FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

January 28, 2010

MACH MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2010-1-R
	:	Citation No. 6680550; 9/29/09
v.	:	
	:	Docket No. LAKE 2010-2-R
	:	Citation No. 6680551; 9/29/09
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mach #1 Mine
ADMINISTRATION (MSHA),	:	Mind ID 11-03141
Respondent	:	

DECISION

Appearances: Thomas Paige, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia and Peter Nessen, Office of the Solicitor, Chicago, Illinois, for Petitioner: Daniel Wolff, Crowell & Moring, LLP, Washington, D.C. and David Hardy, Allen Guthrie & Thomas, PLLC., Charleston, West Virginia for Respondent

Before: Judge Miller

These cases are before me upon Contestant's request for an expedited hearing to challenge Citation Nos. 6680550 and 6680551 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The citations allege that Mach Mining was operating its #1 Mine with an unapproved ventilation plan (both a site specific and a base ventilation plan) in violation of 30 C.F.R § 75.370(d). The cited standard requires, in essence, that the mine operator develop and follow a ventilation plan approved by the Secretary.

On June 4, 2009, Mach Mining ("Mach" or "Contestant") submitted a ventilation plan, which included a base plan and site specific plan, to the Mine Safety and Health Administration ("MSHA"). The parties entered into negotiations and discussed various plan provisions. In September, 2009, Mach communicated its intent to implement the unapproved plan in order to bring these contests. By agreement between MSHA and the Contestant the mine began operation without an approved plan in place and, subsequently, on September 29, 2009, was issued two citations by MSHA Inspector Keith Roberts. In addition, MSHA sent a deficiency letter to Mach that addressed the points remaining at issue. The letter and the citations list the specific items that are in dispute in the site specific plan for the #3 longwall panel and the base, or general, plan at the mine. At hearing, the parties stipulated to specific items listed in the

citations that remain in dispute for review by this Court. Specifically, the parties stipulated that the basis for the Secretary's disapproval of the ventilation plans involved the following issues:

1) Issue #1 in Citation No. 6680550 (panel #3) and Issue #6 in Citation No. 6680551 (general plan): Means of evaluating the effectiveness of the bleeders, bleeder evaluation points.
2) Issue #2 in Citation No. 6680550 and Issue # 15 in Citation No. 6680551: Use of regulators as ventilation controls in the worked-out areas.
3) Issue #3 in Citation No. 6680550 and Issue #14 in Citation No. 6680551: Use of stoppings as ventilation controls in the active tailgate entry.
4) Issue #4 in Citation No. 6680550 and Issue # 9 in Citation No. 6680551: Use of belt air to ventilate the working longwall face.
5) Issue #1 in Citation No. 6680551: Requirement to specify means of compliance with 30 C.F.R. § 75.332, continuous mining machines and split air.
6) Issue #3 in Citation No. 6680551: Requirement to show means of ventilating idle places and places where the roof bolter is operating.
7) Issue #4 in Citation No. 6680551: Inclusion of a depth-of-water action level to avoid issues regarding safe travelways.
8) Issue #8 in Citation No. 6680551: Requirement to change the manner of shuttle car operation.
9) Issue #11 in Citation No. 6680551: Requirement to use something other than check curtains in the headgate entry to direct air across the face.

MSHA argues that the above items, except issue #4 in Citation No. 6680551, should be included in the plan in a manner that meets MSHA's goals of providing a safe and effective ventilation plan. Mach argues that the plan it has used for panels #1 and #2 in the mine has worked successfully and, therefore, will work successfully for panel #3 without any change. Further, Mach alleges that its ventilation system is superior to other systems due to the high capacity fans that allow it to ventilate without "artificial" controls.

The Secretary maintains that the MSHA district manager was not arbitrary and capricious in finding that Mach's current ventilation plan is not suitable for the mining conditions at the #1 Mine while, on the other hand, the plan proposed by MSHA is suitable. The Secretary argues that the district manager, with the assistance of others at MSHA, reviewed all factors and reached a reasonable conclusion regarding the plans.

The contested citations allege violations of 30 C.F.R. § 75.370(d), which states that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." In deciding whether to approve a proposed ventilation plan MSHA looks to § 75.370(a), which provides in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a).

As a general matter, the Commission has held that plan formulation under the Mine Act requires MSHA and the operator to negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding there is some question as to whether Mach negotiated in good faith. Mach requested that negotiations end a number of times in order to take the matter to hearing. It is no secret that Mach was up against a deadline to set up the #3 panel so that the longwall could be moved on time. In addition, there is testimony from one of Mach's witnesses regarding the use of the hearing process to resolve ventilation plan disputes in other districts, which could imply that Mach failed to negotiate in good faith. (Tr. 480). Further, Mach hired two experts, Hartsog and Blandford, in July and August 2009 to advise the mine and create courtroom exhibits for the anticipated hearing. (Tr. 505, 572-573, 587-589). However, in spite of such evidence, the record supports the premise that the Secretary and Mach had extensive back and forth discussions over a period of eight months. *See Emerald Coal Res., LP*, 29 FMSRHC 956, 967 (Dec. 2007). The discussions between the district manager and Mach included telephone calls, emails, letters and meetings, at both the district and national level. During the negotiations both parties made adjustments in their positions regarding the issues. The discussions were ongoing and, based upon those talks, several of the issues were removed from consideration. While I believe the Secretary's argument that Mach failed to negotiate in good faith has some merit, the evidence presented indicates that what negotiations did occur adequately met the requirement of good faith consultation.

For reasons that follow below, I affirm Citation No. 6680550 and Citation No. 6680551 and dismiss Mach's contest proceeding.

