

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 28, 2006

DICAPERL MINERALS CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2004-511-RM
	:	Citation No. 6300457; 09/03/2004
	:	
	:	Docket No. WEST 2004-512-RM
v.	:	Citation No. 6300458; 09/03/2004
	:	
	:	Docket No. WEST 2004-513-RM
	:	Citation No. 6300459; 09/03/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2004-514-RM
MINE SAFETY AND HEALTH	:	Citation No. 6300460; 09/04/2004
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2004-515-RM
	:	Citation No. 6300470; 09/23/2004
	:	
	:	El Grande Plant
	:	Id. No. 05-00438
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-030-M
Petitioner	:	A.C. No. 05-00438-33522
	:	
	:	Docket No. WEST 2005-173-M
	:	A.C. No. 05-00438-45808
v.	:	
	:	Docket No. WEST 2005-216-M
	:	A.C. No. 05-00438-47837
	:	
	:	Docket No. WEST 2005-357-M
DICAPERL MINERALS CORPORATION,	:	A.C. No. 05-00438-55242
Respondent	:	
	:	Docket No. WEST 2005-504-M
	:	A.C. No. 05-00438-64811
	:	
	:	El Grande Plant

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-104-M
Petitioner	:	A.C. No. 05-00438-37368A
	:	
v.	:	Docket No. WEST 2005-358-M
	:	A.C. No. 05-00438-55240A
TERRY J. VANCE, employed by	:	
DICAPERL MINERALS CORPORATION	:	El Grande Plant
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-111-M
Petitioner	:	A.C. No. 05-00438-37367A
	:	
v.	:	Docket No. WEST 2005-359-M
	:	A.C. No. 05-00438-552410A
CLAUDE S. RADFORD, employed by	:	
DICAPERL MINERALS CORPORATION	:	El Grande Plant
Respondent	:	

**ORDER FINDING THAT THE MINE SAFETY AND HEALTH ADMINISTRATION
HAS JURISDICTION TO INSPECT THE EL GRANDE PLANT**

These cases are before me on five notices of contest brought by Dicaperyl Minerals Corporation (“Dicaperl”) and nine petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Dicaperl, Terry J. Vance, and Claude S. Radford 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”). The cases involve citations and orders issued by MSHA at Dicaperl’s El Grande Plant in Conejos County, Colorado. This plant, which Dicaperl calls the Antonito Processing Facility, is about five miles north of the New Mexico border in the town of Antonito, Colorado. Throughout this order, I refer to this facility as the “El Grande Plant” or the “plant.”

Dicaperyl contends that the plant is not subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”). I granted the parties’ request that a hearing be held on this jurisdictional issue. An evidentiary hearing limited to the issue of MSHA’s jurisdiction over the plant was held in the Commission’s courtroom in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs. I also granted the motion of the Perlite Institute to file a brief as *amicus curiae*.

I. BACKGROUND

The El Grande Plant can best be described as a perlite expansion facility. This plant is a free-standing facility that is not located at or adjacent to the quarries where the feedstock for the plant originates. Perlite is a volcanic glass that is used in a wide variety of horticultural, consumer and industrial products. Most of the expanded perlite that is produced at the plant is sold to U.S. Gypsum and Hamilton Materials to make joint compound used in drywall installation. To understand the workings of the plant, it is necessary to start at the beginning, which is the mining of the ore. Dicaperl operates two perlite mines in New Mexico: the No Agua Mine & Mill and the Socorro Mine & Mill. Once the ore is removed from the ground at these mines, it goes through a milling process. The mined material is dumped through a grizzly to remove large rocks and it falls into a jaw crusher. The crushed ore then drops through a scalping screen to remove material larger than one inch. The larger material is sent back through a secondary crusher. Once the material is small enough, it is sent through a dryer. The dried material is dropped onto a two-deck screen where further sizing takes place. This screen deck separates coarse, intermediate, and fine grades of perlite ore. As before, material that is too large is sent back through the secondary crusher and back through the screen deck.

The three finer grades of material from the No Agua and Socorro mills are shipped by pneumatic tractor trailers to the El Grande Plant. These three grades of perlite ore have the consistency of white flour. The No Agua Mine & Mill is about 23 miles from the plant and the Socorro Mine & Mill is about 250 miles from the plant. About 70% of the material processed at the plant is from the Socorro Mine & Mill.

Dicaperl expands and screens the perlite received from No Agua and Socorro at the El Grande Plant. The plant is subdivided into four different plants but, for purposes of these proceedings, the processes are the same in each plant. Each plant consists of storage bins, a furnace, a cyclone, a baghouse, a screen, and product bagging systems. In this order, I discuss the processes used at the plant as if there were but one plant so I use the singular rather than the plural. Exhibit S-2 is a schematic of the plant and Exhibits S-5 through S-15, S-20, and S-21 are photographs of the plant.

