**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
**601 NEW JERSEY AVENUE N. W., SUITE 9500**
**WASHINGTON, D.C. 20001**
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April 19, 2011

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Docket No. LAKE 2008-423-M |
| Petitioner | : | A.C. No. 20-02461-145408 |
| v. | : | |
| | : | |
| ESSROC CEMENT CORPORATION, | : | ESSROC Cement Corp. |
| Respondent | : | |

**ORDER DENYING MOTION TO DISMISS**
**ORDER RESCHEDULING HEARING**

Before: Judge Barbour

On April 05, 2011 Respondent, Essroc Cement Corporation ("Essroc"), filed a motion to dismiss for lack of jurisdiction. The Respondent claims the Essroc Cement Corporation facility is not a "coal or other mine" within the meaning of the Mine Safety and Health Act ("Mine Act"). Resp't Am. Mot. to Dismiss 1. The Respondent contends the Facility is a "cement grinding facility and shipping terminal". *Id.* The Respondent states cement is produced at the Facility by taking finished products mined and milled elsewhere and "combin[ing] these finished products, typically via mixing and grinding processes". *Id.* 2.

In response, the Petitioner argues the Facility is a mine because it engages in milling and grinding and affects commerce by shipping cement. *See* Sec'y Am. Response to Resp't Mot. to Dismiss 2-3, 5. In support of its argument the Secretary submits a letter from L. Harvey Kirk III, CSP, an MSHA Senior Mine Safety and Health Specialist with over 30 years of experience in Portland cement manufacturing and over 15 years of experience as a cement plant production engineer. In the letter, Kirk asserts Essroc is a Portland cement plant that performs finish grinding and shipping. *See* App. to Sec'y Am. Response to Resp't Mot. to Dismiss 7. Further, he states that grinding is a milling process. *Id.* 7-8.

After reviewing the parties' arguments and submissions, I can conclude that MSHA has jurisdiction over the Facility, and I deny the motion. My conclusion is based on the fact that the Facility is a cement plant at which milling and/or grinding is conducted thus making the facility a "mine" within the meaning of the Act. Moreover, the facility engages in interstate commerce and therefore is subject to the Mine Act.

According to Section Four of the Mine Act "[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(2006). The definition of coal or other mines includes facilities used in the milling of materials extracted from their natural deposits. *See* 30 U.S.C. § 802(h)(1)(2006). Milling is not defined in the Mine Act, but it is defined in the Interagency Agreement between the Mine Safety and Health Administration ("MSHA") and the Occupational Safety and Health Administration ("OSHA") ("Interagency Agreement") published in 1979. The Interagency Agreement defines milling as "the separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." Mine Safety and Health Administration and the Occupational Safety and Health Administration Interagency Agreement, 44 Fed. Reg. 22,827, 22,829 (April 17, 1979). The appendix of the Interagency Agreement also provides a list of milling processes under MSHA's jurisdiction, which includes grinding. *Id*. The Interagency Agreement provides guidance regarding the jurisdictional boundaries between MSHA and OSHA. *Sec'y of Labor v. Watkins Eng'rs and Constructors*, 24 FMSHRC 669, 674 (July 2002). In addition, in *Secretary of Labor v. Watkins* the Commission determined that the Interagency Agreement as a whole supports MSHA's view that the term "milling" can apply to cement plants even if the facility does not separate waste from valuable material. *Watkins,* 24 FMSHRC at 674. In its Motion to Dismiss Respondent admits that it conducts grinding at the Facility. Resp't Am. Motion to Dismiss 2. The definition of milling includes grinding, therefore the Facility is a mine within the meaning of the Act. In addition, the Interagency Agreement states MSHA has jurisdiction over mining operations that conduct grinding. Interagency Agreement, 44 Fed. Reg. at 22,829.

The Commission has stated that "Congress intended to exercise its authority to regulate interstate commerce to the 'maximum extent feasible' when it enacted section four of the Mine Act." *Jerry Ike Harless Towing, Inc. and Harless, Inc.*, 16 FMSHRC 683, 686-687 (Apr. 1994)(citing *Marshall v. Kraynak*, 604 F.2d 231, 231 (3d Cir. 1979); *United States v. Lake*, 985 F.2d 265, 267-269 (6th Cir. 1993)). Respondent states that the clinker it uses comes from Canada. Resp't. Am. Mot. to Dismiss 2. I find that the Facility's operations affect commerce because products are purchased from Canada for use at the facility in Essexville, Michigan. Such a finding is consistent with Congress' intent to exercise its power to regulate commerce to its 'maximum extent feasible' through the Mine Act. For the reasons stated above, the Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

The hearing scheduled to begin April 26, 2011 is **CANCELED**. It is **RESCHEDULED** to be heard beginning at **8:30 a.m.** on **Tuesday, July 12, 2011** in Bay City, Michigan. The prehearing requirements set out in the February 23, 2011 Notice of Hearing remain in effect except that discovery must be completed by **June 14, 2011** and the parties must exchange prehearing statements no later than **June 28, 2011**.

Judge David F. Barbour
Administrative Law Judge

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