Findings of Fact

Mach employs a longwall mining system at the #1 Mine. (Tr. 143-144). The dispute in this case centers on whether Mach's proposed system of ventilating panel #3 is suitable, as well as whether the base, or general, plan is suitable to the conditions at the mine. Mach's ventilation system is a "push-pull" fan system, designed to flood the entire mine with air. The "push" of this system is provided by a large capacity intake fan that sends air into the mine, while the "pull" is provided by a large capacity exhaust fan at the back of the bleeder shafts that pulls air out of the mine. Some stoppings and curtains are utilized in the system, but fewer than in a traditional system. Mach's position is that, because the fans put such velocities and volumes of air into the mine by utilizing pressure differentials, the air flows across the face, adequately ventilates the gob area and exits by way of the bleeders. In Mach's view, the system works well and should not be changed or adjusted. The ventilation system design is a relatively new one that has provided ample air to ventilate the #1 and #2 panels during mining. However, the system is not flexible or easily altered, making it difficult to meet changing needs as mining progresses.

Mach's system utilizes the development sections to create the main entries and the gate road entries for the longwall. (Tr. 143). The development system makes use of three mine entries with connected cross-cuts. (Tr. 148). At the time the citations were issued the mine had developed and mined the #1 panel and was in the process of mining the #2 panel. Part of the dispute in this case arose when Mach began to develop panel #3. While mining the #2 panel the mine encountered adverse roof conditions, primarily in the bleeder entries of the mine. In an effort to avoid further adverse roof conditions, the mine developed panel #3 1000 feet beyond the bleeders of panels #1 and #2. This extended development was done without consultation or approval of MSHA.

Inspector Keith Roberts, who has more than 30 years of mining experience, testified that he reviewed the two plans at issue for the #1 Mine. After consultation with the district manager, and armed with information from MSHA and a survey team, Roberts drafted the list of deficiencies contained in the citations. He did so with the input of technical support, including that of Dennis Beiter, a ventilation specialist. After discussing his findings with the district manager, he, along with MSHA personnel, discussed the two ventilation plans with Mach. On several occasions, all parties traveled to Arlington to speak with higher ranking authorities regarding the plans. Roberts visited the mine on several occasions and consulted with inspectors, supervisors, and the operator about the various issues that continued to be disputed.

Robert Phillips, the MSHA district manager in Vincennes, Indiana at the time of this dispute, has been in the mining industry in various positions since 1960 and has been employed by MSHA for 27 years. At the time Phillips started working in this position he was notified that roof control problems existed at the Mach #1 Mine, and that the mine was operating with a "conditional" ventilation plan. In response, Phillips spoke with his roof control specialist about reviewing that plan and arranged to have the ventilation plan reviewed so that an unconditional plan could be put into place. About the same time, the Contestant asked for a review of the ventilation plan for the #3 panel, which had been developed 1000 feet beyond the bleeders of panel #1 and #2. MSHA issued a citation for failing to follow a ventilation plan and, after a contest, Judge Manning agreed that Mach had made a substantial change to the ventilation that required plan approval. *Mach Mining*, 31 FMSHRC 709, 714-715 (May 2009) (ALJ). Mach and MSHA were engaged in two plan discussions: one for the overall mine, and one specifically for the #3 panel area that was being developed with an eye toward mining after the #2 panel was complete. Mach was eager to develop the #3 panel so that it was ready to mine once the #2 panel was complete. Consequently, it pushed MSHA to make findings with regard to the ventilation in that area so that it could have a plan in place to meet the mine's timeline for development. While Mach pushed ahead its plans for the #3 panel, it was also negotiating on a base, or overall, plan for the mine.

District Manager Phillips explained that each district has its own procedure for processing and approving ventilation plans. First, Phillips reviews the plans in a cursory manner and then forwards the plan for review to his technical assistant. From there, the plan is forwarded to the proper supervisor for ventilation. The plan is then faxed to the field office responsible for the mine where the inspector assigned to the mine reviews and provides remarks

on the plan. The plan then goes back and forth between the inspector and his supervisor before the remarks are sent to the ventilation supervisor in the district. Phillips, in order to keep track of the progress of the plan, requires comments from his staff and from the mine to be put in writing rather than exchanged verbally. If there are issues, he asks for assistance, as he did here, from the technical support division of MSHA. Mach's proposed plan, Gov. Ex. 1, dated June 4, 2009 and the proposed plan for the #3 panel, Gov. Ex. 2, dated September 3, 2009, went through such a process. After much discussion and review, both plans were rejected on September 29, 2009. (Tr. 299-302).

I find District Manager Phillips to be thoughtful in his deliberation regarding the plan, and cautious in reviewing every comment and document provided to the district. He sought the assistance of not only the technical support division, but also the headquarters office in Arlington, Virginia. Phillips credibly testified that he considered all input when making his decision regarding the two plans and signing the letters regarding the deficiencies in the plans submitted by Mach.

a. Use of Belt Air to Ventilate the Working Longwall Areas. Issue #4 in Citation No. 6680550 (Panel #3) and Issue #9 in Citation No. 6680551 (General Mine Ventilation Plan).

The Secretary's position is that Mach did not justify the use of belt air as required by the Secretary's new regulation found at 30 C.F.R. § 75.350(b) that requires the operator to provide substantial justification for the use of belt air. The new regulation, according to its preamble, requires a mine operator to have a compelling "need" to use belt air. *Flame-Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air from the Belt Entry*, 73 Fed. Reg. 80580-01, 80591-92 (Dec. 31, 2008) Mach, on the other hand, stresses that its system is designed to use belt air, which it has used successfully on the first two panels. In Mach's view, the system delivers twice the required air to the face and, as a result, there have been no respirable dust citations or methane ignitions. Mach argues that the use of belt air is necessary to keep the longwall face ventilated and, further, it is "safer" to use belt air than not.

Phillips and Roberts credibly addressed the issue of belt air in their testimony. Phillips explained that a new belt air rule was implemented in March, 2009. The Mach "conditional" plan had been approved prior to the new rule and the mine was using belt air to ventilate the working areas in the #2 panel. In an effort to give Mach more time to address the issue, MSHA agreed that Mach could continue to use belt air in the #2 panel while discussing the new plan. However, MSHA did not approve the use of belt air for the #3 panel. In reviewing the Mach plan, Phillips relied on a memo outlining the new belt air rule that was prepared by MSHA and circulated to all district managers. Gov. Ex. 3. The memo explains the new belt air regulation and instructs the district managers to look to four specific items in evaluating the use of belt air. First, the operator must evaluate the hazardous condition it believes will be addressed by using air from the belt entry. In most cases, the hazard will be either methane or dust at the working area. Second, the operator must evaluate how the belt air will mitigate the hazard and explore other possible solutions. Third, the operator must review technology and safety measures that it

will implement to use belt air. Fourth, and finally, the district manager must determine whether the use of belt air would afford at least the same measure of protection as not using belt air. The guidance given to the district managers tracks the standard and explains the regulation and its intent. *Id*.

