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October 19, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0221-M A.C. No. 41-05471-559982
v.	Docket No. CENT 2022-0249-M A.C. No. 41-05471-561967
AREPET INDUSTRIES, LLC, Respondent	Arepet Industries

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION ON JURISDICTION AND ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION ON JURISDICTION

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Arepet Industries, LLC ("Arepet") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

In June 2022 MSHA conducted an inspection of Arepet's Von Ormy plant ("the plant") and issued the four citations that are the subject of these proceedings. During conference calls with the court, the parties represented that there is a question whether the Von Ormy plant is subject to MSHA's jurisdiction. As a result, and at the request of the parties, the court ordered the parties to file joint stipulations and simultaneous cross-motions for summary decision on the issue of jurisdiction. On September 7, 2023, the parties filed joint stipulations of fact, cross-motions for summary decision on jurisdiction, and other documents. Subsequently, each party filed an opposition to the other party's motion for summary decision.

The singular topic at issue in this order is whether summary decision can be granted for either party on the question of jurisdiction. For reasons set forth below, the Secretary's Motion for Summary Decision on Jurisdiction is **GRANTED** and Respondent's Motion for Summary Decision on Jurisdiction is **DENIED**.

STIPULATED FACTS

The parties submitted the following joint stipulations of fact:

1. Arepet Industries, LLC owns and operates the Von Ormy plant which is the subject of the citations at issue in this case.
2. The Von Ormy plant is the only operation owned and operated by Arepet Industries, LLC.

3. Arepet Industries, LLC is owned by partners Cesar Saenz and Ruben Garza.
4. Arepet Industries, LLC does not own or operate any mine pits or excavations.
5. Arepet Industries, LLC currently purchases wet sand from an unrelated company.
6. Arepet Industries' current supplier of wet sand is Madden Materials.
7. Arepet Industries purchases sand that is commercially available to buyers of sand. Sand is delivered to Arepet Industries by end dump trailer.
8. Sand brought to Arepet Industries is initially stockpiled to reduce moisture content before processing.
9. From stockpiles, sand is carried to and loaded into a hopper then conveyed to a Starkaire gas heated fluid air bed dryer.
10. The air dryer reduces the moisture content of the sand.
11. Drying the sand assists in the process of shipping sand to oil and gas drilling sites and makes the sand more usable as an ingredient in the fracking process.
12. From the dryer, sand is carried by conveyor to a mineral separator, manufactured by Rotex.
13. The purpose of the mineral separator, manufactured by Rotex, is to remove any remaining waste material from the sand.
14. The mineral separator, manufactured by Rotex, does not separate sand into different sizes of sand.
15. The removal of any waste material is done to protect equipment at the oil and gas drilling sites which receive sand from Arepet Industries.
16. Any waste material removed by the Rotex is put in piles and periodically removed from the Von Ormy plant by a third party.
17. Arepet Industries has an arrangement with Cuatro-T that periodically hauls off the waste material at no charge. Sand is carried by conveyor belt from the Rotex into the warehouse.
18. The sand is then picked up from the warehouse floor by a front-end loader and placed into the loadout hopper.
19. The Pneumatic trucks mount on to a weight scale and are loaded with the sand via conveyor and through a spout.
20. Arepet Industries currently sells its sand to EOG Resources, Inc., which uses the sand at oil and gas drilling sites.
21. From June 2, 2021, to June 2, 2022, Arepet Industries also sold sand to Halliburton Energy Services, Inc., Liberty Oilfield Services, Marathon Oil EF, LLC, Nextier Completion Solutions, and Laredo Energy Operating, LLC.
22. Arepet Industries began operations in 2008.
23. Before 2019, Arepet Industries operated under OSHA's jurisdiction, and trained its employees according to OSHA's standards and regulations.
24. The Von Ormy plant was inspected by OSHA two times in 2016.
25. The Von Ormy plant was inspected by OSHA in 2018.
26. As a result of OSHA's three inspections of the Von Ormy plant, Arepet Industries received a total of seven (7) citations.
27. Arepet Industries and OSHA entered informal settlement agreements regarding the seven citations, pursuant to which Arepet Industries paid penalties to OSHA totaling $12,580.
28. MSHA did not conduct any inspections of the Von Ormy plant any time between the time the Von Ormy plant began operations and 2019.

