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May 22, 2015

POCAHONTAS COAL COMPANY, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/13 Mine ID: 46-08878 Mine: Affinity Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475 Mine: Affinity Mine

ORDER GRANTING IN PART & DENYING IN PART THE SECRETARY'S MOTION FOR A PROTECTIVE ORDER

Before: Judge Miller

These cases are before me as a result of a contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. These cases are part of a large number of dockets that are related to the notice of pattern of violations ("NPOV") received by Pocahontas in October, 2013 and the subsequent 104(e) enforcement documents issued at the Affinity Mine. The parties have engaged in discovery in all of the dockets related to the NPOV, including written discovery and depositions. On two earlier occasions the parties brought discovery disputes before the Court, both of which primarily involved questions regarding the need for, and scope of, depositions. Pocahontas has determined that it needs further information about the decision to issue the NPOV at the mine and, as a result, served a notice to the Secretary for the deposition of a number of the Secretary's attorneys. On April 13, 2015, the Secretary filed a Motion for Protective Order after receiving the notice and Pocahontas filed a Response in Opposition to the motion on April 16, 2015.

The Secretary represents that, after Pocahontas completed the deposition of Kevin Stricklin, Administrator for Coal Mine Safety & Health, it served a formal notice of deposition

upon the Secretary seeking to depose Heidi Strassler, Associate Solicitor for Mine Safety and Health, Jason Grover, Trial Counsel for the Mine Safety and Health Division of the Office of the Solicitor, Douglas N. White, Associate Regional Solicitor for the Arlington Regional Office of the Solicitor, and Robert S. Wilson, MSHA Counsel for the Arlington Regional Office of the Solicitor at an agreed upon date. The notice also requested each deponent to bring certain documents to aid in their testimony. The Secretary objected to providing any of the attorneys for deposition and filed this Motion for Protective Order.

After the motion was filed and all written responses were received, the parties participated in a conference call with the Court to discuss the issues and determine if a resolution could be reached regarding the motion. Following discussion and argument, it was determined that a resolution could not be reached, and that the Secretary could not provide a non-attorney to supply the information sought by Pocahontas. The information discussed during the conference call was transcribed and a copy provided to the parties. In issuing this order, I rely not only upon the motions filed, but also information learned during the conference call, as well as information in the case file, including two motions for summary decision and their attachments, a number of which are depositions. For reasons set forth below, I **GRANT** in part and **DENY** in part the Secretary's motion and allow discovery with restrictions.

I. BACKGROUND

On October 24, 2013 MSHA issued Written Notice No. 7219153 (the "NPOV," or the "notice") in which it notified Pocahontas that an alleged pattern of violations existed at Pocahontas' Affinity Mine. Subsequently, MSHA issued multiple 104(e) orders to the mine, based upon the NPOV. In challenging the "e" orders, Pocahontas also challenges the validity of the NPOV. The depositions sought in this case primarily relate to the issuance of the notice.

Over the years the Secretary has promulgated several rules regarding the Mine Act's pattern of violations provision and, in March 2013, implemented the current rule. 30 C.F.R. § 104. The rule provides that, at least once each year, MSHA will review the compliance and accident, injury and illness records of mines to determine if any mines meet the pattern of violations criteria. The eight criteria to be addressed during the review are listed in the standard. MSHA initially performs a computer generated screening of its database using two sets of "screening criteria" that are related to the standard and are detailed on the MSHA website. These screening criteria, which address the number and types of violations at mines, speak to the first six of the eight criteria named in section 104.2. A mine must meet the screening criteria on MSHA's website in order to be considered for the issuance of a NPOV. Here, the screening was conducted in September 2013 and included information and data for nearly 14,000 mines for a review period from September 1, 2012 through August 31, 2013. As a result of the initial screening, three mines, including the Pocahontas Affinity Mine, were chosen for further review to determine if the criteria for a pattern of violations were met.

Once a mine meets the initial screening criteria, the district manager for the district in which the mine is located is notified that the mine has met the screening criteria. Subsequently, the district manager notifies the mine that it is being considered for a notice of pattern of

violations. In this case, the Affinity Mine was notified of its potential for a NPOV by David Mandeville, the District Manager for District 4. Mandeville met with the mine and, after the meeting, the mine provided a written response outlining why it should not be considered for a NPOV. Following the meeting, and after receipt of the letter from Pocahontas, Mandeville completed a mitigating circumstances form and submitted it to the MSHA POV review panel for a review of the mitigating circumstances.

