

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4457

SHAMOKIN FILLER COMPANY, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION,

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR SECRETARY OF LABOR

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INTRODUCTION

Petitioner Shamokin Filler Company, Inc. (“Shamokin Filler” or “Shamokin”) operates a custom coal preparation plant in Shamokin, Pennsylvania, that has been regulated by the Mine Safety and Health Administration (“MSHA”) since MSHA began to administer the Federal Mine Safety and Health Act of 1977 (“Mine Act”). After a change in ownership in 2009, Shamokin Filler contested MSHA’s assertion of jurisdiction over the Carbon Plant, claiming that the plant should be regulated by the Occupational Safety and Health Administration (“OSHA”) rather than MSHA.

The Mine Act specifies that a covered “coal or other mine” includes land or equipment “used in . . . the work of preparing coal or other minerals, and includes custom coal preparation facilities.” 30 U.S.C. § 802(h)(1)(C). The Mine Act defines the “work of preparing the coal” as “the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.” 30 U.S.C. § 802(i). Shamokin Filler’s Carbon Plant sizes, dries, stores, and loads anthracite coal to meet customer specifications. The Secretary, an administrative law judge, and the Federal Mine Safety and Health Review Commission (“Commission”) have therefore all concluded that MSHA’s assertion of jurisdiction is proper under 30 U.S.C. §§ 802(h)(1)(C) and (i).

On appeal to this Court, there are no facts in dispute. Instead, Shamokin Filler advances a single legal argument to defeat MSHA jurisdiction: that a coal preparation plant is only subject to MSHA jurisdiction if it begins its preparation process with “raw coal,” *i.e.*, coal that has not been previously prepared in any way. *See* Shamokin Br. at 13. The raw coal requirement that Shamokin attempts to impose has no basis in the statutory text. Rather, Congress made clear that custom coal preparation plants like Shamokin’s Carbon Plant are included in the definition of “coal or other mine” and that doubts about Mine Act jurisdiction should be resolved in favor of MSHA coverage. Shamokin’s proposed raw coal requirement is also inconsistent with this Court’s binding precedent in other coal preparation cases arising under the Mine Act. This Court should therefore deny the petition for review and hold that Mine Act jurisdiction over the Carbon Plant is consistent with Sections 802(h)(1)(C) and (i).

Shamokin Filler also appeals an evidentiary ruling of the administrative law judge that served to exclude evidence of MSHA’s jurisdictional determinations with regard to other facilities that Shamokin Filler asserts are similar to its Carbon Plant. Shamokin Br. at 28-33. Shamokin Filler’s arguments with regard to that evidentiary issue similarly lack merit, and the Commission’s decision should be affirmed because the administrative law judge properly exercised his discretion.

ISSUES

- I. Whether the Commission correctly concluded that 30 U.S.C. §§ 802(h)(1)(C) and 802(i) permit the Secretary of Labor to assign jurisdiction over Shamokin Filler’s Carbon Plant to MSHA rather than OSHA because the Mine Act contains no requirement that a covered custom coal preparation plant must begin its preparation process with “raw coal.”
- II. Whether the Commission correctly concluded that the administrative law judge acted within his discretion in excluding evidence about other companies’ carbon plants.

RELATED CASES AND PROCEEDINGS

Shamokin Filler previously appealed the Commission’s non-final interlocutory decision to this Court. The Court dismissed that appeal without prejudice. *See* Nov. 19, 2012 Order Granting Motion to Dismiss, *Shamokin Filler Company, Inc. v. FMSHRC*, Case No. 12-3697.

Shamokin Filler has continued to contest MSHA’s jurisdiction in administrative proceedings concerning additional citations and orders issued by MSHA for Shamokin Filler’s alleged violations of the Mine Act and related health and safety standards. Those contest proceedings are pending before Commission administrative law judges and are currently stayed pending resolution of this appeal.

STATUTORY BACKGROUND

The Occupational Safety and Health Act of 1970 (“OSH Act”) regulates workplace safety and health unless Congress has conferred jurisdiction over such concerns on another agency in an industry-specific statute. *See* 29 U.S.C.

§ 653(b)(1). The Mine Act is such a specialized statute – it regulates workplace safety and health at “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce.” 30 U.S.C. § 803.

Mine Act jurisdiction over a particular workplace turns on whether a facility can be characterized as a “coal or other mine” under the specialized statutory meaning that Congress gave that term. The Mine Act defines “coal or other mine” to include land and equipment used for three purposes: (1) mineral extraction; (2) mineral milling; and (3) “the work of preparing coal or other minerals.” 30 U.S.C. § 802(h)(1)(C). The Mine Act specifies that the definition of “coal or other mine” “includes custom coal preparation facilities.” *Id.* With respect to coal preparation, the definition of “coal or other mine” states in relevant part:

“[C]oal or other mine” means . . . lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the *work of preparing coal* or other minerals, and *includes custom coal preparation facilities.*

30 U.S.C. § 802(h)(1)(C) (emphasis added). The Mine Act defines “work of preparing the coal” as:

the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 802(i).

The Secretary of Labor administers both the OSH Act and the Mine Act, and therefore bears initial responsibility for determining whether a particular workplace should be subject to OSHA or MSHA jurisdiction. OSHA and MSHA have a memorandum of understanding (“MOU”) that resolves recurring jurisdictional questions and establishes a process for the two agencies to resolve jurisdictional issues in borderline cases. E16-E22. In making a jurisdictional determination, the Secretary must first interpret Section 802(h)(1) to determine whether a facility or work area falls within the bounds of the statutory definition of a “coal or other mine.” *Sec’y of Labor v. Nat’l Cement Co.*, 494 F.3d 1066, 1074-75 (D.C. Cir. 2007) (“*National Cement I*”). Where the statute is ambiguous with regard to a particular facility or work area, the Secretary must make an “expert policy judgment” about whether to assert MSHA jurisdiction. *Sec’y of Labor v. Nat’l Cement Co.*, 573 F.3d 788, 793-95 (D.C. Cir. 2009) (“*National Cement II*”).

The Secretary’s assertion of MSHA jurisdiction is subject to review by the Federal Mine Safety and Health Review Commission in the context of the operator’s contest of a citation or order and the associated penalty. *See* 30 U.S.C. §§ 813, 815(d). The Commission is an independent adjudicatory agency that is the

“equivalent of a court” – it is responsible for adjudication and has no policymaking role. *E.g., Jeroski v. Sec’y of Labor*, 697 F.3d 651, 653 (7th Cir. 2012); *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 160-61 (D.C. Cir. 2006); *Sec’y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996). The Commission’s decision is reviewable by an appropriate Court of Appeals. 30 U.S.C. § 816.

Under the Mine Act’s split-enforcement scheme, both the Commission and the courts give *Chevron* deference to the Secretary’s reasonable interpretations of ambiguous statutory terms, including the Secretary’s interpretations of Section 802(h)(1). *National Cement II* (deferring after remand and subsequent appeal to Secretary’s reasonable interpretation of Section 802(h)(1)(B) because Secretary’s interpretation reflected the agency’s “expert policy judgment”); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984) (according *Chevron* deference to Secretary’s interpretation of Section 802(h)(1)).

Though MSHA and OSHA administer similar regulatory regimes, there are several key differences between the two agencies’ standards and methods of enforcement that bear on the practical implications of the Secretary’s jurisdictional determination. MSHA’s regulatory framework is more specific and extensive than OSHA’s in regulating safety and health hazards associated with the handling of coal, particularly with regard to workers’ exposure to respirable coal dust.