The milled perlite ore is transported from the storage bin at the plant by belt or screw conveyor to a fountain feeder which injects the perlite into a pressurized airline that blows the perlite into the bottom of the furnace. The furnace is vertical and contains a vertical “firing tube” in the center. When the perlite passes through the burner flame and mixes with the hot gasses in the firing tube at temperatures of about 1,600°F, the particles start to melt and become plastic. At this point, the chemically combined water in the particles vaporizes and is quickly released. As the water is released, the particles expand or “pop.” This process can be analogized to the popping of popcorn kernels in hot air. This process takes but a few milliseconds as the perlite shoots up the firing tube in the furnace. The popped perlite is between 4 and 20 times its original volume and is significantly lighter in weight. Dicaperl tries to keep the density of the expanded

perlite in the range of 6.5 to 7.5 pounds per cubic foot. Dicaperl calls these popped perlite particles “microspheres.”

As the microspheres exit the top of the vertical furnace, they are captured by a collector cyclone or a baghouse dust collector. The microspheres move along the airline through an airlock where they are dropped onto a single deck Rotex screen. About 95-97% of the microspheres drop onto the screen, while the remaining 3-5% are pulled into the baghouse filters. The Rotex screen is normally a 60-mesh screen, but a 74-mesh screen is used for some products. The Rotex screen is on a slight incline and rotates in a circular back and forth motion. The material that is too large to pass through the screen falls over the top of the screen into a “tramp” bag. The material that is smaller than the mesh openings falls into product bags. The microspheres in product bags are fine enough to be used in joint compound and are sold to U.S. Gypsum and Hamilton Materials. Microspheres can be too large to pass through the screen because they expanded too much in the furnace or because the size of the perlite particles that entered the vertical furnace was too large. In addition, microspheres sometimes attach to the metal walls of the firing tube and fuse together. Most of these fused microspheres eventually drop to the bottom of the furnace, but some are shot up the firing tube, travel over the screen, and fall into the tramp bag. Finally, foreign objects such as sand, small rocks, mining debris, and small bits of metal from the plant fall into the tramp bag. The material in the tramp bags is shipped to other perlite processing facilities in Indiana and Tennessee.

There are quite a few perlite expansion facilities in the United States. A significant number of these facilities process perlite ore to make microspheres in a manner that is similar to the processes used at the El Grande Plant. As discussed in more detailed below, Dicaperl introduced evidence to show that many of these other perlite expansion facilities are inspected by the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) rather than MSHA whenever such facilities are geographically and operationally separate from mining operations.

MSHA has been inspecting the El Grande Plant since the passage of the Mine Act. The El Grande Plant was assigned the same mine identification number as the No Agua Mine. At that time, the No Agua Mine and the El Grande Plant were owned and operated by another company. The plant was included under the same mine identification number as the perlite mine at the request of the operator. Because the operator moved employees between the mine and the plant, it wanted both facilities under the jurisdiction of a single agency and it wanted the same MSHA inspectors to inspect both facilities. Since the plant was only about five miles north of the New Mexico - Colorado border, both facilities were inspected by MSHA’s Albuquerque Field Office which is part of its South Central District. Ordinarily, facilities in Colorado are inspected out of the Denver Field Office of MSHA’s Rocky Mountain District. Apparently, when the amount of mining activity at the No Agua mine slowed down, MSHA inspectors from Albuquerque were traveling into Colorado for the sole purpose of inspecting the plant. The No Agua Mine is an intermittent operation. Sometime around November 2003, MSHA assigned a

Rocky Mountain District identification number to the plant and MSHA inspectors out of the Denver Field Office began inspecting the plant separately from inspections of the No Agua Mine.

II. BRIEF SUMMARY OF ARGUMENTS PRESENTED

The only issue presented at the hearing is whether MSHA has jurisdiction over Dicaparl's El Grande Plant. The Secretary contends that the plant engages in mineral milling and is therefore a mine as that term is used in section 3(h)(1) of the Mine Act. She states that section 3(h)(1) delegates to her the authority to determine what constitutes mineral milling. She points out that Congress expressed its intention that doubts be resolved in favor of inclusion of a facility under the Mine Act. She provided clarification of the term mineral milling in her interagency agreement between the MSHA and OSHA. ("Interagency Agreement" or "Agreement") (Ex. S-17). The Secretary argues that the dividing line is delineated in the Interagency Agreement in two ways. First, section B(6) of the Interagency Agreement assigns certain types of facilities either to OSHA or MSHA. Second, in instances where the type of facility in question is not specifically assigned to either OSHA or MSHA under the Interagency Agreement, as is the case with perlite expansion facilities, the agreement provides a series of definitions to be used to make this determination. The Secretary contends that the El Grande Plant fits within one or more of the definitions of mineral milling in the Interagency Agreement.