The MSHA POV panel, in its review, is charged with addressing the final two criteria listed in the mandatory standard, which are, other information that demonstrates a serious safety or health management problem at the mine, and mitigating circumstances. 30 C.F.R. §§ 104.2 (7) and (8). Here, the panel, which was chaired by Jay Mattos, the Director of the Office of Assessments, Accountability, Special Enforcement and Investigation, conducted its review and generated a memo listing the panel's findings. The memo was sent to Kevin Stricklin, the Administrator for Coal Mine Safety and Health, and advised Stricklin that the panel recommended that Pocahontas be placed on a pattern of violations. Stricklin then determined that, given the initial screening and the subsequent findings of the POV panel, in his discretion, the mine should receive a NPOV. However, at some point prior to Stricklin's final decision, the body of the notice was drafted with two lists of citations and orders that make up the two alleged patterns of violations included in the NPOV. Stricklin next sent the NPOV, along with a cover letter, to the district office to present to the mine in order to notify the mine that it had been placed on a pattern of violations and, thereafter, inspections would be conducted as required by the Act's pattern of violations provision and the Secretary's regulations implementing the provision.

Based upon the Secretary's regulations and procedures identified on MSHA's website, as well as the record before me in this case, there are three distinct levels to determining whether a mine is subject to a NPOV. First, MSHA conducts a purely quantitative data review of all mines in the country. Second, the POV review panel conducts a review of the mitigating circumstances and other factors, and, based on that review, makes a recommendation to the appropriate MSHA Administrator. Third, and finally, the appropriate Administrator conducts a final review of the materials presented to him, determines if a pattern is shown, and ultimately decides if a pattern is demonstrated by the citations and orders detailed in the proposed notice.

I find that a mine operator may challenge the validity of a NPOV in at least two ways. First, an operator may challenge the NPOV by establishing that, at one or more of these three levels, the Secretary engaged in an abuse of discretion. Second, the operator may challenge whether the citations and orders identified in the NPOV properly describe a pattern of violations. The depositions sought here are primarily for the purpose of determining whether the agency abused its discretion when selecting the citations and orders listed in the body of the notice of pattern violations, and categorizing those citations and orders into groups which allegedly demonstrate two patterns of violations; one related to roof control and one related to emergency preparedness.

In this case, the mine operator propounded interrogatories to the Secretary, deposed Jay Mattos about the screening criteria and the POV panel, and deposed both the district manager, David Mandeville, and the assistant district manager, David Morris, about the mitigating factors,

their involvement in the process, and the preparation and presentation of the POV letter to the mine. Finally, the mine deposed Kevin Stricklin, the Administrator for Coal, regarding the entire POV process, including the selection of the 42 citations and orders named in the NPOV and the grouping of those enforcement documents into two patterns. Mattos, Mandeville and Morris each stated in their depositions that they were not involved in the final step of the process that included selecting and grouping the 42 enforcement actions. Stricklin conducted the ultimate review and decision to issue the NPOV, and he was involved in the selection of the 42 citations and orders only after the attorneys for the Solicitor's office chose which of the enforcement actions to include and in what categories. Stricklin, in his deposition, explained that a CLR and field office supervisor may have been involved in the selection and grouping of the enforcement actions listed in the NPOV but, primarily, the selection was made by attorneys in the Office of the Solicitor. During a conference call with the parties, the Secretary confirmed that the selection was made by attorneys from the Office of the Solicitor, and asserted that taking the deposition of the "point person" in the MSHA district office, who was either the CLR or the field office supervisor, would not yield any useful information about the selection of the 42 enforcement actions. The depositions sought by Pocahontas are aimed at discovering the facts surrounding the selection and grouping of the 42 enforcement actions listed in the NPOV. That selection and grouping was conducted not by an MSHA employee, but by an attorney for the Solicitor's office.

