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SOL (MSHA) V. CAROLINA STALITE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. BARB 79-319-P A.O. No. 31-00136-05006R
v.		Docket No. SE 79-56-M A.O. No. 31-00136-05007
CAROLINA STALITE COMPANY,	RESPONDENT	Docket No. SE 79-91-M A.O. No. 31-00136-05001
		Docket No. SE 79-92-M A.O. No. 31-00136-05003
		Docket No. SE 79-93-M A.O. No. 31-00136-05004
		Docket No. SE 79-94-M A.O. No. 31-00136-05002
		Docket No. SE 79-95-M A.O. No. 31-00136-05005
		Docket No. SE 79-85-M A.O. No. 31-00136-05008
		Docket No. SE 79-87-M A.O. No. 31-00136-05009
		Docket No. SE 79-114-M A.O. No. 31-00136-05010
		Docket No. SE 80-35-M A.O. No. 31-00136-05012
		Docket No. SE 80-37-M A.O. No. 31-00136-05013
		Docket No. SE 80-44-M A.O. No. 31-00136-05014
		Stalite Mill

DECISION AND ORDER

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner
Lewis P. Hamlin, Jr., Esq., William C. Kluttz, Jr., Esq., Kluttz & Hamlin, Salisbury, North Carolina, for Respondent

Before: Judge Kennedy

The operator has moved for summary decision and to dismiss the captioned petitions on the grounds that (1) its business is not subject to Mine Act jurisdiction, and (2) the evidence obtained during the warrantless inspections which resulted in the issuance of the 132 violations charged must be suppressed. I find the operator's business consists of mineral milling or mineral preparation within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. 802(h)(1), and that the Act's provision for warrantless searches is constitutional.

I. Jurisdictional Claim

The contention that Stalite's operation is not a "coal or other mine" within the meaning of section 3(h)(1) of the Mine Act(FOOTNOTE 1) rests on the following:

The Carolina Stalite Company operates a plant in Gold Hill, North Carolina, producing a light-weight construction material called Stalite.(FOOTNOTE 2) The raw material from which the product is made is slate purchased from a neighboring quarry. The quarry is owned and operated by an unrelated employer, Young Stone Company. Young Stone Company mines and crushes the slate and delivers it by conveyor to the premises of Carolina Stalite. The conveyors by which the slate is delivered are owned, operated, maintained, and controlled by Young Stone Company. Young Stone Company is subject to Mine Act jurisdiction, and is regularly inspected by MSHA. There is no corporate affiliation between Carolina Stalite and Young Stone, and no business relationship other than that of vendor and purchaser. Carolina Stalite heats the crushed slate in rotary kilns to approximately 2,000 degrees Fahrenheit which causes it to "bloat" and increase in volume transforming it into a light-weight material. The Stalite is later crushed and sized to fill customer requirements, and is shipped in interstate commerce by truck and rail for use primarily in the manufacture of light-weight concrete masonry blocks.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as including, inter alia, "structures, facilities, equipment, machines, tools, or

other property * * * used in, or to be used in, the milling of * * * minerals, or the work of preparing * * * minerals." Section 3(h)(1) further states that: "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners at one physical establishment." Thus, the dispositive question of jurisdictional fact is whether the Stalite operation is properly classified as mineral milling or preparation.

Since mineral milling or preparation is not specifically defined in the Act, the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) have entered into an agreement by which they define their respective jurisdictions. 39 Fed. Reg. 27382, superceded by 44 Fed. Reg. 22827. Appendix A of the Interagency Agreement includes the following definition: "Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable constituents of the crude from the undesired contaminants with which it is associated."

Respondent's argument is that it separates no constituents of the crude from any contaminants with which it is associated and separates nothing from the material it purchases for manufacture. It merely purchases crushed stone from an unaffiliated quarry, heats that stone to cause it to "bloat," and thereafter crushes and sizes it to order. The operator concludes that since

a separating or refining process is an essential element of milling it cannot be deemed to be engaged in milling.

Although this contention may have merit with respect to this definition of milling,(FOOTNOTE 3) it fails to address the question of whether the operator is engaged in mineral preparation within the meaning of the Act.