The Secretary also argues that her position is consistent with her longstanding interpretation of mineral milling. She states that Dicaparl's evidence concerning MSHA's lack of inspection activities at other perlite facilities is too weak to be given much weight. The perlite industry "contains plants of varied design and function that require a case-by-case jurisdictional determination to be made by MSHA and OSHA taking into consideration the factors set forth in sections B(3) - B(5) of the Interagency Agreement." (Sec. Br. 28). The evidence shows that MSHA has inspected the El Grande plant since the agency was created and that MSHA's predecessor in the Department of the Interior inspected the plant since at least 1972. This history of MSHA inspections at the El Grande Plant establishes a clear pattern of consistent enforcement.

Dicaparl argues that it engages in mineral milling at the Socorro Mine & Mill and No Agua Mine & Mill. It contends that the El Grande Plant manufactures microspheres through the perlite expansion process. The processes used at the El Grande Plant are not mineral milling as that term is used in the Mine Act and defined in the Interagency Agreement. Because the express language of the Interagency Agreement is clear and unambiguous, consideration of the Secretary's interpretation of the language is not warranted. The Secretary's evidence on this issue was provided by MSHA employees who only briefly visited the plant. Claude Radford, who has been the plant manager for the past 15 years, testified as to the processes used at the plant. His testimony should be given considerably more weight than the testimony of MSHA employees. Indeed, the Secretary's own counsel agreed at the hearing that Mr. Radford is the "world's greatest authority on what happens at the El Grande Plant." (Tr. 76). Radford's

description of the plant operations makes clear that it is a manufacturing facility, not a milling operation.

Dicaperl also introduced evidence that eight similar perlite expansion plants are inspected by OSHA rather than MSHA. In addition, in response to discovery, the Secretary provided a list of 21 other perlite expansion facilities that are not currently inspected by MSHA. Dicaperl also submitted an MSHA memo from MSHA's Southeast District which states that Chemrock's Jacksonville, Florida, perlite expansion plant should be inspected by OSHA rather than MSHA. The memo states that "[t]his determination is consistent with past jurisdictional determinations that perlite and vermiculite operations which are geographically and operationally separate from mining operations shall be subject to OSHA's jurisdiction." (Ex. C-7). Thus, Dicaperl concludes that the El Grande Plant is the only MSHA-regulated perlite expansion facility in the United States not located at or near a the mine where perlite is extracted from the earth. The Secretary did not introduce evidence of a single other perlite facility that is inspected by MSHA.

Dicaperl further argues that because the Secretary has interpreted the term mineral milling differently at other perlite expansion facilities, her interpretation of that term should not be accorded deference in this case. An agency's interpretation should not be given much weight when it has not been consistently stated or applied. Perlite expansion facilities like Dicaperl's operate in much the same way today as they did when the Interagency Agreement was drafted. The failure to include the processes used at these facilities in any of the definitions of mineral milling demonstrates that the Secretary intended perlite expansion facilities to be inspected by OSHA.

In its *amicus* brief, the Perlite Institute states that there are about 25 perlite manufacturing plants throughout the United States. A few of these plants are "co-located" with mining operations where the extraction of perlite ore takes place. It states that, in the past few decades, virtually all perlite manufacturing plants, which are not located at a perlite mine, have been under the jurisdiction of OSHA. These plants do not engage in mineral milling as that term is used in the Mine Act and the Interagency Agreement. All mineral milling of perlite ore is performed at the mines where perlite is extracted from the earth. The work performed at perlite plants is part of the final manufacturing process of the product. In some cases, expanded perlite is added to other materials. For example, perlite is added to gypsum and fiber at some perlite plants to manufacture ceiling tiles. In other cases, perlite may be sold in separate grades, sizes or mixtures, depending on intended uses. Many types of non-metallic minerals are routinely subject to further processing to render them suitable for the intended end uses. Under the Secretary's excessively broad reading of the Interagency agreement, all of these processes would be considered mineral milling. The Perlite Institute contends that perlite plants manufacture a product and they bear no genuine resemblance to milling operations that are part of the mining of ore. Perlite plants manufacture a product in accordance with their customers' needs rather than the needs of the mine operator.

III. ANALYSIS OF THE ISSUES WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Mine Act states, in relevant part, that “[e]ach coal or other mine . . . shall be subject to provisions of this [Act].” 30 U.S.C. § 803. The Mine Act defines “coal or other mine” as:

(A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, *used in, or to be used in . . . the work of extracting minerals from their natural deposits . . . or used in . . . the milling of such minerals . . .*

30 U.S.C. § 802(h)(1) (emphasis added). The Mine Act does not define “milling,” but states that in making a “determination of what constitutes mineral milling . . . , the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authorities with respect to health and safety of miners employed at one physical establishment.” *Id.* When Congress passed the Mine Act, the report of the Senate Committee on Human Resources stated that “it is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

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

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

The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the

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

24 FMSHRC at 673.

Dicaperl and the Perlite Institute do not dispute that the Secretary has broad authority to interpret the term "milling," but they contend that her authority is not without limits. As the D.C. Circuit observed, "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) [of the Mine Act]." *Donovan v. Carolina Stalite Co.* 734 F.2d 1547, 1551 (D.C. Cir. 1984). They contend that the Secretary's interpretation is unreasonable and is not entitled to deference.