II. PARTIES' ARGUMENTS

The Secretary, in his motion for protective order, argues that Pocahontas' proposed depositions exceed the scope of discovery and improperly seek to discover privileged information. The Commission's procedural rules limit discovery to relevant, non-privileged materials. Deposing opposing counsel is strongly disfavored and, here, the information sought regarding how the citations and orders listed in the NPOV were selected is not relevant to the validity of the NPOV. Rather, the validity of the NPOV depends solely on whether the violations listed in the notice establish a pattern of violations, and does not depend upon the process the agency went through to select those violations. Moreover, any of the desired information that could be obtained from the attorneys would necessarily inquire into the thought processes and opinions of those individuals and, accordingly, is protected by the deliberative process privilege. Further, the documents, memoranda and email that Pocahontas seeks to have the named individuals produce are tangible things that were prepared in anticipation of litigation by MSHA and the Office of the Solicitor, and are therefore protected under the work product rule. Finally, the Secretary argues that the attorney client privilege protects the communications between MHSA and the Office of the Solicitor regarding the review of facts and data when weighing whether to issue the NPOV, all of which was done in anticipation of this litigation.

Pocahontas, in its response in opposition, states that, during the deposition of Stricklin, it learned that attorneys from the Office of the Solicitor had factual knowledge as to why MSHA issued the NPOV and, as a result, it must be allowed to depose the attorneys named in the notice of deposition. There is no prohibition against deposing opposing counsel when that counsel has engaged in fact finding. Here, the information sought by Pocahontas from the attorneys, facts regarding what was utilized in the selection and grouping of the 42 enforcement actions in the NPOV, is relevant because it goes to the larger issue of the validity of the NPOV. Moreover, as

made clear by the depositions of MSHA personnel, there are no other means to obtain this information other than to depose opposing counsel. The information sought is crucial to the case given that it goes directly to the issue of the validity of the NPOV and the question of whether its issuance was arbitrary and capricious. Pocahontas argues that the information it seeks is purely factual, does not involve opinions, recommendations or deliberations between the Office of the Solicitor and its client, MSHA, and, as a result, is not protected by the deliberative process privilege. Additionally, even if the attorney work product rule protects the additional materials requested of the potential deponents, Pocahontas has a substantial need for those materials given that the attorneys are the only individuals who possess that factual knowledge. Further, the attorney client privilege does not protect the attorneys from deposition given that they have made themselves fact witnesses and the information sought by Pocahontas does not involve a protected communication between attorney and client. In the alternative, Pocahontas argues that the Secretary has waived both the work product rule and attorney client privilege through the previous disclosure of emails related to the NPOV and Stricklin's deposition testimony that individuals from the Solicitor's office have knowledge as to the 42 enforcement actions and the categories identified in the NPOV.

III. ANALYSIS

I find that the factual information sought by Pocahontas is relevant to the case and falls within the proper scope of discovery in these proceedings. Pocahontas has raised the issue of whether the Secretary abused his discretion in issuing the NPOV to the Affinity Mine and a part of that analysis includes the procedure by which MSHA determined what citations and orders issued at the mine demonstrate a pattern. Therefore, the information sought is relevant to the issues raised by the mine. I find further that the privileges asserted by the Secretary do not protect the factual information sought by Pocahontas.

Commission Procedural Rule 56(b) states that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). A judge may "limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." *Id.* at 2700.56(c).

The Secretary argued in two previous discovery-related motions that the information Pocahontas sought to discover was not relevant and was privileged. In each of those instances I issued an order finding that while internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV were privileged, facts related to what information was considered in issuing the NPOV may be relevant, were discoverable, and were not privileged. The depositions were then limited to the facts known by each witness. The same is true in this instance.

As is evident from the response in opposition filed by Pocahontas, the mine seeks only factual information related to a very specific piece of the POV process. The Secretary has provided no evidence that suggests Pocahontas intends to ask questions related to the deliberation process. "The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition[s] altogether." *Rail Link, Inc.*, 20

FMSHRC 181, 182 (Jan. 1998) (ALJ). While I agree with the Secretary that internal deliberations leading up to the decision to issue the NPOV, including the weight given to the different pattern criteria, and thoughts and opinions of the agency's employees are privileged, that protection does not extend to factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions in the NPOV.

