FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

JUN - 8 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. AUSTIN POWDER COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2012-391M A.C. No. 40-00106-284412 E24 Mine: Parsons Quarry

ORDER DENYING RESPONDENT'S AMENDED MOTION FOR SUMMARY DECISION AND GRANTING SECRETARY OF LABOR'S AMENDED MOTION FOR SUMMARY DECISION

Appearances: Anthony M. Berry, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary.

Adele L. Abrams, Esq., CMSP, Law Office of Adele L. Abrams, P.C., for Respondent.

Before: Judge Andrews

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) against Austin Powder Company ("Austin Powder" or "Respondent"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act" or "Act").

Pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67, the parties have submitted cross motions for summary decision. The parties each filed amended motions for summary decision after jointly filing stipulated facts and exhibits and certifying that the stipulated facts included all material facts relevant to the decision.

I. PROCEDURAL BACKGROUND

This action arose from the Secretary of Labor's attempt to assess civil penalties against Austin Powder Company for violations of the Mine Act. On February 8, 2012, MSHA issued two citations to Respondent at its storage facility at the Parsons Quarry

mine. The issue presented is whether MSHA had jurisdiction over Austin Powder's facility at Parsons Quarry.[1] Austin Powder was a contractor that performed blasting services at Parsons Quarry.

On September 11, 2014, the Secretary filed a Motion for Summary Judgment Regarding Jurisdiction. Likewise, the Respondent filed a Motion for Summary Decision on September 15, 2014. The Secretary and Respondent filed replies on September 17, 2014 and September 29, 2014, respectively.

After reviewing the motions and the responses, the undersigned declined to reach the issue of summary decision on the basis that there were additional material facts that needed to be determined in order to make a proper ruling.[2] However, because the parties wished to dispose of the issue through summary decision, and in the interest of judicial economy, the undersigned allowed the parties to renew their motions and to submit joint stipulations of all material facts relevant to the instant proceeding.

On January 23, 2015, the parties submitted 97 joint stipulations, which are enumerated below, and certified that the stipulations represent all of the material facts relevant to the case. The parties also submitted eight exhibits in support of their respective positions.[3]

In its reply brief dated September 29, 2014, Respondent raised a new issue, arguing there was a lack of fair notice when MSHA asserted jurisdiction over the site at Parsons Quarry. By leave of the court, the parties were ordered to address this issue and were provided an opportunity to submit additional stipulated facts. The Secretary addressed this and the jurisdiction issue in its Amended Motion for Summary Decision dated February 27, 2015 and the Respondent addressed both issues in its Amended Motion for Summary Decision also dated February 27, 2015. The parties did not submit any additional stipulated facts.

---

[1] Parsons Quarry is a mine operated by Vulcan Construction Materials. JS ¶ 16. Here and hereinafter, the parties' joint stipulations submitted on January 23, 2015, which are contained *infra*, will be abbreviated as "JS."

[2] *See* Order Denying Respondent's Motion for Summary Decision Order Denying Secretary's Motion for Summary Judgment Regarding Jurisdiction dated December 8, 2014 (unpublished). The undersigned declined to grant the summary decision motions because under Commission Rule 67, in order for there to be a disposition by summary decision, there cannot be any genuine issue as to any material fact.

[3] The parties have stipulated to modifications in the citations and reductions in the proposed assessments; however, a joint motion for approval of settlement with rationale for the modifications must still be filed.

II. STIPULATED FACTS

The parties jointly submitted the following stipulated facts:

1. Exhibit 1 is an accurate copy of citation 8637491.
2. Exhibit 2 is an accurate copy of citation 8637492.
3. Exhibit 3 is an accurate copy of the lease executed between Austin and Vulcan on February 28, 1996.
4. Exhibit 4 is an accurate aerial image of Parsons Quarry with the Storage Area encircled in red.
5. Exhibit 5 is an accurate collection of the citations that were vacated following the October 2008 inspection of Parsons Quarry.
6. Exhibit 6 is an accurate report of Austin's assessed violation history.
7. Exhibit 7 is an accurate copy of a citation Austin received from the Tennessee Occupational Safety and Health Administration (TOSHA) with subsequent abatement and payment forms.
8. Exhibit 8 is an accurate copy of the Memorandum of Understanding between MSHA and the Bureau of Alcohol, Tobacco, and Firearms issued in June 1980.
9. Austin Powder Company ("Austin") was an "operator," as defined in the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 802(d), at the mine, Parsons Quarry, (Mine Identification No. 40-00106) at which the citations at issue in this proceeding were issued.
10. Austin is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to 30 U.S.C. §§ 815 and 823.
11. Form 1000-179 contained in the Exhibit A attached to the Secretary's petition accurately reflects Austin's size when compared with 30 C.F.R. § 100.3(b)(2011).
12. Form 1000-179 contained in the Exhibit A attached to the Secretary's petition accurately sets forth the total number of inspection days and the total number of assessed violations for the 24-month period preceding the month of issuance for each referenced citation.
13. Austin engaged in 794,443 work hours in 2011.
14. Payment by Austin of the proposed penalty of $3,218.00 will not affect Austin's ability to remain in business.
15. Austin was performing blasting activities at Parsons Quarry up to the time that citations 8637491 and 8637492 were written.
16. Parsons Quarry was being operated by Vulcan Construction Materials ("Vulcan") on February 8, 2012.

17. Parsons Quarry is a coal or other mine as that term is defined in Section 3(h)(1) of the Mine Act.

18. At all relevant times, the products of Parsons Quarry entered commerce, or the mine operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.

19. Citations 8637491 and 8637492 both allege violations that occurred at the same storage area (hereinafter referred to as the "Storage Area").

20. The Storage Area is owned by Vulcan.

21. The Storage Area was leased to Austin by Vulcan on February 28, 1996.

22. Austin used the Storage Area to store "explosives and related products," as described by Exhibit 3.

23. Austin was using the Storage Area to store "explosives and related products" on February 8, 2012.

24. Austin uses the "explosives and related products" stored at the Storage Area for performing blasting services for Vulcan and other customers.

25. The "explosives and related products" stored at the Storage Area included detonators.

26. The "explosives and related products" stored at the Storage Area included oxidizers.

27. CFR §§ 56.6132(b) and 56.12032 are each mandatory health or safety standards as that term is defined in Section 3(l) of the Mine Act.

28. The citations contained in Exhibit A attached to the Secretary's petition are authentic copies of the citations at issue in this proceeding with all appropriate modifications and abatements, if any.

29. Citation 8637491 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Austin Powder Company on 2/8/2012.

30. Citation 8637492 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Austin Powder Company on 2/8/2012.

31. Petitioner's agents conducted five inspections of Mine ID 40-00106 from October 6, 2008 to October 14, 2009. Three of those inspections were E01's and the other two were an E15 and an E30.

32. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068396 to Austin Powder at Mine ID 40-00106.

33. Citation number 6068396 was issued under 30 CFR §47.41(a) for a lack of label on a diesel tank located at the ammonium nitrate storage bin.

34. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068396 because "Austin Powder was not within MSHA's jurisdiction".

35. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068397 to Austin Powder at Mine ID 40-00106.

36. Citation number 6068397 was issued under 30 CFR §56.12032 for a missing cover plate on a transformer located behind the hopper for ammonium nitrate.

37. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068397 because "Austin Powder was not within MSHA's jurisdiction".

38. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068398 to Austin Powder at Mine ID 40-00106.

39. Citation number 6068398 was issued under 30 CFR §56.12006 because the disconnect for the main power was not labeled at the ammonium nitrate storage area.

40. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068398 because "Austin Powder was not within MSHA's jurisdiction".

41. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068399 to Austin Powder at Mine ID 40-00106.

42. Citation number 6068399 was issued under 30 CFR §56.12004 because the conduit housing the 220 volt power cable for the ammonium nitrate bucket elevator was damaged.

43. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068399 because "Austin Powder was not within MSHA's jurisdiction".

44. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507651 to Austin Powder at Mine ID 40-00106.

45. Citation number 6507651 was issued under 30 CFR §56.14112(b) because the guard for the motor on the bucket elevator for the ammonium nitrate was open exposing keyed pulley wheels and a drive belt.

46. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507651 because "Austin Powder was not within MSHA's jurisdiction".

47. On October 7, 2008, a representative for the Mine Safety and Health Agency issued citation number 6068400 to Austin Powder at Mine ID 40-00106.

48. Citation number 6068400 was issued under 30 CFR §56.18002(a) for lack of workplace examinations.

49. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6068400 because "Austin Powder was not within MSHA's jurisdiction".

50. On October 9, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507664 to Austin Powder at Mine ID 40-00106.

51. Citation number 6507664 was issued under 30 CFR §56.6132(a)(4) because the #1 magazine had signs posted using sparking metal fasteners.

52. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507664 because "Austin Powder was not within MSHA's jurisdiction".

53. On October 9, 2008, a representative for the Mine Safety and Health Agency issued citation number 6507665 to Austin Powder at Mine ID 40-00106.

54. Citation number 6507665 was issued under 30 CFR §56.6132(a)(4) because the #2 magazine had signs posted using sparking metal fasteners.

55. On October 14, 2008, a representative for the Mine Safety and Health Agency vacated citation number 6507665 because "Austin Powder was not within MSHA's jurisdiction".

56. The materials stored at the Storage Area included blasting caps, cast boosters, and ammonium nitrate prill.

57. Austin stored a truck, hereinafter known as the "Truck", at the Storage Area that was equipped with the ability to mix ANFO blasting agent for filling blasting holes. The Truck also has the capability to manufacture an emulsion blend product (HEET).

58. The blasting performed by Respondent at Parsons Quarry was performed for the extraction of rock for its minerals on that site.

59. When Austin needs to service one of its customers, the Truck is loaded with the materials stored at the Storage Area and then driven to the customer's jobsite.

60. Once the Truck arrives at the jobsite, it creates a blasting agent mix using the materials stored onboard.

61. Austin uses the blasting agent created by the Truck to perform blasting services.

62. The access road to the Storage Area crosses land owned by Vulcan but does not go to or through the pit area.

63. In February 2012, MSHA Inspector James Hollis conducted a regular "E01" inspection of the Parsons Quarry. In the course of his inspection, he requested access to inspect the explosives storage facility.

64. No one from Austin was on-site at the time of Mr. Hollis' inspection.

65. Inspector Hollis contacted a representative of Austin who sent David Byrd, a truck driver for Austin, to meet Inspector Hollis.

66. David Byrd unlocked the magazines before Inspector Hollis could inspect the area.

67. Prior to conducting the inspection, Inspector Hollis did not check with his supervisor, or anyone else within MSHA, regarding MSHA jurisdiction of the leased property. Inspector Hollis was aware that the leased property had not been inspected during previous inspections of Parsons Quarry.

68. Between March 2008 and July 2014, Robert Knight served as an inspector for the U.S. Department of Labor, Mine Safety and Health Administration out of the Franklin, Tennessee, Macon, Georgia, and Dallas, Texas metal/non-metal offices.

69. In October 2008, Robert Knight conducted an E01 inspection of Parsons Quarry, a Vulcan Materials mine.

70. During the October 2008 E01 inspection, Robert Knight issued 8 citations to Austin, whose operation was located on leased land within the boundaries of the Vulcan mine site.

71. A representative for Austin, Charles Lambert, told Robert Knight that he did not believe that the leased land should be under MSHA jurisdiction because the site was used to process materials and take them to multiple sites.

72. Robert Knight issued the citations but was later informed by MSHA management that the citations were required to be vacated due to the fact that Austin's operation was not technically on the mine site and not in MSHA's jurisdiction.

73. James Croft, who was the Field Office Supervisor for Franklin, Tennessee at that time, told Robert Knight that he did not believe that MSHA had jurisdiction because Austin stored material that was used on other sites besides this Vulcan site.

74. James Croft told Robert Knight that he discussed the citations with Mike Davis, who was the District Manager in the Southeast District office in Birmingham, Alabama at the time.

75. Between 2008 and 2014, James Croft served as the Field Office Supervisor (FOS) for the U.S. Department of Labor, Mine Safety and Health Administration's Franklin, Tennessee metal/non-metal office.

76. During his tenure as FOS, James Croft supervised a number of inspectors whose jobs included conducting E01 inspections on various mine sites in the Franklin, TN district.

77. During James Croft's tenure as FOS, Robert Knight worked as an inspector out of the Franklin, TN office.

78. Shortly after Robert Knight issued 8 citations to Austin in October 2008, he called James Croft to discuss the citations. James Croft told Robert Knight that he did not believe that the functions Austin was performing on their leased area were under MSHA jurisdiction.

79. After speaking to Robert Knight regarding the 8 citations issued in October 2008, James Croft called the Southeast District office in Birmingham, Alabama and conferred with Mike Davis, the District Manager at the time. Mike Davis told James Croft that, in his opinion, Austin's property did not fall under MSHA jurisdiction.

80. James Croft instructed Robert Knight to vacate the 8 citations issued in October 2008 on the grounds that Austin was not within MSHA's jurisdiction.

81. Austin uses approximately, but not more than, 10% of its materials at the Storage Area for performing blasting services at Vulcan's Parsons Quarry.

