

**KENTUCKY PROFESSIONAL
ENGINEERS IN MINING
2015 SEMINAR**

MSHA LITIGATION UPDATE

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RWKKT

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A topographic map with contour lines and various labels like 'ROAD', 'SULLIVAN 650', and '700'.

MINE PLANS

STRICT LIABILITY

FLAGRANT VIOLATIONS

THE MINING INDUSTRY

MSHA PLAN APPROVALS



A topographic map with contour lines and various labels. The map is light gray and serves as a background for the text. Labels include 'SULLIVAN 650', 'L.AVE', '700', and '757'.

DISAGREEMENTS

**DIFFERENT
INTERPRETATIONS**

A topographic map with contour lines and various labels like 'BM', '700', '650', and 'L.AVE'.

RESOLUTIONS

THE “FRIENDLY CITATION”

TECHNICAL “FRIENDLY” CITATION

MSHA’s Program Policy Manual

- Operator notifies MSHA that it adopts a change
- MSHA issues a §104(a) citation
- Operator goes back to original plan to prevent shutdown
- Parties go to litigation
- Company’s argument is that plan was as good or better than MSHA proposal

A topographic map with contour lines, roads, and various labels like 'ROAD', 'SULLIVAN 650', 'LANE', and '700'.

***MACH MINING, LLC v.
SECRETARY***

MACH MINING, LLC v. SECRETARY

- Standard was NOT whether plan was “as good or better” than MSHA proposal
- Burden of proof: District Manager was not arbitrary and capricious
- Evidence not presented to District Manager was refused

PRAIRIE STATE GENERATING COMPANY LLC

- D.C. Circuit said Secretary “always retains final responsibility for deciding what has to be included in the plan”
- Only relevant information is what is presented to District Manager in the plan-development process
- District Manager has discretion to say whether or how plans get approved
- All evidence must be given to the District Manager or it will be excluded if case goes to trial
- District Manager must be proven to be arbitrary and capricious when a plan decision is being challenged

A topographic map with contour lines and various labels. The map is light gray and serves as a background for the text. Labels include 'ROAD', 'SULLIVAN 650', 'LANE', '700', '1262', and '757'.

STRICT LIABILITY

SECRETARY OF LABOR v. DRUMMOND COMPANY, INC

REFUGE ALTERNATIVES

- Other components later required to be installed
- National deadline for compliance was December 31, 2013
- Drummond had ordered components from chamber manufacturer, MineArc
- Drummond then ordered component from Industrial Scientific Corporation, purchase order dated November 20, 2013—delivery date set for December 27, 2013—3 days prior to deadline
- Distributor, United Central missed the deadline and part was delivered January 16, 2014
- For years, MSHA allowed proof of purchase orders for the entire units, themselves
- Inspector went to mine to write citations, regardless
- Drummond had produced a purchase order for the components just like it had for the unit per the previous directive
- The citation was issued

SECRETARY OF LABOR v. DRUMMOND COMPANY, INC

- Judge McCarthy relied on 1973 case, *Buffalo Mining*, that a valid defense is impossibility of compliance due to “unavailability of equipment, materials or qualified technicians.”
- Judge McCarthy relied on 2003 case, *Jim Walters*, that “It is not accurate to state...that an operator is always liable for violative conditions, there are exceptions, impossibility of compliance being one.”
- Ruling issued from the bench vacating the citation

A topographic map with contour lines and various labels like 'ROAD', 'LANE', and '700'.

Flagrant

Oak Grove Resources v. MSHA

This is NOT a decision,
but an Intermediate Order

June 2014 ruling deleted the “flagrant” designation

A topographic map with contour lines and various labels like 'ROAD', 'SLUICED', 'LAKE', and '700'.

Oak Grove Resources v. MSHA

Accumulations of
combustible material

Unwarrantable failure

\$146,400

Judge Feldman

MSHA had repeatedly changed interpretation

Vague and inconsistent criteria

Secretary was departing “from his prior position that a flagrant violation requires a likelihood of injury of at least a permanently disabling nature, now arguing that most lost workday injuries are sufficient to support a flagrant violation.”