A. Definition of Milling in the Interagency Agreement.

An analysis of the Interagency Agreement is necessary to resolve the dispute raised in these cases. In the Agreement, the Secretary first states that the Mine Act authorizes the Secretary to promulgate safety and health standards regarding the working conditions of employees engaged in the "preparation and milling of the minerals extracted" from underground and surface mines. (Ex. S-17 at 1). The Interagency Agreement also states that the Occupational Safety and Health Act of 1970 ("OSHAct") gives the Secretary, acting through OSHA, authority over working conditions of employees "except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health." *Id.* Thus, if the Secretary has jurisdiction over a facility under the Mine Act because it is a mill, safety standards developed under the OSHAct do not apply.

The Agreement states that it was written to "set forth the general principle and specific procedures which will guide MSHA and OSHA." *Id.* It states that the Agreement will "serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved." *Id.* "The general principle is that as to unsafe and unhealthful working conditions on mine sites and milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions." *Id.*

The Agreement goes on to state that:

[W]here the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (*e.g.* hospitals on mine sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable working conditions on such sites, then the OSHAct will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSHAct may be applied to such an employer where application of the OSHAct would, in such a case, provide a more effective remedy than citing a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

The Agreement sets forth guidelines that the Secretary will use in determining whether a facility is engaged in mineral milling. It is clear that the Secretary anticipated that she needed to be flexible in her approach because of the myriad circumstances which may exist. Appendix A to the Agreement provides a rather detailed description of the “kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority.” (Ex. S-17 at 2). It is important to understand, however, that the Secretary realized that “[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle.” *Id.* The Agreement states that the “scope of the term milling may be expanded to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling.” *Id.* Conversely, the term “milling” may be narrowed to exclude from its scope “processes listed in Appendix A where such processes are unrelated, technologically or geographically, to mineral milling.” *Id.*

The Interagency Agreement further provides:

The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress’

intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

Id.

In addition, the Interagency Agreement provides that certain specific processes are automatically deemed to be mineral milling, such as the processes at alumina plants and cement plants. *Id.* The Agreement states that other processes are automatically subject to the jurisdiction of OSHA, such as the processes at smelters, refineries, and concrete and asphalt batch plants. *Id.* These processes do not require a case-by-case analysis. Perlite expansion facilities are not specifically listed in the Interagency Agreement. As a consequence, the determination of whether the El Grande Plant is engaged in mineral milling must be determined by examining the specific processes that are conducted at the plant.

The Agreement defines the term “milling” in Appendix A, as follows:

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated. A CRUDE is any mixture of minerals in the form in which it occurs in the earth’s crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute promise of possible profit in extraction, treatment, and sale.

(Ex. S-17 at 5).

As the Commission stated in *Watkins*, Congress “explicitly left a gap for the Secretary to fill with respect to the definition of milling.” (24 FMSHRC at 673). The issue is whether it was reasonable for the Secretary to conclude that the term “milling” covers one or more of the processes that take place at the El Grande Plant. In conducting this analysis, the question becomes whether the Secretary’s interpretation of milling, as applied to the facts of this case, is based on a “permissible construction of the statute.” *Chevron*, 467 U.S. at 842.

At the hearing, Senior Mine Safety and Health Specialist L. Harvey Kirk testified for the Secretary. He testified that during the perlite expansion process at the El Grande Plant, Dicaperl separates from the crude ore “the combined water that [is] chemically bound up in it.” (Tr. 141). Through this process, Dicaperl is making a “more valuable, more desired, [and] certainly more versatile product.” *Id.* In his report, Kirk stated:

The Antonito facility is a mill because it subjects pulverized perlite ore (“a solid crude”) to high temperatures in order to vaporize

combined water in the ore and thereby create (and, in effect, separate) a desired, expanded constituent of the ore. This process produces (after the expanded perlite is sized in collector cyclones and screens) a primary consumer derivative which is used by downstream manufacturers to make joint compound and other products for the public.

(Ex. S-18 at 2). The sudden heating of the perlite causes water to be liberated from the perlite ore. Kirk contends that this water is “an undesired contaminate” which is separated from the “desired constituents” in the crude ore. As a consequence, the Secretary argues that the heat expansion process qualifies as mineral milling.

Claude Radford, a 25-year veteran of the perlite industry, testified that no “contaminants” are removed during the expansion process. (Tr. 219). Instead, the process only “changes the shape of the particle” while allowing the water to evaporate. *Id.* Thus, Dicaparl contends that the El Grande Plant does not fit into the Interagency Agreement’s definition of a mill.

