

November 17, 2005

In The Matter of
Acme Brick Company

PETITION FOR MODIFICATION
Docket No. M-2004-003-M

| <u>Mine I.D.</u> | <u>Mine</u> | <u>State</u> |
|------------------|----------------------------------|--------------|
| 0300132 | Malvern Mining | AR |
| 4100368 | Denton Pits | TX |
| 4103361 | Chew Mine | TX |
| 1600391 | James Town Pit (abandoned) | LA |
| 4100264 | Standard Pit | TX |
| 4100243 | Bennett Plant | TX |
| 4100241 | Mc Queeney Pits & Plant | TX |
| 4100244 | Bridgeport Plant (abandoned) | TX |
| 3400108 | Tulsa Plant Pit #665 | OK |
| 4100305 | AWC,JEN,RSP,FRK, MLC,HLP Pits | TX |
| 4100242 | Garrison Pit & Plant | TX |
| 3400110 | Edmond Pit & Plant | OK |

PROPOSED ORDER OF DISMISSAL

On February 17, 2004, Acme Brick Company filed a petition for modification of 30 CFR §56.9300(a), Berms or Guardrails, at twelve of petitioner's mines located in Texas, Oklahoma, Louisiana, and Arkansas. These mines produce clay and shale for the production of bricks used commercially and in the housing industry.

The relevant standard, 30 CFR § 56.9300 Berms or guardrails, provides in part:

- (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
- (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.
- (c) Berms may have openings to the extent necessary for roadway drainage.

The petitioner's mining of the clay and shale utilizes scrapers and trucks hauling mined clay and shale to create stockpiles. This process also utilizes motor graders or dozers to level off the stockpiles as scrapers and trucks dump their loads to raise the height of the piles.

On May 8, 2003, an MSHA inspector noticed that the clay stockpile at the Edmond Pit and Plant Mine (I.D. No., 34-00110) was not bermed on the outer edges. The MSHA inspector issued a citation under 30 CFR § 56.9300(a) for berms not being provided on

the stockpile. The Petitioner filed this petition as a result of that citation alleging that strict application of the standard's berming requirement to the stockpile would create a hazard by preventing moisture from draining off the clay stockpiles. Petitioner also asserts that wet clay sticks to tires, causing vehicles to skid uncontrollably, especially when brakes are applied. The Petitioner alleges that the alternative method proposed in the petition will at all times guarantee no less than the same measure of protection afforded by the standard. The Petitioner proposes a manner of stockpiling that would not require the berming of stockpiles at the petitioned mines when scrapers, haul trucks and/or motor graders maintain a distance of thirteen feet from the edge of the stockpile. The Petitioner's request did not apply to the elevated ramp or road leading to the stockpile.

MSHA investigators investigated the relevant merits of the petition and filed a report of their findings with the Administrator for Metal and Nonmetal Mine Safety and Health. After a careful review of the entire record, including the petition and MSHA's investigative report, this Proposed Decision and Order is issued.

Findings of Fact and Conclusions of Law

The haulage and dumping activities described at the locations in the petition for modification are not activities subject to 30 CFR § 56.9300. The petitioned standard only applies to roadways and not to the tops of stockpiles where the petitioner's loads are being dumped. The Acme Brick facilities that are subject to this petition are dumping locations for clay and shale and, thus, covered by § 56.9301. Therefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for Metal and Nonmetal Mine Safety and Health, Acme Brick Company's Petition for Modification of 30 CFR 56.9300(a) as it applies to installing berms at the edges of the clay and shale stockpiles of the above listed mines is dismissed.

Order

Therefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator, and pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 811(c), Acme Brick Company's petition for modification of 30 CFR §56.9300 to the above listed mines, is hereby **DISMISSED**.

/s/ Felix Quintana

Felix Quintana
Acting Administrator for
Metal and Nonmetal Mine Safety and Health