FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

September 25, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2020-0039 A.C. No. 15-18536-505478
v.	
NUGENT SAND COMPANY, Respondent	Mine: Warsaw Plant

DECISION AND ORDER

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary and the Respondent both filed Motions for Summary Judgment pursuant to 29 C.F.R. § 2700.67. This matter concerns a single citation, Citation No. 9424742, issued to Respondent on September 11, 2019, for failing to protect powerlines against lightning. 30 C.F.R § 56.12065. ("Powerlines, including trolley wires, and telephone circuits shall be protected against short circuits and lightning.").

Based on an agreement between the parties to file cross-motions for summary judgment and the stipulated facts,[1] the undersigned finds that there are no genuine issues of material fact. For the reasons set forth below, the undersigned concludes that the Secretary is entitled to a summary decision as a matter of law, affirms the citation and assesses a penalty of $121.00 against Nugent Sand Company.

[1] In this Decision, "Sec'y Mem." refers to the Secretary's Memorandum of Points and Authorities in Support of his Motion for Summary Decision, "Resp't Mot. for Summ. J." refers to Respondent's Motion for Summary Judgement, and "JS" refers to the Joint Stipulations.

I. STIPULATIONS

The parties submitted the following joint stipulations, which have been accepted into the record:

1. Warsaw Plant (Mine ID 15-18536) is a "mine" as defined in § 3(h) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 802(h).

2. Nugent Sand Company owns, operates, and controls Warsaw Plant. Nugent Sand Company is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 802(d).

3. At all times relevant to this case, the products of the Warsaw Plant entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Operations of Nugent Sand Company at the Warsaw Plant are subject to the jurisdiction of the Mine Act.

5. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.

6. Warsaw Plant is a sand and gravel processing plant located in Gallatin County, Kentucky. As part of its mining process at Warsaw Plant, Nugent Sand Company utilizes several pieces of electrical equipment including conveyor belts, screens, sand screws, and cone crushers.

7. Electrical power is supplied to Warsaw Plant by three-phase 7200 volt powerlines. Each of these 7200 volt powerlines is protected against lightning by a lightning arrestor. On each 7200 volt powerline, the lightning arrestor is located immediately prior to the powerline's connection to a transformer. No additional lightning protection is provided on the 7200 volt powerlines at the mine facility.

8. Each 7200 powerline connects to a transformer where the voltage is stepped down from 7200 to 480 volts.

9. From each transformer, 480 volt powerlines supply power to the plant's electrical equipment. No additional lightning protection is provided on the 480 volt powerlines. Rather, the 480 volt powerlines are protected against lightning by the lightning arrestors on the 7200 powerlines.

10. The 7200 volt powerlines, lightning arrestors, transformers, and 480 volt powerlines are all located on mine property.

11. The 480 volt powerlines are owned by Nugent Sand Company. Nugent Sand Company contends, and the Secretary neither admits nor denies, that any maintenance performed on the 480 volt powerlines is done under the auspices of Owen Electric Cooperative, Inc.

12. The 7200 volt powerlines, lightning arrestors, and transformers are owned and maintained by Owen Electric Cooperative, Inc.

13. Owen Electric Cooperative, Inc. is a public utility. Nugent Sand Company contracts with Owen Electric Cooperative, Inc. to supply electricity to Warsaw Plant. Owen Electric Cooperative, Inc. has not authorized Nugent Sand Company to perform repairs on its 7200 volt powerlines, lightning arrestors, or transformers.

14. On September 11, 2019, the lightning arrestor on one of the three-phases of the 7200 volt powerlines was blown and therefore inoperable. As a result, that phase of the 7200 volt powerlines, the transformer it connected to, and the 480 volt powerline on the secondary of that transformer were not protected against lightning. The lightning arrestors on the other two phases of the 7200 volt powerlines were operable and therefore those two phases, the transformers that each of those phases connected to, and the two 480 volt powerlines secondary of those transformers were protected against lightning.