82. Austin uses the materials stored at the Storage Area for blasting at a variety of nearby sites, which include mines and construction worksites. Most of the construction worksites are for building roads.

83. In addition to the Truck and the "explosives and related products", Austin maintains a storage magazine, a hopper and conveyor for loading and unloading ammonium nitrate, and oxidizing bins on the leased property.

84. Austin does not mix or prepare explosive materials while within the Storage Area.

85. The "Condition or Practice" section of Citation 8637491 is accurate and describes a violation of 30 CFR § 56.6132(b).

86. The "Condition or Practice" section of Citation 8637492 is accurate and describes a violation of 30 CFR § 56.12032.

87. The gravity of Citation 8637491 is correctly assessed as "Unlikely" and "Fatal."

88. The gravity of Citation 8637492 is correctly assessed as "Unlikely" and "Lost Workdays or Restricted Duty."

89. The "Number of Persons Affected" section of Citation 8637491 is correctly assessed as affecting one person.

90. The "Number of Persons Affected" section of Citation 8637492 is correctly assessed as affecting one person.

91. Austin's negligence with regard to Citation 8637491 was "Low."

92. Austin's negligence with regard to Citation 8637492 was "Low."

93. A penalty of $2,000 is appropriate for the condition alleged in Citation 8637491.

94. A penalty of $600 is appropriate for the condition alleged in Citation 8637492.

95. Austin is a business entity whose work is properly characterized as that of an independent contractor. With regard to the Storage Area, Austin is a lessee of Vulcan.

96. During the period from 2007 to 2014, MSHA conducted 15 inspections of Parsons Quarry, but inspected the Storage Area only four times: on 10/6/2008 with Robert Knight, on 2/8/2012 with James Hollis, on 6/27/2012 with Jay Gortney, and on 4/1/2014 with Kevin Dycus.

97. During the period from January 1, 2009 to December 31, 2011, MSHA performed 5 inspections of Parsons Quarry but did not inspect the Storage Area.

III. NARRATIVE OF FACTS

Vulcan Construction Materials owns and operates Parsons Quarry, a "coal or other mine" under the Mine Act, located in Decatur County, Tennessee. JS ¶¶ 16, 17, 20; JE 3.[4] Since 1996, Austin Powder, an independent contractor, and an "operator" as defined by the Mine Act, has leased land owned by Vulcan at the Parsons Quarry site.[5] JS ¶¶ 9, 21, 95; JE 3. Austin Powder used this leased land as an explosives magazine to store explosives and other related materials. JS ¶ 22; JE 3. Specifically, it stored detonators, oxidizers, blasting caps, cast boosters, and ammonium nitrate prill at the storage area. JS ¶¶ 25, 26, 56. The Respondent used these materials to conduct blasting operations for clients including Vulcan, and at Parsons Quarry the blasting was for the extraction of rocks and minerals at the mine. JS ¶¶ 15, 24, 58, 82.

The storage area itself was located approximately 400 feet, or within a tenth of a mile, from the rest of the mine. JE 4. There was an access road to the storage area which goes over land that is owned by Vulcan; however, the access road does not go to or through the pit area. JS ¶ 62. Austin Powder had a truck at the storage area that was equipped with the ability to mix ANFO blasting agent for filling blasting holes and also had the capability to manufacture an emulsion blend product (HEET). JS ¶ 57. Respondent used this truck to service its customers; it loaded the truck with the materials stored at the area and then drove to the customer's job site where it would create a blasting agent used to perform the blasting services. JS ¶¶ 59, 60, 61. Furthermore, Austin Powder kept a storage magazine, a hopper and conveyor for the loading and unloading of ammonium nitrate, and oxidizing bins at the storage area, but it did not prepare or mix any explosive materials there. JS ¶¶ 83, 84.

Austin Powder uses approximately, but not more than, 10% of the materials stored at the area for blasting services at Parsons Quarry. JS ¶ 81. Respondent uses the remainder of the materials stored there at other mines and construction sites. JS ¶ 82.

From 2007 until 2014, MSHA inspected Parsons Quarry 15 times, but only inspected the storage area four times. JS ¶ 96. MSHA did not inspect the storage area at all in 2007. *Id.* MSHA inspector Robert Knight inspected the storage area on October 6, 2008, inspector James Hollis inspected the storage area on February 8, 2012, inspector Jay Gortney inspected the storage area on June 27, 2012, and inspector Kevin Dycus inspected the storage area on April 1, 2014. *Id.*

---

[4] Here and hereinafter, the parties' joint exhibits are abbreviated as "JE."

[5] *See* 30 U.S.C. § 802(d).

Robert Knight was an inspector for MSHA from March 2008 to July 2014. JS ¶ 68. He worked out of the Franklin, Tennessee; the Macon, Georgia; and the Dallas, Texas metal/non-metal offices. *Id.* In October 2008, Knight inspected Parsons Quarry and included the storage site in his inspection. JS ¶ 69. Knight issued eight citations to Respondent. JS ¶ 70. Specifically, on October 7, 2008 he issued Citation No. 6068396, Citation No. 6068397, Citation No. 6068398, Citation No. 6068399, Citation No. 6507651, Citation No. 6068400, Citation No. 6507664, and Citation No. 6507665, which were all issued to Austin Powder during the inspection. JS ¶¶ 32–54.

Charles Lambert of Austin Powder told Knight that he did not believe that the leased land should be under MSHA jurisdiction because the storage area provided service to multiple sites. JS ¶ 71. After Knight issued the citations, he called to speak with James Croft. JS ¶ 78. Croft—who between 2008 and 2014 served as the Field Office Supervisor for MSHA's Franklin, Tennessee office, and who was Knight's supervisor—told Knight that he did not think that MSHA had jurisdiction over the leased area since Austin stored materials that were used on sites other than just Parsons Quarry.[6] JS ¶¶ 73, 75, 78. Croft had also discussed the matter with Mike Davis, who at the time was the District Manager in the Southeast District office located in Birmingham, Alabama. JS ¶ 74. Davis told Croft that in his opinion, Austin's property was not under MSHA jurisdiction. JS ¶ 79. Croft then told Knight to vacate the eight citations due to the Austin's operation not being under MSHA jurisdiction. JS ¶¶ 72, 80.