Compare 30 C.F.R. Part 71 (establishing MSHA health standards for surface coal mines, including coal preparation facilities) *with* 29 C.F.R. Part 1910, Subpart Z (establishing OSHA health standards for toxic and hazardous substances). Because of the dangers inherent in mining, Congress also gave the Secretary more rigorous enforcement mechanisms under the Mine Act than under the OSH Act. For example, the Mine Act requires two inspections per year for surface mines, permits inspections to be conducted without a warrant, and in specified circumstances authorizes inspectors to issue orders requiring withdrawal of miners from the mine. *See* 30 U.S.C. §§ 813(a), 814(d), 814(e), 817(a); *Donovan v. Dewey*, 452 U.S. 594, 606 (1981). Thus, the Secretary's jurisdictional determinations reflect both his interpretations of the Mine Act and his expert judgment regarding the degree of coal-related hazards present in a particular workplace.

STATEMENT OF FACTS

Shamokin Filler operates a facility in Shamokin, Pennsylvania, that sells products consisting solely of anthracite coal, as well as anthracite coal that is blended with other carbon materials. A30. The facility also manufactures carbon-based products for the steel, glass, rubber, and plastics industries. *Id.*

With respect to the solely anthracite products, Shamokin starts with prepared anthracite coal purchased from local mines, and further prepares it by putting it in a feed hopper and then drying it in an outdoor rotary dryer. *Id.* After the drying, the

coal is screened to remove oversized pieces. *Id.* After the screening, the coal is stored and then bagged, loaded, and shipped for bulk sale. *Id.* Shamokin performs this extra processing to meet customer specifications. *Id.* In 2009 and 2010, Shamokin sold thousands of tons of purely anthracite coal. A26, A30. A “substantial portion” of Shamokin’s business involves the handling and processing of anthracite coal. A37.

Since 1977, MSHA has treated Shamokin’s Carbon Plant as a mine and has inspected it for compliance with the Mine Act. *Id.*

STATEMENT OF THE CASE

Shamokin changed ownership in January 2009 and shortly thereafter contacted MSHA and requested that the agency reconsider its position that the Mine Act covered the operations at the Carbon Plant. A30. After an inspection of the plant and review of the applicable statutory language and case law, the Secretary concluded that the assertion of MSHA jurisdiction was proper. A31. On October 19, 2009, the Regional Solicitor informed Shamokin Filler of that conclusion in a letter that explained that, contrary to Shamokin Filler’s factual assertions, MSHA had observed that the company “engages in the storing, drying, sizing, and loading of coal” and that the company “processes the coal to customers’ specifications and for particular uses.” E66-E69.

Based on this determination, MSHA continued to inspect the Carbon Plant and cited Shamokin Filler for numerous violations discovered during the inspections. *See* A52-A67. The most serious of those citations involved violations of MSHA's respirable dust standards. *See id.* (summarizing stipulations to seven violations of 30 C.F.R. Part 71 for total civil penalties of \$48,546 against Shamokin Filler and \$5,164 against employee and owner William Rosini). In the context of the administrative proceedings concerning those citations, Shamokin Filler again objected to MSHA's jurisdiction. A31. The citations were thereafter consolidated into a single administrative proceeding before a Commission administrative law judge for the purpose of resolving the issue of MSHA's jurisdiction over the Carbon Plant. A6, A31.

An evidentiary hearing on the jurisdictional issue was scheduled for October 27 and 28, 2010. A31. Before the hearing, both the Secretary and Shamokin submitted pretrial motions. *Id.* Shamokin sought to compel the Secretary to produce six internal memoranda concerning MSHA's decisions to release two competitors with allegedly similar operations from MSHA's jurisdiction, A115-A124; the Secretary opposed production of those documents based on the deliberative process, attorney-client, and attorney work-product privileges, A152-A164. The Secretary also filed a separate motion *in limine* that sought to exclude evidence concerning a 2004 MSHA fact-finding committee that had reviewed

operations at seven facilities that Shamokin claimed were similar to its Carbon Plant. A84-86. The Secretary objected to introduction of the comparative evidence because the evidence about MSHA inspections, or lack of inspections, at other facilities was irrelevant to the fact-specific issue in this case, *i.e.*, whether the Mine Act covers the operations at Shamokin's Carbon Plant. *Id.*

At the hearing on October 27, 2010, the judge granted the Secretary's motion *in limine* and denied Shamokin's motion to compel. T19-20, A1-A4, A8-A10. The judge reasoned that the evidence concerning MSHA's treatment of other facilities was not relevant. A2. The judge also analogized to Federal Rule of Evidence 403 and determined that the probative value of the evidence was substantially outweighed by the danger of confusion and the risk of undue delay caused by collateral inquiries into jurisdiction at other facilities. T19-20; A1-A3, A8-A10. The judge further ruled that the six memoranda that Shamokin sought were both irrelevant and privileged, and that the Secretary was not obligated to produce them. A4. The judge explained that his evidentiary rulings did not prejudice Shamokin Filler's ability to present a full factual case because Shamokin was still permitted to present a wide range of other testimony pertaining to the Carbon Plant, its nature and purpose, its specific activities, and whether those characteristics met the relevant definitions under the Act. A3. Indeed, over the two-day hearing, both the Secretary and Shamokin presented such evidence,

including documentary evidence and testimony from ten present and former MSHA and corporate officials. *See* A11-A21 (summarizing testimony).

On March 11, 2011, the judge issued a decision concluding that the Secretary's assertion of MSHA jurisdiction over the Carbon Plant was proper. A5-A28. The judge found, based on the testimony and other evidence presented, that "such activities as storing, loading, sizing, and drying of (anthracite) coal took place" at the Carbon Plant. A24. The judge also found "that the overall purpose of [the] operation was that of a custom (coal) preparation facility as broadly defined" by the Mine Act because the Carbon Plant engages in those activities to make the coal "suitable for subsequent industrial use." A24-A25. In making those factual findings, the judge specifically noted his negative view of Shamokin Filler's chief witnesses, making an express finding that Shamokin's owners offered "contradictory, inconsistent, and suspect testimony" and had attempted to "obstruct" determination of the nature and extent of coal processing operations at the plant. A25.

The judge then applied Section 802(h)(1)(C) and (i), the legislative history, and Mine Act precedent to his factual findings to conclude that the assertion of MSHA jurisdiction was proper because Shamokin Filler engaged in the enumerated actions listed in Section 802(i) and because the nature of the operation

as a whole was to prepare coal “to meet industry and customer specifications.”

A23-A28.

Shamokin sought interlocutory review of the ALJ’s jurisdictional and evidentiary orders, and the Commission initially denied review. A80. Shamokin then moved for reconsideration. A80.

Meanwhile, the judge issued a pretrial order for a trial on the merits of the citations at issue in the fourteen penalty dockets. A33. The order restricted the parties to presenting all direct testimony in written form. *Id.* The Secretary ultimately sought interlocutory review of the pretrial order’s requirement, which the Commission granted. *Id.* At the same time, the Commission granted Shamokin Filler’s motion for reconsideration that sought interlocutory review of the judge’s jurisdictional and evidentiary rulings. A29.

On August 28, 2012, the Commission issued a decision in the Secretary’s favor on all three issues on interlocutory appeal, and remanded the case to the judge for further proceedings on the merits. A29-A46.

In affirming the judge’s jurisdictional ruling, the Commission concluded that the judge’s factual findings were supported by substantial evidence. A36. The Commission analyzed those facts in the context of Commission case law and determined that the Carbon Plant was like those facilities in which it had affirmed MSHA’s jurisdiction because Shamokin engaged in the activities identified in

802(i) for the purpose of meeting customer specifications. A34-A38. The Commission also rejected Shamokin Filler’s argument that a facility that handles only processed, market-ready coal by definition cannot be engaged in “the work of preparing the coal.” A37. The Commission reasoned that the case law did not establish the “bright-line distinction” that Shamokin sought to impose; rather, the case law evaluated a facility’s operations as a whole to determine the types of coal preparation activities performed along with the end-product, rather than the initial state, of the coal. A38.

