

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 16, 2010

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDING
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. VA 2010-489-E
v.	:	Citation No. 7307437;07/21/2010
	:	
CONSOLIDATION COAL COMPANY,	:	Buchanan Mine #1
Respondent	:	Mine ID 44-04856

DECISION

Appearances: Stephen Turow, Esq., Ashton Phillips, Esq., U.S. Department of Labor , Office of the Solicitor, on behalf of the Petitioner.

R. Henry Moore, Jackson Kelly PLLC, for Respondent, Consolidation Coal Company

Before: Judge Moran

This case is before the undersigned administrative law judge (“Court”) on a Referral of an Emergency Response Plan Dispute by the Secretary of Labor (“Secretary”) pursuant to Commission Rule 24(a), 29 C.F.R. § 2700.24(a) and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), as amended by the Mine Improvement and New Emergency Response Act of 2006 (the “MINER Act”), 30 U.S.C. § 876(b)(2)(G). Consol’s Buchanan Mine No. 1 is an underground coal mine located in Mavisdale, Virginia. The citation in issue, No. 7307437, a Section 104(a) citation, was issued on July 21, 2010, pursuant to Section 316(b) of the Mine Act. That citation notes MSHA’s concern that the ERP failed to demonstrate that it would “effectively provide for the safe maintenance of individuals who may be trapped underground in the mine for a sustained period of time” on the basis that the Strata refuges can only maintain interior apparent temperatures at or below 95°F when the mine temperatures surrounding the refuges are 70° or less. MSHA advised that it needed “*reliable* technical data that demonstrates that the Strata refuge alternatives . . . can safely maintain miners given the mine’s specific conditions.” Jt. Ex. 14 (emphasis added). Specifically, the Citation states that, under its ERP, Consol will be using Strata Safety Products’ (“Strata”) Fresh Air Bays for the refuge alternatives but that Consol has not shown that those units will provide a safe environment for miners who may need to use them.

Background

Section 2 of the MINER Act requires underground coal mine operators to develop and submit for MSHA approval an emergency response and preparedness plan (“Emergency Response Plan” or “ERP”). The ERP is intended to address the evacuation of miners who are endangered by a mine emergency and to maintain miners who are trapped underground, unable to evacuate the mine. 30 U.S.C. §876(b)(2). A central tenet of the MINER Act is to provide for the maintenance of miners who cannot evacuate and are forced to remain underground. S.Rep. No. 109-365, 109th Cong., at 4 (2006) at 4. The legislative history for the MINER Act noted that, where miners are unable to escape and therefore must await rescue, “breathable air is essential.” S.Rep. at 6. In carrying out the legislation’s directive, the Secretary issued guidance to the mining community and this included Program Information Bulletin No. PO 7-03 (“PIB”), which directed that ERPs must include a provision specifying how breathable air will be maintained.

The parties’ stipulation as to the issues in this proceeding:

The parties stipulated that the following are the issues relevant to the resolution of the above-captioned ERP Dispute Proceeding.

- a. Did MSHA District Manager Ray McKinney act arbitrarily and capriciously in revoking or withdrawing his approval of the refuge alternative provisions associated with the ERP adopted by Consol for implementation at the Buchanan Mine #1?
- b. Did 30 C.F.R. § 75.1506(a)(3) obligate MSHA District Manager Ray McKinney to accept the use of the ERP-specified Strata refuge units and prohibit him from revoking or withdrawing his approval of the ERP as submitted by Consol for implementation at the Buchanan Mine #1?
- c. Given the course of interaction between Consol and MSHA’s District 5 office concerning the use of Strata refuge units at the Buchanan Mine #1, did MSHA act in accordance with 30 U.S.C. § 876(b)(2)(G) in issuing Citation No. 7307437.

The standard to be applied.

The Commission has most recently addressed the subject of emergency response plans, and disputes arising under those plans, in *Twentymile Coal Co.*, 30 FMSHRC 736, 2008 WL 4287782, August 2008, (“*Twentymile*”). A review of the guidance in that decision is useful here.¹ In ERP disputes, the scope of a hearing is limited to review of the disputed provision(s) of the Plan. The Secretary has the burden of proving that MSHA’s refusal to approve the disputed

¹The Commission, then composed of four members, divided evenly on the *application* of the principles to be applied in ERP disputes, but there was unanimity as to the test itself. This decision’s reference to *Twentymile* speaks only to the aspects of that decision where the Commission members were in agreement.

aspects of the Plan was not “arbitrary and capricious.”² That term is expressed in various ways. For example, in *Twentymile*, Judge Manning described the inquiry as to a District Manager’s requirement to include a provision in the Plan as whether it was “not unreasonable.” Still another way to pose the question is whether the District Manager’s decision was “reasonable in light of the particular circumstances.”

The Commission also noted that the concept of plans is not new under the Mine Act and that the process of devising ERPs, as with the development of other plans, must address the specific conditions of the particular mine involved.³ The process of the development of plans in general, including ERPs, is that the operator and MSHA first negotiate in good faith over disputed provisions and that the negotiation continue for reasonable period of time. Thus, the parties must identify and give notice of their respective positions and then engage in adequate discussion of the disputed issues. Once that has occurred, however, as the negotiation process cannot be unending, it is the Secretary’s responsibility to “independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan.” *Id.* at *10, quoting *UMWA v. Dole*, 870 F.2d 662, (D.C. Cir. 1989), involving mining plans. The point is that, the negotiation process is not identical to that which may occur between private parties. Rather, the Secretary, having made the effort to negotiate the issues, can ultimately “insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *Id.* This is bounded only by the Secretary’s duty to act in good faith and to not impose conditions arbitrarily.⁴

²In *Emerald Coal Res., LP*, 29 FMSHRC 956(Dec. 2007), the Commission earlier upheld the “arbitrary and capricious” standard of review, noted the applicability of the ‘plan’ model for ERPs, stated that, as with other plans such as ventilation or roof control, ERPs must address “the specific conditions of a particular mine,” and that MSHA has a duty to negotiate differences over ERPs in good faith and for a reasonable period of time. In upholding the Secretary’s denial of more time for the mine operators to place purchase orders for refuge chambers, the Commission, upon examining the “totality of [the] circumstances” concluded that the Secretary acted reasonably.

³The MINER Act includes six areas that must be addressed in all ERPs, one of which is there must be post-accident breathable air for trapped miners which is sufficient to maintain them “for a sustained period of time.” *Id.* at * 10.

⁴Consistent with its view of the process, the Commission rejected the contention that mine operators may unilaterally implement their ERPs, expressing that “the approval process, with the involvement of MSHA district office personnel, is an integral part of the plan formulation process.” *Id.* at *11.

In examining the “breathable air” provision in Section 316 of the Mine Act, as amended by the MINER Act, the Commission referenced the “*Chevron*” standard,⁵ and also noted that the Section imposes *additional* breathable air requirements which are sufficient to maintain trapped miners “for a sustained period of time.” *Id.* at *13. The Commission expressly rejected the argument that the test for a particular requirement applies only to “likely” risks, and instead subscribed to the Secretary’s standard that a “reasonable possibility” is sufficient to justify a requirement.⁶ *Id.* It noted that the Senate Report expressed that the “emergency plan should address *possible* incidents⁷ and the attendant need for sufficient breathable air [and that] [t]he projected need is [] fact specific.” *Id.* at *14.

