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FMC V. SOL (MSHA)  
DDATE:  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

FMC CORPORATION,  
CONTESTANT

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
RESPONDENT

Notices of Contest

Docket No. WEST 80-497-RM  
Citation No. 576913, 8/20/80

Docket No. WEST 80-498-RM  
Citation No. 576914; 8/20/80

Docket No. WEST 80-499-RM  
Citation No. 576915; 8/20/80

Docket No. WEST 80-500-RM  
Citation No. 576916, 8/20/80

Docket No. WEST 80-501-RM  
Citation No. 576917; 8/20/80

Docket No. WEST 80-502-RM  
Citation No. 576973; 8/20/80

Docket No. WEST 80-503-RM  
Order No. 576974; 8/20/80

Docket No. WEST 80-504-RM  
Citation No. 576975; 8/20/80

Docket No. WEST 80-505-RM  
Citation No. 576976; 8/20/80

FMC Mine

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

v.

FMC CORPORATION,  
RESPONDENT

Civil Penalty Proceeding

Docket No. WEST 81-355-M  
A/O No. 48-00152-05048

FMC Mine

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Appearances: John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy,  
Salt Lake City, Utah, for FMC Corporation;  
James R. Cato, Esq., Office of the Solicitor, U.S. Department  
of Labor, Kansas City, Missouri, for the Secretary of Labor.

DECISION

Before: Judge Cook

I. Procedural Background

The FMC Corporation commenced the above-captioned "Notice of Contest" proceedings pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The Secretary of Labor also filed a proposal for a penalty in the above-captioned "Civil Penalty Proceeding" pursuant to section 110(a) of the 1977 Mine Act.

On August 11, 1981, a hearing was conducted in the above-captioned proceedings at which time both parties were represented by counsel. During that hearing, certain settlement negotiations were carried out which were later embodied in a joint motion to approve stipulation and settlement agreement which was filed on October 13, 1981. At that same time, a motion was filed to consolidate the above-captioned civil penalty proceeding with the notices of contests in Docket Nos. WEST 80-497-RM, WEST 80-498-RM, WEST 80-499-RM, and WEST 80-500-RM.

II. Stipulation and Settlement Agreement

The joint motion filed by the parties provides as follows:

Come now the parties and move the Federal Mine Safety and Health Review Commission to approve the settlement of the above-captioned matters pursuant to section 110(k) of the Act. The terms of the settlement are as follows:

A.

1. Citations numbered 576913, 576914, 576915 and 576916 were all issued for the failure of FMC to comply with the mandatory standard found at 57.20-8(a) in that FMC did not provide readily accessible adequate toilet facilities in and about the No. 7 shaft underground area of the FMC Mine. Though there did in fact exist adequate toilet facilities in the No. 7 shaft underground area of the mine, these facilities were not readily accessible to the miners by virtue of the distance of the toilet facilities from the various workplaces in the area. Citation number 576913 was written by the inspector at the location nearest the toilet facilities where the inspector initially

determined that the distance of the workplace from the toilet facilities made such facilities no longer readily accessible to the miners in that particular workplace. Citations numbered 576914, 576915, and 576916 each were written to reflect workplaces that were farther from the same toilet facilities.

2. Citations numbered 576974, 576975 and 576976 were all also issued for the failure of FMC to comply with the mandatory standard 57.20-8(a) in that FMC did not provide readily accessible adequate toilet facilities in and about the No. 3 shaft underground area of the FMC Mine. Citation 576974 was written as a 104(d)(1) order of withdrawal because FMC had provided a toilet, but kept it locked and the miners in the area did not have ready access at all times to the key. Further, an inspection of the toilet discovered that the toilet in fact had never been made operational. Citations numbered 576975 and 576976 were each written to reflect different workplaces in the No. 3 shaft underground area that were of such distance from toilet facilities that the facilities were not readily accessible to miners in these workplaces.

3. Mandatory standard 30 CFR 57.20-8(a) requires "Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to the mine personnel." However, this standard gives no guidance as to what shall be considered a maximum distance that a toilet facility may be from a workplace and still be considered readily accessible. After a thorough research of the available case law, the parties have determined that this issue has not been heard by the Commission.

4. Therefore, the parties, after a thorough review of all the available evidence regarding the aforementioned citations, do agree to the following terms for settlement and abatement of said citations:

a. Docket No. WEST 80-497-RM (Citation 576913)

1. The Secretary modifies citation No. 576913 to remove the determination that the violation alleged on the face of the citation constitutes a "significant and substantial" safety or health hazard within the meaning of the Act. However, this modification does not prohibit the Secretary or MSHA from making such a determination should the same or a similar violation of the standard set forth at 30 CFR 57.20-8(a) be discovered at the FMC Mine in the future.

