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2011]

EMERALD COAL RESOURCES, L.P. V. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION: LETTER OF LAW TRUMPS MINER SAFETY

I. INTRODUCTION

Accounting for almost a fifth of the United States' energy consumption in 2009, coal energy plays a central role in the country's energy policy.¹ Unfortunately, coal mining safety issues have long been a drawback of the industry despite the resource's great importance.² Tragedies ranging from the 1907 Darr Mine disaster in Pennsylvania that claimed 239 lives, to the recent explosion on April 5, 2010 at the Upper Big Branch Mine in West Virginia that killed 29, exemplify the perils of coal mine work.³ While safety improvements have been slowed by mine owner appeals of the sanctions and penalties imposed upon them,⁴ federal and state agencies have promulgated regulations in an attempt to alleviate the dangers.⁵

In Pennsylvania, the Bituminous Coal Mine Safety Act of 2008 (Act) gives the Pennsylvania Department of Environmental Protection (DEP) discretion to issue administrative orders in response to an accident as the agency deems appropriate.⁶ The Act defines ac-

1. *Primary Energy Flow by Source and Sector, 2009*, U.S. Dept. of Energy, http://www.eia.doe.gov/emeu/aer/pdf/pecss_diagram_2009.pdf (last visited Apr. 6, 2011) (noting that coal comprised 19.7% of U.S. energy consumption in 2009).

2. *See Why Do We Still Have Mining Disasters?*, N.Y. TIMES ROOM FOR DEBATE BLOG (Apr. 7, 2010, 9:06 PM), <http://roomfordebate.blogs.nytimes.com/2010/04/07/why-do-we-still-have-mining-disasters> (asking why, after long history of injury and death, coal mining remains so dangerous).

3. *See U.S. Mining Disasters*, MINING-TECHNOLOGY.COM (Apr. 15, 2010), <http://www.mining-technology.com/features/feature82279/> (noting that between 1830 and 2000, 15,183 miners were killed in 716 separate accidents in U.S.).

4. *See Gardiner Harris & Erik Eckholm, Mines Fight Strict Laws By Filing More Appeals*, N.Y. TIMES, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/us/07company.html?_r=1&ref=us (reporting that operators appeal one in four citations issued against coal mines, three times greater than average appeal rate).

5. *See History of Mine Safety & Health Legislation*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/MSHAINFO/MSHAINFO2.HTM> (last visited Apr. 6, 2011) (documenting federal mine safety statutes); *see also* Laura Walker, *Pennsylvania Closer to Mine Safety Law Overhaul*, EHS TODAY (Jan. 4, 2008), http://ehs.today.com/safety/confined-spaces/ehs_imp_77498/index.html (noting Pennsylvania's new mine legislation will overhaul outdated regulations).

6. 52 PA. CONS. STAT. § 690.109(b) (2010) (providing that, in event of accident occurring at mine, DEP shall take whatever action it deems appropriate, including issuance of orders to protect life, health, or safety of individuals).

cidents as “unanticipated event[s] including any” of fourteen listed events.⁷ In *Emerald Coal Resources, L.P. v. Commonwealth of Pennsylvania, Department of Environmental Protection (Emerald Coal)*,⁸ the DEP issued compliance orders to Emerald Coal Resources (Emerald) and Cumberland Coal Resources (Cumberland) for failing to notify the DEP of unanticipated events under section 109(a)(1) of the Act and “posted procedures,” respectively.⁹

The coal companies appealed to the Pennsylvania Environmental Hearing Board (EHB), which has authority to review the DEP’s decisions on a de novo basis.¹⁰ The DEP filed for summary judgment.¹¹ The appeals centered on two main issues: first, whether the two “unanticipated events” were accidents under the Act; and second, whether the DEP had authority to expand the definitions of sections of the Act by adjudication rather than through the Act’s newly established Board of Coal Mine Safety’s (Board) rulemaking process.¹² The EHB denied the DEP’s motion for summary judgment, holding that, while the two events were likely acci-

7. *Id.* § 690.104 (2010) (detailing fourteen events that constitute unanticipated events). Unanticipated events include the following:

- (1) A death of an individual at a mine.
- (2) An injury to an individual at a mine, which has a reasonable potential to cause death.
- (3) An entrapment of an individual at a mine which has a reasonable potential to cause death or serious injury.
- (4) An unplanned inundation of a mine by a liquid or gas.
- (5) An unplanned ignition or explosion of gas or dust.
- (6) An unplanned mine fire not extinguished within ten minutes of discovery.
- (7) An unplanned ignition or explosion of a blasting agent or explosive.
- (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use.
- (9) An unplanned roof or rib fall in active workings that impairs ventilation or impedes passage.
- (10) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour.
- (11) An unstable condition at an impoundment or refuse pile which does any of the following: (i) Requires emergency action to prevent failure. (ii) Causes individuals to evacuate an area.
- (12) Failure of an impoundment or refuse pile.
- (13) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes.
- (14) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

Id.

8. No. 2009-023-L, 2010 WL 944146, *1-2 (Pa. Env’tl. Hearing Bd. Feb. 24, 2010).

9. *See id.* at *1-2 (detailing issuance of compliance orders to Emerald and Cumberland).

10. *See History of the Environmental Hearing Board, THE PENNSYLVANIA ENVTL. HEARING BOARD*, http://ehb.courtapps.com/content/ehb_history.php (last visited Apr. 6, 2011) (highlighting that EHB has ability to review DEP decisions).

11. *Emerald Coal*, 2010 WL 9441466 at *2 (noting how DEP moved for summary judgment in both Emerald and Cumberland appeals).

12. *See id.* at *4 (finding EHB was more concerned with method DEP chose to implement sections 104 and 109 rather than DEP’s interpretation of section 104).

dents under the Act, the rulemaking process must be followed because adjudication would not be consistent or fair within the Act's framework.¹³

This Note examines the EHB's decision in *Emerald Coal*. Part II of this Note analyzes the disagreement between the DEP and the mining companies.¹⁴ Part III discusses the laws governing mine safety.¹⁵ Part IV reviews the basis for the EHB's decision in *Emerald Coal*.¹⁶ Part V critically analyzes the EHB's decision to distinguish between expansion and interpretation as well as the resulting effect on the purpose of the Act.¹⁷ Finally, Part VI examines the impact the *Emerald Coal* decision will have on administrative agencies' ability to formulate policy by adjudication and rulemaking as well as the decision's influence on mine safety.¹⁸

II. FACTS

In 2008, the Bituminous Coal Mine Safety Act of 2008 was signed into law.¹⁹ Under section 109 of the Act, mine operators must notify the DEP of "accidents" that occur at their mines.²⁰ Section 104 defines accidents as "unanticipated event[s]" and includes fourteen listed examples.²¹ At Emerald's bituminous coal mine in Wayne Township and at Cumberland's bituminous coal mine in Waynesburg, unanticipated events occurred that were not reported to the DEP.²²

13. *See id.* (holding that EHB was unable to support DEP's issuance of orders for several reasons).

14. For a further discussion of the facts of *Emerald Coal*, see *infra* notes 19-38 and accompanying text.

15. For a further discussion of Pennsylvania mining regulations, see *infra* notes 39-90 and accompanying text.

16. For a narrative analysis of the EHB's decision in *Emerald Coal*, see *infra* notes 91-116 and accompanying text.

17. For a critical analysis of the EHB's decision in *Emerald Coal*, see *infra* notes 117-53 and accompanying text.

18. For a discussion of the impact of *Emerald Coal*, see *infra* notes 154-84 and accompanying text.

19. *Emerald Coal Res., L.P. v. Commw. of Pa., Dep't of Envtl. Prot.*, No. 2009-023-L, 2010 WL 944146, *9 (Pa. Envtl. Hearing Bd. Feb. 24, 2010) (noting signing of Act in July 2008).