29. The Von Ormy plant did not change its operations or process after 2013.
30. Since 2019, MSHA has conducted 22 inspections of Arepet's Von Ormy plant, including follow-up inspections.
31. In June 2022, MSHA conducted an "E01" inspection of the Von Ormy plant. MSHA issued Arepet Industries, LLC seven citations as a result of MSHA's inspection.
32. Arepet Industries, LLC timely contested the June 2022 MSHA citations.
33. Arepet Industries, LLC has asserted that MSHA does not have jurisdiction of the Von Ormy plant.
34. Exhibit 1 is an accurate drawing of the process that Arepet Industries operates at the Von Ormy plant.
35. Exhibit 2 is an accurate copy of the deposition of Cesar Saenz, partner and co-owner of Arepet Industries.
36. Exhibit 3 is an accurate copy of the deposition of Fabien Crossland.
37. Exhibit 4 is an accurate copy of the deposition of Thomas Balch.
38. Exhibit 5 is an accurate copy of the deposition of William Clark.
39. Exhibit 6 includes accurate copies Arepet Industries, LLC's sand sieve tests.

SUMMARY OF THE PARTIES' ARGUMENTS

Arepet's Motion for Summary Decision on Jurisdiction

Arepet, in its motion, argues the Von Ormy plant is not subject to MSHA jurisdiction. Specifically, Arepet argues the plant is not a "coal or other mine" under the Act because neither mineral extraction nor the milling of minerals in the form of "sizing" or "drying" occurs there.

Arepet asserts, and the MSHA inspectors' depositions confirm, that no mineral extraction occurs at the plant. The plant is "not located on mine property nor adjacent to land where extraction takes place" and all sand processed at the plant is "delivered . . . from third party mines that are geographically separated (by many miles) from . . . [the] plant." Arepet Mot. 7. Although one of Arepet's two owners also owns a sand mine, the operations are separate businesses and Arepet has not purchased sand from that sand mine in years.

Arepet argues the plant does not engage in the milling of minerals via "sizing" as that term is used in the Interagency Agreement. The sand purchased by Arepet has already been screened and sized before being delivered to the plant. All sand purchased and sold by Arepet is "100 mesh" sand and "only oversized material (typically less than 2 percent of the wet sand purchased based on quality control data) is removed and it is regarded as trash material and it is not sold by Arepet to any customers." Arepet Mot. 10. Arepet, citing the Commission's decision in *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642, 2649 (2014), argues that "'scalping' to remove unwanted waste from the mineral material is not 'milling.'" Arepet Mot. 10. Here, Arepet uses the Rotex mineral separator to "scalp" waste stones and rock from the sand. Arepet Mot. 10-11. The waste scalped from the sand is not commercially valuable and, after stockpiled, is removed by a third party at no cost to Arepet and, possibly, used as fill material by that third party. Arepet Mot. 11. Moreover, Arepet asserts that one MSHA inspector acknowledged during his deposition that "this type of borrow pit providing scalped fill material falls under OSHA, rather than MSHA." Arepet Mot. 11.

Arepet argues that the plant does not engage in the milling of minerals via "drying" as that term is defined in the Interagency Agreement. In support of its argument, Arepet cites the U.S. Court of Appeals for the Second Circuit ("Court of Appeals") decision in *Sec'y of Labor v. Cranesville Aggregate Companies, Inc., dba Scotia Bag Plant*, 878 F.3d 25 (2d Cir. 2017) ("*Cranesville*") and argues that the Department of Labor has declined to apply a literal reading of the Agreement's definition of "drying" and has instead said that two additional considerations are necessary to determine whether drying sand is considered "milling." First, "drying is a milling activity if the drying is performed to render sand a marketable commodity." Arepet Mot. 12 (internal quotations and citations omitted). Second, "any subsequent drying of marketable sand that is done to produce a specialty product or to make the sand suitable for a particular purpose is not 'milling.'" Arepet Mot. 13. Here, the commercially available sand purchased by Arepet is already "milled and marketable" and the subsequent drying at the plant is only to "make the sand suitable for a particular and specialty purpose, to transport the sand to the oil and gas well drilling sites and to use in the fracking process." Arepet Mot. 14.

