

U.S. DEPARTMENT OF LABOR

AND

**FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION**

Case Backlog Reduction Project Joint Operating Plan

September 7, 2010

Background:

Pursuant to Chapter 7 of H.R. 4899, the “Supplemental Appropriations Act, 2010,” (Public Law No. 111-212), the Department of Labor (DOL) has received an appropriation of \$18,200,000 and the Federal Mine Safety and Health Review Commission (FMSHRC or Commission) has received \$3,800,000. These funds are available for one year from the date of enactment of the authorizing legislation (July 29, 2010) for the purpose of reducing the existing case backlog before the FMSHRC, and other purposes related to mine safety.

In DOL, the funds are made available through the “Departmental Management” account to the Office of the Solicitor (SOL) with authority for the Secretary to transfer funds to the Mine Safety and Health Administration (MSHA).

Pursuant to Senate Report No. 111-188 accompanying the enacted legislation, “[t]he Committee requests that the Department and FMSHRC submit ... a [joint operating] plan not later than 30 days after enactment of this act, and provide quarterly reports thereafter on the status of activities identified in the plan. . . .” The Department has engaged in discussions with FMSHRC to develop the joint plan, which is comprised of two sections describing the operating plan as it will be implemented in each agency.

Executive Summary

As of August 2010, approximately 66,000 MSHA violations are pending before FMSHRC that were contested on or after October 1, 2007, through February 28, 2010. Of these, DOL and FMSHRC assume that about 3,000 citations recently have been or will be approved for settlement. Therefore, the total backlog is assumed to be about 63,000 citations or about 10,500 cases. This backlog is the result of the increased contest rate since 2006. Violations issued after February 28, 2010 are not included and are considered to be the current MSHA caseload. Additionally, those cases considered priority litigation matters by SOL (i.e., all accident-related, flagrant, pattern and statutory cases, such as those arising under Section 105(c) of the Act) will not be included in the portion of the targeted backlog addressed by this operational plan. Since this backlog does not constitute the entire caseload pending before the Commission the agencies have agreed to describe the defined backlog as the “targeted backlog.” This joint operational plan for the period July 29, 2010 through July 29, 2011 is based on the assumption that DOL and FMSHRC will receive additional appropriated funds for this purpose in FY 2011 and FY 2012, as this will clearly be a multi-year effort.

The agencies began the development of this joint operating plan to attack the targeted backlog by reviewing the operational and production capacities and statistics of DOL and FMSHRC, and making tentative projections based on numerous assumptions. Through a process of consultation and the development of a greater understanding of each other’s operational requirements and necessities, the resulting operating plan represents a joint effort to attack the targeted backlog in a coordinated and complementary fashion. Such coordination with the Commission includes SOL’s agreement to provide the Commission

with a list of all docketed cases that are within the targeted backlog.¹ The additional staffing configurations and case processing improvements described below are the core of the effort to reduce this targeted backlog to the greatest extent possible during the 12-month period currently funded.

Each agency has continued to use its own databases, and has developed its production assumptions based thereon; however, there is broad agreement on each agency's projected level of case disposition over the 12-month period. DOL projects that the additional capacity enabled by the funding will result in the disposition of between about 18,000 and 22,000 of the total number of about 63,000 citations in the targeted backlog. Conversion of the citations to cases (since the average case has approximately six citations) results in the number of cases disposed of totaling between approximately 3,000 and 3,667 cases. FMSHRC projects that it will be able to dispose of between 3,300 and 3,500 additional cases during the 12-month period. Conversion of FMSHRC's assumed number of cases to citations results in a range of citations disposed of during the 12-month period of between about 19,800 and 21,000.

These ranges of production assumptions significantly overlap, and confirm that the agencies have reached a general consensus regarding what can be accomplished in this 12-month period. These assumptions suggest that the overall retirement of the entire targeted backlog will take between 2.9 and 3.5 years, at the current level of additional resources.

¹ The process of recording new litigation cases into the Commission's record keeping system is "docketing." When the Commission is notified of the mine operator's intent to seek a hearing, it assigns a docket "number" that includes a reference to the geographic location of the operator (e.g. WEVA for West Virginia). When the case has been given a docket number, it is considered an active litigation matter pending with the Commission. Because SOL has used the date of the issuance of each violation as the basis for determining which matters are in the targeted backlog, in order to ensure that those matters equate to the docketed cases, SOL is providing the issuance dates for docketed cases, to ensure that both agencies are tabulating the same matters as the targeted backlog.

Section I
Department of Labor: Office of the Solicitor (SOL) and Mine Safety and Health Administration (MSHA)

Allocation of the Appropriation

Of the \$18,200,000 provided to DOL, SOL and MSHA will use \$15,391,750 for backlog reduction. SOL will retain \$10,940,750 and \$4,451,000 will be provided to MSHA to undertake this project. Of the \$10,940,750 for SOL, up to \$400,000 will be utilized for enforcement litigation regarding backlog cases before the Commission that are not assigned to the “targeted” backlog. The Secretary has notified Congress of the decision to transfer a total amount of \$7,259,250 from the Departmental Management line for “Legal Services” to MSHA. Of that transferred amount, \$2,808,250 is to cover expenses thru December 31, 2010, for the Upper Big Branch Mine disaster investigation, and \$4,451,000 is for the backlog reduction project.