20. 52 PA. CONS. STAT. § 690.109(a)(1) (2010) (stating that operator must notify DEP within fifteen minutes of discovering accident).

21. 52 PA. CONS. STAT. § 690.104 (2010) (noting fourteen defined occurrences under Act). For a list of the enumerated unanticipated events, see *supra* note 7.

22. *See Emerald Coal*, 2010 WL 944146 at *1-2 (identifying failure of Emerald and Cumberland to notify DEP and DEP's later discovery of unreported, unanticipated events).

On January 19, 2009, Emerald Coal had planned a cut-through from the B-7 section of its mine to the B-6 section.²³ This cut-through would create an air connection; therefore, Emerald scheduled a mine examiner to close doors installed to prevent unsafe ventilation.²⁴ Before the cut-through, however, the mine examiner mistakenly left the B-6 section without closing the doors.²⁵ Although no harm occurred, Emerald officials did not follow their own procedures for safe ventilation, and the incident posed a threat to the miners' health and safety.²⁶ Because Emerald did not notify the DEP about the unanticipated event, the agency issued a compliance order citing Emerald for violating section 109(a)(1) of the Act.²⁷

On February 12, 2009, an electrical storm disabled a ventilation fan at a bleeder shaft in Cumberland's mine for over fifteen minutes, and the diesel powered back-up system also failed to start.²⁸ Cumberland began to evacuate the mine and, while no one was injured, the fan outage posed a threat to the health and safety of the miners who had to evacuate on foot over long distances.²⁹ Cumberland also did not notify the DEP, which then issued an order for violating posted procedures.³⁰

Emerald and Cumberland appealed their orders, asserting that because their respective events were not listed among the Act's fourteen examples of accidents, the events did not qualify as accidents.³¹ The parties also claimed the DEP's interpretations were unreasonable and inconsistent with the legislative intent behind the

23. *Id.* at *1 (relating Emerald's planned cut-through from section B-7 to section B-6).

24. *See id.* (noting mine inspector's role in cut-through operation).

25. *Id.* (highlighting failure to follow plan and disputing whether air reversal actually occurred).

26. *See id.* (stating that Emerald did not contest that incident posed risk to miners).

27. *See Emerald Coal*, 2010 WL 944146 at *1 (discussing occurrence of unanticipated event and Emerald's failure to notify DEP in timely manner).

28. *Id.* (noting how backup system failed and system was restarted by electrician after 16 minutes and 40 seconds).

29. *Id.* (describing threat from outage of ventilation fan and evacuation of miners over long distance on foot).

30. *Id.* at *2 (highlighting that no statutory section was listed in Cumberland order).

31. *See id.* (noting consolidation of appeals and arguing that including, as used in Act, is limiting term).

Act.³² Lastly, Emerald and Cumberland argued that summary judgment was inappropriate, as disputed issues of fact still existed.³³

Conversely, the DEP filed for summary judgment, claiming the events were accidents that required notification.³⁴ The DEP also stated that the term accident is not ambiguous, and even if it were, the DEP's interpretation that included the two disputed events was reasonable.³⁵ Finally, the DEP asserted that it had the necessary authority under the Act to issue the orders.³⁶ The EHB focused on the new rulemaking procedures established under the Act in determining that the DEP had overstepped its bounds in issuing the orders.³⁷ Accordingly, the EHB denied the DEP's motion for summary judgment.³⁸

III. BACKGROUND

Coal mining is one of the most dangerous industries in the United States, with a fatal injury rate almost six times that of private industry.³⁹ Underground bituminous coal mining, at issue in *Emerald Coal*, employs more than half of all U.S. miners and experiences a higher share of injuries, illnesses, and fatalities than any other form of coal mining.⁴⁰ Possible exposure to methane gas, poor ventilation, high temperatures and humidity, and coal dust makes un-

32. *Emerald Coal*, 2010 WL 944146 at *2 (claiming DEP is conducting unlawful stealth regulation).

33. *Id.* at *2 n.1 (noting that summary judgment is appropriate when record establishes there are no genuine issues of material fact and moving party is entitled to judgment as matter of law).

34. *Id.* at *2 (claiming that events were defined by Act and operators failed to notify DEP as required).

35. *Id.* (arguing that term accident is not ambiguous and DEP's interpretation rightly includes two events).

36. *Id.* (noting that DEP has provided adequate notice regarding accident notice requirement, that opportunity to appeal to EHB protects operators' due process rights, and that rules and regulations posted at Cumberland require notification).

37. *See Emerald Coal*, 2010 WL 944146 at *4-5 (finding DEP had attempted to expand section 104's list by issuing compliance orders).

38. *Id.* at *8 (denying DEP's motion for summary judgment).

39. *Injuries, Illnesses and Fatalities in the Coal Mining Industry*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS (Apr. 2010), <http://www.bls.gov/iif/oshwc/osh/os/osar0012.htm> (detailing fatal and non-fatal coal mining injuries in 2007). In private industry, the total fatalities amounted to 4.3 cases per 100,000 full-time equivalent workers. *Id.* In coal mining, the total fatalities were 24.8 per 100,000 full-time equivalent workers. *Id.*

40. *See id.* (discussing how mining industry is divided into bituminous coal underground mining, bituminous coal and lignite surface mining, and anthracite mining). The rate of non-fatal injuries and illnesses in 2008 per 100 full-time workers was 6.5 for underground bituminous coal mining, 2.0 for bituminous coal and lignite surface mining, and 6.2 for anthracite mining. *Id.*

derground coal mining hazardous.⁴¹ As the coal mining industry today recruits skilled individuals to operate complex equipment to efficiently extract coal,⁴² federal and state governments have introduced new regulations and standards for mining conditions to safeguard miners' health.⁴³

A. State Control and Previous Legislation

While the federal government regulates mine safety through the Mine Safety and Health Administration (MSHA), state governments are permitted to implement more stringent laws, which may not fall below the floor set by federal regulations.⁴⁴ Although states can normally become primary enforcers of federal statutes, they do not possess the power to implement federal mine safety laws and, therefore, must enact and enforce their own safety programs.⁴⁵ The statute at issue in *Emerald Coal* is Pennsylvania's Bituminous Coal Mine Safety Act, which replaced prior mine legislation in 2008.⁴⁶

The previous act, the Bituminous Coal Mine Act of 1961, had its roots in nineteenth century legislation and failed to provide an adequate means for Pennsylvania to address modern mining con-

41. See NIOSH Office of Mine Safety and Health Research Topic: Ventilation, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <http://www.cdc.gov/niosh/mining/topics/topicpage30.htm> (last visited Apr. 6, 2011) (listing hazards faced in underground mining).

42. See *Coal Mining*, WORLD COAL ASS'N, <http://www.worldcoal.org/coal/coal-mining/> (last visited Apr. 6, 2011) (discussing how technological advancements have made coal mining more efficient and increased need for well-trained, highly skilled workers).