The parties stipulations:

Consolidation Coal Company (“Consol”) and the Secretary of Labor, by her undersigned counsel, and stipulate and agreed, through counsel, as follows:

1. The Buchanan Mine No. 1 (“Buchanan”) is an underground bituminous coal mine located near Mavisdale, Virginia.
2. Buchanan produces coal by the use of longwall mining and utilizes continuous miners to develop entries around blocks of coal to facilitate such mining.
3. Buchanan is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977

⁵*Chevron U.S.A Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, (1984) represents the foundation stone for statutory construction in the administrative law sphere. Its essence is that, first, under the “*Chevron* Step One inquiry,” one must determine if the statute clearly speaks to the particular issue in dispute and if it does, such expressed Congressional intent is applied. However, where the statute is not clear, the “*Chevron* Step Two” analysis is applied. That inquiry examines whether the agency’s interpretation of the statutory provision is reasonable.

⁶Although the Commission was considering “reasonable possibility” in the context of determining whether the miners could become trapped, and rejected the contention that the measure was to show a “likely” risk of entrapment, the Court believes that the “reasonable possibility” measure applies to the issue faced here; whether there was a ‘reasonable possibility’ that miners awaiting rescue could be exposed to temperatures in the rescue chamber exceeding 95° F. While the Commission did not find, applying the *Chevron I* analysis, that a “reasonable possibility” measure was compelled by the statute, it then applied the *Chevron II* analysis and concluded that the Secretary’s interpretation was reasonable.

⁷The Commission also made it clear that, in reviewing challenges to disputed provisions of an ERP, it is not germane to consider and compare how ERP’s were being addressed in other mining districts.

("the Act"), 30 U.S.C. § 801 et seq.

4. On June 15, 2006, the Mine Improvement and New Emergency Response Act of 2006 ("the MINER Act") was enacted.

5. Section 316(b)(2) of the MINER Act requires that each underground coal mine operator develop and adopt a written emergency response plan ("ERP").

6. Section 316(b)(2) states that an adopted plan is subject to review and approval by the Secretary.

7. Among the elements required in each ERP are provisions with respect to supplying post-accident breathable air to trapped miners. Section 316(b)(2) of the Act contains, in part, the following:

The plan shall provide for – (I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time.

8. The use of refuge alternatives/chambers or shelters is a method of complying with the requirements with respect to post-accident breathable air.

9. ERPs were initially submitted prior to the promulgation of the mandatory standards for refuge chambers or refuge alternatives on December 31, 2008.

10. Consol developed an ERP that was initially approved in June 2007. A copy of such initial plan has been marked as Joint Exhibit 1 and is offered into evidence.

11. Such plan contemplated the use of refuge alternatives manufactured by Strata Safety Products LLC ("Strata"). It stated as follows:
The emergency shelters to be installed are the Strata Products 35 person Inflatable Refuge Chambers (IRC).

12. MSHA issued, on December 31, 2008, the final rule relating to Refuge Alternatives for Underground Coal Mines. A copy of the final rule is identified as Joint Exhibit 2 and is offered into evidence.

13. The final rule specifies in 30 CFR § 75.1506(a) as follows:

Each operator shall provide refuge alternatives and components as follows:

(1) Prefabricated self-contained units, including the structural, breathable air, air monitoring, and harmful gas removal components of the unit, shall be approved under 30 CFR part 7; and

(2) The structural components of units consisting of 15 psi stoppings constructed prior to an event shall be approved by the District Manager, and the breathable air, air monitoring, and

harmful gas removal components of these units shall be approved under 30 CFR part 7.

(3) Prefabricated refuge alternative structures that states have approved and those that MSHA has accepted in approved Emergency Response Plans (ERPs) that are in service prior to March 2, 2009 are permitted until December 31, 2018, or until replaced, whichever comes first. Breathable air, air-monitoring, and harmful gas removal components of either a prefabricated self-contained unit or a unit consisting of 15 psi stoppings ... that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2013, or until preplaced, which ever comes first. ...

14. The Strata unit is a prefabricated refuge alternative produced by Strata Safety Products LLC.

15. The Strata unit with a 36 person capacity, the type of units Consol utilizes, was approved for use by the State of West Virginia.

16. Such Strata units were in service at Buchanan prior to March 2, 2009.

17. On October 15, 2009, Consol submitted a revised ERP for approval. It provided for the continued use of Strata units. A copy of the October 15 ERP is identified as Joint Exhibit 3 and is offered into evidence.

18. By letter dated November 12, 2009, MSHA approved Consol's proposed Buchanan ERP in its entirety. A copy of the November 12, 2009 approval identified as Joint Exhibit 4 is offered into evidence.

19. In his January 27, 2010 letter to Consol General Superintendent William Meade, MHSA District Manager Ray McKinney sought to revoke Consol's October 15, 2009 ERP as it pertained to refuge alternatives in use at Buchanan. The letter served as the initial notice in the approval revocation process. A copy of the January 27, 2010 letter is identified as Joint Exhibit 5 and is offered into evidence.

20. On February 9, 2010, Mr. Meade responded to Mr. McKinney and addressed ambient mine temperatures. A copy of the February 9, 2010 letter is identified as Joint Exhibit 6 and offered into evidence.

21. On April 8, 2010, Mr. McKinney replied to Mr. Meade's letter. Mr. McKinney indicated the letter was intended to serve as the second notice in the plan revocation process. The letter addressed Mr. McKinney's concerns about the Strata units' ability to maintain an internal apparent temperature below 95 degrees where ambient mine temperatures exceeded 70 degrees. A copy of the April 8, 2010 letter is identified as Joint Exhibit 7 and it is offered into evidence.

22. Buchanan General Superintendent Brent Holbrook sent Mr. McKinney an April 30, 2010 letter memorializing discussions that he had with District 5 officials regarding Consol's interest

in the solutions identified by Mr. McKinney (e.g. de-rating refuge capacity and use of cooling systems). The letter also addressed Mr. Holbrook's inquiries regarding the Strata's grandfathered status. Mr. Holbrook requested a meeting and sought an extension to submit additional information. A copy of the April 30, 2010 letter is identified as Joint Exhibit 8 and offered into evidence.

23. A May 4, 2010 letter from Mr. McKinney approved an extension request until May 21, 2010. A copy of the May 4, 2010 extension is identified as Joint Exhibit 9 and offered into evidence.

24. A May 21, 2010 letter from Mr. McKinney further extended the deadline, until June 4, 2010, to submit additional information regarding the efficacy of the use of Strata units at Buchanan. A copy of the May 21, 2010 letter is identified as Joint Exhibit 10 and offered into evidence.

25. On July 13, 2010, Mr. McKinney sent Consol another letter and repeated his prior concerns about the effect of temperatures in excess of 70 degrees on the deployed Strata's interior. Mr. McKinney indicated his intention to revoke the ERP at Buchanan on July 20, 2010 absent a compelling explanation for allowing additional time to provide the requested information or the submission of a revised ERP specifying updated means for safely maintaining trapped miners. A copy of the July 13, 2010 letter is identified as Joint Exhibit 11 and offered into evidence.

26. On July 20, 2010, Mr. Holbrook wrote Mr. McKinney proposing revisions to Buchanan's ERP. The revised plan would limit the number of miners allowed on a section based upon the temperature-adjusted refuge alternative capacity. A copy of the July 20, 2010 letter is identified as Joint Exhibit 12 and offered into evidence.

27. On July 21, 2010, Mr. McKinney sent a letter revoking Buchanan's ERP. Mr. McKinney acknowledged that "in the abstract," Consol's "de-rating plan," which would reduce refuge chamber capacity in areas of the mine with higher temperatures, "may be a viable approach," but he rejected the revisions because they were inadequately supported. Mr. McKinney also expressed concerns about the manner in which Consol had proposed to determine ambient mine temperatures in the areas of the mine where the Strata units are located. A copy of the July 21, 2010 rejection letter is identified as Joint Exhibit 13 and offered into evidence.

