



A publication of the
Oregon Independent Aggregate Association
PO Box 571
Stayton, Oregon 97383
www.oraaggregate.com

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Oregon Independent Aggregate Association Newsletter

October 2019

Chairman's Message

The EPA submitted for withdrawal of the 2015 WOTUS Rule (“Waters of the U.S.”) on Oct. 23rd. The withdrawal appeared in the federal register and is set to take effect Dec. 23rd. As we have discussed before, the 2015 WOTUS would have significantly expanded the EPA’s jurisdiction including dry stream beds and isolated wetlands. The EPA and US Army Corps of Engineers submitted a proposal in Dec. 2018 to formally define the WOTUS in accordance with pre-2015 interpretations. A final replacement rule should be forthcoming. NSSGA provides more discussion and an explanation of the reasons for EPA’s withdrawal in a recent article: <https://www.nssga.org/wotus-repeal-now-in-federal-register/>.

Also from the back-n-forth-rulemaking bin, MSHA officially reinstated the 2017 Workplace Examination Rule, which became effective Sept. 30th. Remember this rule was modified by the Trump administration in 2018 but has since been reversed to the 2017 version. MSHA plans to introduce implementation of the rule over the first 90 days it is effective and provide information and technical assistance to affected businesses. Make sure your workplace examination procedures are in-step with the 2017 version.

Erick Staley
Chairman

2019 Scholarship Application process has been closed. The 2020 Scholarship application form will be available in February for the school term starting September 2020.

Strict Liability of the Mine Act

By: Matthew DeAtley

In previous articles, I mentioned that the Mine Act is a strict liability Act. In this article, I explain what strict liability means. Strict liability is a term of art in the legal world, and many people can misunderstand its meaning. In fact, I have seen MSHA inspectors and Conference Litigation Representatives use the term “strict liability” as a means to issue and uphold otherwise improper citations.

What is Strict Liability?

Legally speaking, strict liability exists when a defendant is liable for committing an action, regardless of what their intent or mental state was when acting. In other words, it does not matter if there was an intent to harm — only that the harm occurred. Outside of MSHA, the strict liability standard is rarely utilized. There are only two main areas of strict liability — harm resulting from (a) the possession of certain animals or (b) conducting abnormally dangerous activities. The law does not use strict liability because lawmakers generally do not want to punish people for accidents. Instead, liability is reserved for the people who choose to do something (or not to do something) that results in harm.

No mine operator ever wants harm to come to their miners. For that reason, the Mine Act must be strict liability. If the Mine Act were not strict liability, then there would have to be some intention for the harm to result for MSHA to be able to issue a citation. If that were the case, MSHA would not be able to enforce the act except in the most severe circumstances.

How Does Strict Liability Affect Mine Operations?

We know that the Mine Act must be strict liability for it to have any effect, but what does the Mine Act being strict liability mean for mine operators? The most significant effect strict liability has is when a mine operator has exercised reasonable care, but a violation still exists through no fault of the mine operator. In this circumstance, there is nothing a mine operator can do to avoid liability. This is true even when mine management does not have knowledge of the violation and could not have known about the violation.

One of the most common examples of strict liability in action is what I call “unfightable” citations. An inspector issues an “unfightable” citation for a backup alarm or horn not functioning. Since the standard says that backup alarms must be operational *at all times*, a citation can be issued if the backup alarm fails at any time. Inspectors issue this citation even if the inspector hears the backup alarm working, but it goes out during the inspection. The courts have upheld these citations under strict liability multiple times. Therefore, it is extremely unlikely that the Court will ever vacate a citation like this.

Strict liability means that when a violation of an MSHA standard exists on the mine site, MSHA has the statutory authority to issue a citation to the mine operator, regardless of who caused or created the violation. Unfortunately, strict liability is not going to change, nor is the Mine Act going to go away. Therefore, mine operators must take steps to mitigate the liability for strict liability violations.

Steps to Lower Negligence

There are several steps mine operators can take to protect themselves against strict liability citations. Understanding that these citations will most likely be upheld, and the goal is to reduce the negligence, thereby ensuring the smallest fine possible. Next, a mine operator can use the following procedures to show why negligence should be marked “Low” instead of “High”:

- Have written policies for proper ways to deal with issues and train your miners on those policies.
- Hold trainings on how to correctly use safety equipment and document the training.
- Have company policies stating that failure to comply with the standard operating procedure will result in discipline, including termination.
- Maintain Discipline records showing the policies are enforced.
- Document violations and their corrections or any actions that have been taken to remove the violation from the work area.

Getting negligence reduced is a matter of showing evidence that mine operators are taking care of the issue. Proper documentation and preparation for an inspection can go a long way to help reduce the amount of fines a mine operator will receive.



Class Dates for the year **2020 Part 46** have been scheduled

Roseburg class will be on March 9, 2020

Albany Class will be on March 10, 2020

Class Instructors will be Josh Schultz and Michael Peelish from Adele Abrams office

2019 Board Meeting Schedule

Our December Board Meeting has been cancelled

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