43. See *History of Mine Safety & Health Legislation*, *supra* note 5 (noting that Congress passed Mine Improvement and New Emergency Response Act (MINER Act) in 2006). "The MINER Act amended the Mine Act to require mine-specific emergency response plans in underground coal mines." *Id.* It also created new regulations that focused on mine rescue teams and the sealing of abandoned areas, mandated prompt notification when mine accidents occur, and created stronger civil penalties. *Id.*

44. See 30 U.S.C. § 955 (2006) (providing that state laws are not considered to be "in conflict with this chapter").

45. See 40 Pa. Bull. 3836 (July 10, 2010), available at <http://www.pabulletin.com/secure/data/vol40/40-28/1247.html> (stating abilities of state government to implement coal mining safety programs). While states are often able to obtain primary enforcement authority of federal statutes, they do not have authority to enforce the Mine Safety Act. *Id.*

46. *Emerald Coal Res., L.P. v. Commw. Of Pa., Dep't of Envtl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *9 (Pa. Envtl. Hearing Bd. Feb. 24, 2010) (Krancner, J., concurring) (describing signing of Act in July 2008).

cerns.⁴⁷ A major problem with the old law, illustrated by the Quecreek Mine accident in 2002,⁴⁸ was the state's lack of power to fine mining companies and mine operators for violations.⁴⁹ More importantly, under the previous legislation, DEP Acting Secretary John Hanger stated that the DEP lacked authority to write new regulations to correct problems found in the state's mine safety law.⁵⁰

B. Bituminous Coal Mine Safety Act of 2008

As previously discussed, the Act provided the first major update to Pennsylvania's mining law since 1961.⁵¹ Established "to protect the lives, health and safety of those who work at mines in this Commonwealth,"⁵² the Act was the result of five years of work among industry representatives, workers, and the government.⁵³ The final version passed the Pennsylvania General Assembly unanimously.⁵⁴

One of the most important provisions of the Act is section 106, which created the Board of Coal Mine Safety.⁵⁵ Governor Edward Rendell's press release upon signing the Act labeled the Board as the "most significant" part of the Act.⁵⁶ The Act established the Board to provide the means to respond quickly to changes in min-

47. See *Mining Tragedies Spur Analysis in Pennsylvania*, NPR (Jan. 24, 2006), <http://www.npr.org/templates/story/story.php?storyId=5170932> (noting that previous act dealt with regulation of mules in mines and other obsolete issues).

48. See Laura Walker, *Pennsylvania's New Mine Safety Board Holds First Meeting*, EHS TODAY (Jan. 8, 2009), http://ehstoday.com/safety/news/pennsylvania_mine_safety_0108/ (discussing Quecreek Mine incident, where nine Pennsylvania coal miners were trapped underground for three days before being rescued).

49. See *Mining Tragedies Spur Analysis in Pennsylvania*, *supra* note 47 (noting how fines were imposed by federal government, not by state authorities, and that ability to administer fines is part of "critical new legislation").

50. See Walker, *supra* note 48 (identifying that DEP previously lacked authority to create regulations to remedy problems investigators found in state's mine safety law).

51. See Walker, *supra* note 5 (noting legislation is first significant update to state mining laws since 1961).

52. See 52 PA. CONS. STAT. § 690.103(a) (2010) (stating that it is in public interest to establish plan to protect lives, health, and safety of miners in Commonwealth). The Act also declares that the first priority of the bituminous coal mining industry must be the health and safety of those who work at mines. *Id.*

53. *Emerald Coal Res., L.P. v. Commw. Of Pa., Dep't of Env'tl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *9 (Pa. Env'tl. Hearing Bd. Feb. 24, 2010) (Kraner, J., concurring) (citing participation by Pennsylvania Coal Association, United Mine Workers Union, and administration, primarily through DEP).

54. See *id.* at *9 (finding Act had earned backing of mine owners and operators, workers, and administration, and passed Pennsylvania House and Senate by votes of 203 to zero and fifty to zero, respectively).

55. *Id.* at *10 (citing establishment of Mine Safety Board as one of Act's major highlights).

56. See *id.* (highlighting Governor Rendell's remarks that reiterate importance of Board and its power).

ing technology and conditions.⁵⁷ The Board is comprised of seven members representing the DEP, workers, and owners/operators,⁵⁸ and has the authority to write new mine-safety regulations.⁵⁹ The DEP lacked power to write new mining regulations on its own under the previous statute, but the new Act gives the Board the ability to expand the Act at its discretion.⁶⁰

The Act also defines an accident under section 104 as an unanticipated event, including fourteen listed examples.⁶¹ While the Act does not specifically list the events that occurred in *Emerald Coal*, in *McClellan v. Health Maintenance Organization of Pennsylvania*⁶² and *Velocity Express v. Pennsylvania Human Relations Commission*,⁶³ events were deemed reportable accidents if they were of the same general kind, class, or nature as the provided examples.⁶⁴ Further, in *Pennsylvania Human Relations Commission v. Alto-Rest Park Cemetery Ass'n*⁶⁵ and *Readinger v. Workers' Compensation Appeal Board*,⁶⁶ use of the word "including" was held to show intent to expand, rather than limit, the definition.⁶⁷

57. *Id.* at *11 (noting comments by Governor Rendell, Secretary McGinty, and Secretary Hanger that Board will be able to act more quickly than existing regulatory process).

58. See *Emerald Coal Res., L.P. v. Commw. Of Pa., Dep't of Env'tl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *10 (Pa. Env'tl. Hearing Bd. Feb. 24, 2010) (Kraner, J., concurring) (describing balanced membership, consisting of three representatives from workers/unions, three representatives from owners/operators, and one representative from DEP).

59. See 40 Pa. Bull. 3836 (July 10, 2010), available at <http://www.pabulletin.com/secure/data/vol40/40-28/1247.html> (discussing statutory authority pursuant to sections 106, 106.1, and 106.2 to adopt regulations implementing Act, including additional safety standards).

60. *Emerald Coal*, 2010 WL 944146 at *10 (Kraner, J., concurring) (stating that Board has authority to write new mine safety regulations, which DEP was unable to do under prior statute).

61. 52 PA. CONS. STAT. § 690.104 (2010) (noting fourteen defined unanticipated events under Act). For a list of these events, see *supra* note 7.

62. 686 A.2d 801 (Pa. 1996).

63. 853 A.2d 1182 (Pa. Commw. Ct. 2004).

64. See generally *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801, 805 (Pa. 1996) (finding "health care provider" to be potentially broad enough to be construed as same type of event as listed in examples); see also *Velocity Express v. Pa. Human Relations Comm'n*, 853 A.2d 1182, 1186 (Pa. Commw. Ct. 2004) (citing finding in *McClellan* that general expressions preceding specific lists of included items should not be interpreted in their widest context, resulting in exclusion of delivery service providers from specific list of professionals governed by Fair Housing Act).

65. 306 A.2d 881 (Pa. 1973).

66. 855 A.2d 952 (Pa. Commw. Ct. 2006).

67. See *Pa. Human Relations Comm'n v. Alto-Rest Park Cemetery Ass'n*, 306 A.2d 881, 885-86 (Pa. 1973) (finding that term including demonstrates legislative intent for possible expansion rather than restriction of definition); see also *Readinger v. Workers' Comp. Appeal Bd.*, 855 A.2d 952, 954-55 (Pa. Commw. Ct. 2006) (noting same finding as *Alto-Rest* case).