Fund Deployment

Office of the Solicitor:

Backlog Reduction: \$10,940,750 (up to \$400,000 non-targeted backlog)

Mine Safety and Health Administration:

Backlog Reduction:	\$ 4,451,000
Upper Big Branch Investigation:	\$ 2,808,250
Total Transfer:	\$ 7,259,250

Project Description

SOL considers the targeted backlog reduction efforts to be a standalone project, separate from the other litigation and legal services currently provided to MSHA and all other DOL agencies. As indicated above, SOL is utilizing \$10,540,750 and MSHA is requesting \$4,451,000 to undertake the targeted backlog reduction effort (concentrated on cases filed before FMSHRC between October 1, 2007 and February 28, 2010).

The \$15,391,750 in total DOL funding for backlog reduction will be utilized by SOL and MSHA to achieve the following two purposes: 1) reduce the backlog of FMSHRC cases; and 2) prioritize the backlog reduction efforts to focus on the worst offenders.

The successful execution of the backlog reduction project also requires significant case management changes at FMSHRC, which are also discussed in the FMSHRC portion of this joint report. Consistent with the Congressional intent for this project, SOL is working with MSHA to obtain necessary information about each docketed case that is part of the

backlog reduction project. The dedicated SOL staff in each SOL region will use this information to identify dockets containing a large percentage of violations that present “significant and substantial”² or “unwarrantable failure”³ allegations. Such violations will be considered “priority” matters.⁴ Once such dockets are identified, SOL will inform FMSHRC in a manner consistent with the applicable procedural rules, so that these matters may be properly prioritized and handled in a manner that is in accordance with the mandate to focus resources on those matters.

Additional Staffing for SOL and MSHA

The resources required for this project consist of additional temporary or term full-time equivalent (FTE) or other staff and support services necessary to process, prepare and litigate the backlog of cases before the Commission. To develop this program efficiently and effectively, the Department is hiring up to about 78 staff for SOL and approximately 15 for MSHA. DOL does not expect all SOL employees that are hired to be onboard for the entire period of the availability of these funds. Therefore, our production assumption is that, over the course of the twelve months of this project, SOL will field the equivalent of approximately 70 FTEs, an “FTE” being equivalent to a full-time staffer on duty for the entire period.⁵ SOL personnel will be attorneys and necessary support staff, and will be located in SOL’s regions and National Office, as follows: Region 3 (Philadelphia/Arlington) up to 25 staff, Region 4 (Atlanta/Nashville) up to 25 staff, Region 7 (Kansas City/Denver) up to 25 staff, and in the National Office 3 staff. SOL initiated the hiring of attorneys in late August 2010, and will bring the remainder of staff onboard in September-October 2010. The object class breakout of SOL’s “FTE Object Class Expenditures” is included in a chart attached at the end of this plan as Attachment A.

MSHA plans to hire or contract approximately 15 staff for this project and meet the additional overtime requirements for existing staff. MSHA plans to field up to three technical advisors for each of the three SOL regional offices, for a total of nine staff. The agency will also field MSHA clerical staff for this project in each of the six Metal and Nonmetal district offices, for a total of six staff. These additional staff, as well as existing

² A significant and substantial violation (“S&S”) is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.”

³ “Unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. The Commission has found that such failure is “characterized by ‘indifference,’ ‘serious lack of reasonable care,’ ‘reckless disregard,’ or ‘intentional misconduct.’”

⁴ All violations contained in the backlog, as defined, have already been segregated into dockets by FMSHRC. It would be inefficient to attempt to reorganize the violations into new dockets containing only “significant and substantial” or “unwarrantable failure” allegations. Addressing dockets with the highest percentage of such allegations will accomplish the goal of efficaciously disposing of high priority matters without creating an administrative quagmire.

⁵ SOL employee time spent on this project will be tracked through SOL’s SOLAR and TD systems. Cases that are part of the backlog will be tagged by including a specific identifier in their titles, to easily identify these matters and assure proper recording of time. Reports illustrating human resource allocation to the project will be generated at regular intervals to demonstrate the project’s progress.

staff in the Coal district offices, will act as a litigation liaison for the backlog reduction project, provide assistance and technical expertise, as well as assist SOL in evaluating the merits of individual cases. They will also research information and assemble documents from Conference Litigation Representative (CLR) files and other MSHA sources, such as accident histories and reports, mine plans, history of methane liberation, similar violations at the involved mine or within the District Office purview, reports of Section 110 investigations, or related financial information. MSHA staff for this project in the six Metal and Nonmetal district offices will be new FTEs, while in Coal districts the staffing will be with current employees on an overtime basis, due to the fact that Coal already has adequate clerical support to handle the requirements of the position after an initial spike in activity during the transitional phase of moving cases from the District offices to the SOL Regional offices. A more detailed explanation of MSHA's hiring plan is attached as Attachment B at the end of this Joint Report. Attachment C is a chart showing the expected timeline for DOL hiring for this project.

Because of the nature of the funding and the nature of the work that MSHA must perform in connection with the backlog reduction plan, some of the MSHA work must be performed by existing staff, primarily MSHA inspectors who will be required to support litigation efforts by consulting with SOL on the facts of cases and appearing as witnesses for depositions and hearings. Because of the training time for inspectors (2 years), their other duties cannot be assumed by new FTEs, given the timeframe of the backlog reduction project. Consequently, a substantial portion of MSHA's expenditure will go toward overtime for the inspectorate so that MSHA can both support the backlog project and meet its mandate to regularly inspect surface mines two times per year and underground mines four times per year.

