FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2023-0120
v.	:	
MORTON SALT, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker and Marvit, Commissioners

DECISION

BY: Jordan, Chair; Baker and Marvit, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act") and is before the Commission pursuant to our grant of interlocutory review.[1] The case arose when Morton Salt, Inc. ("Morton Salt") received a notification under section 104(e) of the Act that it had engaged in a pattern of violations which could significantly and substantially contribute to mine health or safety hazards.[2]

Any operator so notified is subject to an order requiring the immediate withdrawal of miners, if an inspection within 90 days discovers any additional significant and substantial violations at the operator's mine. Any subsequent inspections that reveal significant and substantial violations will result in further withdrawal orders, until the mine achieves an inspection with no such violations. 30 U.S.C. §§ 814(e)(2), (3).[3]

[1] The Judge below first certified the issue, finding that: (a) his ruling involves a controlling issue of law and (b) immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

[2] Section 104(e) of the Mine Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1).

[3] Section 104(e)(2) provides, in pertinent part, that "a withdrawal order shall be issued by . . . the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially

It is the Secretary's initial written notification to an operator that a pattern of violations exists which is the subject of the instant appeal. Specifically, the question the Commission unanimously certified for interlocutory review is "whether the Commission has authority to review the Secretary's decision to issue a notice of pattern of violations." 45 FMSHRC 1023, 1024 (Dec. 2023). For the reasons set forth herein, we conclude that the Commission lacks such jurisdiction.

I.

Background

A. Pattern of Violations History

In 1977, following a series of fatal mine disasters, Congress took steps to strengthen the existing 1969 Coal Mine Health and Safety Act.[4] The resulting 1977 Mine Act included a new enforcement tool: a "pattern of violations" provision which was designed to improve compliance

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contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until . . . such violation has been abated." 30 U.S.C. § 814(e)(2).

Section 104(e)(3) provides, in pertinent part, that "[i]f, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no [significant and substantial] violations of mandatory health or safety standards . . . the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply." 30 U.S.C. § 814(e)(3).

[4] These disasters included the Sunshine Silver Mine where, in 1972, 91 miners died of carbon monoxide asphyxiation. At Buffalo Creek, in 1972, 125 persons died when a dam burst. At Blacksville, in 1972, nine miners died in a mine fire. At Scotia, in 1976, 23 miners and three inspectors died in two explosions of accumulated methane gas. At the Potter Tunnel mine, in 1977, nine miners died when water inundated active workings. As the Supreme Court recognized in *Thunder Basin Coal Co. v. Reich*:

> The House and Senate Committee Reports observed that these accidents resulted from hazards that were remediable and that in many cases already had been the object of repeated enforcement efforts. *See generally* Leg. Hist. 362, 371, 592-93, 637. The 1972 Buffalo Creek disaster, for example, occurred after the mine had been assessed over $1.5 million in penalties, "not one cent which had been paid." *Id*. at 631. Sixty-two ventilation violations were noted in the two years prior to the Scotia gas explosions, but the imposed penalties failed to coerce compliance. *Id*. at 629-30.

510 U.S. 200, 210 n.12 (1994).

in mines that had demonstrated recurrent significant and substantial ("S&S") violations of mandatory health and safety standards.[5]

It was not until 1990 that MSHA issued regulations implementing the Mine Act's pattern of violations provisions. 55 Fed. Reg. 31128 (July 31, 1990). However, after the Upper Big Branch mine disaster on April 5, 2010, that killed 29 miners, the U.S. Department of Labor's Office of the Inspector General audited MSHA's Pattern of Violations program and found that MSHA had not considered that mine's recurrent history of violations. The Inspector General's Report uncovered a litany of deficiencies within the program and recommended that MSHA revise the implementing regulations. *See* Office of Audit, Office of Inspector General, U.S. Dep't of Labor, Rep. No. 05-10-005-0-001, In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority (2010). Therefore, in 2013, MSHA revised those regulations. 78 Fed. Reg. 5056-74 (Jan. 23, 2013). MSHA determined that its 1990 regulations contained too many processes, limiting the "effective use of [section 104(e)], resulting in delays in taking action against chronic violators and depriving miners of necessary safety and health protections." *Id*. at 5056. MSHA's revised regulation simplifies some procedures. For example, prior to the changes, MSHA issued mine operators intermediate notices that their mine had an elevated history of non-compliance and there was a *potential* that MSHA would later issue a Notice of Pattern of Violations. Under the new rules, MSHA provides operators with the ability to self-monitor their own compliance history with an online Monthly Monitoring Tool.

Under the revised rule, at least once each year, MSHA reviews certain compliance records for every mine in order to determine if the mine meets the screening criteria for a pattern of violations. 30 C.F.R. § 104.2. The regulations describe eight categories of information that are relevant to a pattern determination. *Id*.[6] Each category has been reduced to a specific

[5] The Senate Subcommittee on Labor stated that the "pattern of violations" authority was intended to "to protect miners when the operator demonstrates his disregard for the health and safety of miners . . . ." S. Rep. No. 95-181 at 32, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978) ("*Legis. Hist.*").

[6] According to 30 C.F.R. § 104.2 the eight listed elements include:

(1) Citations for S&S violations;
(2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
(4) Imminent danger orders under section 107(a) of the Mine Act;
(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
(8) Mitigating circumstances.

numerical screening criterion. These numerical screening criteria are posted on MSHA's website and are subject to periodic revision. *Id.* § 104.2(b). The website explains that the Secretary will use two alternate methods of applying the screening criteria to make an initial determination of a pattern of violations designation. Any mine identified as meeting either set of criteria is subjected to further review by MSHA personnel. *Pattern of Violations*, MSHA (Apr. 2021), www.msha.gov/compliance-and-enforcement/pattern-violations-pov. Under this process, mine operators can proactively monitor the website to determine if their mine's violation history puts it at risk of a pattern designation.

If any mine meets MSHA's screening criteria, the agency Administrator issues a memorandum to the appropriate MSHA District Manager, who is asked to determine whether there are mitigating circumstances that justify postponing or declining to issue a pattern Notice.[7] *Pattern of Violations Procedures Summary*, MSHA (Apr. 2021), https://www.msha.gov/pattern-violations-pov-procedures-summary. An MSHA panel reviews the information provided by the District Manager, along with any additional information deemed necessary, and makes a

[7] MSHA's website provides the following Appendix regarding mitigating circumstances:

> For mitigating circumstances to be considered, the mine operator will have to establish such circumstances with MSHA before the Agency issues a POV notice. The types of mitigating circumstances that could justify a decision to not issue a POV notice, or to postpone the issuance of a POV notice to reevaluate conditions in the mine, may include, but are not limited to, the following:
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> • An approved and implemented corrective action program containing concrete, meaningful measures specifically tailored to address the repeated S&S violations accompanied by positive results in reducing S&S violations;
> • A bona fide change in mine ownership that resulted in demonstrated improvements in compliance;
> • MSHA verification that the mine has become inactive;
> • The amount of time the corrective action program has been in place
> • Other factors affecting the accuracy with which the corrective-action program verifies reductions in S&S violations;
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> No one mitigating circumstance necessarily shall be determinative, and all mitigating circumstances shall be weighed together on a case-by-case basis.

Pattern of Violations Procedures Summary, MSHA (Apr. 2021), www.msha.gov/pattern-violations-pov-procedures-summary.

recommendation to the Administrator. The Administrator then determines whether to issue a Notice of Pattern of Violations to the mine operator.

B. Morton Salt's Alleged Pattern of Violations

According to the Secretary, in the 12-month period from September 1, 2021, to August 31, 2022, Morton Salt received 82 citations describing significant and substantial violations, 45 of which involved loose-ground hazards in violation of 30 C.F.R. § 57.3200.[8] Sec'y Mot. for Summ. J. at 1. Loose ground conditions such as "scales" (a bulge of salt) expose miners to potentially fatal injuries if the scale were to fall while miners are in the area.[9]

On December 1, 2022 (after engaging in the above-described protocol) MSHA issued Morton Salt, a notice alleging that 45 citations represent a pattern of violating safety standards relating to "loose ground hazards on ceilings and/or ribs throughout the mine." Notice of Pattern of Violations No. 9679401.

After serving this notice, MSHA inspectors observed additional significant and substantial violations which, pursuant to section 104(e), resulted in the issuance of withdrawal orders. In the proceeding before the Judge, Morton Salt is challenging the violations that prompted the withdrawal orders, and also seeks to contest the Secretary's prior notice that Morton Salt had a pattern of violations.

The Secretary moved for summary decision, seeking an order affirming the validity of the Notice of Pattern of Violations. The Judge denied the Secretary's motion, concluding that the Secretary had failed to show there is "no genuine issue as to any material fact and that it is entitled to summary decision as a matter of law, particularly concerning how the Respondent's mitigating circumstances factored into the decision to issue the [Notice of Pattern of Violations]." Order at 2 (Dec. 5, 2023). The Secretary then filed a motion requesting that the Judge certify the case for interlocutory review. Following the Judge's certification, the Commission granted interlocutory review as to whether the Commission has the authority to review the Secretary's decision to charge an operator with a Notice of Pattern of Violations.

