**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

March 15, 2024

| | |
|---|---|
| MINERAL MANUFACTURING CORP.,<br>Contestant,<br><br>v.<br><br>SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION, MSHA,<br>Respondent | CONTEST PROCEEDINGS<br><br>Docket No. SE 2023-0185<br>Citation No. 9701784; 04/11/2023<br><br>Docket No. SE 2023-0186<br>Citation No. 9701785; 04/11/2023<br><br>Mine: Eufaula Plant<br>Mine ID: 01-03237 |
| SECRETARY OF LABOR, U.S.<br>DEPARTMENT OF LABOR, MINE<br>SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner<br><br>v.<br><br>MINERAL MANUFACTURING CORP.,<br>Respondent | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. SE 2023-0191<br>A.C. No. 01-03237-576247<br><br>Docket No. SE 2023-0203<br>A.C. No. 01-03237-578487<br><br>Mine: Eufaula Plant |

## DECISION ON JURISDICTION

Before the Court are the parties' cross-motions for summary decision on jurisdiction.[1] For the reasons which follow, the Court finds that MSHA has jurisdiction over Mineral Manufacturing Corporation's Eufaula Plant. The only genuine jurisdictional contention in this matter is whether the Eufaula Plant is engaged in milling. If milling is occurring, then it is *ultimately, solely, and finally* up to MSHA and OSHA, not the regulated entity, to make the determination between themselves which entity will have jurisdiction over the milling activity.

For the reasons which follow, the Court finds that the Eufaula Plant performs milling of kaolin clay, and that it is not a ceramics manufacturing plant, and as such, per the Secretary of Labor's determination, it is under the jurisdiction of the Mine Safety and Health Administration.

[1] The Court also considered the parties' replies: Petitioner's Opposition to Mineral Manufacturing Corporation's Partial Motion for Summary Decision on the Issue of Jurisdiction and Mineral Manufacturing Corporation's Reply to Petitioner's Motion.

**Setting the Table; the Agreed-Upon Facts**

THE SECRETARY OF LABOR'S STATEMENT OF RELEVANT UNDISPUTED FACTS:

1. Mineral Manufacturing Corporation (MMC) owns and operates the Eufaula Plant located at 50 Harbison Walker Road, Eufaula, Alabama.
2. MMC does not engage in mineral extraction at the property where the Eufaula Plant is located.
3. MMC purchases and processes alumina clay from multiple vendors/mines located in Georgia and Alabama, one of which, the Fleming Pit Facility, was recently acquired by MMC.
4. All of the employees at the Fleming Pit facility are MMC employees.
5. MMC engages in kaolin clay extraction at pit sites in the Barbour and Henry County areas where MMC owns mineral rights or has permits pending, but these pits are not located on the same property as the worksite at issue in this case.
6. The kaolin clay contains varying amounts of alumina.
7. The purchased clay is brought to the Eufaula plant by truck and dumped on the Eufaula plant property.
**8. As needed for processing, clay is picked up by loader and run through a crusher.**
**9. After the initial blending with other clays to reach the desired alumina content, the clay is run through a crusher.**
**10. Crushed and blended clay is transferred by loader to an extrusion operation to further reduce particle size and produce a smoother material.**
**11. The material is fed into a pug sealer mixer where water is added to reach a 16 – 18% moisture content.**
**12. The material is fed into a second pug sealer mixer and then into an extruder which compresses the alumina clay into a noodle type shape.**
**13. The material is taken from the extruder by loader and conveyor belt and loaded into a rotary kiln.**
**14. The kiln heats the material temperatures between 2850 and 3100 degrees F.**
**15. The very high temperature in the kiln causes a chemical reaction with the alumina clay, producing the ceramic material Mullite.**
**16. Mullite is primarily produced synthetically through applying heat and other processes to alumina clay to produce the ceramic material.**
**17. The Mullite produced by MMC is mostly sold for use as refractory material for use in the manufacturing of finished products.**
**18. MMC sells its ceramic mullite product as "kiln run" and also crushes and sizes mullite after kiln treatment and before shipment, according to customer needs.**
19. Mullite is shipped in bulk by dump truck or packaged in bulk bags for shipment to customers.
20. OSHA and MSHA have entered into an agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional

questions, and provide for coordination between MSHA and OSHA in all areas of mutual interest. The parties have stipulated to the authenticity of this document, and the agreement is attached as Exhibit C.