A more detailed description of the relative placement of SOL and MSHA staff by location and category is included in the attached spreadsheet.

Administrative Actions to Facilitate Disposal of Violations

In addition to increasing communication between FMSHRC and SOL to prioritize litigation matters, SOL and FMSHRC have agreed upon the following administrative actions to facilitate the disposition of violations contained in the backlog:⁶

- **Mandatory Disclosures** – procedures are being developed for the mandatory disclosure of certain categories of documents or the names of non-miner witnesses to facilitate settlement or, when necessary, the hearing process.
- **Judge-Facilitated Settlement Conferences** – FMSHRC's administrative law judges will facilitate the settlement process, using methods similar to a mediator or employed in other judicial settings. Optimally, these settlement conference

⁶ SOL considers a citation to be disposed of once SOL personnel have completed all required actions for submission to FMSHRC, whose administrative law judges will then enter the appropriate order to finally resolve the matter.

judges will not be the same judge who presides at hearing, if settlement negotiations do not result in resolution of the matter.

- Calendar Calls – FMSHRC administrative law judges will schedule a series of cases at the same hearing time and location and dispose of each matter one after the other. The matters will be consolidated based on such factors as: cases contested by a single operator involving a particular mine; cases where one attorney represents the operator for all dockets; cases involving the same inspector(s).
- Simplified Proceedings – FMSHRC has proposed a new rule to be codified at 29 C.F.R. 2700.1, *et seq.*, governing “simplified proceedings.” FMSHRC and SOL will work to use these streamlined procedures as much as possible in addressing the backlog.

SOL will also seek to streamline the processing of cases within the backlog by employing the Federal Rules of Civil Procedure as a guide for SOL’s motion and discovery efforts before the Commission’s Administrative Law Judges (ALJs). For example, SOL attorneys will file motions in certain cases requesting the judge to issue an order requiring the disclosure of documents by the parties early in the proceedings, and/or to limit the scope of discovery.

DOL Production Assumptions

The most recent full fiscal year of actual statistics for SOL’s FMSHRC caseload is FY 2009. In FY 2009, SOL concluded a total of 3,856 MSHA litigation matters, and utilized approximately 53 FTEs to accomplish that production. We note that SOL’s definition of matters concluded or “disposed of” refers to matters that SOL has completed processing. Those matters may remain pending with the Commission. The average number of citations per litigation matter handled by SOL is approximately six citations per matter. Therefore, in FY 2009, SOL estimates that its attorneys disposed of matters involving approximately 23,000 citations (3,856 matters x 6 citations = 23,136 citations). Consequently, SOL disposed of approximately 434 citations per FTE in FY 2009.

The staffing of this project is designed to have experienced permanent or rehired annuitants provide the management and leadership for each SOL project office. The newly hired term/temporary attorney FTE will vary in grade from GS 11 through GS 14, and will generally have litigation or other relevant experience. SOL intends to keep the most complex and challenging matters with its existing permanent staff that is already proficient at handling cases before FMSHRC. If the 70 FTEs were on board and fully trained as of the date of enactment of the enabling legislation, SOL assumes that these FTEs could dispose of approximately 26,000 citations during the 12-month operation of the project. However, because of the necessary lead time for implementing the project, substantial requirement for training and other start-up efforts, SOL has concluded that the more realistic assumption is that the additional staff will be able to dispose of between

approximately 3,000 and 3,667 cases (or approximately 18,000 to 22,000 citations) during the 12-month period. At that rate of disposition, assuming the same FTE level and the other estimates, SOL projects that the complete removal of the targeted backlog of 63,000 citations would take approximately 2.9 to 3.5 years.

The citation case backlog will be divided geographically, with each of the three designated SOL regional office being assigned roughly the same percentage of the total number of cases. SOL anticipates that cases will need to be transferred between the regional offices to equalize the caseload. For example, the Denver region may take backlog cases from SOL's San Francisco, Dallas, and Chicago regions.

We expect that the number of cases disposed of per quarter will increase as newly hired staff gain training and experience and additional staff members are hired. Accordingly, the quarterly breakdown for disposing of citations is as follows:

<u>QUARTER</u>	<u>ASSUMED NUMBER OF CITATIONS DISPOSED</u>
Q4 FY10 (Partial)	560 – 680
Q1 FY11	4,260 – 5,210
Q2 FY11	4,925 – 6,030
Q3 FY11	4,925 – 6,030
Q4 FY11 (Partial)	3,330 – 4,050
TOTAL:	18,000 – 22,000

Section II Federal Mine Safety and Health Review Commission

A. Background

As the result of the provisions included in H.R. 4899, FMSHRC is receiving an appropriation of \$3,800,000 that will be available for one year from the date of enactment of the authorizing legislation. These funds were designated to reduce FMSHRC's current case backlog. As of August 10, 2010, the FMSHRC caseload had 17,805 cases, which it considers its "general backlog."

DOL's and FMSHRC's definition of the targeted backlog is a subset of FMSHRC's general backlog, and consists of cases that were filed between October 1, 2007 and February 28, 2010.⁷ As noted above, DOL estimates that the average number of citations per case is six.