Before the Commission, the Secretary maintains that her decision to issue or not issue a Notice of Pattern of Violations is an exercise of her prosecutorial discretion and therefore unreviewable. No matter the outcome of this interlocutory appeal, the Secretary will bear the burden of proving before the Judge that a pattern of violations existed at the mine, and the operator will have every opportunity to defend itself by providing mitigating circumstances and challenging the citations that constitute the alleged pattern.

[8] Section 57.3200 requires that ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area.

[9] *See e.g.*, Citation 9674895. Sec'y Pet. Ex. A.

II.

Disposition

A. The Secretary's Decision to Issue a Notice of Pattern of Violations is a Decision Committed to the Agency's Discretion and is Not Subject to Commission Review.

The Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. *See, e.g.*, *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co*., 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co*., 11 FMSHRC 759, 764 (May 1989). The Commission cannot exceed the jurisdictional authority granted to it by Congress; it does not possess plenary authority to review all actions taken in accordance with the Mine Act. *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 159 (Feb. 2016); *Kaiser Coal*, 10 FMSHRC at 1169; *see also Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

Several provisions of the Mine Act grant subject matter jurisdiction to the Commission. Section 105(d) authorizes the Commission to review citations and orders issued by the Secretary when she determines that a violation of a safety standard has occurred. The Commission can also review challenges to the penalty proposed for the associated violation. 30 U.S.C. § 815(d). Nowhere in the Mine Act is the Commission granted authority to review the Secretary's issuance of a "notice" alleging a pattern of violations.

Instead, consistent with the Mine Act and Commission caselaw, when a section 104(e) withdrawal order is contested, the Secretary carries the burden of proving that an operator engaged in a pattern of violations. *Brody Mining, LLC*, 37 FMSHRC 1914, 1931 (Sept. 2015) ("*Brody II*"). In *Pocahontas Coal Co*., 38 FMSHRC 176, 183-84 (Feb. 2016), we explained that while an operator cannot directly contest a Notice of Pattern of Violations with the Commission, the operator can seek Commission review, pursuant to section 105(d), of any subsequently issued section 104(e) withdrawal order. In essence, that means that the operator must simply wait until there is immediate legal consequence before seeking Commission review. In exercising our jurisdiction pursuant to section 105(d) to review a contested section 104(e) withdrawal order, the Commission can require the Secretary to demonstrate that the operator has engaged in a pattern of violations. *Id*. Section 105(d) lists the various remedial actions the Commission can order and also "unambiguously sets forth a broad grant of the Commission authority to direct 'other appropriate relief.'" *Id*. Nothing in this decision diminishes the operator's ability to challenge the alleged pattern of violations using the process set forth in *Pocahontas Coal Co*. and *Brody II*.

In *Brody II*, the Commission defined a pattern of violations as "an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." 37 FMSHRC at 1924. An operator challenging a section 104(e) withdrawal order can dispute the existence of the specific violation described in the order, but that operator can also challenge the existence of a pattern of violations. The burden remains on the Secretary to demonstrate the existence of the pattern to the satisfaction of the Commission Judge.

The Secretary must demonstrate the pattern based upon the specific S&S citations and orders listed in the previously issued pattern notice. *See id.* at 1931. No particular number of violations is necessarily indicative of a pattern. *Id*. at 1925. If the Secretary demonstrates the pattern to the Judge, and also proves the subsequent violation of the cited mandatory safety standard, the section 104(e) order is affirmed.[10] Conversely, if the Secretary fails to demonstrate that the citations and orders considered cumulatively demonstrate a disregard for the health and safety of miners, the associated Notice of Pattern of Violations is vacated and the contested section 104(e) order is modified to a section 104(a) citation.[11] Indeed, in the instant case, Morton Salt is actively engaged in this process before the Judge below.[12]

The Commission's ability to consider whether a pattern of violations exists must be distinguished from our lack of jurisdiction to review how or why the Secretary decided to *charge* an operator with a pattern notice. Section 105(d) *does not* provide the Commission with jurisdiction to review the Secretary's internal decision-making processes related to her decision to charge an operator. *Id.* at 1928-29 ("evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice."). The determination of whether a pattern of violations exists is an exercise of prosecutorial discretion.[13] Following the panel recommendations and analysis of the screening criteria, the Secretary retains the discretion to determine whether the operator has engaged in a pattern of violations which could significantly and substantially contribute to mine health or safety hazards. *Pattern of*

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[10] The underlying pattern notice will automatically be terminated, pursuant to the statute, after an MSHA inspector performs an inspection of the mine and finds no further S&S violations. 30 U.S.C. § 814(e)(3).

[11] The Secretary's decision to charge a mine operator with a pattern of violations is based upon all *issued* citations (final and non-final). Accordingly, at a hearing on the contest of a section 104(e) order, the Secretary may also need to engage in associated litigation involving contested non-final citations and orders relied upon by the Secretary in concluding that a pattern exists. *See Brody Mining, LLC*, 37 FMSHRC 1914, 1929-30 (Sept. 2015) ("*Brody II*").

[12] We are treating Notices of Pattern of Violations as we would any other charging decision under the Act. In the same way, we do not allow challenges to the Secretary's decision-making process in issuing a 104(a) citation, but the Secretary maintains the burden of proving the existence of a violation.

[13] Our dissenting colleague, Commissioner Rajkovich, makes the argument that the Commission necessarily has subject matter jurisdiction over the Secretary's deliberative process preceding the issuing of the Notice of Pattern of Violations. In doing so, he mis-states the majority's argument as one concerning lack of subject matter jurisdiction. Slip op. at 24. The majority repeatedly states that the Commission has jurisdiction to review the pattern of violations once there is a final order. This jurisdiction, however, does not extend to the Secretary's deliberative process concerning her prosecutorial discretion. By framing both issues as being about subject matter jurisdiction, our dissenting colleague extends the bounds of that concept beyond where the courts have permitted the Commission to tread.

Violations, 78 Fed. Reg. 5056, 5065 (Jan. 23, 2013). Once the Secretary has determined that a pattern of violations exists, the purely ministerial task of issuing the notice is mandatory.

Notably, the mine operator faces *no immediate consequence* when issued a pattern notice. Only if an inspector observes a significant and substantial violation within the next 90 days—i.e., if the operator is found to be in further violation of the law—will MSHA issue an order withdrawing affected miners from the area. 30 U.S.C. § 814(e)(1). The operator may contest that withdrawal order before the Commission. Moreover, if an inspection of the mine reveals no S&S violations, the pattern notice expires.

The distinction between the jurisdiction to consider citations and orders as compared to a decision to charge an operator is not novel. In fact, in *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151 (D.C. Cir. 2006), the D.C. Circuit reversed a Commission attempt to review the Secretary's charging decision. *Id*. at 161 ("like a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion"). The Court held that the Commission had no statutory authority to review the Secretary's decision to charge both the contractor and the mine operator for safety violations committed by the contractor.[14] The D.C. Circuit rationalized that under the Mine Act, "the Secretary's charging discretion is as uncabined as that of a United States Attorney under the Criminal Code."[15] *Id*. at 157. The Court chastised the Commission's attempt to review a charging decision and "substitute its views of enforcement policy for those of the Secretary, a power . . . the Commission does not possess." *Id*. at 158. Our colleagues make a similar mistake today.[16] The Mine Act and associated caselaw

[14] The Mine Act defines an "operator" to mean "any owner, lessee, or other person who operators, controls, or supervises a . . . mine or any independent contractor performing services . . . at such mine." 30 U.S.C. § 814(a).

[15] "[W]ith respect to criminal charging decisions, the Supreme Court has made clear that the government's decision 'as to whom to prosecute' is generally unreviewable." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156-57 (D.C. Cir 2006) (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[16] Then-Judge Scalia, writing for the majority, stated in *Brock v. Cathedral Bluff's Shale Oil Co*.:

> [A]n agency's exercise of its enforcement discretion [is] . . . an area in which the courts have traditionally been most reluctant to interfere. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958) (per curiam); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir.1976), cert. denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977). We think the policies underlying that restraint extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the Federal Mine Safety and Health Review Commission. At the very least the Commission

are clear; we lack jurisdiction to review the Secretary's internal processes related to her exercise of discretion.

B. The Administrative Procedures Act Does Not Provide a Meaningful Standard for Review of the Secretary's Decision to Issue a Pattern of Violations Notice.