In affirming the judge’s evidentiary rulings, the Commission applied an abuse of discretion standard and found that the judge acted within his discretion in excluding the evidence. A39-A40. The Commission agreed with the judge that the contested evidence was not relevant to the issue of whether the Carbon Plant is subject to Mine Act jurisdiction because each facility presents a different set of facts, and because the legal determination in any event would turn on the statutory language rather than a comparative analysis. A39. The Commission also upheld the judge’s analogy to Federal Rule of Evidence 403, agreeing that the evidence, which was of “limited probative value,” would have “unduly delayed the trial” because it would have “necessitated a significant number of additional witnesses, consuming an inordinate amount of trial time.” A40.

Shamokin Filler appealed the Commission's interlocutory decision to this Court, but that appeal was dismissed without prejudice as premature on the Secretary's motion. *See* Nov. 19, 2012 Order Granting Motion to Dismiss, *Shamokin Filler Company, Inc. v. FMSHRC*, Case No. 12-3697.

The parties then sought and obtained an appealable final order from the administrative law judge by stipulating to the violations and associated civil penalties contingent on the outcome of this jurisdictional appeal. A47-A68. When that order became a final order of the Commission, Shamokin again appealed to this Court, challenging the Commission's jurisdictional and evidentiary rulings in the Commission's August 28, 2012 order. A71-A72.

STANDARD OF REVIEW

This Court reviews purely legal questions of statutory interpretation *de novo*, while giving *Chevron* deference to the Secretary's reasonable interpretation of ambiguous Mine Act terms. *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996) (applying Supreme Court's decision in *Martin v. OSHRC*, 499 U.S. 144, 152 (1991) to Secretary's statutory interpretation under the analogous OSH Act); *see also National Cement II*, 573 F.3d at 793-95 (giving *Chevron* deference to Secretary's interpretation of Section 802(h)(1)).

The substantial evidence standard of review, which applies to judicial review of the Commission's factual findings, *see* 30 U.S.C. § 816(a)(1), is not relevant

here because Shamokin Filler does not challenge any of the Commission’s factual findings on appeal. *See* Shamokin Br. at 10-28.

The administrative law judge’s decision to exclude the evidence regarding MSHA’s jurisdictional decisions at other facilities is reviewed for abuse of discretion. *Gunderson v. U.S. Dep’t of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010). An agency’s reasonable and nonarbitrary decision to exclude evidence should be affirmed. *Id.*; *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 485 (D.C. Cir. 1982). Only prejudicial error requires reversal. *Gunderson*, 601 F.3d at 1021; 5 U.S.C. § 706 (directing reviewing courts to take “due account . . . of the rule of prejudicial error.”).

SUMMARY OF ARGUMENT

On appeal to this Court, Shamokin does not challenge the Commission’s factual findings that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries, and loads anthracite coal to make it suitable for subsequent industrial use. Shamokin’s only argument against MSHA jurisdiction is the legal argument that a custom coal preparation plant must begin its preparation process with “raw coal” to be subject to Mine Act jurisdiction. That argument fails because neither Section 802(h)(1)(C) nor Section 802(i) of the Mine Act limits MSHA jurisdiction over custom coal preparation facilities to facilities that begin their coal preparation process with raw coal. Moreover, the legislative history

instructs that doubts about Mine Act jurisdiction should be resolved in favor of coverage. To accept Shamokin's position would be to impose a new statutory requirement that has no basis in the text or history of the Act.

Shamokin's interpretation also fails because this Court's precedent requires a functional approach to Mine Act jurisdiction, under which the jurisdictional analysis turns on the "nature of the functions that occur" at the site in question. *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 184 (3d Cir. 1997). Preparation functions indicating Mine Act coverage include, but are not limited to, the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of anthracite coal. 30 U.S.C. §§ 802(h)(1)(C), (i). An entity is covered by the Mine Act if it performs one or more of these functions as an "integral," "critical," or "necessary" part of the overall process of preparing the coal for its "ultimate consumer." *RNS Services*, 115 F.3d at 184-85; *Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1504 (3d Cir. 1992). Shamokin's preparation functions clearly meet this Court's functional test.

Even if the Mine Act's jurisdictional provisions are ambiguous with regard to whether a coal preparation plant must start its preparation process with raw coal to be subject to MSHA jurisdiction, the Court should still affirm because the Secretary's interpretation is entitled to deference as a reasonable construction of the Act.

Finally, the Commission correctly held that the administrative law judge did not abuse his discretion by excluding comparative evidence about MSHA's internal jurisdictional determinations at other allegedly similar facilities. The judge's decision was neither arbitrary nor irrational, because it avoided collateral inquiries into factual situations of little, if any, relevance. Moreover, the judge's analogy to Federal Rule of Evidence 403 presents no conflict with the Administrative Procedure Act.

ARGUMENT

I. The Commission Correctly Concluded that the Mine Act Permits the Secretary to Assign Jurisdiction Over the Carbon Plant to MSHA Rather than OSHA

Sections 802(h)(1)(C) and 802(i) establish a "functional test" for Mine Act jurisdiction over coal preparation activities. *See, e.g., RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 184 (3d Cir. 1997); *Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1503 (3d Cir. 1992) ("*Penelec*"); *see also Sec'y of Labor v. Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (Jan. 1982) ("*Elam*"). Under the functional test, the jurisdictional analysis turns on the "nature of the functions that occur" at the site in question. *RNS Services*, 115 F.3d at 184. Preparation functions indicating Mine Act coverage include, but are not limited to, the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of anthracite coal. 30 U.S.C. §§ 802(h)(1)(C), (i). An entity is covered by the Mine Act if it performs

one or more of these functions as an “integral,” “critical,” or “necessary” part of the overall process of preparing the coal for its “ultimate consumer.” *RNS Services*, 115 F.3d at 184-85; *Penelec*, 939 F.2d at 1504.

The outcome of the functional test is not affected by (1) the identity of the ultimate consumer of the coal; *see, e.g., Penelec*, 969 F.2d at 1052-53 (affirming Mine Act jurisdiction over the coal preparation activities on the site of an electric power plant – the ultimate consumer of the coal); (2) the preparation plant’s connection (or lack of connection) to mineral extraction; *see, e.g., Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 592 (3d Cir. 1979) (“[T]he work of preparing coal or other minerals is included within the Act whether or not the extraction is also being performed by the operator.”); or (3) whether title to the coal has passed from the extracting company to the processing company, *see, e.g., Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1550-51 (D.C. Cir. 1984) (milling of slate gravel still subject to MSHA jurisdiction after sale from operator to processor); *Stroh v. Director, OWCP*, 810 F.2d 61, 64 (1987) (under Black Lung Benefits Act, fact that coal was sold prior to processing does not defeat claim for benefits). Applying similar reasoning, the outcome of the functional test should not be affected by the initial state of the coal when preparation activities occur – *i.e.*, whether the coal is “raw” or already partially prepared. *See* Sections I.A-I.E, *infra*.

On appeal, Shamokin Filler does not dispute that it engages in the storing, sizing, drying, and loading of thousands of tons of anthracite coal each year for the purpose of meeting customer specifications. Applying the functional test for Mine Act jurisdiction over coal preparation activities to these undisputed facts, the Secretary's assertion of MSHA jurisdiction over the Carbon Plant must be affirmed.

A. The Plain Language of Sections 802(h)(1)(C) and 802(i) Compels the Court's Affirmance of MSHA Jurisdiction Over Shamokin Filler's Custom Coal Preparation Plant

The plain language of Sections 802(h)(1)(C) and 802(i) is the origin of the functional test for Mine Act jurisdiction over mineral preparation activities. Section 802(h)(1)(C) defines "coal or other mine" as "lands, . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface . . . used in, or to be used in, or resulting from . . . the *work* of preparing coal or other minerals." 30 U.S.C. § 802(h)(1)(C) (emphasis added). Congress's use of the noun "work" – which means "activity in which one exerts strength or faculties to do or perform," *Webster's Third International Dictionary* 2634 (3d ed. 2002) – suggests that the jurisdictional inquiry must focus on the *actions taken* or *functions performed* by the preparation plant for the purpose of transforming coal inputs into more usable or marketable outputs.