Phillips explained the long history of belt air, including the belt air committee and its recommendations regarding the use of belt air. He discussed the general hazards associated with using belt air in working areas, including smoke and fire carried to the working face from the belt. According to Phillips, Mach failed to address the four criteria necessary for him to make a reasoned decision, and therefore did not justify the use of belt air in its plan. Phillips requires more of an explanation and Mach has not provided it. (Tr. 314-317).

Roberts agreed with Phillips regarding the use of belt air. In his testimony, Roberts described how Mach's proposed plan depicts the use of belt air to ventilate the working sections. However, he stated that Mach failed to identify a hazardous condition that would justify the use of belt air and, in addition, did not discuss providing at least the same measure of protection as entries that were not using belt air. Further, Roberts reviewed the new regulation and administrative documents and understands that a mine operator must meet all of the requirements in the regulation in order to justify the use of belt air. (Tr.78-80).

Mach's position is that it would be "less safe" if it were not permitted to use belt air to ventilate the longwall face. Mach used belt air to ventilate the longwall face in panel #1 and #2 and, therefore, according to Mach, its safety is justified. Mach has had no dust violations in the belt entry on the active longwall section or longwall face. (Tr. 110, 397). Mach argues that hazards would be present without the use of belt air, and believes it has justified the use to the district manager. Mach argues that it submitted some additional information to the district manager at a meeting in Arlington, Virginia, but was under the impression that belt air would not be allowed and did not pursue it further. (Tr. 346-349). Gary Hartsog, Mach's expert witness, testified that eliminating the use of belt air would cause problems with the overall ventilation system. He explained that in order to direct the belt air outby, the mine must turn down the bleeder fan to such a low setting that there would not be enough air going through the gob to keep it adequately ventilated. (Tr. 520). While Hartsog acknowledged the inherent dangers recognized by the belt air technical study panel, he nevertheless believed that it was safe to use belt air at the #1 Mine. (Tr. 578-581).

Phillips agreed that Mach had expressed concerns about discontinuing the use of belt air. However, there is no evidence in the record that Mach provided sufficient information during its meetings with MSHA to explain its position. Mach, in turn, agrees that MSHA believes Mach had not submitted enough information. The citations and the letters explain to Mach that they have not provided sufficient information to the District to make an appropriate evaluation of the use of belt air. At the present time, given that Mach has not provided sufficient information to justify the use of belt air, the plan proposed by MSHA is suitable.

b. Bleeder Evaluation Points. Issue #1 in Citation No. 6680550 (Panel #3) and Issue #6 in Citation No. 6680551 (General Ventilation Plan): Means of Evaluating the Effectiveness of the Bleeders and Specifically Evaluation Points in the Bleeder System.

MSHA requires Mach to evaluate the effectiveness of the bleeders, and, as part of that obligation, requires bleeder evaluation points at specific locations. MSHA argues, among other things, that 30 C.F.R. § 75.364(a)(2)(iii) requires that at least one bleeder be walked every seven days. The purpose of the regulation is to ensure that the bleeders are free from obstructions and that proper air quantity, quality, and direction continue throughout the system. Mach counters that, because of unstable roof, it is not safe to walk the bleeders and it is not necessary because the air is tested at the point it exits the mine. Mach believes that, given the velocity and pressure differential of the air, there is no need to risk evaluating the bleeder areas when a reading is taken "around the perimeter" and at the end of the system. According to Mach, the risk associated with walking the bleeders far outweighs the information obtained. Mach points out that it has evaluated its bleeders for the first two panels and will continue to do so for panel #3, but without using the evaluation points sought by MSHA.

Dennis Beiter is employed by MSHA in the Pittsburgh Safety and Health Technology Center as the supervisor of the Ventilation Division. (Tr.136). He spends half of his time supervising and the other half participating in mine investigations, face ventilation investigations, and investigations into explosions, accidents, fires and ignitions. Beiter has worked in underground coal mines in Pennsylvania and Illinois, and has worked for MSHA as a mining engineer in ventilation since 1991. He holds a Bachelor of Science in mining engineering from Pennsylvania State University and served on a committee that explored issues associated with bleeders and gob in the aftermath of a fatal explosion at South Mountain. As a member of that committee, he drafted a report on the bleeder and gob issues and made recommendations for education regarding bleeder ventilation systems in underground coal mines. (Tr. 138-139). He is well qualified as an expert in underground coal mine ventilation and ventilation surveys.

Beiter and his team conducted two ventilation surveys at the Mach Mine. The first survey was conducted from March 31 through April 2, 2009, and the second in June. (Tr. 145). At the time of the first survey, the mine had completed mining panel #1 and had advanced about 1000 feet in panel #2. (Tr. 150). Beiter conducted an air pressure and air quantity investigation. He also conducted a tracer gas study, collected bottle samples, took underground readings at identified locations, measured pressure differentials, and used chemical smoke and hand-held gas detectors to determine the direction of airflow and the levels of methane and oxygen. A map attached to his report provides an overview of the bleeder system, the pressure differentials, and the key locations of the ventilation system. Gov. Ex. 4 Figure 1. It also indicates all places where readings and measurements were taken during the survey. (Tr. 147- 148). Beiter relied on this map, as well as others, during his testimony. Gov. Ex. 4 Figure 1, 4.