In the event of an accident, section 109(a) of the Act requires mine owners to notify the DEP within fifteen minutes of the occurrence.⁶⁸ Once notified, the DEP may assert its authority granted by section 109(b) to “[t]ake whatever action it deems appropriate, including the issuance of orders, to protect the life, health, or safety of an individual.”⁶⁹ The Act also holds mine owners responsible for safety at their mines, stating that owners or operators “can be held criminally liable” for their actions.⁷⁰

C. Administrative Agencies: Adjudication Versus Rulemaking

Section 501 of the Act permits the DEP to “issue written orders to enforce this act, to effectuate the purposes of this act and to protect the health and safety of miners and individuals in and about mines.”⁷¹ Both the United States Court of Appeals for the Third Circuit, in *Beazer East, Inc. v. United States Environmental Protection Agency (Beazer)*,⁷² and the Supreme Court of Pennsylvania, in *Pennsylvania Human Relations Commission v. Norristown Area School District (Norristown)*,⁷³ have noted that administrative agencies, such as the DEP, traditionally have the option of choosing between adjudication or rulemaking when interpreting statutes and regulations.⁷⁴

In *Beazer*, the defendant was found to have committed four violations in the operation of its coal tar plant in Follansbee, West Virginia.⁷⁵ *Beazer East, Inc.* objected to the Environmental Protection Agency’s (EPA) decision to interpret the words “tanks” and “surface impoundments” through adjudication, but the Third Circuit found the EPA was addressing “interpretive” rules, which interpret language in published regulations, rather than “legislative” rules, which impose new legal duties upon parties and must follow notice

68. See 52 PA. CONS. STAT. § 690.109(a)(1) (2010) (imposing operator’s duty to promptly notify DEP upon occurrence of accident).

69. See *id.* § 690.109(b) (2010) (explaining DEP’s responsibilities upon occurrence of accident).

70. See Walker, *supra* note 5 (noting possibility of criminal liability for mine-owners who violate Act).

71. 52 PA. CONS. STAT. § 690.501(a)(1) (2010) (providing that DEP may issue written orders to enforce Act and protect miners).

72. 963 F.2d 603 (3d Cir. 1992).

73. 374 A.2d 671 (Pa. 1977).

74. See *id.* at 677 (noting that administrative agencies may proceed by rulemaking or adjudication, and nothing in Administrative Agency Law or PHRA prevents Commission from proceeding by adjudication); see also *Beazer East, Inc. v. U.S. Envtl. Prot. Agency, Region III*, 963 F.2d 603, 609 (3d Cir. 1992) (reaching same holding as *Norristown*).

75. See *Beazer*, 963 F.2d at 604 (detailing issuance by EPA of four violations under Resource Conservation and Recovery Act).

and comment procedures.⁷⁶ The EPA, in the Third Circuit's view, therefore did not need to proceed with notice and comment procedures under the Administrative Procedure Act.⁷⁷

In *Norristown*, a school district appealed the result of an adjudication by the Pennsylvania Human Relations Commission (PHRC), claiming that the PHRC had engaged in rulemaking by treating desegregation "guidelines" as regulations that carried the force of law rather than as mere statements of policy.⁷⁸ The Supreme Court of Pennsylvania ruled that the guidelines were statements of policy, and noted that nothing in administrative law or the Pennsylvania Human Relations Act required rulemaking over adjudication.⁷⁹

Although contrary to the normal practice of the Pennsylvania General Assembly, an agency's adjudicatory power can be denied or limited if it is the Assembly's true legislative intent to do so.⁸⁰ In *Department of Environmental Resources v. Butler County Mushroom Farm*,⁸¹ the Department of Environmental Resources (DER) ordered Butler County Mushroom Farm (Butler) to develop a system to identify all persons underground at any time.⁸² Butler appealed the order, claiming the DER lacked authority to issue such an order.⁸³ The Commonwealth Court found the DER had overstepped its delegated authority and was only able to offer instructions for correcting violations.⁸⁴ Subsequently, the Supreme Court of Pennsylvania found that the DER's interpretation placed too much emphasis on "instruction" and thereby turned an enforcement device

76. See *id.* at 604, 606 (finding that interpretive rules and statements of policy are exempted from notice and comment requirement of Administrative Procedure Act).

77. See *id.* at 610 (noting how EPA made reasonable attempt to fill interstices of complex regulatory scheme by giving meaning to language with its authority to define).

78. See *Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 676-77 (Pa. 1977) (arguing that Commission's announcement of guidelines constituted rulemaking and regulations, rather than statements of policy).

79. See *id.* at 676-78 (observing that legislature envisioned adjudicative case-by-case approach to eliminate racial imbalance in public schools).

80. See *Dept. of Env'tl. Res. v. Butler County Mushroom Farm*, 454 A.2d 1, 3 (Pa. 1982) [hereinafter *Butler I*] (noting how Commonwealth Court holding restricted DER's adjudicatory power contrary to normal practice).

81. 454 A.2d 1 (Pa. 1982).

82. See *id.* (issuing order for implementation of check system to identify all persons underground at any time).

83. See *id.* (challenging DER's authority to issue order by filing appeal with EHB).

84. See *Butler Cnty. Mushroom Farm v. Dept. of Env'tl. Res.*, 432 A.2d 1135, 1137 (Pa. Commw. Ct. 1981) [hereinafter *Butler I*] (concluding that DER personnel were merely able to enter work places and issue instructions for correction of violations), *overruled by Butler II*, 454 A.2d 1 (Pa. 1982).

into a non-binding educational tool.⁸⁵ The Pennsylvania Supreme Court held that under sections 12 and 13 of the Pennsylvania General Safety Law Act, the legislature's intention was to give the DER adjudicatory power to issue necessary orders to correct violations.⁸⁶

Adjudication and rulemaking are appropriate in different situations.⁸⁷ In *Norristown*, the Supreme Court of Pennsylvania found that adjudication is best suited for case-specific factual situations involving the implementation of existing requirements.⁸⁸ Conversely, in *Pennsylvania State Board of Pharmacy v. Cohen*,⁸⁹ Pennsylvania's highest court determined that rulemaking is appropriate for creating new rules and provides more advance notice than adjudication.⁹⁰

IV. NARRATIVE ANALYSIS

The EHB denied the DEP's motion for summary judgment in *Emerald Coal*, disagreeing with the DEP's interpretation of the Act.⁹¹ While the EHB agreed in part that accidents are not restricted to the fourteen listed unanticipated events,⁹² it found the manner in

85. See *Butler II*, 454 A.2d at 5 (holding that Commonwealth Court's decision contradicted legislature's intent to provide enforcement device).

86. See *id.* at 4-5 (examining sections 12 and 13 of Pennsylvania General Safety Law Act and noting legislative intent to give broad meaning to word "instructions").

87. See generally *Emerald Coal Res., L.P. v. Commw. Of Pa., Dep't of Env'tl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *4-5 (Pa. Env'tl. Hearing Bd. Feb. 24, 2010) (finding that, while adjudication and rulemaking are not mutually exclusive, adjudication is not best for promulgating new requirements).

88. See *Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 677 (Pa. 1977) (holding adjudication to be appropriate legislature-envisioned case-by-case approach to eliminate racial imbalance in public schools).

89. 292 A.2d 277, 282-83 (Pa. 1972).

90. See *id.* at 282-83 (finding belief that entitlement to evaluate "unprofessional conduct" on case-by-case basis was not based on statute or rule "suffers from constitutional infirmities of vagueness").