Congress made its focus on the functions performed by the preparation facility even more obvious in Section 802(i), which defines the “work of preparing the coal.” Section 802(i) has three elements:

- **Types of coal:** Section 802(i) details the types of covered coal, including “bituminous coal, lignite, [and] anthracite.”
- **Enumerated preparation functions:** Section 802(i) also provides an enumerated list of the typical functions a facility performs when preparing coal, including “breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading.” By their nature, these functions can all be performed on either raw or partially prepared coal. (Indeed, the Commission expressly found that sizing, drying, storing, and loading of previously prepared anthracite coal regularly occurs at Shamokin’s Carbon Plant. *See* A36.)
- **Catch-all phrase for other preparation functions:** Finally, Section 802(i) includes a catch-all phrase to cover actions taken or functions performed that may additionally qualify as “preparation,” but that Congress failed to capture in the enumerated list. *See RNS Services*, 115 F.3d at 185 (“The list of items indicative of ‘the work of preparing the coal’ enumerated in the Mine Act is by no means exclusive.”). Thus, in addition to breaking, crushing, etc., the “work of preparing the coal” also includes “such other work of preparing such coal as is usually done by the operator of the coal mine.” *See id.* This

catch-all phrase could encompass additional coal preparation functions that Congress did not specifically list because they are the result of new coal preparation technologies or processes. *See generally* Norman J. Singer, 2A *Sutherland Statutory Construction*, § 47.17 Eiusdem generis (7th ed. 2012) (noting that statutes are often drafted with “general words follow[ing] specific words” “to save the legislature from spelling out in advance every contingency in which the statute could apply”). It could also reach activities other than those listed above that are “usually done” by the same preparation plant at issue. *RNS Services*, 115 F.3d at 185.

These three elements – the types of coal covered, the enumerated preparation functions, and the catch-all phrase – comprise Section 802(i)’s complete definition of the “work of preparing the coal.”

Neither Section 802(h)(1)(C) nor Section 802(i) contains any limitation on the state of the coal at the beginning of a covered facility’s coal preparation process. Section 802(h)(1)(C) refers to the “work of preparing coal” without specifying that Mine Act jurisdiction only extends to preparation “work” performed on “raw” or “run-of-mill” coal. Likewise, Section 802(i) focuses on the actions taken, not the initial state of the coal that the preparation facility acts upon. The Mine Act’s references to “preparing coal” or “preparing the coal” cannot mean “preparing *exclusively raw* coal” because such an interpretation would “read a

limitation into the statute that has no basis in the statutory language.” *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995) (internal quotation marks and citation omitted).

Shamokin’s argument that the catch-all phrase is actually a “modifying clause” that imposes an implied “raw coal” requirement is not persuasive and should be rejected by this Court.¹ The Secretary understands Shamokin’s “modifying clause” argument to be that the phrase “as is usually done by the operator of the coal mine” implies a raw coal requirement because (1) the “modifying clause” establishes that breaking, crushing, sizing, cleaning, washing, drying, mixing, and storing only qualify as “work of preparing the coal” if those actions are like those “usually done” by the operator of a paradigmatic coal mine; and (2) the coal preparation that is “usually done” by the operator of a paradigmatic coal mine is the processing of raw coal. *See Shamokin Br.* at 13. Shamokin’s argument fails for four reasons.

First, this Court has already concluded that the clause Shamokin identifies refers to the preparation facility at issue in the jurisdictional proceeding, not a “typical” or “paradigmatic” mine. *See RNS Services* at 185 (Section 802(i)’s final

¹ The Secretary objected to this argument at the Commission review stage as precluded by 30 U.S.C. § 823(iii) because Shamokin Filler failed to present it to the administrative law judge and instead presented it to the Commission for the first time on appeal. *See A36*, n. 7. Because the Commission addressed the argument on the merits, however, the Secretary does not press that procedural objection here.

clause “simply explains that the work of the coal mine is the work that is usually done in that particular place,” not “a typical, paradigmatic, ‘usual’ coal mine.”). The Court reached that conclusion because the clause uses the definite article “the” rather than the indefinite article “a.” *See id.*; *see generally American Bus. Ass’n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (“In construing [a] statute, [the] definite article ‘the’ particularizes the subject which it precedes and is [a] word of limitation as opposed to [the] indefinite or generalizing force [of] ‘a’ or ‘an’.”) (internal quotation marks and citation omitted).

As then-Judge Alito pointed out in his dissent in *RNS Services*, Shamokin Filler is not the first to treat the definite article as the indefinite in interpreting this statutory provision. *See* 115 F.3d at 191-92 (Alito, J., dissenting). The Secretary has previously done so, as has the Commission. *See id.* (citing *Elam*, 4 FMSHRC at 7). Upon careful review of the language at issue, however, the Secretary believes that the majority’s analysis in *RNS Services* is the best reading of the phrase because that reading is the most consistent with generally accepted principles of statutory construction. Moreover, contrary to the dissent’s suggestion in *RNS Services*, *see* 115 F.3d at 192, the Court need not rewrite Congress’s text to avoid an overly expansive interpretation of Mine Act jurisdiction. The “functional” analysis applied in *RNS Services*, *Penelec*, *Elam*, and other cases can be reconciled with a grammatically proper reading of the phrase because it is

justified by several other textual clues, including (1) Congress’s singular focus on the functions performed by preparation facilities in both Sections 802(h)(1)(C) and (i); (2) the overarching concept of “preparation,” which suggests a process with a purpose, *see Webster’s Third International Dictionary* 1790 (3d ed. 2002) (“prepare” means “to make ready beforehand for some purpose: put into condition for a particular use”); and (3) Congress’s use of the word “custom” in Section 802(h)(1)(C), which implies the purposes identified in *Elam* – *i.e.*, processing coal “to meet market specifications” or “to make coal suitable for a particular use,” *see Elam*, 4 FMSHRC at 8.

Second, even if the clause at issue referred to “an” operator generally rather than “the” operator in this case, the term “operator” itself – as defined by the Mine Act at 30 U.S.C. § 802(d) – does not have the narrow meaning that Shamokin ascribes to it. The statutory term “operator” broadly encompasses “any owner, lessee, or other person who operates, controls, or supervises a *coal or other mine*.” *See* 30 U.S.C. § 802(d) (emphasis added). The relevant definition of “operator” therefore refers back to the definition of “coal or other mine” at issue here, which Congress defined to include enterprises engaged in extraction, milling, *or* preparation. *See* § 802(h)(1)(C); *see also Carolina Stalite*, 734 F.2d at 1552 (holding that preparation facilities need not be connected to a company, facility, or property where extraction occurs to be covered by the Mine Act); *Marshall*, 602

F.2d at 591-92 (same). Thus, Congress’s use of the broadly defined term “operator” does not suggest that an “operator” must be engaged in both extraction and preparation, or imply that a covered preparation facility would *always* or by definition begin with raw coal.

Third, even if the clause referred to “an” operator rather than “the” operator, and even if the term “operator” itself referred to those paradigmatic enterprises engaged in both coal extraction and preparation, Shamokin’s reading of Section 802(i) would violate the rule of the last antecedent. Under that rule, the limiting clause (“as is usually done”) should ordinarily be read to modify only the noun immediately preceding it (“such other work”). *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003). Applying that rule here means that “breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite” are “work of preparing the coal” even if they are not “usually done by the operator of the [or “a”] coal mine.” The rule of the last antecedent is not absolute, of course, and may yield to indications of a contrary Congressional intent, *Barnhart*, 540 U.S. at 26, but here there are no indications of such intent. There is no comma before the phrase “as is usually done by the operator of the coal mine,” and therefore no intent to avoid the last antecedent rule. *See, e.g., Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616, 630 (3d Cir. 1994).