Arepet argues that the history of enforcement at the plant does not support Mine Act jurisdiction. Arepet notes that for approximately 80% of the plant's operational history it has been under OSHA jurisdiction and Arepet has based its compliance efforts and employee training on OSHA standards. Nevertheless, despite no change in the activities performed at the plant, MSHA started inspecting the plant in 2019 in place of OSHA. At that time, Arepet was not represented by counsel and was unaware of the 2017 *Cranesville* decision. Further, Arepet asserts that it is not clear whether the process outlined in the Interagency Agreement for addressing questions of jurisdiction between MSHA and OSHA was followed.[1] Had that process been followed and the *Cranesville* decision taken into consideration, "it is likely that the U.S. Department of Labor officials . . . would have determined that the process at the Von Ormy plant . . . should remain under OSHA jurisdiction." Arepet Mot. 16.

Finally, Arepet argues OSHA's regulations "are more applicable to, and protective of, the safety and health of workers at the . . . plant than are those of MSHA[.]" Arepet Mot. 17. Specifically, Arepet argues OSHA's respirable silica and equipment standards are more protective of employees at the plant, and that Arepet has geared its programs and training toward compliance with OSHA standards.

Accordingly, Arepet requests that the court grant its Motion for Summary Decision on Jurisdiction and determine that MSHA does not have jurisdiction over the Von Ormy plant.

The Secretary's Opposition to Arepet's Motion for Summary Decision on Jurisdiction

The Secretary, in her opposition to Arepet's motion, makes three primary points. First, the Secretary asserts Arepet mischaracterized the court's holding in *Cranesville*. In *Cranesville*,

[1] Section (B)(8) of the Interagency Agreement provides, in part: "When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy."

the sand delivered to the plant required no additional processing to be marketable, whereas here the sand had to be "upgraded" via drying and sizing so that the oil and gas companies could use it without fear of damaging machinery used in the fracking process.

Second, the Secretary argues Arepet overstates the importance of discussions between OSHA and MSHA. Even if there was a failure to follow a jurisdictional decision process, it is not fatal to any jurisdictional determination. Moreover, the Court of Appeals in *Cranesville* held that the Secretary's jurisdictional determination is entitled to substantial deference.

Third, the Secretary avers that Arepet's suggestion that OSHA standards are more protective than MSHA standards is not relevant to the question of jurisdiction. Arepet is free to enact more stringent safety standards than either OSHA or MSHA mandate, both of which "provide a minimal safety standard." Sec'y Opp'n. 4.

The Secretary's Motion for Summary Decision on Jurisdiction

The Secretary argues that Arepet's Von Ormy plant is a "mine" under Section 3(h)(1) of the Mine Act and, therefore, subject to MSHA jurisdiction. Under the Mine Act, "lands, structures, facilities, equipment, machines, tools, etc. used in the work of extracting *or* milling minerals are considered a 'mine,' and there is no requirement that milling facilities and equipment be in proximity to, or affiliated with an extraction operation." Sec'y Mot. 7 (emphasis in original).[2] Here, although Arepet did not extract the mineral it processed, it did engage in "milling" as that term is understood in the MSHA-OSHA Interagency Agreement ("Interagency Agreement") and case law.

According to the Interagency Agreement, "milling is the process of separating valuable minerals from worthless material or 'treating the crude crust of the earth to produce the primary consumer derivatives[,]'" and includes the processes of "sizing" and "drying." Sec'y Mot. 8. (citing 44 Fed. Reg. at 22829).

