

MAY 2016

VOL. 16-5

PRATT'S

# ENERGY LAW

## REPORT



**EDITOR'S NOTE: CLEAN POWER UP IN THE AIR**

Steven A. Meyerowitz

**THE LONG AND WINDING ROAD OF THE CLEAN POWER PLAN LITIGATION**

Jim W. Rubin and H. Alex Iliff

**SENATE PASSES REAUTHORIZATION BILL FOR PHMSA; HOUSE BEGINS CONSIDERATION**

Michael K. Friedberg and David C. Whitestone

**YOU HAVE THE RIGHT TO REMAIN CONCERNED: THE CLASH BETWEEN MSHA SPECIAL INVESTIGATIONS AND CIVIL PENALTY CASES**

Robert Huston Beatty, Jr.

**OREGON ENACTS PHASE-OUT OF "COAL BY WIRE" AND DOUBLES RENEWABLE PORTFOLIO STANDARD**

Richard H. Allan

**THE ARRIVAL OF THE BILLION DOLLAR OIL & GAS BANKRUPTCY CASES**

Douglas E. Deutsch

**THE EUROPEAN COMMISSION APPROVES AN ENERGY SECURITY PACKAGE EMPHASIZING INFRASTRUCTURE DEVELOPMENT AND LNG IMPORTS**

Ignasi Guardans, Steven C. Sparling, David L. Wochner, Alessandro Di Mario, and Michael L. O'Neill

# Pratt's Energy Law Report

---

VOLUME 16

NUMBER 5

MAY 2016

---

<b>Editor's Note: Clean Power Up in the Air</b>	
Steven A. Meyerowitz	167
<b>The Long and Winding Road of the Clean Power Plan Litigation</b>	
Jim W. Rubin and H. Alex Iliff	169
<b>Senate Passes Reauthorization Bill for PHMSA; House Begins Consideration</b>	
Michael K. Friedberg and David C. Whitestone	174
<b>You Have the Right to Remain Concerned: The Clash Between MSHA Special Investigations and Civil Penalty Cases</b>	
Robert Huston Beatty, Jr.	180
<b>Oregon Enacts Phase-out of "Coal by Wire" and Doubles Renewable Portfolio Standard</b>	
Richard H. Allan	186
<b>The Arrival of the Billion Dollar Oil &amp; Gas Bankruptcy Cases</b>	
Douglas E. Deutsch	195
<b>The European Commission Approves an Energy Security Package Emphasizing Infrastructure Development and LNG Imports</b>	
Ignasi Guardans, Steven C. Sparling, David L. Wochner, Alessandro Di Mario, and Michael L. O'Neill	202

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at .....

Email: ..... jacqueline.m.morris@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844

Outside the United States and Canada, please call ..... (518) 487-3000

Fax Number ..... (518) 487-3584

Customer Service Web site ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940

Outside the United States and Canada, please call ..... (518) 487-3000

---

ISBN: 978-1-6328-0836-3 (print)

ISBN: 978-1-6328-0837-0 (ebook)

ISSN: 2374-3395 (print)

ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]

(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

*An A.S. Pratt® Publication*

Editorial Office  
630 Central Ave., New Providence, NJ 07974 (908) 464-6800  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**SAMUEL B. BOXERMAN**

*Partner, Sidley Austin LLP*

**ANDREW CALDER**

*Partner, Kirkland & Ellis LLP*

**M. SETH GINTHER**

*Partner, Hirschler Fleischer, P.C.*

**R. TODD JOHNSON**

*Partner, Jones Day*

**BARCLAY NICHOLSON**

*Partner, Norton Rose Fulbright*

**BRADLEY A. WALKER**

*Counsel, Buchanan Ingersoll & Rooney PC*

**ELAINE M. WALSH**

*Partner, Baker Botts L.L.P.*

**SEAN T. WHEELER**

*Partner, Latham & Watkins LLP*

**WANDA B. WHIGHAM**

*Senior Counsel, Holland & Knight LLP*

---

## **Hydraulic Fracturing Developments**

**ERIC ROTHENBERG**

*Partner, O'Melveny & Myers LLP*

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail [Customer.Support@lexisnexis.com](mailto:Customer.Support@lexisnexis.com). Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 347.235.0882. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

