

Week of **February 9, 2015**

Court Holds MSHA Has Jurisdiction over Coal Blending Operation

MSHA's jurisdiction extends to a Virginia coal blending operation, the U.S. Court of Appeals for the Fourth Circuit, in Richmond, has ruled, rejecting a company's argument that the Mine Act covers only coal mine operators. *Power Fuels, LLC v. Federal Mine Safety & Health*, No. 14-1450 (4th Cir. Jan. 27, 2015).

Power Fuels, LLC, owns and operates a coal terminal that serves a Dominion Virginia Power facility across the road by mixing coal according to the power company's specifications, storing it, and transporting it to the plant. MSHA inspectors cited Power Fuels for several violations, beginning in 2013. Disagreeing with Power Fuels' argument that MSHA lacked jurisdiction, Administrative Law Judge George Koutras upheld the first three citations. Power Fuels appealed to the Federal Mine Safety and Health Review Commission, which stood by ALJ Koutras and declined the company's petition for discretionary review, prompting the company's appeal to the Court.

Power Fuels argued that the Mine Act was intended to cover coal mine operators. The company cited the Act's definition of "work of preparing the coal," which lists many coal preparation activities that are "usually done by the operator of the coal mine." Since Power Fuels does not extract coal, it is not the operator of a coal mine, and therefore should not be covered, the company contended.

Disagreeing with the company, the three-judge appeals panel said the statute had to be read broadly. "As the statutory text makes clear, the coverage of the Mine Act is not limited to extractive activities only," the Fourth

Circuit wrote. "The Act, crucially, extends to a variety of activities involved in preparing coal. The statute's jurisdictional reach is deliberately broad, and the concomitant definitions are not rigid."

Power Fuels also asserted that a broad reading of the phrase "work of preparing the coal" meant there were no limits to MSHA's reach. Again, the Court disagreed. It noted that MSHA's Program Policy Manual expresses a limitation that the agency "will not inspect facilities where coal is prepared solely to facilitate loading and not to meet specifications or to render the coal for any particular use."

The Mine Act gives MSHA jurisdiction over "custom coal preparation facilities." The Court said that "Power Fuels' blending terminal is such a facility" because activities are performed there, such as mixing, storing, and loading coal, that are listed in the Mine Act as involving the work of preparing coal.

Citing court precedent, the panel went on to conduct a "functional analysis" of the jurisdictional question. It said this type of inquiry "turns on how the facility uses the coal and whether the employees are exposed to the safety and health hazards associated with coal-preparation activities." This led the Court to reiterate that the company's blending terminal prepares coal "and thereby subjects workers to the risks contemplated in the Mine Act."

Brian Hendrix wrote "[THE IRON LAW & MSHA,](#)" published by *Coal Age*.



DOL Seeks Public Input on Regulations

The Department of Labor is turning to the public once again for suggestions on which of its existing regulations administered department-wide should be revised or repealed.

In a request for information (RFI), DOL said it would accept comments from the public through February 25 on how its significant regulations could be improved by modernizing, modifying, redesigning, streamlining, expanding, or repealing them. "This request for public input will inform development of the Department's future plans to review its existing significant regulations," DOL said.

DOL offers a series of questions individuals should consider when they respond. The questions make clear DOL seeks comment not only on regulations, but also on guidance and interpretative documents, and reporting requirements.

"The Department is especially interested in candidates for review for which there is evidence of rapid technological change in a sector that could influence the structure and need for the regulation, whether the chosen regulatory approach will impose large ongoing costs on regulated entities, whether the agency is regulating in an area of significant uncertainty that may be lowered with a future retrospective study, and other

similar conditions," DOL said. Commenters are instructed to confine remarks to items not currently on the department's regulatory agenda.

DOL had issued a request for information for regulatory review suggestions in 2011, and received 100 individual recommendations from more than 900 respondents. That eventually led DOL to develop what it calls a Plan for Retrospective Analysis of Existing Rules. The latest iteration of the plan, dated August 2014, lists eight OSHA actions undergoing regulatory review and one from MSHA that deals with updating the mine safety agency's criteria and procedures for assessment of civil penalties. The OSHA initiatives address blood-borne pathogens, national consensus standards, mechanical power presses, unnecessary or duplicative provisions or paperwork requirements primarily in construction, cranes and derricks in construction, chemical management and permissible exposure limits, and improving tracking of workplace injuries and illnesses.

Comments may be posted at <http://www.dol.gov/regulations/regreview/>. DOL makes clear it will not be bound by comments. The Department's effort comes in response to two presidential Executive Orders calling on federal agencies to improve regulation and regulatory review and identify and reduce regulatory burdens.



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