15. On September 11, 2019, Mine Safety and Health Administration Inspector Steaven Caudill ("Inspector Caudill") issued Citation No. 9424742 for a violation of mandatory safety standard 30 C.F.R. § 56.12065. A copy of Citation No. 9424742 was served on an authorized agent of Nugent Sand Company. At all relevant times, Inspector Caudill was acting in an official capacity and as authorized representative of the Secretary of Labor.

16. On September 11, 2019, Nugent Sand Company informed Owen Electric Cooperative, Inc. of the blown lightning arrestor. Employees of Owen Electric Cooperative, Inc. replaced the blown lightning arrestor. After the blown lightning arrestor was replaced, on September 12, 2019, Inspector Caudill terminated Citation No. 9424742.

17. Nugent Sand Company contends that it is not liable for the violation. To the extent Nugent Sand Company is liable for the violation, the parties agree and stipulate:

a. The violation was not significant and substantial.

b. The violation was unlikely to result in an injury or illness.

c. If an injury or illness were to occur as a result of the violation, the injury or illness could reasonably be expected to be permanently disabling.

d. One person was affected by the cited hazard.

e. Nugent Sand Company's negligence was low.

18. Payment of the total proposed penalty of $121.00 for Citation No. 9424742 will not affect Nugent Sand Company's ability to continue in business.

19. The certified copy of the R-17 Assessed Violation History Report, attached as Exhibit 1, accurately reflects Nugent Sand Company's violation history at Warsaw Plant for the time period of September 11, 2016 to September 11, 2019.

II. Background

Nugent Sand Company ("Nugent Sand") owns and operates the Warsaw Plant, a sand and gravel processing plant in Gallatin County, Kentucky. JS at ¶¶ 1-6. The Warsaw Plant is a "mine" as defined in § 3(h) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"). 30 U.S.C. § 802(h); JS at ¶ 1. As relevant here, the Warsaw Plant entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of section 4 of the Mine Act. 30 U.S.C. § 803; JS at ¶ 3. Consequently, operations of Nugent Sand at the Warsaw Plant are subject to the jurisdiction of the Mine Act. JS at ¶ 5.

On the mine property, three-phase, 7200-volt powerlines supply electrical power to the Warsaw Plant. JS at ¶ 7. Each 7200-volt powerline connects to a transformer where the voltage is stepped down, and 480-volt powerlines run from the transformer to the plant's electrical equipment. *Id.* at ¶ 7-8. Immediately prior to each 7200-volt powerline's connection to a transformer, each powerline has a lightning arrestor. *Id.*. at ¶ 7. This is the only lightning protection on the 7200-volt powerlines, and there is no additional lightning protection on 480-volt powerlines from the transformer to the plant's electrical equipment. *Id.* at ¶ 9.

Although the 480-volt powerlines from the transformer to the plant are owned by Nugent Sand, the 7200-volt powerlines, lightning arrestors, and transformer are all owned and maintained by Owen Electric Cooperative, Inc. ("Owen Electric"), a public utility that contracts with Nugent Sand. *Id.* at ¶¶ 12-13. Nugent Sand has no authority to perform repairs on the 7200-volt powerlines, lightning arrestors, or transformers. *Id.* at ¶ 13.

On September 11, 2019, the lightning arrestor on one of the three phases of the 7200-volt powerlines was inoperable. Without an operable lightning arrestor, that phase of the 7200-volt powerline as well as its transformer and a 480-volt powerline were not protected against lightning. *Id.* at ¶ 14. On that same date, MSHA Inspector Steaven Caudill issued Citation No. 9424742 for a violation of mandatory safety standard 30 C.F.R. § 56.12065. *Id.* at ¶ 15.

That same day, Nugent Sand notified Owen Electric of the inoperable lightning arrestor. On September 12, 2019, Owen Electric replaced the inoperable lightning arrestor; and Inspector Caudill terminated the Citation. *Id.* at ¶ 16.

The parties stipulate that the alleged violation was not significant and substantial and was unlikely to result in an injury or illness; that the expected injury or illness would be permanently disabling and would affect one person; and that Nugent Sand's negligence was low. *Id.* at ¶ 17. The parties also stipulate that the total proposed penalty of $121.00 would not affect Nugent Sand's ability to continue in business. *Id*. at ¶ 18.