Finally, even assuming that the purported “modifying clause” served to modify the preparation functions listed in the definition of “work of preparing the coal,” the clause still does not modify Congress’s separate and express inclusion of “custom coal preparation plants” within the definition of “coal or other mine.” *See* 30 U.S.C. § 820(h)(1). Congress used two separate phrases to underscore its intent to cover preparation facilities. It first stated that the term “coal or other mine” means lands and equipment “used in . . . the work of preparing coal or other minerals.” *Id.* In an abundance of caution, it then additionally stated that the definition of “coal or other mine” “includes custom coal preparation facilities.” *Id.* (emphasis added); *see also Shook v. Dist. of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir.1998) (“Sometimes Congress . . . drafts provisions that appear duplicative of others—simply, in Macbeth’s words, ‘to make assurance double sure.’ That is, Congress means to clarify what might be doubtful—that the mentioned item is covered.”). Thus, even if the definition of “work of preparing the coal” leaves some doubt, Congress’s additional, express inclusion of “custom coal preparation facilities” in Section 802(h)(1)(C) is evidence of Congress’s intent to cover *all* coal preparation activities, not just those stages of preparation that are closest in time or space to extraction. This is especially true because the word “custom” suggests a specialized process for a particular consumer of coal – and such specialized

processes could logically include the type of coal preparation occurring at the Carbon Plant.

For all of these reasons, the so-called “modifying clause” cannot and does not imply that coal preparation must begin immediately after extraction, *i.e.*, with “raw coal,” to be subject to MSHA jurisdiction. Rather, as recognized by this Court’s functional test, MSHA jurisdiction turns on whether a coal preparation plant engages in either the enumerated preparation functions in Section 802(i) or the additional preparation functions encompassed by Section 802(i)’s catch-all phrase, and whether those functions are “integral,” “critical,” or “necessary” to preparing the coal for its ultimate use.

B. This Court’s Controlling Mine Act Precedent Additionally Compels Affirmance of MSHA’s Jurisdiction Over Shamokin Filler’s Custom Coal Preparation Plant

This Court has already decided a trilogy of Mine Act jurisdiction cases concerning coal preparation activities that – in addition to the clear statutory text – compel affirmance. *See RNS Services, Inc. v. Sec’y of Labor*, 115 F.3d 182 (3d Cir. 1997); *Air Prods. & Chemicals, Inc. v. Sec’y of Labor*, 37 F.3d 1485 (table) (1994) (unpublished); *Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992) (“*Penelec*”).

In *Penelec*, this Court affirmed MSHA’s jurisdiction over the transportation of coal from scales located near the extraction site to a preparation facility located

within an electric generating plant. 969 F.2d at 1503. The coal in question was delivered by conveyor belt from the extraction site to scales where the coal was weighed and sampled. *Id.* Another belt then moved the coal from the scales to the coal processing station, where it was “broken, crushed, sized, washed, cleaned, dried, and blended in order to make a ‘usable coal product’ for the electric generating facility.” *Id.* MSHA had asserted jurisdiction over and inspected the processing station itself since 1977. *Id.* In 1988, MSHA first asserted jurisdiction over the conveyor belts used to transport the coal from the scale to the processing station. *Id.* The operator challenged MSHA’s jurisdiction, but this Court affirmed, reasoning that the “plain language of section 802(h)(1)” required a “functional analysis” of the actions performed at the conveyor. *Id.* at 1503-04. The Court explained that because the conveyors served a function “necessary” to the preparation of coal for the “ultimate consumer,” they were encompassed in Section 802(h)(1)’s definition of “coal or other mine.” *Id.* at 1504.

Soon thereafter, in *Air Products*, this Court summarily denied another energy company’s petition for review of MSHA’s jurisdiction over the coal handling facilities at its power generation plant. *See* 37 F.3d at 1485. In the administrative adjudication below, the Commission had affirmed the Secretary’s assertion of MSHA jurisdiction, finding that the energy company performed coal preparation functions including “breaking, crushing, sizing, and storing coal.” *Air*

Prods. & Chems. Inc. v. Sec’y of Labor, 15 FMSHRC 2428, 2431 (Dec. 1993).

The Commission also found that, consistent with this Court’s decision in *Penelec*, these functions were “necessary in the ‘work of preparing the coal’ before the coal is transferred to the boiler building to produce energy.” *Id.* This Court did not disturb the Commission’s ruling in favor of MSHA jurisdiction.

Finally, in *RNS Services*, this Court again affirmed MSHA’s jurisdiction over a site where coal refuse was loaded for delivery to the coal preparation site previously at issue in *Air Products*. 115 F.3d at 184-85. The Court reiterated the role of a “functional analysis” in determining Mine Act jurisdiction over entities involved in coal preparation. *Id.* at 184. It concluded that “[t]he storage and loading of the coal [was] a *critical step* in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and *the Mine Act was intended to reach all such activities.*” *Id.* at 185 (emphasis added). The Court followed the decision in *Air Products*, reasoning that if the “subsequent processing” to be performed by the power generation plant was properly classified as coal preparation, the steps antecedent to that preparation were also covered. *Id.* Indeed, the Court in *RNS Services* noted that Section 802(h)(1)(C) “is so expansively worded as to indicate an intention on the part of Congress to authorize the Secretary to assert jurisdiction over *any lands integral to the process of preparing coal for its ultimate consumer.*” *Id.* at 186 (emphasis added).

MSHA's jurisdiction in this case comports with the functional analysis employed in both *Penelec* and *RNS Services*. That functional analysis recognizes that a company does not become a mine "per se" simply because it performs one function on the list of coal preparation activities enumerated in Section 802(i) – for example, "storing" of coal. Rather, to be subject to MSHA jurisdiction, a company must perform one or more preparation functions enumerated in 802(i), and those functions collectively must be "integral," "critical," or "necessary" to the overall process of preparing the coal for its "ultimate consumer." See *RNS Services*, 184-85; *Penelec*, 939 F.2d at 1504; accord *Elam*, 4 FMSHRC at 7 ("'work of preparing coal' connotes a process . . . undertaken to make coal suitable for a particular use or to meet market specifications") (emphasis added).

Shamokin Filler sells coal that it has prepared by sizing, drying, storing, and loading it to meet customer specifications. The activities performed by Shamokin's Carbon Plant together form a process that is integral to preparing the coal for its ultimate use by Shamokin's customers, and Shamokin's customers pay a premium for the value that the extra preparation adds to the coal. The product that Shamokin Filler sells at the end of its process is still anthracite coal, not some other manufactured product. It would therefore conflict with *Penelec* and *RNS Services* if this Court were to hold that MSHA's assertion of jurisdiction over the Carbon Plant was improper.

C. The Legislative History Supports the Secretary’s Plain Text Reading of Sections 802(h)(1)(C) and 802(i) – Not Shamokin Filler’s

Any questions unresolved by the text of the statute are settled by consulting the Mine Act’s legislative history, which instructs that all surface preparation facilities are covered by the Act, and that doubts about jurisdiction should be resolved in favor of coverage. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (whether Congress’s intent is clear under *Chevron*’s first step may depend not only on the statutory language at issue, but also on the statute’s structure and legislative history: the “traditional tools of statutory construction”).

The 1977 Conference Report states that both the House and Senate versions of the bill “broadly defined mine to include all underground or surface areas from which the mineral is extracted, and all surface facilities used in preparing or processing the minerals.” S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., at 38 (1977), *reprinted in* Legis. History of the Federal Mine Safety and Health Act of 1977, at 1316 (1978) (“Legislative History”) (emphasis added). The Conference Report explains that the conference version of the bill adopted the broad definition of “mine” in the House and Senate bills.

Moreover, the Senate Committee on Human Resources, which reported out the bill containing the definitional provisions as enacted, emphasized its intent that

doubts about jurisdiction should be resolved in favor of Mine Act coverage. *See S. Rep. No. 95-181, 95th Congress, 1st Sess., at 14, reprinted in Legislative History at 602.* The Committee Report first stated its intent for the Mine Act to cover preparation facilities:

[T]he structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of “mine.”