In this regard, the Interagency Agreement gives 18 specific examples of mineral milling or preparation processes considered to be included in Mine Act jurisdiction. One of these processes is "heat expansion" which is defined as follows: "Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit volume." Additionally, the Interagency Agreement defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively course particles," and "sizing" as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes."

These definitions taken together exactly describe the Stalite process. It can be concluded, therefore, that the Carolina Stalite Company is engaged

in mineral processing within the jurisdiction of the Mine Safety Act if the definitions contained in the Interagency Agreement are in accord with the legislative intent.

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

The operator contends, however, that the Secretary's designation of certain operations such as brick, clay pipe, refractory, and concrete product plants as being within OSHA jurisdiction while including the Stalite operation within MSHA jurisdiction is arbitrary and capricious, and constitutes an abuse of discretion. The operations listed in the Agreement as being within OSHA jurisdiction are, however, primarily manufacturing in nature and generally do not exclusively rely on such milling-related processes as heat expansion, crushing or sizing. Section B.4 of the Interagency Agreement states that "under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these

processes are related, technologically or geographically, to milling." In making this determination, the Agreement states that the following considerations will be taken into account:

> [T]he processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. Id.

The Secretary asserts that the conversion of slate to a light-weight aggregate is recognized as mineral processing, and the exposure of employees to the safety and health hazards associated with these processes is the same regardless of whether the operation is free-standing or is directly associated with a mineral extraction process. MSHA and its predecessors have had years of experience inspecting mining and milling operations, and have had the opportunity to develop an expertise in the inspection of Carolina Stalite's operations during the 18 inspections of its plant carried out since 1971. Given these considerations, along with the fact that the Carolina Stalite operation is located directly adjacent to its stone quarry supplier which is also subject to MSHA jurisdiction, I cannot find that inclusion of respondent's operation within the coverage of the Mine Act is an abuse of discretion.(FOOTNOTE 4)

This conclusion is in accord with Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), which dealt with a closely analogous situation. There, the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." 602 F.2d at 592.

Thus, I find that the Carolina Stalite Company's operation is properly subject to Mine Act jurisdiction, and the fact that it does not itself extract the minerals which it processes does not remove its employees from the Act's protection.

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II. Fourth Amendment Claim(FOOTNOTE 5)

With respect to the assertion that the warrantless inspection of the Stalite plant was violative of the Fourth Amendment and the fruits of that inspection must be suppressed, the operator asserts and the Secretary does not dispute, the following material facts:

On the morning of Tuesday, October 17, 1978, at approximately 9:00 a.m., Charles L. Blume, a Federal mine inspector, entered the Carolina Stalite Company office and requested entry to inspect the operation under the Mine Safety and Health Act of 1977. The company's assistant superintendent, Fred Drew, declined admittance to Mr. Blume because management had instructed him to refuse entry to MSHA inspectors. Mr. Blume returned again that afternoon, at which time the plant superintendent, Ben Ketchie, was present. Mr. Ketchie, citing the same instructions, also refused admittance to Inspector Blume, whereupon Mr. Blume, following the instructions contained in the MSHA Inspection Manual issued a section 104(a) citation alleging a violation of section 103(a) of the Mine Act for failure to admit him for the purpose of inspecting the plant. The time fixed for abatement was 4:00 p.m. that afternoon, but was extended overnight when the inspector did not return that day.

The following day, Wednesday, October 18, at approximately 9:00 a.m., Mr. Blume returned to the Carolina Stalite Company and informed Mr. Ketchie that unless entry was granted he would issue a section 104(b) closure order which would have the effect of immediately shutting the operation down. Inspector Blume delayed action to allow Mr. Ketchie time to call Allen Johnson, managing partner, and agreed to await his arrival before proceeding further.

With attorney Clarence Kluttz, Mr. Johnson arrived at the plant later that morning. At that time, Mr. Blume informed them that unless entry was allowed for the purpose of conducting an inspection, he would have to issue a closure order.

Mr. Kluttz asked if he could have 2 work days to familiarize himself with the provisions of the Mine Act. Mr. Blume refused this request. Mr. Kluttz called Mr. Blume's supervisor, Marvin Nichols, who also refused a further delay. At that time, the operator elected to cooperate and permit entry because of the threat of closure.

