

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710

AUG 30 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

SIGNAL PEAK ENERGY, LLC

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Docket No. WEST 2016-624-R

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:¹

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). At issue is whether the Administrative Law Judge properly upheld the rejection by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) of a ventilation control plan proposed by Signal Peak Energy, LLC (“Signal Peak”).

In July 2016, MSHA issued a technical citation to Signal Peak alleging a violation of 30 C.F.R. § 75.370(a)(1).² MSHA issued the citation after Signal Peak and MSHA reached an impasse while negotiating provisions of the operator’s ventilation plan. The dispute arises from MSHA’s denial of the operator’s request for approval to change its ventilation plan from a dual-entry tailgate return system to a single-entry tailgate return system.

The operator had argued that changing its ventilation plan would decrease the amount of oxygen in the gob, or mined-out area, thereby lessening the chance of spontaneous combustion, and would reduce the risk of material handling and roof control incidents. MSHA in turn expressed concerns that the operator’s proposed plan could cause noxious gob gases to enter an

¹ The votes of the four Commission members regarding whether to affirm the decision below are evenly divided. All four members join in the factual and procedural background section of this decision. However, Commissioners Jordan and Cohen join in one opinion voting to affirm, while Acting Chairman Althen and Commissioner Young vote to reverse the Judge’s decision.

² Section 75.370(a)(1) states in relevant part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager” and that “[t]he plan . . . shall be suitable to the conditions and mining system at the mine.” 30 C.F.R. § 75.370(a)(1).

area where miners work, reduce available oxygen in that area, and result in less effective monitoring for a spontaneous combustion event.

The Judge affirmed MSHA’s technical citation. In doing so, she held that MSHA’s rejection of Signal Peak’s proposed plan was not arbitrary and capricious. 39 FMSHRC 638, 653 (Mar. 2017) (ALJ). Signal Peak filed a petition seeking discretionary review of the Judge’s decision, which we granted.

Two Commission members vote to affirm the Judge’s decision and two Commissioners vote to reverse the Judge’s decision. As a result, the Judge’s decision will stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Factual Background

1. The Mine’s Operations

Signal Peak operates the Bull Mountain Mine, a large underground coal mine in Montana. The operator primarily mines its coal using the longwall method.

During longwall mining, the operator drives two sets of lengthy parallel entries on each side of a block of coal. At the end of the entries, the operator creates a crosscut perpendicularly (at right angles) to connect the parallel entries. The coal along the perpendicular cut becomes the longwall face.

A shearer moving back and forth across the face extracts the coal from the longwall. In turn, a conveyor system in an entry transports the coal from the face. The set of entries containing the conveyor system is the headgate; the parallel set of entries at the other side of the longwall panel is the tailgate. In developing the panel, there are three headgate entries and three tailgate entries. Each panel of coal is approximately 22,000 feet long and 1,250 feet wide.

Hydraulic roof jacks support the roof in a canopy above the longwall and shield miners operating machinery along the face from collapsing rock. As the face retreats, the operator moves the roof support shields outby towards the mine’s entrance to allow the roof to collapse into a compressed area known as the gob. Gases may build up in the gob area. To ventilate the longwall, air flows through the headgate entries, then along the face, and exits the area through the tailgate entries.

Although the Signal Peak mine does not have a high concentration of methane, it is prone to spontaneous combustion, which is the “heating and slow combustion of coal . . . initiated by the absorption of oxygen.” Stip. 4; Am. Geological Inst., *Dictionary of Mining, Mineral and*

Related Terms, 529 (2d ed. 1997) (“*DMMRT*”).³ Due to this danger and because it had been experiencing elevated levels of carbon monoxide (“CO”) in the gob, Signal Peak changed from a “bleeder entry”⁴ system to a “bleederless” system in January 2010.

A bleederless system reduces the potential for spontaneous combustion by limiting the oxygen that is available in the longwall gob. *Id.* The gob area must be isolated and sealed from the active mining area. Accordingly, a bleederless ventilation system requires the progressive installation of seals as the panel is mined.

In December 2011, Signal Peak experienced a major event of spontaneous combustion, which resulted in the loss of approximately 22 production days. The event was caused by oxygen pulled in by the mine’s exhausting ventilation system through subsidence cracks on the surface into the rider seam⁵ above the main seam being mined.

As a result, Signal Peak, with the approval of MSHA, instituted additional measures on subsequent longwall panels in order to decrease the risk of spontaneous combustion. These measures included lowering the gob’s oxygen levels by injecting nitrogen into the gob and monitoring the oxygen levels on an ongoing basis. Further, in January 2013, the operator replaced the exhausting ventilation system with a blowing ventilation system in order to pressurize the gob and decrease the danger of pulling air into the gob through cracks in the mine surface.