21. MMC operates a ceramics manufacturing plant in Pennsylvania which further processes ceramic mullite from its ceramics plant in Eufaula, Alabama (Eufaula Plant).

22. The Pennsylvania ceramics plant has always been under OSHA jurisdiction.

Petitioner, Acting Secretary of Labor's Motion for Summary Decision on Jurisdiction ("Sec's Motion") at 3-5, (emphasis added).

Respondent Mineral Manufacturing Corporation's "Partial Motion for Summary Decision on the Issue of Jurisdiction" ("Respondent's Motion") is identical to the Sec's Motion. Respondent's Motion at 2-4.[2]

**The Summary Judgment Standard**

As Respondent notes, "Commission Procedural Rule 67 provides that summary decision is appropriately granted when "the entire record … shows (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R.§ 2700.67 (b). Respondent's Motion at 4. The Court finds that both elements are present in this matter.

**The Applicable Statutory Provision**

**The Mine Act, at 30 U.S. Code § 802 – Definitions, provides "For the purpose of this chapter, the term - … "coal or other mine" means:**

(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*

[2] Both motions have, as the last item, Item No. 23., which states "Counsel for MMC sent a letter dated January 18, 2023 to MSHA's District Managers in Birmingham, Alabama and Barbourville, Kentucky regarding MSHA's jurisdiction over its Eufaula Plant. That letter is attached as Exhibit D in the Sec's Motion. The Court did not include item 23 in the list above because it considers it to be irrelevant to the jurisdictional issue before it.

> *purposes of this chapter, the Secretary*[3] [of Labor or his delegate] *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. Code § 802(h)(1) (emphasis added).

**The Parties' Arguments, with the Court's Analysis**[4]

[3] Per 30 U.S.C. § 802(a), "Secretary" means the Secretary of Labor or his delegate.

[4] The Court notes that this issue of jurisdiction is not merely an academic one. The Eufaula Plant, which bears MSHA Mine ID: 01-03237, in the previous 6 years, had 47 cited 104(a) violations. These violations were all paid at their initial proposed penalty amount. *See Mine Data Retrieval System*, Violations, Mine ID: 0103237,1/1/2018-03/10/2024, MSHA (Mar. 11, 2024), https://www.msha.gov/data-and-reports/mine-data-retrieval-system.

Substantively, in the matters presently before the Court are two dockets. Docket No. SE 2023-0191, involves an alleged violation of 30 C.F.R. §56.14105, which asserts that "[m]aintenance work is being conducted at this operation on the Pug Mills while the equipment is not powered off and blocked against hazardous motion. Miners have been required to use plastic stakes to remove material buildup inside the pug mills by placing them through the guards of the pug mills by hand and using them to push the material off the sides and down into the mills. The mills have drums with teeth that process clay and rotate at approximate 1700 RPMs during operation. This practice occurs in order to prevent material in the mills from building up on the sides to the point of pushing the guards upwards, which activates t Pug Mills' emergency stop devices and halts production. The practice has been part of normal mining operations for an extended period of time, exposing miners to possible injuries from cuts, lacerations, and blunt force trauma. Mine management engaged in aggravated conduct constituting more than ordinary negligence by directing miners to conduct the cleanup activity around moving without ensuring the pug mills are de-energized and locked out to prevent hazardous motion. This violation is an unwarrantable failure to comply with a mandatory standard." Petition at 15.