Id. The Committee then went on in the very next sentence to articulate its preferred canon of construction for the Mine Act’s jurisdictional provision:

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 possibl[e] 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.

Id.

Contrary to Shamokin Filler’s assertions, *see Shamokin’s Br. at 15*, there is nothing in the Committee Report that limits the Committee’s announced canon of construction to “milling operations located on a common site with mineral extraction activities.” Rather, the canon of construction directly follows a sentence *affirming* the Committee’s intent to cover mineral preparation plants generally – with no limitation on where such plants are located.

This and other courts have reviewed this legislative history and have found it to strongly support the Secretary’s assertion of Mine Act jurisdiction over surface

preparation facilities even when those facilities are not located on the property where extraction occurs. *See, e.g., Carolina Stalite*, 734 F.2d at 1553-54 (“The legislative history, though not free from contradictory statements, tends, rather strongly, to support the Secretary’s view of the Act’s reach.”); *Marshall*, 602 F.2d at 592 (stating after reviewing legislative history that “the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator”). Shamokin’s restrictive reading – which would limit the legislative history’s stated canon of construction to structures such as dams and impoundments (not relevant here) as well as milling operations located on a common site with mineral extraction activities – is therefore contrary to both the legislative history itself and the courts’ interpretations of it.

Finally, Shamokin Filler attempts to rewrite history when it characterizes the definition of “work of preparing the coal” from 1969 to 1977 as “referring to the processing of raw coal that ended when the coal was in condition for delivery to distributors and consumers” – and then claims that Congress adopted that definition in the 1977 Act. *See Shamokin Br.* at 14. The two Fourth Circuit cases that Shamokin cites from 1975 and 1976 reversed the Secretary’s denial of Black Lung benefits because the Secretary had been *too restrictive* in her interpretation of “work of preparing the coal.” *See Sexton v. Mathews*, 538 F.2d 88, 89 (4th Cir. 1976) (per curiam) (reversing denial of benefits because loading coal with shovel

from the tippie into a lorry at mine engaged in extraction was “work of preparing the coal”); *Roberts v. Weinberger*, 527 F.2d 600, 602 (4th Cir. 1975) (remanding for entry of benefits because claimant’s deceased husband hauled coal from the point of extraction to processing site). The Fourth Circuit read the definition of “work of preparing the coal” to *include* preparation work such as loading coal and hauling coal from the mine to the preparation site, and to exclude the manufacturing of coke from coal. *Sexton*, 538 F.2d at 89; *Roberts*, 527 F.2d at 601-02. The cases say nothing about whether further preparation of previously prepared coal falls within the definition of the “work of preparing the coal,” because facts requiring such an analysis were not before the court. Thus, even if Shamokin Filler’s opening brief pointed to evidence that those cases were actually considered by Congress when drafting the 1977 Mine Act – and it does not – the cases do not stand for the proposition that Shamokin advances.

D. Even Assuming that the Mine Act is Ambiguous, the Court Owes Deference to the Secretary’s Reasonable Interpretation

Even assuming that the Court finds that Sections 802(h)(1)(C) and (i) are ambiguous with regard to whether they permit the Secretary to assert MSHA jurisdiction over a custom coal preparation plant that engages in further preparation of previously processed coal to meet the specifications of the coal’s ultimate

consumer, the Secretary's reasonable interpretation of the Act is entitled to deference. *National Cement II*, 573 F.3d at 324; *Carolina Stalite*, 734 F.2d at 269.

Deference to the Secretary's interpretation is owed even though Sections 802(h)(1) and (i) are "jurisdictional" provisions. Because the Carbon Plant will be regulated by the Secretary under either the OSH Act or the Mine Act, the Secretary is "not determining the outer limits of his own authority, but merely 'adjusting the administrative burdens between his various agencies.'" *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1288 n.1 (D.C. Cir. 1990) (quoting *Carolina Stalite*, 734 F.2d at 1553). Moreover, deference to the Secretary's interpretation is additionally warranted because Section 802(h)(1) "expressly authoriz[es] the Secretary to define what constitutes a 'mine.'" *Id.* (referring to last sentence of 30 U.S.C. § 802(h)(1)(C)).

Deference is also owed to the Secretary's interpretation here notwithstanding its presentation as a litigation position before the Commission and now to this Court. Because of the Mine Act's split-enforcement model, the Secretary has no ability to adopt statutory interpretations through adjudication like unitary agencies do. Thus, "the Secretary's litigation position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard and is therefore deserving of deference. *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (internal quotation

marks omitted); *accord Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (affording full *Chevron* deference to the Secretary’s litigation position before the Occupational Safety and Health Review Commission); *Pattison Sand Company, LLC v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012) (affording full *Chevron* deference to the Secretary’s litigation position before the Federal Mine Safety and Health Review Commission); *Sec’y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113-16 (4th Cir. 1996) (same). *But see Vulcan v. FMSHRC*, 700 F.3d 297, 312-16 (7th Cir. 2012) (stating, arguably in dicta, that *Chevron* deference is only warranted where litigating position before the Commission is “embodied in a citation” or “issued pursuant to rulemaking authority”); *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742-43 (6th Cir. 2012) (holding that only *Skidmore* deference is owed to Secretary’s litigation position before the Commission).

The Secretary’s interpretation of Sections 802(h)(1)(C) and 802(i) is reasonable and furthers the purposes of the Act. Through passage of the Mine Act, Congress sought to prevent “unsafe and unhealthful conditions and practices in . . . coal or other mines.” 30 U.S.C. § 801(b). It furthers that purpose to cover, to the maximum extent consistent with the statutory terms, workers subject to the conditions, practices, and hazards associated with coal preparation. This is so

regardless of whether the workers prepare coal that is completely “raw” or has previously been partially prepared in some way.

In contrast, under Shamokin Filler’s interpretation, MSHA would have jurisdiction over an operation that performs preparation activities specified in the Mine Act on coal that has not previously been partially prepared elsewhere, but would not have jurisdiction over an operation that performs *precisely the same activities* – and exposes employees to *precisely the same hazards* – on coal that has previously been partially prepared elsewhere. Such a distinction – under which the jurisdictional outcome is determined not by what the operation at issue does, but by what some other operation did – has no basis in the Mine Act, employee safety, or simple common sense. It also undercuts the Mine Act’s purpose, *cf. Carolina Stalite*, 734 F.2d at 1552, and turns the Mine Act’s legislative history on its head. The guiding principle prescribed by Congress requires coverage in cases of doubt, not exclusion in the absence of specific enumeration.

The Secretary’s interpretation would not, as Shamokin Filler suggests, result in a parade of horrors in which “a whole range of non-mining operations that use processed coal” would be subject to Mine Act jurisdiction. *See Shamokin Br.* at 15. Under the Secretary’s interpretation, simply storing or loading coal would not bring an end-user of coal under MSHA’s scrutiny. Rather, consistent with this Court’s precedent in *Penelec* and *RNS Services*, as well as the Commission’s

analysis in *Elam*, such activities would only trigger MSHA jurisdiction where they were an integral part of an overall process to prepare the coal to make it suitable for a particular end use or to meet market specifications. *See, e.g., Sec’y of Labor v. Kinder Morgan Operating L.P. “C”*, 23 FMSHRC 1288, 1293-94 (2001) (affirming MSHA jurisdiction where coal storage and loading facility also engaged in blending and mixing of coal to meet customer specifications), *aff’d*, 78 Fed. Appx. 462 (6th Cir. 2003).

Moreover, even if the Secretary’s reading permitted him to assert MSHA jurisdiction over the kind of operations that Shamokin suggests, the Secretary’s assertion of jurisdiction over those operations would still need to be *reasonable* under *Chevron*’s second step. It would be patently unreasonable for the Secretary to assert MSHA jurisdiction over a family’s basement coal bin simply because the bin “stores” coal and “storing” of coal is enumerated in Section 802(i). *See RNS Services*, 115 F.3d at 190 (Alito, J. dissenting). But it is eminently reasonable for the Secretary to assert jurisdiction here, where the Carbon Plant’s extensive drying, sizing, storing, and loading of anthracite coal to meet customer specifications regularly exposes the Plant’s workers to the very health and safety risks that the Mine Act and MSHA’s implementing regulations were designed to mitigate.