Beiter and his team, along with representatives from the mine, traveled every bleeder entry and stood in every cross-cut, except those that were not safe due to the deteriorating roof

condition in the bleeder entries. They used chemical smoke to determine air movement in all of the cross-cuts between the bleeder entries and the south mains for headgate number one. (Tr. 157, 163). Beiter, or persons in his party, traveled both tailgate entries, the number three entry, and the tailgate travelway in their entirety. They encountered deep water with bridges spanning the water in many locations. (Tr. 162). They traveled the bleeder entries from headgate number two to the bleeder shafts and outby tailgate number one for four cross-cuts, collecting information regarding the adequacy of the airflow distribution and the adequacy of the dilution of gases. (Tr. 180). Traveling the bleeders was necessary to determine if the ventilation system was effective, as well as to determine what effect the roof falls had on the system. (Tr. 181-181).

The #1 Mine uses an intake shaft with a blower fan located at the surface to bring air into the mine. As the air enters the mine, it is forced into the mine with the blowing fan at the top of the intake shaft. (Tr. 149). At the other end of the mine are two bleeder shafts, one cross-cut apart, that join one another before reaching the bleeder shaft fan. (Tr. 150). The air reaches the bleeder shaft through the bleeder entries, which are perpendicular to the longwall panels and the gate entries. (Tr. 152).

When Beiter's team began the first survey, panel #1 had been mined and was now the gob area. Panel #2 was in the process of being mined and the bleeder entries were connected with the bleeders for panel #1. The bleeders in panel #2 were changed from panel #1 when the mine encountered extremely bad roof. Five bleeder entries were mined from headgate number two to headgate one, and two entries continued on but were never were fully developed to reach the bleeder shafts. (Tr. 154). As the mine began to develop panel #3 in preparation for a move of the longwall from panel #2, the bleeder entries were again changed. Without MSHA's knowledge, Mach developed the bleeder entries of panel #3 an additional 1000 feet beyond the bleeders for panels #1 and #2. According to Beiter, the change in the bleeder entries has an effect on the ventilation and, in turn, on the ventilation plan. Beiter testified that the fact that one panel is mined, which in turn creates a gob area, affects the ventilation plan as each panel moves forward.

Based upon the studies completed by the technical support team, Beiter explained that when the air movement was examined between the number two entry and the number three entry of the tailgate, it sometimes traveled from two to three, and at other times from three to two. (Tr. 166). Beiter was able to determine that the air flow from headgate number one to tailgate number one passed over the gob, or worked-out area. He stated that "[e]ven though there is a significant volume of airflow . . . from headgate one towards tailgate one in the big sense, in the little sense at each cross-cut, there's not a significant volume you can measure." (Tr. 186). He explained that when panel #1 is mined out and panel #2 is being mined, the existence of panel #2 has an effect on how the air from the gob gets to the bleeder system. (Tr. 187). Further, he stated:

> In the three entry longwall development system, as the two panels are mined out, one subsequent to the other, the only opening left between the panels is the

> middle entry. The number one entry falls for the mining of panel one. Panel two caves entry number three. Now you have some open area along the perimeter of the walk that . . . has some open area to it. The primary place for air to flow and gas to accumulate in volume are in those open entries inby [the] face and along the cave material itself. (Tr. 187).

Beiter confirmed that Mach must have evaluation points to determine the air quality and quantity before the air reaches the bleeder entries and at points within the bleeder system. He suggested that evaluation points be placed at the areas proposed by MSHA because the evaluation points are necessary for panel number #3 and for the base ventilation plan. He confirmed that the mining of panel #3 changed in design from the previous panels. When the panel #3 entries were driven, they were driven beyond those of panel #2, creating a "stair-step" in the bleeder entries inby panel #3. (Tr. 194-195). In order to determine if the system is functioning effectively, Beiter would require a number of measuring points and evaluation points. (Tr. 198-199).

Mach places much emphasis on the fact that both of Beiter's surveys contain the same conclusion, i.e., the bleeder system was working effectively on the date of each survey. However, the reports generated as a result of the surveys go on to reach a number of other conclusions. The conclusion of Beiter's team was that the "adequacy of the airflow distribution in the bleeder system and the dilution of methane elsewhere in the bleeder system in addition to the 30 C.F.R. Part 75.323(e) location(s), could not be determined from information collected [by the mine] at the required weekly examination locations for the bleeder system." Gov. Ex. 5 at 7. Beiter and his team were able to make their recommendation and conclude that, based upon measurements at evaluation points that are not contained in the proposed plan of Mach, the system was working effectively on the day of the survey. For this reason, Beiter believes that in order to adequately evaluate the system, readings at the evaluation points recommended by MSHA are important. Mach's proposal lacks "consideration of a very significant piece of information, and that's the adequacy of the airflow to dilute the contaminants that are being liberated in that worked-out area to safe levels." (Tr. 209). That is why Beiter suggested the location of evaluation points at the back end of panel #3 and the bleeder entries. (Tr. 209). Evaluation at those areas would provide representative information regarding airflow and the dilution of contaminants. (Tr. 209).

Beiter explained that Mach had requested a change to the mine ventilation plan for its #1 Mine to allow the use of a step bleeder system as it developed the #3 panel. He explained that MSHA could not approve the plan primarily because of the location of the evaluation points for the ventilation system. Mach asserts that it is sufficient if it tests and finds little, if any, methane at the point the air exits the mine. However, the exit point does not explain to Mach or MSHA where the air is going or what the readings are at the working areas or idle areas in the mine. It is critical, as Beiter explained, that the system be evaluated and tested at various points in the mine.

Anthony Webb, the general mine manager for the Mach #1 Mine, explained the mine's current method of evaluating the bleeder system and confirmed that it is the method used in panels #1 and #2. (Tr. 378-380). Webb testified, as he did with each issue, from notes that were handed to him by his attorney, thereby making his testimony less believable. He testified primarily about the quantity of air that moved in the system. He believes that the evaluation points suggested by MSHA cannot be representative of what is going on in the flow path of the system. (Tr. 389). Webb maintains that during the prospective mining of panel #3, ventilation will not be any less effective given that the mine fan still has 30% unused capacity left and, therefore, further evaluation points sought by MSHA are unnecessary. (Tr. 388). In Webb's view the value of the data must be weighed against the risk of obtaining it. (Tr. 390).