91. See *Emerald Coal*, 2010 WL 944146 at *3-4 (noting no dispute of material facts). The EHB also observed that the Cumberland order cites only to "posted procedures," which requires review, whereas Emerald's section 109 order requires notification, investigation, corrective action, and reporting. See *id.*

92. See *id.* (observing that term including is attempt to enlarge rather than limit, and if fourteen accidents were only accidents, there would be no unanticipated events under Act). The EHB found it impossible to list all unanticipated events, noting that accidents are reportable if they are of same general kind, class, or nature as the specifically mentioned examples, but the EHB agreed with the DEP that events at Emerald and Cumberland were of same general kind and nature. *Id.*

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which the DEP attempted to enforce sections 104 and 109 of the Act to be unacceptable.⁹³

A. An Unbridled Creation of New Regulations

The EHB held that the DEP attempted to expand the list of unanticipated events in section 104 by issuing compliance orders, which was inconsistent with the Act's framework.⁹⁴ The EHB considered the provisions of the Act as a whole and held that, for the first time in the history of Pennsylvania mine safety law, the Act established a rulemaking mechanism for expanding upon a statute.⁹⁵ In reading sections 104 and 109 along with 106 and 106.1,⁹⁶ the EHB determined that the legislature established a process for creating new standards and regulations, guaranteeing full participation by all key parties.⁹⁷ Although it is more convenient for the DEP to issue orders, the EHB noted that adjudications deny stakeholders their seat at the table, thus negating the legislature's aim of incorporating all key parties in the process.⁹⁸

Rather than an interpretation of existing regulations, the EHB held that these two orders constituted new regulations, which made uncontrolled cut-throughs and fan stoppages accidents warranting DEP notification.⁹⁹ The EHB considered that the orders would become binding precedent if upheld and, therefore, decided that new regulations shall be established by rulemaking, not adjudication.¹⁰⁰ In his concurrence, Judge Michael Krancer noted that the Board's mission is to revise regulations as needed, thereby rendering the DEP's unilateral writing of recommendations illegal and impermis-

93. *See id.* at *4 (explaining that court cannot support adjudication because unilateral adjudication is inappropriate).

94. *See id.* (finding that, while administrative agency can use rulemaking procedures or adjudications to formulate policy, agency's decision must be consistent with enabling statute's framework).

95. *Id.* (discussing how adjudication avoids legislature's mechanism for "adding flesh to statutory bones" and Act as whole provides for rulemaking when all provisions are given effect).

96. *See Emerald Coal*, 2010 WL 944146 at *5 (detailing creation of Board of Coal Mine Safety). The Board consists of seven members, with six split between owners and workers and one representing the DEP, and is given power and instructions to promulgate regulations as well as safety standards. *Id.*

97. *Id.* at *9 (Krance, J., concurring) (stressing importance of representing all three parties in rulemaking).

98. *Id.* at *5 (noting importance of process and forward-thinking feature of new statute).

99. *Id.* (discussing DEP's attempt to create "across-the-board" rule, which would require notification of DEP within fifteen minutes of accident).

100. *See id.* at *5-6 (holding that when lawmaking requires promulgation of new requirements, rulemaking rather than adjudication should be followed).

sible.¹⁰¹ The EHB took careful notice of the guidance document published by the DEP in 2005 to interpret the previous mine legislation.¹⁰² The guidance document directed that notice was required for two events similar to the Emerald and Cumberland events: ventilation interruptions requiring withdrawal of personnel from the mine and unplanned connections into abandoned working or boreholes.¹⁰³ Those events, however, were not included in the new Act, which instead listed fourteen events and placed a new rulemaking board in charge of filling in the needed details.¹⁰⁴

Realizing that orders can bring serious consequences, including criminal liability, the EHB found it unfair to impose penalties on mine operators for failing to give notice of unanticipated events that are not described with any specificity in statutes or regulations.¹⁰⁵ The EHB found this practice would be an attempt at ad hoc promulgation, more appropriately handled via the Board's rulemaking process.¹⁰⁶ Further, the EHB disagreed with the DEP's contention that the orders were necessary for the health and safety of miners, citing several other provisions of the Act which could be relied upon in the event of hazardous conditions.¹⁰⁷ Concluding that sections 104 and 109 did not support the DEP's issuance of orders to Emerald and Cumberland, the EHB denied the DEP's motion for summary judgment.¹⁰⁸

B. Judge Mather's Defense of Adjudication

Judge Richard Mather dissented in part from the majority, explaining that the DEP is not required by the Act to operate under

101. *Emerald Coal*, 2010 WL 944146 at *10 (citing Governor's office statement that "Board [of Coal Mine Safety] will have the authority to write new mine safety regulations-something the department is unable to do through the existing statute.").

102. *See id.* at *6 (noting DEP's issuance of guidance document).

103. *Id.* (discussing how legislature could have elected to expand definition of term accident under new Act but chose not to do so). The two events omitted were ventilation interruptions requiring withdrawal of personnel from the entire mine and unplanned connections into abandoned working or boreholes. *Id.*

104. *See id.* (finding that legislature added phrase "an unanticipated event, including . . ." to add some flexibility to statute).

105. *See id.* at *6-7 (observing that DEP's brief cites need to add "gloss" to statute so only events that have already caused or reasonably could pose threat to safety should be covered by term accident).

106. *See Emerald Coal*, 2010 WL 944146 at *7 (describing purpose of Board of Mine Safety).

107. *See id.* (noting that DEP is able to monitor safe ventilation under section 690.211, equipment condition under section 690.201(2), duties of mine foreman under section 690.212(a), and work requirements under section 690.201(1)).

108. *See id.* at *8 (denying DEP's motions for summary judgment).

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the Board's authority to issue orders.¹⁰⁹ The DEP on its own, Judge Mather noted, had authority under the Act to examine unanticipated events on a case-by-case basis by issuing orders.¹¹⁰ While he agreed with the majority that the list of unanticipated events is non-exhaustive,¹¹¹ he saw no reason to require rulemaking instead of adjudication simply because such a procedure exists.¹¹² Judge Mather emphasized that "it is a basic tenet of administrative law that agencies have some discretion to choose between adjudication and rulemaking when interpreting statutes and regulations committed to their authority."¹¹³

Further, the dissent noted that sections 501(a)(1) and 109(b)(1) of the Act give the DEP broad authority and discretion to respond to accidents, including the express authority to issue an order in connection with accidents.¹¹⁴ As the Act's main goal is to "protect the life, health or safety of an individual," Judge Mather determined that the DEP was improperly stripped of its authority when the majority held that it could not issue orders identifying unanticipated events that qualify as accidents.¹¹⁵ Nevertheless, Judge Mather concurred that the DEP had not met its burden for summary judgment.¹¹⁶

109. *See id.* at *12 (Mather, J., concurring in part and dissenting in part) (finding as matter of law that DEP must act with Board's backing).

110. *Id.* at *12, *16-17 (finding that DEP can "give meaning to and identify additional unanticipated events at a mine that meet the statutory definition of 'accident' on a case-by-case basis by issuing an order.").

111. *Emerald Coal*, 2010 WL 944146 at *13 (stating that term including indicates additional events may be added).

112. *See id.* at *14 (explaining well-settled matter of law that administrative agency may establish binding policy through rulemaking or adjudications, and that nothing requires rulemaking over adjudication without statutory prohibition).

113. *See id.* at *16 (noting that nothing in Act prevents DEP from issuing orders); *see also id.* at *13 (quoting *Beazer East, Inc. v. United States Environmental Protection Agency*, 963 F.2d 603, 609 (3d Cir. 1992)) (holding that section 106.1 does not provide exclusive means for DEP to implement provisions under section 109 of Act).

114. *See id.* at *13 (detailing provisions of section 109(b)(1)); *see also id.* at *16 (describing provisions of section 501(a)(1)).

115. *See id.* at *13-15 (explaining Judge Mather's several objections to majority's ruling).

116. *See Emerald Coal*, 2010 WL 944146 at *17 (concurring with majority's decision to deny motion for summary judgment).