III. Legal Principles and Analysis

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show 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. Based on the parties' agreement to file cross-motions for summary judgment and the stipulated facts, the undersigned concludes that there are no genuine issues of material fact and that this

matter is ripe for summary judgment. The parties do not dispute the existence or the particulars of the violation itself.[2] Consequently, the Secretary and the Respondent agree that the sole issue is whether, as a matter of law, the Respondent is liable for the violation.

As an initial matter, the 7200-volt powerlines, the transformer, and the lightning arrestors are all on mine property, JS at 2, and subject to the regulations of the Mine Act. *Old Dominion Power Co.*, 6 FMSHRC 1886, 1890 (Aug. 1984) (*rev'd on other grounds* 772 F.2d 92 (4th Cir. 1985)).

However, despite the violation occurring on its mine, Nugent Sand contends that it is not liable for the violation. Nugent Sand argues that it is not liable for the violation because Owen Electric owned and exercised control over the 7200-volt powerlines and lightning arrestors.[3] Resp't Mot. for Summ. J. at 1 **(**"The transformers[] and the associated lightning arrestors[] are not the property of Nugent Sand" and they are "maintained and serviced by Owen Electric . . . and Owen [Electric] does not authorize Nugent Sand . . . or any contractors . . . to service, maintain, or check them."). The Secretary argues, in part, that Nugent Sand is strictly liable for the violation occurring at the mine. Sec'y Mem. at 6-7 (citing cases).

Strictly speaking, this is a question of vicarious liability, and not strict liability. Strict liability operates to find liability even where the actions in question are not negligent, while vicarious liability operates to find liability even where the actions in question were done by another party. *See W. Fuels-Utah v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989) ("The general rule . . . is that a person is not liable for a harm done unless he caused it by his action (*actus reus*), and did so with a certain intent (*mens rea*). Strict liability alters this general rule by eliminating the requirement of *mens rea;* one may then be punished for acting in a forbidden way, even if one was without any particular intent, such as willfulness or negligence. . . Vicarious liability, on the other hand, alters the general rule by holding a person liable for the act of another—that is, by attenuating the requirement of an *actus reus*."). Case law involving the Mine Act often elides the two concepts of strict liability and vicarious liability. *See, e.g.*, *Allied Prods. Co. v. FMSHRC*, 666 F.2d 890, 894 (5th Cir. 1982) (discussing strict liability and stating that "[i]f the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation"); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981)

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[2] Nugent Sand Company included a letter from Owen Electric with its Motion for Summary Judgment. Nugent Sand Company presents this letter to address the gravity and level of negligence of the violation. However, the parties have stipulated as to the levels of gravity and negligence, and this letter does not contradict those stipulations. Consequently, this letter does not present any genuine dispute over material facts. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.").

[3] Nugent Sand Company also argues that it has a grounding system that "provides protection to personnel," but this argument goes to the negligence and gravity of the violation, not the question of liability. Resp't Mot. for Summ. J. at 2.

("Mine owners are strictly liable for the actions of independent contractor violations under" the Mine Act.).

Therefore, the question is whether Nugent Sand is vicariously liable for a violation occurring under the control of Owen Electric while operating on the mine. This question must be answered in the affirmative. For although the case law often elides the concepts of strict and vicarious liability, the case law is clear as to the liability of mine operators for actions done by third parties on the mine. *W. Fuels-Utah*, 870 F.2d 711 at 713; *Allied Prods. Co. v. FMSHRC*, 666 F.2d at 894; *Cyprus Indus.*, 664 F.2d at 1120. Not only is a mine operator vicariously liable for the actions of an independent contractor, but also for the acts of unknown third parties. *Miller Mining Co., Inc. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983) ("It is of no consequence that [the operator] may have been the innocent victim of an unrelated party's desire, for whatever reason, to get the mine back in production. The Fifth Circuit recently recognized the inherent danger of mines, and held any failure to comply with a regulation under the Act would result in a citation to the operator. Imposing a kind of strict liability on employers to ensure worker safety, the court pointed out there are no exceptions for fault, only harsher penalties for willful violations." (citations omitted)). In short, "when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty. When a violation occurs, a penalty follows." *Asarco, Inc.-Nw. Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); *see also Ames Constr., Inc. v. FMSHRC*, 676 F3d 1109, 1112 (D.C. Cir. 2012) ("Where supervision or control of a distinct aspect of the mining activity is farmed out to a firm different from the principal production-operator, refusal to apply the act's liability without fault provision would thwart the act's purposes."); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006) (*Twentymile Coal II)* ("[T]he owner of a mine is liable without regard to its own fault for violations committed or dangers created by its independent contractor ."), *rev'g* 27 FMSHRC 260 (Mar. 2006) (*Twentymile Coal I*).