Our dissenting colleagues tacitly recognize that the Mine Act does not provide the Commission with jurisdiction to review the Secretary's decision-making processes concerning whether or not to issue a Pattern of Violations Notice. Instead, the dissents would ground review of the Secretary's enforcement decisions in section 706(2)(A) of the Administrative Procedure Act ("APA"), which requires setting aside agency action that is arbitrary, capricious, or an abuse of discretion. Slip op. at 22-23 (Althen dissent); Slip op. at 25-30 (Rajkovich dissent).[17]

However, under section 704 of the APA, agency actions are only reviewable if that review is provided for by statute or if there is a final agency action for which there is no other adequate remedy in court. 5 U.S.C. § 704. As noted above, nothing in the Mine Act states that the Secretary's decision-making process in issuing a Pattern of Violations Notice is subject to review. Therefore, the Secretary's actions here are only reviewable under the APA if final.

The issuance of a Notice of Pattern of Violations is not a final agency action. The Supreme Court has stated that to be "final," an agency action must satisfy two criteria. First, the action must mark the consummation of the agency's decision-making process—it must not be tentative or interlocutory in nature. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). Second, the action must be "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id*. at 178 (citations omitted).

We note that under this definition, the agency action at issue here is not final. A review of section 104.2, 30 C.F.R. § 104.2, shows that it describes an interlocutory or intermediate step of the Secretary's deliberative process, not the final agency action. As described *supra*, the Secretary's analysis of the screening criteria under section 104.2 does not dictate a decision, let alone a final one. Following the analysis under section 104.2, the Secretary must still convene a Pattern of Violations panel that must review the evidence (including mitigating circumstances) and, ultimately, make the decision whether to issue a Pattern of Violations Notice. Even after the Notice of Pattern of Violations is issued, it is at least arguable that legal consequences do not yet attach. Only after an inspection occurs, where an S&S violation is discovered, and the Secretary

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> [ ] must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.

796 F.2d 533, 538 (D.C. Cir. Jul. 1986).

[17] We note that the Commission is expressly not bound by the APA in conducting its review. *See* 30 U.S.C. § 956. Nonetheless, Courts have previously looked to the APA for guidance in Mine Act proceedings. *See Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006) (holding that principles codified in the APA may be binding in Mine Act proceedings, even if the APA itself is not); and *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 316 n* (4th Cir. 2008).

issues withdrawal orders pursuant to the Pattern of Violations Notice, is a final agency action committed. At that time, the operator can challenge the withdrawal order, as well as the underlying Pattern of Violations Notice. In short, the Secretary's consideration of mitigating circumstances pursuant to section 104.2(a) is not the consummation of the decision-making process, it is a discrete step in that process.

Even if we found that the Notice of Pattern of Violations was a final agency action, it would still not be reviewable under the exceptions provided by the Court. When review is precluded by statute, or when "agency action is committed to agency discretion by law" no review is available. *Bennett*, 520 U.S. at 175, *citing* 5 U.S.C. § 701(a). The first exception obviously does not apply here, as nothing in the Mine Act expressly precludes review of the Secretary's decision to issue a Pattern of Violations Notice and, thus, we need not consider it further. With respect to the second exception, an action is committed to agency discretion in instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

The interlocutory review at issue here was precipitated by the Judge's decision to deny the Secretary's motion for summary decision and his ruling that he would conduct a hearing on the material factual disputes "concerning how the Respondent's mitigating circumstances factored into the [Secretary's] decision to issue the NPOV." Order. at 2 (Dec. 5, 2023). The Secretary considers mitigating circumstances when evaluating mines for a pattern of violations pursuant to 30 C.F.R. § 104.2. More specifically, after a mine is identified as meeting the screening criteria, the Secretary considers whether there are any mitigating circumstances which would make issuance of a Pattern of Violations Notice to that mine inappropriate. 78 Fed. Reg. at 5063 ("There may be extraordinary occasions when a mine meets the POV criteria, but mitigating circumstances make a POV notice inappropriate."). Therefore, the question before us is whether the Secretary's consideration of alleged mitigating circumstances under section 104.2 is committed to the Secretary's discretion when she considers whether to charge an operator by issuing a notice of pattern of violations. We believe that it is.

In essence, the Pattern of Violations regulations and screening criteria function as a sieve, allowing the Secretary to identify mines with acute compliance problems for further scrutiny. They also provide notice to the public and the regulated community about the kinds of information the Secretary may consider during internal deliberations on whether to issue a Pattern of Violations Notice. The fact that the Secretary explains her sifting procedures and the kinds of information she will consider to the public does not change the fact that the Secretary decides, in her discretion, whether to issue a Pattern of Violations Notice. It also does not necessarily open the substance of the Secretary's deliberations to the Commission's scrutiny. *See Wayte*, 470 U.S. at 607 ("the decision to prosecute is particularly ill-suited to judicial review").

As we have previously determined, even after the Secretary applies the screening criteria, she has discretion in determining whether a particular mine exhibits a pattern of violations and therefore should be issued a Pattern of Violations Notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2050-51 (Aug. 2014) ("*Brody I*"). Specifically, "the screening criteria set forth language that indicates that even if a mine meets the criteria, MSHA still exercises discretion in

determining whether a POV notice should be issued to the mine." *Id*. at 2049. Because the Secretary engages in further, internal deliberations after using the regulations and the screening criteria, neither the Mine Act nor 30 C.F.R. § 104.2 provide a standard of review for analyzing how the Secretary considers the relevant data. That is, there is no law to apply to the Secretary's deliberations.

As the D.C. Circuit recognized in *Twentymile*, the Mine Act does not provide a meaningful standard upon which to judge MSHA's exercise of charging discretion. 456 F.3d at 157. While *Twentymile* concerned MSHA's discretion in issuing a citation to a mine operator pursuant to section 104(a) of the Mine Act, section 104(e) is similarly constructed and silent as to a standard by which review could be conducted. *Cf*. 30 U.S.C. § 814(a) ("If upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this chapter . . . he shall, with reasonable promptness, issue a citation to the operator."); 30 U.S.C. § 814(e)(1) ("If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine . . . he shall be given written notice that such pattern exists.").

The instant case demonstrates why 30 C.F.R. § 104.2 cannot fill the Mine Act's silence and provide the meaningful standard against which the Secretary's notice decision can be measured. Here, the Judge sought to hold a hearing to determine how the Secretary considered the operator's alleged mitigating circumstances. The question posed by the Judge was not "were there mitigating circumstances present here?" That is a judicial question, and the kind Commission Judges regularly answer in cases involving sections 104(a) and (d) of the Act, 30 U.S.C. §§ 814(a), (d). Instead, the question was, "how did the Secretary consider the alleged mitigating circumstances when deciding to issue the Pattern of Violations Notice?"

We find it impossible to conceptualize a legal analysis that asks whether the Secretary sufficiently analyzed certain material. How would we determine whether the Secretary properly utilized the factors in 30 C.F.R. § 104.2 in reaching her decision to issue a Notice of Pattern of Violations? What are the metrics against which the Secretary's actions would be compared? It is not a legal question, but instead a question into the nature of the Secretary's internal deliberations.

From a practical perspective, it is hard to understand what our review would encompass. If the issue is simply whether the Secretary had access to the alleged mitigation before issuing a Pattern of Violations Notice, then the issue here is moot. The Secretary provided in discovery several memoranda and internal documents, with only minor redactions, that set forth which mitigating circumstances she reviewed. *See* Sec'y Mot. for Summ. J. Ex. A, Attachs. 4 & 5.[18]

[18] In his dissent, Commissioner Rajkovich states that this is the scope of the information sought, arguing "[t]he details of how an MSHA employee weighed a particular factor when considering whether to propose a mine for POV status would be of less interest than whether the Secretary considered that factor when she made the final decision to issue the POV Notice." Slip op. at 31. In this case, that issue has already been answered in the affirmative. The Secretary considered the alleged mitigation submitted by the operator.

Further, we note that any mitigating circumstances that the Secretary has access to would, necessarily, have come from the operator. As a result, the operator would also be aware of what alleged mitigation the Secretary had access to and when the Secretary received it.[19]

If the question is anything beyond whether the Secretary had access to the alleged mitigation, it would necessarily raise questions as to how the Secretary used that information: what weight did the Secretary give the alleged mitigation? How did the Secretary consider the alleged mitigation in light of the other factors? How did mitigation play into the totality of the circumstances that the Secretary considered before issuing a Pattern of Violations Notice? All of those questions go to the heart of the Secretary's deliberative process and are not subject to our review.

One of our dissenting colleagues argues that the Secretary's action here has no room for discretion because section 104(e) of the Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he shall be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1). That is, because the statute includes the imperative phrase "shall" that the Secretary *must* provide notice if there is a pattern of violations. Slip op. at 28 (Rajkovich Dissent). In our colleague's interpretation, this is not a judgment call: either there is or is not a pattern of violations and the Secretary is bound to take one action or the other, and then we can review that action to see if the Secretary met the standard in 30 C.F.R. § 104.2.