Substantively, Docket No. SE 2023-0203, involves an alleged violation of 30 C.F.R. §56.12004 and an alleged violation of 30 C.F.R. §56.14201(b), which assert, respectively, that "[t]he outer jacket on the grounding lead on the portable welder wires were exposed to mechanical damage[]. The welder was not in use at the time of inspection and the leads was rolled up. The welder is used as needed for maintenance or repair in the plant area. This condi[tion] on exposes person to electrical shock and or burn hazards," and "[t]he conveyors and other related electrical driven equipment could not be seen from the control room. There was an audi[b]le device located on the top of the control that was not functioning properly when checked. The plant operator, clean up or maintenance personnel all have access to these areas at any time. Persons are exposed to an entanglement hazard that could cause serious injuries." Petition at 15-16.

**The Secretary of Labor's Contentions**

As the Secretary points out, the Mine Act's definition of a "coal or other mine" is very broad, to wit, 30 U.S.C. § 802(h)(1), as truncated and highlighted by the Court for the relevant language, defines a "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, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, **or resulting from, the work of extracting such minerals . . . , or used in, or to be used in, <u>the milling of such minerals</u>**, 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) (pertinent language emphasized by this Court).

The Secretary notes that:

> The Mine Act does not define the term "milling" but gives the Acting Secretary the authority to make "a determination of what constitutes mineral milling." 30 U.S.C. § 802(h)(1). The Interagency Agreement identifies "milling" as an area within MSHA's regulatory authority and defines milling to include the processes of "sizing" and "drying." *See* 44 Fed. Reg. at 22829. According to Appendix A of the Interagency Agreement, milling is the process of separating valuable minerals from worthless material or "treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 Fed. Reg. at 22829.

Sec. Motion at 9.

The Court holds that the Secretary is clearly correct on this score – the Mine Act gives *the Secretary* the authority to make "a determination of what constitutes mineral milling." 30 U.S.C. § 802(h)(1). The Act's use, in 30 U.S.C. § 802(h)(1), regarding "making a determination of what constitutes milling for purposes of [the Mine Act]" vests that determination in the Secretary of Labor alone. That language does not suggest the determination is shared, collaboratively or otherwise, with mine operators. That authority results in a determination, *by the Secretary*, of whether the activity in question constitutes milling.

As the Secretary notes, Appendix A of the Interagency Agreement provides that:

> milling includes one or more of the following processes: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing," [that] "crushing" is defined as "the process used to reduce the size of mined materials into

> smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved," [that] … "sizing" is defined 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[,]" [that] … "pulverizing" [is defined] as "the process whereby mined products are reduced to fine particles, such as to dust or powder size [,]" [and that] "kiln treatment" is defined as "the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat."

Sec. Motion at 9-10.

Using that Interagency Agreement as its guidepost, the Secretary contends that MMC engages in milling by crushing, pulverizing, sizing, and kiln treating kaolin clay. Jt. Stip. 8-10, 14-16. Those cited stipulations, the Court observes, admit that the clay is run through a crusher, then subjected to an extrusion operation to further reduce particle size and produce a smoother material, then subsequently loaded into a rotary kiln for the purpose of heating the material, which process causes a chemical reaction with the alumina clay, with the result of producing the ceramic material Mullite. *Id.*

Thus, the product, Mullite, is produced by the steps described above to produce the ceramic material. *Id*. at 15. These described, stipulated, processes clearly fit within the Interagency Agreement as they include crushing, reducing the size of the clay, and heating the material. *Id*. at 10.

As noted in *Donoho Clay*, 3 FMSHRC 2381 (Oct. 1981) (ALJ), on March 29, 1979, the agreement between OSHA and MESA was superseded by an "MSHA-OSHA Interagency Agreement," which recognized the Secretary's dual enforcement role and the continuity of enforcement principles of the earlier agreement.