The El Grande Plant is not associated with an area where material is extracted from the ground. The plant receives perlite from two different mines. The first question is whether the El Grande treats “the crude crust of the earth to produce therefrom the primary consumer derivatives.” Can previously crushed and sized perlite be considered to be “the crude crust of the earth?” The Interagency Agreement defines “crude” as “any mixture of minerals in the form in which it occurs in the earth’s crust.” The perlite received at the plant from the No Agua and Socorro Mines is a mineral, but it is not in the same “form” in which it occurs in the earth’s crust because it was milled before it left the two mines. Nevertheless, the perlite was not chemically changed, it was simply crushed or pulverized into a fine powder. Clearly once a mineral enters the milling process it is no longer in the form in which it occurs in the earth’s crust. Nevertheless, the downstream processes used to mill a mineral cannot be said to be something other than milling just because the material entering that particular process is not in the “form” in which it occurs in the earth. The mineral can only be in that form in the first step of the milling process. Thus, secondary crushing is still milling even though the material entering the secondary crusher is not in the form in which it naturally occurs. I find that the Secretary established that Dicaparl treats the crude crust of the earth to produce primary consumer derivatives at the El Grande Plant.

Another issue raised by the Secretary’s definition of milling is whether the removal of water from the perlite through the heat expansion process can be considered to be the “separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.” The Secretary contends that because the removal of water is key to the expansion process, the water should be considered to be an undesired contaminant which is removed at the plant. Because an undesired contaminant is removed, she contends that mineral milling is taking place.

I find the Secretary's interpretation to be reasonable based on the evidence presented. When the perlite is expanded (popped), all moisture is removed. The heating process at the plant is designed to expand the perlite to make it less dense. This process upgrades the product for use in the construction industry. The product would not be the same if the moisture remained in the perlite. Thus, the "undesirable contaminant" in the crude (water) is separated from the "valuable desired constituents of the crude," in order to upgrade the product.

In the mining industry, the first stage of milling generally consists of crushing and grinding the ore using crushers, ball mills, rod mills and other similar equipment. The milling process does not stop there, however. The separation of the desired mineral from the unwanted contaminants is typically performed by subjecting the crushed ore to a series of processes which removes contaminants. In the crushed stone industry, for example, the crushed material is sized for customer use and unwanted material is removed. In the metal mining industry, finely crushed ore may be placed in large flotation vats which contain chemical reagents that help separate the desired metallic minerals from the host rock. All of these processes are part of the milling operation. The term "milling" is not limited to the processes that crush and grind the crude ore. In this case, Dicaperl uses high heat to remove the undesirable water from the ore.¹

I find that the Secretary's contention that the removal of water from the perlite at the plant constitutes mineral milling is a permissible and reasonable construction of the term milling in section 3(h)(1) of the Mine Act. The water which is removed is not water on the surface of the perlite but is water that is embedded in the perlite itself and is removed to create a lighter product. The water is not incidentally evaporated from the perlite as it passes through the vertical furnace; the removal of the water is a key component of the expansion process.

Another operation that the Secretary contends that Dicaperl performs at the plant is sizing. In Appendix A of the Interagency Agreement, the Secretary sets forth examples of processes which she interprets as milling under the Mine Act. These examples are: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting." (Ex. S-17 at 7.) The Secretary defines these processes in the Interagency Agreement. Kirk testified that Dicaperl performs milling at the plant because it sizes the perlite after it is expanded. The Interagency Agreement defines "sizing" as "the 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." (Ex. S-17 at 7). There is no

¹ I note that the Secretary is not bound by any particular technical definition of milling. As the Commission stated, "[i]n enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that such separation was critical to the determination that 'milling' took place." *Watkins*, 24 FMSHRC at 675. In this case, however, the Secretary contends that the removal of water from the perlite powder fits within her definition of milling in Appendix A of the Agreement.

dispute that all of the expanded perlite is screened through one of two screens. Material that does not fit through the screen is bagged separately.

Kirk testified that the El Grande Plant uses screens to remove oversized particles which form in the furnace and to remove “tramp” material from the final product. He testified that the screening is necessary to produce a “uniform particle size” for its two main customers. (Ex. S-18 at 5). The product sold to US Gypsum is passed through a 74 mesh screen, while the product sold to Hamilton Materials is passed through a 60 mesh screen. Kirk believes that sizing occurs because the processes at the plant separate perlite particles of mixed sizes into groups of particles of the same size or within a similar range of sizes. (Ex. S-18 at 5).

Radford testified that the perlite received at the El Grande Plant has already been screened at the mine to very specific sizes. He states that the “ore [from the mines] has to be within a certain specification or when it is placed into the Antonito processing facility it would make an out-of-spec product . . . [T]he size of the product produced at Antonito is directly dependent on the ore that is received from the two mines.” (Tr. 210). Thus, the El Grande Plant uses different feed stock from the mines when it makes its two product lines. (Tr. 210-11). Radford further testified that the screening system at the plant is not essential and that the purpose of the screen is “quality control.” (Tr. 213-14). The “tramp bag” actually contains a large amount of material that would fall through the screens if further screening were performed. There is no separating of small and large microspheres into two separate bags. The tramp bag contains material that meets product specifications, out-of-spec material, and foreign matter. He stated that the material in the tramp bag is one percent or less of the total volume of material produced at the plant. (Tr. 173). Dicaparl contends that all sizing occurs at the mills at the two mines and that the screens at the plant are only used to keep foreign materials and over-sized perlite out of the product bags. The screens at the plant do not separate 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.

