FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. VA 2013-0029-M A.C. No. 44-05046-302469
v.	Docket No. VA 2013-0082-M A.C. No. 44-05046-305615
KERNEOS, INC., Respondent	Docket No. VA 2013-0120-M A.C. No. 44-05046-308052
	Docket No. VA 2013-0183-M A.C. No. 44-05046-310655
	Mine: Chesapeake Plant

DECISION AND ORDER

Appearances: Thomas Grooms, U.S. Department of Labor, Office of the Solicitor, Nashville, TN, for Petitioner;

Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak & Steward, P.C., Washington, DC, for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act") involves 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Kerneos, Inc. ("Kerneos" or "Respondent") at its Chesapeake Plant. Kerneos alumina and quicklime make a specialty calcium aluminate cement. (Tr. 127: 4; Tr. 145:3-16; Tr. 255:23-24; Ex. S-16; Ex. S-35)

The parties presented testimony on September 8, 2014, in Washington, D.C., regarding the sole issue of MSHA's asserted jurisdiction over the Chesapeake Plant. For the reasons stated below, I find that MSHA does have jurisdiction over the Kerneos Chesapeake Plant.

Background History

In 2008, James R. Petrie, the Northeast District Manager for MSHA, notified Thomas Green, the President of Kerneos, that MSHA was relinquishing jurisdiction over the Chesapeake Plant, which would thereafter be under the jurisdiction of the Occupational Safety and Health Administration ("OSHA"). (Ex. S-9) This determination was made in the course of a penalty proceeding, *See Kerneos, Inc.*, VA 2007-0076 and VA 2007-0077.

Lewis Harvey Kirk, III[1] first learned of the transfer of jurisdiction from MSHA to OSHA in 2011 in the course of a conversation he had with Derek Goossens.[2] (Tr. 118:20 – 119:20) Kirk then discussed this with his supervisor, Bill Wilson, who knew of the transfer, but disagreed with the removal of jurisdiction. (Tr. 119:24 – 120:8) Both Wilson and Kirk spoke to the Administrator and Deputy Administrator of the metal/non-metal branch about the change in jurisdiction, which resulted in Mike Davis, the Southeast District Manager, getting involved.[3] (Tr. 120:11-16)

At that point Davis informed Kirk that an inquiry needed to be made and offered Judith Etterer's assistance to investigate the Chesapeake Plant. (Tr. 121:9-23) Kirk joined Etterer in her investigation at the plant in late May, 2011.[4] (*Id.*; Tr. 122:10-11) Kirk testified that he was at the plant to see what materials, equipment, and processes were being used, to determine if MSHA had jurisdiction over the plant. (Tr. 124:16-21) The investigation resulted in MSHA's determination that the Kerneos plant was under its jurisdiction. (Mike Davis Dep. at 10:2-17) Kerneos objects to this assertion of jurisdiction and argues that it should be under OSHA's jurisdiction.

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[1] At the time of the hearing, Kirk had been employed at MSHA since 2003. (Tr. 102:20 – 103:1) Kirk obtained a BS in civil engineering from the University of Delaware in 1969. (Tr. 103:6-13) Kirk worked for Lehigh Portland Cement for approximately 30 years. (Tr. 103:16 – 104:2) Since Kirk began with MSHA in 2003, he has worked in the safety division. His title at the time of the hearing was senior mine safety and health specialist. As part of his job, he performs jurisdictional investigations to determine MSHA jurisdiction over facilities. (Tr. 110:13 – 111:4)

[2] At the time of the hearing, Goossens had been employed by MSHA since 2007 inspecting metal/non-metal mines. (Tr. 20:16 – 21:4) He has been in the metal/non-metal industry since 1972, approximately 42 years. (Tr. 21:8-22) Goossens received his undergraduate degree from University of England, with a major in extractive metallurgy, and concentrations in mathematics and mechanical engineering. (Tr. 22:5-8) Goossens began employment at Lafarge, Kerneos' predecessor, in 1989. (Tr. 23:3-4) Goossens worked for Lafarge from 1994-2005, and from 1994-1996 he was the production manager. (Tr. 23:25 – 24:8) By 2003, Goossens was the plant manager. (Tr. 115:9-11)