Arguing from these facts, the operator seeks a finding (1) that entry to the plant was nonconsensual and only granted as a result of the inspector's threat to issue a section 104(b) closure order, and (2) that the Fourth Amendment does not permit warrantless searches of this particular operation, and that the fruits of such nonconsensual searches must be suppressed.

I conclude that the existence of the operator's standing instructions regarding entry shows it had ample time to reflect on its policy before the inspector arrived, that the 24 plus hours allowed by the inspector for compliance after he arrived was reasonable and that the inspector's refusal and that of his supervisor to further extend the time for compliance was not under the circumstances an abuse of discretion.

Respondent urges that the inspector was not authorized to issue a section 104(a) citation or to threaten to issue a section 104(b) closure order citing violation of section 103(a) since the Act provides that where entry is denied the Secretary's only recourse is to seek an injunction in Federal district court pursuant to the provisions of section 108(a). The operator claims that the issuance of a section 104(b) order amounts to the imposition of a summary sanction not contemplated by the Act, which "provides for immediate judicial review by requiring the Secretary to secure an injunction

in the district court if he is refused entry." Citing Marshall v. Stoudt's Ferry Preparation Company, supra at 594.(FOOTNOTE 6)

Disposition of this claim depends on an analysis of the respective functions of sections 104 and 108 of the Act, and of the remedies available in the face of a closure order. Section 104(a) provides that whenever an inspector "believes that an operator * * * has violated this Act * * * he shall with reasonable promptness issue a citation to the operator." (Emphasis added.) Section 104(b) provides that "if a violation described in a citation * * * has not been totally abated * * * [and] the period of time for the abatement should not be further extended, he * * * shall promptly issue" a closure order. (Emphasis added.) Thus, the scheme of section 104 is to require inspectors to issue citations whenever they find a violation of the Act or the mandatory standards, and to issue closure orders whenever an operator fails or refuses to abate the violation. The inspector, after issuing the citation, informed the operator that a section 104(b) closure order would issue if the operator continued to refuse entry. The operator then permitted entry and the section 104(b) order never issued.

The operator maintains that the inspector had no authority to threaten the issuance of a closure order since section 108 requires the Secretary to

seek an injunction whenever entry is denied. Section 108(a)(1) merely provides, however, that "[t]he Secretary may institute a civil action for relief, including a permanent or temporary injunction * * * whenever such operator or his agent - (A) violates or fails to comply with any order or decision issued under this Act * * * [or] (C) refuses to admit such representatives to the * * * mine, [or] (D) refuses to permit the inspection of the * * * mine." (Emphasis added.) Thus, it is clear that the language of section 108 is permissive rather than mandatory in nature, and that the 1977 Mine Act contemplates a complementary scheme of administrative remedies followed by, where necessary, judicial intervention.

There is, however, language in some cases which seemingly supports the operator's position that the exclusive enforcement provision in denial of entry situations is a section 108(a) injunction. In addition to the statement in Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, 606 F.2d 693, 696; (6th Cir. 1979), petition or cert. filed No. 79-1204 (February 4, 1980); and Marshall v. Charles T. Sink, No. 77-2514 (4th Cir., January 24, 1980), suggest that "the Secretary must seek an injunction when an operator refuses to allow an inspection." Id. Slip opinion at 6.

In support of this conclusion, the cases cite Justice White's opinion in Marshall v. Barlows' Inc., 436 U.S. 307 (1978). There it was held that finding warrantless searches unconstitutional under OSHA would not necessarily doom similar provisions in other statutes, and that since other regulatory acts had differing "enforcement needs and privacy guarantees," they must be evaluated on a case-by-case basis. Id. at 321. In dicta, however, Justice

White cited the Metal Act of 1966 and the Coal Act of 1969 as examples of statutes which while authorizing warrantless searches provided for judicial intervention to enforce the right of entry. Id. at note 18. What Justice White failed to note was that both the Metal Act and the Coal Act were repealed by the 1977 Mine Act 6 months before the decision in Barlow's; and that the 1977 Act contains an administrative sanction for a refusal of entry not contained in either of the predecessor statutes.