Judge Feldman

“Unreasonable ... Congress intended that it is only the most blatant and egregious violations that can be cited under Section 110(b)(2)”

A topographic map with contour lines and various labels like 'ROAD', 'SULLIVAN 650', and 'LANE'.

Flagrant:

“Continuously bad, offensive, or reprehensible
nature...
with respect to its
significant risk of causing death
or serious bodily injury.”

Flagrant Violations

Repeated failure to
eliminate the violation
properly designated as flagrant

or

A relevant history of violations
that also meet the requirements
with respect to
knowledge, causation and gravity

Flagrant Violations

Known violation that is conspicuously dangerous

Substantial and proximate cause of death or serious injury that has occurred or can reasonably be expected to occur

A topographic map with contour lines and labels like 'ROAD', 'SULLIVAN 650', and 'LANE'.

The Secretary Must:

State why condition was so conspicuously bad and hazardous that it could not reasonably escape notice

Include ignition sources and any relevant aggravating factors

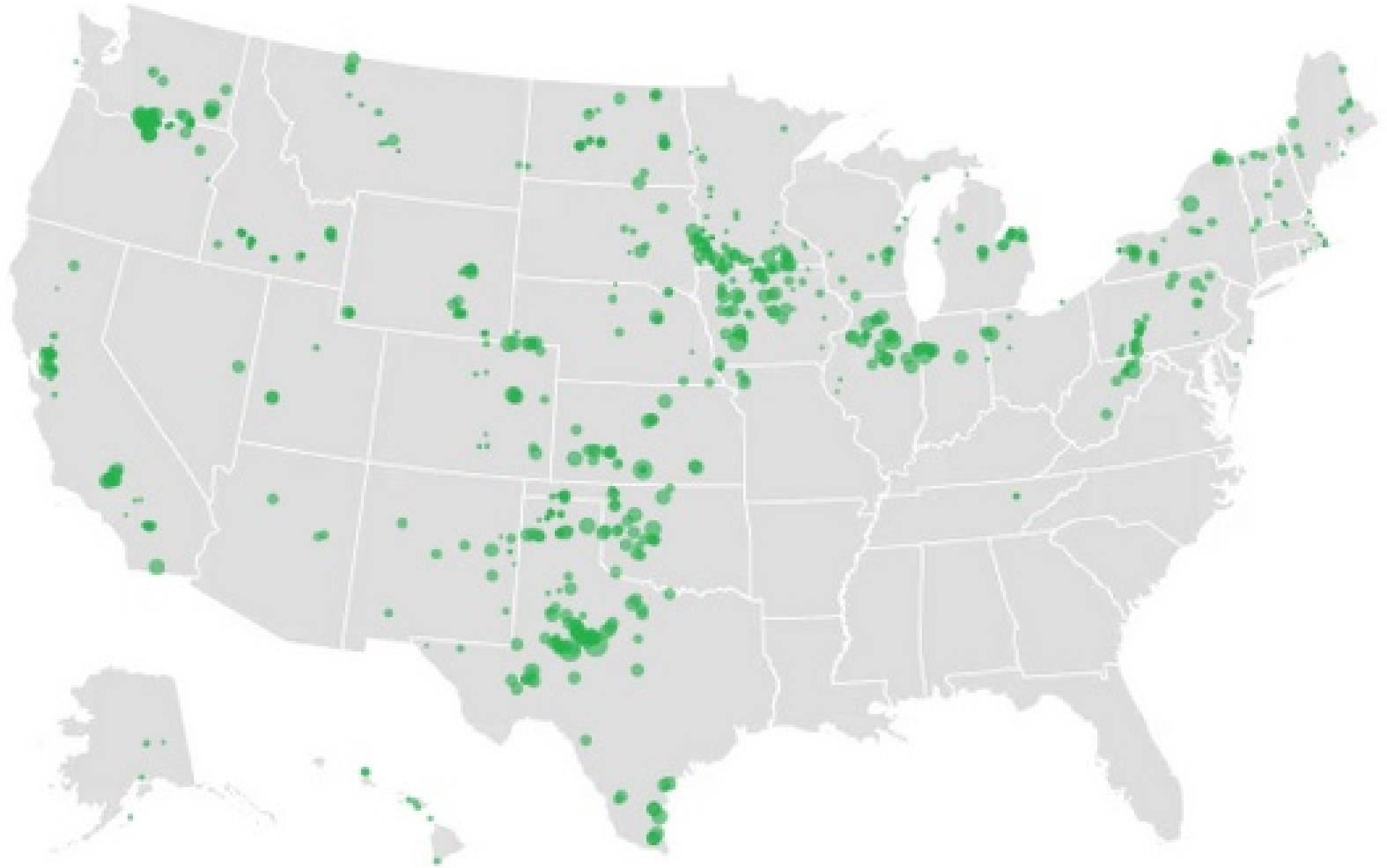
NO IGNITION SOURCES WERE PRESENT

- “The issue is not whether the cited accumulations are potentially hazardous, but rather whether they have been properly designated as flagrant”
- The packed coal fines were S&S and due to an unwarrantable condition, but the condition would not have directly caused a death or serious bodily injury
- The Secretary relied on speculation of future source of heat during the course of continued mining operations
- Consideration based on continued mining operations goes beyond the scope of a flagrant analysis
- No prosecutorial discretion to arbitrarily and capriciously label violations as flagrant
- Flagrant designation was deleted
- Case was certified to the Federal Mine Safety and Health Review Commission

A topographic map with contour lines and various labels like 'ROAD', 'L.AVE', and elevation numbers (700, 550, 1262, 757).