Mach argues that it has developed an "alternative method of evaluation" of its bleeder system through the evaluation and monitoring of points located around the perimeter of the bleeder system. Mach claims it is able to obtain all relevant information, including the air quantity, quality, and direction, without endangering the lives of miners by requiring them to walk the bleeder entries. According to Mach, the evaluation points around the perimeter tell the examiner that the air is moving in the right direction, while the evaluation point on the surface reads the quantity and quality of air that exits the bleeder system. Mach's expert, Gary Hartsog, agrees that the evaluation points proposed by Mach are effective to evaluate the "ventilation system." (Tr. 548-49). Hartsog, who has an engineering degree from West Virginia University, conducted his own ventilation survey after reviewing the two conducted by MSHA. (Tr. 513). He reached the same conclusion as Beiter, i.e., that the system was effective at the time of his survey. However, he did not make any recommendations or address the recommendations made by MSHA as a result of their own ventilation surveys.

Mach admits that wide variations in air quality, as portrayed in Beiter's survey, are coming through the bleeder system. Mach Brief at 10; (Tr. 236-237). Hartsog says that traveling the bleeder system would provide "minimal relevant information." (Tr. 556). In his opinion, the evaluation around the perimeter would provide sufficient information to evaluate the effectiveness of the bleeders. (Tr. 549). Hartsog admits, however, that taking air measurements at the exhaust fan will not indicate where, and in what quality, the air has traveled in the bleeders

There is no question that there are adverse roof conditions existing in bleeders which may deteriorate further as mining progresses. However, those adverse roof conditions may have an effect on the ventilation system. (Tr. 552). The district manager's reliance on the information gathered by Beiter and the conclusions reached by Beiter's team are all well-founded and suitable for this mine. I conclude that, unlike Hartsog's proposals, the evaluation points recommended by Beiter give a complete view of the effectiveness of the ventilation system.

c. Stoppings in Active Tailgate Entries. Issue #3 in Citation No. 6680550 (Panel #3) and Issue #14 in Citation No. 6680551 (General Ventilation Plan): Use of Stoppings as Ventilation Controls in the Active Tailgate Entry.

The Secretary argues that Beiter's survey established that air was moving toward the active tailgate entry, rather than away from the active tailgate entry, and that stoppings should have been in place to assure the correct movement of air. (Tr. 210-11). The stopping line required by MSHA would protect the active tailgate entry from methane and move air away from that entry. Mach argues, again, that its system is effective without imposing new ventilation controls. Mach alleges that MSHA failed to prove that the use of controls in the #1 Mine is safer and therefore more suitable to the mine.

It is Beiter's opinion that there should be ventilation controls in the bleeder entries of panel #3 that are sufficient to control and distribute the airflow. (Tr. 206). The lack of ventilation controls makes it difficult to control airflow distribution in the system. He explained that during his survey it was clear that the controls in headgate number two were critical to controlling the airflow of the system. Those controls worked in conjunction with the curtains near the face to build pressure across the worked-out area and provide airflow across the longwall face and into the bleeder entries. The controls, not part of the Mach proposal, are important to establish pressure differential and direction of airflow into the worked-out area, in the headgate, and on the longwall face. (Tr. 206).

Stoppings are necessary, based upon the MSHA survey, to "prevent the vast majority of any airflow that was in the number two entry and its contaminants from entering into the tailgate entry." (Tr. 211). Beiter's opinion is based not only on the two surveys conducted at the mine, but also on his observation of notable changes in the air movement when stoppings were put in place during the course of the second survey. The second survey was conducted in the same manner as the first and, like the first survey, was conducted with Mach personnel. (Tr. 212-213). The longwall face had progressed at the time of the second survey from about 800 feet to approximately 4800 feet in the second panel. (Tr. 215). Ventilation controls, i.e., stoppings, that were in place for the first survey had been removed by the time of the second survey. Gov. Ex. 5 Figure 5. The second survey began on June 9. When the survey team returned on June 11, the stoppings had been reconstructed in the same manner as they had been for the first ventilation survey. According to Beiter and his team, the stoppings made a significant difference in airflow patterns and pressure differential. (Tr. 217). The pressure differential changed when the ventilation controls were reconstructed prior to the team's arrival on June 11. (Tr. 221). The result was that the direction of air movement carried the liberated gases into the caved areas. (Tr. 222). Mach argues that the change in the stoppings is insignificant, that the ventilation controls will compromise the overall Mach system, and that they are difficult to construct. Mach, however, presented no real evidence that the tailgates would be adequately ventilated without the stoppings in place. Beiter's view of the need for stoppings, however, has a legitimate basis in fact and is a sound basis for the inclusion in the ventilation plan.

d. Bleeder Entry Ventilation Controls. Issue #2 in Citation No. 6680550 and Issue #15 in Citation No. 6680551: Use of Regulators as Ventilation Controls in the Worked-out Areas.

The Secretary argues that because Mach chose to drive the #3 panel 1000 feet outby the bleeder entries of panel #1 and #2, it created a stair-step effect that requires controls to ensure proper ventilation in the bleeder entries. MSHA proposes a permanent stopping line and other controls across the bleeders behind panel #3. The ventilation controls are needed to ensure that air does not short circuit and travel through caved areas or around the corner of the stair-step. (Tr. 198-199, 203, 205-207).

At the time of Beiter's second survey, Mach removed ventilation control stoppings behind panel #2, which resulted in a redistribution of air in the bleeder system. (Tr. 216-217, 220-222). Mach's expert, Hartsog, believes that the controls suggested by Beiter would only add resistance in the system and slow down the air movement. (Tr. 564). Hartsog failed to explain how the air would avoid a short circuit without some control in place. Hartsog also opined that it would be difficult to get to the area to build stoppings. He testified that it would take enormous time and effort to get the materials into the bleeders for construction, and that it might prove to be dangerous to undertake construction given the roof conditions. (Tr. 552-554). Consequently, Mach argues that no stoppings should be built in the bleeder system because it would be labor intensive and the roof is bad. In addition, Mach believes that its ventilation design works effectively because there are few, if any, ventilation controls to block or redirect air flow. (Tr. 419-20, 550-56).