I find that the Secretary established that sizing takes place at the El Grande Plant. The screens are used to make sure that similar sized particles are placed into the product bags for its two major customers. Calling the screening process “quality control” does not change this fact. The definition of sizing does not contemplate that a certain percentage of material must be separated out to qualify under the definition. In addition, I am not persuaded by Dicaparl’s argument that sizing does not occur because “a significant amount of material that is smaller than the mesh size also ends up in the tramp material bag.” (D. Br. 20-21). The Secretary does not dispute that sizing also occurs at the No Agua and Socorro Mines. Although different feedstock is used to make different products at the plant, the screening process at the plant still separates perlite particles of mixed sizes into products that meet a specific product’s size specifications by eliminating oversized particles and foreign material. The Perlite Institute equates “sizing” with sorting and argues that since no sorting of product occurs at the plant, sizing is not performed. (PI Br. 11). This argument too narrowly interprets the definition of sizing. The screens sort material into two groups: (1) perlite that meets size and other product specifications, and (2)

foreign material, oversized perlite, and perlite that failed to fall through the screen. The Secretary's position is reasonable and is a "permissible construction" of the term milling.

Based on the above, I find that the Secretary's conclusion that the El Grande Plant is subject to Mine Act jurisdiction because it is a mill is reasonable and is entitled to deference. Several other factors set forth in the Interagency Agreement also weigh in favor of MSHA jurisdiction. First, the Secretary has promulgated safety and health standards which are applicable to the plant. The citations and orders at issue involve alleged violations of MSHA's safety standards dealing with such subjects as safe access, falling hazards, guarding of moving machine parts, and good housekeeping. MSHA's inspectors have expertise with respect to hazard prevention in these areas. The hazards alleged to be present at the El Grande Plant, as set forth in the subject citations and orders, do not present issues which are outside of MSHA's expertise. MSHA has been inspecting the plant since the Mine Act was passed and its inspectors are familiar with the working conditions at the plant. The hazards at issue in these cases are not different from the hazards presented at other facilities that perform milling. In addition, because Dicaparl has been subject to the jurisdiction of MSHA at the plant and its mines, it has been an "operator" for a considerable length of time with the result that it is familiar with the requirements of MSHA's safety and health standards. Although I limited my discussion to the heat expansion process and the sizing operations at the plant, all of the processes at the plant are geographically and technologically related to each other. Finally, Dicaparl was provided with fair notice of Mine Act jurisdiction because MSHA has been inspecting the plant for many years.²

² The Secretary also argued that the plant is a mill because it engages in "heat expansion." That term is defined in Appendix A of the Agreement. "Heat expansion" is defined as "a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume." (Ex. S-17 at 8). Kirk admitted that the El Grande Plant does not use a rotary kiln or sinter hearth, but he argues that the vertical furnace used at the plant is simply an advancement over more traditional equipment. Radford convincingly testified that vertical furnaces have been used in the perlite industry since the 1950s, long before the Interagency Agreement was drafted, and that no perlite expansion facilities use rotary kilns or sinter hearths. The Secretary provides no reasonable argument to explain why the drafters of the Interagency Agreement mentioned industry-specific heating vessels if they wanted to include a wider range of furnaces. She asks the Commission to ignore those words in the definition. Ignoring key words or phrases in the Secretary's own interpretation of the term "heat expansion" is not reasonable and is not a "permissible construction" of the definition. A vertical furnace is not a type of rotary kiln or sinter hearth. Consequently, I did not rely on the definition of "heat expansion" in reaching my conclusion.

The Secretary also asks the Commission to find that Dicaparl engages in "kiln treatment" at the plant. The Interagency Agreement defines "kiln treatment" as "the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat." (Ex. S-17 at 8). Kirk believes that the "kiln treatment" provision can "fairly be called a 'mineral

B. Consistency in the Secretary's Interpretation.

Although the Secretary has consistently enforced the Mine Act at the El Grande Plant, Dicaperl contends that the Secretary's interpretation of the Interagency Agreement offered in these cases is inconsistent with her longstanding position with respect to other perlite expansion facilities. (D. Br. 27). I find that Dicaperl's arguments in this regard are in the nature of an affirmative defense.