Following the back-and-forth discussions between MSHA officials on October 14, 2008, MSHA vacated citation No. 6068396 because "Austin Powder was not within MSHA's jurisdiction." JS ¶ 34. Citation Nos. 6068397, 6068398, 6068399, 6507651, 6068400, 6507664, and 6507665 were all vacated for the same reason. JS ¶¶ 37, 40, 43, 46, 49, 52, 55. Austin Powder received modifications to each of the citations which were vacated. JS ¶ 5, JE 5. The modified condition or practice stated "The fact that Austin Powder was not within MSHA's jurisdiction even though the equipment was accessible by miners within the middle of the mine site was not revealed until after the citations were issued to the contractor." JE 5. The modifications also reference the fact that the area was "leased property" used by Austin Powder. *Id.*

After the citations were vacated, the Tennessee Department of Labor and Workforce Development, Occupational Safety and Health Administration (TN-OSHA), conducted a referral inspection of the storage area. JE 7. TN-OSHA issued one citation to Respondent during the inspection, and Austen Powder accepted the citation and authorized payment of the penalty. *Id.*

From January 1, 2009 to December 21, 2011, MSHA inspectors inspected Parsons Quarry five times, but did not inspect the storage area during those inspections. JS ¶ 97. However, during an "E01" inspection of Parsons Quarry on February 8, 2012, Inspector James Hollis requested to inspect the explosives storage facility. JS ¶ 63. Because no one

[6] Croft supervised a number of inspectors who conducted E01 inspections at various mine sites in the Franklin, TN District. JS ¶ 76.

from Austin Powder was on-site at the time of the inspection, David Byrd, a truck driver, was sent to meet Hollis and unlocked the magazines before the inspection. JS ¶¶ 64, 65, 66. Hollis did not check with his supervisor or anyone else at MSHA in regards to MSHA's jurisdiction over the leased property before inspecting it; however, he was aware that the area had not been inspected during previous inspections at Parsons Quarry. JS ¶ 67.

During the inspection, Hollis issued two citations, 8637491 and 8637492, for violations at the storage area leased by Austin Powder. JS ¶¶ 19, 29, 30; JE 1, 2. The citations were properly served on February 8, 2012 by a duly authorized representative of MSHA upon an agent of Austin Powder. JS ¶¶ 29, 30.

Citation No. 8637491 was issued for a broken ground strap on the door of the #2 magazine, which was used to store detonators. JE 1. The purpose of the ground strap was to provide protection in case the magazine was exposed to electricity, such as from lightning. *Id.* The citation was marked as moderate negligence, unlikely, fatal, non-S&S, and affecting one person. *Id.*

Citation No. 8637492 was issued because the dry transformer at the ANFO storage was missing a cover plate on its bottom. JE 2. The purpose of the cover plate was to help maintain the inner integrity of the box and protected against electrical shock. *Id.* The citation was marked as moderate negligence, unlikely, lost workdays or restricted duty, non-S&S, and affecting one person. *Id.*

IV. PARTIES' CONTENTIONS ON JURISDICTION

A. Secretary's Contentions

The Secretary contends that MSHA has jurisdiction over both the Respondent and the Storage Area. Secretary's Amended Motion for Summary Decision, 1.[7] Specifically, the Secretary contends that Section 4 of the Mine Act, which states that mines shall be subject to the provisions of the Act, and Section 3(h)(1) of the Act, which defines "coal or other mine," extend Mine Act jurisdiction to the storage area. SAM 1–2. The Secretary cites *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984) and *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981) to further argue that Congress intended the Mine Act and the definition of a "mine" to be interpreted liberally, therefore broadening the Mine Act and MSHA's jurisdiction. SAM 2.

[7] Hereafter, the Secretary's Amended Motion for Summary Decision that was submitted on February 27, 2015 shall be abbreviated SAM. Likewise, Respondent's Amended Motion for Summary Judgment and Argument in Support of its Motion shall be abbreviated RAM.

The Secretary cites *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), for the proposition that the Commission has applied the broad definition of a mine to a storage facility in instances when materials were stored that were used in the mining process. SAM 3. The Secretary also notes that the Commission has recognized that materials stored in the storage area could present hazards to miners, just like other hazards associated with mining. *Id.*

In applying the case law to the facts of the present case, the Secretary argues that MSHA may exercise jurisdiction over the storage area because doing so would meet the plain language requirements of the Mine Act and would be consistent with Commission precedent. *Id.*

The Secretary further contends that the fact Respondent leases the area from Vulcan is irrelevant. SAM 4. Rather, the Secretary argues that because Respondent engages in the work of extracting minerals from their natural deposits, and the materials and equipment to do this are stored in the storage area, the storage area should be considered a "coal or other mine" under the Mine Act, and is therefore under MSHA jurisdiction. SAM 5.

The Secretary also contends that MSHA officials' previous determination that it did not have jurisdiction over the storage area is not dispositive of whether it actually had jurisdiction over the site. *Id.* Rather, the Secretary argues that the plain language of the Mine Act and Commission precedent allow MSHA to assert jurisdiction. SAM 5–6.

The Secretary argues that it is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) and that MSHA has a long history of asserting jurisdiction over shops and storage areas that are used in the mining process. SAM 6. To support its position, the Secretary cites *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704 (Apr. 1994), *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning) and *Austin Powder Co.*, 14 FMSHRC 620 (Apr. 1992) (ALJ Morris). The Secretary also argues that the fact that MSHA has been inconsistent in its assertion of jurisdiction does not affect the deference it should be afforded, and cites *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 998 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) as support. *Id.*

Finally, the Secretary contends that the Respondent's use of the storage area for mining purposes is not *de minimis*. SAM 9. The Secretary cites *Northern Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848-89, (7th Cir. 2002) in support of its argument. The Secretary contends that the Respondent's argument that the storage area should not be under MSHA's jurisdiction since it uses less than 10% of the materials stored at the site for blasting services at Parsons Quarry would be a novel interpretation of Section 3(h)(1). SAM 9.

B. Respondent's Contentions

The Respondent contends that MSHA does not have jurisdiction over the storage facility at Parsons Quarry, and that it did not have fair notice of MSHA's assertion of jurisdiction at the storage site.

First, Respondent argues that the storage site does not fall under Mine Act or MSHA jurisdiction because it is not "an area of land from which minerals are extracted" as part of the definition of "Coal or other mine" under Section (3)(h)(1) of the Mine Act. RAM 5. Likewise, Respondent contends that the storage facility was not a "private way or road appurtenant to" an extraction area, as part of the definition under (3)(h)(1). *Id.*

The Respondent also argues that it would not be covered by the Mine Act because the storage area is not a "service area for mining equipment belonging to and used at the quarry." *Id.* Rather, it merely stores explosives and related materials, which are used at a variety of sites under the jurisdiction of either MSHA or the Occupational Safety and Health Administration (OSHA), including Parsons Quarry. RAM 5–6; JS ¶ 81. Further, a truck at the site is only used to transport the stored materials to other sites. RAM 6.