28. Citation No. 7347437 was issued on July 21, 2010, pursuant to Section 316(b)(2) of the Act, 30 U.S.C. § 816(b)(2). A copy of the citation is identified as Joint Exhibit 14 and is offered into evidence.

29. Under the heading and caption "Condition or Practice" the Citation alleges as follows: Consolidation Coal Company ("Consol") violated § 316(b)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") by failing to develop, adopt, and submit to MSHA an

Emergency Response Plan (“ERP”) for use at the Buchanan Mine #1 that has been demonstrated to effectively provide for the safe maintenance of individuals who may be trapped underground in the mine for a sustained period of time.

Consol’s ERP provides that Strata Safety Products’ (“Strata”) Fresh Air Bays will be used for the refuge alternatives, but Consol has failed to demonstrate that these units will provide a safe environment for miners who may need to seek refuge. Strata specified that their units can only maintain miners at internal apparent temperatures not exceeding 95° F when mine temperatures surrounding the units are 70° F and below. However, temperatures in the mine have been recorded as high at [sic] 78° F by mine examiners in locations where these units may be used, and temperatures have regularly been measured in excess of 70° F by mine examiners and MSHA inspectors in such locations. After repeated requests and significant opportunity, Consol has failed to demonstrate that, as provided in the ERP, the Strata refuge alternatives will be capable of maintaining interior apparent temperatures not exceeding 95° F.

MSHA has discussed this ERP provision with the operator over a period of seven months, highlighted its concerns with respect to the use of the Strata refuge alternative as proposed in the [Buchanan] Mine #1 , and explained the Agency’s rationale for demanding reliable technical data that demonstrates that the Strata refuge alternative as used at Buchanan Mine #1 can safely maintain miners given the mine’s specific conditions. MSHA has carefully considered the operator’s position and reviewed all proposals the operator has submitted to address these concerns. However, Consol has failed to provide reliable information to demonstrate that the Strata refuge alternatives can safely maintain miners for a sustained period of time at Buchanan Mine #1 given the manner that the refuges are proposed for use in the ERP.

30. Strata has represented that, when used at maximum capacity, refuge units specified for use in the Buchanan Mine #1’s ERP are capable of maintaining internal apparent temperatures at or below 95 degrees Fahrenheit when used in mining environments with ambient temperatures at or below 70 degrees Fahrenheit.

31. Both MSHA and Buchanan Mine #1 representatives have measured ambient mine temperatures in excess of 70 degrees Fahrenheit at locations where Strata refuges are located pursuant to Buchanan’s existing ERP during certain of the warmer months of the year.

32. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

33. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein. The parties stipulate that the correspondence and attachments between Consol and MSHA may be admitted into evidence without objection.

34. Consol’s operations affect interstate commerce.

35. The subject Citation was properly served by duly authorized representatives of the Department of Labor upon an agent for Consol on the date and at the place indicated therein.

Findings of Fact

MSHA witness Gregory Meikle is the Assistant District Manager for the Technical Division in Coal District 5, Norton Office. His immediate supervisor is District Manager Ray McKinney. Meikle's duties include the oversight, review and maintenance of all required plans, including emergency response plans. In Mr. McKinney's absence, he is also the acting District Manager.

Regarding this dispute, Meikle explained that, with all plans, they are submitted to the District Manager, and it is that individual who has the authority to either approve or deny, for reason, any plan that is submitted under the regulation.⁸ Here, the District Manager's concern was with Consol's ERP. Particularly involved was the survivability of miners trapped underground, an issue amplified by the agency's concerns about deep cover mines⁹ and their ambient temperatures. As a consequence of those concerns, MSHA took measurements at the Buchanan Mine. Those measurements were taken with an eye towards the worst case conditions, that is, the temperatures during the hottest time of the year. Accordingly, a MSHA ventilation specialist, David Woodward, took temperature measurements in August and September 2008 at that mine at the location of the refuge alternatives.¹⁰ These were, of course, taken in unsealed areas of the mine. Government Exhibit 13 is a spreadsheet developed from those temperature readings. The concern which was articulated from those temperature readings was that the Strata units could be used at specifications higher than those for which the units were intended.

⁸Meikle stated that with any plan, including ERPs, all parties with a stake in the matter have an opportunity for input and that such input includes that derived from operators, miners, miners' representatives, MSHA inspectors, both technical and enforcement, and the agency's technical supervisory support group.

⁹Meikle expressed that MSHA had concerns over temperatures in deep cover mines as they could impact upon the refuge chambers and the concern that temperatures above 70 degrees could exceed the capabilities of the Strata units.

¹⁰Both 'dry bulb' and 'wet bulb' temperatures were taken. With the latter, employment of a wet sleeve over the thermometer bulb enables one to calculate the humidity, while the former is simply a 'bare' thermometer reading. For demonstrative purposes, Gov. Ex. 13A, was entered into the record. It is a map, supplied by Consol which presented, for demonstrative purposes, a rough approximation of the location of the Strata units at the mine and the places where MSHA took its thermometer readings.

Subsequently, MSHA learned from Strata, around November 2009, that the survivability of miners inhabiting their units would be maintained as long as the mine ambient temperature, (the mine air temperature) remained at 70 degrees or below. Meikle explained that the 70 degree temperature could result in a 95 degree apparent temperature inside the unit when occupied at its full capacity. This was significant because both NIOSH and the state of West Virginia had determined that temperatures in such refuges could not be more than 95 degrees without risking survivability to those in them.

MSHA did not feel that the February and March 2005 bore hole temperatures, supplied by Consol, and indicating that the mine's temperatures would not exceed 70 degrees, were a reliable indicator of ambient temperatures to which miners could be exposed. Rather, MSHA preferred to rely upon other temperatures, taken by Consol, as reflected in Gov. Ex. 14. Those temperatures were derived from the Buchanan Mine No. 1 examination books, and they recorded the apparent temperatures around the mine's refuge chambers.

Gov. Exhibits 14A and 14B were offered to drive home the point established by Consol's own temperature readings. Exhibit 14A is a spreadsheet developed from Consol's temperature readings. While the spreadsheet does not reflect *all* of the temperature data from Consol, it would have made no sense to include all of the readings, as MSHA was concerned, in the context of the survivability of miners in a rescue chamber, about those readings above 70 degrees. Exhibit 14B is an e-mail sent from Bill Fisher, an engineer for Consol and Buchanan Mine No. 1, in connection with the operator plan submittal to MSHA. Attachments with that email consisted of charts developed of temperatures at certain locations in the Buchanan Mine and they involved July 2010 temperatures. These also show temperatures at the mine in excess of 70 degrees. The point of this information is that *Consol itself* has recorded temperatures in 2010 which were above 70 degrees at this mine at locations of the refuge chambers. Accordingly, there can be no serious dispute that mine temperatures at this mine at the relevant locations for this dispute (i.e. the location of the Strata refuge units) can and do exceed 70 degrees.

This information, that is, the temperature readings and the information from Strata, prompted the District Manager's concern about the survivability of miners in those rescue chambers under those temperatures¹¹ and resulted in the January 27, 2010 MSHA letter to Consol. Joint Ex. 5. The letter, from District Manager McKinney, expressed his concern about the Strata units being used in conditions beyond their intended use and that miners would not be protected under such conditions.¹² Accordingly, the letter sought information from Consol to

¹¹ The information from Strata advising about the problem associated with temperatures above 70° was received by MSHA in late November, 2009.