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2. FMC does withdraw its notice of contest to citation No. 576913 and accepts the citation subject to the modification stated above, as final.

b. Docket No. WEST 80-498-RM (Citation No. 576914), WEST 80-499-RM (Citation No. 576915), WEST 80-500-RM (Citation No. 576916)

The Secretary vacates citations numbered 576914, 576915 and 576916. These citations were issued pursuant to the same facts and circumstances that gave rise to citation number 576913 and represent a repetition of the violation alleged in Citation No. 576913. It is the Secretary's position herein that the issuance of repetitive citations to an operator for an alleged violation of the same mandatory standard based upon these facts and circumstances would not further effectuate the purposes of the Act. Therefore, the operator herein having withdrawn its notice of contest to Citation No. 576913, the Secretary does vacate Citations numbered 576914, 576915 and 576916.

c. Docket No. WEST 81-355-M (Civil Penalty Proceeding)

1. Citations numbered 576913, 576914, 576915 and 576916 are also the subject of the above-referenced civil penalty proceeding.

2. The Secretary has vacated citations numbered 576914, 576915 and 576916, as per above. The respondent does accept citation 576913 and agrees to pay the assessed civil money penalty of \$48 in full. The respondent is a large operator and payment of the assessed penalty will not affect the respondent's ability to continue in business. The alleged violation in citation number 576913 was the result of ordinary negligence and the respondent demonstrated the ordinary amount of good faith in abating the violation. The gravity of the alleged violation was not serious. The respondent's history of previous violations is not extraordinary with respect to its size. The inspector's statement for citation number 576913 and the findings of the MSHA Assessment Office are attached hereto and incorporated herein by reference. The parties agree that the aforementioned terms of settlement for this docket are in the public interest and effectuate the intent and purposes of the Act.

d. Docket No. WEST 80-503-RM (Order No. 576974)

1. The Secretary modifies Order No. 576974 to remove the determination that the violation alleged on the face of the citation involved a "significant and substantial" safety

or health hazard within the meaning of the Act. However, this modification does not prohibit the Secretary or MSHA from making such a determination should the same or a similar violation of the standard set forth at 30 CFR 57.20-8(a) be discovered at the FMC Mine in the future.

2. FMC withdraws its notice of contest to Order No. 576974 and accepts the Order, subject to the modification stated above, as final.

e. Docket No. WEST 80-504-RM (Citation No. 576975), WEST 80-505-RM (Citation No. 576976)

The Secretary vacates citations numbered 576975 and 576976. Citations numbered 576975 and 576976 and Order No. 576974 were issued for a violation of 30 CFR 57.20-8(a) in that FMC did not provide readily accessible toilet facilities in and around the No. 3 shaft underground area of the FMC Mine. Citations numbered 576975 and 576976 were written to reflect workplaces of a greater distance from the nearest available toilet facilities than the workplace referenced in Order No. 576974. The issuance of citations numbered 576975 and 576976 represents a repetition of the violation alleged in Order No. 576974. It is the Secretary's position herein that the issuance of repetitive citations to an operator for an alleged violation of the same mandatory standard based upon these facts and circumstances would not further effectuate the purposes of the Act. Therefore, the operator herein having withdrawn its notice of contest to Order No. 576974, the Secretary does vacate citations numbered 576975 and 576976.

Further, with regard to the standard set forth at 30 CFR 57.20-8(a), unless and until the standard is amended to set forth and define "readily accessible," or such a determination is made by the Commission, the FMC Mine shall not be in violation of said standard if it has adequate toilet facilities that are within ten (10) minutes travel time from each and every workplace in the mine by means of travel available to each and every miner in those workplaces, except where the circumstances of the mine are such that it is impossible or unsafe to provide toilet facilities within the distance aforementioned.

B. Docket No. WEST 80-501-RM, WEST 80-502-RM

Citations numbered 576917 and 576973 were issued for an alleged violation of the standard set forth at 30 CFR 50.20-11.

After a thorough and diligent investigation into all the available evidence regarding the issuance of these citations, it is the Secretary's determination that there is insufficient evidence to prove the violations alleged. Therefore, with the concurrence of the contestant, FMC Corp., the Secretary vacates Citations numbered 576917 and 576973.

The parties further agree that the elements of this stipulation and settlement agreement apply only to the particular citations herein and do not prejudice the Secretary in making any future determinations with respect to the operations of FMC Corporation at the FMC Mine. FMC corporation's consent to the terms of this agreement shall not constitute an admission by FMC Corporation of any violation of the Act or the standards promulgated thereunder in any subsequent proceedings other than proceedings brought directly under the Federal Mine Safety and Health Act of 1977, as amended.

It is the parties' belief that approval of this stipulation and settlement agreement is in the public interest and will effectuate the intent and purpose of the Act.

WHEREFORE, the parties pray that this stipulation and settlement agreement be approved and that the above-captioned proceedings be dismissed.

### III. Determination

As relates to the settlement proposal concerning Citation No. 576913, information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The reasons given above by counsel for the parties for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

As relates to the remaining provisions of the joint motion to approve stipulation and settlement agreement in the above-captioned proceedings, such joint stipulation and settlement agreement is APPROVED and the motion by both parties to dismiss all of the above-captioned proceedings will be GRANTED.

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ORDER

The motion to consolidate the above-captioned civil penalty proceeding with Docket Nos. WEST 80-497-RM, WEST 80-498-RM, WEST 80-499-RM, and WEST 80-500-RM, is GRANTED.

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$48 assessed in this proceeding.

IT IS FURTHER ORDERED that the above-captioned proceedings be, and hereby are, DISMISSED.

John F. Cook  
Administrative Law Judge