# You Have the Right to Remain Concerned: The Clash Between MSHA Special Investigations and Civil Penalty Cases

*By Robert Huston Beatty, Jr.\**

*While Section 103(a) of the Federal Mine Safety and Health Act is best known as a method for meting out civil penalty enforcement actions, operators are beginning to experience an increasingly rapid uptick in special investigations propelled by Mine Safety and Health Administration's investigative authority under the law. The author of this article discusses the investigations and what operators should keep in mind if investigated.*

Section 103 of the Federal Mine Safety and Health Act of 1977 ("Mine Act") provides the Mine Safety and Health Administration ("MSHA") with an abundance of plenary powers relating to the regulation of surface and underground mining operations in the United States. While Section 103(a) is best known as the spring board for meting out civil penalty enforcement actions, operators nationwide are beginning to experience an increasingly rapid uptick in special investigations propelled by MSHA's investigative authority under Section 103(a).

## **SECTION 110(c) OF THE MINE ACT**

A primary source of these investigations is found in Section 110(c) of the Mine Act, which states:

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

Subsection (c) provides MSHA with a direct avenue to impose monetary penalties against directors, officers or agents of the mine operator. This penalty is separate from any monetary penalty issued against the mine operator

---

\* Robert Huston Beatty, Jr., is a partner at Dinsmore & Shohl LLP, focusing his practice exclusively on representing mine operators in the coal and metal/non-metal sectors of the mining industry. He may be reached at robert.beatty@dinsmore.com.

involving an elevated enforcement action.<sup>1</sup> Of the three potential targets in subsection (c), only the term *agent* is defined in the Mine Act.<sup>2</sup> Consequently, an increasing number of front line foreman and supervisors are becoming the subject of MSHA special investigations.

### ELEVATED ENFORCEMENT ACTIONS

While MSHA certainly investigates such things as advance notice, false reporting, and equipment misrepresentation, in practice many special investigations originate from MSHA's review of elevated enforcement actions, and they have plenty of opportunities. For the three year period between 2012 and 2014, MSHA issued an average of 3,537 elevated enforcement actions in the coal and metal nonmetal sides of the industry.<sup>3</sup> Specifically, between 2012 and 2014 there was an average of 1,415 elevated enforcement actions issued to coal operators and 2,122 elevated enforcement actions issued to metal nonmetal operators. Consequently, metal nonmetal operators are witnessing a corresponding increase in MSHA special investigations.

### THE CLASH

A phenomenon impacting both industries is the clash occurring between the adjudication of the underlying elevated enforcement actions before the Federal Mine Safety and Health Review Commission<sup>4</sup> ("Commission") and MSHA's processing of the special investigation springing from the elevated enforcement actions. The problem originates from the fact that timeframes for initiating and processing mine operator challenges are established by the Commission's Procedural Rules and enforced by a Commission Administrative Law Judge ("ALJ").<sup>5</sup> This means civil penalty cases are processed, normally, within 120

---

<sup>1</sup> The investigation of a Section 110 violation of the Mine Act is initiated at the request of the District Manager, usually as a result of one of the following circumstances: after a mine accident; as a result of complaints received alleging violations of Section 110(e) (advance notice), 110(f) (false reporting), or 110(h) (equipment misrepresentation), or as a result of reviewing citations and orders. MSHA Special Investigations Procedures Handbook, Chapter 4 (C) Initiating Section 110 Investigations.

<sup>2</sup> Section 3(e) of the Mine Act defines an agent as any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine.

<sup>3</sup> See <http://www.msha.gov/MSHAInfo/FactSheets/MSHAbytheNumbers/CalendarYear/Elevated%20Enforcement%20Actions.pdf>.

<sup>4</sup> The Federal Mine Safety and Health Review Commission is an independent adjudicative agency that provides administrative trials and appellate review of legal disputes arising under the Mine Act.

