

## Upper Big Branch Mine Explosion and the Federal Response: Part Two

### How will federal actions ultimately impact West Virginia's coal mining industry?

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[Donnie L. Adkins II](#), [Jeffrey A. Foster](#)

This is part two in a series discussing the UBB mine explosion, the federal response, the potential response and the possible impact on West Virginia's coal industry. There has already been a considerable federal response in the short time since the accident but there will likely be much stronger and more aggressive action by the federal government. The article will provide a brief summary of relevant information concerning the UBB accident and summarize the ensuing federal response.

As has been widely reported, on April 5, 2010, at 3:27 p.m., there was an explosion at Massey Energy's UBB underground coal mine located in Montcoal, Raleigh County, West Virginia. Twenty-nine miners were killed in the explosion that occurred about 1,000 feet underground.

On April 26, Massey Energy released a letter to its stakeholders. The letter advised that the UBB mine had ceased operations pending a determination of the cause of this explosion and that it was unclear when it would resume production. It also indicated that company personnel along with federal and state investigators would be investigating the accident. Since then, three teams of investigators have been involved in a methodical inspection of the mine in an effort to determine what went wrong. These teams represent the U.S. Mine Safety and Health Administration (MSHA), the State of West Virginia, and Massey Energy. As of mid-August, that investigation was on-going and no conclusions as to the cause of the accident had been reached.

Notwithstanding the as-yet unresolved investigation, Congress and the federal government have responded to the accident in a number of different ways directed at coal mine operators and MSHA itself. On May 6, former Senator Robert C. Byrd and Senator Jay Rockefeller proposed legislation requiring publicly-traded mining companies such as Massey Energy Co. to report "serious" notices of mine safety violations issued by state and federal inspectors in their public filings with the Securities and Exchange Commission (SEC) in order for it to be tracked by both shareholders and industry analysts. The bill also imposes penalties if this information is not fully disclosed. The legislation was amended into H.R. 4173, the Wall Street Reform and Consumer Protection Act, which was signed into law by President Obama on July 21.

In addition to the foregoing, on May 13, the U.S. Senate added \$22 million in funding for MSHA to H.R. 4899, the supplemental budget bill. This funding is designed to assist the agency in clearing a backlog of over 16,000 company appeals of notices of violations issued by the agency's inspectors. Included in the funding package is \$18.2 million for the solicitor's office at MSHA to prosecute those appeals and \$3.8 million for the Review Commission to hear them. That supplemental budget proposal was signed by President Obama on July 29.

On May 14, the U.S. Department of Justice (DOJ) acting through the U.S. Attorney's Office for the Southern District of West Virginia sent a letter to the U.S. Secretary of Labor confirming the fact that the DOJ is currently conducting an investigation into possible criminal violations of federal law associated with the UBB

explosion. The letter asked that MSHA request that any Administrative Law Judge (ALJ) designated to hear future claims relating to administrative actions arising out of the UBB explosion stay such proceedings until any criminal matters are resolved. The DOJ is concerned the civil cases may interfere with the criminal investigation. On May 20, MSHA motioned the ALJ assigned to this case to stay the civil proceedings while the federal criminal investigation is being conducted. On June 2, the ALJ issued an Order granting in part and denying in part the agency's motion to stay. On June 30, the Federal Mine Safety And Health Review Commission (FMSHRC) issued an Order staying all civil proceedings.

On June 24, the U.S. Labor Department Office of Inspector General issued a report critical of MSHA's practices in connection with the inspection and oversight of coal mines. The Inspector General asserted that MSHA failed to subject coal mines that had been cited for repeated mine safety violations to stricter oversight based upon a presumed disregard for the well-being of its miners associated with those violations. Specifically, the Inspector General found that in 2009, MSHA removed ten mines from a list of "chronic" violators for inappropriate reasons, such as its own lack of resources. In response, Labor Secretary Hilda Solis said that the current violator system needs to be scrapped, and a new one be put in place that is focused "on protecting miners". The report and Secretary Solis' comments signal an intention on the part of both the Department of Labor and MSHA to more aggressively enforce existing statutes and regulations as well as seek enhanced powers, the logical consequence of which will be an increase in the number of notices of violations issued by MSHA as well as increased penalties and efforts to enjoin continued operations at locations where it is determined that such action is warranted.