¹²Government Exhibit 23 is a letter from Strata Safety Products discussing the refuge chamber internal heat/humidity statement. It references that a 70-degree ambient mine temperature is the temperature at which their fresh air base could maintain a 95-degree apparent temperature. Tr. 98

support the continued use of the Strata units under those adverse conditions. Reducing the number of persons occupying such refuges or employing a suitable cooling system were mentioned as possible solutions to the problem.

Consol's initial response was that the mine's temperatures would not exceed 70 degrees. Its theory was that cooler mine air flowing over the refuges from the mine's ventilation would reduce the temperatures inside the rescue unit. Consol also cited to bore hole temperatures¹³ but MSHA concluded that the information it provided did not support the use of the refuge chambers in the conditions that concerned MSHA. That is, conditions where the mine temperature exceeded 70°. MSHA could not subscribe to the bore hole temperatures because most of them were taken from sealed areas of the mine.¹⁴ In contrast, the temperatures taken by MSHA were derived, as previously mentioned, from the relevant active areas of the mine. Miners, of course, by definition, cannot take refuge in 'sealed' areas of a mine.

Further discussion of the mine temperatures is clearly unwarranted. There is no credible information to rebut that mine temperatures at this mine exceed 70°, at least at certain times of the year. Not surprisingly, these temperatures are experienced in the summer months. So too, the claim that the mine's ventilation system would act to cool the refuge chamber down so that effectively the temperature would not exceed 70° and therefore that the refuge interior would not exceed 95° does not warrant further discussion because, even if the ventilation had that effect, it provides no answer to a scenario where the ventilation had shut down during a mine emergency.

Joint Ex. 7 represents MSHA's response, identifying the expression of its concerns to the information offered by Consol. That letter, which referenced possible solutions to the problem MSHA identified, gave Consol until April 30, 2010 to provide the information to support the use and conditions for the refuge units. Consol's response asked for more time to submit the information requested by MSHA and the request was granted. Jt. Ex. 9. The extension gave Consol until May 21st. Then, another extension was allowed by MSHA, this time until June 4, 2010. Jt. Ex. 10. At Consol's request, MSHA also had a meeting with the Respondent on May 24, 2010. Gov. Ex 8 reflects Meikle's notes of that meeting. Tr. 80. Among other aspects of that meeting, Consol advanced its belief that MSHA had to accept the Strata units as they had been 'grandfathered.' Tr. 81. Meikle expressed that both he and the District Manager were not

¹³A bit of an audacious offering on the part of Consol, at least in terms of the data's genesis, the bore hole temperatures it cited to support its claim that the mine does not experience temperatures above 70° came about after methane explosion fires in 2005 and 2007. The bore holes were drilled to determine gas concentrations and to assess whether there was any active fire going on in the sealed area. Tr. at 71-72.

¹⁴Consol's theory was that temperature measurements from a sealed area of the mine would be most indicative of the temperatures the refuge chambers would experience if the mine's ventilation shut down in an emergency. Tr. 119-120. Based on the record as a whole, for the reasons advanced by MSHA, the Court does not subscribe to this claim.

asserting that the Strata units could not be used. Rather, they were questioning *how* the units were being used in the context of the adverse temperatures that had been recorded.

According to Meikle, Consol agreed to provide information to support the use of the units in temperatures above 70°. Although the expectation was that Consol would provide information, that is supporting documentation, to justify the use of the refuge under those elevated temperature conditions, Consol never provided it by the new deadline of June 4th. Tr.83. Following that, the MSHA District Manager again wrote to Consol on July 13th. Jt. Ex. 11. Among other reasons, the letter was prompted by the District Manager's concern about the hot summer months that had arrived. This time, the letter gave Consol until July 20th to provide the information it needed regarding "the use of the refuge alternatives in the mine, in the conditions we expected and had measured." Tr. 86.

Consol did provide information to MSHA on July 20th. Jt. Ex. 12. Meikle received a draft of this information early the same day and he expressed to Consol that it did not provide the information MSHA was seeking. Tr. 87. No additional information was provided after that and Consol did not refer MSHA to any other source for that information. However, Consol did provide a table or chart, proposing to limit the number of miners that would occupy the refuges, based on mine temperatures and this information was apparently derived through Strata. Appendix C. Tr. 88. Meikle contacted MSHA's Tech Support to learn about Strata's discussions with that MSHA division and he learned that Tech Support advised that they didn't have information to support the proposed derating chart. Tr. 89.

The critical point, as expressed by Mr. Meikle, was that the information Consol provided in its July 20th submission did not enable MSHA to conclude that the refuges would maintain miners under the conditions that concerned it. Tr. 91. Thus, Consol did not submit any additional information to support the Appendix C deration table it presented. Tr. 96. As Meikle noted, the District Office did have discussions with MSHA's Technical Support Division, about the reliability of the data submitted by Consol. He related that Tech Support had questions over whether the derating table could be substantiated and that, without such data, they simply were not in a position to assert whether it was reliable or not. Tr. 96. Nor did Strata have such data by July 20th. Instead, as Meikle recollected, there were efforts to have such data from tests but they would not be conducted for weeks. Tr. 97.

In further explaining why MSHA decided to issue the citation on July 21st, Meikle noted "we were approaching the time of year where we knew, and already had credible relevant information that the temperatures were exceeding the 70 degrees, and that was a part of our concern, that if miners had to utilize those refuge alternatives, they would not have been afforded, through the use of this refuge alternative, the opportunity to remain at a 95 degree ambient temperature inside, if at full capacity, or derated capacity. We didn't have the information to support that." Tr. 93.

Not only did MSHA have problems with the lack of data to support the deration chart, it also had issues with the proposal to average temperatures from the previous week. Tr. 92. As Meikle succinctly put it, “ It's not the temperature *last* week that's going to get me if I'm in that refuge. It's the temperature at the time I'm in the refuge.” Tr. 92. (emphasis added).

Meikle stated that the mine was being cited, not for violating the safety standard that contained the grandfather clause, but rather for failing to demonstrate that the refuges would provide a safe environment for miners. Tr. 94. Joint Exhibit 14 is the citation that was issued and Joint Exhibit 13 was a letter which accompanied that citation, explaining the rationale for the citation's issuance. Speaking further to the contention of Consol that the grandfather provision made any citation a nullity, Meikle noted by analogy that as part of his duties he reviews other mine operator plans, such as ventilation and roof control plans. In that role he has rejected plans that proposed to use a piece of equipment in an unsafe manner, even though the equipment itself was otherwise approved. Tr. 95.

As brought out through its cross-examination of Meikle, one of Consol's contentions is that MSHA, in its “questions and answers” related to refuge chambers, dated April 29, 2009, it stated that the capacity of grandfathered state-approved units does not have to be reduced to comply with Section 75.1506(b)(1). Tr. 108-109. Consol Ex. 1., Gov. Ex. 8. As MSHA pointed out, the Final Rule discussing 75.1506(b)(1) provided in the answer to that question that “Refuge alternatives shall provide at least 15 square feet of floor space per person and 30 to 60 cubic feet of volume per person, according to the following chart. The air lock can be included in the space and volume if waste is disposed outside of the refuge alternative.” Accordingly, MSHA took note that those issues are not present in this litigation. Tr. 126. Joint Ex. 2, the Final Rule at page 80698

Another contention of Consol is that MSHA did not do enough when it was aware, on July 20th and on the 21st, that Strata was doing tests. Consol believes that MSHA should have contacted Strata about this. However, this contention overlooks that it is the mine operator's plan and that it is the mine operator's responsibility to obtain supporting data. Tr. 124.