Finally, though Shamokin goes to great lengths to characterize the interpretation that the Secretary advances here as inconsistent with past

pronouncements, the Secretary notes that he has consistently asserted jurisdiction over this facility since 1977, when MSHA started administering the Mine Act. The Secretary also notes that his litigation position here is consistent with his litigation position in other cases in which he has asserted jurisdiction over facilities that have further prepared previously processed coal. *See, e.g., Kinder Morgan*, 78 Fed. Appx. at 463 (affirming MSHA’s jurisdiction where coal arriving at marine loading facility “ha[d] already been processed by other facilities” but where facility engaged in the mixing, storing, and loading of coal); *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1081 (8th Cir. 1999) (rejecting Secretary’s assertion of MSHA jurisdiction over a utility company that performed preparation tasks on “previously processed coal” principally because utility itself consumed the coal after further processing). Finally, the Secretary’s litigation statements that Shamokin quotes regarding the “handling” of previously processed coal, *see* Shamokin Br. at 19-21, are not inconsistent with the Secretary’s position here. Under the Secretary’s interpretation, “handling” of fully processed coal would not be subject to Mine Act jurisdiction if such handling included just “storing” or “loading” unless those functions were also part of an overall *process* of preparation to meet customer specifications or to prepare the coal for its ultimate use.

Thus, in the event that the Court finds the statutory text ambiguous, *Chevron* deference is warranted to the Secretary's reasonable interpretation of Sections 802(h)(1)(C) and (i).

E. No Case Cited by Shamokin Filler Holds that the Mine Act Does Not Cover Further Processing of Previously Processed Coal

Identifying no valid statutory basis for its raw coal requirement, Shamokin Filler cites extensively to the case law. The cited cases do not detract from the Secretary's arguments about the controlling precedent supporting MSHA jurisdiction because no case cited by Shamokin holds that the Mine Act precludes the Secretary from asserting MSHA jurisdiction over the further preparation of partially prepared coal. At most, the cases are "consistent with the distinction" that Shamokin advances, *see* Shamokin Br. at 16; they certainly do not affirmatively support it.

Some of the cases that Shamokin cites *upheld* Mine Act coverage of facilities that handled some unprocessed coal. *See, e.g., Air Products*, 37 F.3d at 1485; *Penelec*, 969 F.2d at 1503; *United Energy Servs, Inc. v. FMSHRC*, 35 F.3d 971, 975 (4th Cir. 1994) (following this Court's functional analysis and affirming MSHA's assertion of jurisdiction over employees of an electrical power company engaged in coal preparation activities). None of those decisions limited their affirmance of MSHA's jurisdiction to the processing of raw coal. Rather, as discussed above, the decisions focused on the coal preparation functions

performed. *See, e.g., United Energy*, 35 F.3d at 975 (“The statute sets forth a functional analysis, not one turning on the identity of the consumer, and United Energy’s *activities* meet the functional test.”) (emphasis added); *RNS Services*, 115 F.3d at 185-186 (rejecting operator’s arguments turning on the “purity” of the coal and reiterating the importance of the *process* performed, even when performed on coal refuse) (emphasis added).

Another group of cases arose under the Black Lung Benefits Act of 1972 (“BLBA”), 30 U.S.C. §§ 901 *et seq.* *See Shamokin Br.* at 16-18. Courts occasionally use Black Lung cases as persuasive precedent when deciding Mine Act jurisdiction cases because Section 802(h)(2)’s definition of “coal or other mine” for purposes of the BLBA is very similar (though not identical) to Section 802(h)(1)’s definition of “coal or other mine” for purposes of the Mine Act. The case law interpreting Sections 802(h)(1) and 802(h)(2) is not fully interchangeable, however, because the purpose and structure of the two statutes are very different. *See Sec’y of Labor v. Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1297-98 (Nov. 2000), 2000 WL 1682492, (concluding that Black Lung cases “do not provide a basis from which to extrapolate an exemption from Mine Act coverage,” and that such cases “lack precedential value in resolving Mine Act jurisdictional disputes”); *Sec’y of Labor v. Pennsylvania Elec. Co.*, 11 FMSHRC 1875, 1881 n.7 (Oct. 1989), *aff’d on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) (same). The

Mine Act was designed to “assur[e] safe and healthful working conditions for the nation’s miners,” whereas the BLBA was designed to provide benefits to disabled miners suffering from pneumoconiosis, or “black lung,” which is caused by long-term exposure to respirable coal dust. *See* 11 FMSHRC at 1881 n.7. Moreover, black lung benefits are financed by a trust funded by a tax on coal producers, *see* 26 U.S.C. § 4121(a), and therefore, under that Act, covered coal preparation arguably must be more closely tied to coal production. *Id.* Like the Commission, this Court should refrain from relying on Black Lung cases to reject MSHA jurisdiction under the Mine Act.

Even assuming that the Black Lung cases are instructive, they do not establish the legal principle that Shamokin advances. The only case Shamokin cites that deals with additional preparation of previously prepared coal is the Fourth Circuit’s decision in *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986). But in *Eplion*, the court concluded that the miner’s widow was not entitled to benefits because the additional “washing” the miner performed on the coal was not undertaken for a commercial purpose. *See* 794 F.2d at 937. Indeed, the decision suggests that such additional washing would have brought the miner within the ambit of the “the work of preparing the coal” if it had been performed for a commercial purpose, *see id.*, which the preparation functions performed by Shamokin surely are.

Finally, Shamokin cites to an Eighth Circuit and a district court case holding that the Mine Act does not permit the Secretary to assert MSHA jurisdiction over power plants that consume the coal they prepare. *See Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1083 (8th Cir. 1999); *Herman v. Commonwealth Edison*, No. 98 C 3308, 1998 WL 704335, at *5 (N.D. Ill. Sept. 28, 1998). Those cases are distinguishable from the present case, in which Shamokin prepares coal to sell to its customers rather than for its own use. In any event, the Eighth Circuit's poorly reasoned majority opinion in *Associated Electric* is arguably in conflict with this Court's controlling precedent in *Penelec* and *RNS Services*, in which this Court adopted and utilized a more rigorous functional test. *See Associated Elec.*, 172 F.3d at 1089 (Heaney, J. dissenting) ("Not only does the majority choose to disregard Congress's clear mandate, it subjects the . . . coal-processing operation to a cursory, incomplete, and legally unfounded functional analysis.").

In sum, the foregoing array of cases does not establish the principle that Shamokin seeks to establish, and should not be used to override the Mine Act's clear text.

II. The Commission Correctly Held that the Administrative Law Judge Acted Within His Discretion in Excluding Evidence About Other Carbon Plants

The Commission correctly concluded that the administrative law judge did not abuse his discretion in excluding evidence about bagging facilities other than the Carbon Plant. The judge's analogy to Federal Rule of Evidence 403 was proper under the circumstances and consistent with the Administrative Procedure Act ("APA"). In addition, in the event that the Court holds that the plain language of Sections 802(h)(1)(C) and (i) supports the Secretary's assertion of MSHA jurisdiction, the judge's exclusion of comparative evidence was also proper because the contested evidence is irrelevant to the jurisdictional inquiry.