<sup>5</sup> See *e.g.*, 29 C.F.R. § 2700.26, 29 C.F.R. § 2700.28, and 29 C.F.R. § 2700.29.

days after the citation or order is assessed. On the other hand, the procedure for moving MSHA special investigations forward is left to MSHA with guidance from its Special Investigations Procedures Handbook (Chapter 4) (“Handbook”).

MSHA proclaims it will conduct comprehensive investigations as expeditiously as possible in accordance with the timeframes established in its Handbook. To this end, the Handbook requires all Section 110(c) cases to be forwarded to the Office of Assessments within 220 days of the issuance of the underlying enforcement action or incident and all criminal referrals forwarded to the Department of Justice within 240 days from the same date.

While MSHA's intent is admirable, the truth is the agency consistently ignores the Handbook timeframes, thereby creating widespread delays in processing Section 110(c) investigations and the announcement of proposed monetary penalties against agents of the mine operator. In some cases, MSHA special investigations have lingered for years without a decision on whether or not it will process a civil penalty against an operator agent identified in the investigation.

In recent years, as the Commission trudged its way through a large backlog of civil penalty cases, MSHA's penchant for creating extended delays in processing Section 110(c) investigations seldom impacted active civil penalty cases.<sup>6</sup> The Commission's decision to acquiesce in MSHA's constant delay of Section 110 investigations was shortsighted as it failed to take into account what the industry would ultimately experience: a reduction in the Commission's backlog and consequently a clash, or overlapping, of active civil penalty cases with delayed special investigations.

Currently, the industry is experiencing an about face at the Commission on this issue as ALJs are now denying defense counsel motions to stay an operator's civil penalty case. By way of example, in a recent matter an ALJ granted the operator's motion to stay only to rescind the decision several days later and order the parties to initiate discovery in the civil penalty case. The ALJ's reasoning: he now had more time to hear cases and was not willing to accept the judicial economy argument as a reason to consolidate the civil penalty case with a future penalty case against the operator's agent. This sea change in the

---

<sup>6</sup> During this time period Commission ALJs, faced with a judicial economy arguments from defense counsel, routinely granted motions to stay the underlying civil penalty case while MSHA was completing its investigation. The argument was simple: if MSHA concluded its special investigation and issued a monetary penalty against a miner operator agent, any legal challenge to the penalty would be consolidated with the underlying civil penalty case and a single hearing held instead of conducting separate hearings on the two cases.



Commission's approach to an age old problem creates very important issues for mine operators and their agents.

For example, there is now a real possibility legal fees for mine operators will double as ALJs force separate hearings for the civil penalty proceeding and the agent's case.<sup>7</sup> In addition, a separate hearing in the civil penalty case, prior to completion of the special investigation, will likely be detrimental to the operator's ability to formulate a defense to underlying enforcement actions.

Defending a Commission case involves the sharing of discovery between the parties. Discovery necessarily involves having the operator's agent, with knowledge of the facts of the citation or order, verify sworn discovery responses and provide sworn deposition and trial testimony. It is important to keep in mind that at this juncture of the civil penalty case many MSHA special investigations have not been concluded, which means MSHA has not decided if it will impose a penalty against the operator's agent. An ALJ's decision to deny a motion to stay the civil penalty case allows the discovery process to unfold before the eyes and ears of MSHA's attorneys, at the same time an uncertain MSHA special investigator is contemplating whether he will recommend a penalty against the agent.

This point is extremely important because while most Section 110(c) investigations result in monetary penalties against agents, the language in subsection (c) grants the government far broader authority including the issuing of the same fines, and imprisonment that may be imposed upon a person under Section 110(d).<sup>8</sup> The threat of potential criminal sanctions against an agent of the mine operator, however slight, highlights the significance of the ALJ's order forcing discovery in a civil penalty case prior to MSHA concluding its Section 110(c) investigation.

