

CLIENT ALERT

MSHA Jurisdiction Extends Over Coal Blending Facilities, According to the Fourth Circuit Court of Appeals

Jan.29.2015

The U.S. Court of Appeals for the Fourth Circuit has held that the Mine Safety and Health Administration (MSHA) properly exercised enforcement jurisdiction over a facility that receives and blends coal to meet the specified needs of a nearby power plant. The case is *Power Fuels, LLC*, No. 14-1450, decided January 27, 2015. The Fourth Circuit hears appeals of Mine Act enforcement cases originating at mining operations in Maryland, the Carolinas, Virginia, and West Virginia.

Power Fuels owns and operates a coal-blending terminal in Wise County, Virginia. The terminal is located across the road from a power plant operated by Virginia Electric and Power Company, doing business as Dominion Virginia Power. Power Fuels purchases and receives coal from other sources, then samples and blends it according to Dominion's requirements before delivering it to the power plant. Power Fuels also stores approximately eight days' worth of fuel for the power plant. Dominion owns all of the coal that Power Fuels prepares, and about 80 percent of the fuel used at the power plant comes from Power Fuels. Power Fuels does not extract coal from the ground, nor does it crush or wash the coal. All it does is take delivery and blend the coal before storing it temporarily or delivering it to Dominion.

In 2012, shortly after both companies started operating, an MSHA inspector saw trucks delivering coal to the Power Fuels site. Thus alerted to the possibility that activities possibly covered by the Mine Act were taking place, MSHA and the Department of Labor investigated the facility and determined that the blending terminal fell within MSHA's jurisdiction. The following year, MSHA issued three citations to Power Fuels, alleging violations of MSHA's mobile equipment regulations.

Power Fuels challenged the citations, arguing that health and safety at the facility should be overseen by the Department of Labor's Occupational Safety and Health Administration (OSHA) rather than MSHA. It argued that Power Fuels did not operate a "mine," as defined by the Mine Act, because the work it performed was the sort of work customarily performed by a consumer of coal and not its producer. The Review Commission administrative law judge who initially heard the case agreed with MSHA that the agency had properly exercised its enforcement authority over the facility and upheld the citations. The Commission declined review and Power Fuels appealed to the Fourth Circuit.

The Court of Appeals agreed with the administrative law judge. It looked at the legislative history of the Mine Act and noted that Congress intended that the Act be broadly construed whenever possible, so as to bring operations within its scope rather than excluded. It held that both the nature of the blending facility and the work performed there fit neatly within the definition of a "mine" as a place where the "work of preparing coal" takes place. The Court also reasoned that the people who work at the Power Fuels facility are exposed to the very hazards that the Mine Act was intended to address, so it is more appropriate for MSHA, not OSHA, to be responsible for overseeing their safety and health.

Finally, exemplifying how difficult it has become for regulated parties to battle agencies on the scope of their enforcement jurisdiction, especially in light of the Supreme Court's 2013 *City of Arlington* decision, the Fourth Circuit made it clear it had no interest in second-guessing the Secretary of Labor's decision—making when the question pertains to "the borderline between the

background regulations of OSHA and the specialized regulations of MSHA," since both are under his authority. The court stated that the only real question is whether enforcement by MSHA would be contrary to the language of the Mine Act. The court concluded it was not.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Daniel W. Wolff

Partner – Washington, D.C.

Phone: +1 202.624.2621

Email: dwolff@crowell.com