MSHA's second witness, Wesley Shumaker, is a general engineer with the Applied Engineering Division, Approval and Certification Center, Director of Technical Support. Tr. 138. He noted that Tech Support is not the entity that determines whether an ERP should be approved. Rather, approval is made by the individual MSHA districts. Tr. 144. Shumaker explained that the term “apparent temperature,” sometimes referred to as “effective temperature” is a way of characterizing the effects of temperature and humidity on humans and how it relates to “core temperature” and its effects. Tr. 147. In this regard the witness identified the NIOSH report on refuge alternatives and its reference to a 95 degree apparent temperature threshold. He noted that West Virginia has established an upper limit of 95 degrees Fahrenheit for this as well. Tr. 148-149. Gov. Exhibit 15. Gov. Exhibit 16, an excerpt from the West Virginia Mine Safety Technology Task Force report, reiterates this maximum apparent temperature for refuges. Tr. 150-151.

In other testimony, Shumaker explained that derating calculations are not simple matters to carry out. Further, he noted that, while NIOSH can conduct such tests, Tech Support does not have authority to test refuge units. Tr. 156-157. Gov. Exhibit 15, a December 2007 report by NIOSH, involved the same 36 person Strata unit at issue in this litigation. However, those tests were conducted at 60 degrees Fahrenheit ambient temperatures and as such he could not assert that the unit would pass at 70 degrees, for example. Tr. 158. Importantly, beyond the deficiencies noted, making comparisons at different temperatures and with different size refuge units, Shumaker noted that before the citation was issued here he did not have the “actual test report” from Strata.¹⁵ Tr. 160-161. Shumaker’s overarching point was that, while it had done some “rough calculations,” Tech Support simply did not have the information it needed to assess whether the units would work safely. While Strata has asserted that their units were effective to 70 degrees, Tech Support lacked the mechanism to verify that claim. Tr. 167. As he again noted, such calculations are “very complicated.” Tr. 165. As Tech Support only had a summation of that testing, it could not evaluate it, as it did not know how the testing was done. Then too, another problem was that it involved testing on a 26 man, not a 36 man unit. Tr. 168. Accordingly, speaking as an engineer, Shumaker could not say, based on the limited information Tech Support had, that the unit could work above 70 degrees without exceeding the maximum apparent temperatures. Tr. 170. Nor did the meeting which ensued between Strata and Tech Support lay those concerns to rest. Shumaker described Strata’s results regarding the 26 man unit as “off-the-cuff,” meaning that supporting data was not presented. As for the more pertinent information regarding its 36 man refuge unit, Strata advised only that they had contracted with an engineering firm to do computer modeling for derating information. Tr. 173. There was also the matter of *when* the engineering firm would have the testing results. Thus, as of the July 13, 2010 meeting with Strata, there was no set timetable as to when the results would be presented, but as Shumaker understood it, the data was at least four weeks away. Tr. 177. Accordingly, while Strata *believed* that its ratio comparison, as adapted for a 36 man unit, from its 26 man information, would work, the fact it was pursuing modeling was an acknowledgment that data to back up their belief was still needed. Tr. 174-177.

In summing up his concerns, Shumaker agreed with the Court’s characterization of the heart of the problem that, even if the derating proposal he had at the time of the July 13th meeting with Strata were delivered by a priest, a rabbi and a minister, and thus could be no doubt about earnest belief that the derating would effectively protect miners from temperatures above 95 degrees, Tech Support would still need to independently understand the basis for their conclusions, as it cannot take such assertions on faith. Rather it needs to understand the underlying basis for the conclusions being asserted. Tr. 182. More precisely, Shumaker stated: “[W]e thought that there had to be more information available to be able to make a good decision that the derating chart was a safe one to use.” Tr. 180. Thus, while he believed that derating can be used, the information was needed to know what a safe level is and this is accomplished

¹⁵Tech Support, prior to the issuance of the citation here, had Strata’s initial submission to the state of West Virginia which included its methodology calculation for apparent temperature in one of its refuge chamber models, but it was not for a 36 person unit. Tr. 163.

through validation. Tr. 180.

Michael Canada is a Manager for Safety for Consol's Central Appalachia Operations. Tr. 202. Although he stated initially that far fewer than 36 persons would ever occupy the Strata units in this litigation, he later allowed that under some circumstances such numbers could occur. Circumstances such as "hot seat" change outs as shifts change and during a long wall move could present the potential for as many as 40 people working at such a location. However, Mr. Canada then maintained that there would be two chambers available and consequently that only 20 miners would need to seek refuge in a given chamber. Tr. 222-223. Even if that is the case, as the Secretary pointed out through cross-examination, Consol never brought such a contention to MSHA prior to the issuance of the citation. Tr. 225-226.

Mr. Canada also asserted several times that he "felt good," and in fact "felt real good" about his conclusion that temperatures in the shelters would not go above the 95°F mark because the mine's ventilation would keep things below that. He felt the same way about the scenario presented if the ventilation shut down. Tr. 208-209. While the Court in no way challenges Mr. Canada's feelings that such temperatures would not exceed 95°, it illustrates the fundamental problem over which MSHA's Tech Support division and the District Manager were grappling. They needed data, not simply good faith belief, to support those claims. Canada conceded the point, admitting that he lacked a basis and data to support his feeling, and relied upon his experience that told him that when air moves it cools. Tr. 227. However, as lives could be at stake, MSHA reasonably concluded that it needed data to intelligently assess the beliefs.

The second, and last witness called by Consol, was John Reinmann, who is the Vice President of engineering and operation for Strata. His testimony, in its critical aspects, may be summarized quite briefly.¹⁶ He acknowledged that Strata met with Tech Support representatives on July 13th and that they discussed Strata's cooling development work and the "concept of derating as an option." Tr. 240. Realizing that it would have to do additional testing and that they could not rely on NIOSH to do that, Reinmann expressed that Strata knew it would "have to set up and contract to get our units tested." This resulted in testing in February 2008 to "simulate the mine conditions and to simulate the people inside [refuge] chambers." Tr. 241. Later that same year Strata did tests on a 26 man refuge unit.¹⁷ For that 26 man unit, Strata determined that, at 76 degrees, ten men would be the most it would recommend occupying its refuge. Tr. 244. The refuge units at the Buchanan mine were "never mentioned during the entire meeting." Tr. 245. Significantly, Mr. Reinmann acknowledged that the modeling to determine temperatures in these refuge units "having to deal with both the temperature issue and the humidity issue and what's going on at all the surfaces in there, . . . *it gets to be a very complicated problem.*" Tr. 246. (emphasis added). Thus Mr. Reinmann effectively conceded that the simple ratio attempted to be employed by Consol to their 36 man units is not so simple a

¹⁶Mr. Reinmann's testimony was brief by any measure, covering 23 pages of transcript.