Against the backdrop of MSHA's lengthy delays in processing special investigations, Section 110(c)'s reference to the criminal provisions of Section

---

<sup>7</sup> This assumes, of course, that the mine operator indemnifies the agent for the legal costs associated with perfecting a legal challenge to MSHA's monetary penalty arising from the special investigation, a practice which is fairly common in Mine Act litigation.

<sup>8</sup> Section 110(d) states: "[a]ny operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(1) or section 105(c), shall, upon conviction, be punished by a fine of not more than \$250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than \$500,000, or by imprisonment for not more than five years, or both."

110(d) could very well become an impediment in the defense of a mine operator's civil penalty case. Stated differently, an operator agent with firsthand knowledge of the facts leading to an MSHA elevated enforcement action may become leery of providing a sworn statement in the company case particularly if he or she has been identified in an active Section 110 investigation.<sup>9</sup>

Further, an ALJ's denial of a motion to stay the civil penalty case also creates incentive for MSHA to advance civil penalty cases before completing a special investigation in order to take advantage of information obtained by its attorneys in the discovery process. In a typical Section 110(c) investigation, MSHA investigators attempt to obtain statements from agents to try to make their case that the agent knowingly authorized, ordered, or carried out a violation of a mandatory safety or health standard. As a practical matter, the success of MSHA special investigators, in terms of actually gathering the information necessary to legally support a knowing violation against an agent, depends on the experience of the investigator and the agent's awareness of his or her rights in the process.

For example, an agent's decision to provide a statement to an MSHA special investigator is entirely voluntary. Irrespective of what the MSHA investigator says, the agent has an unfettered right not to speak with MSHA during a Section 110 investigation. However, just as important is the agent's right to have a representative present should he or she agree to provide a statement. Even then, the agent's statement is not a sworn statement under oath. It is alarming how few operator agents are aware of these important rights.

On the other hand, during discovery in the operator's civil penalty case, an agent with knowledge of the underlying elevated enforcement action is subject to a subpoena by the ALJ to provide sworn deposition and trial testimony. The overlap of the civil penalty case and the special investigation created by MSHA's foot dragging during the 110 investigation and the ALJ's refusal to grant a motion to stay in the civil penalty case creates a scenario where MSHA can capitalize on the agent's sworn statement to finalize its Section 110 investigation decision.

Now that the problems are identified where do we go from here? If you are faced with an MSHA special investigation at your operation, you should keep several things in mind at the outset.

---

<sup>9</sup> The overlap in MSHA special investigations and civil penalty cases has the potential to create conflict of interest issues in the execution of joint legal representation agreements between the mine operator and its agent. The mine operator's counsel would be wise to closely analyze these potential conflicts in cases involving elevated enforcement actions and corresponding Section 110(c) investigations.

**IF YOUR OPERATION IS THE SUBJECT OF AN MSHA SPECIAL INVESTIGATION, KEEP THESE THINGS IN MIND**

First, unlike other MSHA investigations, such as accidents and fatality investigations, Section 110 investigations can be delayed. MSHA special investigators will often show up when least expected seeking permission to gain access to operator agents. Again, remember that Section 110 statements are voluntary and it is perfectly acceptable for the agent to politely suggest he or she does not care to discuss the matter or provide a statement. Most MSHA special investigators will understand and respect this request. This simple statement secures the agent's rights and allows the mine operator time to contact an attorney, hopefully well versed in the MSHA special investigation process, to assist with the investigation.

Finally, the most effective way to avoid MSHA special investigations is to educate your supervisors and foreman to understand the triggering mechanisms for investigations. For example, all elevated enforcement actions issued by MSHA are reviewed to determine if the agent knowingly authorized, ordered, or carried out a violation of a mandatory safety or health standard. A large number of MSHA investigations are premised on the issuance of Section 104(d) unwarrantable citations and orders.

**CONCLUSION**

The good news is mine operators can help stem the tide of MSHA special investigations. For far too long mine operators and supervisors have felt helpless during MSHA inspections and investigations. This practice must end. The key to managing MSHA is a healthy mix of adherence to MSHA regulations and the proper education and training of foreman, supervisors, and others who are impacted by MSHA's presence. Knowledge is power.