The case law also speaks to the reasoning behind this vicarious liability. The Commission has stated as follows:

> It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

Republic Steel Corp., 1 FMSHRC 5, 11 (Apr. 1979). Although there is no evidence that Nugent Sand maintains its contractual relationship with Owen Electric for the purposes of avoiding liability, this relationship nonetheless does not absolve Nugent Sand of its liability for actions occurring at the mine.[4]

[4] Moreover, the undersigned notes that Nugent Sand could have used this contractual relationship to indemnity itself. *See, e.g.*, *Consolidation Coal Co.*, 26 FMSHRC 138, 139 (Mar. 2004); *W-P Coal Co.*, 16 FMSHRC 1407, 1408 (July 1994).

Nugent Sand alleges that it cannot be held liable for the actions of Owen Electric because Nugent Sand did not exercise control over the transformers. Resp't Mot. for Summ. J. at 1 ("Owen [Electric] does not authorize Nugent Sand . . . to service, maintain, or check" the transformers.). On at least two occasions, the Commission has accepted such an argument; and on both occasions the Commission was reversed on appeal. *Twentymile Coal II*, 456 F.3d 151; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (*Cathedral Bluffs II), rev'g* 6 FMSHRC 1871 (Aug. 1984) (*Cathedral Bluffs I*) .

In *Cathedral Bluffs*, the Commission held that the Secretary must satisfy the Secretary's own Enforcement Guidance in order to cite the owner-operator for violative actions by an independent contractor. *Cathedral Bluffs I*, 6 FMSHRC at 1873. Discussing control, the Commission held that, under the Guidance, an owner-operator can be found liable for the actions of an independent contractor if there is a level of control that creates a "functional nexus" beyond a mere contractual relationship. *Id.* at 1876. The Circuit Court for the District of Columbia reversed the Commission's decision. *Cathedral Bluffs II*, 796 F.2d at 539. Specifically, the D.C. Circuit ruled that the Guidance was a policy and not a binding regulation.[5] The D.C. Circuit further ruled that, because the Guidance was not binding, "the Secretary retained his discretion to cite production-operators as he saw fit." *Id.* at 538.

The Commission later applied the D.C. Circuit's decision in *Cathedral Bluffs II* in cases such as *Mingo Logan*. *Mingo Logan Coal Co.*, 19 FMSRHC 246 (Feb. 1997). In *Mingo Logan*, the Secretary cited both an independent contractor and the mine owner-operator for the failure of an employee of the independent contractor to have adequate training. In ruling that the owner-operator could be held liable for the inadequate training of an employee of an independent contractor, the Commission affirmed that "MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors." *Id.* at 249 (citing *Cyprus Indus. Minerals*, 664 F.2d at 1119 ("Mine owners are strictly liable for the actions of independent contractor violations."); *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354 (Sept. 1991) ("[T]he Act's scheme of liability . . . provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents and contractors.")).