Section A (3) of the Interagency Agreement explains its purpose and general principles as follows:

> This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions. However, where 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 mite sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act 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 OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as 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 legislative history of the Mine Act indicates a Congressional intent to resolve jurisdictional doubts in favor of coverage under the statute. The Report of the Senate Committee on Human Resources states:
>
> 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 the broadest possibly [sic] 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, 95th Cong., 1st Sess. 14 (1977), reprinted in, Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978). Section B(5) of the Interagency Agreement recognizes the Congress' intent that doubts be resolved in favor of coverage under the Mine Act.

*Donoho* at 2383-2384.

> The Court agrees with the Secretary's summary that:
>
> MMC runs its blended clay through a crusher before transferring the clay by loader to an extrusion operation to further reduce particle size and produce a smoother material. Jt. Stip. 9-10. MMC's kiln treatment of clay to remove water and moisture satisfies the Interagency Agreement's definition of milling because the treatment is integral to and part of the numerous other milling processes that occur at the property, with the kiln treatment occurring midway through the milling cycle and bookended by various crushing processes. Jt. Stip. 8-10; 13-15; 18. Regarding sizing, MMC sizes the material into various sizes, using screens to obtain desired product dimensions. Jt. Stip. 18.
>
> Like the operation in *Donoho*, MMC is a clay plant that relies primarily on milling processes to create its final product, synthetic mullite. Jt. Stip. 8-10, 14-16; 18. The mullite is a "primary consumer derivative" produced by milling kaolin clay into marketable for use in numerous refractory applications and industries but is not a finished ceramic product. 44 Fed. Reg. at 22,829. Rather, MMC's mullite is raw material sold in loose, bagged form and used by MMC's customers to fashion ceramic products. Jt. Stip. 19.

Sec. Motion at 10.

**The Issue of Commerce**

As the Secretary remarks:

> For MSHA to exert jurisdiction over MMC, the evidence must show not only that MMC is a "coal or other mine" under the Mine Act but also that MMC's products enter commerce or its operations affect commerce. *Cactus Canyon*, 45 FMSHRC at 394. Under Section 3(b) of the Mine Act, 30 U.S.C. § 802(b), commerce is defined as:
>
> > trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof[.]
>
> MMC argues that its process for milling clay does not fall under the definition of milling for the purpose of MSHA jurisdiction because the clay already entered commerce. This Court[5] has determined that a mine can be subject to MSHA jurisdiction even if the product the mine mills "was purchased on the open market." *Cactus Canyon*, 45 FMSHRC at 395. The Acting Secretary argues that the same reasoning should apply to MMC.
>
> MMC has sold its mullite to refractory companies to be used in the manufacturing of finished products. Jt. Stip. 17. Given these facts, MMC's operations affect commerce, and its products enter commerce. *See Cactus Canyon*, 45 FMSHRC at 394-395.

*Id.* at 11.

The Court finds that MMC's operations the Eufaula Plant constitute commerce.

**This Matter, that is Whether the Respondent's Eufaula Plant is Subject to MSHA's Jurisdiction, has Been Decided Before.**

The Secretary notes that this Court determined MSHA has jurisdiction over MMC's Eufaula Plant in 2011. This will be discussed below.

[5] The reference to "[t]his Court" applies to a decision by another administrative law judge with the Mine Review Commission, not the undersigned.

The Court agrees with the Secretary's observations that Section 3(h)(1)(C) of the Mine Act grants the Acting Secretary discretion to determine what constitutes milling, which discretion is granted deference both by the Commission[6] and the Courts, stating:

