



State of West Virginia
Office of the Attorney General

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The Honorable Frank Foster
Director
West Virginia Office of Miners' Health, Safety & Training
#7 Players Club Dr., Suite 2
Charleston, WV 25311-1282

Dear Director Foster:

You have asked for an Opinion of the Attorney General concerning certain inspections of electric pumps in coal mines. We are issuing this Opinion under West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law ... whenever required to do so, in writing, by ... any ... state officer." Where this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that underground coal mines use electric water pumps to remove water throughout the mine, including in non-active work sites. If these pumps malfunction, then mine sections may flood. Malfunctioning pumps can also cause sparks that then ignite explosive gases in the mine.

In a 1990 memorandum, your office implemented inspection requirements for these pumps. The memorandum requires mine operators to conduct pre-shift inspections of these pumps in "all active working places in active working sections ... and other parts of the mine where miners will be working." The same memorandum says mine operators must inspect "energized" pumps in "inactive working sections where miners will not be working ... during each shift." And if the mine operator does not perform an on-shift inspection of an inactive area, then your memorandum provides that operators must conduct a pre-shift inspection before the next shift "prior to the energization of the equipment[] or before any miner is allowed to enter these areas."

According to your letter, mine operators are now “questioning” whether the part of the 1990 memorandum “requiring on-shift examinations in inactive working sections [of the mine] is consistent with West Virginia mining laws.”

Your letter raises the following legal question:

Can the Office of Miners’ Health, Safety, and Training require coal mine operators to conduct pre-shift or on-shift examinations of electrically powered water pumps that are located outby the last open crosscut or in a non-working section of the coal mine?

We conclude that the Office can presently require mine operators to conduct weekly inspections of all pumps, including those located outby the last open crosscut or in a non-working section of the coal mine. Right now, however, the Office cannot require more frequent pre-shift or on-shift examinations of electrically powered water pumps that are located outby the last open crosscut. That said, we believe the Office could appropriately propose a legislative rule implementing such a requirement.¹

DISCUSSION

Statutes decide whether an agency like your office can act. An agency’s “power is dependent upon statutes.” *W. Va. Off. of Miners’ Health, Safety & Training v. Beavers*, 246 W. Va. 614, 621, 874 S.E.2d 726, 733 (2022). Agencies have “only such [powers] as have been conferred upon them by law expressly or by implication.” *Id.* And “the agency’s powers should not be extended by implication beyond what may be necessary for [the statutes’] just and reasonable execution.” *Pennsylvania v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014). Meanwhile, “legislative rules in West Virginia are authorized by acts of the Legislature and [courts] have treated them ... as statutory enactments.” *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 584, 466 S.E.2d 424, 435 (1995).

“To promote safety in a highly dangerous business, the Legislature has provided nonexclusive, multiple examinations for potential safety risks.” *Itmann Coal Co. v. Miller*, 166 W. Va. 84, 88, 272 S.E.2d 668, 671 (1980). We thus address each of the relevant statutes and legislative rules in turn.

West Virginia Code § 22A-2-14

On-Shift Inspections Under Section 22A-2-14

West Virginia Code § 22A-2-14 says that certain mine supervisors must “examine all working places under his or her supervision for hazards at least once every two hours during each coal-producing shift, or more often if necessary for safety.” But “working place” is a defined term.

¹ Because your question focuses on the Office’s authority, we do not address whether common-law duties might separately compel mine owners to inspect the pumps you describe. For example, early cases describe how a mine operator has a “common-law duty to exercise reasonable care to provide reasonably safe machinery, tools, and appliances for use in the mine.” *Humphreys v. Raleigh Coal & Coke Co.*, 73 W. Va. 495, 80 S.E. 803 (1914).

It refers solely to “the area of a coal mine inby the last open crosscut.” W. Va. Code § 22A-1-2(c)(12).