V. CRITICAL ANALYSIS

In determining that the DEP failed to meet its burden for summary judgment,¹¹⁷ the EHB ruled that the DEP exceeded its authority to enforce the Act by issuing orders to Emerald and Cumberland.¹¹⁸ Despite finding the events at the Emerald and Cumberland mines to be of the same general nature as the events listed in the Act, the EHB attempted to adhere to the letter of the law by focusing on the Act's new rulemaking procedure.¹¹⁹ By doing so, the EHB questioned when it is appropriate for the DEP to issue orders under the Act.¹²⁰ This ruling curtailed the DEP's ability to regulate mine safety and diluted the Act's primary purpose of protecting the health and safety of mine workers by striking down orders issued in the workers' interest.¹²¹

A. Expansion Versus Interpretation

The EHB found the DEP's orders to be a legislative expansion, rather than an interpretation of an existing statute.¹²² In *Beazer*, the court documented the distinction between legislative rules and interpretive rules.¹²³ Legislative rules impose new legal duties upon parties and must follow notice and comment procedures, whereas interpretive rules interpret language in published regulations.¹²⁴ The EHB held that the DEP was prohibited from developing its in-

117. *Id.* at *8 (concluding that sections 104 and 109 do not support DEP's issuance of orders to Emerald and Cumberland and denying DEP's motion for summary judgment).

118. For a discussion of how the DEP exceeded its authority, see *infra* notes 122-34 and accompanying text.

119. *Emerald Coal Res., L.P. v. Commw. Of Pa., Dep't of Envtl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *4 (Pa. Envtl. Hearing Bd. Feb. 24, 2010) (noting that events at mines were of same general kind as listed events in section 104, but Act provides for rulemaking for first time in history of Pennsylvania mine safety law).

120. See 52 PA. CONS. STAT. § 690.109(b)(1) (2010) (providing that DEP shall "take whatever action it deems appropriate, including the issuance of orders, to protect the life, health or safety of an individual"); see also *id.* § 690.501(a)(1) (stating that DEP "may issue written orders to enforce this act, to effectuate the purposes of this act and to protect the health and safety of miners and individuals in and about mines.").

121. See *id.* § 690.103(a)(1) (expressing that first priority must be health and safety of persons working in and about mines).

122. See *Emerald Coal*, 2010 WL 944146 at *4 (finding that DEP had attempted to expand list in section 104 by issuing compliance orders).

123. See *id.* at *15 (Mather, J., concurring in part and dissenting in part) (noting longstanding reliance by Pennsylvania courts on federal reasoning in this area of law).

124. For a discussion of the difference between legislative and interpretive rules, see *supra* notes 71-90 and accompanying text.

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terpretation of accidents through adjudication because doing so would expand the statute.¹²⁵

The orders issued by the DEP, however, bear more resemblance to interpretation of the existing statutory language of unanticipated events than to a new promulgation.¹²⁶ Consistent with statutory construction, the majority found that the word “including,” as used in the Act, intended expansion rather than a final determination.¹²⁷ The EHB also determined that the events at Emerald and Cumberland appeared to be of the same general kind and nature as the fourteen listed events.¹²⁸ Though these rulings appear to affirm the DEP’s interpretation of the Act’s language in sections 104 and 109, the majority reversed course, holding that the DEP’s action was an attempt to create a rule establishing cut-through errors and fan stoppages as accidents.¹²⁹ This judgment significantly limits any alteration of the list in section 104, funneling all the discretion and flexibility intended by the legislature into the hands of the Board alone.¹³⁰

The EHB determined that the Act calls for rulemaking, highlighting the Act’s language directing the Board to develop “[a]dditional regulations with respect to mine safety if the Board determines that existing Federal and State regulations do not adequately address a specific hazard.”¹³¹ By placing an emphasis on rulemaking, the EHB effectively precludes any expansion to the list of accidents through interpretation.¹³² This approach allows the DEP to issue orders to enforce the Act, yet lessens the significance of this power by holding that all interpretation of regulations shall

125. See *Emerald Coal*, 2010 WL 944146 at *15 (holding that uniqueness of situation and interpretation of existing language permitted EPA to develop its interpretation of “tanks” and “surface impoundments” through adjudication).

126. See *id.* at *13 (explaining how orders that interpret or give meaning to unanticipated events language fit within general grant of authority to protect life, health, or safety of individuals).

127. *Id.* at *3 (basing support for expansion of term including upon impossibility of listing every event).

128. *Id.* at *4 (agreeing with DEP that events at Emerald and Cumberland were of same general kind and nature as fourteen events specifically mentioned in section 104).

129. *Id.* at *4 (holding that DEP attempted to expand list in section 104 by issuing compliance orders).

130. *Emerald Coal*, 2010 WL 944146 at *3 (finding it impossible to list every unanticipated event that might qualify as accident and determining that legislature intended some flexibility in defining boundaries and limits of accidents).

131. 52 PA. CONS. STAT. § 690.106(a)(2) (2010) (acknowledging Board’s ability to pass additional regulations).

132. See *Emerald Coal*, 2010 WL 944146 at *4 (deeming DEP’s issuance of orders to be attempt at making law).

be the Board's exclusive domain.¹³³ Although this concept is consistent with the Act's call for rulemaking to ensure representation of all views, it elevates interpretation to the level of promulgation.¹³⁴

While not wholly indicative of intent, the Act's legislative history supports the EHB's ruling because ventilation interruptions and cut-throughs were excluded in section 104 despite being included as accidents in past guidance documents.¹³⁵ Furthermore, the EHB felt it would be unfair to penalize Emerald and Cumberland for events that were not specifically described in the Act or any regulation,¹³⁶ even though Emerald and Cumberland both conceded these events posed possible threats to miners' safety.¹³⁷ Neither Emerald nor Cumberland argued that the events were ordinary occurrences; both conceded that the events were unusual and unanticipated.¹³⁸ The EHB acknowledged that rulemaking is the best means for forming new, generally applicable rules because of the advanced notice it provides, while adjudication is suited for case-by-case implementation of existing requirements.¹³⁹ The EHB vaguely alluded to the potential for the DEP to issue future orders for violations in "unique circumstances," but did not specify when such an order would be appropriate.¹⁴⁰

B. Weakening the Purpose of the Act

The Act's priority is to ensure the health and safety of all persons who work at mines.¹⁴¹ When the Pennsylvania Bituminous

133. *See id.* (holding that legislature created Board to "add flesh to statutory bones").

134. *See id.* at *10 (Kraner, J., concurring) (finding membership of Board was "serious bone of contention" during creation of Act, resolved by establishing balanced membership of owner/operators and workers).

135. *See id.* at *6 (detailing how DEP's guidance for ventilation and boreholes in prior law was excluded from list of accidents in section 104 of Act).

136. *Id.* (holding that citation of operators for events not specifically described in statutes or regulations is fundamentally unfair).

137. *See Emerald Coal*, 2010 WL 944146 at *1 (discussing how Emerald and Cumberland were not anticipating air connection during cut-through or fan stoppages and evacuation).

138. *Id.* (explaining that Emerald and Cumberland did not dispute that events posed potential threat to health and safety of miners).

139. For a discussion of the difference between legislative and interpretive rules, see *supra* notes 71-90 and accompanying text.

140. *See Emerald Coal*, 2010 WL 944146 at *5 (declaring that EHB's intention is not to completely "foreclose the possibility that unique circumstances in some future case may justify the issuance of an order requiring notification of an accident for an incident not clearly spelled out in [s]ection 104.>").

141. 52 PA. CONS. STAT. § 690.103(a)(1) (2010) (asserting that "first priority and concern of all" must be health and safety of mine workers).

