5) exemption protects “inter-agency or intra-agency memorandums of letters which would not be available by law to a party ...in litigation with the agency.” However, the information redacted did not even remotely fit this exemption. For instance, on pages 3 and 4 of the report, there seem to be redactions regarding how the impoundment plan was approved. Such information would not fall under the (b)(5) exemption. On page 5, there appears to be information regarding Spadaro’s letters of concern, which were given to the press by Spadaro – again matters that could not conceivably fit under (b)(5).

Ms. Pacheco also withheld material under the (b)(6) exemption for personal information affecting an individual's privacy. This exemption permits the government to withhold all information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” There is no “unwarranted invasion of personal privacy” in this case. The testimony of all government employees is not subject to this exemption, as demonstrated in previous MSHA internal investigations released to the public.

December 2009 Report Still Contains Inappropriate, Unsupported Redactions

The latest version of the MOI still redacts three pages of material under “Mine Seals Construction” citing exemption (b)(7)(c). Yet the IG explains how the entire section of the report on mine seal construction is personal information that should be protected.

We believe that this section details critical information about requirements of the impoundment sealing plan, as related to the underground seals, which were never conveyed to the proper MSHA enforcement personnel, according to MSHA’s own internal investigation entitled “Internal Review of MSHA’s Actions at the Big Branch Refuse Impoundment Martin County Coal Corp., Inez, Martin County, Ky., Jan. 21, 2003.” The MSHA internal review, a public document, stated the District manager, Carl Boone, did not following standard operating procedures. It is public record that Martin County had injected slurry into the underground mine workings without joint approval of MSHA and the state, and this slurry could have impacted the ventilation seals that failed. MSHA’s Technical Support did not consider the impoundment sealing plan, and this is discussed on pg. 11 of MSHA’s internal review. If decisions were made contrary to existing standards, why would that be covered by exemption (b)(7)(c)?

The seal information is particularly important since there are impoundments today that are built over abandoned mines with just these types of seals used at Martin County in the underground workings.

In addition, the IG still refuses to release the names of the Triad employees who participated in the investigation (p. 21 redaction). Yet this information is available in Federal Mine Safety and Health Review Commission (FMSHRC) records, and records from the state of Kentucky. Moreover, the entire Triad report to MSHA, along with Triad's conclusions, is in a report dated March 30, 2001, is a public record, and is in the public domain. See: <http://www.osmre.gov/resources/newsroom/News/Archive/2002/030402%20Report/appendix4.pdf> . The Triad report is also available through the Federal Mine Safety and Health Academy.

On page 2, second paragraph, first line, it is noted that Larry Wilson was the engineer who visited the impoundment after the 1994 breakthrough, and made the nine recommendations that would have prevented future use of the impoundment. Wilson believed the impoundment was unsafe, and should not have been used unless his nine engineering recommendations could be met. This is public knowledge. Yet, throughout the rest of the report, Wilson’s name was redacted.

Larry Wilson’s name appears in many cases before the FMSHRC. He is one of MSHA’s top engineers with years of experience. His opinions, which are based on facts he gathers, are important in understanding mine safety issues. One would believe that a senior engineer’s opinions would outweigh the opinion of a less-experienced engineer, and therefore including his name in documents sheds light on how this agency functions. In addition, Wilson’s opinions and recommendations in this case were overridden by a district manager who was not a mine engineer. If there is another engineer involved, then

that engineer's name should be included, again, so the public knows who the engineer is and how decisions were made.

The Labor IG also redacted names of witnesses who appeared before FMSHRC Judge Zielenski on January 16, 17, 18, and 23, 2007 in a hearing in Pikeville. Names that the IG redacted are in the public record of this case, including names of the impoundment accident review team Pat (Theodore) Bentoney (impoundment specialist for MSHA) and Harold Owens (authorized representative who investigated the impoundment failure). Both of these MSHA employees were witnesses on behalf of MSHA.

In summary, application of FOIA by DOL IG personnel in this matter appears to be been contrary to both law and common sense. The ability of the public to judge the integrity of the work performed by the DOL IG is negatively affected by improper withholding of official information.

3. Whether the employment of individuals connected with the subject matter of the MOI as contractors reviewing the releasability of the MOI was appropriate.

DOL Solicitor Christopher Durso informed *Mine Safety and Health News* editor Ellen Smith on Oct. 9, 2009 that Tom Mascolino, who is now a FOIA contractor for MSHA, was reviewing the IG report before it was released to *Mine Safety and Health News*. Mr. Mascolino was part of the citation process against Martin County coal impoundment failure and was involved in some of the allegations lodged by Mr. Spadaro.

Having Mr. Mascolino review and make release recommendations concerning a case in which he was personally involved is inappropriate and creates the appearance of conflict.

In closing, PEER requests that the Integrity Committee of the CIGIE undertake an inquiry to answer the three complaints of wrongdoing that PEER has made against the Labor Department Inspectors General, its staff members and contract employees.

The importance of this request rests not only in removing a blot on the history of MSHA. According to MSHA reports, there are more than 200 coal slurry sites in the U.S. sitting atop underground mines, the same situation that lead to the Martin County blow-out. In addition, there are 400 slurry impoundments whose failure could cause loss of lives.

Our concern about the public safety implications underlying this issue is not academic. Following the Martin County case, there have been six serious mine disasters:

- The Jim Walters Resources Mine disaster in which 13 miners were killed;
- The Sago Mine disaster in which 12 miners were killed;
- The Aracoma Mine disaster in which 2 miners were killed;
- The Darby mine disaster in which 5 miners were killed;
- The Crandall Canyon Mine disaster in which 6 miners and 3 mine rescuers were killed; and

- The Quecreek Mine accident in which 9 miners were trapped in a flooded mine, but rescued through a borehole.

These tragedies will continue to recur until MSHA addresses underlying causes, and the place to start is in Martin County. Failure to correct the record in the Martin County disaster will perpetuate a dangerous record of official indifference and irresponsibility.

For these reasons, PEER asks you to undertake this investigation so that these calamities can never happen again.

Thank you for your attention to this matter. If PEER can provide you with any additional information to aid your inquiry, please do not hesitate to contact me.

Sincerely,

Jeff Ruch
Executive Director