Arepet engaged in "drying" as that term is defined by the Interagency Agreement when it used a "Starkaire gas heated fluid air bed dryer . . . [to] reduce[] the moisture content of the sand." Sec'y Mot. 9. Although Arepet cites *Cranesville* for its argument that it did not engage in "drying," that reliance is misplaced. Unlike the facility at issue in *Cranesville*, "drying" is essential to how Arepet processes the sand and is not the only activity performed at the plant.[3] Sec'y Mot. 9-10.

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[2] The Secretary cites this court's recent decision in *Cactus Canyon Quarries Inc.*, 2023 WL 3790763 ("*Cactus Canyon*").

[3] The Secretary argues that in *Cranesville* the court held that "the Secretary's decision over jurisdiction was entitled to Chevron deference, that the Mine Act did not unambiguously speak to the issue of whether the Cranesville Bag Plant was under MSHA or OSHA jurisdiction, and that the Secretary's determination that the Bag Plant was under OSHA jurisdiction was reasonable." Sec'y Mot. 13. Moreover, the Secretary asserts that the decision "reiterates the longstanding

In addition to "drying", Arepet engaged in "sizing" as that term is defined by the Interagency Agreement by "running the sand through a Rotex mineral separator to 'separate usable from unusable sand,' and remove waste material described as 'oversize' by one of Arepet's owners." Sec'y Mot. 10 (Internal citations omitted). Arepet's attempt to characterize this process as "scalping," an activity associated with "borrow pits," is also misplaced because there are other "aspects of milling in Arepet's sand process." Sec'y Mot. 11.

Based on the above arguments, the Secretary asserts that there is no genuine issue of material fact and her "interpretation . . . of the term 'milling' is proper[ ]and clearly within the bounds of her discretion." Sec'y Mot. 14. Accordingly, the Secretary requests that the court grant her Motion for Summary Decision on Jurisdiction.

Arepet's Opposition to the Secretary's Motion for Summary Decision on Jurisdiction

Arepet, in its opposition, argues that the plant is not a "sand mill," as alleged by the Secretary, and that it does not engage in extraction or milling at the location. Despite a history of OSHA jurisdiction at the plant, and no change in the operations or processes, MSHA took over jurisdiction without "any official consideration of the issue or the participation by any person within MSHA knowledgeable of the Department of Labor's application of the Interagency Agreement." Arepet Opp'n. 3.

Although the Secretary's motion cites this court's decision in *Cactus Canyon* as support for her argument, Arepet argues that the facts and factors of this case are clearly different and distinguishable. Unlike the plant at issue in *Cactus Canyon*, Arepet's plant does not engage in crushing or sizing. There is no crusher at Arepet's plant and the sand purchased by Arepet has already been screened and sized. The sand sold by Arepet is the same size as that purchased by Arepet, i.e., "100 mesh." Arepet "uses the Rotex to remove harmful oversize or trash materials prior to sale" in order to "ensure that as pure sand as possible is shipped" to its customers "for the specialty use of oil and gas fracking." Arepet Opp'n. 5-6. The waste materials removed from the sand are set aside and ultimately removed from the plant by a third-party contractor "apparently to use as fill material." Arepet Opp'n. 6.

In addition, Arepet argues that its plant does not engage in "drying" as the Department of Labor interpreted that term in the *Cranesville* case. In *Cranesville* the Court of Appeals found that the Mine Act was ambiguous with regard where the milling cycle ends and the manufacturing cycle begins and determined that the Secretary's distinction between "'drying' which is 'milling' and covered by the Interagency Agreement and 'drying' which is not 'milling' under the Interagency Agreement, was reasonable." Arepet Opp'n. 9. There, the Secretary asserted that "drying" is not milling under the Interagency Agreement when the "drying is not necessary to make the mineral a marketable commodity" and is done "to make the sand more suitable for a particular purpose or use[.]" Arepet Opp'n. 7. Although the Secretary, in her motion, asserts that Court of Appeals based its decision on the "substantial deference" it gave to the Department of Labor regarding OSHA and MSHA jurisdiction, she ignores that what the

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principle that the Secretary of Labor is entitled to substantial deference regarding OSHA and MSHA jurisdiction. Sec'y Mot. 13.

court actually gave deference to was the Secretary's definition of the term "drying." Ignoring the definition of "drying" the Secretary advocated before the Court of Appeals is not "reasonable."