The Secretary has demonstrated the need for ventilation controls in the bleeder entries and the importance of those controls to be included in the ventilation plan of the mine.

e. Ventilation of Idle Places and Places where Roof Bolter is Operating. Issue #3 in Citation No. 6680551: Requirement to Show Means of Ventilating Idle Places and Places Where the Roof Bolter is Operating.

The Secretary argues that a methane buildup hazard is created when a curtain is not present to direct air into idle areas that have been cut but not yet bolted.

Mach argues that MSHA failed to demonstrate a basis for requiring Mach to ventilate its idle areas or areas where roof bolting operations were occurring. Mach has not been asked in the past to use a line curtain to direct air from the main ventilation into idle places or into areas where roof bolting is occurring. (Tr. 90, 355). It is Mach's opinion that, by not using the line curtain the mine avoids directing dust from the continuous miner, that may be working in the area, onto its roof bolters. MSHA, on the other hand, is concerned with methane accumulations in those areas. Mach counters that the mine has not experienced a methane buildup in idle areas, or areas where roof bolts are being installed. In addition, Mach avers that roof bolting machines are equipped with methane monitors and that the bolters use a probe to sweep the area in front of them as they progress. (Tr. 408).

Roberts explained the potential methane hazard that exists if the area where roof bolters are working is not adequately ventilated. The line curtain, in most cases, is used when the continuous miner is cutting, and therefore is already in place and may be adjusted to

accommodate the roof bolters. (Tr. 18-25). Phillips agreed, and added that an additional factor that must be considered is the nature of roof bolting in causing a spark and, in turn, an ignition if methane has been allowed to build while an area is idle. (Tr. 69). The Secretary points out that adjustments can be made and that it is far safer to avoid a methane buildup in those idle areas, or areas that are being roof-bolted, than it is to completely disregard having a curtain for fear that more dust will reach the roof bolter operator. The Secretary demonstrates a legitimate concern for the possibility of a methane buildup in those areas that are currently idle but will eventually require the roof bolter to enter and bolt the roof.

f. Continuous Miners on the Same Air Split. Issue #1 in Citation No. 6680551: Requirement to Specify Means of Compliance with 30 C.F.R. § 75.332.

As a result of a complaint at the mine, Inspector Roberts issued a citation alleging a violation of 30 C.F.R. § 75.332(a). Roberts found that, contrary to the regulation, two continuous mining machines were operating on the same split of air. (Tr. 57). Roberts, in advising the district manager to include a provision regarding the use of split air in the mine ventilation plan, explained that MSHA wants to assure that the mine has a plan in place to deal with two continuous miners working on the same split of air. (Tr. 70-71, 66,-67). However, both Hartsog and Webb testified that Mach is using an appropriate system to meet the requirements of the standards and it is not necessary to have the provision in the plan. (Tr. 405-407, 568).

The Secretary avers that, in order to assure compliance, it is appropriate to include a provision regarding the use of air splits when two continuous miners are operating. MSHA relies, rightly, on the premise that additional provisions, including the subject air split provision, may be required to be included in the plan as "required by the district manager." Gov. Brief at 18; 30 C.F.R. § 75.371.

g. Issue #4 in Citation No. 6680551: Inclusion of a Depth-of-Water Action Level.

Mach asks the Secretary to include a provision in the plan allowing the accumulation of up to 12 inches of water before any action is taken. Mach seeks a means to ascertain when a citation may be issued for accumulation of water in the bleeder entries in violation of 30 C.F.R. § 75.371(a). Webb testified on behalf of Mach that 12 inches of water is not a hazard and therefore the proposal is sound. MSHA refused the provision as an attempt on the part of Mach to circumvent the regulation, something that the district manager will not allow. I conclude that the district manager was well within his discretion to deny a proposed plan that places limits on a mandatory standard.

h. Issue #8 in Citation No. 6680551: Requirement to Change the Manner of Shuttle Car Operation, and Issue #11 in Citation No. 6680551: Requirement to Use Something Other than Check Curtains in the Headgate Entry to Direct Air Across the Face.

The Secretary did not present evidence at hearing or brief the issue of the requirement to change the manner of shuttle car operation, or the requirement to use something other than check curtains in the headgate entry to direct air across the face. As a result, I refrain from addressing these issues.

Conclusions of Law

While plan contests are based on consultations between the Secretary and the operator, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996). As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989), *quoting* S. Rep. No. 95-181, at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

The framework for resolution of a plan dispute has been established by the Commission in a number of cases, including *Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008). The Commission has held that, "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining Co.*, 18 FMSHRC at 1746. At issue is whether the Secretary properly exercised her discretion and judgment in the plan approval process. The standard of review incorporates an element of reasonableness. *See Monterey Coal*, 5 FMSHRC 1010 at 1019 (June 1983). I must therefore look at the issue of suitability in terms of the discretion of the district manager.

a. Unsuitability of the Current Mach Plan.

There are two plans at issue in this case: (1) a general plan for the entire mine and (2) a specific plan for the mining of panel #3. MSHA issued a citation for each plan. Because the issues are fundamentally the same in each citation they may be addressed together. The general plan was in effect when Phillips came to District 8. At that time there was no plan for the development and mining of panel #3. Rather, the plans in place were conditional plans. After his arrival, Phillips instructed his ventilation supervisor to contact Mach and start working on a plan that was not "conditional."

The ventilation plan that was in place at the Mach #1 Mine was found to be unsuitable in a number of ways. First, it did not address the #3 longwall panel that had already been developed an extended distance beyond the bleeders of panels #1 and #2. In developing the panel #3 bleeders 1000 feet beyond those in panels #1 and #2, the mine created a stair-step in the bleeder system and had no means of evaluating the area. This was a substantial change in the ventilation plan and it needed to be addressed. In addition, the longer Mach continued to mine under that plan, the more gob it created, which in turn necessitated ventilation changes to meet

the changing circumstances in the mine. Further, as mining progresses and Mach moves forward with panel #3, the air has a longer route to travel. The plan in place contained no provision for these contingencies and therefore was not suitable. Finally, the mine had been conditionally granted the use of belt air, but, following the implementation of the new belt air regulation, the district manager was directed to review the matter. As a result, it is clear that the plan in place was no longer suitable for the mine.