In terms of defining how a citation or case is disposed of, FMSHRC considers a case to be disposed of at the trial level once a judge issues a decision. DOL considers a citation to be disposed of once SOL personnel have finished all required actions for submission to FMSHRC (such as the filing of a settlement motion or a post-trial brief). Therefore, there will always be some differences between SOL and FMSHRC statistics regarding the number of matters that have been disposed of. However, over time the SOL dispositions will generally be reflected in FMSHRC dispositions.

This section of the report outlines FMSHRC's staffing plan, case processing targets, case prioritization system, and the administrative actions it will take to facilitate the disposal of cases.

B. Additional Staffing for FMSHRC

Well before the final passage of the supplemental appropriation bill, FMSHRC made extensive efforts to recruit new staff whose positions would be funded by the supplemental appropriation and obtain office space to house the additional staffers. With these additional funds, it will hire 17 new employees and open two new temporary offices to accommodate its expanded staff. The attached chart (Attachment D) indicates the breakdown of new hires. Attachment E indicates hiring dates.

Offices for the additional staff will be in two new locations: (1) Rosslyn, Virginia, in offices leased from the DOL's MSHA (which occupies the remainder of the space pursuant to a lease with GSA) and (2) Pittsburgh, Pennsylvania (where FMSHRC will lease space from GSA). There are offices for eight staff members in Rosslyn and for nine staff members in Pittsburgh. The Pittsburgh office also has a hearing room.

⁷ A small percentage of cases in this subset will not be counted by DOL as part of the targeted backlog, as they are complex cases that will not be handled in the stand-alone project described above.

FMSHRC has taken the following actions to hire staff funded by the supplemental appropriation:

Judges

FMSHRC anticipates hiring six additional FTEs judges in three categories:

- Permanent judges, referred to by the Office of Personnel Management (OPM) as “incumbent judges,” who may be expected to remain with FMSHRC indefinitely;
- Senior judges (judges who have retired from federal service) for 12 to 18 month terms (pursuant to 5 U.S.C. § 3323(b)(2) and 5 C.F.R. § 930.209);
- Loaned judges from various agencies, obtained via the ALJ Loan Program administered by the OPM (pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208).

From the above categories, FMSHRC will be hiring:

- One incumbent judge
- The equivalent of three full-time senior judges (two full-time senior judges and two half-time senior judges)
- The equivalent of two full-time judges from the ALJ Loan Program.

On May 6, 2010, FMSHRC wrote to the OPM requesting the loan of 12 ALJs to assist in reducing its case backlog. OPM responded affirmatively, and five agencies (the Department of Housing and Urban Development (HUD), the Federal Trade Commission (FTC), the Occupational Safety and Health Review Commission (“OSHRC”), the Environmental Protection Agency (EPA), and the U.S. Postal Service (USPS)) have consented to loaning judges to FMSHRC (two from OSHRC and one from each of the other agencies) on a temporary, intermittent basis. Pursuant to communications received from OPM, these agreements are valid through September 30, 2010, and are subject to an expected extension through FY 2011. The Federal Communications Commission has also agreed to loan one judge on a temporary, intermittent basis through September 30, 2011, subject to a possible extension for FY 2012. Although it is currently unclear how many cases the seven loaned judges will adjudicate, FMSHRC estimates that they will serve as the equivalent to two full-time judges. Each judge will initially be assigned 100 cases after the memorandum of understanding with the loaning agency is signed. The production capacity of the loaner judges can be evaluated after one quarter of activity to understand what can be expected from this category of judges.

FMSHRC sent memoranda of understanding to the six agencies on August 16, 2010. The two judges from OSHRC have been sent Commission cases for adjudication.

In regards to the training of these new judges, FMSHRC held a Mine Act training course for the new hires who have little or no Mine Act experience (which is the case for most of the new judges). It has also been evaluating a proposal to provide training to all of its judges in high volume case management.

Law clerks

Law clerks are attorneys generally hired at the GS-11 level who provide support to the ALJs. FMSHRC hired six law clerks on a limited term basis of two years (moving towards a 1-to-1 ratio between judges and clerks). The clerks started on August 30, 2010. Clerks assigned to Rosslyn will work at FMSHRC's Washington, D.C. office until the Rosslyn space is available. The Pittsburgh clerks will tele-work until that office is available.

The clerks are vital to the efficient trial level adjudication needed to reduce the case backlog. The judges, who each have a docket of at least 700 cases, are highly dependent on the clerks to communicate with the parties and their attorneys, assist in the disposition of settlements, and draft decisions. The clerks are particularly essential due to the high volume dockets the judges must manage and the aging of the cases.

Legal assistants

Three new legal assistants will be hired on a limited term basis under the supplemental appropriation, allowing each of the six new judges to share a legal assistant with one other judge.

Docket clerks

Although no additional clerks for FMSHRC's docket office will be hired with funds from the supplemental appropriation, FMSHRC intends to hire seven contract docket clerks using funds from its FY 2010 budget. Two were hired on August 30, 2010. The remaining clerks are expected to be hired by September 30, 2010. These additional clerks will be needed to handle the increased work flow in the docket office generated by the influx of new cases and by the new judges. (One or two of the docket clerk positions may be utilized as additional legal assistants for the new judges.)