[3] At one point the Chesapeake Plant was regulated by the northeast district, but was then transferred to the southeast district. (Tr. 120:19-23)

[4] Etterer prepared a report of her findings. (Tr.121:24 – 122:7)

Definition of a Mine

Section 4 of the Mine Act provides, in part, that "[e]ach coal or other mine ... shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in section 3(h)(1) of the Act as:

> (A) an area of land from which minerals are extracted [...], (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, *structures*, *facilities*, *equipment*, *machines*, tools, *or other property* [...] or used in, or to be used in, *the milling of such minerals*, *or the work of preparing* coal or *other minerals* [...] 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.

30 U.S.C. § 802(h)(1) (emphases added).

This Section defines a "mine" to include "structures" and "facilities" used in "milling" or "the work of preparing [...] minerals." *Id.* "It does not require that those structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). The Commission has also recognized this, observing that "'milling' and 'preparation' can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market." *Id.* at 1551 (internal citations omitted).

The language in Section 3(h)(1)(C) "gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference both by the Commission and the courts." *Id.* at 1552. The *Donovan* court went on to state that, "[i]n this highly technical area deference to the Secretary's expertise is especially appropriate." *Id.* at n.9; *See Magma Copper Co. v. Secretary of Labor,* 645 F.2d 694, 696–98 (9th Cir.), *cert. denied,* 454 U.S. 940 (1981); *National Industrial Sand Ass'n v. Marshall,* 601 F.2d 689, 703 (3d Cir.1979).

Indeed, when the Mine Act was enacted, the report of the Senate Committee on Human Resources specified that

> [T]here 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 possibl[e] 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. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978) (emphasis added).

***Chevron* Deference**

In reviewing MSHA's interpretation of a statute, I must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984); *Watkins Eng'rs & Constructors* 24 FMSHRC 669, 672-73 (July 2002). If the statute is clear and unambiguous, effect must be given to its language. *Id.* When a statute is ambiguous or silent on the point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. *Id.* Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). "The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected." *Watkins* 24 FMSHRC at 673 (citations omitted).

In *Watkins*, the Commission reached the following conclusion:

> The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. *See In re: Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 591 (5th Cir. 2000) ("Congress expressly delegated to the Secretary ... authority to determine what constitutes mineral milling") (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. See *Chevron*, 467 U.S. at 843-44; *Thunder Basin,* 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13.

24 FMSHRC at 673.

"Milling" is not defined in the Mine Act, but it is defined in the Interagency Agreement between MSHA and OSHA ("Interagency Agreement") published in 1979. The Interagency Agreement defines milling as "the separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." Mine Safety and Health Administration and the Occupational Safety and Health Administration Interagency Agreement,

44 Fed. Reg. 22,827, 22,829 (April 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983).[5] Appendix A to the Interagency Agreement provides a detailed description of the kinds of operations included in mining and milling. The Agreement defines the term "milling" in Appendix A, as follows:

> 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 desired constituents of the crude from the undesired contaminants with which it is associated. A CRUDE is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute promise of possible profit in extraction, treatment, and sale.

44 Fed.Reg. at 22,829; Ex. S-5 at 4. Appendix A further provides that "milling" consists of *one or more* of the following processes: *crushing, grinding*, pulverizing, *sizing,* concentrating, washing, drying, roasting, pelletizing, *sintering*, evaporating, calcining, *kiln treatment,* sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting. *Id.*; Ex. S-5 at 6 (emphasis added). Additionally, Appendix A provides that MSHA has authority to regulate the "mining" of "alumina" and "lime." *Id.* Further, the Interagency Agreement explicitly states that "MSHA['s] jurisdiction includes [...] alumina and cement plants." 44 Fed.Reg. at 22,828; Ex. S-5 at 2.