Both section 8(b) of the Metal Act and section 104(b) of the Coal Act limited the sanction of closure orders to violations of mandatory standards. Therefore, the only possible remedy for a refusal of entry under both predecessor statutes was injunctive. Under section 104(b) of the 1977 Mine Safety Act, however, the closure order sanction was expanded to include violations of the provisions of the Act itself. It is the scope of this provision which is being challenged here, and it is the existence of this provision which was ignored by the Supreme Court in Barlow's.

This error on the part of Justice White was subsequently compounded by the courts of appeals in the cases cited above. For example, in Nolichuckey Sand, supra at 696, it was stated that the "enforcement provisions of the Metal Act [were] carried over to and included in the 1977 Amendments Act." What the Sixth Circuit failed to recognize was that the enforcement provisions of the Metal Act were not only carried over but supplemented by the expanded closure and penalty sanctions of the 1977 Act. It is important to note that at least one case recognized the proper interrelationship between the complementary closure and injunctive sanctions of the 1977 Act. In

Marshall v. Donofrio, 605 F.2d 1196 (3rd Cir. 1979), affirming 465 F. Supp. 838 (E.D. Pa. 1978), cert. denied No. 79-848 (February 19, 1980), the inspector issued a section 104(a) citation under the 1977 Mine Act upon a denial of entry, and a section 104(b) closure order upon a subsequent denial of entry. When the operator persisted in refusing entry even in the face of the closure order, the Secretary brought a suit for an injunction under section 108. It is significant to note that in Donofrio the propriety of first pursuing administrative remedies before resorting to the courts was never questioned.

Correctly stated, the operator's argument is that the issuance of a section 104(b) closure order in a denial of entry situation amounts to the imposition of a summary sanction and a deprivation of the operator's right to the labor of its workforce without due process. The claim is that the inspector's threat to issue such an order had, therefore, a chilling effect on the operator's exercise of his constitutionally-protected rights. This contention is incorrect in light of the remedies available to an operator faced with what he believes to be an illegal closure order.

Had the closure order issued, the operator could have immediately applied for expedited proceedings before the Commission pursuant to 29 C.F.R. 2700.52 as well as for temporary relief pursuant to 29 C.F.R. 2700.45 and section 105(b)(2) of the Act. If immediate relief was not granted by the Commission, the operator could then take the matter to the court of appeals. See Sink v. Morton, 529 F.2d 601 (4th Cir. 1975).

Since "such procedure accords the plaintiff due process," Sink, supra at 604, and since section 104(b) requires an inspector to issue a closure order whenever an operator refuses to abate a violation within a reasonable amount of time, it must be concluded that the threatened issuance of such an order was not unlawful or the subsequent search unconstitutional.(FOOTNOTE 7)

We then come to respondent's primary contention that the Fourth Amendment precludes warrantless inspections of operations such as that of Carolina Stalite. Having found that the operation is under the jurisdiction of the Mine Act, the question becomes whether the reasoning of Marshall v. Barlow's, supra, arising under the Occupational Safety and Health Act, or that of the cases decided under the Mine Act is dispositive. Marshall v. Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, supra; Marshall v. Charles T. Sink, supra; Marshall v. Texoline, 612 F.2d 935 (5th Cir. 1980); Marshall v. Donofrio, supra. The operator argues that the Mine Act cases are not controlling since the Stalite operation is not part of a closely-regulated industry long subject to Government supervision and inspection,

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no license is required to engage in this business, and it has never been pervasively regulated.(FOOTNOTE 8)

In Barlow's, the Court held that warrantless inspections under the Occupational Safety and Health Act (OSHA) were violative of the Fourth Amendment. Based on its earlier decisions in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the general rule that warrantless searches are presumptively unreasonable. It did not find applicable, in the OSHA context, the recognized exception to the warrant requirement which exists for "pervasively-regulated businesses" and for "closely-regulated" industries "long subject to close supervision and inspection." Barlow's, supra at 313.

The Court found that several protections are given the operator of a business when an OSHA inspector presents a search warrant. The warrant assures the owner that the inspection is reasonable, authorized by statute, and pursuant to an administrative plan containing specific neutral criteria. In addition, it advises the owner of the scope and object of the search. Id. at 323.

These protections could be provided without undue burden, in the Court's view, because of the comparative ease with which "probable cause" could be shown. The requirement of probable cause for the issuance of a search warrant for an administrative inspection is more easily met than the probable

cause requirement in the criminal law sense. A showing that a business was chosen for inspection on "the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" would serve as sufficient probable cause. Id. at 321.