Finally, Arepet argues that, contrary to the Secretary's assertion, the history of enforcement at the plant supports a finding that OSHA has jurisdiction. Failure to object to MSHA jurisdiction when Arepet was not aware of the *Cranesville* decision does not give MSHA jurisdiction. Rather, any jurisdictional determination must be decided based on the facts of this case.

DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has long recognized that "summary decision is an extraordinary procedure." *Energy West Mining Co.,* 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471(Nov.1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The singular issue in this order is whether MSHA had jurisdiction to inspect Arepet's Von Ormy plant on the date the subject citations were issued. The Secretary argues that the plant is subject to Mine Act jurisdiction because mineral milling takes place at the facility. Arepet contends, among other things, that it is not a "coal or other mine" under Section 3(h)(1) of the Mine Act because it does not extract minerals or engage in the milling of minerals at the plant. 30 U.S.C. § 802(h)(1).[4]

[4] The parties agree that no extraction occurs at the Von Ormy plant. Accordingly, I have limited my analysis to whether milling occurred at the site such that it is subject to Mine Act jurisdiction.

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Accordingly, for MSHA to have had jurisdiction to inspect the Von Ormy plant, the evidence must establish, first, that the plant was a "coal or other mine" under the Act and, second, that the products of the plant enter commerce, or the operation or products of the plant affect commerce.

Preliminary Considerations

Some preliminary matters are worth noting. First, an operator is permitted to raise jurisdictional issues at any time. It is immaterial that Arepet did not raise the issue of MSHA jurisdiction following the first MSHA inspection at the plant. Second, as set forth in Arepet's brief, Section (B)(8) of the Interagency Agreement provides a mechanism for resolving questions surrounding MSHA vs. OSHA jurisdiction. I find it troubling that this procedure was apparently not followed when jurisdiction over the plant was transferred from OSHA to MSHA in 2019. Indeed, although there may have been behind the scenes discussions between MSHA representatives and OSHA representatives when this decision was made, it would appear that the decision was based primarily on the inclination of one MSHA inspector. Nevertheless, the only question before me is whether MSHA had jurisdiction to inspect the plant at the time the citations were issued. Finally, I acknowledge that the facts put forth by the parties present a close jurisdictional issue. As discussed below, I find that the jointly stipulated facts establish that MSHA had jurisdiction to inspect the plant.

Is the plant a "coal or other mine" under the Mine Act?

In the case at hand, the Secretary seeks to establish Mine Act jurisdiction over the Von Ormy plant via subsection (C) of section 3(h)(1) of the Act, which, in pertinent part, defines a "coal or other mine" to include "structures, facilities, equipment, machines, [and] tools . . . used in … the milling of … minerals." 30 U.S.C. § 802(h)(1).

The Mine Act does not define the term "milling." When a statutory term is not expressly defined it should be accorded its commonly understood definition. *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). In *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002) the Commission, when analyzing the commonly understood definition of "milling" and related terms, stated the following:

> 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." . . . [*Dictionary of Mining, Mineral, and Related Terms* 344 (2d ed. 1997) ("*DMMRT*")] (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry).

Although the Mine Act does not expressly define the term "milling," it does grant the "Secretary discretion, within reason, to determine what constitutes mineral milling. . . [.]" *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).[5] In 1979 the Secretary exercised that discretion when MSHA and OSHA entered into an interagency agreement to delineate certain areas of authority between the two agencies and set forth guidelines for resolving jurisdictional questions involving milling. MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1979) amended by 48 Fed. Reg. 7,521 (Feb. 22, 1983) ("Interagency Agreement" or "the Agreement"). Among other things, the Interagency Agreement clarifies the agencies' intent that the Mine Act, as opposed to the OSH Act, be applied to milling operations, and reiterates Congress's intent that jurisdictional doubts be resolved in favor of inclusion of a facility within coverage of the Mine Act. *Id*.