It is important to note that the Secretary realized that "[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle." *Id.* at 22; 828 Ex. S-5 at 2. The Interagency Agreement also states that the "scope of the term milling may be expanded to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling." *Id.*

Analysis under *Chevron* of the Secretary's interpretation of "milling"

The question to be answered is whether the Secretary's interpretation of "milling" is based on a "permissible construction of the statute," *Chevron*, 467 U.S. at 842, and is reasonable, *Mead*, 533 U.S. at 227. In *Watkins*, the Commission held that the Secretary's interpretation of "milling" was reasonable when MSHA adopted the view that the term "milling" can apply to cement plants even if the facility does not separate waste from valuable material. *Watkins,* 24 FMSHRC at 674. The Commission further found that:

> The Secretary's interpretation of "milling" is consistent with the general usage of the term within the mining industry and with

[5] The interagency agreement was originally reported in 39 Fed. Reg. 27,382 (1974), and the current agreement is published in 44 Fed. Reg. 22,827 (1979).

> ordinary usage. Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents ...," while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." *DMMRT* at 344 (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission ... look[s] to the ordinary meaning of terms not defined by statute"). These definitions are consistent with the Secretary's interpretation that milling includes processes such as grinding and crushing [...] The legislative history of the Mine Act also supports the Secretary's interpretation of "milling." Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*") ("[I]t is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.").

24 FMSHRC 669, 674-76

The court in *Watkins* also held that "in light of the explicit delegation of authority granted to the Secretary in section 3(h)(1) to define milling, that the Secretary's definition of milling was reasonable." *Watkins,* 24 FMSHRC at 676 (citing *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592-93 (5th Cir. 2000)). The court in *Kaiser* held that "the Interagency Agreement expressly includes alumina plants within the jurisdiction of MSHA. Despite some general language ceding regulation of 'refining' to OSHA, the Agreement could not be more clear that '[p]ursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling ... MSHA jurisdiction includes ... alumina and cement plants.'" *Kaiser*, 214 F.3d at 592 (citing Interagency Agreement at 22,827).

I agree with the reasoning cited above and find the Secretary's interpretation of "milling" under the Interagency Agreement to be reasonable and entitled to deference.[6]

MSHA has jurisdiction over Kerneos' Chesapeake Plant

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[6] Kerneos argues that the Secretary's current interpretation, being in conflict with its previous position, is entitled to considerably less deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981); *See General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). I find this argument to be unavailing. Even if the Secretary was given less deference in its interpretation of what constitutes "milling," I still find the Secretary's interpretation to be reasonable.

The issue now becomes whether it was reasonable for the Secretary to conclude that the Chesapeake Plant is a "mine" engaging in "milling." Kirk concluded that the Chesapeake Plant should be subject to MSHA's jurisdiction because they used alumina and lime materials and applied milling processes such as grinding, crushing, sizing, kiln treatment, and sintering to make cement. (Tr. 186:1 – 187:4) I agree with this assessment and for the foregoing reasons find that the Interagency Agreement supports the Secretary's determination the MSHA has jurisdiction over the Chesapeake Plant.

The Respondent argues its Chesapeake Plant is the only calcium aluminate cement manufacturing plant in the U.S. and is not a "mine" engaged in "milling." (Resp. Br. at 1; Tr. 248:5-7) Kerneos states that no material is extracted at the plant and it does not handle raw, mined materials. (*Id.* at 1-2; Tr. 288:16-17) Kerneos argues that the materials used at the plant have "already undergone significant chemical and physical changes through processes performed at other facilities" and is "performing manufacturing of consumer-ready products at its plant," and therefore, there is no treatment of "the crude crust of the earth." (*Id.* at 2, 13; Tr. 288:13-15)

I find these arguments unconvincing. The raw materials being sintered at the Chesapeake Plant are alumina and quicklime. (Tr. 31:15-17; 255:23-24) Alumina and lime are listed among the items that are under MSHA's jurisdiction in the Interagency Agreement. (Tr. 128:14-25; 44 Fed. Reg. at 22,829) Indeed, the materials were included in the list codified by MSHA and OSHA even though both alumina and lime are not "crude crust[s] of the earth" that require processing.