I have previously made clear that the issue of the validity of the NPOV is properly before the Court in these proceedings and the parties may obtain discovery of relevant, non-privileged material related to that issue. Moreover, I have noted that, as part of its contest to the validity of the NPOV, Pocahontas argues that the issuance of the NPOV was arbitrary and capricious and that MSHA did not follow its own rules. I have explained that in order for the Court to make a determination on this argument, it is necessary to know which facts MSHA considered when making its determination to issue the NPOV. Included in the determination to issue the notice to Pocahontas, is the factual information the Secretary considered regarding the selection and grouping of the 42 enforcement actions listed in the NPOV.

On April 1, 2015 Pocahontas, after taking the deposition of Kevin Stricklin, the MSHA Administrator for Coal, first learned that it was the attorneys in the Solicitor's office, not MSHA personnel, who selected the 42 enforcement actions to include in the NPOV. Stricklin also explained that the two groups of patterns contained in the notice were chosen by the attorneys. Subsequently, Pocahontas sought to have the Secretary supplement his answers to previous interrogatories and identify all individuals, including each attorney in the Office of the Solicitor, with knowledge as to why the mine received the NPOV. The Secretary rejected the request, stating that the information was not relevant or reasonably calculated to lead to the discovery of admissible evidence. Moreover, the Secretary asserted that the information provided by attorneys from the Office of the Solicitor would be protected by multiple privileges. Pocahontas then delivered notices of deposition to Heidi Strassler, Jason Grover, Robert Wilson and Douglas White, all attorneys in the Office of the Solicitor who have represented MSHA or otherwise been involved in this matter. During the course of a telephone conference, the Secretary agreed that it was the attorneys from the Solicitor's office who determined which citations formed a pattern and which should be included in the notice provided to the mine. However, the Secretary did not indicate which of the named attorneys, if any, were involved in those decisions.

The Secretary, citing *Hickman v. Taylor*, 329 U.S. 495, 516 (1947), argues that taking the deposition of an attorney is strongly disfavored. The Secretary argues that the rationale for keeping attorneys out of litigation is based on the recognition that allowing the deposition of counsel on relevant, non-privileged information can interrupt pending litigation. That disruption however, is more evident in cases where a party is represented by only one or even two attorneys who are deeply involved in preparing and litigating the case. Here, the Secretary is represented by several attorneys from the Solicitor's office and several more have been involved in the pattern of violations issues. Therefore, the risk of interruption or disruption caused by the deposition of only one of the Secretary's attorneys is minimal at best. Both parties acknowledge that the Eighth Circuit's decision in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) is instructive as to when opposing counsel may be deposed. There the court determined that deposing an attorney should be limited to circumstances where the party seeking the deposition has shown that (1) no other means exists to obtain the information than to depose

opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Id.* at 1327.

Based on the Secretary's representations, the first and third elements of the *Shelton* test are easily met. In this case the Secretary was given the opportunity to provide an agency person who could attest to the facts surrounding the choice of the citations listed in the NPOV. However, the Secretary ultimately conceded that no one at MSHA could provide that information because it was the attorneys in the Office of the Solicitor who made the decision. As a result, given that counsel for the Secretary selected and grouped the enforcement actions included in the NPOV, there are no other means for Pocahontas to obtain the factual information surrounding the choice of the 42 enforcement actions listed in the NPOV. Moreover, and as discussed above, the information is crucial to Pocahontas' argument that the Secretary has abused his discretion and that the NPOV was invalidly issued. Accordingly, I find that the first and third elements have been met.

With regard to the second *Shelton* element, I find that certain information sought by Pocahontas regarding this discrete part of the NPOV process is both relevant and non-privileged. The Secretary, in addressing the second element of the *Shelton* test, argues first that the information sought by Pocahontas is irrelevant. I disagree and find that the information sought by Pocahontas regarding what was considered when selecting and grouping the citations and orders listed in the NPOV is relevant. Second, I find that the facts, including who, what, where and when, as they relate to the selection of the citations and orders to be included in the written notice, are not privileged information.