In January 2015, Signal Peak submitted a revised ventilation plan that proposed an additional change, which is the subject of this litigation. It proposed changing from a system in which air flows out of both tailgate entries (“dual entry system”) to a system in which the air exiting the longwall would flow only through a single entry (“single entry system”). *See* attached diagrams, Sec. Ex. 24 (the dual entry system) and Sec. Ex. 26 (the single entry system).

Under the dual entry system, the operator leaves the tailgate entries open to the first crosscut in by the panel. As ventilating air exits the longwall, its flow is divided with some going down entry 1 (entry closest to the panel) while a separate quantity of air is directed back to the cross cut and then into the other tailgate entry (entry 2) for exit (sometimes called the “back-around return”). Under the single entry system, the tailgate entries are mined as the longwall develops, and air leaving the longwall exits only through the tailgate entry 1. Like the current plan, the proposed single entry plan would be a bleederless, blowing air system.

³ The necessary components of spontaneous combustion are: (1) coal of a suitable chemical and physical nature; and (2) sufficient broken coal and air leaking through it to supply the oxygen needed. *DMMRT* at 529.

⁴ “Bleeder entries” are defined as “[p]anel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways.” *DMMRT* at 55.

⁵ A “rider seam” is defined as “[a] thin coal seam above a workable seam, or a seam that has no name.” *DMMRT* at 460.

2. The Plan Negotiation Process

On January 12, 2015, the operator submitted the proposed plan to Russell Riley, District Manager for MSHA Coal Mine Safety and Health District 9. On April 3, 2015, Riley rejected the operator's plan and requested additional information about seals and monitoring. In Riley's view, the operator failed to show that its plan would be "as effective [as the current dual-entry plan] at minimizing risks to miners such as possible low [oxygen] and [methane] buildup near the tailgate entries." Sec. Ex. 4.

On April 23, 2015, the operator submitted another proposed single-entry plan, and met with MSHA District 9 personnel approximately two weeks later to discuss it. On May 29, 2015, Riley again rejected the operator's plan. According to Riley, the proposed plan failed to ensure that contaminated air from the gob would not "enter the longwall face exposing miners to low [oxygen] levels at the tailgate and to gob gasses [sic] moving outby around the last shield." Sec. Ex. 7. Riley also stated that an increased likelihood of carbon monoxide overexposures and spontaneous combustion would occur, as well as an increase in carbon dioxide.

On July 9, 2015, Signal Peak and MSHA District 9 personnel met again to discuss the operator's proposed single-entry plan. Rather than approve the plan, Riley requested assistance from the MSHA Director of Technical Support at the Ventilation Division of the Pittsburgh Safety and Health Technology Center.

On January 13, 2016, MSHA Technical Support issued a report prepared by Dennis Beiter, Senior Mining Engineer in the Ventilation Division (the Beiter report).⁶ The report recommended against approval stating, "the dual tailgate return system . . . results in better protection for miners and enables earlier detection of spontaneous combustion." Sec. Ex. 10 (quoting Sec. Ex. 10a at 2).

Riley then rejected the operator's proposed plan for the third time, relying on Beiter's report. The findings of better protection against buildups of toxic gases, lowered oxygen, and better monitoring were the basis for disapproving the Signal Peak plan.

In March 2016, MSHA District 9 requested that MSHA Technical Support perform two fan stoppage tests using the mine's existing dual-entry tailgate return and a simulated single-entry tailgate return. On April 25-28, 2016, the fan stoppage tests were performed by Thomas Morley, a Mining Engineer in the Ventilation Division, and others.⁷ On May 3, 2016, MSHA Technical Support issued a report prepared by Morley. On May 11, 2016, Riley sent a letter to the operator referencing Morley's report, which stated that unacceptably low levels of oxygen occurred during the fan stoppage tests for *both* plans. Although Morley did not suggest that the operator's proposed plan be denied, he recommended that the operator add language to its plan to

⁶ Beiter was not told whether District 9 had a preference of one plan over the other, but instead was directed to perform an independent review. Tr. 108-09.

⁷ The first fan stoppage test occurred on Monday, April 25, for the dual-entry system. It lasted 90 minutes. The second 90-minute test for the single-entry system occurred three days later on Thursday, April 28.

address fan stoppages, regardless of whether it ultimately used a dual-entry or a single-entry plan. Sec. Ex. 15a at 5-6; Sec. Ex. 15.

Based on the results of the fan stoppage tests, on May 11, 2016, MSHA notified Signal Peak that it needed to make immediate changes to its existing ventilation plan to protect miners in the event of a fan stoppage. On May 16 and 18, 2016, the operator submitted another proposed single-entry tailgate return ventilation plan.