Coal Mine Act of 1961 became outdated,¹⁴² the new Act was implemented to allow the “full extent of the Commonwealth’s powers to protect the lives, health and safety of miners and others in and about underground bituminous coal mines.”¹⁴³ Consistent with this goal, the DEP was given the authority to “[t]ake whatever action it deems appropriate, including the issuance of orders, to protect the life, health or safety of an individual.”¹⁴⁴ Additionally, the DEP has the power to “issue written orders to enforce this Act, to effectuate the purposes of this Act and to protect the health and safety of miners and individuals in and about mines.”¹⁴⁵

The EHB, however, placed more emphasis on rulemaking than on the DEP’s power to protect miners, essentially stripping the DEP of its ability to issue orders for events outside those explicitly listed in section 104.¹⁴⁶ The EHB found that, while the DEP may take action to ensure safety, it must do so in a manner consistent with the Act’s enabling framework.¹⁴⁷ Somewhat contradictorily, the EHB affirmed that the DEP may proceed by adjudication or rulemaking as long as not otherwise stipulated,¹⁴⁸ but also found that under section 106(a), the privilege of adjudication had been denied and a rulemaking procedure was required.¹⁴⁹

Coupled with the governor’s signing statement declaring that the DEP previously lacked authority to write regulations to correct

142. *Id.* § 690.103(a)(4) (noting that previous act is outdated and lacks effective means to modify existing standards or adopt new standards).

143. *Id.* § 690.103(b)(1) (explaining that Act’s purpose is to use full extent of state’s powers to ensure safety).

144. *Id.* § 690.109(b)(1) (giving DEP power to take whatever action it deems will protect health and safety of miners).

145. *Id.* § 690.501(a)(1) (providing that DEP may issue orders to enforce purpose of Act); *see also id.* § 690.105(a)(3)-(4) (listing powers given to DEP, including issuing orders and instituting procedures to implement provisions and effectuate purpose of Act).

146. *See Emerald Coal Res., L.P. v. Commw. Of Pa. Dep’t of Env’tl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *4 (Pa. Env’tl. Hearing Bd. Feb. 24, 2010) (holding that rulemaking procedure must be followed and DEP’s expansion of section 104 was unauthorized attempt to make law by adjudication).

147. *See id.* (explaining that choice of either adjudication or rulemaking must be “reasoned, fair, and consistent with enabling statute’s framework”).

148. *See id.* (noting that administrative agencies may use adjudication and rulemaking to formulate policy with force of law); *see also Pa. Human Relations Comm’n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 677 (Pa. 1977) (describing how administrative agency law envisions that administrative agencies may proceed by rulemaking or adjudication).

149. *See* 52 PA. CONS. STAT. § 690.106(a)(2) (2010) (providing that Board shall establish additional regulations with respect to mine safety if it finds existing federal and state regulations inadequate); *see also id.* § 690.103(b)(3) (calling for establishment of rulemaking process to expeditiously update mandatory health and safety standards).

problems with existing mine safety law, the EHB found that the Board had been given new power to promulgate rules.¹⁵⁰ The EHB viewed the DEP's issuance of orders as an unauthorized revision and an attempt to usurp power now granted to the Board under the Act.¹⁵¹ Despite charging the DEP with the duty to "take whatever action it deems appropriate," out of fear of being unfair to mine owners, the EHB diminished the force of the Act by limiting the DEP's authority to issuing orders on the Act's unambiguously defined provisions.¹⁵² While sections 109 and 501 seemingly grant full authority to the DEP, the EHB determined that sections 103 and 106 mandate rulemaking; this interpretation makes the Act unclear and allows procedural safeguards to stand in the way of the foremost goal of protecting lives.¹⁵³

VI. IMPACT

The immediate result of the EHB's decision in *Emerald Coal* was that Emerald and Cumberland were relieved from implementing the DEP's recommendations from its orders.¹⁵⁴ Additionally, both mining companies escaped criminal liability for failing to report their violations.¹⁵⁵ Beyond these immediate effects, the decision is likely to have broader significance because it delineates the DEP's powers under the Act, sheds light on administrative agencies' abilities, and could couple with recent events in the mining industry to foster a forceful call for improved safety.¹⁵⁶

150. See *Emerald Coal*, 2010 WL 944146 at *10 (Kraner, J., concurring) (citing Governor's signing statement declaring that Board will have power to write new safety regulations, which DEP was unable to do under previous act); see also *id.* at *4 (noting that legislature established Board as mechanism to add substance to Act's provisions).

151. See *id.* at *5 (describing how DEP attempted to create across-the-board rule that would have force of stare decisis and turn Board into "paper tiger" if affirmed); see also *id.* at *11 (Kraner, J., concurring) (declaring orders to be "power grab" of "bait and switch, double-cross type" that is illegal and must be forbidden).

152. For a discussion of the primary purpose of the Act, see *supra* notes 141-45 and accompanying text; see also *Emerald Coal*, 2010 WL 944146 at *6 (asserting that citation for events not specifically defined in statute or regulations is "fundamentally unfair").

153. See 52 PA. CONS. STAT. § 690.103(a)(1) (2010) (expressing that most pressing public interest and first priority of Act is protecting miners' health and safety).

154. See *Emerald Coal*, 2010 WL 944146 at *1-2 (listing violations and corrective actions DEP ordered Emerald and Cumberland to take).

155. See *id.* at *6 (noting that criminal liability may follow issuance of orders, and failure to notify DEP constitutes second degree felony under § 690.505).

156. For a discussion of the importance of the EHB's decision, see *infra* notes 157-84 and accompanying text.

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A. The Board Reigns Supreme: Restrictions on the DEP and Administrative Agencies

The EHB's ruling granted great power to the Board, proclaiming that the Board has authority to decide what constitutes an interpretation and what amounts to an expansion of a regulation.¹⁵⁷ Moreover, the EHB gave the Board authority over the DEP to determine how the Act will be implemented, subjecting the DEP's actions to the final say of the Board.¹⁵⁸ The EHB did not identify situations in which the DEP would be permitted to issue orders for undefined circumstances, effectively curtailing the DEP's authority.¹⁵⁹ The holding that the Board's reading of the Act supersedes the DEP's interpretation establishes strong precedent for the Board's authority.¹⁶⁰

While the EHB stated that it did not intend to completely foreclose future issuance of orders that are not "spelled out," DEP orders interpreting or expanding the Act are likely to be challenged and overturned.¹⁶¹ Additionally, if the DEP views the *Emerald Coal* decision as a prohibition against identifying unlisted circumstances as unusual enough to warrant an order, it may be less likely to issue such orders in the future and instead err on the side of not risking being overturned.¹⁶² While the DEP's mandates that lack express statutory support are on shaky ground, so too are DEP adjudications in other situations where rulemaking is on the table.¹⁶³ Going forward, the DEP will need to cite the statutory provision on which

157. See *Emerald Coal*, 2010 WL 944146 at *4 (holding that legislature envisioned Board as means to expand upon statutory provisions).

158. See *id.* at *5 (finding that DEP was impermissibly attempting to create across-the-board rule through orders to Emerald and Cumberland, and that upholding orders would create binding, industry-wide rule).

159. See *id.* (relating intention not to completely "foreclose the possibility that unique circumstances in some future case may justify the issuance of an order requiring notification of an accident for an incident not clearly spelled out in [s]ection 104.").

160. See *id.* at *7 (finding that employing Board's deliberative standard-making expertise is better policy than making up law on ad hoc basis).

161. For an examination of limitations on DEP's power, see *supra* notes 121-40 and accompanying text.

162. See *Emerald Coal*, 2010 WL 944146 at *15 (Mather, J., concurring in part and dissenting in part) (describing how holding deprives DEP of authority to issue orders identifying unanticipated events that occur at mines and qualify as accidents).