¹⁷The testing is done using 'simulated' people, in the form of electrical coils. Tr. 243.

leap and by that statement as well as by the testing Strata was contracting to have done, he admitted that the ratio is no genuine substitute for data.¹⁸

Discussion¹⁹

There are several aspects of this matter that, on this record, cannot be considered to be in genuine dispute. First, there is no reasonable dispute that adverse physical results occur when people are subjected to apparent temperatures above 95° Fahrenheit. Thus, that is at the *top-most* tolerable temperature for miners to exist, for sustained periods of time, while in a refuge chamber, awaiting a rescue. This is, in the Court's view, important to bear in mind, as the 95° mark represents the maximum temperature; it is not as if there is then available some margin above that under which miners can stay in a refuge chamber and not risk adverse physical effects.²⁰ A second, undisputed, fact is that the Strata 36-person units used at this mine can only keep miners at or below that critical 95° mark when the ambient temperature around the refuge chamber is 70° F or less.²¹ With those important facts in mind, the record establishes that the mine's ambient temperatures in fact exceeded 70° during the warmer months of the year at locations where the refuge units were located.²² Accordingly, the reasonableness of District Manager McKinney's decision to issue the citation in issue here must be assessed both in the context that the discussions between MSHA and Consol had gone on for six months and also, given McKinney's justifiable concerns, in view of Consol's failure to provide sufficient, *reliable*, as opposed to anecdotal, information for MSHA to reasonably conclude that miners would not in fact be subject to temperatures above the maximum tolerable, should they have to seek refuge in the Strata unit.

The contention that the District Manager prematurely ended the discussions regarding the disputed issue.

Consol contends that the District Manager acted arbitrarily and capriciously in that he "prematurely terminated [the] ERP discussions." Consol Br. at 15. Under this perspective, when

¹⁸Mr. Reinmann could only offer "we *think* 15 men in a 36-man chamber at 76 degrees ambient, [that] the conditions will stay below the 95 degrees ambient." Tr. 248 (emphasis added).

¹⁹This portion of the decision incorporates the contentions made the parties in their post-hearing submissions.

²⁰Gov. Ex. 15 & 16, Tr. At 36, 151-156.

²¹Gov. Ex. 23 & 24, Tr. 44, 52, 252-253.

²²Gov. Ex. 13, 14, 14A, 14B, and Tr. at 44-45, 54-56.

Consol submitted its derating plan on July 20, 2010,²³ the District Manager's act of rejecting it the next day was on its face arbitrary and capricious because that was an insufficient amount of time to review and further discuss Consol's offering. In the Court's view, the problem with that contention is that it views the District Manager's action as a snapshot and by doing that it ignores that the whole matter had been in discussion since late January 2010, some six months earlier. Although the turnaround time for the District Manager's response was short, only a day, MSHA knew, within that time frame, that the supportive data it needed was still lacking and it knew, even in that brief time, that Consol's idea that one could use the previous week's average temperatures to determine the derating schedule for the following week was inherently suspect, as it is clear that such a predictive method may miss the actual temperatures of the following week by a significant amount. Further discussion would not cure either deficiency.

Although Consol asserts that the District Manager could only revoke the plan "where the parties reach an impasse in which the operator refuses to comply with the District Manager's plan demands," that view is not consistent with the guidance the Commission has provided in matters involving ERPs.²⁴ This view also fails to consider the context in which the District Manager acted; the hottest months of the year were then present. Thus, in the context of the discussion that had been going on for six months and that the hottest months had now arrived, the Court does not agree with the assertion that the District Manager acted "prematurely and precipitously" in deciding to issue the subject citation.

Further, the discussions between MSHA and Consol during the six months preceding the issuance of the citation, MSHA did not dictate how Consol was to assure that the refuge chambers not exceed the 95° maximum, as it allowed that this could be achieved, potentially,²⁵ through air conditioning for the units or at least through the more basic method of simply "de-rating" the units, a term which simply means reducing the maximum number of miners that

²³ Consol acknowledges that it was not until July 20, 2010 that it first "submitted a specific derating proposal for the refuge alternatives." Consol Br. at 6.

²⁴ While Consol argues that the District Manager's statement that Consol's plan offered a potentially viable approach demonstrates that it was premature for MSHA to end the discussions, as it was made only a day after Consol's July 20th submission, this contention ignores that MSHA had concluded that further talk would not be a suitable substitute for the supporting data and that the talk had been going on for a half a year. This contention folds into Consol's related assertion that, at that point, it was *MSHA's* responsibility to obtain such data from Strata. Consol Br. at 20. Last, in this regard, while Consol also contends that Strata had the needed data and that it was available to the District Manager, the claim that Strata had the data is not supported by the record and consequently the idea that it was "available" is not supported either.

²⁵ The approach of reducing refuge chambers through air conditioning is not realistic at this point in time as there are no approved units presently. Tr. 105. Thus, only derating is a viable remedy to this issue.

would occupy a chamber, down from the 36 person maximum each unit could accommodate.²⁶ But “de-rating” is more complex than simply plucking a reduced occupancy number out of the air and then declaring that, with that reduced number, the 95° mark would not be exceeded. MSHA must be able to independently evaluate, by being provided with some reasonably supported scientific data, that the de-rated number of miners occupying the chamber would not endure temperatures above 95 degrees. Under such a standard of review, Consol did not provide MSHA with any reliable information so that it could independently assess the impact of the proposed de-rated number on the ambient temperature.²⁷

Accordingly, while Consol attempted, on July 20, 2010, a date at the very end of a six-month period of time, during which period discussions occurred with MSHA,²⁸ to provide some information to support its de-rating proposal, it lacked the critical supporting data, for MSHA to thoughtfully assess it. Accepting the proposal in that state would have required MSHA to adopt it on faith, instead of science. The late-in-the-discussion data, provided through Strata, was a simply a linear extrapolation. As set forth in footnote 6 of the Secretary’s Post-hearing Statement, when Strata met with MSHA on July 13, 2010, they “explained that the de-rating calculation for the 36-person unit was based on a single test on a Strata 26-person unit at 76°F [and that] they calculated the appropriate de-rating value for the 36-person unit at 76°F by merely performing a proportional calculation based on the de-rating result obtained from the single test on the 26-person unit.” See Sec’s Stmt at n. 6 p. 8. With these variables at work, MSHA’s Technical Support section could not agree with any independent degree of confidence that the simple linear extrapolation was sufficiently reliable. Strata admitted as much, since it acknowledged that computer modeling would be needed to support the claim that the linear extrapolation would be a reliable predictor of the temperatures. Tr.174-175.

It was against this backdrop, the elapsing of six months of opportunity for discussion and the late-presented linear extrapolation approach to de-rating, an approach unsupported with any computer modeling data, that the District Manager, aware that the hottest months of the year

²⁶Brief mention may be made of Consol’s assertion that it was extremely unlikely that 36 miners would ever need to use a given Strata unit. First, the Court agrees that because, as of the time of the citation’s issuance, Consol had not made that claim, and because the Court agrees with the Secretary’s contention that the District Manager’s decision to issue the citation must be evaluated on the basis of what he knew at the time that citation was issued, that argument cannot be considered now. Even though that is dispositive of the contention, it is also noted that Consol’s witness at the hearing conceded that there can be circumstances when as many as 40 miners may be at work in a particular part of the mine at a given point in time.

²⁷To be clear, neither Strata, nor Consol, provided such *reliable* information to MSHA.