FUTURE OF COAL

Wind-Powered Electric Plants

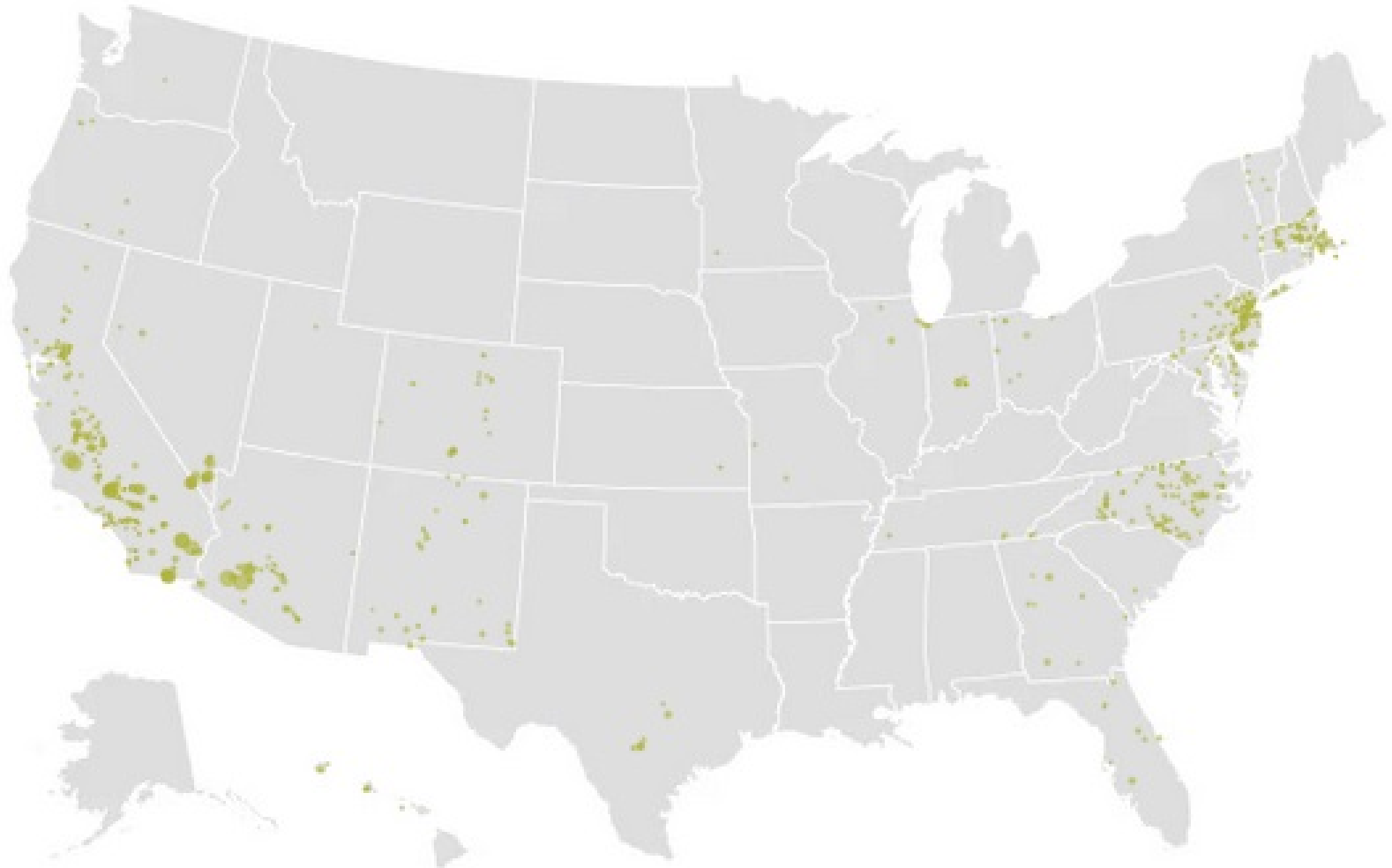


843 plants generating 5% of
the nations electricity



© Stuart McMahon

Solar-Powered Electric Plants