> Here, there are no genuine issues of material fact regarding how MMC produces mullite that would support Respondent's position that MMC should be under OSHA jurisdiction. However, even in close cases, the Mine Act grants the authority to define the term milling to the Acting Secretary, and not to the ALJ or the Commission. 30 U.S.C. § 802(h)(1); *see also Carolina Stalite Co*. at 1551 (stating that the language of 802(3)(h)(1) gives the Acting Secretary discretion, within reason, to determine what constitutes mineral milling and that determining what constitutes milling is "just the sort of determination the Secretary was empowered by Congress to make."
>
> Here, the Acting Secretary determined that the activity at MMC's Eufaula Plant constitutes mineral milling within the authority of MSHA. The Acting Secretary's determination must be given the deference it is entitled to under the law. *Carolina Stalite*, 734 F.2d at 1551-53; *see also, In re Kaiser Aluminum and Chemical Co*., 214 F.3d 586, 591 (5th Cir. 2000) ("*Kaiser Aluminum*") (finding the Secretary should be given *Chevron* deference when determining what processes constitute milling); *Sec'y of Lab., Mine Safety & Health Admin. v. Nat'l Cement Co. of Cali*., 494 F.3d 1066 (D.C. Cir. 2007) (finding that 'the Secretary's interpretation of the law must be given weight by both the Commission and the courts' (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5–6 (D.C. Cir. 2003) (quoting *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting *S. Rep. No. 95–181, at 49 (1977),* U.S. Code Cong. & Admin. News 1977, pp. 3401, 3448). Here, the Acting Secretary's decision that MMC is a mine under the Mine Act because it is engaged in milling should be entitled to substantial deference because that decision was reasonable.

*Id.* at 12-13.

[6] Highlighting the Commission's deference to the Secretary's discretion in such matters, in *Calmat of Arizona*, 27 FMSHRC 617, (Sept. 2005), one former Commissioner, in a separate affirmance, opined that, were it not for the mine operator's admission of MSHA's jurisdiction, *he* would have held that "the area in question, by geographical location, was more logically aligned with the concrete batch plant and more appropriately within OSHA's jurisdiction." *Id.* at 627, former Commissioner Michael Duffy, separate, concurring opinion. The problem, of course, is that Congress left such determinations to MSHA and OSHA, not to a Commissioner's personal take.

**Deja Vu All Over Again**[7]

As mentioned above, in 2011, MMC contested MSHA's jurisdiction over the Eufaula Plant, and its motion for (ALJ Moran).

The Secretary points out, in denying MMC's earlier motion:

> ALJ Moran stated, "the Secretary, per the Mine Act, need only show that milling occurs and that it has made the determination that MSHA should oversee that activity. Thus, the Contestant is not entitled to weigh in with its views over which entity, MSHA or OSHA, is the more appropriate overseer." *Id*. at *5, footnote 8. Moreover, the Court recognized the Mine Act's expansive jurisdictional provision stating, ". . . the case law has been well established that Congress' definition of a mine is quite broad and not limited to classic lay understandings of that term. Beyond that, Congress expressly included milling activities within the [Mine] Act's coverage." *Id*. at *6. As the Court held in 2011, the Act's broad definition of the term "coal or other mine" and the Acting Secretary's reasonable determination that MMC engages in milling are sufficient bases to demonstrate that MSHA's exercise of jurisdiction over MMC's Eufaula Plant is legally proper.

Sec. Motion at 11-12.

The Court reviewed its February 2011 decision denying Mineral Manufacturing's Motion for summary decision and finds that it encompasses the issues raised in the Respondent's present Motion, which pertained to the same Eufaula Plant. As this Court decided in its summary decision pertaining to this very mine, MMC's Eufaula Plant is within MSHA's jurisdiction as it engages in milling. *Mineral Mfg. Corp. v. Sec. of Labor, Mine Safety and Health Administration*, 2011 WL 13550393, (Feb. 2011).

In that 2011 decision, this Court also:

> [took] note that the interagency agreement allows for a resolution process when there is a question of jurisdiction between OSHA and MSHA. It states that "when any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy." MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22,827 (Apr. 17, 1979), amended by 48 Fed. Reg. 7, 521 (Feb. 22, 1983). As advised by the interagency agreement, the District Manager of MSHA's Metal/Non-Metal Southeastern District, Michael A. Davis, and the Regional Administrator of OSHA, Benjamin

[7] The phrase "Deja Vu All Over Again" is attributed to the famous Yankees baseball catcher, Yogi Berra. *Deja Vu All Over Again,* WIKIPEDIA (Mar. 13, 2024), https://en.wikipedia.org/wiki/Deja_Vu_All_Over_Again#:~:text=%22D%C3%A9j%C3%A0%20vu%20all%20over%20again,Again%2FThe%20Best%20of%20T.