The importance of hiring additional docket clerks cannot be overstated. For example, docket clerks process cases when they are first filed, prepare and mail any pre-assignment and assignment orders, and process settlement orders. Until FMSHRC institutes an electronic filing system, additional docket clerks are needed to handle the pleadings received in each case and to perform the tasks which must be completed before a judge is even assigned to a case. For example, each year several hundred cases are settled before assignment. These cases are reviewed by the Chief Judge, and processed and mailed by

the Docket Office. In addition, several hundred cases annually are in default status before assignment. They are also processed and mailed by the Docket Office.

Accordingly, FMSHRC anticipates hiring seven contract docket clerks with unobligated funds from the FY 2010 budget. These contractors should facilitate the assignment process, which includes pulling information from case files for the Chief Judge's review as he decides how to assign cases, entering data into the case tracking system, creating assignment orders, and mailing the orders to the parties. As evidence of the benefits of docket clerks, in FY 2009, 437 cases were assigned, on average, per month. FMSHRC hired five contract docket clerks in October 2009 - the beginning of FY 2010 - and the average jumped to 808 assignments per month for FY 2010 (through the end of July). Specifically, from October 2009 through March 2010 - the months during which the contractors were employed - 899 cases were assigned, on average, per month. However, after the contracts ended, the average number of assignments per month decreased to 672.⁸ If cases are not assigned in an expeditious manner, they cannot be disposed of quickly.

Senior Executive Service position

Pursuant to the Congressional mandate to hire a Senior Executive Service ("SES") level individual, FMSHRC advertised this position on July 6, 2010. The SES staffer will supervise and oversee the new staff hiring, the development and execution of the plan to reduce the general case backlog, and the implementation of an electronic case filing system. Because insufficient applications were received, FMSHRC extended the application deadline to August 13, 2010. However, no new applications were received. It anticipates that one candidate will be interviewed within the next month.

FMSHRC has consulted with both the Office of Management and Budget ("OMB") and OPM about enlarging the candidate pool. OPM has informed FMSHRC that it can publicize the limited term SES opportunity through one of its listservs, which is available to agencies participating in the Executive Resources and Development Program. (The Executive Resources and Development program provides training to federal managers at the SES level and to those who intend to apply for SES positions). FMSHRC will also circulate an announcement presenting the SES position as an opportunity for a detail from another federal agency. This will be sent through the Small Agencies Council ("SAC") community listserv. Lastly, the Bureau of Public Debt (which provides FMSHRC with human resources support) will advertise the SES detail announcement through USAJobs, although it is not typically used to publicize SES positions that involve details from another agency.

Attorney advisor

Under the supplemental appropriation, FMSHRC plans to hire one additional attorney for our Office of General Counsel (OGC) (which currently has six attorneys). This will be a

⁸ The contracts ended at the beginning of April 2010 for all but one of these contract employees.

term appointment. The OGC, among other things, has the lead role in handling cases that have been appealed to the five FMSHRC Commissioners. Because of the recent increase in appeals and the expectation that many more appeals will be filed in the future, an additional attorney advisor is needed. The OGC attorneys also perform other duties (such as ethics counseling, review of financial disclosure forms, equal employment opportunity programming) which will increase as the size of the FMSHRC staff expands.

C. Case Processing Targets

Based on a straight-line assumption from past experience, FMSHRC could assume that the additional staff resulting from this project would dispose of an additional 2460 cases in the 12-month period. However, it is estimated that the settlement rate of targeted backlog cases will be higher because the targeted backlog has fewer complex cases. Consequently, assuming that the Solicitor's office files 900 – 1000 additional settlement motions during this one year period (resulting in a total of 7,300 – 7,400 settlement motions), FMSHRC projects that it should be able to dispose of 3,300 - 3,500 additional cases (rather than 2,460).⁹ However, this focus on settlements will require transferring resources that would have been devoted to hearings and the subsequent preparation of decisions.

With the additional 3,300 – 3,500 dispositions enabled by the increase in staff hired with funds from the supplemental appropriation, FMSHRC anticipates that its total number of case disposals from July 29, 2010 through July 29, 2011 will be 10,040 - 10,240 cases. It is estimated that the general backlog (not limited to the targeted backlog of all matters filed between October 1, 2007 and February 28, 2010) at the end of that period will be 16,680 -16,880. Without the supplemental funding, it is estimated that 6,740 cases would have been disposed of in that same 12-month period, leaving a general backlog of 20,180 cases as of July 29, 2011.

The six new judges (and to a certain extent the judges who began working for FMSHRC in May 2010) will be subject to a learning curve, and the estimated 3,300 – 3,500 additional dispositions take this into account. It is also important to understand that the target could be affected by the Secretary of Labor's prioritization of cases.

D. Case Priorities

FMSHRC's Office of Administrative Law Judges generally prioritizes cases involving fatalities, injuries, flagrant violations, emergency response plans, and discrimination complaints. As explained below, calendar call cases (involving specific operators or specific geographic areas) will also be prioritized. All other cases are prioritized by the date the initiating pleading is filed.

⁹ This assumes that most, if not all, of the settlement motions received are fully justified.

DOL has engaged in discussions with FMSHRC to jointly address the prioritization of cases. As mentioned previously, the Solicitor's Office will inform FMSHRC in a manner consistent with FMSHRC's applicable procedural rules of dockets containing priority cases (those with large percentages of violations with "significant and substantial" and/or "unwarrantable failure" allegations). FMSHRC judges will give priority to such cases, with consideration to the Secretary's prosecutorial discretion and the due process rights of the parties and to the adversarial nature of these proceedings.