Appendix A to the Agreement describes "milling" as a process "to effect a separation of the valuable minerals from the gangue constituents of the material mined" as well "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." 44 Fed. Reg. at 22829.

In addition, Appendix A also contains a list of "general definitions of milling processes for which MSHA has authority to regulate[,]" which includes the terms "drying" and "sizing." Although the Interagency Agreement is not dispositive, it can assist in determining whether the Secretary's application of the term "milling" to a particular facility is reasonable. *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984).

For purposes of this analysis, it is helpful to first determine whether Arepet engaged in "sizing" as that term is defined in the Interagency Agreement. "Sizing" is defined as "[t]he 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." 44 Fed. Reg. at 22829-22830. In *State of Alaska, Dept.of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014), the Commission cited the Interagency Agreement's inclusion of "sizing" in its list of milling processes and found that the operator "clearly engag[ed] in 'milling' under section (h)(1)" where it used a screen to separate material "based on size, with oversized rock separated out entirely." Here, the Von Ormy plant used the Rotex "to remove any remaining waste material from the sand." Jt. Stip. 12. Although the Rotex "does not separate *sand* into different sizes of sand," it does remove "oversize" waste material, i.e., rocks, pebbles, and a small amount of oversized sand, from the sand Arepet purchases. Jt. Stip. 14, Ex. A-2 pp. 16-17. In doing so, it separated material of all the same size, i.e., the 100 mesh sand, from material which was not of the same size. I find that this amounted to "sizing" as that term is defined in the Interagency Agreement.

[5] Section 3(h)(1) of the Act 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 employed at one physical establishment[.]" 30 U.S.C. § 802(h)(1).

I note that Arepet asserts the material it purchases is "all 100 mesh size when it is purchased and is sold as 100 mesh sand." Arepet Mot. 10. However, it is quite clear that the product delivered to the Von Ormy plant is not the same as the product sold by Arepet, even if they share the same description as 100 mesh sand.[6] While Arepet attempts to explain away the "oversize material" which, according to it, typically accounts for less than 2% of the purchased product, as de minimis waste, it is clear that removal of that material was critical to the oil and gas companies who purchased the sand from Arepet.

I find Arepet's argument that it engaged in "scalping," and that scalping is not milling, to be unavailing. Arepet cites the Commission's decision in *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642 (2014) ("*Alaska DOT*"), for the position that "'scalping' to remove unwanted waste from the mineral material is not 'milling.'" However, Arepet's argument lacks context and is an incorrect reading of that decision.

In *Alaska DOT* the Commission considered whether the Interagency Agreement's "borrow pit" exception to MSHA jurisdiction applied to an operation. While the Commission cited the Agreement's language regarding "scalping" as it relates to "borrow pits" it did not hold that "scalping," as a general matter, is not "milling." Rather, the Commission, at most, simply recognized that the language of the Interagency Agreement allows limited milling in the form of a scalping screen to remove large rocks, wood and trash from the material extracted *from a borrow pit*. *Id*.

The Interagency Agreement makes clear that an operation must meet certain criteria to be considered a "borrow pit" subject to OSHA, and not MSHA, jurisdiction.[7] Then, and only then, is "scalping" the single excepted form of milling that will not bring the operation within MSHA's jurisdiction. *See also Kerr Enterprises, Inc.*, 26 FMSHRC 953, 956-957 (Dec. 2004) (ALJ).[8] Here, Arepet does not argue, and the stipulated facts do not establish, that the Von

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[6] Many of Arepet's arguments are based upon a "fact" that is not included in the parties' agreed-upon stipulations. The parties stipulated that Arepet purchases commercially available wet sand that it initially stockpiles and did not agree upon the mesh size of the sand. Jt. Stips. 7 & 8. Nevertheless, for purposes of this order, I assume that Arepet contracted with Madden Materials, its sand supplier, to purchase a product described as 100 mesh sand.