Respondent contends that words, unless they are otherwise defined, should be interpreted to mean their "ordinary, contemporary, common meaning." In support of its argument, Respondent quoted the *Merriam Webster's Collegiate Dictionary*, 10th Ed., definition of "used," meaning to be "employed in accomplishing something," as well as Norman J. Singer, *Sutherland Statutory Construction*, Vol. 2A, § 47.28 (7th ed., Thomson/West, April 2014). RAM 6.

The Respondent argues that the storage area is not "employed in" mining at Parsons Quarry because it is maintained and controlled by a different company—Austin Powder—which leases the site. *Id.* Respondent states that only a small percentage of the material stored at the site is delivered to and used at Parsons Quarry. *Id.*

Next, Respondent cites *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 743 (6th Cir. 2012) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), in support of its argument that this court should only defer to the Secretary's statutory interpretation insofar as its interpretation is persuasive. RAM 6–7. Respondent also argues that even if the Court were to apply *Chevron* deference in its interpretation, the Secretary's interpretation should not be accepted because it is not reasonable. RAM 7. Moreover, the Respondent cited *AKM, LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012) as support of its argument that deference should be given to the Secretary's interpretation so long as the legal language is ambiguous and the Secretary's interpretation is reasonable. RAM 7.

In further support of its argument, Respondent cites the various factors listed in *North Fork Coal* that are used to determine the weight that should be placed on the Secretary's interpretation of a statute. *Id.* These factors include the validity of the Secretary's reasoning, the Secretary's consistency with other pronouncements, and other

relevant factors. *Id.* The Respondent contends that, in the instant case, MSHA's current interpretation is inconsistent with previous determinations, just as it was in *North Fork Coal*, and *Akzo Nobel Salt v. FMSHRC*, 212 F.3d 1301, 1034 (D.C. Cir. 2000). RAM 7–8. Respondent argues that MSHA was previously *consistent* in its determinations that the storage site was *not* under its jurisdiction. RAM 8. Respondent states that MSHA's continued decision not to inspect the site at Parsons Quarry, even in light of the MOE with BATF and its statutory requirement under the Mine Act to inspect mines at least four times a year, shows an ongoing finding and determination by MSHA that the storage site is not under its jurisdiction. RAM 8.

Respondent cites *Bush & Burchett v. Reich*, 117 F.3d 932, 937 (6th Cir. 1997) for the proposition that the Secretary's assertion of jurisdiction would extend the Mine Act to "unprecedented and absurd lengths," and that the Secretary has not suggested a limiting principle. RAM 9.

Next, Respondent contends that Mine Act jurisdiction has only rarely been extended to sites outside of mine property, and that those situations were factually distinguishable from the present case. *Id.* Respondent distinguishes *U.S. Steel Mining Co.*, 10 FMSHRC 146 (Feb. 1988) and *Jim Walter Resources*, 22 FMSHRC 21, 25 (Jan. 2000), in both of which the Commission found jurisdiction over off-site facilities. *Id.* Respondent argues that in the instant proceeding, the storage facility is on leased property, is operated by a company other than the mine operator, stores materials not owned by the operator, and the materials are used at various sites regulated by either OSHA or MSHA. RAM 10.

V. ANALYSIS OF JURISDICTION

The first issue presented in this case is whether MSHA has jurisdiction over Austin Powder's leased land used as a storage facility at Parsons Quarry. For the foregoing reasons, the undersigned finds that MSHA is able to assert jurisdiction over this leased property.

MSHA's primary authority to assert jurisdiction over the leased property is derived from the Mine Act:

> Each 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 chapter.

30 U.S.C. § 803.

Section 3(h)(1) of the Act defines the term "coal or other mine" as:

> (h)(1)(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, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or 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.

30 U.S.C. § 802(h)(1). The Third Circuit has held that persons working in these ancillary areas work in "coal or other mines," even if they are not likely to work in the actual production or extraction process. *National Indus. Sand Ass'n v. Marshal*, 601 F.2d 689 (3d Cir. 1979).

The Secretary contends that under the Mine Act, MSHA has jurisdiction over the storage area. In contrast, the Respondent contends that MSHA does not have jurisdiction over the area because it is not "an area of land from which minerals are extracted" and is therefore not a "coal or other mine." 30 U.S.C. § 802(h). When reviewing MSHA's interpretation of its jurisdiction of the area under the Mine Act, the undersigned must first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

Section 3(d) of the Act defines an "operator" as, "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C § 802(d). By performing services that are of the "work of extracting [] minerals from their natural deposits," Respondent is under the jurisdiction of the Mine Act. 30 U.S.C. § 802(h)(1).

Furthermore, a plain language reading of the Mine Act shows that MSHA has jurisdiction over the Respondent's leased property at Parsons Quarry. The Commission has specified that under the Mine Act, MSHA not only has jurisdiction over mines, but also over "facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Jerry Ike Harless Towing, Inc. v. Sec'y of Labor*, 16 FMSHRC 683, 687 (Apr. 1994). In the present case, the storage area is a facility that stores materials that are used in the extraction of minerals from their natural deposits at both Parsons Quarry and other mines. JS ¶¶ 15, 24, 58, 82. Thus, the storage area, operated by a lessee, is a facility that stores machines, tools and other property such as blasting materials, used the extraction of

minerals from their natural deposits. 30 U.S.C § 802(d); 30 U.S.C. § 802(h)(1); *Jerry Ike Harless Towing, Inc.* at 16 FMSHRC 687 (Apr. 1994).

Respondent's contention that the storage area is not "employed in" mining at Parsons Quarry because it is maintained by a different company is misguided. RAM 6. Its similar argument that the explosives and related materials stored at the storage area serve both Parsons Quarry and other customers, is also erroneous. While the Respondent argues the storage area is not "used in" in mining, it is clear that the work of storing, accessing, loading, preparing and using the materials for blasting activities is done in support of mining. In *Jim Walter Resources, Inc. v. Sec'y of Labor*, 22 FMSHRC 21, 27 (Jan. 2000), the Commission held that the employees at a centralized facility should not be treated differently than other employees, and the hazards faced by miners are not limited to the hazards of underground mines.

Moreover, the Courts have found that it was Congress's intent for the Mine Act to have broad jurisdiction over mines and their surrounding areas. Specifically, the Courts have emphasized that Congress intended that the Act's definition of a "mine" to be very broad and to be construed liberally. The Court of Appeals for the District of Columbia stated:

> Because the Act was intended to establish a "mine safety and health law, applicable to *all mining activity*," its jurisdictional bases were expanded to reach not only the "areas . . . from which minerals are extracted," but also the "structures . . . which are used or are to be used in . . . the preparation of the extracted minerals."

Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1554 (D.C. Cir. 1984) citing S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), and U.S.Code Cong. & Admin. News 1977, 3401, 3414. (*See* also *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979), *Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981), and *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 795–96 (4th Cir. 1981). Report No. 181 also stated, "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 broadest possibl[e] interpretation." S.Rep. No. 181, *supra*, at 14.[8]

Given that Congress intended for the statute to be interpreted broadly, Respondent's contention that the Secretary's assertion of jurisdiction would extend the Mine Act to "unprecedented and absurd lengths" needs to be addressed. RAM 9; *Bush &*

---

[8] The Commission has also cited this Senate Report to support a broad reading of the definition of a "mine." The Commission used the language to support its opinion that "Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 675–76 (July 2002).

Burchett v. Reich, 117 F.3d 932, 937 (6th Cir. 1997). The contention can be a valid one in the right context; a certain level of contact with mining is needed in order for the business activity to be part of the mining process. As stated by Court of Appeals for the District of Columbia Circuit:

> It is clear that 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.

Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984). Thus, Respondent's citing of *Bush & Burchett v. Reich*, 117 F.3d 932 (6th Cir. 1997) is distinguishable. In that case, the Sixth Circuit stated that "there could conceivably be no limit to MSHA jurisdiction a result Congress clearly did not intend." *Id.* at 937. However, there is clearly a limit to MSHA's jurisdiction, and that limit is not met in the present case. Thus, Respondent's assertion that suppliers and venders could possibly be under MSHA jurisdiction because of their selling mining equipment is not valid, as they are clearly outside the scope of milling and preparation. In the instant case, Respondent's work at the storage facility in storing and accessing explosives to be used in the mining process, and specifically to be used at Parsons Quarry, provides sufficient contact with mining for jurisdiction to attach.

The undersigned finds that the language of the statute is clear and unambiguous. Thus, this plain language reading of the statute is sufficient to determine the "unambiguously expressed intent of Congress" and is thus the end of the matter for the court. *Chevron U.S.A. Inc.*, 467 U.S. at 842–43. However, even if the second prong of the Chevron analysis were necessary, MSHA's assertion of jurisdiction over the storage facility would be appropriate. The second prong of Chevron would require this court to inquire "whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843.

"Deference is accorded to 'an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.'" *Secretary of Labor v. Lone Mountain Processing*, 20 FMSHRC 927, 937 (Sept. 1998) (citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994)). Furthermore, the agency's interpretation of the Mine Act is entitled to be affirmed if that interpretation is one of the "permissible interpretations the agency could have selected." *Lone Mountain Processing*, 20 FMSHRC at 937 (citing *Chevron*, 467 U.S. at 843; *Joy Techns., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997)).

The Secretary has chosen to interpret the statute broadly, stating that the Mine Act's definition of a mine is expansive and inclusive. This is a reasonable and

permissible construction of the statute, given that the legislative history suggests that Congress intended for there to be a broad construction and application of the statute. S.Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), and U.S.Code Cong. & Admin. News 1977, 3401, 3414.

This interpretation is also compatible with the Mine Act's purpose. *See Secretary of Labor v. National Cement Co. of Cal.*, 573 F.3d 788, 796 (D.C. Cir. 2009) ("Not only is the Secretary's interpretation consistent with the statute's language, it is perfectly aligned with a key objective of the Mine Act. The Secretary must act to ensure the "health and safety of [the mining industry's] most precious resource—the miner." (*quoting* 30 U.S.C. § 801(a).)).

The Respondent contends that the Secretary's interpretation is inconsistent with other pronouncements, as was the case in *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Cir. 2012). While various MSHA officials previously believed that the storage facility was not under MSHA jurisdiction, this was not official policy of the entire agency. Furthermore, MSHA had continued to find similar places under its jurisdiction during the period in which the storage facility was not being inspected by MSHA, as was illustrated by the facts and holding of *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning). Thus, the Secretary's official MSHA-wide interpretation has been consistent, which adds to its reasonableness.

The Commission has previously stated that this definition of "coal or other mine" "is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Jerry Ike Harless Towing, Inc. v. Sec'y of Labor*, 16 FMSHRC 683, 687 (Apr. 1994) (citing *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984) and *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5 (Jan. 1982)). The Fourth Circuit similarly held, "[a]s the statutory text makes clear, the coverage of the Mine Act is not limited to extractive activities only." *Power Fuels, LLC*, 777 F.3d 214, 217 (4th Cir. 2015).

In specific cases, an administration building approximately a quarter of a mile away from a surface mine has been held to be under MSHA jurisdiction as a mine. *See Secretary of Labor v. Cogema Mining, Inc.*, 18 FMSHRC 919, 929 (July 1996). Similarly, the United States District Court for the Middle District of Pennsylvania held that the law "requires that an above-ground structure necessarily be in the immediate area of the mine" to be considered a mine. *Skipper v. Mathews*, 448 F.Supp. 300, 303 (M.D. Pa. 1977). Within reasonable limits, areas that are near the mine are defined as mines by the Act and fall within MSHA's jurisdiction. The Sixth Circuit has held that a central mine shop for a coal company was not a "coal mine" under the Mine Act because the machine shop was located three-quarters of a mile away from active mines. *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Consolidation*

Coal Co., 884 F.2d 926 (6th Cir. 1989).[9] However, in the instant case, the storage facility is less than a tenth of a mile from the rest of the mine, placing it within the area that could be considered "immediate." JE 4.

Moreover, the support functions performed in an area of close proximity to a mine also play a role in determining whether an area is considered a mine for Mine Act purposes. For instance, the Commission has stated that this can even be the case when a single facility is used in operations at various mines. In *Jim Walter Resources, Inc.*, the Commission noted that miners are not only exposed to hazards in underground mines, but are also exposed to hazards in other parts of the mining industry, including when encountering equipment and supplies. *Jim Walter Resources, Inc. v. Sec'y of Labor*, 22 FMSHRC 21, 27 (Jan. 2000).

While a broad reading of the statute would certainly support the inclusion of a storage area under MSHA's jurisdiction, in the present case it is not necessary to rely on such an expansive interpretation. Here, the storage area is a facility actually "used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC at 687. The facility contains explosives used both at Parsons Quarry and at other sites. Furthermore, the area, being roughly one tenth of a mile from the rest of the mine, is clearly close enough to the area where minerals were actually extracted to be included in the statutory definition of a mine. Thus, these materials would expose miners to hazards. *See Jim Walter Resources, Inc.*, 22 FMSHRC at 27 (Jan. 2000).