The ventilation surveys conducted by Beiter and technical support at the mine demonstrate that the ventilation was good at the time of the survey. Mach takes this to mean that the plan in place was working, i.e., suitable, and need not be changed. In fact, the experts who testified on behalf of Mach assert that the ventilation system is so good, that it will last throughout the mining of six panels or more. MSHA counters that the system no longer functions properly as new panels are developed and specifically as the # 3 panel begins.

Mach's argument fails to take into account the changing conditions at the mine, i.e., the stair-step bleeder that has been created, the fact that the air course is longer, and the fact that there is a much larger mined-out area, or gob, to ventilate. I agree with the district manager that the plan in place was not suitable to the Mach mine and therefore was subject to review by MSHA.

b. Suitability of the MSHA Plan.

Next, the Secretary must show that the district manager did not abuse his discretion in determining that the MSHA plan is suitable to the conditions at the Mach #1 Mine. Specifically, the Secretary must show that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plan and its suitability. The Commission has defined "suitable" as " 'matching or correspondent,' 'adapted to a use or purpose: fit,' 'appropriate from the view point of . . . convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.' " *See Secretary v. Peabody Coal Company* 18 FMSHRC 686, 690 (May 1996)(omission in original), *quoting Webster's Third New International Dictionary* 2286 (1986), aff'd 111 F.3d 963 (D.C. Cir. 1997). The evaluation points proposed by MSHA, the ventilation controls, and the belt air all must be suitable to this mine.

The evidence presented by the Secretary clearly demonstrates that the MSHA proposal is suitable as it relates to the evaluation points for the bleeder system. First, Bieter's testimony is well founded that measuring the quality and quantity of air traveling through the system at various points is a crucial part of the ventilation plan, and that the perimeter checks or the exhaust check proposed by Mach is not adequate. The bleeder system was changed by Mach and created an even greater need for reliable evaluations of the system. Mach argues that the plan in place is good enough and that the extended bleeders have not changed that. MSHA refutes this argument based upon the surveys conducted by Beiter. Beiter testified that, if the mine uses the evaluation points it proposes, the information will not be sufficient to evaluate the effectiveness of the system.

Beiter explained that ventilation controls are necessary in the bleeders and the tailgate area, and that the proposal by MSHA is suitable. He was able to witness the changes in the air quantities and qualities when he conducted his second survey. Midway into that second survey, the mine made changes by installing stoppings in certain areas. Given these changes, Beiter opined that the ventilation controls are important and essential to an effective system.

The ventilation surveys conducted by MSHA's technical support people indicate that, while the ventilation system works well, it is important nevertheless to evaluate it at different locations in the mine to be sure that there is no methane or dust in those areas. An evaluation at the exhaust fan where all air exits the mine is not a credible indication of air quality and quantity as air travels through the mine. The evaluation points proposed by MSHA are critical in providing the information necessary to determine the effectiveness of the ventilation system. If the areas cave as the mine says they will, given the roof stresses Mach observed, then those areas will affect the air, which in turn requires an even greater need to regularly and reliably confirm the effectiveness of the bleeders and the ventilation as a whole. MSHA has demonstrated that its plan, which requires the mine to evaluate the air at the recommended evaluation points, is suitable to the mine. The Secretary has demonstrated that, as successive panels are mined, additional airflow paths through the larger worked-out area are created. These additional airflow paths, coupled with the creation of open areas where gases can accumulate, result in a more complex system, which, if not properly addressed, poses a hazard to miners. (Tr. 224).

While Mach's #1 Mine currently uses belt air, MSHA has determined that it may not be suitable. MSHA considers belt air and its associated hazards so important that it commissioned a panel to look into the issue and author a report. As a result of that report a new regulation was promulgated and district managers were given guidelines to follow when making a determination as to whether the use of belt air is appropriate in each circumstance. The regulation, which became effective in March 2009, imposes a higher standard upon mine operators to show that the use of belt air to ventilate the face is a safe option. The panel and the MSHA directive both indicate that belt air should not be used at the face unless there is no safe alternative. Based upon the testimony, the use of belt air has not been eliminated from consideration by the Secretary. However, Mach has a duty to provide further information and justification in order to continue the use of belt air. Mach's argument focuses on how detrimental reversing the belt air would be to the overall ventilation plan. However, Mach did not attempt to address the possibility of directing the air in some other manner or offer an alternative to belt air that is workable. Instead Mach relies upon its argument that it is safer to use belt air because, if the mine is required to turn the belt air around, it will take away air meant to ventilate the face and gob.

I credit Beiter's testimony far more than the generalization made by Mach's expert, Hartsog. Beiter spent significant time in the mine and conducted two very thorough studies of the ventilation system in its entirety. Beiter examined all of the changes made by the mine and the effect those changes had on ventilation. The district manager relied on the information provided by Beiter and his team, and rightfully determined that the plan proposed by MSHA is suitable for this mine.

The parties agree, and I concur, that the current ventilation system at the Mach #1 Mine is a new system that utilizes a high volume of air with the intention of keeping all areas free of methane and dust. The #1 Mine is well built and incorporates a good ventilation system as well as wide entries and up-to-date technology. Although the mine has received dust citations, it has not received a citation for dust at the working face in the two years it has been in operation. The measurements taken at the exhaust fan after the air has left the mine have never shown a methane concentration greater than .4. However, all of this is not enough to convince me that, as Mach asserts, the ventilation plan does not now need, nor ever will need, any changes.

c. Decision of the District Manager.