On June 15, 2016, for the fourth time, Riley rejected Signal Peak's proposed plan. About a week later, the operator requested the issuance of a technical citation.⁸ MSHA subsequently issued the citation that is the subject of this litigation.⁹

B. The Judge's Decision

The Judge affirmed the citation. 39 FMSHRC at 653. As a threshold matter of law, she rejected Signal Peak's argument that the Secretary is required to prove that the operator's ventilation plan is "unsuitable" for the mine, holding that operators are "not entitled to . . . *de novo* hearing[s] on the merits of . . . plan[s]." *Id.* at 651. Instead, she held that a district manager's rejection of a proposed plan must be "arbitrary, capricious, or an abuse of discretion" in order to be vacated. *Id.*, citing *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (July 2013), *aff'd*, *Prairie State Generating Co. LLC v. Secretary of Labor*, 792 F.3d 82 (D.C. Cir. 2015); *Mach Min., LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff'd*, *Mach Min., LLC v. Secretary of Labor, Mine Safety and Health Admin.*, 728 F.3d 643 (7th Cir. 2013)). Applying the "arbitrary and capricious" standard of review, the Judge held that Riley's decision "was based on careful consideration of all of the relevant factors, and that he did not abuse his discretion in requiring the mine to use a dual-entry plan." 39 FMSHRC at 653.

The Judge found that Riley reasonably explained his position that: (1) the dual-entry system was more effective at removing noxious gases from the tailgate area where miners work, (2) the dual-entry system enabled better monitoring of conditions in the gob and earlier detection of noxious gases before the gases reached the working face, (3) the dual-entry system did not present significant material handling hazards, (4) there was a suitably low risk of spontaneous combustion under the dual entry system, and (5) fan stoppage tests did not strongly favor either plan. The Judge found that the District Manager based his decision on a careful consideration of relevant factors and did not abuse his discretion.

⁸ The operator had twice before requested issuance of a technical citation. On those occasions, however, MSHA continued to consider the request and asked for additional information or investigation.

⁹ MSHA's original citation included a reference to the deficiencies in the mine's current ventilation plan discovered during the fan stoppage tests. Due to the ongoing negotiations addressing these deficiencies, however, the Secretary at hearing moved to amend the citation to remove that portion, and the Judge granted the motion. 39 FMSHRC at 638, n.1. As such, the fan stoppage deficiencies in the current plan are not at issue in the case before us.

Accordingly, the Judge affirmed the citation.

II.

Separate Opinions of the Commissioners

Commissioners Jordan and Cohen, voting to affirm the Judge:

We vote to affirm the Judge’s conclusion that District Manager Riley’s decision to reject Signal Peak’s proposed single-entry ventilation plan was not arbitrary and capricious. The record reflects that District Manager Riley carefully weighed several criteria before deciding to reject the operator’s proposed plan. For instance, he determined that although the single-entry plan would offer the benefit of potentially diminishing exposure to certain hazards, such as spontaneous combustion and roof control hazards, any benefit would come at the expense of protection from other potential hazards, such as an increased likelihood that miners would be exposed to contaminated air.

The District Manager did not dismiss the operator’s concerns regarding spontaneous combustion. Rather, he determined that the proposed additional protections against the risk of spontaneous combustion would be marginal because the mine had already taken adequate steps to control spontaneous combustion by injecting nitrogen into the gob and installing a blowing system of ventilation. District Manager Riley reasonably focused on the hazard of oxygen-deficient air exiting the gob into the areas where miners work. In sum, Riley rejected the single-entry plan, concluding that the plan “will not ensure that [contaminated] air” from the gob would not “enter the longwall face exposing miners to low [oxygen] levels at the tailgate and to gob gasses [sic] moving outby around the last shield.” Sec. Ex. 7.

The Judge concluded that Riley reasonably evaluated the relevant factors and specific conditions of the mine prior to his determinations about the proposed plan. The Commission is not in a position to substitute its view for the expertise of the District Manager on this highly technical issue. Instead, the law requires us to determine whether the Judge’s findings that informed her decision, on whether the District Manager’s decision was arbitrary and capricious, was supported by substantial evidence. We conclude that substantial evidence supports the Judge’s findings.¹

¹ We also uphold the District Manager’s and Judge’s decisions as necessary to prevent the weakening of standards under section 101(a)(9) of the Mine Act. 30 U.S.C. § 811(a)(9). In our view, the Act’s prohibition of weakening of mine health and safety standards is equally applicable to ventilation plans. Just as new mandatory standards may not “reduce the protection afforded miners” provided by the standards they replace, *see id.*, we would decline to read new plans – enforced as mandatory standards – to reduce the protection of miners provided by the plans they replace. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989) (holding that roof control plans are enforceable as mandatory standards) (citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976)).

