

## Chapter 18

### Abuse of Discretion: MSHA’s Impermissible Use of 103(k) Orders

**R. Henry Moore**  
**Arthur M. Wolfson**  
*Jackson Kelly PLLC*  
**Pittsburgh, Pennsylvania**

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### § 18.01. Introduction.

Section 103(k) of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. Section 801 *et seq.*, (the Mine Act), provides the Mine Safety and Health Administration (MSHA) with a broad grant of authority to assert control over mine sites in critical accident situations.<sup>1</sup> A recent trend has developed in which MSHA appears to exceed that authority in three important ways: (1) routinely asserting its authority under Section 103(k) in situations that involve no accident as defined by statute or regulation; (2) issuing 103(k) orders that exceed the scope of the incident at issue; and (3) requiring operators to submit detailed plans to release closure orders, thereby binding them to additional requirements that may exceed the bounds of the Mine Act's mandatory standards. This approach to utilizing Section 103(k) goes beyond MSHA's authority under the Mine Act, and imposes requirements on operators that are not subject to proper rulemaking or subject to effective challenge.

### § 18.02. Sections 103(j) and 103(k).

#### [1] — The Purpose of Section 103(k).

Orders issued under Sections 103(j) and 103(k) are intended to respond to critical events that take place initially during an accident situation, such as rescue and recovery operations after a mine disaster. The Senate Report for the 1977 Mine Act describes the authority afforded the Secretary as “intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.”<sup>2</sup> Similarly, the Federal Mine Safety and Health Review Commission, which adjudicates contests of orders and citations under the Mine Act, has recognized that orders issued under Sections 103(k) and 103(j) of the Act are “the means by which the Secretary may assume initial control of a mine in the event of an accident, in order to protect lives, initiate rescue and recovery operations, and preserve evidence.”<sup>3</sup>

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<sup>1</sup> 30 U.S.C. § 813(k).

<sup>2</sup> S. Rep. No. 95-181 at 29 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on human resources, legislative history of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

<sup>3</sup> Clinchfield Coal Co., 8 F.M.S.H.R.C. 1310, 1311 n.2 (Rev. Comm. Sept. 1986). The Review Commission is intended to be an independent adjudicatory body under the Mine