Federal Rule of Evidence 403 allows a trial court to exclude relevant evidence if its probative value is outweighed by other concerns. It states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403. A trial judge's decision to exclude evidence under Rule 403 is reviewed for abuse of discretion and "may not be reversed unless it is arbitrary and irrational." *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 187 (3d Cir. 1990) (internal quotation marks omitted); *see also United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

The administrative law judge in this case concluded that the comparative evidence proffered by Shamokin Filler would “involve all of the [] pejorative evidentiary consequences” identified in Rule 403. A2. To illustrate, the judge explained that it would be extremely time-consuming to conduct “collateral inquiries” into MSHA’s jurisdictional determinations with regard to other allegedly comparable facilities:

[T]his Court finds that it would be quite cumbersome and impractical, in evaluating whether the Carbon Plant is subject to MSHA jurisdiction, to begin by reviewing whether and why MSHA has exercised or should exercise jurisdiction over similar “bagging facilities” located in the Carbon Plant’s geographical area and in other parts of the country. The collateral inquiries would be endless.

A2. On appeal, the Commission agreed, reasoning that the limited probative value of the evidence was outweighed by the risk of delay:

[A]llowing Shamokin to present evidence that may be of limited probative value would have unduly delayed the trial. Shamokin would have been required to present evidence on each of the other facilities in order to demonstrate the similarities between those facilities and the Carbon Plant and thereby the relevance of MSHA’s evaluation of those other facilities. This would have necessitated a significant number of additional witnesses, consuming an inordinate amount of trial time.

A40.

The Commission’s reasons for excluding the comparative evidence were neither arbitrary nor irrational. *Cf. In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 783 (3d Cir. 1994) (affirming district judge’s exclusion of minimally relevant

evidence where allowing the evidence “would create the need to have mini-trials” on collateral issues). To the contrary, the Commission’s exclusion of the comparative evidence reflects a commonsense approach to managing this hearing (and many others). The Commission has used the same logic to exclude comparative evidence in other adjudications that similarly present fact-intensive, case-by-case inquiries, such as proceedings to approve ventilation and emergency response plans. *See Sec’y of Labor v. Mach Mining, LLC*, 34 FMSHRC 1784, 1807 (Aug. 2012) (affirming judge’s exclusion of ventilation plans at other mines because only conditions at operator’s mine are relevant to district manager’s determination of which plan provisions should be approved or denied), appeal docketed, No. 12-3598 (7th Cir.); *Sec’y of Labor v. Twentymile Coal Co.*, 30 FMSHRC 736, 764-66 (Aug. 2008) (affirming judge’s exclusion of other emergency response plans because it was unlikely that two underground coal mines would present exactly the same factual situation).

Moreover, contrary to Shamokin’s suggestion, *see Shamokin Br.* at 30, the Commission’s analogy to Rule 403 does not run afoul of the APA. The APA grants administrative law judges the discretion to “regulate the course of the hearing.” 5 U.S.C. § 556(c)(5); *see also* 29 C.F.R. § 2700.55 (Commission procedural rule stating that a Commission judge “is empowered to . . . regulate the course of the hearing”). The APA also requires agencies to adopt procedural rules

that “provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d); *see also* 29 C.F.R. § 2700.63 (Commission Procedural Rule stating that “[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.”).

Though Commission proceedings are not directly governed by the Federal Rules of Evidence, it was not erroneous for the judge to exercise his discretion to manage the hearing by analogizing to an instructive evidentiary rule that presents no conflict with the APA. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 n. 8 (Dec. 2000) (Federal Rules of Evidence do not by law apply to Commission hearings, but they “may have value by analogy.”); *see also Gunderson v. U.S. Dep’t of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (courts afford “considerable deference” to agency tribunals in formulating administrative procedures); *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000) (giving “extreme deference” to agency’s decision not to permit discovery where APA silent on issue); *Laird v. ICC*, 691 F.2d 147, 154 (3d Cir. 1982) (“[T]he formulation of administrative procedures is a matter left to the discretion of the administrative agency.”).

APA Section 556 *requires* agencies to adopt rules for “the exclusion of irrelevant, immaterial, or unduly repetitious evidence,” but it does not *prohibit* agencies from adopting other evidentiary rules that are consistent with due process.

See 5 U.S.C. § 556(d) (“Any oral or documentary evidence *may* be received, but the agency as a matter of policy *shall* provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”) (emphasis added). In other words, Congress’s use of the word “shall” in the second clause of Section 556 indicates that an adjudicatory agency *must* provide for the exclusion of certain kinds of evidence, but it does not prohibit the agency from providing for the exclusion of other types of evidence that would otherwise be admissible.

Hearings must be full and fair, but they need not be unlimited. *See* 5 U.S.C. § 556(d). As the judge noted, comparing MSHA’s jurisdiction over the Carbon Plant with MSHA’s jurisdiction over other facilities would be “cumbersome and impractical” because “[t]he collateral inquiries would be endless,” requiring an evaluation of the similarities and dissimilarities of each allegedly similar facility, the Secretary’s jurisdictional decision, and the regulated facility’s response. A2. Such a comparison would be particularly tangential here, where, as the Commission noted, MSHA has consistently asserted jurisdiction over the facility for decades; Shamokin “admits that the nature of its business has not changed”; and “there appears to be no change in the facts or law supporting Mine Act jurisdiction.” A40.

If Shamokin Filler is attempting to suggest a claim of selective prosecution – and it does not say so – Shamokin has failed to make the necessary showing of

discriminatory intent and discriminatory effect required to justify discovery and the admission of evidence. *See United States v. Armstrong*, 517 U.S. 456, 468 (1996); *see also Secy's of Labor v. Sturm Ruger & Co.*, 20 O.S.H. Cas. (BNA) 1720, 2004 WL 1056560, at *5-*6 (OSHRC May 2004) (employer claiming that an OSHA inspection resulted from vindictive prosecution and was unreasonable in other ways must show evidence of vindictiveness to obtain discovery on the issue), *aff'd* 135 Fed. Appx. 431, 435-36 (1st Cir. 2005). Having made no showing that it was being selectively prosecuted for impermissible reasons, Shamokin had no right to present evidence on this tangential issue at the hearing. Indeed, absent a selective prosecution claim, the Secretary's discretionary decisions regarding whom to cite for Mine Act violations are unreviewable so long as they are consistent with the limits of the Mine Act. *See Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 317-19 (4th Cir. 2008); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156-59 (D.C. Cir. 2006).

Finally, in the event that the Court holds that the plain language of Sections 802(h)(1)(C) and (i) supports the Secretary's assertion of MSHA jurisdiction, the judge's exclusion of comparative evidence was independently proper because the contested evidence is irrelevant to the jurisdictional inquiry. Under the plain text argument that the Secretary advances, the legal analysis for the "work of preparing the coal" involves the application of a statutory definition to the facts of a

particular facility. That statutory analysis does not necessitate an analysis of comparative treatment such as that required in a discrimination, retaliation, or selective prosecution case. Thus, to the extent that jurisdiction turns on a plain language analysis of the statute Congress enacted – as the Secretary asserts it does – the Secretary’s statements in internal jurisdictional memoranda have no bearing on the result. *Cf. Lancashire Coal Co. v. Sec’y of Labor*, 968 F.2d 388, 392-93 & n.5 (3d Cir. 1992) (deciding the jurisdictional dispute on the plain language of the Mine Act without relying on MSHA’s internal memorandum regarding a comparable facility).

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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ADDENDUM

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ADDENDUM

Federal Mine Safety and Health Act of 1977

30 U.S.C. § 801. Congress declares that—

- (a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;
- (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
- (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;
- (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;
- (e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;
- (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and
- (g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

30 U.S.C. § 802(d). For the purpose of this chapter, the term-- (d) “operator” means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

30 U.S.C. § 802(h)(1). For the purpose of this chapter, the term-- (h)(1) “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 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)(2). For purposes of subchapters II, III, and IV of this chapter, “coal mine” means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. § 802(i). For the purpose of this chapter, the term-- (i) “work of preparing the coal” means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 803. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.

Administrative Procedure Act

5 U.S.C. § 556(c). Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
- (9) dispose of procedural requests or similar matters;
- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter.

5 U.S.C. § 556(d). Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent

consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of this Court.

Dated: May 6, 2013

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,450 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 6, 2013

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CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF systems.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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