> Ross, discussed on January 21, 2011 the issue of whether MSHA or OSHA held proper jurisdiction over the Eufaula Plant. The jurisdictional issue was resolved in favor of placing the Eufaula Plant within the jurisdiction of MSHA. (Decl. of Michael A. Davis 4.) Although their determination is not binding upon this Court, it provides persuasive guidance that the Eufaula Plant lands squarely within the jurisdiction of MSHA.

*Mineral Mfg. Corp*, 2011 WL 13550393, at n. 9.

**The Contentions of the Respondent, Mineral Manufacturing Corporation[8]**

The Respondent's argument section refers at the beginning to the definition of a mine. However, with that start, it avoids critical, adverse, language from that definition, dropping the following key words from Congress that:

> **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). (emphasis added).

Respondent then cites to *Secretary of Labor v. Cranesville Aggregate Cos*., 878 F.3d 25 (2d Cir. 2017) ("*Cranesville*") as an example of a court rejecting MSHA jurisdiction, favoring OSHA jurisdiction. Looking to the Interagency Agreement, at Paragraph B.6, the Respondent contends that "certain types of facilities are *categorically covered* by each agency." Respondent's Motion at 8. (emphasis added). The Court does not consider *Cranesville* to be instructive. As a start, the jurisdiction of the Second Circuit Court of Appeals does not include Alabama.

More significantly, and ironically, Cranesville was arguing *that MSHA* should have jurisdiction over the safety violations.

The case also provides a window into the mine's understandable interest in having OSHA, not MSHA, have jurisdiction of the Eufaula Plant, as the Occupational Safety and Health Review Commission. In fact, the OSHA Administrative Law Judge ("ALJ") vacated the citations, finding that jurisdiction belonged to MSHA. The Second Circuit determined that the ALJ failed to give deference to the Secretary's determination giving jurisdiction, *in this instance,* to OSHA for this mine's bag plant. That Court noted that interagency Memorandum of Understanding ("MOU")

[8] Non-issues do not warrant any extended discussion. Accordingly, the subject of commerce, as referenced above, is sufficiently addressed. That the Acting Secretary also has the *burden of proof*, to establish that jurisdiction exists, is not in dispute either. Respondent's Motion at 4, citing Section 4 of the Mine Act and *Secretary of Labor v. Bowman Constr. Co., Inc*, 36 FMSHRC 683, 688 (2014). The Secretary has met its burden of proof on these issues.

between OSHA and MSHA explains what constitutes a mine, and therefore subject to MSHA regulation, and that the MOU defines "milling" as the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives and that drying is included as milling. *Cranesville* at 29.

The Circuit recognized that though the MOU offers a list of mineral milling, it is a non-exhaustive list. *Id.* And, it must be said, that *non-exhaustive list* provides some very important information, explaining it includes:

> 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 safety and health hazards associated with all the processes conducted at the facility**.

*Id.* (emphasis added).

The focus for that decision involved one product: sand. Critically, however, and a significant distinguishing factor from this case, MMC's Eufaula Plant, *the experts in the Cranesville case, all agreed that the sand delivered to the Bag Plant was a finished product*. *Id*. at 31.

That is not the case here as the Eufaula Plant is not dealing with a finished product. Again, ironically, Cranesville's expert was asserting that the jurisdiction belonged to MSHA as "the drying process employed at the Bag Plant was similar to other drying operations which were found to make up part of the mining process and therefore was subject to MSHA authority." *Id*.