Kerneos also argues that it is not a "cement" plant but is a "specialty" cement plant that makes calcium aluminate cement. (Resp. Br. at 19) Kerneos further establish that it is not a "cement" plant by comparing itself to Portland cement plants, which are under MSHA's jurisdiction. It claims that its plant is smaller, uses a different type of kiln, its raw mills are smaller, there are no preheaters, they do not perform some of the processes that are listed on the Interagency Agreement,[7] and its finished product differs substantially from Portland cement plants. (Resp. Br. at 19-21; Tr. 204:2; Tr. 206:2-3; Tr. 207:1-6) These arguments are equally unconvincing. The size of the plant, and its production and operation capacities does not negate the fact that its processes are similar to the Portland cement plants, and that its processes are listed in the Interagency Agreement. Additionally, stating that the Kerneos plant is a "specialty cement plant" simply establishes that the Kerneos plant is a "cement plant" that produces a very expensive product. (Tr. 276:8-13)

Goossens testified at the hearing that crushing (Tr. 130:9; Tr. 132:9), grinding (Tr. 132:13-25; 134:3), sizing (Tr. 134:18-21), sintering (Tr. 135:20), and kiln treatment (Tr. 136:19)

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[7] Concentrating (Tr. 207:12), washing (Tr. 207:13-14), drying (Tr. 207:15-16), pelletizing (Tr. 210:8-10), and evaporation (Tr. 210:11-12) are some of the processes not used at the Kerneos plant. This, however, is not relevant in my analysis of whether the processes that are used at the plant are included under the Interagency Agreement because "[m]illing consists of one or more of the [...] processes" listed in the Interagency Agreement. 44 Fed. Reg. at 22,829.

all occur at the Chesapeake plant. Graham Reid[8] admitted at the hearing that at the Chesapeake Plant, the raw mill blends and mixes and *reduces the size* of particles by *grinding*. (Tr. 295:21 – 296:14) He further admitted that *sintering* occurs in the rotary *kiln*. (Tr. 270:13-14; 296:19-21) Reid then admitted that from the kiln, the materials go into a cement mill where a *grinding* process occurs. (Tr. 298:2-13) Reid testified at the hearing that he does not think what Kerneos does with the air separator fits under the sizing definition in the Interagency Agreement because it is not a process that uses a screen. (Tr. 266:17 – 267:2) However, Reid later admitted that the air separator cannot be removed out of the process because the "particle size distribution would not be the same shape." (Tr. 306:16-20) This shows that the air separators at the Chesapeake Plant do in fact perform a sizing function despite the Respondent's arguments to the contrary.

Kerneos' Chesapeake Plant is a cement plant that mills lime and alumina and performs grinding, sizing, sintering, and kiln treatment processes. It is a "mine" under MSHA's jurisdiction as contemplated in the Interagency Agreement. I conclude that the Kerneos Chesapeake plant is subject to the jurisdiction of the Mine Act.

It is **ORDERED** that the parties immediately confer regarding the possibility of settlement pursuant to 29 C.F.R. § 2700.53, and within sixty (60) days of the filing of this decision the parties shall provide a status report to the court if a settlement has not been reached.

L. Zane Gill
Administrative Law Judge

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[8] At the time of the hearing, Reid had been the plant manager at Kerneos' Chesapeake plant since 2005. (Tr. 234:13-20) Reid has a master's degree in chemical engineering from the University of Cambridge in England. (Tr. 236 :22-24) For the first six years of his career, he worked for a chemical company called Imperial Chemica in the UK, like DuPont in the U.S. (Tr. 237:4-10) Reid then worked for Lafarge in London since 1999. (Tr. 238:17 – 239:2) He was promoted to production manager in two and a half years, and then became plant manager when he was transferred to Kerneos' plant in Virginia in 2005. (Tr. 239:9-25)