Dicaperl argues that as early as 1984, MSHA determined that perlite expansion facilities not located on mine property, *i.e.*, property where extraction takes place, would not be subject to MSHA jurisdiction. In a memorandum authored by Roy L. Bernard, Administrator for Metal/Nonmetal, MSHA determined that vermiculite expansion facilities "which are geographically and operationally separate from mining operations shall be subject to [OSHA] jurisdiction." (Ex. C-6). Based on that memo, the MSHA southeast district manager determined that a perlite expansion facility in Jacksonville, Florida, should also be inspected by OSHA. (Ex. C-7). In the memo, the district manager states that the Florida plant receives "previously crushed perlite by rail from a mine in Oklahoma," it "heat expand[s]" the perlite, and then bags the product for shipment by "truck or rail to be used in potting soil or concrete block." *Id.* As grounds for the decision to place the plant under OSHA jurisdiction, the memo states that the "determination is consistent with past jurisdictional determinations that perlite and vermiculite operations which are geographically and operationally separate from mining operations shall be subject to OSHA's jurisdiction." *Id.* Dicaperl maintains that Chemrock's Jacksonville plant is substantially similar to its El Grande Plant.

heating catchall.' " (Ex. S-18 at 6). He calls it a "catch-all" application because the definition contains the phrase "otherwise upgrading mineral products through the application of heat." I find that it defies logic to believe that the vertical furnace at the plant performs a function that is related to kiln treatment. A "kiln" can be defined as: "(a) A large furnace used for baking, drying, or burning firebrick or refractories, or for calcining ores or other substances. (b) A furnace or oven, which is usually made from refractory brick, used to dry and fire various types of ceramic ware." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 297 (2d ed. 1997). The Secretary's interpretation of her Interagency Agreement to conclude that Dicaperl performs kiln treatment at the plant is unreasonable and is not a permissible interpretation of the Agreement.

My findings in this regard do not affect my holding that the Secretary reasonably interpreted the term "milling" to include the El Grande Plant under Mine Act jurisdiction. The Interagency Agreement lists certain processes in Appendix A, such as "kiln treatment" and "heat expansion," under the heading "Specific Examples of MSHA Authority." (Ex. S-17 at 5). These examples do not limit or restrict the general definition of "milling" provided in the Agreement. I have relied on the Secretary's definitions of "milling" and "sizing" in reaching my conclusion that MSHA's enforcement of safety standards at the plant is reasonable.

Dicaperl presented other evidence to support its position that the Secretary is inconsistent in her exercise of jurisdiction over facilities that are substantially similar to the El Grande Plant. Dicaperl's witnesses testified that various other perlite facilities use processes that are "substantially similar" to that used at the El Grande Plant. (D. Br. 6-8). In response to discovery, the Secretary identified 26 similar perlite facilities that are not being inspected by MSHA. (Ex. C-10). Dicaperl points out that the Secretary is required by law to exercise enforcement jurisdiction over all mines and milling operations pursuant to section 103(a) of the Mine Act. She does not have discretion "to exercise selective enforcement over facilities of her choosing." (D. Br. 30). Dicaperl also states that the evidence establishes that MSHA exercised jurisdiction over a number of perlite expansion facilities in the past, but subsequently abandoned such jurisdiction. (Exs. C-2, C-3). This fact further illustrates the Secretary's failure to consistently enforce the Mine Act at perlite expansion facilities. In sum, the Secretary's interpretation of the term "milling" in these cases is inconsistent with the Secretary's past enforcement at other perlite expansion facilities. "The continued inclusion of the El Grande Plant under MSHA's jurisdiction, while other perlite expansion facilities are not under the agency's jurisdiction, defies common sense and leads to the bizarre result of a single facility in the industry being under MSHA's jurisdiction while its competitors in the same industry are under OSHA's jurisdiction." (D. Br. 32) (*citing Nat'l Cement Co. Of Cal. Inc.*, 27 FMSHRC 721, 728-29 (Nov. 2005).

The Secretary contends that Dicaperl's arguments are irrelevant and that the only issue is whether her application of the Interagency Agreement to the El Grande Plant is reasonable. Second, she argues that, although MSHA has determined that it should not exercise jurisdiction over vermiculite facilities not otherwise located at a mine, it has not issued a similar policy for perlite facilities. The Secretary points out that MSHA has been inspecting the El Grande Plant since 1979 and that she is currently inspecting 10 other perlite mines or mills. (Tr. 244-45; Ex. C-3). The decision by the local office of MSHA to stop inspecting the perlite facility in Florida "appears to have been a local resource-driven determination [that is] permitted under section B(5) of the Interagency Agreement." (S. Br. 26, footnote omitted).