It is important to note, however, that the warrant requirement of the Fourth Amendment is not absolute. Search warrants are not required in certain classes of cases involving pervasively-regulated businesses or closely-regulated industries subject to strict supervision and inspection. The leading cases which illustrate this exception are Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972).

Colonnade involved a warrantless inspection of a Federally-licensed liquor dealer. The court held that "Congress has broad authority to fashion standards of reasonableness for searches and seizures" in industries which have been "long subject to close supervision and inspection." 397 U.S. at 77. Noting that the liquor industry had been regulated since pre-Fourth Amendment days both in England and the American colonies, the court upheld the warrantless inspection provisions in question. Id. at 75-77.

The Supreme Court also applied this rationale in Biswell, which dealt with searches conducted under the Gun Control Act of 1968. Because of the ease with which firearms could be concealed or transported, a warrant requirement was seen as seriously reducing the effectiveness of the inspection program. Unlike the regulation of the liquor industry, however, the historic regulation of the firearms industry was relatively recent,

apparently having only originated with the Federal Firearms Act of 1938. Noting that "Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is Governmental control of the liquor industry," the Court relied on Congressional findings prefacing the Gun Control Act to find that:

> [C]lose scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme * * *. 406 U.S. at 315.

Thus, the strong public interest in the regulation of firearms reduced the amount of time necessary to establish a "tradition" of close Government supervision.

In Barlow's, the Government argued that the "pervasive regulation" exception applied because businesses subject to OSHA had been covered by the minimum wage and maximum hours provisions of the Walsh-Healey Act since 1936. The Court rejected this argument, however, because Walsh-Healey and other statutes which regulate businesses solely on the basis of their being engaged in interstate commerce are not of the same specificity and pervasiveness as OSHA. 436 U.S. at 314.

These cases read together indicate that an exception to the warrant requirement of the Fourth Amendment exists where an industry has been regulated closely over a period of time, but that the length of the historic regulation required to qualify for the exception cannot be precisely fixed,

and will be greatly influenced by the nature of the public interest behind that regulation.

It must be emphasized that the Court in Barlow's explicitly limited its decision to OSHA inspections and stated that other warrantless search provisions must be examined on an individual basis in light of the "specific enforcement needs and privacy guarantees of each statute," noting that other statutes may "apply only to a single industry, where regulation might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply." Id. at 321. As of this date, four courts of appeals, the Third Circuit in Stoudt's Ferry, and Donofrio, supra; The Fourth Circuit in Charles T. Sink, supra; the Fifth Circuit in Texoline, supra; and the Sixth Circuit in Nolichuckey Sand, supra, have ruled that the Mine Act is such a statute and have upheld the validity of the warrantless search provision of section 103(a) of the Mine Act.

In Stoudt's Ferry, the Third Circuit held that the warrantless inspection provisions of the Mine Act are "sufficiently distinguishable from those of the Occupational Safety and Health Act so as to withstand constitutional challenge." 602 F.2d at 590. Noting that the inspection provisions of the Mine Act are more limited and closely defined than those of OSHA, the court called attention to the unequivocally stated Congressional intent that the Mine Act's inspection provisions would not require warrants and its finding that such inspections were reasonable.(FOOTNOTE 9) The Third Circuit concluded:

> Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding. * * * [W]e believe that there are enough major differences between Barlow's and the case at bar to lead to a contrary result. In our view, warrantless inspections and the procedure provided for enforcement in the Mine Safety Act meet the standards of reasonableness in this pervasively regulated industry.

Id. at 593-594, accord Marshall v. Charles T. Sink, supra.; Marshall v. Texoline, supra.

Similarly, in Nolichuckey Sand, the Sixth Circuit held that a warrantless inspection of a sand and gravel pit subject to Mine Act jurisdiction was not violative of the Fourth Amendment. In so holding, the court rejected the same contentions advanced by Carolina Stalite in this proceeding that "its

business does not fall within an exception to the warrant requirement because the sand and gravel industry has no long history of government regulation, no license is required and it has never been "pervasively' regulated." 606 F.2d at 695.