Considering the statutory definition of “working place,” we conclude that this first part of Section 22A-2-14 does not empower the Office to require inspections *outby* the last open crosscut, as your question contemplates. “Where the legislature . . . declare[s] what a particular term means, such definition is ordinarily binding upon the courts and *excludes any meaning that is not stated.*” *In re Greg H.*, 208 W. Va. 756, 760, 542 S.E.2d 919, 923 (2000) (emphasis added) (cleaned up). Thus, areas outby the last open crosscut are excluded from the on-shift inspection requirement under Section 22A-2-14.

On the other hand, if there are places inby the last open crosscut that are not being actively mined, then those places (and the pumps found there) would be subject to inspection under Section 22A-2-14. The statute says “all” working places should be inspected—and all means all, active or inactive.²

Pre-Shift Inspections Under Section 22A-2-14

This section also provides that certain mine personnel should “examine each mine within three hours prior to the beginning of a shift and before any miner in such shift enters the active workings of the mine.” W. Va. Code § 22A-2-14. Because the pre-shift inspection requirement applies to the “mine,” and not just the “working place” (or the “active workings of the mine”), this part of the section arguably imposes a broader requirement than the preceding on-shift inspection provision. The “mine”:

... includes the shafts, slopes, drifts, or inclines connected with, or intended in the future to be connected with, excavations penetrating coal seams or strata, which excavations are ventilated by one general air current or divisions thereof, and connected by one general system of mine haulage over which coal may be delivered to one or more points outside the mine, and the surface structures or equipment connected or associated therewith which contribute directly or indirectly to the mining, preparation or handling of coal, or construction thereof.

W. Va. Code § 22A-1-2(6).³

Because it is broader, this second portion of the section might support a pre-shift inspection requirement embracing even pumps outby the last crosscut or in non-working sections of the mine.

² Our construction is consistent with West Virginia Code § 22A-2-40(15), which provides that mine operators must “maintain in permissible condition all electric face equipment, *which is taken into or used inby the last open crosscut of any mine.*” (emphasis added). “Electric pumps” can be “electric face equipment.” W. Va. Code § 22A-2-40(12) (referring to “electric pumps[] and such other low horsepower electric face equipment”); *see also* W. Va. Code § 22A-1-2(4) (defining “face equipment” to mean “mobile or portable mining machinery having electric motors or accessory equipment normally *installed or operated inby the last open crosscut in an entry or room*” (emphasis added)).

³ Although not mentioned in your letter, West Virginia Code § 22A-2-13 similarly requires “[t]he mine foreman, assistant mine foreman, or fire boss [to] visit and carefully examine each working place in which miners will be

To be sure, pumps are not “shafts, slopes, drifts, or inclines,” as the statute defines those terms. *See Itmann Coal*, 166 W. Va. at 86, 272 S.E.2d at 670 (describing how those terms are defined). But the definition specifies that term “mine” merely “includes” those items. “A term whose statutory definition declares what it ‘includes’ is more susceptible to extension of meaning by construction than where the definition declares what the term ‘means.’” *Greg H.*, 208 W. Va. at 761 n.6, 542 S.E.2d at 923 n.6. And here, the definition refers to “surface structures or equipment,” suggesting that subsurface “equipment” (like pumps) might fall within the definition, too. W. Va. Code § 22A-1-2(6); *see also, e.g., Mine*, Black’s Law Dictionary (11th ed. 2019) (broadly defining “mine” to include any “underground excavation used to obtain minerals, ores, or other substances”).

In other words, the Legislature has left a gap in defining what areas and items are subject to *pre*-shift inspection under Section 22A-2-14. And “if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap.” *Appalachian Power Co.*, 195 W. Va. at 589, 466 S.E.2d at 440.

But if your office wants to enforce its preferred understanding of the statute through fines or other enforcement actions, then it will need to propose—and the Legislature will need to adopt—a legislative rule setting out that understanding. Your office has the “authority to propose or promulgate rules” to “carry out and implement the provisions of this chapter relating to health and safety inspections and enforcement.” W. Va. Code § 22A-1-6. But any agency rule intended to have the “force of law” and “suppl[y] a basis for the imposition of civil or criminal liability” is a legislative rule. *Id.* § 29A-1-2(e); *see also id.* § 22A-1-6 (explaining that the requirements found in Article 29A apply to rulemaking under Section 22A-1-6). In contrast, an interpretive rule (or some other lesser form of agency guidance) “may not be relied upon to impose a civil or criminal sanction nor to regulate conduct.” *Id.* § 29A-1-2(c).

