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:
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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 on Preemption, MSHA has determined that the Mine Act does not show any basis, or reason that this statement is not justified by the provisions 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.

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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. Rephasing 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:
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