E. Administrative Actions to Facilitate Disposal of Cases

1. Global Settlements and Calendar Calls

FMSHRC is exploring various techniques to increase the number of dispositions through global settlement conferences. Essentially, this concept requires grouping a large number of cases by operator, mine, and/or law firm, and issuing an order requiring the Secretary and the representative of the operator to appear via teleconference or in person to identify those alleged violations that can be settled. The concept also envisions the judge playing a more activist role in assisting the parties to reach mutually agreeable settlements. Violations that cannot be settled at the conference will be set for trial at a future date either before the judge conducting the calendar call or another FMSHRC judge.

It is anticipated that the resulting settlements will be presented and approved on the record during the global settlement conference. The written decisions approving the settlements will be issued subsequently and will reference detailed transcripts of the settlements. In this way, the written decisions can accommodate the requirements of Commission Rule 69 (requiring a decision approving a settlement to be in writing and to contain reasons or bases for approving the settlement) and still be processed with significantly less time and administrative effort.

FMSHRC has reemployed a former Chief Judge (who served from 1982 until 2000) as a consultant to familiarize the current judges with the concept of global settlement conferences as a tool that can more efficiently move a significant number of review and penalty cases. The disposition of a significant number of relatively less complex cases via this system will balance the expected focus on complicated cases involving "significant and substantial" violations and other major cases, which will involve substantial time commitments.

2. Rulemaking

Simplified proceedings rule

On May 20, 2010, FMSHRC published in the Federal Register a notice of proposed rulemaking regarding simplified proceedings. *See* 75 Fed. Reg. 28223. The proposed rules are intended to simplify and streamline the procedures for handling certain civil penalty proceedings before FMSHRC. FMSHRC anticipates that the simplified

proceedings will likely reduce the amount of time between docketing and disposition of cases in this category. In addition, the simplified proceedings could significantly reduce the time and resource expenditures of both MSHA and mine operators. The comment period on the proposed rules ended on June 21, 2010. FMSHRC is reviewing the comments and is considering appropriate revisions to be implemented in the final rule. FMSHRC anticipates publishing a final rule in December 2010.

Settlement procedure rule

On April 27, 2010, FMSHRC published in the Federal Register an interim rule with a request for comments regarding penalty settlement procedures. *See* 75 Fed. Reg. 21987. The interim rule sets forth new requirements regarding the filing of settlement motions with FMSHRC in all penalty proceedings, except for discrimination proceedings and proceedings against individuals. First, the rule requires a party filing a settlement motion to submit a proposed order approving settlement. Second, the rule requires the filing party to submit the motion and proposed order electronically. The interim rule took effect on May 27, 2010, and FMSHRC received comments through June 28, 2010. FMSHRC is reviewing the comments and is considering appropriate revisions to be implemented in the final rule. It intends to publish a final rule by November 2010. In addition, FMSHRC has made forms for proposed orders available on its website and is working with parties to address any technical difficulties.

F. Electronic Filing

FMSHRC has been exploring various electronic products and system designs to replace or upgrade its current case management system. FMSHRC aims to adopt an integrated product that will allow most cases and documents to be filed, managed, stored and tracked internally online and to allow secure access by litigants. An additional goal is to increase public access under the Freedom of Information Act and other transparency initiatives designed to promote greater public understanding of its activities.

FMSHRC's docket office is currently working with an ad hoc electronic filing project team to develop a list of requirements that must be addressed in the new system. Once reviewed by the project team,¹⁰ the Chairman and the Executive Director, the list will be shared with the judges and law clerks for feedback. FMSHRC will also coordinate with MSHA, as it is both the largest user and the originator of almost all cases, to ensure that the approach will be compatible and can readily access data from MSHA's own system. FMSHRC is planning a series of meetings with MSHA in September 2010, to ascertain compatibility issues, to determine what limitations must be accommodated by its system, and to get feedback from MSHA on the list of requirements. Within a few months, FMSHRC plans to identify the items it will include in any request for proposal and a list of requirements to evaluate off-the-shelf products if it chooses to pursue this option.

¹⁰ When the new SES staff member is hired, he or she will become an integral member of the project team.

FMSHRC has been consulting with other federal agencies using electronic filing systems regarding how a new system could be integrated and how to best incorporate it with the current case tracking system. The National Labor Relations Board (“NLRB”) extensively detailed its own efforts, candidly acknowledging mistakes and noting the risk that almost any system may be obsolete as soon as it is purchased. The staff at NLRB emphasized that this is a dynamic process that needs to evolve and that would require an on-site contractor or employee to oversee the initial development and integration and to adjust the system to accommodate changing requirements and technology. NLRB staff indicated that it would be possible to develop an integrated e-filing and tracking system using the current case tracking system architecture, provided that FMSHRC retained a skilled programmer to manage the implementation and transition, and that the contract specifications are properly designed to attain key objectives. FMSHRC may visit another federal agency in this time and will likely meet again with technical staff at the NLRB.