[7] Section (B)(7) of the Interagency Agreement states that "'[b]orrow pit' means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. *No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash*. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit." 44 Fed. Reg. at 22828. (emphasis added)

[8] In *Kerr*, the ALJ stated that "scalping would ordinarily give rise to Mine Act jurisdiction. However, the Interagency Agreement exempts a 'borrow pit' from the broad reach of the Mine Act if certain conditions are met."

Ormy plant is a borrow pit. Even so, as discussed above, I have already determined that the plant's use of the Rotex amounted to "sizing."

Having found that Arepet engaged in milling via use of the Rotex, I now consider the second alleged milling process, i.e., drying. "Drying" is defined as "the process of removing uncombined water from mineral products, ores, or concentrates, for example, by application of heat, in air-actuated vacuum type filters, or by pressure type equipment." 44 Fed. Reg. at 22830. I find that Arepet engaged in "milling," as that term is defined in the Interagency Agreement, by "drying" the sand. The parties stipulated that the sand at the plant was conveyed to a "gas heated fluid air bed dryer" for the purpose of reducing the moisture content of the sand. Jt. Stip. 8-10. Unquestionably, the application of heat via the gas heated dryer removed uncombined water from the sand and satisfied the Interagency Agreement's definition of "drying." However, further discussion is warranted.

Much of Arepet's Motion and Opposition is spent arguing that the Secretary is bound by an interpretation of the term "drying" advanced in the *Cranesville* case. In *Cranesville*, the Court of Appeals found that the Secretary reasonably determined that operations at a bag plant fell under OSH Act and not the Mine Act. There, operations at the bag plant consisted of drying sand, sometimes mixing the sand with other minerals to create a concrete pre-mix, and bagging the material that had already been "fully milled." The court noted that the sand had been "crushed, washed, and screened" at another plant and was "fully milled" prior to arrival at the bag plant.[9] 878 F.3d. at 34. In finding that the Secretary reasonably concluded that the bag plant was not a mineral processing operation, but rather a manufacturing facility using milled materials delivered from the other plant, the court stated that "drying is merely one factor to consider in the functional analysis" and "the Secretary may consider all processes conducted at the facility and their relation to each other." *Id*. at 35.

Here, unlike in *Cranesville*, the sand had not been "fully milled" upon arrival at the Von Ormy plant. Rather, and as discussed above, the Rotex machine milled the sand and separated the oversize waste material from the sand. Critically, the milling of the sand by the Rotex occurred *after* the sand had been dried. Because the milling process was not yet complete at the Von Ormy plant at the time the sand was dried, the facts in the *Cranesville* case are substantially different.[10]

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[9] Notably, the *Cranesville* court stated that the operator of Plant 5, where the sand was processed prior to its arrival at the bag plant, had "unquestionably performed milling operations . . . where [the excavated materials] . . . were crushed, *sized,* and washed." 878 F.3d. at 35 (emphasis added).

[10] It is important to recognize that the court in *Cranesville* did not consider the jurisdiction issue de novo. Rather it concluded that "because the Secretary has authority to distinguish between mining and non-mining activities for purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference." 878 F.3d. at 35. As a consequence, Arepet's considerable reliance on this case is misplaced. Indeed, the Secretary's reasonable interpretation of Mine Act jurisdiction in this case is also entitled to deference.

The Interagency Agreement states "there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle." [11] 44 Fed. Reg. at 22828. However, common sense dictates that the manufacturing cycle involves the "making" of something, whereas both the Interagency Agreement and the Commission have recognized that "milling," as a general matter, often involves the removal of waste or impurities from a valuable mineral. 44 Fed. Reg. at 22829; *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 674-675 (July 2002). Here, I find the Secretary reasonably concluded that Arepet's "drying" and "sizing" processes were part of the mineral milling cycle, and not the manufacturing cycle given that they involved removing moisture and oversized waste material from the valuable sand.[12]

Based on the above analysis, I find that "milling," as that term is understood in the mining industry and defined in the Interagency Agreement occurred at the Von Ormy plant. I further find that "sizing" and "drying," as those terms are defined in the Interagency Agreement, occurred at the Von Ormy plant. Based on these findings, the Secretary reasonably determined that Arepet's operation engaged in "milling" as that term is used in the Mine Act.