We do not believe that to be a reasonable interpretation of the Mine Act. There is no question that there is unanimity among the Commissioners that the word "shall" denotes an imperative.[20] However, it is necessary to look to the context of the Act itself to see what Congress has demanded from the Secretary, and how our dissenting colleague conflates two distinct matters—one discretionary and one mandatory—to arrive at an incorrect answer. The Secretary's review of the screening criteria and panel recommendations, including mitigating circumstances, is used to make the determination of whether a pattern of violations exists. This deliberation and its outcome—that is, whether a mine has exhibited a pattern of violations—is discretionary. If the Secretary determines that a mine has exhibited such a pattern of violations

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Commissioner Althen's dissent appears to be built entirely around a misconception that this information was not provided.

[19] The operator may also introduce "mitigating circumstances" during the case on the merits before the Judge in order to rebut the Secretary's assertion that it acted with "disregard for the health or safety of miners."

[20] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007), *citing Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretion-less obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); Shall, *Black's Law Dictionary* 1375 (6th ed. 1990) ("[a]s used in statutes . . . this word is generally imperative or mandatory").

then it *shall* issue a notice of pattern of violations. This second action is mandatory and ministerial. However, simply because the Secretary must notify the operator when it has been determined that its mine has exhibited a pattern of violations, does not open up the prior discretionary deliberations for review.

Section 104(e) of the Act describes a ministerial action that must occur *after* the Secretary has exercised her prosecutorial discretion and determined a pattern of violations exists. It is similar to section 104(a), which gives the Secretary discretion to determine when a violation exists, but then mandates that the Secretary issue a citation if she determines that such a violation exists.[21] This section does not imply the Secretary has no prosecutorial discretion to determine what is, or is not, a violation of a mandatory health standard. Obviously, an inspector is exercising his/her judgment at all times during an inspection and using delegated discretion to determine whether a given condition is a violation requiring a citation. The Act merely directs the Secretary to complete the ministerial task of issuing the citation to provide notice to the operator after that discretion has been exercised. In the same way, section 104(e) in no way diminishes the Secretary's discretion to determine when a Pattern of Violations Notice should be issued, she is simply required to serve the notice once she deems it necessary.

C. Commission Review of the Secretary's Discretionary Enforcement Decisions Would Encourage Piecemeal Litigation.

In addition to our lack of statutory authority, there are practical and policy considerations which counsel against Commission review of the Secretary's decision to issue a Notice of Pattern of Violations. These considerations can be most clearly illustrated by considering what a hearing on this issue would look like, and the number of insurmountable issues stemming from such a hearing.

In *Fed. Trade Comm'n v. Standard Oil Co. of California*, 499 U.S. 232 (1980), the Supreme Court set forth several analogous practical concerns that would arise by allowing a respondent to challenge the validity of the government's decision to bring an enforcement action. For example, the Court stated that the effect of judicial review on the validity of the government's determination that there was "reason to believe" a respondent had violated the law:

> is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. *McGee v. United States*, 402 U.S. 479,

[21] "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator." 30 U.S.C. § 814(a)(1).

> 484, 91 S.Ct. 1565, 1568, 29 L.Ed.2d 47 (1971*)*; *McKart v. United States*, 395 U.S. 185, 195, 89 S.Ct. 1657, 1663, 23 L.Ed.2d 194 (1969). Furthermore. . . judicial review to determine whether the Commission decided that it had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated. Finally, every respondent to a Commission complaint could make the claim that [the Respondent] had made. Judicial review of the averments in the Commission's complaints ***should not be a means of turning prosecutor into defendant before adjudication concludes.***

Id. at 242-43 (emphasis added).

The Court's concerns about inefficient, piecemeal litigation are amply demonstrated by the procedures that would be required to provide the review sought by Morton Salt. After the issuance of a Notice of Pattern of Violations and consequent withdrawal orders, an operator would bring a challenge to the Commission. A Commission Judge would then trifurcate the proceeding. First, the Judge would consider whether the Notice was validly issued based on an assessment of whether the Secretary had properly considered the various factors contained in 30 C.F.R. § 104.2.[22] In this inquiry, it is not clear what, if any, evidence or testimony concerning internal deliberations the Secretary would be required to produce under well-established privileges. Presumably, the Judge would be looking at, for example, whether the Secretary had considered mitigating circumstances and assessing whether the Secretary had given that factor appropriate weight as compared to other considerations. It is not clear to the Commission how the Judge would be expected to make such a determination since the Pattern of Violations rule only states that the Secretary will consider such factors, but provides no requirements for the relative weight of each factor.[23]

[22] Commissioner Althen contends that the Judge here should also determine whether 30 U.S.C. 814(e) and 30 C.F.R. § 104.2 provide the Secretary with the authority to consider non-final violations when deciding to issue a Pattern of Violations Notice. Slip op. at 17 n.1, 20 n.4. This issue has previously been considered and decided by the Commission in *Brody I*, 36 FMSHRC at 2039-49 ("we find no abuse in the Agency's decision to rely on non-final issuances [in deciding to issue the Notice] even though some S&S designations may later be changed in adjudication") (citation omitted).

[23] In his dissenting opinion, Commissioner Althen would require the Secretary to submit her application of the pattern criteria in 30 C.F.R. § 104.2 for Commission review before permitting the Secretary to attempt to demonstrate that an operator has engaged in a pattern of violating the Mine Act. In effect, Commissioner Althen would flip the Secretary's role at the outset of a pattern hearing, requiring the Secretary to *defend* her decision to issue the notice instead of prosecute, a tactic which the Supreme Court found to be inappropriate at least in *Fed. Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232 (1980).

In seeking to require Commission review, Commissioner Althen implies that the Secretary may have ignored mitigating circumstances presented by Morton before deciding to

If the Judge determined that the Secretary had validly issued the Notice, she would then turn to consider whether there was, in fact, a pattern of violations. This would be looking at the same evidence that had been presented in the previous portion of the hearing but would presumably consider whether the Secretary had established sufficient evidence to prove the existence of a pattern. *See Brody II*, 37 FMSHRC at 1924 ("an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners"). In essence there would be an entire hearing on the sufficiency of the Secretary's deliberations and then a second hearing on the fruit of those deliberations using the same evidence. Of course, the Judge may also be hearing contests of the underlying citations and their associated civil penalties. Then, only if the Judge determined that the Secretary had appropriately deliberated on the Notice and that a pattern of violations was, in fact, present, would the Judge then turn to the third portion of the hearing and consider the merits of the contested withdrawal order.[24] All of this complicated, redundant, and ad hoc judicial review of the Secretary's internal processes would often occur while the mine at issue was continuing to receive withdrawal orders.

The process outlined above, with all of its attendant procedural hurdles and opportunities for interlocutory review would delay resolution of the ultimate question of whether Morton Salt in fact engaged in a pattern of violating mandatory health or safety standards. This would create a new procedural hurdle with no basis in the law or regulations. In essence, the practical impact of the review proposed by our dissenting colleagues would be to make the Secretary the defendant, forcing her to defend her decision-making processes rather than demonstrate that 45 loose-ground hazards represent a pattern of violations. For these reasons, the Commission should not review the Secretary's decision to *issue* the Notice of Pattern of Violations, but instead center its review on whether the Secretary has proven the *existence* of a pattern of violations.

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issue the notice. However, the record before us demonstrates that the Secretary considered specific mitigating circumstances, including Morton's change in ownership, change in management, additional staffing, change in organizational structure and the implementation of a corrective action program, prior to issuing Morton a pattern notice. *See* Sec'y Mot. for Summ. J. Ex. A, Attachs. 4 & 5.

[24] It is significant that the Secretary's current process for issuing a Pattern of Violations Notice was created, at least in part, in reaction to an audit by the Department of Labor's Inspector General finding that its previous process, which included more intermediary steps (including the so-called PPOV ("potential pattern of violation" notice)) was never effectively implemented. *See Brody I*, 36 FMSHRC at 2029-30 (citing Office of Audit, Office of Inspector General, U.S. Dep't of Labor, Rep. No. 05-10-005-0-001, In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority (2010)) (other citations omitted).

III.

Conclusion

In summary, the Commission does not have jurisdiction to review the Secretary's decision to issue a Notice of Pattern of Violations. The case should proceed before the Judge so that he may determine whether the Secretary can demonstrate that Morton Salt has engaged in a pattern of violating mandatory health or safety standards.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z Marvit, Commissioner

Commissioner Althen, dissenting:

We review a purely legal question. The legal issue taken by the Commission is "whether the Commission has authority to review the Secretary's decision to issue a notice of pattern of violations." 45 FMSHRC 1023, 1024 (Dec. 2023). Had the majority answered this question correctly, we would have returned the case for action by the Administrative Law Judge to determine whether the Secretary abused her discretion under the particular facts of this case. However, the majority has found that the Commission is powerless to review the issuance of a Notice of a Pattern of Violations ("POV Notice"). Therefore, the Commission essentially holds that the Secretary has unfettered discretion to issue a POV Notice even if she does not comply with her own regulations in finding a pattern of violation exists. That finding is clearly and dangerously incorrect.