163. *Id.* at *4 (asserting that DEP's choice to proceed by adjudication or rulemaking must be "reasoned, fair and consistent with the enabling statute's framework").

it relies and document such authority to adjudicate when issuing an order in connection with the Act.¹⁶⁴

The decision in *Emerald Coal* speaks to situations beyond DEP and Board interactions; it demonstrates a significant limitation on an administrative agency.¹⁶⁵ While agencies can generally create law through either promulgation or adjudication,¹⁶⁶ an agency's use of its discretionary powers should conform to legislative intent.¹⁶⁷ When an act specifically calls for rulemaking, the legislature's intent for a prescribed procedure is more than just a suggestion.¹⁶⁸ By instituting a specific rulemaking mechanism, as the Pennsylvania General Assembly did in order to guarantee the input of interested parties, the legislature can limit an agency's ability to act on its own authority.¹⁶⁹

When an agency makes a decision that applies to parties beyond particular litigants, rulemaking procedures are generally a more fitting choice.¹⁷⁰ As adjudication and rulemaking are suited for different purposes, the legislature can pass statutory provisions to restrict administrative agencies' powers and ensure that the legislature's intent is carried out.¹⁷¹ As long as it is the legislature's true intent to limit agency discretion, its statutes should override the power of an administrative agency.¹⁷² Future litigants challenging administrative agencies' actions when a rulemaking procedure ex-

164. *See id.* at *6 (observing that legislature did not list events by which DEP attempted to issue violations).

165. For a discussion of administrative agencies' lawmaking powers, see *infra* notes 166-73 and accompanying text.

166. *See Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.*, 374 A.2d 671, 677 (Pa. 1977) (holding that administrative agencies may proceed by either rulemaking or adjudication).

167. *See R & R Mktg., L.L.C. v. Brown-Forman Corp.*, 729 A.2d 1, 4 (N.J. 1999) (stating that administrative agency's decision may not violate express or implied legislative policies).

168. *Emerald Coal*, 2010 WL 944146 at *4 (noting that Act provides for rulemaking for first time in history of Pennsylvania mine safety law).

169. *See id.* at *11 (Krancer, J., concurring) (finding that, in face of legislature's actions, DEP's decision to act unilaterally and write regulations was illegal).

170. *In re Sheriff's Officer (PC2209J) and Sheriff's Officer Sergeant (PC2215J), Gloucester County*, 543 A.2d 462, 464 (N.J. Super. Ct. App. Div. 1988) (stating that rulemaking procedures are implicated when subject matter of agency determination concerns matters beyond individual litigants and involves general administrative policies).

171. For a discussion of adjudication and rulemaking, see *supra* notes 71-90 and accompanying text.

172. For a discussion of legislative intent, see *supra* notes 80-86 and accompanying text.

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ists could point to the EHB's decision in *Emerald Coal* as an example of a restriction on agency adjudicative power.¹⁷³

B. Potential Outcry for Effective Safety Measures

In the wake of the disaster at the Copiapo Mine in Chile, the EHB's decision to hold the Act's rulemaking procedure above its substantive call for safety may be unpopular.¹⁷⁴ Safety is of the utmost importance in mining; mining companies often tout their excellence in safety, and Alpha Natural Resources LLC (Alpha), the parent company of both Emerald and Cumberland, is no exception.¹⁷⁵ Alpha maintains a "Running Right Safety Process," under which all employees are expected to identify hazards and initiate corrective actions.¹⁷⁶ In addition, many of Alpha's mining operations have won safety awards in recent years.¹⁷⁷

Despite this safety awareness, the Emerald and Cumberland mines only mustered awards for participation in a mine rescue competition in 2010.¹⁷⁸ Both were also included in a "blitz" of inspections by the MSHA following the Upper Big Branch disaster, an effort which targeted fifty-seven mines with histories of significant and/or repeat violations.¹⁷⁹ While Alpha is striving to improve its safety, Emerald, Cumberland, and Alpha subsidiary AMFIRE Min-

173. See *Emerald Coal*, 2010 WL 944146 at *5 (refusing to allow DEP's unilateral action in face of call for rulemaking to become binding precedent).

174. See Victor Herrero, *All 33 Miners Rescued from Chile Mine*, USA TODAY, Oct. 14, 2010, http://www.usatoday.com/news/world/2010-10-12-Chile-miners_N.htm (detailing rescue at Chilean copper mine, where thirty-three miners were trapped underground for sixty-eight days).

175. See Press Release, Mine Safety & Health Admin., MSHA Launches Inspection Blitz in Nation's Coalfields (Apr. 21, 2010), available at <http://www.msha.gov/Media/PRESS/2010/NR100421.asp> (listing mines targeted by MSHA for emergency inspections in wake of Upper Big Branch explosion and noting that Emerald and Cumberland mines are owned by Alpha Natural Resources LLC).

176. See *Running Right Safety Process*, ALPHA NAT. RESOURCES, <http://www.alphanr.com/safety/process/Pages/default.aspx> (last visited Apr. 6, 2011) (describing how reporting is anonymous, allowing hazards to be confronted and dealt with immediately).

177. See *Safety Awards*, ALPHA NAT. RESOURCES, <http://www.alphanr.com/safety/awards/Pages/default.aspx> (last visited Apr. 6, 2011) (detailing safety awards won by Alpha-owned mines in 2008 and 2009).

178. See *Two Alpha Natural Resources Affiliates Win Nationwide Mine Rescue Competition*, CNN MONEY (Oct. 8, 2010), <http://money.cnn.com/news/newsfeeds/articles/prnewswire/CG79049.htm> (noting that Emerald won Division 2 First Aid Competition and Cumberland placed second in Division 2 Mine Rescue Skills Competition).

179. See Press Release, *supra* note 175 (listing Emerald and Cumberland as only two mines operated by Alpha subjected to inspections focusing on safety standards concerning methane, mine ventilation, and rock dusting, all of which can cause mine accidents).

ing Co. had 740 accidents from 2005 to 2008, with overexertion, falling, and being struck by an object constituting the three most common causes of injury.¹⁸⁰

At a time when mine safety has captured the attention of both national and global audiences, the EHB chose to place its focus on the Board's function.¹⁸¹ Even though the Act, unlike its predecessor, includes the word "safety" in its title, the EHB adhered to the legislative process outlined in the Act and prohibited the DEP from making independent rulings to protect miners.¹⁸² Against Judge Mather's wishes, the EHB stripped the DEP of its ability to do everything necessary to ensure miners' safety by restricting the DEP from issuing orders for events outside those explicitly listed in section 104.¹⁸³ As a result, the EHB recast the intent of the Act; rather than a bastion of protection for the health and safety of miners, the EHB deemed the Act a safeguard of a more balanced legislative approach to promulgating mine safety regulations.¹⁸⁴

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180. See Anya Litvak, *Accidents and Deaths at Pennsylvania Mines*, PITTSBURGH BUS. TIMES, Apr. 30, 2010, http://bizjournals.com/pittsburgh/datacenter/accidents_and_deaths_at_pennsylvania_mines.html?appSession=12781575482696 (offering total reported accidents at Alpha from 2005 to 2008, noting most common causes of injury, and citing finger and back as most commonly injured areas).

181. *Emerald Coal Res., L.P. v. Commw. of Pa., Dep't of Env'tl. Prot.*, No. 2009-023-L, 2010 WL 944146, at *4 (Pa. Env'tl. Hearing Bd. Feb. 24, 2010) (observing that Act provides for rulemaking for first time in history of Pennsylvania mine safety law).

182. See *id.* at *10-11 (highlighting remarks by Governor Rendell, Secretary McGinty, and Secretary Hanger detailing how Act and Board will improve efficiency and accountability in rulemaking and enforcement process).

183. For a list of the powers given to the DEP under the Act, see *supra* notes 140-45 and accompanying text.

184. See *Emerald Coal*, 2010 WL 944146 at *15 (acknowledging that ruling deprives DEP of authority to issue orders identifying unanticipated events at mines which qualify as accidents). For an examination of the importance of the rulemaking process, see *supra* notes 122-40 and accompanying text.

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