

Week of **June 2, 2014**

## **GAO Recommends Federal Action on Ammonium Nitrate**

A deadly explosion at a fertilizer plant last year has a government watchdog agency calling on federal agencies to assume a greater role in preventing accidents from ammonium nitrate (AN).

The Government Accountability Office (GAO) has recommended that OSHA, EPA and the Department of Homeland Security (DHS) take action after its investigation found numerous gaps in federal oversight of AN facilities. GAO's investigation was launched at the request of members of Congress after some 30 tons of AN detonated during a fire at a plant in West, Texas in April 2013. The incident resulted in the deaths of more than a dozen people and extensive property damage.

OSHA's explosives regulations,, which have not been significantly revised since 1971, apply to AN facilities. The OSHA regulations allow the substance to be stored in wooden buildings, which increases the fire and explosion hazard, GAO said in a report released May 21. In addition, GAO asserted OSHA has done little outreach to increase awareness of its rules within the fertilizer industry, a primary user of AN. OSHA's high hazard workplace inspection program does not target AN facilities and, according to GAO, information on these facilities is not available to OSHA to use for targeting.

Other OSHA and EPA chemical safety regulations require facilities to complete hazard assessments, use procedures to prevent and respond to accidents and conduct routine compliance audits, but the rules do not apply to AN, according to GAO.

GAO said the total number and location of U.S. facilities storing AN is unknown. However, the facilities that

reported to DHS as having reportable quantities of ammonium nitrate were most often engaged in supplying and supporting the agriculture and mining industries. Neither OSHA nor EPA has reporting requirements; however, DHS requires facilities storing reportable quantities to provide the information for security purposes. Federal law also requires certain facilities to report their AN holdings to state and local agencies for emergency response purposes, but the data is not routinely shared with federal authorities. Under a 2013 Executive Order, federal agencies are exploring options for improving data sharing, but this effort remains unfinished.

"Federal data provide insight into the number of facilities in the United States with ammonium nitrate, but do not provide a complete picture because of reporting exemptions and other data limitations," GAO wrote.

Federal agencies should improve data sharing among themselves and with the states, OSHA and EPA should consider revising their related regulations to cover AN, and OSHA ought to conduct outreach to the fertilizer industry and target high risk facilities for inspection, GAO recommended.

Steps to improve communications have already been taken, the auditors noted in their report. For instance, OSHA recently published information and updated its website to explain how its regulations on explosives and blasting agents at 29 CFR 1910.109 apply to AN fertilizer, what legal requirements apply and how to store and handle AN safely. An August 2013 advisory – issued jointly by OSHA, EPA and the Bureau of Alcohol, Tobacco and Firearms – highlighted OSHA's regulations for fertilizer-grade AN.

## MSHA Ignores Mine Operators' Walk-Around Rights at Its Peril

When MSHA ignores its statutory obligation to allow representatives of mine operators to walk with agency inspectors during their visits, it can jeopardize enforcement actions taken while government agents are unaccompanied.

That risk was realized in February 2012 when an inspection party showed up at Martin County Coal Corporation's (MCC) Voyager No. 7 Mine in Kentucky in response to an anonymous ventilation complaint. Before the group entered the mine, they prevented the operator from arranging for any company representative to accompany them. The ventilation complaint subsequently was found to lack merit.

Three members of the seven-person inspection party, however, set off on a regular inspection. They found alleged cracks in the walls (ribs) near three conveyor belts, two loose rib bolts and an entry wider than allowed. Fallen material at an intersection indicated to inspectors that a crack had allowed the material to break free from the rib.

Inspectors issued a citation and two orders for alleged ground control violations. A third order was issued for failure to conduct adequate on-shift examinations because inspectors believed the alleged hazardous conditions were obvious and had existed for over a month. In all, MSHA proposed \$50,024 in penalties.

However, the observations on which the violations were based conflicted with those of another inspector who testified he had not observed the cited conditions in visits during the prior two-week period. Company representatives corroborated his testimony.

Administrative Law Judge Jerold Feldman deferred to the "broad discretion" of the inspectors who had noted the conditions. He also supported their designation of the alleged hazards as likely to lead to reasonably serious injuries. However, he did not sustain their characterization of unwarrantable failure, i.e., that the operator's alleged failure to address the hazards demonstrated aggravated conduct beyond ordinary negligence.

Feldman also said another reason for rejecting the unwarrantable failure designations was inspectors' failure to recognize the operator's walk-around right under section 103(f) of the Mine Act. A Federal Mine Safety and Health Review Commission decision recognized the operator's 103(f) right and stated evidence in a legal proceeding may be excluded when that right is violated if the operator can show prejudice.

"The prejudice to MCC in this case is self-evident" because it prevented the operator from resolving factual disputes that could have been settled on-site, Feldman wrote. The judge did not say if violation of the operator's walk-around right alone would have led him to dismiss the elevated negligence classification.

He deleted the unwarrantable failure designations and cut the fine for the three hazardous conditions infractions to \$4,000 each. He also vacated the on-shift examination order. Since his decision was based in part on the dissenting testimony of the MSHA inspector, Feldman also called on the agency to assure no reprisals would be taken against him.

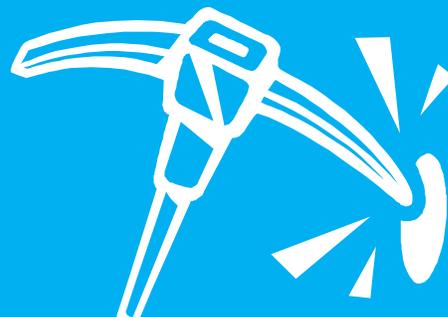
## MSHA, OSHA Release Regulatory Plans

Federal agencies slipped their regulatory agendas (available at <http://resources.regulations.gov/public/component/main?dmfClientId=1401406622446&dmfTzoff=240>) quietly out the door May 23, on the eve of the Memorial Day holiday weekend. MSHA's agenda indicates the agency expects a proposed rule to amend its civil penalty rules and final rule on proximity detection devices for coal mine continuous mining machines to be released at any time. A proposal on proximity detection devices in underground mines will be issued in September.

OSHA expects to release final rules on revised reporting requirements this month, confined spaces in construction in August, and slip, trip and fall prevention in October. A proposed rule on beryllium will appear in July, and a combined proposed rule/direct final rule in September to update its eye-and-face protection standard to incorporate a consensus standard. Notably, MSHA has put aside, at least for now, a rule to regulate crystalline silica, while OSHA has scheduled a proposed injury and illness prevention programs rule for "long-term action."

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