In July 2010, FMSHRC staff attended an online demonstration for a commercial, off-the-shelf software product that integrates case tracking and file management. Initial review of the product shows some promise and advantages. The primary benefit is that a system designed to combine case tracking and file management may be easier to use and more intuitive. On the other hand, the product might require a complete elimination of FMSHRC’s existing case tracking system after extensive efforts to improve it have been made. It will continue to consider other stand-alone products.

FMSHRC is undertaking a more detailed review of the system presented in July and is considering two or three alternative off-the-shelf products. Any additional demonstrations will be conducted this fall. Depending on the promise any of those products offer as a possible stand-alone solution, it will need to do a comparative analysis and to select the best representative from among them or to determine that no off-the-shelf product is likely to fully meet its needs. This review will include evaluation of compatibility with the current case tracking system. If FMSHRC determines that the current case tracking system will not be compatible with the solution selected, the decision will need to be made early in the process to avoid disruptions to the current system.

The target date for deciding what kind of system to obtain is by the end of 2010. Once FMSHRC has selected the type of system it is likely to use and has fully identified the contract requirements in coordination with MSHA and solicitors at DOL, it will interview and select a technical contractor to oversee and manage the implementation. It expects the advertisement and hiring to take place this winter.

The Commission will submit a report within the next six months that will provide a more detailed description of the costs and timelines associated with this project.

Conclusion

FMSHRC and DOL submit this joint operating plan with the firm intention to do all in their power to dispose of the maximum number of cases in the targeted backlog. They

also undertake this project firmly committed to the mandate that enhanced safety and health for miners is their foremost imperative.

In the quarterly progress reports to come, they will provide Congress with coordinated and comprehensive updates regarding the principal aspects of the joint operating plan.

Attachment A

Office of the Solicitor FTE Object Class Expenditures

FMHSRC Backlog

Salary & Benefits	\$7,944,326
All other Costs	\$2,930,181
SOL Cost for 70 FTEs	\$10,874,507

Contingency Funding	\$66,243
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Total	\$10,940,750
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Fully Loaded FTE Cost GS 13/1

MSH Backlog 70 FTE

<u>Object Class</u>	<u>Cost</u>	<u>FY-10</u>	<u>FY-11</u>	<u>FY-11</u>	<u>TOTAL</u>
	<u>Per FTE</u>	<u>Aug - Sep</u>	<u>Oct - Dec</u>	<u>Jan - July</u>	
Full-time permanent	\$89,033	\$1,038,718	\$1,558,078	\$3,708,224	\$6,305,020
Personnel benefits	\$23,149	\$270,067	\$405,100	\$964,138	\$1,639,305
Travel and transportation of persons	\$1,142	\$13,323	\$19,985	\$47,564	\$80,873
Travel and transportation of things	\$27	\$315	\$473	\$1,125	\$1,912
Rental payments to GSA	\$11,113	\$129,652	\$194,478	\$462,856	\$786,986
Communications, utilities, and misc.	\$1,074	\$12,530	\$18,795	\$44,732	\$76,057
Printing and reproduction	\$115	\$1,342	\$2,013	\$4,790	\$8,144
Other services	\$1,948	\$22,727	\$34,090	\$81,134	\$137,951
Other services (Contingency Funding)	N/A	\$0	\$66,243	\$0	\$66,243
Purchases of goods/services from Govt.	\$15,595	\$181,942	\$272,913	\$649,532	\$1,104,386
Operation and maintenance of equip.	\$2,625	\$30,625	\$45,938	\$109,331	\$185,894
Supplies and materials	\$1,565	\$18,258	\$27,388	\$65,182	\$110,828
Equipment	\$6,173	\$72,018	\$108,028	\$257,105	\$437,151
Total	\$153,559	\$1,791,517	\$2,753,518	\$6,395,715	\$10,940,750

2 Months

3 Months

7 Months

Assumptions

Pay 2%
Non Pay 1%

Factor

1.020
1.010

Attachment B

Mine Safety and Health Administration FY 2010 (Supplemental) Case Backlog Hiring Plan

MSHA's initial plan includes hiring an additional 15 employees over the last quarter of FY 2010. Of that amount, six will be MSHA clerical personnel (GS-6), and nine will be technical advisors (GS-13). Three of the technical advisors will be hired within the Metal/Nonmetal activity and six will be hired within the Coal activity. Three technical advisors will be located in each of the three SOL regional offices, for a total of nine FTE.