Although your 1990 memorandum purports to merely implement Section 22A-2-14, the lack of any express statutory text *directing* the kinds of pump inspections described in that memorandum means any enforcement action likely cannot rest on the statute alone. Nor do we think such inspections are “necessarily” implied. And even “the longstanding interpretations by a state agency of rules it is required to enforce—whether stated in an interpretative rule under the [Administrative Procedures Act] or set forth in a less formal expression of agency policy—may not be afforded any weight against a citizen.” *Cookman Realty Grp., Inc. v. Taylor*, 211 W. Va. 407, 413, 566 S.E.2d 294, 300 (2002) (Albright, J., concurring); *see also Walls v. Miller*, 162 W. Va. 563, 570, 251 S.E.2d 491, 497 (1978) (rejecting “a so-called ‘interpretation’” from the Director of the Department of Mines that “emasculated” the statute’s requirements). So if you plan for the pump-inspection requirement to have “force of law” and provide the basis for liability, a legislative rule is required.

working at the beginning of each shift.” But this provision would not permit the inspections that you describe because it only applies in a “working place” (that is, in by the last crosscut) and in locations “in which miners will be working.”

For these reasons, you likely need to establish firmer authority by way of a legislative rule before you can appropriately act against mine operators for failing to conduct a pre-shift inspection of a water pump under Section 22A-2-14.

West Virginia Code § 22A-2-20

Pre-Shift Inspections Under Section 22A-2-20

West Virginia Code § 22A-2-20(a) says, in relevant part, that fire bosses must “examine all active working places in [his or her] assigned area and make tests with an approved device for accumulations of methane and oxygen deficiency.”

By its terms, this pre-shift inspection requirement applies only inby the last open crosscut *and* in a working section of the coal mine. As explained above, the reference to statutorily defined “working places” informs us that the provision applies only inby the last open crosscut. And the reference to “active” working sections tells us that that requirement applies only where workers will be present and performing work. “Active” is defined as “producing or involving action or movement,” “marked by present operation” or “engaged in an action or activity.” *Active*, Merriam-Webster Online Dictionary, <https://bit.ly/3IhNisd> (last visited Feb. 13, 2024). And another part of the statute contemplates that the pre-shift inspection requirement does not apply to areas of the mine that workers have not yet entered. W. Va. Code § 22A-2-20(b); *cf.* W. Va. Code § 22A-1-2(c)(5) (defining “inactive workings” as “portions of a mine in which operations have been suspended for an indefinite period, but have not been abandoned”).

Thus, this part of the statute could not justify the kind of inspections described in your question.

On-Shift Inspections Under Section 22A-2-20

In addition, if “it becomes necessary to have workers enter areas of the mine not covered during the pre-shift examination [described in West Virginia Code § 22A-2-20(a)],” then the Code says the fire boss should “examine the area for hazardous conditions, determine if air is traveling in its proper direction and test for oxygen deficiency and methane” “within three hours before any person enters the area.” W. Va. Code § 22A-2-20(b).

This part of the statute applies more expansively. It refers to “areas of the mine” that workers will enter, not just “working places.” And it applies to all areas that workers intend to enter, not just places where they might be specifically working to mine coal. Given those two differences, the examination requirement would seem to apply even if workers are entering otherwise abandoned or inactive areas of the mine. It would not apply to areas where no workers are present (or will be present) at all.

But as we explained above, the lack of *express* text referring specifically to pump inspections suggests that your Office would be best advised to propose a legislative rule if it intends to enforce that understanding of the inspection requirement by way of civil penalties or the like. In developing the rule, the Office will need to apply its “developed expertise” to evaluate whether the pumps can present the sort of “hazardous conditions” described in the statute. *Amedisys W.*

Va., LLC v. Pers. Touch Home Care of W. Va., Inc., 245 W. Va. 398, 414, 859 S.E.2d 341, 357 (2021) (cleaned up).