Agreeing that the sand and gravel industry does not have the long history of regulation and licensing referred to in Colonnade and Biswell, supra, the court noted that all employees in such operations are exposed to health and safety hazards and that it was "reasonable to bring all mineral extraction businesses and operations under a single regulatory act." Id. at 695. The court concluded that "the enforcement needs in the mining industry make a provision for warrantless inspections reasonable." Id. at 696.

The record shows and the operator does not deny that since 1971 its business has been regularly inspected and regulated under the Metal Act. Even a casual review of the Metal Act and the mandatory safety standards issued thereunder demonstrates the pervasive nature of that regulation. For these reasons, I conclude that as a matter of fact and law, respondent is engaged in a business subject to pervasive and longstanding Federal-state regulation.

Thus, it is proper to conclude that the operator is within the jurisdiction of the Mine Act and subject to the warrantless search provisions of section 103(a) until such time as the Supreme Court rules otherwise.(FOOTNOTE 10)

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Accordingly, it is ORDERED that respondent's motion for summary decision and to dismiss and to suppress evidence be, and hereby is, DENIED.

It is FURTHER ORDERED:

1. That full compliance with the Pretrial Order issued September 24, 1979, be accomplished on or before Friday, May 16, 1980.

2. That the operator's motion for a protective order be, and hereby is GRANTED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE_ONE

1 Section 3(h)(1), 30 U.S.C. 802(h)(1), provides:

"For the purpose of this Act, the term "coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machine, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."

~FOOTNOTE_TWO

2 Stalite is an unregistered trade name used by respondent.

~FOOTNOTE_THREE

3 A Dictionary of Mining, Mineral and Related Terms (U.S. Bureau of Mines, 1968), page 707, defines milling as including "the grinding and crushing of ore * * * and preparation for market," and defines ore as including "a mineral of sufficient value as to quality and quantity which may be mined with profit." Id. at 772. These definitions taken together classify the Stalite process as milling. It should also be noted that the Stalite process is similar to that of cement plants utilizing rotary kilns and crushing and sizing equipment. Although cement plants also do not separate constituents of a crude from undesired contaminants, they are classified as mills and are subject to Mine Act jurisdiction.

~FOOTNOTE_FOUR

4 As a result of this determination, it is clear that Carolina Stalite's argument that 30 C.F.R. 56.2 provides a restrictive definition of milling which is inapplicable to its operation is likewise without merit. That section provides that the word mill "includes any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." The operator contends that the words "used at or in connection with, an excavation or mine" is limiting language which excludes the Stalite operation since it is independent of the neighboring quarrying operation. This construction cannot be accepted since to do so would limit the jurisdictional language of section 3(h)(1) which does not include the "in connection with" phrase. Thus, the 30 C.F.R. 56.2 definition must be construed as being illustrative rather than exclusive. Accord, Readymix Sand & Gravel Company, WEST 79-66-M (December 5, 1979). It must also be noted that this provision was originally promulgated at 34 Fed. Reg. 12511 (July 31, 1969), pursuant to the Federal Metallic and Nonmetallic Mine Safety Act, P.L. 89-577, 80 Stat. 772, and is not reflective of the jurisdictional reach of the 1977 Mine Act.

~FOOTNOTE_FIVE

5 Neither party has questioned the propriety of addressing the constitutional challenge. For years, it has been the conventional wisdom that an administrative agency is not competent to rule on constitutional challenges to the organic statute of the agency. See Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robinson, 415 U.S. 361 (1974). This has led to the anomalous result that constitutional challenges raised for the first time on appeal have been dismissed for failure to exhaust the "available" administrative remedy, despite the fact that the agency refuses to rule on such challenges. See Marshall v. Able Contractors, 573 F.2d 1055, 1057 (10th Cir.), cert. denied, 439 U.S. 826 (1978). Increasingly, however, courts are beginning to recognize that important and difficult constitutional questions cannot be decided devoid of factual context, and that agency adjudicative procedures are uniquely suited to the factfinding necessary to the determination of constitutional issues. Marshall v. Babcock & Wilcox Company, No. 79-1641 (3rd Cir., November 16, 1979). Indeed, four circuits have held that constitutional challenges must be brought in the first instance before the agency in order to preserve the issue for appeal. In Re Worksite Inspection of Quality Products, 592 F.2d 611 (1st Cir. 1979); Bethlehem Steel Corporation v. OSHRC, No. 79-1040 (3rd Cir., October 15, 1979); Blocksom & Company v. Marshall, 582 F.3d 1122, 1124 (7th Cir. 1978); Marshall v. Able Contractors, supra. See also, Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350, 353 (D.D.C. 1979), holding that the Mine Safety and Health Review Commission is authorized to decide "all matters in dispute" in cases before it. This comports with the requirement of 5 U.S.C. 557(c)(A) that the agency decide "all the material issues of fact, law or discretion presented on the record * * *", as well as of section 106(a)(1) of the Mine Act, 30 U.S.C. 816(a)(1), which states that "No objection that has not been urged before the