A. The “Arbitrary and Capricious Standard” of Review Applied by the Judge was Appropriate and Consistent with Legal Precedent.

Signal Peak argues that the Judge erred in applying an “arbitrary and capricious” standard of review, and asks the Commission to reconsider its decisions in *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (Jul. 2013) and *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012). Signal Peak urges the Commission to adopt an approach under which, upon appeal of a ventilation plan dispute, the Judge would hold a *de novo* hearing at which the Secretary is required to prove that the operator’s plan is unsuitable, and if so, that MSHA’s plan is suitable. SP Br. at 13-19; Oral Arg. Tr. 12. We decline to do so.

The Commission has recognized the Secretary’s discretion in the ventilation plan process, relying upon the Act’s legislative history. *See, e.g., Peabody Coal Co.*, 18 FMSHRC 686, 690-692 (May 1996); *C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996). The Senate Committee Report on the Act stated that “while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan.” 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) (“*Legis. Hist.*”).

The Secretary’s ultimate responsibility to approve ventilation plans was expressly affirmed by the D.C. Circuit and Seventh Circuit respectively. *See Prairie State Generating Co.*, *supra*, *aff’d*, 792 F.3d 82, 91-92 (D.C. Cir. 2015); *Mach Mining, LLC*, *supra*, *aff’d*, 728 F.3d 643, 657-58 (7th Cir. 2013).

Prairie State and *Mach Mining* require a Judge to consider whether a district manager’s decision to deny the operator’s proposed ventilation plan was made arbitrarily, capriciously, or otherwise amounted to an abuse of discretion. *Mach Mining*, 728 F.3d at 658; *Prairie State Generating Co.*, 792 F.3d at 93. Under this standard, a district manager’s action may be considered 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. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We continue to apply this standard here.²

We reaffirm the application of the “arbitrary and capricious” standard of review in ventilation plan disputes as best effectuating the independent responsibilities delegated to MSHA and to the Commission by the Mine Act. As the court recognized in *Mach Mining*, the process delegated to the Secretary of approving mine-specific ventilation plans involves a congressional

² Our colleagues candidly acknowledge that they believe the decisions of the Seventh Circuit in *Mach Mining* and the D.C. Circuit in *Prairie State Generating Co.* were wrongly decided. Slip op. at 17 n.5. Indeed, their opinion is predicated on a legal theory that is antithetical to those two circuit court decisions.

mandate that his representatives exercise independent judgment. 728 F.3d at 657. Therefore, the ventilation plan approval process is more akin to the *formulation* of a safety standard rather than the *enforcement* of that standard and, thus, a *de novo* hearing (prototypically granted when the Secretary seeks to enforce a safety standard against an operator) regarding the proposed plan would be inconsistent with Congress’s delegation of responsibilities. *See id*; *see also Prairie State*, 792 F.3d at 91-92. Accordingly, the court in *Prairie State* held that a “deferential [standard of] review appropriately respects the Secretary’s policymaking prerogative and ensures that his determinations are reasonable and adequately supported by the evidence.” 792 F.3d at 92.

For these reasons, we deny Signal Peak’s request to abrogate *Prairie State* and *Mach Mining*.³

³ Our colleagues, purporting to rely on *Secretary of Labor v. Canyon Fuel Co.*, 894 F.3d 1279 (10th Cir. 2018), assert that section 303(o)’s requirement that a ventilation plan be “suitable to the conditions and mining system at the mine” limits the Secretary’s authority when reviewing ventilation plans to a determination of whether the plan submitted by the operator to MSHA “achieves safety and health requirements for adequate ventilation.” Slip op. at 15-17, 18. Our colleagues expressly reject the idea that “suitable” may include a determination of which of two proposed ventilation plans affords the greatest safety for miners. Thus, they state, “[s]ection 303(o) does not call for a ‘comparability’ analysis of potentially different ventilation plans.” *Id.* at 20. However, our colleagues provide no standard for determining when a proposed plan “achieves safety and health requirements for adequate ventilation” and do not define the word “adequate.” Their rejection of MSHA’s ability to compare the relative merits of alternative ventilation plans lacks legal foundation.

Moreover, our colleagues fail to understand MSHA’s use of the word “minimum” in its Handbook for Mine Ventilation Plan Approval Procedures. MSHA Handbook Series, Handbook Number PH13-V-2, Mine Ventilation Plan Approval Procedures (Apr. 2013). The Handbook is saying that once the ventilation plan is approved, it becomes the minimum standard for ventilation requirements at the mine. In no way is MSHA suggesting that ventilation plans need only provide minimum protection for miners.