West Virginia Code § 22A-2-8

West Virginia Code § 22A-2-8(a) charges the mine foreman with “keep[ing] a careful watch over the ventilating apparatus, the airways, traveling ways, *pumps* and drainage.” (emphasis added). Relatedly, the mine foreman “shall have all water drained or hauled out of the working places where practicable, before the miners enter, and such working places shall be kept dry as far as practicable while the miners are at work.” *Id.*

Although this statute is one of the few that expressly refers to pumps, it does not *expressly* provide for pre-shift or on-shift inspections of the pumps. Certainly, at least to some extent, “the mine foreman’s duties” are laid out with “great particularity, ... expressly naming the things committed to his charge.” *Jaggie v. Davis Colliery Co.*, 75 W. Va. 370, ___, 84 S.E. 941, 942 (1914). And “it is evident the Legislature had in mind ... electric motors,” seeing as how the statute refers to certain types of them. *Id.* But the statute does not specify the how and when the foreman needs to discharge his duties to keep a careful watch. Rather, at least without further clarification, the statute appears to leave it to the foreman to decide what a “careful watch” might constitute in each mine. *See, e.g., Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S.W. 232, 234 (1898) (treating the question of whether a mine foreman fulfilled his duty to keep a careful watch under a similar statute as a question of fact for the jury).

The words in the statute are broad enough that they could conceivably embrace pre-shift or on-shift requirements. “Careful” means “giving a lot of attention ... so that you do not have an accident, make a mistake, or damage something.” *Careful*, Cambridge Dictionary, <https://tinyurl.com/2p9ayvbs> (last visited Feb. 13, 2024); *see also, e.g., Careful*, Merriam-Webster Dictionary, <https://tinyurl.com/4xxz73t7> (last visited Feb. 13, 2024) (“marked by attentive concern and solicitude” or “by painstaking effort to avoid errors or omissions”). “Watch” has similar connotations: To “stand guard,” *Watch*, Black’s Law Dictionary (11th ed. 2019), or “to keep someone or something under close observation,” *Watch*, Merriam-Webster Dictionary, <https://tinyurl.com/4vnnamvr> (last visited Feb. 13, 2024). So given the words’ focus on close attention, a “careful watch” could potentially include something like a regular or “continuous and systematic surveillance.” *Stone v. Port Auth. of N.Y. & N.J.*, No. 11-cv-3932, 2014 WL 3110002, at *4 n.5 (E.D.N.Y. July 8, 2014) (discussing statutory definition of “fire watch”).

But while this statute, too, might leave a “gap” that can be filled by the agency, we again conclude that the gap must be filled by a legislative rule. The existing terms of the statute do not expressly or impliedly mandate inspections at specific times and places. And the West Virginia Supreme Court has warned that this particular “statute ought not to, and cannot, consistently with the rules of construction, have effect beyond that clearly indicated by its terms.” *Crockett v. Black Wolf Coal & Coke Co.*, 75 W. Va. 325, ___, 83 S.E. 987, 988 (1914). So if the Office concludes that a careful watch can only be kept by way of mandated pre-shift or on-shift inspections, or if such inspections are needed to make sure that working places are “kept dry,” then it will need the Legislature’s sign-off to imbue that understanding with the force of law.

West Virginia Code § 22A-2-40(20)

West Virginia Code § 22A-2-40(20) provides that “[a]ll electric equipment shall be examined weekly, tested, and properly maintained by a qualified person to assure safe operating conditions.” Pumps are electric equipment. The statute does not limit this inspection requirement to any area of the mine. So *all* pumps must at least be examined weekly, no matter if they are outby the last open crosscut or in an inactive part. The Legislature was apparently indifferent to whether these weekly inspections took place pre-shift, post-shift, or on-shift.

