E&MLF

Chapter 4

Cite as 20 *Energy & Min. L. Inst.* ch. 4 (2000)

When Is a Non-Mine Mine a "Mine?" The Riddle of MSHA's Assertion of Jurisdiction over Electric Power Plants and Other Coal Users

Thomas C. Means
Crowell & Moring LLP
Washington, D.C.

Synopsis

§ 4.01. Introduction.

One of the regulatory riddles familiar to those who follow federal banking law is the phenomenon of what are called "non-bank banks."[1] The riddle took shape when the Federal Reserve Board became convinced of the need to regulate certain financial institutions that did not fall within the statutory definition of a "bank" that was subject to the agency's regulatory authority, but that offered many of the services that banks offered. Although the agency decided that the plain purposes of the banking laws would be best served by defining these non-bank institutions as "banks" subject to the agency's controls and promulgated regulations to accomplish that, the

1 *See* Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986).

Supreme Court struck down those regulations as *ultra vires*. Although sympathetic to the agency's good intentions, the Court could not permit the agency to treat a non-bank as if it were a bank. It declared unlawful the agency's "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself," and referred the agency to Congress for legislative relief if the statute fell short of providing the agency with the regulatory authority over non-banks that it deemed necessary to protect the public interest.[2]

Today the Federal Mine Safety and Health Administration (MSHA) faces a similar situation with respect to certain facilities such as coal-fired electric power plants, cogeneration plants, and synthetic fuels and other manufacturing plants that use coal (or coal refuse) either as a fuel or a feedstock for their operations. Invoking its statutory mission to protect the health and safety of miners (those persons who work at a mine.)[3] MSHA has introduced us to the non-mine mine. Although the Supreme Court has not yet had the opportunity to evaluate the legitimacy of MSHA's novel creation, most (but not all) court decisions and decisions of the Federal Mine Safety and Health Review Commission (Commission) have sustained the agency's actions, at least until quite recently. This chapter surveys the case law and analyzes MSHA's legal arguments supporting its jurisdiction to regulate non-mine mines, focusing on coal-fired electric power plants specifically. We then demonstrate that the Federal Mine Safety and Health Act of 1977[4] ("Mine Act" or "Act") does not grant MSHA jurisdiction over these non-mine "mines."

§ 4.02. MSHA's Jurisdiction Generally.

Although coal-fired electric power plants have been historically the exclusive domain of the Occupational Safety and Health Administration (OSHA) insofar as workplace health and safety is concerned, there have been a number of situations, primarily in the last decade, in which MSHA has asserted jurisdiction over certain coal-handling activities at traditional power plants, as well as cogeneration plants and synthetic fuel

2 *Id*. at 373-74.

3 30 U.S.C. § 802(g).

4 30 U.S.C. § 801 *et. seq.*