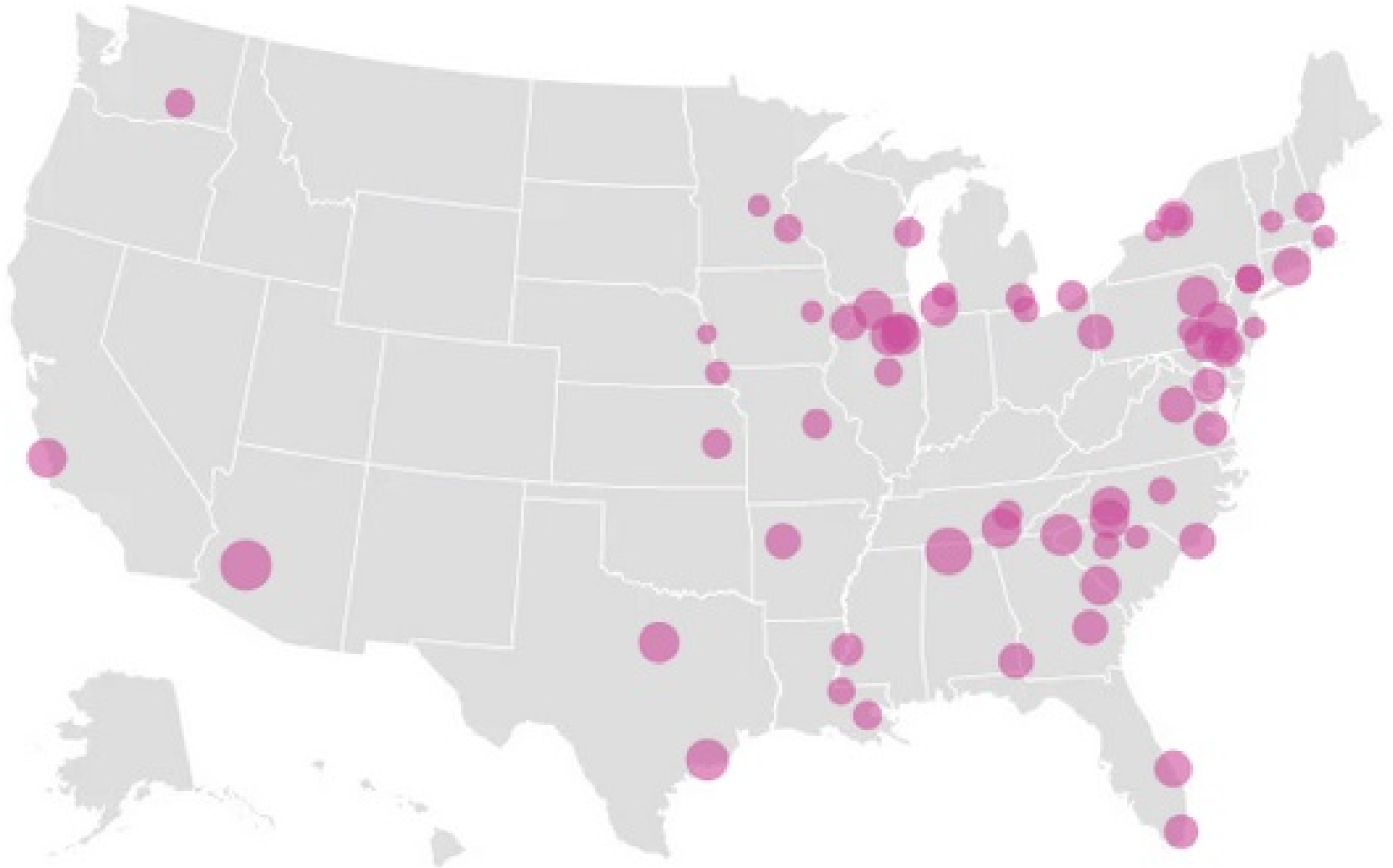


772 plants generating 1% of
the nation's electricity



David Paul Morris/BLOOMBERG

Nuclear-Powered Electric Plants

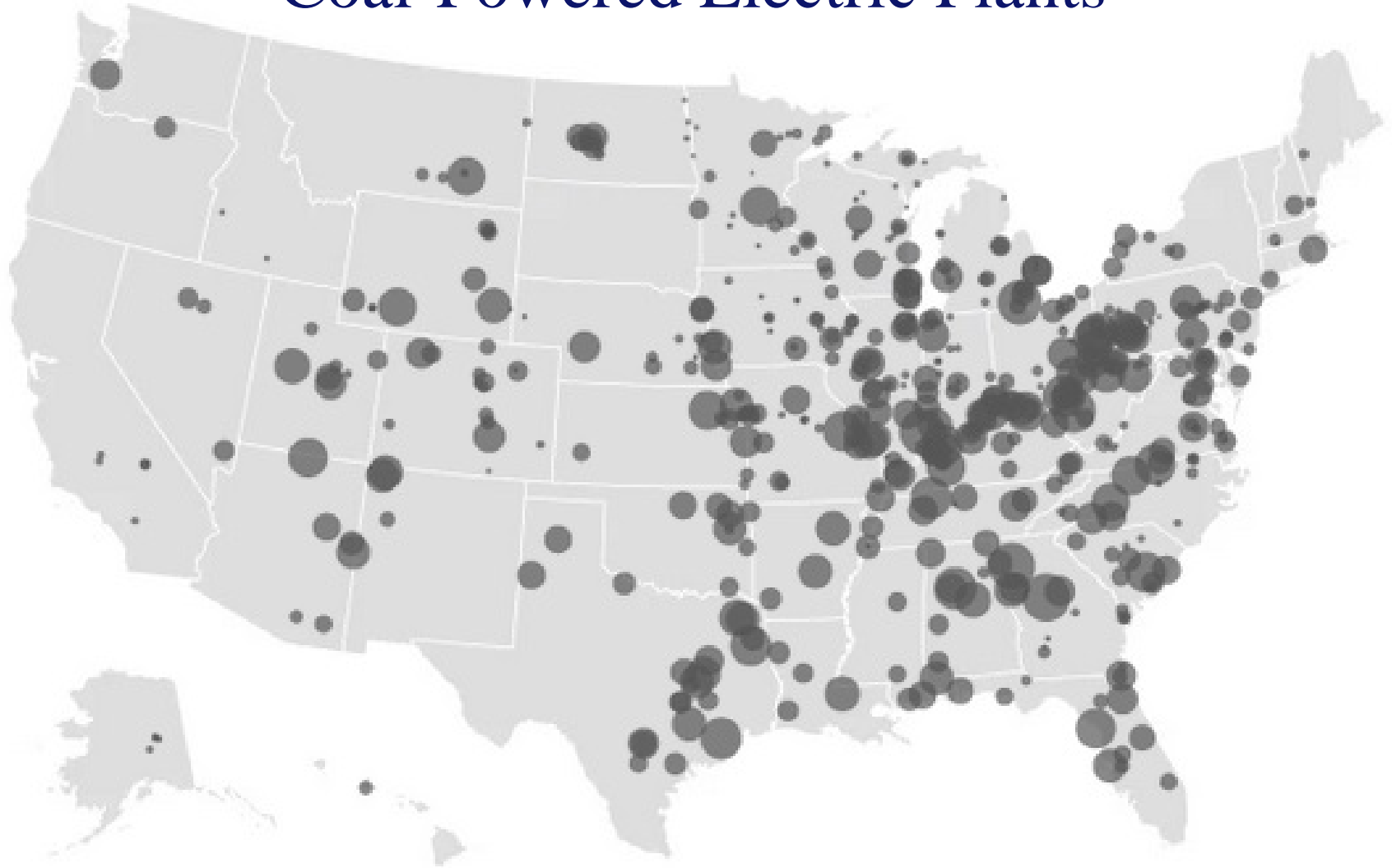


63 plants generating 20% of