Commission shall be considered by the court %y(3)4B" Indeed, Congress specifically found that the provisions that "objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process." Leg. Hist. at 637. See generally, Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harvard Law Review 1682 (1977); Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3d 308, 556 P.2d 289 (1976).

~FOOTNOTE_SIX

6 Regarding the "immediacy" of judicial review under section 108(a), it should be noted that some district courts have been notoriously slow in considering requests for injunctions following denials of entry. For example, the Eastern District of Wisconsin in Marshall v. Waukesha Lime & Stone, C.A. No. 79-C-114, denied a request for preliminary injunction on March 9, 1979, and has yet to hear the request for permanent injunction, and in Marshall v. Halquist Stone, C.A. No. 78-C-463, the preliminary injunction was denied on September 15, 1978, and the permanent injunction proceedings are still pending.

~FOOTNOTE_SEVEN

7 Although the Constitution generally requires notices and a hearing prior to a deprivation of private property, there are well recognized exceptions to this requirement where significant governmental interests or the public health and safety are involved. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht carrying contraband); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control orders); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931) (collection of Federal revenue); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (seizure of enemy property); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of contaminated food). See also, In Re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1319 (D.D.C. 1978) (upholding cessation orders for failure to abate violations under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1271(a)(2)).

~FOOTNOTE_EIGHT

8 The record discloses, however, that the plant had been inspected some 18 times by MESA and the Bureau of Mines since 1971, and was required to comply with the mandatory standards promulgated under the Metal Act of 1966.

~FOOTNOTE_NINE

9 "This is intended to be an absolute right of entry without need to obtain a warrant. The Committee notes with approval the decision of the three-judge Federal Court in Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973) which holds the parallel provisions of the Coal Act permitting unannounced warrantless inspections of coal mines constitutional. Safety conditions in the mining industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries or their

authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant * * *. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." Leg. Hist. at 615.

~FOOTNOTE_TEN

10 While it is unnecessary to consider the authority of the Commission to order suppression of the evidence, I note that two circuits have ruled that in a civil regulatory context the exclusionary sanction does not necessarily apply to the fruits of all unconstitutional inspections. In Todd Shipyards v. Secretary, 586 F.3d 683, 690 (9th Cir. 1978), the court held that the exclusionary rule is not retroactively applicable to a pre-Barlow's warrantless search under OSHA since "the deterrent effect of the exclusionary rule would not be enhanced by its application to an OSHA search that may have exceeded the Barlow's limits but which took place before the Barlow's decision." The court noted that the inspectors were acting "pursuant to an apparent Congressional authorization which had not yet been declared unconstitutional by a court of competent jurisdiction." Id. Likewise, in the present situation, even if the inspection were to be held violative of the Fourth Amendment it would have taken place long before a court of competent jurisdiction so held. Thus, since the "introduction of evidence which had been seized by law enforcement officials in good faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold,"' a retroactive application of the exclusionary rule would not be justified. United States v. Peltier, 422 U.S. 531, 536 (1975). Likewise, in Savina Home Industries v. Secretary, 594 F.2d 1358, 1364 (10th Cir. 1979), it was held that the exclusionary rule is not applicable to a pre-Barlow's inspection, and that evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional. In the present situation, it could not be said that the inspector should have known that his actions were unconstitutional given the state of the case law under the Mine Act. Thus, even if I were to hold the search in question violative of the Fourth Amendment, the exclusionary sanction would not be retroactively available.