As demonstrated below, there is a specific legislative rule governing MSHA's review for a pattern of violations. That rule incorporates specific screening criteria. The majority's decision of absolute discretion erroneously insulates MSHA from the obligation to follow the legislative rule promulgated by the Secretary, herself.[1] With this answer, the Secretary may ignore section 104.2(a) that requires consideration of specific enumerated elements, and the pattern criteria incorporated into the regulation under section 104.2(b). 30 C.F.R. §§ 104.2(a), (b). The majority do not deny that erroneous result; they embrace it.

I.

BACKGROUND

Due to the vagueness of section 104(e) of the Mine Act, 30 U.S.C. § 814(e), it was ignored for many years after the passage of the Act. In 1990, the Secretary published an initial regulation. *Pattern of Violations*, 55 Fed. Reg. 31128 (July 31, 1990). Years later, during the Obama Administration, the Secretary undertook a path toward enforcement. In 2011, the Secretary proposed a new regulation for enforcement of the pattern of violations section. 76 Fed. Reg. 5719 (Feb. 2, 2011). MSHA held many public meetings regarding the proposal and received a substantial number of public comments. The Secretary then published a final rule on

[1] There is still room for initial review. The operator contends that the statute and legislative rule do not permit the use of unproven citations in considering whether a pattern of violations exist. The Commission has previously ruled that the Secretary may use non-final citations. *Brody Mining, LLC*, 36 FMSHRC 2027, 2036-47 (Aug. 2014) ("*Brody I*"). At some point, that incorrect decision may become ripe for reversal by a circuit court. It is useful, therefore, for the Judge below to determine if removal of non-final citations would cause the Secretary's findings to fall below the requirements of the screening criteria thereby causing the initial notice to fall for lack of compliance with the Secretary's regulation when applied only to violations.

January 23, 2013.[2] 78 Fed. Reg. 5056 (Jan. 23, 2013). The regulation is found at 30 C.F.R. Part 104.

Surprisingly, the pattern of violations regulation does not define a pattern of violations. In subsequent litigation, the Commission defined a pattern of violations as "an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." *Brody Mining, LLC*, 37 FMSHRC 1914, 1924 (Sept. 2015) ("*Brody II*"). Therefore, the test of whether a group of violations constitutes a "pattern" for purposes of Part 104 is the nature and relationship of the grouping of violations and whether that nature and relationship prove a "disregard" for the health or safety of miners.

According to Black's Law Dictionary, the term "disregard" means "[t]he action of ignoring or treating without proper respect or consideration . . . [t]he quality, state, or condition of being ignored or treated without proper respect or consideration." *Disregard*, Black's Law Dictionary (12th ed. 2024). In other words, the test under Part 104 is whether the violations show that the operator "ignored or disrespected" safety. To determine whether an operator has "disregarded" safety, an Administrative Law Judge must review all evidence, unfavorable and favorable, related to an operator's safety record and concern for safety matters. This consideration will include all areas identified in the Secretary's regulation at 30 C.F.R. § 104.2 and any other evidence bearing upon the issue.[3]

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[2] In the preamble to the publication of the final regulation, MSHA commented that, although the Mine Act requires a pattern of "violations," Congress did not "explicitly" forbid use of non-final citations, so MSHA may use non-final citations. *Pattern of Violations*, 78 Fed. Reg. 5056, 5060 (Jan. 23, 2023). Under the Secretary's odd logic, if one person tells another what he can do, that permission to perform some acts grants the other person the right to do anything that he has not been explicitly told he cannot do.

[3] One of the arguments between the parties in the substantive case below involves the issue of mitigation. Section 104.2(a) of the Secretary's rule includes mitigation as an element for whether a pattern exists. 30 C.F.R. § 104.2(a)(8). At least one of the operator's arguments against a pattern finding is that it mitigated concerns over the number of violations or safety issues. The outcome of the mitigation issue is not before us. Using mitigation as an example, the question in this limited case is not whether the operator mitigated its conduct or whether the Secretary did a sufficient job of taking mitigation into account. The Commission here is reviewing whether the Commission may review the issuance of a notice of a pattern of violations—that is, may the Secretary ignore the part of her legislative rule requiring consideration of mitigation. When the case goes to hearing, the regulation will permit the parties to introduce any evidence bearing upon mitigation—one of the elements identified in section 104.2(a) of the rules. Without speculating at all on any outcome, the operator may attempt to show mitigating circumstances that offset a finding that the operator "disregarded" miner safety. If so, then the operator is not in a pattern of violations within the Commission's definition. It will not be MSHA's judgment that controls the outcome; it will be the Administrative Law Judge's determination after reviewing any mitigation evidence.

Part 104 contains substantive provisions and issues that must be examined for enforcement. Section 104.2(a) identifies eight specific criteria that MSHA must review once every year to identify any mines with a pattern of violations. The attributes are:

> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
> (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
> (8) Mitigating circumstances.

30 C.F.R. § 104.2(a).

The above listing is a discrete list of issues that, by rule, the Secretary must consider before making a POV determination. These are not mere guidelines, interpretive rules, policy statements, or agency precedents regarding a pattern of violations; these are matters that *must* be considered. This is a legislative rule created by the Secretary of Labor with express authorization from Congress. *See* 30 U.S.C. § 814(e)(4) (delegating authority to MSHA to establish criteria for determining when a pattern of violations exists). These rules carry the force of law and are binding on the agency. *United States v. Nixon*, 418 U.S. 683, 695 (1974) (superseded by statute on other grounds) (rule binding on agency because it had "the force of law").

The pure legal question before the Commission is not whether the Secretary followed her rules. That is in the contest between the parties. The question posed by the Commission here is whether the Secretary may ignore the requirements of Part 104 so that she has absolute discretion to issue a Notice of a Pattern of Violations notwithstanding the rules. Absolute discretion would exempt the Secretary from following her own legislative rule.

Section 104.2(a) identifies specific criteria that must be reviewed. Section 104.2(b) obligates MSHA to create specific pattern criteria. In turn, the criteria must be posted on MSHA's website. 30 C.F.R. §§ 104.2(a), (b). The obligations of section 104.2 are mandatory, and MSHA must comply by reviewing the criteria of section 104.2(a) and creating and posting under section 104.2(b) the specific criteria for determining a mine's pattern violator status.

Pursuant to section 104.2(b), MSHA created threshold criteria for consideration of a pattern of violation status. *See Pattern of Violations (POV)*, MSHA (Apr. 2021), https://www.msha.gov/compliance-and-enforcement/pattern-violations-pov. Under MSHA's scheme for determining pattern violator status, an operation that does not meet the criteria cannot be found to be in a pattern of violation status. If the wording of section 104.2(b) does not make that clear, MSHA's application of the criteria does.

MSHA created, and it should be commended for this, a calculator tool that allows an operator to determine how close it is to pattern violator status under the pattern criteria promulgated by MSHA and incorporated by section 104.2(b). *POV Calculator*, MSHA, https://www.msha.gov/data-and-reports/data-sources-and-calculators/pov-calculator (last visited Aug. 27, 2023). Having created that tool in conjunction with the issuance of the criteria and having assured operators they may rely upon MSHA's calculation of compliance, MSHA would/should not be heard to argue that it may whimsically disregard the criteria in determining a mine's pattern of violation status.[4]

With this background, we turn to the issue on review. Does the Secretary have unfettered discretion to issue a Notice of a Pattern of Violations without regard to analyzing the factors required by her legislative rule?[5]

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[4] As noted above, the parties dispute whether MSHA may include citations—that is, unproven allegations—in its pattern analysis. The title of section 104(e) of the Act is "Pattern of violations; abatement; termination of pattern." 30 U.S.C. § 814(e). There is no reference in the Mine Act or regulations to a pattern of "allegations." If the Administrative Law Judge below refuses to accept citations when the case is returned to him, then, depending upon the facts, the POV notice may fall on summary judgment.

[5] The majority mischaracterizes many aspects of this dissent. They say this dissent implies that the Secretary may have ignored mitigating circumstances. Slip op. at 14-15 n. 23. This dissent is not concerned with the facts of this case. The Commission does not consider here whether the Secretary abused her discretion. We decide only whether the Secretary is exempt from a review of whether she followed her own rules. The issue of whether the Secretary complied with her rules in this particular case is not before us.

The majority states that issuance of a Notice of Pattern of Violations is a discretionary charging decision. *See* Slip op. at 7 n.12. That is true. However, if the Secretary does not apply the Mine Act or her own rules in making an otherwise discretionary charging decision, the Secretary's decision will be set aside. For example, under section 103(j) of the Mine Act, 30 U.S.C. § 813(j), in the event of any accident in a mine, the Secretary has the discretionary authority, where rescue and recovery work are necessary, to take action she deems appropriate to protect the life of any person. Such discretion may only be exercised when rescue and recovery work is necessary. If the Secretary does not comply with that requirement, the Commission will set aside the Secretary's action. *Big Ridge, Inc.*, 37 FMSHRC 1860 (Sept. 2015).