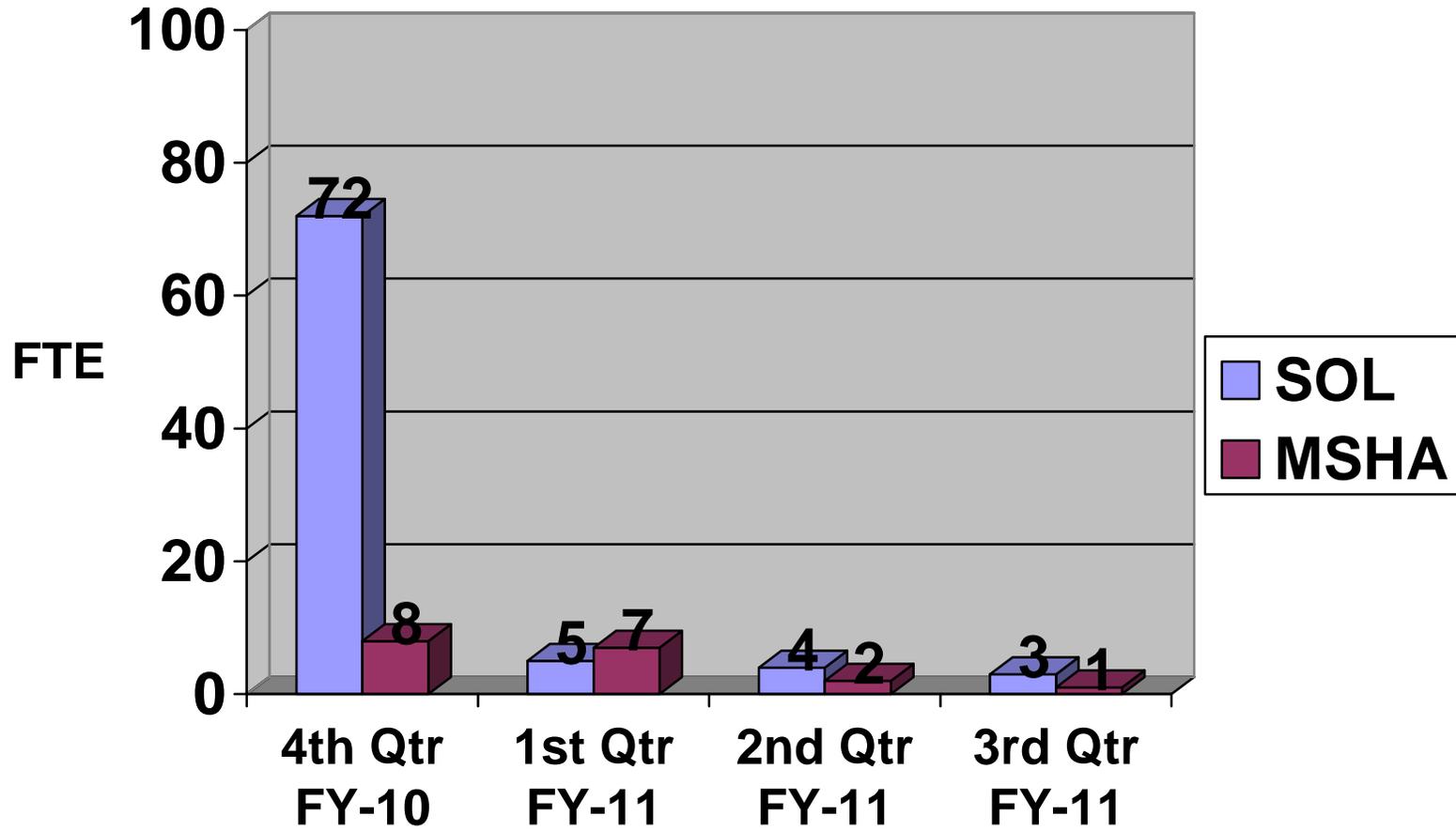
Coal will not hire additional clerical employees for the backlog reduction project. The program will first attempt to use existing clerical staff who will work overtime to accomplish tasks related to the additional litigation work. If the work cannot be accomplished in this way, the program will hire personnel. Metal/Nonmetal plans to hire additional clerical personnel to cover the workload.

The locations of the employees are shown in the following table.

Clerical Staff MNMS&H Districts	
Northeast District	1
Southeast District	1
North Central District	1
South Central District	1
Rocky Mountain District	1
Western District	1
Subtotal, MSHA Clerical Staff	6
MSHA Technical Advisors assigned to SOL Regions	
Philadelphia, PA Region 3	3
Nashville, TN Region 4	3
Denver, CO Region 7	3
Subtotal, MSHA Technical Advisors	9
Total MSHA Hires	15

Attachment C

DOL FMSHRC PROJECT HIRING PLAN



Attachment D

FMSHRC Employment Plan

GOVERNMENT EMPLOYEES

	2010 current	additions (3.8)	Total FTE's
Office of the Commission			
Office of the Commissioners			
Chairman	1		1
Commissioners	4		4
Counsel	2		2
Confidential Assistants	2		2
SES		1	1
Office of the General Counsel			
General Counsel	1		1
Deputy GC	1		1
Administrative Assistant	1		1
Attorney Advisors	4	1	5
Office of the Executive Director			
Executive Director	1		1
Administrative Officer	1		1
Administrative Specialist	3		3
IT	1		1
Total	22	2	24
Office of the Administrative Law Judges			
Office of the Administrative Law Judges			
Judges	14	6	20
Law Clerks	9	6	15
HOD	1		1
Legal Assistants	9	3	12
Settlement Counsel	1		1
Office of Docket			
Management Analyst (supervisory)	1		1
Management Analyst	1		1
Legal Assistants	4		4
Total	40	15	55
TOTAL FTE	62	17	79

CONTRACTORS from unobligated balances FY2010

Office of the Administrative Law Judges			
Office of Docket			
Legal Assistants	7		7

Attachment E

FMSHRC Hiring Plan

Position	Number of Staff Hired	Date of Hiring
Law Clerks	6	8/30/2010
Judges	1	8/30/2010

Position	Number of Staff to be hired	Estimated Date of Hiring
SES	1	10/25/2010
Attorney Advisor	1	10/25/2010
Judges	5	9/11/2010
Legal Assistants	3	10/11/2010
**The hiring of the 5 other judges is pending dual compensation waiver approvals.		