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager are arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 30 FMSHRC at 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

I find that the district manager in this case went beyond the requirements of examining relevant data by seeking out data, information, and opinions from a number of highly qualified people. He articulated a satisfactory explanation both for his finding that the Mach plan was not suitable to the mine and for his determination that the provisions sought by MSHA are suitable. The record clearly demonstrates that the district manager had a solid basis to determine that Mach's plan was not suitable. He understood that the mine was operating on a "conditional" plan, and that the plan contained the use of belt air to ventilate working areas. He was aware that the mine had started to develop the #3 panel, had created a stair-step in the bleeder area, and that the mine had suffered a number of roof falls that may have affected the ventilation.

Further, I find that District Manager Phillips did not abuse his discretion in determining that the plan changes requested by MSHA are suitable to this mine. Based upon the information provided to him from multiple sources, i.e., input from the agency and from the mine, he determined that the use of belt air needed further examination, that there must be relevant

evaluation points in the bleeder system, that ventilation controls must be put in place, particularly in the bleeders and the tailgate area, and that the area where the roof bolters are operating must be ventilated. The changes proposed by MSHA are within reason and are suitable to the conditions as they currently exist at the mine. There is a clear connection between the facts found by Phillips and the decisions that he made. His reasoning and explanation fit squarely with the information and evidence that was before him.

I find the approach of the district manager to be reasonable given all of the circumstances. In other words, the district manager's refusal to approve the Mach plan without the provisions listed in the citations was not arbitrary and capricious. The district manager was reasonable in determining that the plan in place at Mach was not suitable, both in general terms and in terms of the mining about to begin in the #3 longwall panel. Phillips did not approach the plans in a vacuum, but instead sought and received input from inspectors, their supervisors, roof and ventilation control specialists, MSHA's technical support division, and finally from the MSHA headquarters office in Arlington. Phillips spent months discussing the issues with Mach, requesting further information, meeting with them, and reviewing material. He has been in the mining industry for more than forty years and has extensive experience with ventilation and ventilation plans. He was familiar with the Mach #1 Mine, its ventilation system, and its arguments regarding the plan. He reviewed all of the information presented to him, followed the instructions of the agency and Congress in assessing the use of belt air, understood the risks of the plan, and, in the end, made a reasonable decision regarding the suitability of the plan provisions proposed by MSHA.

Mach argues that the district manager is seeking to make material changes to the mine's ventilation plan and that the changes make the mine unsafe, and the ventilation ineffective. This argument focuses primarily on the issues of ventilation controls, belt air, and evaluation points. Mach argues that it makes the system less effective to use ventilation controls and eliminate the use of belt air, that by using the evaluation points proposed by MSHA the mine is less safe as the roof deteriorates, and that building stoppings is not safe and requires an unusual amount of labor.

I reject Mach's proposal that the Secretary be required to prove that the hazard addressed by a new plan provision either exists or is reasonably likely to occur, i.e., that the mine is less safe if the MSHA plan is put in place. "Section 303(o) of the Act, in setting forth the requirement that a ventilation plan be suitable to mining conditions, does not require that plan provisions be based on the existence of specific hazards or the likelihood that specific hazards may occur." *Peabody Coal*, 18 FMSHRC at 690. I conclude that the Secretary carried her burden of proving the suitability of the new MSHA plan provisions, once she identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision. *Id.*

While MSHA agrees with Mach that the "push/pull" ventilation system is generally a good one, the nuances of the system need work. Mach's view is that the system is good and needs no changes now or in the future. Mach wants little, if any, MSHA involvement in the mine ventilation plan. It appears that while the system is a good one, it has little flexibility to

meet the changing conditions in the mine. I find that the Mach experts diminished their credibility by insisting that the ventilation system works in all conditions ad infinitum. Such insistence ignores a realistic assessment of the potential for change as mining progresses. On the other hand, MSHA has reviewed and recognized that changes in the mine are inevitable and the plan must be flexible and meet such change. I find that the district manager was not arbitrary and capricious, that he made well thought-out decisions, and that the plan MSHA proposed is suitable to this mine.

d. Other Matters.

I find no value in Mach's argument that MSHA approved its ventilation plan when it terminated a citation on September 9, 2009. The regulation is clear that a ventilation plan must be approved, in writing, by the district manager. 30 C.F.R § 75.370. There can be no dispute that this did not occur here.

I find no merit to Mach's argument that they should not be subject to both a general plan and a site specific plan for the #3 panel. The Secretary explained why the two discussions were ongoing. It appears that separating the discussions of the #3 panel from the general plan provided Mach an opportunity to focus on that which was most important to it, i.e., having a plan in place to move forward on their mining schedule.

During the course of the hearing, Mach attempted to introduce evidence concerning the ventilation plans at other mines, ventilation or dust surveys at other mines, and information that had not been provided to the district manager during the course of the negotiations regarding the ventilation plans. I refused to allow that evidence for several reasons, but most importantly because it is not relevant to the decision regarding the circumstances and suitability of the plan to this mine. While I understand that many plans are based upon the experience at other mines, it is extremely unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plan.

Since I must examine whether the actions of the district manager are arbitrary and capricious, I must look at how he made his decision, what he had before him at the time, and what information he used. Any document generated after that time is not relevant and will not assist me in making an informed decision in this matter. The same can be said about the testimony of a former district manager, who does not have the same information in front of him; it has no probative value. District managers are individuals and may make different determinations even if it were possible to exactly re-formulate what went into one decision.

I conclude that the Secretary has met her burden of proving that the district manager did not abuse his discretion in determining that the prior Mach ventilation plan is no longer suitable to the mine and that the plan provisions proposed by MSHA are suitable. Accordingly, Citation No. 6680550 and Citation No. 6680551 are affirmed and Contest Proceedings, Docket Nos. LAKE 2010-1-R and LAKE 2010-2-R are hereby dismissed.

Margaret A. Miller
Administrative Law Judge

Distribution:

Peter Nessen, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Suite 844, Chicago, IL 60604-1502 (via certified mail)

Thomas Paige, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA 22209-2247 (via certified mail)

Daniel W. Wolff, Esq., Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, D.C 20004-2595 (via certified mail)

David J. Hardy, Esq., Allen Guthrie & Thomas, PLLC, P.O. Box 3394, Charleston, WV 25333-3394 (via certified mail)