The majority says this dissent would require the Secretary to submit her application of the pattern criteria for Commission review before permitting the Secretary to attempt to demonstrate

II.

DISCUSSION

We can make short work of the purely legal issue before the Commission: May the Commission review the Secretary's decision to issue a Notice of Pattern of Violations or, stated differently, does the Secretary have discretion to find a pattern of violations without consideration of the factors in her legislative rule for determining a pattern of violations? The answer is clear: She does not.[6]

As set forth above, the Secretary proposed a substantive rule and accepted extensive public comments; the Secretary published a final rule reflecting consideration of the comments; the Secretary's final rule obligates the Secretary to an annual review of all mines to find any pattern violators; that annual review must include eight specifically identified areas, including mitigating circumstances; the Secretary published on its website the specific minimum criteria for consideration of pattern violator status; the Secretary created a public "calculator" to permit operators to determine whether they are close to pattern violator status; and the Secretary affirmatively states that the criteria are a minimum threshold.

Federal agencies must comply with their own legislative rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954) (superseded by statute on other grounds). The *Accardi* principle is rock-solid law when applied to legislative rules. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) ("It is axiomatic that an agency must adhere to its own regulations."); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Blackwell as Tr. of Gary Blackwell Revocable Living Tr. v. Tennessee Valley Auth.*, 622 F.Supp.3d 543, 550 (W.D. Ky 2022); *Pitman v. United States Citizenship and Immigr. Serv.*, 485 F.Supp.3d 1349, 1352 (D. Utah 2020).

Indeed, in *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010), the United States Court of Appeals for the Seventh Circuit held that "even if the applicable statutes confer complete discretion on agency actors, if those actors have the authority to constrain their discretion by promulgating legislative rules, and they choose to do so, they have created law that can serve as the basis for judicial review." *Id.* at 665, *quoting* Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 605 (2006); *see also § 4.22 Binding effect on the agency*, 1

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that a pattern exists. Slip op. at 14 n. 23. This is akin to the majority's groundless complaint about piecemeal litigation. Slip op. at 13-15. The defenses need not be made or considered *seriatim*. A defense of an abuse of discretion allegation should not suspend discovery or other aspects of prosecuting the case.

[6] Commissioner Rajkovich demolishes the majority's mistaken position that the issuance of a Notice of a Pattern of Violations is not a final decision within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. Slip op. at 25-26 n.4. We do not seek to embellish upon his compelling discussion.

Admin. L. & Prac. § 4.22 (3d ed.) ("One of the most firmly established principles in administrative law is that an agency must obey its own rules.")

The United States Court of Appeals for the Tenth Circuit states this principle in *New Mexico Farm and Livestock Bureau v. United States Dep't of Interior*:

> Turning to the merits of the issue, we have held that "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1165 (10th Cir. 2002). When an agency does not comply with its own regulations, it acts arbitrarily and capriciously. *Id*. at 1178; *see also Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004) ("[The APA] require[s] agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations.")

952 F.3d 1216, 1230-31 (10th Cir. 2020).

Going further, the Administrative Procedure Act codifies the nature and principles of judicial review of agency actions. *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151, 159 (D.C. Cir. 2006). Agency actions will be set aside when an agency does not observe procedures required by law. 5 U.S.C. § 706(2)(D). The Commission has affirmed the use of section 706 principles for review of the Secretary's actions. *See Mach Mining, LLC*, 34 FMSHRC 1784, 1790, 1790 n.11 (Aug. 2012).

The Secretary promulgated a legislative rule governing the determination of a mine's pattern of violation status. The Secretary must follow her rule in making that determination. Whether the Secretary did so must be determined by an Administrative Law Judge.

The Secretary's legislative rule requires:

> At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violation criteria.

30 C.F.R. § 104.2(a).

The rule then lists eight specific factors that the review must include. These are factors one would expect, and the Secretary requires, to go into a pattern of violations determination. The Secretary does not have "prosecutorial discretion" to ignore the factors required for review by the rule. These duties undercut any claim to unfettered discretion to find a pattern of violations without making the necessary analyses. The Secretary could not justly claim that she decided to look at factors (i) through (iv) but decided to ignore factors (v) through (viii).

Failure to make the review required by section 104.2 and to apply all elements is arbitrary and capricious and an abuse of discretion. The Secretary's right to find a pattern of violations is not wholly discretionary. She is constrained by case law, statute, and regulations setting forth elements that must be reviewed before an adverse finding.

Charging a pattern of violations is not akin to a citation in which an inspector armed with education and experience must make an on-the-spot determination of whether a particular circumstance constitutes a violation. A determination of POV status is a studied determination that must be made on factors explicitly identified in the Code of Federal Regulations.

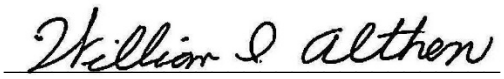
III.

CONCLUSION

If an Administrative Law Judge finds that the Secretary did not make the examinations required by her own rules, the Notice of a Pattern of Violations should be vacated and returned to the Secretary for compliance with the rules. The majority decision erases any chance of that fundamental right arising from basic notions of due process, settled case law, and Administrative Procedure Act principles.

As a practical matter, the majority's erroneous decision should not affect the outcome of the Secretary's claim. The Secretary bears the burden of proving by a preponderance of the evidence that, considering the inter-relationship among S&S violations and the operator's concern for safety, the actions of the operator show a disregard for health and safety. Both parties may introduce evidence on all the factors in 30 C.F.R. § 104.2 and any other evidence relevant to the issue of whether the operator disregarded safety. The Administrative Law Judge will then decide whether the operator disregarded safety.

I respectfully dissent from the majority's unwarranted grant of absolute discretion to the Secretary.



William I. Althen, Commissioner

Commissioner Rajkovich, dissenting:

My colleagues in the majority hold that, because the Commission lacks subject matter jurisdiction over the Secretary's decision to issue a Notice of a Pattern of Violations ("POV Notice"), that decision is an entirely unreviewable exercise of prosecutorial discretion. I dissent. For the reasons discussed below, I believe the Supreme Court's test in *Heckler v. Chaney*, 470 U.S. 821, 828-30 (1985), provides the proper framework for determining whether acts of prosecutorial discretion are reviewable. I would further hold that the Secretary's decision to issue a POV Notice is bound by limited but meaningful standards, therefore *once subject-matter jurisdiction properly attaches* through the contest of a related withdrawal order issued pursuant to 30 U.S.C. § 814(e)(1), the Commission may conduct a limited review of the Secretary's issuance decision to determine whether it was arbitrary and capricious.

A. The majority incorrectly frames this interlocutory review as a question of subject matter jurisdiction.

The primary legal basis for the majority's holding is that the Commission cannot exceed its defined grants of subject matter jurisdiction, and we have not been explicitly granted such jurisdiction over the Secretary's decision to issue a POV Notice. *See* Slip op. at 6-9. I would find the majority's analysis insufficient to answer the question on review and inconsistent with our prior decision in *Pocahontas Coal Co.*, 38 FMSHRC 176 (Feb. 2016).

In *Pocahontas*, we held that the Commission lacks subject matter jurisdiction to review direct challenges to POV Notices. However, we also held that once jurisdiction properly attaches through the contest of a related withdrawal order, the Commission has the authority to review the underlying POV Notice to "dispose fully" of the case. *Id.* at 181-84. Here, Morton Salt has properly contested the relevant withdrawal orders. As part of that contest, the operator challenges the validity of the underlying POV Notice on various grounds, including the Secretary's consideration of mitigating circumstances when deciding to issue the POV Notice. The Judge noted genuine issues of material fact on that point, and the Secretary sought interlocutory review as to whether the Secretary's decision was reviewable. Functionally, the question on interlocutory review is whether, *in attempting to fully dispose of the case properly before him*, the Judge below may review the Secretary's decision-making process in issuing the POV Notice.

I agree with the majority that we lack the jurisdiction to review direct challenges to the Secretary's decision to issue a POV Notice. However, the question before us is whether we may review the Secretary's issuance decision in order to fully dispose of a case for which we already have subject-matter jurisdiction. For the reasons below, I would hold that *once subject matter jurisdiction attaches* through the contest of a related section 104(e) withdrawal order, the Commission may conduct review as necessary to fully dispose of the case, including determining whether the Secretary's action in issuing a POV Notice complied with the minimum procedural requirements in 30 C.F.R. Part 104.[1]

[1] The majority states that I frame the issue on appeal as a matter of subject matter jurisdiction, and that I would grant the Commission "subject matter jurisdiction over the

B. **The Secretary's claim of unreviewable discretion must be rejected under the Supreme Court's *Heckler* Test.**

As described in further detail below, the Supreme Court has provided a framework for determining whether exercises of prosecutorial discretion are reviewable. The Secretary claims that her decision to issue a POV Notice is an unreviewable enforcement decision that has been committed to the Secretary's discretion by law. Specifically, she asserts that the decision to issue a POV Notice is a presumptively unreviewable exercise of prosecutorial discretion, and that no meaningful standard of review exists. Sec'y Br. at 7, 9-10. I would find that any presumption of unreviewability is overcome, because the Act and the Secretary's regulations provide sufficiently meaningful standards to allow limited review.