Far from a decision which “perfectly illustrates” our colleagues’ position, slip op. at 19, *Canyon Fuel* reiterated the principle set forth in *Mach Mining*, 728 F.3d at 658, and *Prairie State*, 792 F.3d at 92, that “the Secretary acts arbitrarily if he ‘entirely fail[s] to consider an important aspect of the problem.’” 894 F.3d at 1297. Indeed, we are not aware of any pronouncement by the Commission or a circuit court in the history of the Mine Act and its predecessor Coal Act going back to 1969 which sanctioned the idea that a ventilation plan is “suitable” because it is adequate even though another plan for the same mine afforded better protection for miners. Quite to the contrary, in *UMWA v. Dole*, *supra*, 870 F.2d at 666, the D.C. Circuit held: “Thus when new standards replace existing mandatory health or safety standards it is not sufficient that the new standards demonstrate a reasonable accommodation of the competing goals of safety and efficient coal mine operation. The statute expressly mandates that no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing to improved efficiency.”

B. Substantial Evidence Supports the Judge’s Findings.

1. Substantial Evidence Supports the Judge’s Finding that the District Manager Reasonably Concluded that the Proposed Single-Entry Plan Would Create an Unacceptable Risk of Noxious Gob Gases and Low Oxygen Entering Areas Where Miners Work.

The operator’s proposed single-entry plan would change the manner in which the air travels after sweeping the working face. Specifically, the proposed plan would omit the “T split” and “back around” return that are components of the dual-entry plan; instead the air would leave the mine in a single entry, the same entry in which miners work. 39 FMSHRC at 645.

The Commission reviews the Judge’s factual findings under the substantial evidence standard of review. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as reasonable minds might accept as adequate to support [the Judge’s] conclusion even if it is possible to draw two inconsistent conclusions from the evidence.” *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) (citation omitted); *see also Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Judge credited the testimony of both District Manager Riley and the Secretary’s expert witness Beiter, who explained that because the blowing ventilation system puts pressure on the gob, noxious gases or low oxygen may be released into areas where miners work, if the proposed single-entry system was used. 39 FMSHRC at 647; RH Tr. 35-36, 117-18. The mined-out gob contains locations where noxious gases can accumulate. Riley and Beiter were concerned about three different events which could cause the release of noxious gases or low oxygen to occur: (1) a fan stoppage; (2) the air pressure in the tailgate entries and face becoming

Moreover, in actual practice, our colleagues’ insistence that MSHA must view an operator’s proposed plan in a vacuum and turn a blind eye to an alternative plan (even one currently in effect at the operator’s mine) is difficult, if not impossible, to apply. As recognized by Congress, ventilation issues are “complex and potentially multifaceted,” S. Rep. No. 95-181, at 25 (1977), *reprinted in Legis. Hist.* at 613, and thus ventilation plans are more readily assessed by balancing competing concerns in a mine, which necessitates an evaluation of potential solutions and the potential effects of those solutions on other aspects of the plan. Thus, in determining “suitability,” there are trade-offs which must be evaluated. In the present case, MSHA’s plan emphasized protection from noxious gases entering working areas while Signal Peak’s plan emphasized protection from spontaneous combustion. Rather than an arbitrary determination of whether a plan (viewed with blinders on to avoid consideration of any other options) is “adequate,” the process of evaluation involves a balancing of hazardous risks. Instead of our colleagues’ formulation, we are guided by the D.C. Circuit’s statement in *Prairie State* that as used in section 75.370(a)(1) “suitability is a discretionary, contextual exercise of expert judgment regarding the safeguards needed to keep miners safe.” 792 F.3d at 93.

lower than the gob's air pressure, which would create a path of least resistance for the gases to travel out from the gob to the working areas, or (3) a delayed rock fall that could push gob air out on the face. RH Tr. 36-37, 111-12.

Riley testified that under the current plan, in these scenarios, the "back-around return" in the dual-entry system acts as a "pressure relief valve" to help prevent the gob air from coming out onto the face. RH Tr. 35. Specifically, the air that flows inby through the gob at the tailgate from the "T-Split" pushes and directs the noxious gob gases up crosscut 49 and then outby in tailgate entry number 2 (the "back return" entry), which is sealed off from entry number 1. RH Tr. 35, 115-16; *see also* Sec. Ex. 24.

By contrast, the operator's proposed single-entry system would eliminate tailgate entry number 2, which means that any noxious gas accumulations would exit the gob and flow directly into tailgate entry number 1, where miners work. Sec. Ex. 26; RH Tr. 117-18, 121-22; *see also* Sec. Ex. 10(a) at 3 (Beiter Report) (concluding that the "potential for miners exiting the tailgate side of the longwall face to be exposed to more elevated contaminant levels is greater in a [single-entry] system than in a dual tailgate return system incorporating a back return.").