²⁸To be sure there were some delays in responses during the six month period of discussion time but, given the requested extensions by Consol, it can hardly be claimed that this was attributable to one side exclusively.

were at hand, reasonably decided he could wait no longer and issued the subject citation.²⁹

Neither the information provided by Consol which tended to show how mine ventilation can cool the temperatures inside a refuge, nor its mine temperature readings from sealed areas of the mine, assuaged the District Manager's concerns that there could be days when the temperature in the refuge could exceed 95 degrees. The Secretary asserts, and the Court agrees, that this information was not dispositive, in the case of ventilation's cooling effect, as that assumption takes as a given that the mine's ventilation will continue to operate after a mine event in which miners cannot evacuate. Just as Consol's argument that, for most of the year, temperatures in the mine are at or below 70°, will not help miners awaiting rescue in a refuge chamber if the mine's temperatures are above that on the day of a disaster, nor can the assumption that ventilation will cool a rescue chamber actually have such an effect if the ventilation, for whatever reason, shuts down during a mine disaster. By their very nature, plans to save miners, in the event of a disaster, cannot be built upon the odds that the mine ventilation will keep running any more than such plans can 'play the percentages' that the disaster will cooperate and occur on a day when the mine's temperatures are at the year's average.³⁰

As to the temperatures Consol presented from sealed off areas of the mine, offered to show the ambient temperatures, if there is no ventilation operating in an event requiring the use of a refuge chamber, MSHA points out that Consol did not provide information showing how long it would take for the ambient temperatures to match up with those of the surrounding rock. While, at some point, such equilibrium may occur, there was no data to show the time it would take for this to happen.³¹

²⁹The District Manager's concerns were not limited to the lack of independent information to support the linear extrapolation proposal. He also had issues with Consol's idea that it would determine the ambient temperature for an upcoming week by averaging the previous week's temperatures. That concern stemmed from the fact that a previous week's temperatures can not guarantee those of a current week.

³⁰The Secretary also points out that Consol, as with the lack of supporting data for the linear de-rating, failed to provide data or analysis, to show the efficacy of forced convection. JT Ex. 7 at p. 2; and at 8, 9 and 12. Sec's Stmt at 12.

³¹The Secretary notes this was not the only problem with the 'surrounding rock' temperature theory advanced by Consol. For example, the temperatures Consol took were taken in the cooler months of February and March and the ambient temperatures in the sealed area had between 7 to 30 days to attain the levels recorded. But, in the event of a mine disaster and the need to retreat to a mine refuge, there is no such time luxury for temperatures to even out. Indeed, the refuge chamber is designed with the hope that, within 96 hours, those trapped will be rescued. Though this is certainly enough to justify MSHA's rejection of the 'surrounding rock' temperatures as a gauge of the ambient temperatures, MSHA considered and then rejected that theory in its final rule for the refuge alternative. JT Ex. 2 at p 80663. Tr. at 258.

Further addressing the timing of the District Manager's decision to issue the citation on July 21, 2010, the Secretary observes that Congress provided a mechanism for resolving ERP disputes which emphasized promptness.³² As mentioned, beyond that clear expression of Congressional will, there was the practical consideration facing the District Manager: the very months he was concerned about, the warm months of summer, were at hand. In short, the dialogue had gone on long enough. Congress and the Mine Act made it clear that, certainly by July, it was time for this dispute to be referred to the Commission.³³ Beyond satisfying the procedural requirement to discuss the refuge chamber temperature issues, the Secretary notes that, substantively, the District Manager was also conferring with MSHA's Technical Support division during this process. These consultations with MSHA's Tech Support caused him to conclude that Consol had not provided the reliable support needed for him to accept their de-rating plan. Given that no reliable support would be forthcoming until the computer modeling was completed, and as that the date for that information's delivery was uncertain, the District Manager reasonably concluded that, as the hottest months were upon the mine, the citation had to be issued.

The contention that the grandfathering provision precludes MSHA from raising objections concerning refuge chambers until 2018.

It is Consol's contention that "MSHA was aware of the issue of mine temperatures [which were] above the apparent temperature criteria used by the State of West Virginia in approving shelters" and that, in 30 C.F.R. § 75.1506, it 'grandfathered' such approved shelters anyway.³⁴ Consol Br. at 7-8.

Consol argues that 30 CFR § 75.1506(a)(3) exempted the ERP-provided Strata refuge units from the compliance standards and that, as a consequence of that exemption, the District Manager had no choice but to accept their use at the Buchanan Mine No. 1. Consol Br. at 21. Consol contends that the language of this provision could not be clearer; it maintains that such "grandfathered refuge alternatives are exempt from compliance with the standards as they relate to ERPs." Consol Br. at 22. For Consol, this means that if refuge has deficiencies, as long as it is "grandfathered" the ERP cannot be denied or revoked, no matter what. All that needs to be

³²The Secretary points to S. Rep. 109-365, 109th Cong., 2d Sess (Dec. 6, 2006), in which Congress spoke to "the need for expedition in the resolution of [ERP] disputes." Sec's Stmt at 15.

³³On this point, the Secretary notes that the Commission has spoken about this expressly. In *Cumberland Coal*, it held that although the District Manager must negotiate, in good faith, disputed plan provisions for a time, once that has occurred the Secretary ultimately has the authority to insist upon the inclusion of particular provisions if approval is to occur.

³⁴Consol contends that the grandfathering provision at 30 C.F.R. § 75.1506, makes the District Manager's request for "all inclusive data" arbitrary and capricious. Consol Br. at 14.

shown for this insulated status to take effect is that the ERP be state approved and in service in an MSHA-approved ERP before March 2, 2009. If that is the case, then the refuge is “pre-approved” and as such exempt from compliance with 30 CFR Part 7. While Part 7 specifies that the apparent temperature of a refuge not exceed 95°F that requirement is ignored if the unit is both state approved and in service in an MSHA-approved ERP before March 2, 2009. In effect, Consol’s argument here is that, even if survivability cannot be sustained, in this case if temperatures in the refuge exceed 95°F, what really counts is the refuge’s grandfathered status, not survivability.

While the Court rejects Consol’s interpretation, nevertheless it is still surprising that the Respondent would make the contention, its legal merits aside, given the possible result in taking such a stance. Despite the potential consequences, of such a stance if the contention were to prevail, Consol asserts that the legislative history also supports its position. In this regard it notes that the final rule expressly spoke of allowing refuges that do not meet the requirements of the final rule and that such refuges are to be afforded a “reasonable time *for manufacturers* to meet the safety and approval requirements of the final rule.” Consol Br. at 23 (emphasis added). Consol finds further support for its position in MSHA’s “Questions and Answers” to its final rule on these refuges, noting that the agency stated that the capacity of the grandfathered state approved units did not have to be reduced in order to comply with § 75.1506 (b)(1).³⁵ Undeterred by the potential consequence of its argument if it carried the day, Consol contends that everyone understood that these refuges would not be ‘perfect’ and that their effectiveness in sustaining lives would be “an evolutionary process”³⁶ for which *manufacturers* would be given a reasonable period of time to meet the final rule’s requirements. Consol Br. at 24 (emphasis added). However, the problems the District Manager has with Consol’s refuge units is not about the units themselves. Rather, it is about ambient temperatures above 70° and the number of miners that would be using the refuges under such conditions and that is a matter for which Consol must make adjustments, not Strata.

³⁵Consol also rejects as inapplicable the testimony of MSHA witness Meikle that one could have a single boom roof bolter which is approved for permissibility but not for roof control use, because the refuge chambers in issue here are approved for apparent temperature. Consol Br. at 25. Thus, Consol maintains that the Strata units being in compliance with Section 75.1506(a)(3) means that the units are approved, period, without regard to whether the refuges meet 30 CFR part 7. As previously stated by the Court, *the units* are approved but *the use* of those units is a distinct matter which can be addressed where such *use* can impact whether the refuge can function to support miners awaiting rescue.

³⁶ While a mine operator may contend that there is a ‘low probability’ of an event occurring, one can imagine that, despite low odds, such an event may strike and that the occurrence of a disaster does not depend on the odds. Should such an event occur, the public may rightly ask why MSHA and Consol too for that matter, did not err on the side of caution where sustaining the lives of those awaiting rescue is involved.