Respondent also contends that only a small percentage of the material stored at the area was delivered to and used at Parsons Quarry. The Commission has previously held that "not all independent contractors are operators under the Mine Act, and that 'there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.'" *Otis Elevator Co.*, 11 FMSHRC 1896, 1900–01 (Oct. 1989), quoting *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979). The Commission later stated, "An independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence." *Lang Bros., Inc.*, 14 FMSHRC 413, 420 (Mar. 1992). For example, in *Northern Illinois Steel Supply Co.*, the Seventh Circuit held that a company's drivers delivering "truckloads of steel to designated delivery points, loosened the restraints on the loads, and occasionally helped to rig the load" was *de minimis*, even though the steel that was delivered was eventually turned into structures that were critical in the mining process. *Northern Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 849–50 (7th Cir. 2002).

---

[9] In *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Consolidation Coal Co.*, 884 F.2d 926, the Court of Appeals for the Sixth Circuit found that the site was too far away from where coal was actually extracted from the ground, and concluded that because of this geographical component it was not a "coal mine."

In the instant case, however, Respondent's use of the storage area for mining activities at Parsons Quarry is not *de minimis*. Respondent uses "not more than" 10% of the materials from the storage area at Parsons Quarry, which is more than enough to establish that its use is not *de minimis*. JS ¶ 81. Using up to 10% of the stored materials would not signal "that it would be difficult to conclude that services were being performed." *Otis Elevator Co.*, 11 FMSHRC at 1900–01. Unlike in *Northern Illinois Steel Supply Co.*, the items stored are used directly in the mining process through blasting services performed by Austin Powder. JS ¶ 24.

For the reasons set forth above, I find that MSHA has jurisdiction of Austin Powder Company's leased storage facility at Vulcan's Parsons Quarry mine.

VI. PARTIES' CONTENTIONS ON FAIR NOTICE

A. Secretary's Contentions

The Secretary contends the Respondent had fair notice that the storage area fell within MSHA's jurisdiction. Citing *Calamat Co. of Az.*, 27 FMSHRC 617, 624 (Sept. 2005) (*citing General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)), the Secretary argus that a party has fair notice of MSHA's jurisdiction when a regulated party acting in good faith would be able to know how to conform with the agency's standards by reviewing regulations and other public information. SAM 6.

The Secretary contends that even though MSHA vacated the citations of October 2008, the Respondent had other reasons to know of MSHA's jurisdiction over the storage area, including the plain language of the Mine Act, previous litigation on the subject of jurisdiction, and from the holding in *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning).[10] SAM 7. The Secretary also contends that Respondent would have had fair notice of its intent to assert jurisdiction based on the public statement made in the Metal and Nonmetal General Inspection Procedures Handbook, MSHA Handbook Series PH09-IV-1 (Oct. 2009). SAM 8. In the handbook, MSHA instructs inspectors to inspect areas storing explosives on behalf of the Bureau of Alcohol, Tobacco, and Firearms (BATF) due to MSHA's 1980 Memorandum of Understanding (MOU) with BATF. *Id.*

Citing *Mainline Rock and Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012), the Secretary argues that MSHA cannot be estopped from later asserting jurisdiction in an area where it had previously vacated citations, because if it would be estopped from doing so, it would not be able to fulfill its statutory obligations to inspect mine sites due to a previous mistake. *Id.*

[10] The Secretary argued that because this decision was issued one day prior to the inspection of the storage area in the present case, Respondent would have been on notice of MSHA's intent to assert jurisdiction over similar places.

B. Respondent's Contentions

Citing *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317 (2012), the Respondent contends that fair notice is a fundamental principle in our legal system and that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." Respondent also cites *Energy West Mining*, 17 FMSHRC 1313 (1995) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108) and *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991), arguing that a person of ordinary intelligence must be able to know what is prohibited in order to comply with the law. RAM 10.

Respondent states that the Commission determined, in *Alan Lee Good*, 23 FMSHRC 995, 1009 (Sept. 2001) (Verheggen, C., & Riley, C., separate opinion)[11] and *Calmat Company*, 27 FMSHRC 617, 624 (Sept. 2005), that "a reasonably prudent person" would know that a statute applies because of the language of the Mine Act or from MSHA's previous enforcement or interpretation. RAM 10.

The Respondent contends that the Supreme Court has stated that when an agency's interpretation of a statute changes, governed parties must have fair notice of the change. *Fox Television*, 132 S.Ct. at 2318. The Respondent argues that in the present case it was not afforded any notice that MSHA would seek to assert jurisdiction over the storage area. RAM 11. Furthermore, Respondent argues that it was aware of MSHA's previous interpretation of the Mine Act; that MSHA, in the modifications vacating the citations, stated that Austin Powder was not under its jurisdiction even though its storage area was in the middle of a mine site and had equipment that miners could access. RAM 11; JS ¶¶ 73, 74; JE 5. Respondent also argues that this interpretation was not made by low level officials, but by the MSHA Field Office Supervisor and the District Manager. RAM 11. This determination was reinforced by MSHA not inspecting the area during subsequent inspections. *Id.*

Respondent argues that there have not been any changes to the Mine Act since the vacation of citations and the stopping of the inspections at the leased property, and that there were no other indications that MSHA would seek to change its interpretation from 2008. *Id.*

VII. ANALYSIS OF FAIR NOTICE

Under Commission precedent, the standard for fair notice is whether a reasonably prudent person familiar with the mining industry, the Mine Act, and the protective purposes of the standard would understand the law, which, in the present case is the law

[11] In *Alan Lee Good*, 23 FMSHRC 995, 1003 (Sept. 2001), the Commission's vote was evenly split. Chairman Verheggen and Commissioner Riley issued a separate opinion and Commissioners Jordan and Beatty issued a separate opinion. Chairman Verheggen and Commissioner Riley concurred with the result of the other commissioners' opinions.

regarding jurisdiction discussed *supra*. For the reasons that follow, the undersigned finds that the Respondent was afforded fair notice.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317, (2012). Regulatory clarity is vital for the protections provided by the Fifth Amendment's Due Process Clause. *Id.* at 2317.

If a statute or regulation either requires or forbids action, but the requirement itself is so vague that people of common intelligence must guess at its meaning or apply it differently, it is a violation of due process. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Furthermore, all persons are entitled to be informed of the state's regulations and laws. *See Papachristou v. Jacksonville,* 405 U.S. 156, 162 (1972). When an agency struggles to provide a definitive reading of its regulatory requirements, a regulated party is not 'on notice' of the agency's interpretation of its regulations, and may not be punished. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995).

The Respondent would have been able to determine the definition of a mine, and also know that the storage facility would be considered a mine under the Mine Act, with a plain reading of the statute. This reading of the statute would also be consistent with previous MSHA determinations and case law on similar matters.[12] Furthermore, the reading would be consistent with MSHA's previous public statements.[13] Moreover, the Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission has previously held that in situations where jurisdiction is not disputed after a plain language reading of the Mine Act, fair notice is provided. *Orica USA, Inc. v. Sec'y of Labor*, 32 FMSHRC 709, 712 (May 2010) (ALJ Lesnick). Judge Lesnick also held that Orica USA, Inc. could have reasonably expected MSHA to assert jurisdiction over its activities that were covered by the Act because of the Act's undisputed language. *Id.*

While a plain language reading of the statute leads to the conclusion that the Respondent would be on notice, it is important to address the fact that various MSHA officials were inconsistent in their assertion of MSHA jurisdiction at the site. However, the MSHA officials' inconsistency is not sufficient to overcome a plain language reading of the statute.