Signal Peak claims that the results of a fan stoppage test⁴ contradict MSHA's concerns. It asserts that the oxygen levels for the single-entry test fell to a "slightly lesser degree" than the dual-entry test, and that therefore the single-entry system was just as safe, if not slightly safer, than the dual-entry system. Accordingly, it contends that Riley's rejection of the single-entry plan was arbitrary.⁵

⁴ The test was meant to determine how quickly gases would come out of the gob into the working face in the event of a fan stoppage.

⁵ Signal Peak also points to testimony from Morley regarding the fan stoppage tests, which could potentially be interpreted to suggest that noxious gas and low oxygen would be unlikely to exit the gob in the event of a fan stoppage, under the single-entry system. *See, e.g.*, Tr. 79 ("We didn't find many contaminants at all"); Tr. 80-81 (stating that "good quality" air came out from behind the shields); SP Post-Hrg. Br. at 16. This testimony is not relevant, however, because Morley's statements were made in response to questions from Signal Peak's counsel about the air quality that had occurred during the time *in between the two fan stoppage tests*. *See* Tr. 79 (Q: "[D]id you compare on Monday with readings on *Tuesday and Wednesday* to see whether there were more contaminants on the dual entry or the single entry?") (emphasis added). The second test did not occur until *Thursday*, April 28, 2016. Sec. Ex. 15 at 4. As such, the Judge appropriately did not give much weight to Morley's testimony in favor of the operator on this issue.

For the same reason, we reject the operator's argument that the air in the gob would not come out into the face during normal mining operations because the mine face has higher air pressure than the gob. Tr. 130, 143. MSHA was not concerned with normal mining operations. MSHA is concerned with *aberrations* from normal mining operations – where the ventilation is being disrupted or not properly controlled (such as a drop in barometric pressure or a loss of fan power). RH Tr. 122-23.

We disagree. Riley considered the results of the fan stoppage test and he determined that the results did not favor one plan over the other. This determination was supported by substantial evidence and was within the District Manager's discretion. Furthermore, there is evidence that the tests were not performed in accordance with the agreed upon protocols creating doubt about the reliability of the results. 39 FMSHRC at 649.

The operator also suggests that the back-up fan at the mine rendered the District Manager's decision arbitrary and capricious. However, MSHA had provided an opportunity for Signal Peak to supply necessary information about the back-up fan before it made its decision, and the operator failed to do so.⁶ We decline to consider this new information, which was never communicated to MSHA. *See, e.g., Chamber of Commerce v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006) (holding that interested parties may not "withhold relevant data [in rulemaking proceedings] and blindsides the agency on appeal"). Even assuming that we were to find that the Judge erred in overlooking the evidence of the back-up fan, this constitutes harmless error because there is still evidence of the other types of events that could have caused the release of noxious gases or low oxygen into the areas where miners work, e.g., the air pressure in the tailgate entries and face could become lower than the gob's air pressure, which would create a path of least resistance for the gases to travel from the gob into the working areas or a delayed rock fall could occur, which would push gob air out on the face. RH Tr. 36-37, 111-12.

As such, we find that substantial evidence supports the Judge's finding that the District Manager reasonably concluded that the proposed plan would create an unacceptable risk of noxious gob gases and low oxygen entering areas where miners work.

2. **Substantial Evidence Supports the Judge's Finding that the Risk of Spontaneous Combustion Under the Current Ventilation Plan was Low.**

Signal Peak argues that the Judge and the District Manager overlooked material evidence that the proposed plan would significantly decrease the risk of spontaneous combustion. The operator relies on the fact that the current plan directs a certain amount of air in by the number 1 tailgate entry for a distance of one crosscut (approximately 225-285 feet) along the inner edge of the gob. *Id.* at 34; Tr. 128; SP Ex. EEE; Sec. Ex. 24. By contrast, the operator argues that the proposed single-entry plan would introduce substantially less oxygen into the gob, which would better prevent spontaneous combustion. SP Br. at 25; RH Tr. 78-79; Tr. 50-51, 128.

The operator also asserts that the proposed plan would introduce less oxygen into the gob on the headgate side. Specifically, under the current plan, the crosscut seals cannot be installed until after the longwall passes each crosscut. The operator emphasizes that the seals are

⁶ Signal Peak had never submitted to MSHA any information regarding whether the back-up fan had a separate power source or whether it could easily be activated – even though MSHA had specifically requested this information. Sec. Ex. 10(a) at 5 (Beiter Report) (requesting clarification on "the means or time necessary for implementing [the back-up fan's] usage following a main fan outage . . . [and] whether or not the backup main fan was powered by a power source separate from the main fan").

currently built between headgate entries 2 and 3, and that the seals would obstruct access to the primary escapeway in entry 2 if built prior to the gob advancing. *See* Sec. Ex. 24. This means that, until the seal is constructed, there is an opening into the gob through which air could enter. *Id.* Under the proposed plan, the seals would be between entries 1 and 2 and so could be built before the longwall advances without obstructing access to the escapeway. SP Br. 25-26; *see also* Sec. Ex. 26. This would prevent any temporary opening into the gob through which air could enter.