Mine operators have the right to understand the pattern of violations process as it applies to them. Given that an operator may challenge the issuance of a NPOV by showing that the Secretary, in issuing the NPOV to the operator, abused his discretion and acted in an arbitrary and capricious manner, factual information about what the Secretary considered when selecting and grouping the enforcement actions listed in the NPOV goes directly to the question of whether the Secretary abused his discretion. The mine operator is entitled to learn facts such as when the decision was made about the citations and orders that form the pattern, where the decision was made, who was involved, and what documents and information were before the decision-makers. Even if Stricklin made the final decision to accept the NPOV and the patterns described therein, as alleged by the Secretary, the mine is entitled to understand the process that was used to determine what information was provided to him and who was responsible to provide that information. Stricklin understood that the attorneys for the Secretary played a substantial role in selecting the enforcement actions to be listed and the Solicitor agreed that it was attorneys, not agency employees, who made the decision for the agency. MSHA had only a "point person" involved in the process, and in the opinion of the Solicitor deposing that person would yield little information as to the selection process. Therefore, the mine operator is correct that it has not had access to the facts underlying this particular step of the NPOV process.

The Secretary, in addressing the second element of the *Shelton* test, argues not only that the information is irrelevant but also that the information sought by Pocahontas is protected by the deliberative process privilege, work product rule, and attorney client privilege. However, as more clearly spelled out below, there are facts that can be disclosed without seeking information

that is protected by these privileges. In addition, the Secretary waived his right to assert certain privileges when attorneys for the Solicitor's office operated beyond their role as advisors to the agency and instead took agency action on their own.

The Secretary first asserts that any information which could be obtained from the named attorneys about why certain enforcement actions were included in the NPOV would inquire into the thoughts, process and opinions of those individuals and is, therefore, protected from discovery by the deliberative process privilege.

The deliberative process privilege is intended to protect the "'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992) (quoting *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)). In order to assert the privilege, the material sought must be "pre-decisional" and "deliberative." *Id.* at 992. A communication is "pre-decisional" when it is made prior to the adoption of the agency policy or decision. *Id.* A communication is "deliberative" if it is actually "related to the process by which policies are formulated." *Id.* However, purely factual material that does not expose the decision making process is not protected. *Id.* at 993 (*citing Exxon v. Doe*, 585 F. Supp. 690, 698 (D.C. 1983)). A court charged with determining whether to recognize the privilege must balance the public interest in protecting the information with the litigant's need for that same information. *See Clinchfield Coal Co.*, 23 FMSHRC 347 (Mar. 2001) (ALJ) (Citing *United States v. Nixon*, 418 U.S. 683 (1974); *8 Wright and Miller*, Federal Practice and Procedure § 2019 at 167-169 (1970)).

I find that factual information relied upon by the Secretary, his attorneys, and MSHA in selecting and grouping the 42 enforcement actions contained in the NPOV is not protected by the deliberative process privilege. Here, while the selection of the 42 citations prior to the final decision to issue the NPOV may be pre-decisional, the mine is not seeking the thought process or analysis of that decision. Instead, it seeks the facts relied upon in coming to the decision to include the enforcement documents. Undoubtedly much of the communication between the attorneys and MSHA included thoughts, process, and opinions of those individuals as to why they selected, and how they grouped, the 42 enforcement actions. However, in order to form those thoughts and opinions, and select and categorize the 42 enforcement actions, the attorneys had to rely on facts before them. Accordingly, while many of the communications between the Secretary and his counsel are protected by the deliberative process privilege, facts regarding what information the attorneys considered when selecting and grouping the 42 enforcement actions included in the NPOV are not protected by this privilege.

The Secretary next asserts that the work product rule protects against the disclosure of materials in the possession of the attorneys from the Office of the Solicitor related to why Pocahontas received the NPOV.

In *Asarco Inc.*, 12 FMSHRC 2548, 2557-2558 (Dec. 1990) the Commission explained that the work product privilege is a "qualified immunity against discovery." A party may withhold otherwise discoverable materials if the materials are (1) documents and tangible things;

(2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that party's representative. *Id.* at 2558; Fed R. Civ. P. 26(b)(3). However, even where litigation is contemplated, if the document was generated in the ordinary course of business, rather than for purposes of litigation, then the document is discoverable. *Asarco Inc.*, 12 FMSHRC 2548, 2558-2559 (Dec. 1990). Moreover, the party seeking discovery of the materials may be able to overcome the protection if it can show a substantial need for the materials in order to prepare its case and is unable, without undue hardship, to obtain the substantial equivalent of those materials by other means. *Asarco Inc.*, at 2558.