In addition to the foregoing, three additional major pieces of federal legislation were introduced in July for the purpose of ostensibly strengthening mine safety laws in response to the UBB explosion:

- H.R. 5663 the "Robert C. Byrd Miner Safety And Health Act Of 2010 was introduced by Representative George Miller from California on July 1 and was passed out of the House Judiciary Committee on July 29 and placed on the Union Calendar for consideration by the full House of Representatives. Among other things, this legislation, if enacted, provides for independent investigations of mine accidents involving three or more deaths by a panel appointed by the Secretary of Health and Human Services. It also amends existing mine safety laws by broadening its provisions dealing with a pattern of noncompliance with the statute, to include any violation of the Act, not just violations involving "mandatory health or safety standards." With this change, MSHA would have more expansive authority to order withdrawals from mines where a pattern of violations or accidents is deemed present. Moreover, enhanced civil penalties can be imposed against operators for any violations of the Act where a pattern of such violations is deemed present, even if those violations do not involve mandatory health or safety standards. It also provides for civil penalties of not less than \$10,000 or more than \$100,000 for retaliation against workers reporting such violations. Those penalties double in the event of repeated retaliatory actions. In addition, criminal convictions for willful violations of the provisions of the Act are increased to \$1 million and up to five years in prison for a first offense as well as a criminal penalty for knowingly retaliating against an employee who reports safety violations to MSHA of up to 10 years in prison. This bill also provides for civil and criminal penalties for officers, directors, and agents who knowingly authorize, order, or contribute to the occurrence a violation of the Act. Finally, this Act, if adopted in its current form, would abrogate the "at-will employment" doctrine at coal mines for hourly employees and prohibit the discharge of such employees without reasonable job-related grounds based on a failure to satisfactorily perform job duties.
- H.R. 5788 the Mine Safety Accountability and Improved Protection Act was introduced by Congresswoman Shelley Moore Capito from West Virginia on July 20. The legislation honors the Nation's fallen miners by requiring improved mine safety practices and compliance in order to prevent future mine accidents. The bill was referred to the House Committee on Education and Labor where it is presently pending.
- S. 3671 the Senate Mine Safety And Health Act Of 2010 was introduced by Senator Jay Rockefeller from West Virginia on July 29. This legislation is virtually identical to Representative Miller's bill that

was introduced on July 1. Its intended to improve compliance with mine and occupational safety and health law, empower workers to raise safety concerns, prevent future mine and other workplace tragedies, establish rights of families of victims of workplace accidents, and address other mine safety issues. The legislation was referred to the Senate Committee on Health, Education, Labor and Pensions where it is presently pending.

These bills will not be considered until after Labor Day at the earliest because Congress is in recess until that time. It is unclear which of these three bills (if any) will ultimately become law and what form the final version will take. Of the three bills, Congresswoman Capito's legislation is the least onerous while creating requirements that will result in maximum safety for West Virginia's coal miners. That said, the likelihood of a Democrat controlled Congress passing this bill in lieu of bills sponsored by their members is questionable. As a consequence, the National Mining Association (NMA) has signaled it supports some of the proposed reforms suggested by Congressman Miller and Senator Rockefeller with certain caveats and modifications. However, there are other important issues the NMA feels should be addressed where the legislation is silent. Finally, there are several provisions outlined in these two bills, the NMA believes could be problematic for the West Virginia coal mining industry without making coal mining tangibly safer. The primary areas of concern are:

- Mine safety progress could be threatened by overly punitive provisions;
- Mine safety would not be advanced by additional MSHA workforce authority;
- Mine safety and health will not be improved by penalty provisions that are not commensurate with the severity of the violation;
- Misallocation of safety resources will weaken safety efforts and results; and
- Transparency can be undermined by rule-making.

Many of the NMA's concerns regarding the legislation are shared by the West Virginia Coal Association (WVCA). In addition to the NMA concerns, the WVCA believes the current legislation is problematic for the following reasons:

- Many provisions are very onerous and punitive across industry;
- The legislation is too expansive, containing unnecessary and questionable provisions;
- The legislation empowers MSHA to impose greater enforcement action;
- Many of the provisions have little to do with the UBB accident; and
- Language of the bill doesn't match the stated intention;

Most recently, on August 16, MSHA issued a press release discussing new guidelines for industry compliance with ventilation regulations. MSHA released four new program information bulletins (PIBs) pertaining to ventilation issues in underground coal mines. According to the press release, the purpose of these PIBs is to remind mine operators, miners' representatives, MSHA enforcement personnel and other interested parties about mandatory coal mine safety standards relative to inadequate ventilation, intentional changes in the mine's ventilation system, maintaining face ventilation control devices, and maintaining methane monitors in permissible and proper operating condition for mining equipment. The press release also indicated, the release of these PIBs was prompted by testimony at a recent field hearing regarding the UBB explosion.

Overall, the final form of the federal mine safety legislation will largely determine the level of impact the federal government's actions will have on West Virginia's coal mining industry. The most prudent course of action would, of course, be for Congress to await the findings of the various groups investigating the cause of the UBB explosion and address those specific causes if appropriate through targeted legislation. Absent those findings, actions currently being taken on the legislative and regulatory front on both the state and federal levels run the risk of addressing perceived rather than real issues threatening miner safety. If that

occurs, the industry will be negatively impacted without any real or tangible improvement in the safety of working conditions of miners.

Stay tuned-we will update you periodically regarding new developments.