1. Legal Framework

As a general rule, agency actions are reviewable under the arbitrary and capricious standard unless Congress has expressed an intent to preclude review or the action is "committed to agency discretion by law."[2] 5 U.S.C. §§ 702, 706; *Heckler*, 470 U.S. at 828-30; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *see also Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 316-17 (4th Cir. 2008). With respect to the second exception, the Supreme Court has explained that decisions not to prosecute or enforce are generally committed to an agency's absolute discretion, and are therefore presumptively unreviewable.[3] *Heckler*, 470 U.S. at 831. However, this presumption of unreviewability may be overcome if the relevant statute "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion."[4] *Id.* at 834.

Secretary's deliberative process preceding the issuing of the notice of pattern of violation." Slip op. at 7 n.13. To the contrary, as clearly stated above, I argue that the *majority incorrectly* frames the issue as one of subject matter jurisdiction, and I only claim for the Commission the authority to review the Secretary's POV issuance decision once subject matter jurisdiction over a related withdrawal order properly attaches. I make no claims of expanded subject matter jurisdiction.

[2] The relevant provisions of the Administrative Procedure Act were not conceived of in "jurisdictional terms." *Califano v. Sanders*, 430 U.S. 99, 106 (1977). Reviewability under the framework described herein does not convey, or remove, subject matter jurisdiction.

[3] There is some question as to whether this presumption of unreviewability applies to *all* exercises of prosecutorial discretion, or only to decisions *not* to prosecute or enforce. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Robbins v. Reagan*, 780 F.2d 37, 44-45 (D.C. Cir. 1985). If it is the latter, then the Secretary's decision to issue a POV Notice would not fall under the *Heckler* framework and would be presumptively reviewable. Regardless, I would find that any presumption of unreviewability is rebutted in this instance.

[4] The majority asserts that this framework does not apply here because the agency action at issue is not final. Slip op. at 9-10, *citing* 5 U.S.C. § 704. An agency action is final if it marks

In determining whether a meaningful standard of review exists, courts may look to agency regulations or policies that create binding norms. *Robbins v. Reagan*, 780 F.2d 37, 45-46 (D.C. Cir. 1985); *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003). The key inquiry is the extent to which the agency remains "free to exercise its discretion to follow or not to follow that general policy." *Nat'l Mining Ass'n* v. *Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (citation omitted).

With respect to POVs, the potentially relevant materials are comprised of Section 104(e) of the Mine Act, Section 104 of the Secretary's Regulations, and MSHA's website.

Section 104(e) of the Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he shall be given written notice that such pattern exists," and directs the Secretary to "make such rules as [s]he deems necessary to establish criteria for determining when a pattern of violations . . . exists." 30 U.S.C. §§ 814(e)(1), (e)(4).

The Secretary accordingly promulgated a regulation which "establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine." 30 C.F.R. §104.1. The regulation states:

> (a) At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:
>
> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;

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the consummation of the agency's decision-making process and if legal consequences flow from the action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). My colleagues reasonably find that the Secretary's preliminary screening, which subjects a mine to further review and precedes the ultimate decision to issue a POV Notice, is not a final action. However, the question before us is whether we have "authority to review the Secretary's decision to issue a notice of a pattern of violations." Slip op. at 2. The agency action at issue is the *ultimate decision to issue the notice*, not the preliminary screening analysis that precedes it. The Secretary's decision to issue a POV Notice reflects her final determination that a pattern exists at a mine, and subjects that mine to enhanced penalties for future violations of mandatory health or safety standards. 30 U.S.C. § 814(e)(1). In other words, it marks the consummation of the decision-making process and results in legal consequences. The Secretary's decision to issue a POV Notice is a final agency action.

The majority appears to directly conflate 30 C.F.R. § 104.2 with the agency action at issue. Slip op. at 9 ("A review of section 104.2, 30 C.F.R. § 104.2, shows that it describes an interlocutory or intermediate step . . . not the final agency action."). As discussed in detail below, I would find that the requirements in section 104.2 are necessary but insufficient elements of the Secretary's decision to issue a POV Notice. Section 104.2 provides binding norms with which the Secretary must comply when taking the relevant final agency action, but does not *fully* define the scope of that action.

> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
> (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
> (8) Mitigating circumstances.
>
> (b) MSHA will post the specific pattern criteria on its Web site.

30 C.F.R. § 104.2.

MSHA's website currently provides two sets of pattern criteria. Mines that meet all the criteria in either set will be "further considered" to determine whether the operator should be issued a POV Notice, with specific consideration of an operator's MSHA-approved Corrective Action Program as a "mitigating circumstance" that may justify postponing or not issuing the POV notice. *See Pattern of Violations (POV)*, MSHA (Apr. 2021), https://www.msha.gov/compliance-and-enforcement/pattern-violations-pov.

In other words:

(1) If a mine has a pattern of violations, the Secretary must issue a POV Notice. 30 U.S.C. § 814(e)(1); *see also* 30 C.F.R. § 104.3(a).

(2) The Secretary's procedures for determining whether a pattern exists require the Secretary to conduct a review which must include eight categories of information. 30 C.F.R. §§ 104.1, 104.2. This includes mitigating circumstances.

(3) MSHA's website provides baseline requirements for some of the categories listed in 30 C.F.R. § 104.2. If a mine meets the baseline requirements, MSHA will give the mine further consideration and determine whether to issue a notice, i.e., whether a pattern exists.

Notably, the Commission has previously reviewed elements of the Secretary's POV Regulations under the arbitrary and capricious standard, but held that the website criteria were non-binding. *Brody Mining, LLC*, 36 FMSHRC 2027, 2035-38, 2047-51 (Aug. 2014) ("*Brody I*").

2. *Congress has expressed an intent to circumscribe the Secretary's discretion in issuing a POV Notice.*

The Mine Act provides that "[i]f an operator has a pattern of violations of mandatory health or safety standards . . . he *shall* be given written notice that such pattern exists." 30 U.S.C. § 814(e)(1) (emphasis added). In *Heckler*, the Supreme Court explicitly differentiated statutes which *require* the Secretary to act from statutes which *authorize* her to act. The Court stated that a statute under which the Secretary "shall" bring a civil action if she finds probable cause to believe a violation has occurred "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." 470 U.S. at 833-34. Under the Mine Act, if the Secretary finds a pattern of violations, she must issue a notice. The decision has not been left entirely to the Secretary, i.e., the Mine Act has expressed an intent to circumscribe the Secretary's discretion.

3. *The Mine Act and the Secretary's regulations create a meaningful standard by which the Commission may review elements of the Secretary's decision to issue a POV Notice.*

A review of the Mine Act and the Secretary's regulations establishes that, while the Secretary retains significant discretion as to the details, there are baseline standards against which to compare her actions: In issuing a POV Notice, (1) the Secretary must have concluded that there was a pattern of violations, and (2) in concluding that there was a pattern of violations, the Secretary must have conducted a review that was consistent with Part 104.

Both the Mine Act and the Secretary's regulations require the Secretary to issue a notice if there is a pattern of violations. 30 U.S.C. § 814(e)(1); 30 C.F.R. § 104.3(a). Accordingly, the first meaningful standard of review is simply: Is there a pattern?

The Secretary has also established criteria and procedures for determining whether a pattern exists.[5] The question is whether these criteria and procedures create binding norms, or whether the Secretary remains free to exercise her discretion. *See Nat'l Mining Ass'n*, 589 F.3d at 1371 (citation omitted). The Commission has already found the POV criteria posted on MSHA's website to be non-binding.[6] *Brody I*, 36 FMSHRC at 2049-51. However, the

[5] The Secretary emphasizes that Congress delegated the creation of such criteria and procedures to her. 30 U.S.C. § 814(e)(4). However, having discretion to make rules is not the same as making a discretionary rule. *See Brody I*, 36 FMSHRC at 2035-36 (noting the express delegation of rulemaking authority in section 104(e)(4) and reviewing the resulting regulations under the arbitrary and capricious standard). The question is whether the rules, *once made*, impose binding norms on the Secretary's behavior.

[6] The Secretary claims the Commission has also already found the Secretary's issuance of a POV Notice to be an unreviewable exercise of prosecutorial discretion. Sec'y Br. at 9, *citing Brody Mining, LLC*, 37 FMSHRC 1914, 1928-29 (Sept. 2015) ("*Brody II*"). In context, the Commission's reference to prosecutorial discretion in *Brody II*—which we did not call unreviewable—was simply part of a procedural discussion regarding development of the record.