The Commission has explained that "milling" "independently qualifies . . . [an] operation as a 'mine' within the meaning of the Act." *Drillex Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994). Moreover, the legislative history of the Act makes clear Congress intended "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and . . . 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., L*egislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("Legis. Hist"). Accordingly, I find that the Von Ormy plant is a mine under the Act because "milling" occurred at the facility.

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[11] In *Donovan v. Carolina Stalite Co*. the D.C. Circuit Court of Appeals recognized "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h). The jurisdictional line drawn by the statute rests upon the distinction, which is somewhat elusive, to say the least, between milling and preparation, on the one hand, and manufacturing, on the other. Classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation." 734 F.2d 1547, 1551 (D.C. Cir. 1984).

[12] The milling processes utilized at the Von Ormy plant can be distinguished from the manufacturing processes used at the bag plant in *Cranesville*. In *Cranesville*, the sand was already fully milled and was only being "dried as part of the manufacturing process" which included, at times, mixing the sand with other minerals, i.e., adding material to make a new product, and then bagging. 878 F.3d at 35 (2d Cir. 2017). In contrast, the processes at the Von Ormy plant involved removing unvaluable waste from the valuable sand.

Do the products of the Von Ormy plant enter commerce or the operation or products of the plant affect commerce?

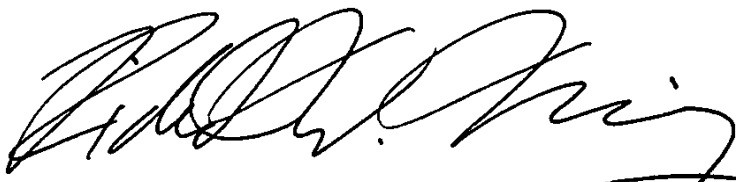
The Commission has recognized that "[b]ecause Congress, in the Mine Act, intended to exercise the full reach of its authority under the Commerce Clause, the Secretary has a minimal burden to show that . . .[a mine's] operations or products affect interstate commerce." *Jerry Ike Harless Towing, Inc. and Harless Inc.*, 16 FMSHRC 683 (Apr. 1994); *State of Alaska Dept. of Transp.*, 36 FMSHRC 2642, 2645 (Oct. 2014).

I find that the Von Ormy plant's products affect "commerce" as that term is used in the Act.[13] The joint stipulations make clear that Arepet currently sells its sand to EOG Resources, which uses the sand at oil and gas drilling sites. Jt. Stip. 20. Moreover, Arepet has in the past sold sand to other customers, including Halliburton Energy Services, Inc., Liberty Oilfield Services, Marathon Oil EF, LLC, Nextier Completion Solutions and Laredo Energy Operating, LLC. Jt. Stip. 21. The Secretary asserts, and Arepet does not dispute, that EOG Resources has operations in several other states. Moreover, Arepet's past customers include multinational corporations with oil and gas related operations throughout the world. *See* 29 C.F.R. § 2700.67(a). Accordingly, I find that the sand produced at the Von Ormy plant both enters and affects commerce.

Having determined that the Von Ormy plant is a "coal or other mine" and that its products affect commerce, I find that the plant is subject to Mine Act jurisdiction.

ORDER

For reasons set forth above, the Secretary's Motion for Summary Decision on Jurisdiction is **GRANTED** and Respondent's Motion for Summary Decision on Jurisdiction is **DENIED**. The parties are **ORDERED** to confer and, by November 7, 2023, suggest multiple potential hearing dates in the months of December 2023 and February 2024.



Richard W. Manning
Administrative Law Judge

[13] Section 3(b) of the Mine Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]" 30 U.S.C. § 802(b).

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