At the end of the day, OSHA's jurisdiction was upheld by the Second Circuit by its determination that "the overall work at the Bag Plant was unrelated to the milling process." *Id*. at 35. As that Court remarked, "because the Secretary has authority to distinguish between mining and non-mining activities for the purposes of enforcement, when the Secretary reasonably applies a functional analysis, the Secretary's determination as to which act governs is entitled to substantial deference." *Id*. at 36. Absent an unfounded, outlandish, determination by the Secretary, which clearly did *not* occur here, the substantial deference principle applies.

Although the Respondent insists that the Eufaula Plant is a "ceramic plant," the *label* that *it wishes to* applies is not determinative.[9] Instead, it is a functional analysis which is partnered with the Secretary's broad authority under 30 U.S.C. § 802(h)(1). This authority expressly confers *due consideration* to the convenience of administration in the Secretary's determination of what constitutes mineral milling in delegating to one Assistant Secretary all authority with respect to the health and safety of miners employed at one physical establishment.

[9] In its Reply to Petitioner's Motion, the Respondent merely continues, at length, its assertion that its Eufaula Plant is a ceramic plant. As mentioned, the label Respondent would like to apply is not determinative. It is a functional test, not a naming test, and the joint stipulations are this mine's undoing.

The Court notes that in *Sec v. Drillex*, 16 FMSHRC 2391, (Dec. 1994), the Commission observed that the:

> term "milling" includes processes by which minerals are made ready for use. *See DMMRT at 706; Webster's Third New International Dictionary, Unabridged 1434 (1971).* The Interagency Agreement further defines "milling" as:
>
> the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.
>
> 44 Fed. Reg. at 22829. The Interagency Agreement includes "crushing," "the process used to reduce the size of mined materials into smaller, relatively coarse particles," among milling processes subject to MSHA's regulatory authority. *Id*. Drillex crushed stone into gabion and smaller particles and separated usable stone from undesired contaminants. Therefore, Drillex engaged in milling. *See Donovan v. Carolina Stalite Co*., 734 F.2d 1547, 1551-54 (D.C. Cir. 1984).

*Drillex* at 2395.

**Conclusion:**

**Mine Operators do not have a seat at the table when it comes to making a determination of what constitutes mineral milling for purposes of the Mine Act. Absent completely unfounded, irrational, reasons presented for such determinations, it is up to MSHA and OSHA to determine which entity exercises jurisdiction over their respective Acts.**

**It bears repeating that Congress has clearly spoken to this issue in Mine Act itself stating:**

> (B) **In making a determination of what constitutes mineral milling** for purposes of this chapter, **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). (emphasis added).

In sum, it may be said, the Eufaula Plant is milling, still milling, after all these years, and therefore the Court agrees with the Secretary that the Respondent's claim that it does not engage in milling of the clay "is contrary to the Mine Act, authoritative guidance on the issue of jurisdiction, and Commission case law interpreting this issue." Sec. Motion at 13.

Considering the above, and in light of the Joint Stipulated Facts, the Court finds there is no genuine issue of material fact, and that, as applied here, designating the activity at Eufaula Plant as performing milling is reasonable and the Acting Secretary's interpretation here of the term "milling" is within the bounds of her discretion. Restated, it is not for a mine operator to redesignate the description of its operation, in this case calling it a "ceramic manufacturing plant" and, by employing that new nomenclature, carry the day, when the facts, here the stipulated facts, establish that the plant is engaged in milling.

Accordingly, the Court **GRANTS** the Acting Secretary's Motion for Summary Decision on Jurisdiction, and enters this **ORDER**, **AFFIRMING MSHA's jurisdiction over the Respondent, Mineral Manufacturing Corporation's Eufaula Plant.**

**SO ORDERED.**

William B. Moran

William B. Moran
Administrative Law Judge

Distribution

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705 (safetylawyer@gmail.com)

Jean C. Abreu, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303 (abreu.jean.c@dol.gov)

John O. Gainey, Esq., Office of the Solicitor, U. S. Department of Labor, 61 Forsyth Street, S.W. Room 7T10 Atlanta, GA 30303 (gainey.john.o@dol.gov)