



State of West Virginia
Office of the Attorney General

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Eugene White, Director
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Charleston, WV 25311

Dear Director White:

You have asked for an Opinion of the Attorney General concerning which entity has authority to grant site-specific modifications to the statutes and rules governing diesel-powered equipment in underground coal mines. This Opinion is being issued pursuant to West Virginia Code Section 5-3-1, which provides that the Attorney General "shall give written opinions . . . upon questions of law, whenever required to do so, in writing, by . . . any . . . state officer, board or commission." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your request involves the interplay of statutory powers between, on the one hand, the Director of the Office of Miners' Health, Safety and Training ("OMHST"), and on the other, the State Coal Mine Safety and Technical Review Committee/Board of Coal Mine Health and Safety ("TRC/Coal Board"). In your correspondence you note that the West Virginia Legislature has generally granted the TRC/Coal Board authority to consider petitions submitted by mine operators seeking a site-specific rule modification. You also note that the Legislature has authorized the use of diesel-powered equipment in underground coal mines and assigned certain duties and responsibilities regarding approval of diesel-power equipment, again on a site-specific basis, to OMHST.

Your letter raises the following legal question:

Did the Legislature vest OMHST or the TRC/Coal Board with the authority to consider petitions for a site-specific modification to statutes or rules governing the use of diesel-powered equipment in underground coal mines?

We conclude that although generally the TRC/Coal Board is vested with the authority to consider petitions seeking site-specific rules relating to mine operation or mine safety, OMHST possesses this power in the specific context of site-specific requests for using diesel equipment in underground mines.

Discussion

One of the primary functions of the TRC is to “[a]ccept and consider petitions submitted by individual mine operators or miners seeking site-specific rule making pertaining to individual mines and make recommendations to the board considering such rule making.” W. Va. Code § 22A-6-7(a)(3). Specifically, the TRC makes recommendations to the Coal Board regarding “rules with general mining industry application.” *Id.* § 22A-6-7(e). The TRC may also “accept requests for site-specific rulemaking on a mine-by-mine basis” and recommend site-specific rules to the Coal Board. *Id.* § 22A-6-7(f)(1). The Coal Board, in turn, may adopt the TRC’s recommendation only where applying the site-specific rule to the specific “mine will not reduce or compromise the level of safety or protection afforded miners below that level of safety or protection afforded by any applicable statutes.” *Id.* § 22A-6-7(f)(3).

In the more specific context of diesel-powered equipment, in 1997 the Legislature authorized the use of diesel-powered equipment in underground coal mines. *See* W. Va. Code § 22A-2A-101. More recently, the Legislature vested the Director of OMHST with certain duties relating to authorizing this type of equipment. *See id.* § 22A-2A-310, *et seq.* As most relevant to your question, the Director has authority to “consider site-specific requests for the use of diesel equipment in underground coal mines and for the use of alternative diesel-related health and safety technologies and methods.” *Id.* § 22A-2A-310(b). The Legislature also tasked the Director with revising rules promulgated pursuant to Chapter 22A of the West Virginia Code to allow “diesel generators in underground mines,” but only if “the generator is vented directly to the return and at least one person is present within sight and sound of the generator.” *Id.* § 22A-2A-1001(10).

Your letter explains that, together with the Coal Board, you are seeking an opinion on “the general issue” of which of these two entities “has the authority to consider requests for modification to statutory or rule created diesel equipment mine safety laws on a site-specific basis for an individual mine.” A plain reading of these statutory provisions reveals that the Director of OMHST is charged with considering requests for the use of diesel-powered equipment or diesel-related alternative technologies, while the TRC/Coal Board is vested with the authority to consider site-specific rule-making requests relating to the mining industry more generally.

Regarding questions of overlapping or conflicting statutes, the Supreme Court of Appeals of West Virginia has held that “[w]here two statutes are in apparent conflict, the Court must, if

reasonably possible, construe such statutes so as to give effect to each.” Syl. pt. 9, *Barber v. Camden Clark Mem’l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citation omitted). More specifically, the Court has also explained that “[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. pt. 10, *id.* (citation omitted).

Here, the relevant statutory provisions are in apparent conflict because they seemingly confer the same rule-making authority on both OMHST and the TRC/Coal Board. West Virginia Code Section 22A-2A-310(b) expressly vests the Director of OMHST with the authority to consider requests for the use of diesel-powered equipment in underground coal mines. Yet West Virginia Code Section 22A-6-7(e) seemingly vests the TRC/Coal Board with the *same* authority, because the general power it describes to consider site-specific rule-making requests would seem to include the subset of requests related to diesel-powered equipment. Further, applying the principles of statutory interpretation outlined in *Barber*, it appears that these interpretations cannot be reconciled to grant both entities concurrent power: Particularly in an area of the law concerned with safety, *e.g.*, W. Va. Code § 22A-6-7, the potential for confusion and conflicting rules from two separate entities would be an untenable reading of the statutes.

As such, *Barber* instructs that the statute containing the most specific language controls. That statute is Section 22A-2A-310(b) because it addresses the narrow issue of rule-making authority relating to diesel-powered equipment in underground coal mines, whereas Section 22A-6-7(e) vests the TRC/Coal Board with broad authority to consider rule-making requests more generally. We therefore conclude that although generally the TRC/Coal Board is vested with the authority to consider a petition seeking site-specific rules relating to mine operation or mine safety, the Legislature’s more specific delegation to OMHST in Section 22A-2A-310(b) means that OMHST—not the TRC/Coal Board—has power to issue site-specific rules relating to the use of diesel-powered equipment.

You also note that the question that brought this issue to a head relates to the requirement in West Virginia Code Section 22A-2A-1001(10) that a diesel generator located in an underground coal mine be vented directly into the mine return. As our analysis above explains, if any entity has authority to modify this requirement on a site-specific basis, it is OMHST. Nevertheless, we also note that this requirement is within the part of the statute where the Legislature gave explicit health-and-safety directives for specific situations—here, that diesel-powered generators are allowed in underground coal mines *only if* “the generator is vented directly to the return.” *Id.* § 22A-2A-1001(10). To be sure, site-specific rulemaking authority in this context generally includes power to modify a default legislative directive. *See id.* § 22A-2A-604(a) (allowing approval of plans for fueling diesel-powered equipment in intake escapeways when necessary based upon mine design, despite general prohibition on fueling in intake escapeways.); *id.* § 22A-2A-602(b)(1) (giving discretion to either prohibit underground diesel fuel tanks or establish petitioning process for the allowance of underground diesel fuel tanks on a site-specific basis). And nothing in the remainder of this statute speaks to whether the Legislature exempted any parts of the relevant Code from OMHST’s site-specific rulemaking power. Thus, while a reviewing court would likely conclude that OMHST has power to grant exemptions from Section 22A-2A-1001(10) in appropriate circumstances, when reviewing

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OMHST's *rationale* for any exemption a court may also give weight to the Legislature's strong statutory directive about what safety looks like in the specific context of underground coal mine vents. We therefore urge OMHST to give appropriate consideration to this statutory default when considering any site-specific rulemaking requests that involve Section 22A-2A-1001(10).

Sincerely,



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Solicitor General

Virginia Payne
Assistant Solicitor General