---

[12] *See, e.g., Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning). In this case, Judge Manning determined that an off-site facility was under MSHA jurisdiction because items kept there were available for use in mining.

[13] *See* Metal and Nonmetal General Inspection Procedures Handbook, MSHA Handbook Series PH09-IV-1, p. 27 (Oct. 2009). This handbook is publicly available through MSHA's website.

MSHA officials asserted jurisdiction over Austin Powder's site at Parsons Quarry until 2008; however, they did not inspect the site in 2007. JS ¶ 96. From January 1, 2009 to December 31, 2011, the officials no longer asserted MSHA's jurisdiction. JS ¶ 91. Then, officials again asserted jurisdiction, which materialized in new inspections that started in 2012, including the February 8, 2012 inspection during which Inspector James Hollis issued Citation No. 8637491 and Citation No. 8637492.

The Respondent contends that because MSHA had changed its interpretation as to whether it had jurisdiction of the storage facility at Parsons Quarry, it was not afforded fair notice. This point is not valid. First, MSHA did not change its interpretation; even though MSHA officials were not inspecting the storage facility at Parsons Quarry, MSHA was still asserting jurisdiction at other similar sites.[14] Furthermore, what happened at Austin Powder's site at Parsons Quarry is factually distinguishable from *FCC v. Fox Television Stations*, which Respondent relies upon, since in that case the FCC retroactively applied a new policy that it adopted in an Order to events that took place *before* the Order had been issued. 132 S.Ct. at 2315. In the instant proceeding, MSHA's official policy had never changed; MSHA officials made mistakes in applying its official policy and therefore erred in not asserting jurisdiction.

Thus, while Respondent points out that there had not been any changes to the Mine Act or any indication that MSHA sought to change its interpretation following the vacation of the citations at the storage facility, other information would have alerted Respondent to the fact that MSHA could seek to assert jurisdiction over the site. For instance, MSHA's Metal and Nonmetal General Inspection Procedures Handbook provided public notice that MSHA inspectors could inspect areas like the storage facility at Parsons Quarry. Similarly, MSHA's continued assertion of jurisdiction in other similar locations, such as that in *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning), would have alerted Respondent that MSHA may also do so at its site at Parsons Quarry.

Having determined that the instant situation is distinguishable from *FCC v. Fox Television Stations*, it is helpful to consider Commission precedent regarding interpretation under the Mine Act. When examining the issue of fair notice, "the Commission uses an objective test, i.e., 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'" *Island Creek Coal Co.*, 20 FMSHRC 14, 24 citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying this standard to notice of a regulatory requirement,

> the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community

[14] *See, e.g.*, Metal and Nonmetal General Inspection Procedures Handbook and *Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ Manning).

with 'ascertainable certainty' of its interpretation of the standard in question.

Alan Lee Good, 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion), *citing Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982).

The Commission laid out various criteria in *Alan Lee Good*, one of which was consistency of an agency's enforcement. The other criteria, including the text of the statute, its placement in the overall regulatory scheme, and public notice, outweigh the fact that some MSHA officials were inconsistent in their application of the statute. *Alan Lee Good*, 23 FMSHRC at 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion). For instance, the text of the statute is plain; a reasonably prudent person that is familiar with the mining industry and the Mine Act would understand that a site that is being used in the mining process would be defined as a mine under the Mine Act and the case law explaining the Act.[15] Moreover, the Mine Act itself is central to MSHA's regulatory scheme since it is the law from which MSHA derives its authority to regulate the mining industry, and the parameters of the law itself are what bind all case law and regulation. Finally, as was mentioned, MSHA has provided public notice of its intent to regulate sites like the one in question, in both cases and in handbooks such as the Metal and Nonmetal General Inspection Procedures Handbook. Together, these criteria outweigh the fact that MSHA officials were inconsistent in their application of the law in this single instance for limited period of time.

Respondent argues that it had been provided notice of MSHA's previous interpretation of the Mine Act regarding jurisdiction since it had been told that it was not under MSHA's jurisdiction. JS ¶¶ 34, 37, 40, 43, 46, 49, 52, 55. However, the language of the modifications to the citations, which highlights that the storage site is leased property and states that "the equipment was accessible by miners within the middle of the mine site," suggests that the site is under MSHA jurisdiction. JE 5. Again, a reasonably prudent person familiar with the Mine Act would know that an area "within the middle of [a] mine site" and one that has equipment "accessible by miners" would be under MSHA's jurisdiction. Further, in applying the Commission's test from *Island Creek Coal Co.* and *Ideal Cement Co.*, Austin Powder, and its employees, would have been on notice since a reasonably prudent person familiar with the Mine Act and its protective purposes would have understood that MSHA would have been able to assert jurisdiction over the site.

Therefore, under Supreme Court and Commission precedent, MSHA must provide clear notice of its regulations to those who are governed by them, and the notice needs to be conveyed in a manner so that a reasonably prudent person familiar with the

[15] See analysis concerning jurisdiction, *supra*.

mining industry and the protective purposes of the Mine Act would understand what is being conveyed. In the present case, MSHA, through publicly available information and through the enforcement of the Mine Act elsewhere, in fact did provide clear notice of its interpretation of the Mine Act to Austin Powder, an entity that was familiar with the mining industry, the Mine Act, and the protective purposes of it. Thus, Respondent had fair notice that MSHA would assert jurisdiction.

VIII. ORDER

The undersigned finds that MSHA had jurisdiction over Austin Powder Company's leased storage area at Vulcan's Parsons Quarry mine and that the Respondent had sufficient fair notice of the law. Accordingly:

The Respondent's Amended Motion for Summary Decision is **DENIED**; and

The Secretary's Amended Motion for Summary Decision is **GRANTED**.

It is further **ORDERED** that the parties immediately confer regarding the stipulated settlement[16] and within thirty (30) days of the date of this decision, either file a joint motion for approval or provide a status report to the undersigned.

Kenneth R. Andrews
Administrative Law Judge

Distribution:

Anthony Berry, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

Adele L. Abrams, Esq., CMSP, Law Office of Adele L. Abrams, PC, 4740 Corridor Place, Suite D, Beltsville, MD 30705

/nsc

[16] See, JS ¶¶.14, 85-94.