The Secretary contends that, although other perlite facilities may be similar to the El Grande Plant, there may be important differences. Jason Guzek, Vice President of Operations at Belmont Holdings Corporation,³ and Mr. Radford testified about several perlite facilities which they alleged were not being inspected by MSHA. (Tr. 225-31, 281, 289-302; D. Br. 6-9). The Secretary contends that local MSHA officials often make these jurisdictional determinations based on unique factual circumstances. For example, some of these other perlite facilities actually make finished products such as ceiling tiles, fire doors, potting soil and filter media at the same location. (Tr. 240-42, 306-07). Other facilities do not screen perlite. (Tr. 229, 240). Other facilities process perlite that has already been expanded at the El Grande Plant. (Tr. 106, Ex. S-22). The Secretary also contends that Respondent did not offer any technical details about the processes that occur at these other facilities. The evidence shows that the perlite industry

³ Dicaperl is a subsidiary of Belmont Holdings Corporation. Mr. Guzek oversees production, efficiency and personnel matters for Belmont.

consists of “plants of varied design and function that require a case-by-base jurisdictional determination to be made by MSHA and OSHA taking into consideration the factors set forth in sections B(3)-(5) of the Interagency Agreement.” (S. Br. 28).

I find that the arguments presented by Dicaparl and the Perlite Institute are not very persuasive. At the hearing, the Secretary objected to the introduction of Dicaparl’s evidence on MSHA’s lack of enforcement at other perlite facilities on the grounds that such evidence was irrelevant to the issue whether the El Grande Plant is a mill. Although I overruled the Secretary’s objections, I agree that MSHA’s failure to inspect other perlite facilities is not relevant to the issue whether the Secretary has the authority to enforce MSHA’s standards at the El Grande Plant. Moreover, I hold that Dicaparl did not establish that the Secretary’s enforcement policies are fatally inconsistent. Although perlite expansion facilities may be similar, they are not exactly alike. For example, the memo in which local MSHA officials announced that MSHA would stop inspecting the Jacksonville, Florida, plant noted that potting soil had been manufactured at the plant and that “this finished product may again be manufactured in the future.” (Ex. C-7). This type of case-by-case factual determination is committed to agency discretion under the Interagency Agreement. The Agreement specifically gives the agency flexibility when evaluating what constitutes mineral milling for purposes of MSHA enforcement. The Secretary is given the authority to expand or narrow the scope of the term “milling” depending on geographic and technologic factors. This flexibility is especially important “in operations near the termination of the milling cycle and the beginning of the manufacturing cycle.” (Ex. S-17 at 2). It would be quite cumbersome and impractical for Commission judges, when evaluating whether a facility is a mill subject to MSHA jurisdiction, to evaluate whether MSHA should be exercising jurisdiction at other similar facilities. There are too many factors that come into play and the Secretary has been granted broad authority to exercise her discretion when determining what is a mill under the Mine Act.

Dicaparl’s argument that MSHA does not have the authority to “exercise selective enforcement over facilities of its choosing, while not exercising jurisdiction over other facilities that fit within the definition of mining or milling,” is not well taken because it misstates the issue. (D. Br. 30). The Secretary is not arguing that she has the authority to waive Mine Act jurisdiction at mineral milling facilities, she is arguing that she has the authority to determine what is mineral milling for purposes of the Mine Act. As long as her determination is reasonable, that decision is within her discretion. As stated above, the Secretary is not required to apply a technical definition of milling when determining whether the safety of employees at a facility is best served by MSHA or OSHA inspections. Practical considerations, including the “convenience of administration,” can be factored into her analysis. The “convenience of administration” clause of section 3(h)(1) [of the Mine Act] is a broader concept than the need to eliminate overlapping jurisdiction.” *Watkins*, 24 FMSHRC at 674 n. 8 (citation omitted). MSHA has been inspecting the El Grande Plant for about 27 years. The Interagency Agreement contemplates that, when determining what “constitutes mineral milling,” the Secretary can consider the “expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility.” (Ex. S-17 at 2). In

this case, I find that her decision to assign MSHA the authority to inspect all the processes at the El Grande Plant to be reasonable and is entitled to deference.

The U.S. Court of Appeals for the District of Columbia Circuit, recently held that the “Commission is generally without authority to review the Secretary’s discretionary decisions regarding whether to cite owner-operators, their independent contractors, or both for safety violations committed by the independent contractors.” *Sec’y of Labor v. Twentymile Coal Co.*, No. 05-1124, 2006 WL 1867249, at *10 (DC Cir. July 7, 2006). The court based its decision, in part, on the fact that the Mine Act does not provide a “meaningful standard” against which to judge MSHA’s exercise of discretion on that issue. *Id.* at *6. It found that the Mine Act is “utterly silent on the manner in which [MSHA] is to proceed against a particular transgressor.” *Id.* at *6 (citation omitted). I note that the Mine Act provides a very loose standard against which to judge MSHA’s exercise of discretion when determining whether a facility performs milling. I have not relied on *Twentymile* but have determined that the Secretary’s exercise of discretion in this case to be reasonable based on the language of the Mine Act and the guidelines and definitions set forth in her Interagency Agreement.

IV. ORDER

For the reasons set forth above, I find that the Mine Safety and Health Administration has jurisdiction to inspect the El Grande Plant. Consequently, Dicaperl Mineral Corporation’s motion to dismiss these cases is **DENIED**.

Richard W. Manning
Administrative Law Judge

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