Regarding the contention advanced by Consol that the Refuge Alternative Final Rule precluded the District Manager from reviewing the existing EPR at the Buchanan Mine #1, the Secretary asserts that such a claim runs contrary to “the essential fabric of the Mine Act” and is refuted by the final rule addressing the subject. Sec’s Stmt at 19, citing JT Ex 2 at 80694-80700. The Secretary notes that the District Manager concluded that, even if the Strata units were covered under 30 C.F.R. § 75.1506 (a)(3), that did not preclude him from considering the *manner* in which those units were used in specific settings. The Secretary takes the position that, since the District Manager is the “MSHA representative formally authorized to conduct the periodic review of [Consol’s] ERP, the [District Manager’s] reading of the provision is the Agency’s formal application of the provision for purposes of this proceeding, and is entitled to significant deference.” Sec’s Stmt at 20.³⁷ The Court agrees and it adds that, taken to its logical extreme, Consol’s position in this regard would lead to outrageous results. For example, if one assumes, hypothetically, that the ambient temperature would be such that miners in the refuge chamber would be subjected to temperatures of 100°F, Consol would have it that, as the units had been approved, even those extremes could not be addressed until 2018. While Counsel suggested that under such circumstances, of its own volition, Consol would act, it lays bare the untenable stance it takes. Clearly Congress would not have intended such a result, a scenario which ignores the distinction between approving the use of the units generally and approving the *manner* of their use.

In addition, the Secretary contends that its interpretation of the regulatory provision is “consistent with its function as an exception to § 75. 1506(a)(1)’s mandate that all refuge unit components be approved pursuant to 30 CFR Part 7.” Sec’s Stmt at 21. While it concedes that MSHA permitted a limited exception to that provision, it did not permit a mine operator to then use an approved refuge unit beyond the manufacturer’s recognized capability for such units. In this regard it notes that such exceptions are to “be read narrowly to achieve the remedial purposes of the statute and the final rule.” Sec’s Stmt at 23, citing *The Helen Mining Co.*, 1 FMSHRC 1796, 1979. In sum, the view expressed by Consol would mean that the provision would allow mine operators to have refuge units that could not safely maintain miners, a patently untenable result under the Mine Act.³⁸ Sec’s Stmt at 23-24.

³⁷The Secretary cites to *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176 (10th Cir. 2008) as one example of this principle.

³⁸As referred to earlier, Consol’s position would operate to bar District Managers from conducting periodic reviews of ERP’s to assure real world compliance with Part 75 provisions until December 31, 2018, at which time the structural components are to be approved, per Part 7. Besides, as the Secretary has noted, MSHA is not acting here to prohibit the use, per se, of the existing Strata refuge units, even though they lack Part 7 approved components. Rather, it is for now only insisting on the proper *manner* of such use of those units.

The contention that the District Manager acted arbitrarily and capriciously by seeking perfection in Consol's ERP

Although Consol concedes that the “District Manager [is required] to periodically review [emergency response] plans,”³⁹ it is Consol's contention that in this instance the District Manager acted arbitrarily and capriciously in not approving Consol's plan. Consol Br. at 12. It contends that the District Manager sought ‘perfection’ from Consol's ERP and, by that view, his rejection of Consol's “derating schedule and associated temperature calculation method was arbitrary and capricious.” Consol Br. at 12. It notes there is agreement that, at least when temperatures are 70 degrees or less for the refuge chambers involved in this litigation, the apparent temperature in those refuges will be 95 degrees or less. While Consol agrees that there will be times during the course of the year when the ambient mine temperature will exceed 70 degrees, its proposal to cut the number of persons who would use the refuge in such circumstances by “over 50%” should have been accepted by the District Manager. It argues that such acceptance should have been forthcoming because the heat and humidity sources come from the number of people occupying the refuge and because, with fewer people, the heat from the CO² scrubbers would also be reduced.

Oddly, while Consol admits that the District Manager's rejection was based on the lack of sufficient information to support the claimed effects of the reduction of the number of miners who would occupy the refuge, it maintains that Strata's derating schedule should have been sufficient, a view it urges in the context of its position that such ERPs aren't perfect anyway but rather are an ‘evolving’ phenomena.⁴⁰ It also contends that its plan for managing the derating, that is, by looking at the average temperature in the preceding week, was a ‘reasonable’ touchstone for formulating the upcoming week's derating schedule.⁴¹ The shortcomings of this temperature prediction method have already been discussed.

³⁹ The Court finds that it is part of the District Manager's statutory obligation to periodically review the mine's ERP every six months in order to continue to conclude that the Strata units could safely maintain miners consistent with the ERP. 30 U.S.C. § 876(b)(2)(D).

⁴⁰Consol also maintains that the MSHA shares the burden for developing the supporting information. Thus, it is critical of MSHA for failing to come up with its own derating proposal, and for failing to obtain additional information from Strata on its own. Consol Br. at 13.

⁴¹This is another example of Consol's position that, if MSHA didn't like the plan to average a prior week's temperature and apply those results for the following week's derating, then it was incumbent on MSHA to present an alternative approach. The Court does not agree with Consol's idea that the burden of production shifts to MSHA if it does not accept the mine operator's proposal. MSHA's role is to evaluate the mine operator's proposal and assess whether data from the operator supports that proposal. Here, reliable data was not presented.

ORDER

In conclusion, the Court agrees with the fundamental assertion in the Secretary's post-hearing statement that the Strata 36 person refuge units used at this mine may not assure a safe environment at all times in that there may be periods during the course of the year in which the ambient temperatures could become too high for miners to safely inhabit the refuges. That being the case, the Court agrees that MSHA District Manager Ray McKinney did not act in an arbitrary or capricious manner when he issued the citation which triggered this litigation. The process of trying to resolve the reasonable concerns of the District Manger had continued for six months (from January 27 through July 21, 2010) and certainly by that point in time, (if not sooner), as District Manager McKinney did not have sufficient information from which he could *reliably conclude* that the refuge units could safely maintain trapped miners, the issuance of the citation, pursuant to Section 316(b)(2)(G)(ii), was fully warranted. Accordingly, the citation is affirmed and Consol is directed to submit a revised ERP, which establishes that miners will in fact be afforded the protection required under Section 316(b)(2) of the Mine Act, at all times, no matter what month or day of the year such a refuge may be needed.

As noted at the outset of this decision, the parties stipulated as to the issues to be resolved in this proceeding. On the basis of the the foregoing discussion, the Court concludes that:

- a. MSHA District Manager Ray McKinney did not act arbitrarily and capriciously in revoking or withdrawing his approval of the refuge alternative provisions associated with the ERP adopted by Consol for implementation at the Buchanan Mine #1.
- b. 30 C.F.R. § 75.1506(a)(3) did not obligate MSHA District Manager Ray McKinney to accept the use of the ERP-specified Strata refuge units and prohibit him from revoking or withdrawing his approval of the ERP as submitted by Consol for implementation at the Buchanan Mine #1.
- c. Given the course of interaction between Consol and MSHA's District 5 office concerning the use of Strata refuge units at the Buchanan Mine #1, MSHA did act in accordance with 30 U.S.C. § 876(b)(2)(G) in issuing Citation No. 7307437.

Accordingly, for the foregoing reasons, the citation at issue is **AFFIRMED** and it is **ORDERED** that Consol submit a revised ERP that is demonstrated, at all times, to provide miners with the protection mandated in Section 316(b)(2) of the Mine Act.

William B. Moran
Administrative Law Judge

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