the nation's electricity



D. Markosian

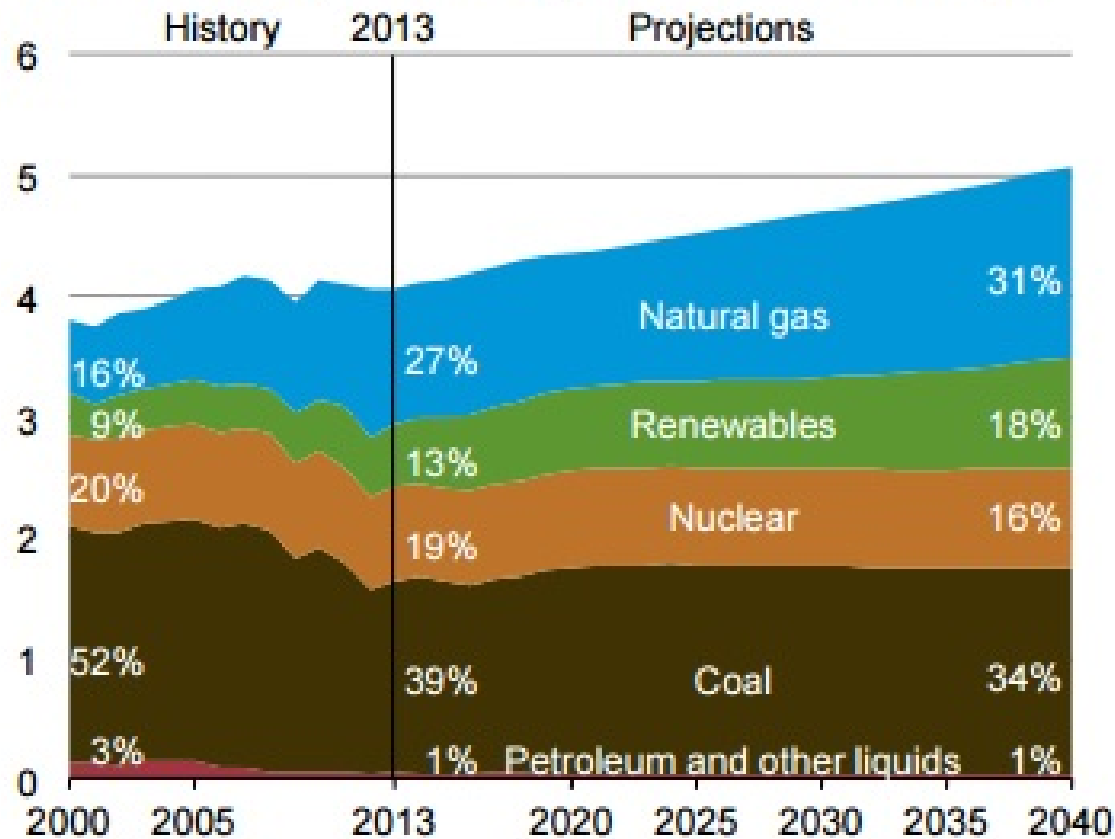
Coal-Powered Electric Plants



511 plants generating 34% of the
nation's electricity

In 2040 Coal will provide 34% of the nation's electricity

Figure 31. Electricity generation by fuel in the Reference case, 2000-2040 (trillion kilowatthours)



Source: U.S. Energy Information Administration, Annual Energy Outlook 2015