Despite these arguments, we believe that the Judge did not overlook any material evidence that the proposed plan would significantly decrease the risk of spontaneous combustion. The Judge found that the “mine’s current ventilation plan [requiring a blowing system] has been in place since January 2013 and has successfully limited spontaneous combustion since that time.” 39 FMSHRC at 644-45. The Judge further concluded that Riley reasonably determined that the risk of spontaneous combustion was suitably low under the current plan, and that it was not necessary to decrease the amount of air entering the gob beyond the current amount. *Id.* at 652. These findings are supported by substantial evidence.

Riley testified that he had considered Signal Peak’s concerns that the current plan imposes a significant risk of spontaneous combustion. RH Tr. 41-42. Specifically, Riley testified that he had taken into account the fact that the mine has a lengthy incubation period (the time for the coal in the gob to combust when exposed to oxygen).⁷ RH Tr. 41-43. Based on these criteria, Riley had concluded that it was not necessary to decrease the amount of air entering the gob below the current amount.

Furthermore, Riley testified that he had considered the fact that Signal Peak “inject[s] nitrogen into the gob to help prevent spontaneous combustion” and explained that, since December 2011, there have been no spontaneous combustion events at the mine, which indicated to him that the present system is effective. RH Tr. 43, 105-07. Signal Peak’s Vice President of Engineering Farinelli himself agreed that, since December 2011, the operator has been successfully mining under the dual-entry system, and controlling spontaneous combustion. Tr. 176. Therefore, the record supports Riley’s determinations, which the Judge recognized, that the risk of spontaneous combustion is low under the current plan, and that considerations of preventing spontaneous combustion should not be a decisive factor here in determining the suitability of the proposed plan.

Moreover, Riley testified that he had taken into account that the mine injects nitrogen 10-15 crosscuts (2200 to 3300 feet) behind the face. RH Tr. 79-80; Tr. 31. This indicated to Riley that there is no imminent threat of spontaneous combustion caused by the current practice of introducing air a mere 225-285 feet into the gob on the tailgate side because, if the risk for spontaneous combustion was so great, the mine would be injecting nitrogen much closer to the longwall face. RH Tr. 43; *see* Sec. Ex. 24.

⁷ Incubation periods are based on the “temperature versus the moisture content versus the oxygen content” of the mine. RH Tr. 42-43.

Signal Peak claims that nitrogen injected closer to the face would be diluted by the air on the face and immediately behind the longwall shields, and therefore would be ineffective in inerting the gob. Tr. 36-37, 187. However, Beiter testified that only a *portion* of the nitrogen would be diluted and carried away by the face airflow, and that, in his view, the operator would have simply needed to inject a higher quantity of nitrogen closer to the face. Tr. 37-38.

Likewise, Signal Peak's claim that the current plan allows for more oxygen to be introduced into the gob on the headgate side conflicts with other evidence in the record. Beiter rejected this claim in his report. Specifically, Beiter stated that "a curtain was typically installed in the crosscut in by the longwall face where the headgate seal would later be constructed. That curtain was described as 'not tight.'" Sec. Ex. 10(a) at 6. In Beiter's view, "[c]onstruction of a more substantial control such as a permanent stopping or framed check curtain (temporary stopping) instead of a curtain described as 'not tight' would reduce the quantity of intake air leaking into the worked-out area." *Id.* This would prevent air from flowing through any opening into the gob on the headgate side before the seal is constructed. Tr. 10. As stated, the Judge permissibly credited Beiter's testimony.

In summary, the record does not reflect that the District Manager failed to give adequate consideration to the evidence relating to the hazard of spontaneous combustion.

3. Substantial Evidence Supports the Judge's Finding that the Current Plan Allows for Earlier Detection of Spontaneous Combustion.

Even if spontaneous combustion did present a problem here, the Judge recognized that Riley determined that the dual-entry system enables better monitoring of conditions in the gob. 39 FMSHRC at 648. Indeed, Riley testified that an air monitoring sensor in the dual-entry system "gives the true air concentrations and the gas that they detect from the back[-around] return" and "give[s] earlier detection . . . from the gob at this sensor versus not having the back[-around] return and having the sensor hung right here on the last shield only about two foot from the working face and the gob gases would be out into the working area before they were detected by the detection system." RH Tr. 40-41.