I find that that the work product rule applies to some of the materials sought, but that, with limitations, other of those materials are discoverable. The notice of deposition requests the deponent to produce the "entire file, including but not limited to, any and all notes, documents, memoranda, e-mail correspondence, and any other correspondence . . . which relates in any manner to his knowledge as to why . . . " the mine received the NPOV notice. The request further seeks any document used to refresh memory. The request is very broad and seeks documents that go beyond the action of choosing the 42 citations and orders to list in the notice. Therefore, my order is limited to any fact contained in a document that relates to the selection of the citations and orders to include in the NPOV issued to Pocahontas along with facts related to the selection and inclusion of the two categories of pattern.

Pocahontas' request for production of files, notes, documents, memoranda, emails, and other correspondence involves documents and tangible things and, therefore, step one of the test is met. The question of whether the documents were prepared in anticipation of litigation is a more difficult one. The Secretary argues that, because the attorneys were involved in the review of the 42 enforcement actions listed in the NPOV, litigation was clearly anticipated. However, Pocahontas argues that litigation could not have been contemplated because, at the time the 42 enforcement actions were selected and put into categories, no 104(e) order had been issued which would have allowed the mine to contest the validity of the underlying NPOV.

I reject the Secretary's argument that simply because attorneys were involved the materials sought were prepared in anticipation of litigation. The involvement of attorneys cannot, by itself, support the conclusion that litigation was anticipated. Otherwise, the simple "involvement" of attorneys could be used to shield most any document or tangible thing from discovery. I also reject the argument of the mine that because no 104(e) orders had been issued, the documents could not have been generated in anticipation of litigation. Instead, I find that there may be documents included in the list that were in fact generated in anticipation of litigation, but others that were not. Here, the NPOV itself is not a pleading or charging document. Rather it is a notice generated in MSHA's ordinary course of business. Undoubtedly, some of the documents sought by Pocahontas from the attorneys were generated in the ordinary course of business leading up to the decision to issue the NPOV, but the actual drafting of the NPOV was simply a notice, like any other notice drafted by MSHA. I cannot agree that by virtue of the fact that MSHA was drafting an enforcement document, it was done in anticipation of litigation. The same would be true for every citation, order, safeguard or other notice that MSHA is required to prepare. The Secretary's decision to involve the attorneys, and ultimately have them make the decisions regarding what to include in an MSHA document under these particular circumstance, cannot now be used to shield facts from Pocahontas. As a result, I find

that materials which include facts regarding the process of choosing what to list in the notice are not protected.

Even if the work product rule had applied to all materials, I find that Pocahontas has a substantial need for facts regarding what data and information were considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions. I agree with Pocahontas that if the attorneys in the Office of the Solicitor who selected and grouped the enforcement actions in the NPOV were the only individuals involved in that activity, then they may have made themselves fact witnesses to this matter. However, the Court is not willing to grant Pocahontas carte blanche to access all information in the materials sought, especially with regard to any thoughts and opinions concerning the issuance of the NPOV. As the Commission has stated, if the court finds that materials should be produced, it is incumbent upon the court to "'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" *Asarco Inc.*, at 2558 (quoting Fed. R. Civ. P. 26(b)(3)). While the Court agrees that Pocahontas should have access to the materials sought, access should only extend to certain factual information regarding the selection and grouping of the enforcement actions.

With regard to Pocahontas' argument that the Secretary has waived protection under the work product rule, I agree in part. To the extent that the Secretary has already disclosed certain materials, inadvertently or otherwise, those materials are no longer protected under the work product rule. However, with regard to materials which have not yet been turned over, and involve information beyond facts relied upon by the attorneys and MSHA in selecting and grouping the 42 enforcement actions, the Secretary has not waived work product or other protection.

Finally, the Secretary asserts in his motion that the information sought in the depositions is subject to the attorney client privilege. The attorney client privilege protects the confidential communications between attorneys and their clients. It is designed to "encourage full and frank communication between attorneys and their clients" and "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). However, the privilege is not without its limits. As the Court in *Upjohn* explained, the privilege extends only to communications and does not protect disclosure of the underlying facts. *Id.* at 395-396.