But *Cathedral Bluffs II* was not the last time the D.C Circuit reversed the Commission on this issue. In *Twentymile Coal II*, the D.C. Circuit reviewed the Commission's determination that the Secretary had abused her discretion when she issued a citation for a mine owner-operator for the actions of an independent contractor. As relevant here, the Commission ruled that citing the owner-operator was an abuse of discretion because the independent operator was in the best position to prevent the violation, the owner-operator did not have "significant, continuing" involvement in the work that resulted in the violation, and the owner-operator did not contribute

[5] Even were Nugent to rely on the Enforcement Guidance as a binding regulation, the Guidance permits the Secretary to cite an owner-operator for the actions of an independent contractor when the owner-operator's miners are exposed to the hazard. *Cathedral Bluffs II*, 796 F.2d at 245 (quoting 45 FR 44,497). Here, the parties have stipulated that one miner would be affected by the hazard, and the Citation indicates that the blown lightning arrestor "exposes employees around the plant to electrical shock hazards and potential flash injuries." Citation No. 9424742.

to the violation, either through action or significant omission. *Twentymile Coal II*, 456 F.3d at 154 (quoting *Twentymile Coal I*, 27 FMSHRC at 268-273).[6]

In rejecting these arguments, the D.C Circuit made "relatively short work of the question of the Secretary's authority to cite owner-operators for violations committed by their contractors." *Id.* After reviewing case law, the D.C. Circuit affirmed that "liability under the Mine Act is without regard to fault" and "the argument that only an operator directly responsible for the violation . . . can be held liable . . . must be rejected." *Id.* at 155 (quoting *Int'l Union, United Mine Workers of Am.*, 840 F.2d 77, 84 (D.C. Cir. 1988)).

For the same reasons in *Cathedral Bluffs II* and *Twentymile Coal II*, the undersigned rejects Nugent Sand's argument that its lack of control insulated it from liability.

The parties agree there was a violation at the mine that Nugent Sand *owns, operates, and controls*. JS at ¶ 2. Consequently, Nugent Sand is liable for the violation as stated in the Citation.

IV. Penalty Assessment

It is well established that the Commission Administrative Law Judges assess civil penalties de novo for violations of the Act. Section 110(i) of the Act delegates to the Commission the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator contests the proposed penalty, the Secretary petitions the Commission to assess the proposed penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once factual findings on the statutory penalty criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620

[6] It should also be noted that the administrative law judge found that the owner-operator "did not have direct control over the cited equipment." *Twentymile Coal I*, 6 FMSHRC at 274 (quoting the ALJ decision).

(May 2000). In exercising this discretion to determine the amount of a penalty, the Commission has recognized that a judge is not bound by the penalty proposed by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

When determining a proper assessment for this violation, the undersigned considered the following stipulated facts: 1) the Respondent's history of violations of this standard in the 15 months prior to the accident (JS, Attach. 1 at 1); 2) the Respondent's size as an operator who worked only 17,678 hours at the mine in 2019 (MSHA, *Mine Data Retrieval System*, https://www.msha.gov/mine-data-retrieval-system (searchable by mine name)); 3) the Respondent's low level of negligence (JS at ¶ 17); 4) that the penalty will not have an effect on the Respondent's ability to continue in business (*id.* at ¶ 18); 5) that any injury or illness would be unlikely and would be expected to result in permanently disabling injuries affecting one person (*id.* at ¶ 17); and 6) the timely good-faith abatement (*id.* at ¶ 16 (showing the termination of the Citation the day following its issuance)).

Based upon the undersigned's consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, the undersigned assesses a penalty of $121.00. This amount is the result of an independent determination by the undersigned of the statutory criteria and a penalty amount that would respond to the seriousness of the violation and would deter future violations. *American Coal Co. v. FMSHRC*, 933 F.3d 723, 728 (D.C. Cir. 2019).

III. CONCLUSION

For the foregoing reasons, the Respondent's Motion for Summary Judgment is **DENIED**, the Secretary's Motion for Summary Judgment is **GRANTED**, and Citation No. 9424742 is **AFFIRMED**, as issued. It is further **ORDERED** that the Respondent pay a total penalty of $121.00 within thirty days of this order.[7]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

[7] Payment should be sent to: Pay.gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508 or, alternately, Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Megan A. Carrick
U. S. Department of Labor
Office of the Solicitor
618 Church Street
Suite 230
Nashville, TN 37219-2440
carrick.megan.a@dol.gov

Damon E. Hughes
Nugent Sand Company
1833 River Road
P.O. Box 6072
Louisville, KY 40206
dhughes@nugentsand.com