Secretary's POV *regulations* clearly create binding norms. Section 104.2 states that MSHA "will review" various mine records to determine if any mines meet the pattern criteria, and that the review "will include" eight listed factors. 30 C.F.R. § 104.2. These procedural requirements must be met if the Secretary is to properly determine that a pattern exists and that a notice should be issued. While these requirements are not particularly stringent, they are requirements that the Secretary has bound herself to follow.

The Secretary claims her rules are merely meant to "guide" determinations as to whether to issue a POV Notice. Sec'y Br. at 12-13. That is broadly true—Part 104 and the website are structured so that the criteria generally indicate whether a mine *may* have a pattern, leaving the Secretary with some discretion to determine whether the mine in fact *has* a pattern and therefore must be issued a POV Notice. Mines that meet the website criteria are not automatically issued a notice but instead receive "further consideration" by MSHA personnel, who retain discretion to consider additional information and may choose *not* to issue a sanction.

However, the Secretary also chose to institute, through notice-and-comment rulemaking, *minimum regulatory procedural requirements* in determining whether a pattern exists. It is "axiomatic" that an agency must adhere to its own regulations. *Drummond Co.*, 14 FMSHRC 661, 677 (May 1992), *citing Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986). The Secretary cannot bind herself to procedural requirements and then claim her actions are *entirely* unreviewable. At the very least, the Commission may review the Secretary's decision to determine whether the Secretary considered the factors listed in section 104.2(a), and whether a pattern of violations exists.[7] If not, then the issuance was not "in accordance with" the relevant statutes and regulations and may be arbitrary and capricious.[8] 5 U.S.C. § 706(2)(A).

More significantly, we held that the Judge had jurisdiction to review the validity of the POV Notice and that "[t]he Secretary is ordinarily required to disclose his theory" of the pattern. *Id.* at 1928-29. These are not consistent with *unreviewable* discretion.

[7] While the scope of our review is narrow, I would be wary of imposing a bright line rule regarding "permissible" questions. As an obvious example, Judges are not limited to asking solely "if" a pattern of violations existed. Rather, the Secretary is "ordinarily required to disclose [her] theory of how the groupings in a POV notice constitute one or more patterns of violations." *Brody II*, 37 FMSHRC at 1928. More practically, almost any question can be phrased as a matter of *if*, *how*, or *why* a choice was made, or an action taken. Rather than a list of permissible questions, the Commission and its Judges have the authority to ask *questions as necessary* to determine whether the Secretary complied with the binding requirements in her regulations. If the Secretary believes a question exceeds our scope of review or impinges on her deliberative process protections, she may raise that issue on a case-by-case basis.

[8] I do not suggest that any procedural inadequacy would inherently invalidate the resulting POV Notice. As noted, agency actions are generally reviewable under the arbitrary and capricious standard. 5 U.S.C. § 706. If the Commission were to conduct a review and conclude that the Secretary failed to comply with a procedural requirement, we would then determine whether that failure was arbitrary and capricious. For example, if the Secretary failed to consider a section 104.2 factor, the POV Notice may still be valid if the other factors so overwhelmingly

The scope of the Commission's review may be limited, but it serves the important function of ensuring that the Secretary adheres to its regulations.

The "mere fact that a statute grants broad discretion to an agency" does not render the agency's actions unreviewable "unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins*, 780 F.2d at 44-45. Here, there is minimal but clear guidance as to how the Secretary's discretion is to be exercised: in deciding to issue a POV Notice, the Secretary must determine whether a pattern exists, which in turn requires the Secretary to conduct a review that includes certain types of records and eight specific factors. These requirements, though limited, sufficiently constrain the Secretary's actions to create a meaningful standard of review against which to judge those actions: If the Secretary fails to determine that the mine has met the pattern criteria, or in making that determination fails to conduct a proper review in accordance with Part 104, then any resulting POV Notice may be arbitrary and capricious. I would dissent from the majority and find that the Secretary's decision to issue a POV Notice is not unreviewable.

C. The Secretary's right to invoke the deliberative process privilege does not invalidate the Commission's review authority.

Nothing in this opinion is intended to revoke the protections afforded by the deliberative process privilege. As the Judge recognized here, the privilege protects against inquiries that "go[] beyond factual matters into internal deliberations, including the weight given to different pattern criteria and the thoughts and opinions of the agency's employees." Order at 2 (Nov. 13, 2023). If *any* line of questioning in a legal proceeding impinges upon the Secretary's internal deliberations, the Secretary may raise the privilege and challenge that line of questioning.

However, the existence of the privilege does not revoke the Commission's review authority. Deliberative process is a *privilege that may be asserted by the Secretary,* not a limitation on the Commission's authority. *See* Privilege, *Black's Law Dictionary* (11th ed. 2019) ("A privilege grants someone the legal freedom to do or not to do a given act"). The Secretary's right to assert the deliberative process privilege is a separate legal issue from the Commission's authority to review the Secretary's decision. Rather than serving as a blanket prohibition against inquiry regarding the Secretary's decision to issue a POV Notice, it should be raised on a case-by-case basis where the issue arises.

Nor does the privilege eliminate all potential lines of questioning as a practical matter. The privilege applies to information that is deliberative and pre-decisional.[9] *See In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992-94 (June 1992). The Secretary's *decision* to issue a POV Notice is inherently a final determination rather than a pre-

supported the issuance of a POV Notice that the Secretary's decision to issue the notice was not arbitrary or capricious.

[9] There may also be an exception to the privilege "if a party can clearly show that the decision resulted from bias, bad faith, misconduct, or illegal or unlawful action." Privilege – Deliberative Process (1), *Black's Law Dictionary* (11th ed. 2019).

decisional deliberation. More practically, an operator seeking to challenge (or a Judge reviewing the validity of) a POV Notice will logically be most interested in determinations *reflected in that final issuance*, rather than preliminary analyses that may not have even been adopted: The details of how an MSHA employee weighed a particular factor when considering whether to propose a mine for POV status would be of less interest than whether the Secretary considered that factor when she made the final decision to issue the POV Notice. While lines of questioning may (even accidentally) stray into pre-decisional matters, they would not naturally be the focus of review.[10] And, as noted, in the event a line of questioning does stray into pre-decisional deliberations, the Secretary may assert the deliberative process privilege.

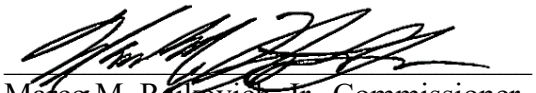
D. Limited review by the Commission would not unduly disrupt litigation.

The majority asserts that Commission review of the Secretary's decision to issue a POV Notice would require a separate hearing, resulting in a "trifurcate[d]" proceeding and imposing unduly burdensome procedural hurdles and delays. Slip op. at 13-15. No such "trifurcation" has been suggested, nor is it necessary. I note that POV litigation is already routinely bifurcated: this case was bifurcated on September 5, 2023, with one proceeding to adjudicate the substantive citations and one to adjudicate the POV Notice. Adjudication of a POV Notice *already* permits some review of the Secretary's rationale in deciding that a pattern of violations exists. *Brody II*, 37 FMSHRC at 1928 (the Secretary is "ordinarily required to disclose [her] theory" underlying the pattern). The increased scope of review proposed in this opinion would merely allow an operator to raise, and a Judge to address, limited additional arguments *during the existing POV Notice proceeding*. Any "delays" arising from these additional arguments, for example, the need to take further testimony or address deliberative process objections, would be no more time-consuming than normal complications arising during litigation, and would not be sufficient justification to abrogate our responsibility of ensuring that the Secretary abides by her binding regulations.

[10] Questions regarding the Secretary's consideration of mitigating circumstances, as at issue here, may be particularly likely to stray into internal deliberations (for example, questions as to why a particular circumstance was not given more weight). Notably, however, the Judge in this case phrased the issue as a dispute regarding how the circumstances "factored into" the issuance of the Notice. Order at 2 (Dec. 5, 2023). This could be interpreted as questioning the Secretary's post-decisional "theory of the pattern" rather than pre-decisional deliberations. Regardless, questions regarding the Secretary's consideration of mitigating circumstances should not be *inherently* prohibited, as consideration of mitigating circumstances is a procedural requirement in section 104.2(a). While the Secretary's frustration with this line of questioning is understandable, I do not believe the Judge erred as a legal matter in finding the Secretary's consideration of mitigating circumstances "material" to the case.

E. Conclusion

The Commission's role in Mine Act adjudication is to render proper review of actions taken under the statute. I would find that Commission review of the Secretary's decision to issue a POV Notice is authorized under the Mine Act, at least with respect to certain procedural requirements that bind the Secretary's exercise of prosecutorial discretion. Accordingly, I respectfully dissent.



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