First, there is some question whether there was any privileged advice given between attorney and client since the Solicitor apparently took over the process and made the decisions without discussing those decisions with a client. Next, it is fair to assume that the Office of the Solicitor was provided with some facts from its client, or otherwise sought out facts on its own, in order for its attorneys to select the 42 enforcement actions that it believes demonstrate a pattern of violations. Accordingly, I find that facts relied upon by the attorneys when selecting and grouping the 42 enforcement actions are not protected by the attorney client privilege. Obviously, as generally discussed above in the context of the other privileges, communications between MSHA and the attorneys for the Office of the Solicitor which involve internal thoughts, opinions, conclusions, and legal theories remain privileged and are not subject to discovery. While Pocahontas also argues that the Secretary has waived the attorney client privilege, I

disagree. The privilege remains intact for communications which have not already been disclosed and involve thoughts, opinions, conclusions, legal theories, etc.

In addition to the arguments raised in the motion for protective order, the Secretary also argued during the telephone conference call with the parties that, here, the attorneys' decision to include certain citations and orders, as well as the groupings of those enforcement actions, in the NPOV is one of prosecutorial discretion. In making the argument the Secretary asserted that, just as a prosecutor has discretion regarding what to include in an indictment in a criminal matter, the attorneys for the Secretary have discretion when deciding which enforcement actions to include in the NPOV. I disagree. I find that the NPOV process is not akin to an indictment or the filing of a lawsuit. Rather, the NPOV is a notice from the agency that the mine has problems with its safety record and that MSHA has determined it is necessary to provide more scrutiny in order to help the operator become compliant and provide a safer workplace. While a NPOV may anticipate some litigation, it is not a pleading or other charging document. Even if it were, it must be based upon facts and those facts should be shared with the entity being put on notice. While I agree that the agency may seek advice from its attorneys in the Office of the Solicitor, here the actions of at least some attorneys went beyond advice and amounted to decision making regarding the contents of the NPOV. For that reason, and the reasons discussed above, the request for a protective order is **denied in part and granted in part**.

IV. ORDER

I am mindful of the disfavor with which courts order the deposition of opposing counsel. Accordingly, while the Secretary asserts that the deposition of the CLR and field office supervisor mentioned by Stricklin in his deposition will not yield information that is of use to Pocahontas, the Secretary is nevertheless **ORDERED** to produce for deposition, within the 14 days of the date of this order, the person from MSHA who was most closely involved in the selection and categorization of the 42 enforcement actions included in the NPOV. Pocahontas may question the witness about factual information that was relied upon when selecting and grouping the 42 enforcement actions in the NPOV, where the selection and grouping took place, when it took place, who was involved in the selection, and what facts, if any, were relied upon in making the selection. Internal thoughts, opinions, and conclusions remain protected and are not discoverable.

In the event Pocahontas is unable to learn the facts its needs from the deposition of the CLR or field office supervisor, Pocahontas is **ORDERED** to, within 7 days of the deposition, propound interrogatories to the Secretary for the sole purpose of discovering facts related to the selection of the citations and orders that were listed on the notice of pattern of violations issued to the mine. The mine may include a request for production, and any document that is subject of an objection shall be submitted to the Court within ten days of the date of the objection for an *in camera* review. All documents may be redacted so that they include only facts. The interrogatories will be answered within ten days by an attorney of the Secretary's choosing who

has direct knowledge of the facts Pocahontas seeks to discover. The designated attorney for the Secretary is **ORDERED** to, within 10 days of service of the interrogatories, respond, in affidavit form, and include a description of their involvement in the selection of the enforcement documents for the NPOV. The same facts that were discoverable in the deposition remain discoverable in the interrogatories. The attorney who answers the interrogatories will, from that point forward, be a fact witness in this matter and will NOT be able to represent the Secretary for the remainder of this case or in any other case involving the subject NPOV. In the event Pocahontas does not obtain the information it needs, it may file a motion within 10 days of the date of service of the Secretary's interrogatory response. If Pocahontas does not file such a motion, the parties are **ORDERED** to, within 20 days of the date of service of the Secretary's interrogatory response, supplement the record for the pending motions for summary decision with any new information learned from the depositions and interrogatories that is relevant to its arguments in this case.

Margaret A. Miller
Administrative Law Judge

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