This section, however, does not provide the Office authority to mandate more frequent inspections. If the Legislature wanted to require mine operators to inspect more often in this section, then we would expect to see language implying that the weekly mark was a minimum—words such as “at least” or “no less than.” That language is missing here. And if there were any doubt, then canons of construction would dispel it. In particular, “[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” *State v. Folse*, No. 21-0972, 2023 WL 7320617, at *5 n.16 (W. Va. Nov. 7, 2023). Here, the reference to weekly inspections suggests a legislative intent *not* to require more under this section.⁴

West Virginia Code of State Rules § 36-14-4

Finally, you ask whether an existing legislative rule governing “electric equipment in mines” could provide a basis for the inspections you describe, at least in return airways. See W. Va. Code R. § 36-14-4.2.

For several reasons, the cited regulation does not provide the Office with a basis to require pump inspections in the areas described in your letter.

First, the “[p]ermissible electrical equipment” covered by the rule is meant to be “pre-shift examined in accordance with W. Va. Code § 22A-2-20.” W. Va. Code R. § 36-14-4.2.2. But as explained above, pumps that are not located inby the last open crosscut and in a working section of the coal mine are not covered by Section 22A-2-20’s pre-shift inspection requirement. Thus, those pumps would not be the kind of “electrical equipment” covered by this regulation.

Second, the regulation expects that the inspected equipment will be in a “working area ... in which miners will be working.” *Id.* § 36-14-4.2.2-3. Here again, the regulation’s language is inconsistent with requiring inspections in “non-working sections,” as your letter suggests.

Third, the repeated references to “work area” and “working area” in the relevant part of the regulation again imply that workers will be actively working in the covered locations. Other

⁴ We do not think this statute’s reference to weekly inspections forecloses more frequent inspections under *other* sections. Certainly, this statute specifically addresses inspections of electrical equipment throughout the mine. And “the general rule of statutory construction ... requires a specific statute to be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 332, 325 S.E.2d 120, 121 (1984). But these various statutes need not be “reconciled” given that the Legislature “provided for nonexclusive, multiple examinations for potential safety risks.” *Itmann Coal*, 166 W. Va. at 88, 272 S.E.2d at 671.

regulations certainly imply as much. *See, e.g., id.* § 36-1-15.1 (specifying ventilation requirements for the “working area” where “personnel are employed in shaft and/or slope”); *id.* § 36-22-4.3 (distinguishing between “any mine” and “work area of any mine”). So, too, do West Virginia cases. *See, e.g., McElroy Coal Co. v. Schoene*, 240 W. Va. 475, 483, 813 S.E.2d 128, 136 (2018) (describing “the working area where the coal is being removed”). Authority from elsewhere supports the same view. *See, e.g., Napper v. United States*, 374 F. Supp. 3d 583, 590 (S.D.W. Va. 2019) (“[I]nspectors inspected the working areas of the mines as determined by the active operation of the Mine at the time of the inspections.”); *Simpson v. Fed. Mine Safety & Health Rev. Comm’n*, 842 F.2d 453, 455 (D.C. Cir. 1988) (treating the “working area” as synonymous with the “face” of the mine); *Old Ben Coal Corp. v. Loc. Union No. 1487 of United Mine Workers of Am.*, No. 70-155, 1971 WL 906, at *2 (E.D. Ill. Jan. 14, 1971) (describing the working area of the mine as “the section where the coal was actually being mined”).

Fourth, the inspections are conducted “as work progresses,” again reflecting that the relevant area to be inspected is a place where work is taking place. W. Va. Code R. § 36-14-4.2.5.

We therefore conclude that the regulation’s inspection provisions apply to equipment being used in “those areas where actual persons are located and working.” And while your letter offers a potentially broader reading of the regulation, we see no room for that construction in the text of the statute. “A reviewing court would only be required to afford deference to an agency’s interpretation”—if at all—“if the regulation contained an ambiguity.” *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 220, 832 S.E.2d 135, 146 (2019). This regulation does not.

* * * *

In sum, the Office can presently require mine operators to conduct weekly inspections of all pumps, including those located outby the last open crosscut or in a non-working section of the coal mine. The Office cannot presently require more frequent pre-shift or on-shift examinations of electrically powered water pumps that are located outby the last open crosscut. The Office would, however, have the authority to propose a legislative rule implementing such a requirement.

Sincerely,



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