

Approved: November 11, 2009.

**Steven T. Miller,**

*Deputy Commissioner of Services and Enforcement.*

Approved: November 11, 2009.

**Michael F. Mundaca,**

*Acting Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E9-28330 Filed 11-24-09; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### 30 CFR Parts 7 and 75

RIN 1219-AB58

#### Refuge Alternatives for Underground Coal Mines

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Final rule; correction.

**SUMMARY:** This rule informs the mining community that MSHA rescinds the Agency's intent stated in the preamble to the final rule on Refuge Alternatives for Underground Coal Mines, concerning preemption of private tort litigation with respect to the Agency's approval of specifications for a refuge alternative.

**DATES:** *Effective Date:* November 25, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939. Ms. Silvey can be reached at 202-693-9440 (voice), 202-693-9441 (facsimile), or [silvey.patricia@dol.gov](mailto:silvey.patricia@dol.gov) (Internet e-mail).

**SUPPLEMENTARY INFORMATION:** On December 31, 2008, MSHA published a final rule on Refuge Alternatives for Underground Coal Mines. (73 FR 80656). The preamble includes a discussion on preemption, and states that "it is MSHA's intent that its approval of specifications for a refuge alternative preempts private tort litigation questioning the propriety of those specifications." (73 FR 80658).

On May 20, 2009, the President issued a Memorandum for the Heads of Executive Departments and Agencies on Preemption. The purpose of the Memorandum is to state the general policy of the Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the

States and with a sufficient legal basis for preemption. The Memorandum directs executive departments and agencies to "review regulations issued within the past 10 years that contain statements in regulatory preambles or codified provisions intended by the department or agency to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption." In addition, the memorandum states that "where the head of a department or agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the head of that department or agency should initiate appropriate action, which may include amendment of the relevant regulation."

Section 506(b) of the Federal Mine Safety and Health Act of 1977 (Mine Act), concerning "Effect on State Laws," specifically addresses preemption of state law as follows:

The provisions of any State law or regulation in effect upon the operative date of this Act, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this Act or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this Act. 30 U.S.C. 955.

In addition, the House Report to the Mine Act, states that "Federal law would supersede any State law in conflict with it," but that "State laws providing more stringent standards than exist under the Federal law, however, would not be held in conflict with the [Mine] act." H. Rep. No. 95-312, 95th Cong., 1st Sess., at 55 (1977).

In accordance with the Presidential Memorandum on Preemption, MSHA has reviewed the Agency's standards and regulations issued within the past 10 years. MSHA's review found that a statement in the preamble to the Refuge Alternatives final rule is the only rule issued in the past 10 years to contain a preemption statement.

MSHA has determined that the Mine Act does not show any basis, or Congressional intent, for inferring any attempt to preempt state tort law regarding MSHA's approval specifications for refuge alternatives. As stated earlier, the Mine Act provides, for example, that State laws or regulations that provide more stringent requirements than those imposed under the Mine Act, are not construed or held to be in conflict with the Mine Act. MSHA's determination to rescind the preemption statement in the preamble to the Refuge Alternatives rule is

consistent with the intent of the Mine Act and is consistent with the Presidential Memorandum. The preemption statement in the preamble was, at best, interpretive guidance purporting to interpret statutory language in the Mine Act, which was included in the preamble of the final rule without seeking prior public comment. It did not create any new law or substantive rule, but simply stated what the agency thought the statute meant. Further, this interpretation was published only recently, making it unlikely that any member of MSHA's regulated community has relied to their detriment on the interpretation. Under these circumstances, notice and comment also are not required in withdrawing this interpretation. See *Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009); *MetWest, Inc. v. Sec'y of Labor*, 560 F.3d 506, 509-511 (DC Cir. 2009).

Accordingly, MSHA rescinds the last paragraph of the section-by-section discussion of "Section 7.501 Purpose and Scope," starting on line 51 of the center column and ending on line 24 of the third column, 73 FR 80658, for the reason that this statement is not justified under the Mine Act principles governing preemption, and there was no intent by Congress, under the Mine Act, to supersede state action in this regard.

Dated: November 19, 2009.

**Joseph A. Main,**

*Assistant Secretary for Mine Safety and Health.*

[FR Doc. E9-28214 Filed 11-24-09; 8:45 am]

BILLING CODE 4510-43-P

## POSTAL REGULATORY COMMISSION

### 39 CFR Part 3020

[Docket Nos. MC2010-2 and CP2010-2; Order No. 324]

#### New Postal Product

**AGENCY:** Postal Regulatory Commission.  
**ACTION:** Final rule.

**SUMMARY:** The Commission is adding the Priority Mail Contract 20 to the Competitive Product List. This action is consistent with changes in a recent law governing postal operations. Republication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

**DATES:** Effective November 25, 2009 and is applicable beginning October 28, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Stephen L. Sharfman, General Counsel,