Beiter testified that detecting spontaneous combustion early would be more difficult in a single-entry system because of the increased dilution that would occur, which could mask the existence of the carbon monoxide. Beiter further explained that, in the dual-entry system, "the contaminants are elevated in that back return airflow. They're less diluted . . . from a detection standpoint, the less dilution you have, the more likely you are to find an indication of the beginning of a heating, of a spontaneous combustion event as opposed to a more diluted atmosphere," providing earlier detection of spontaneous combustion. Tr. 18-22, 43; *see also* Sec. Ex. 10(a) at 3. The Judge expressly credited Beiter's testimony, finding that he had "significant experience with spontaneous combustion." 39 FMSHRC at 650.

Signal Peak argues that the dual-entry system does not provide a reliable method of early detection of spontaneous combustion. The operator points to testimony by Vice President of Engineering Farinelli stating that the monitoring advantage of the back-around system described by Beiter is minimal because the atmospheric monitoring sensor in the back return only measures

the *percentage* of CO in the tailgate entry – which is relative to how much oxygen is present in the air. Tr. 146-50. According to Farinelli, if only a relatively low amount of oxygen exists, the concentration of CO showing up on the sensor is higher. By contrast, higher levels of oxygen will dilute the concentration of CO, which paints a misleading picture of how much CO is actually present in the gob.

The Judge chose to rely on the testimony of Riley and Beiter. We find that substantial evidence, i.e., evidence capable of persuading a reasonable mind, exists to support the Judge’s finding that the dual entry system provides a better method of early detection of spontaneous combustion.

4. **Substantial Evidence Supports the Judge’s Finding that the Single-Entry Plan Would Only Minimally Reduce Material Handling and Roof Control Hazards.**

Although Signal Peak’s proposed plan would obviously reduce material handling and roof control hazards by eliminating the need to maintain tailgate entry number 2, the Secretary has demonstrated that the resulting reduction in hazards would be minimal. According to Riley, the operator has done a “pretty good job” in mitigating the hazards that relate to roof control and material handling. RH Tr. 43-45, 81-83. According to Beiter’s report, discussions with the operator’s personnel did not indicate a history of accidents involving material handling during the installation of standing support in the No. 2 headgate entry of previous longwall panels. Sec. Ex. 10(a) at 6. Thus, Beiter reasonably concluded that the operator was doing a good job of installing support in a safe manner. Tr. 14-15, 49-50.

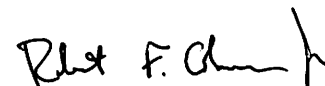
Additionally, Beiter testified that he “was not made aware” and “[n]o records were provided” that there were any issues regarding safe access to construct seals in the dual-entry system. Tr. 12-13. Indeed, as Farinelli himself testified, “we feel we are doing an excellent job at managing our roof control.” Tr. 176. As a result, substantial evidence supports the Judge’s finding that the reduction in material handling and roof control hazards would be minimal under the single-entry system.

Conclusion

Accordingly, we would hold that under the appropriate standard of review, the Judge’s decision affirming the District Manager’s rejection of the plan is supported by substantial evidence.



Mary Lu Jordan, Commissioner



Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen and Commissioner Young, in favor of reversing:

We would find that the Judge applied the wrong legal standard and that substantial evidence¹ does not support a finding that the operator’s ventilation plan was not suitable — that is, was not appropriate to meet the requirement to provide safe and healthful ventilation at the specific mine. Accordingly, we would reverse the decision of the Administrative Law Judge and approve the operator’s plan.

Legal Principles

The focal point of this case is the requirement of section 303(o) of the Mine Act that an operator must prepare and MSHA must approve a ventilation plan “suitable to the conditions and the mining system of the coal mine . . .” 30 U.S.C. § 863(o).² In turn, the issue narrows further to the meaning of the term “suitable” and whether substantial evidence supports the Judge’s determination that the plan prepared by the operator was not suitable.

The Mine Act does not define “suitable.” Courts of appeal and the Commission have held that in the absence of a statutory definition or a technical usage of the term “suitable,” we apply the ordinary or dictionary meaning of the word. *Canyon Fuel Co., LLC v. Sec’y of Labor*, 894 F.3d 1279, 1288 (10th Cir. 2018); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). Consequently, for our purposes, “suitable” means “adapted to a use or purpose,” “having the necessary qualifications: meeting requirements” and “fitted for, adapted or appropriate to a person’s . . . needs.” *Canyon Fuel*, 894 F.3d at 1288.

The purpose of a ventilation plan is to provide safe and healthful atmospheric conditions. MSHA has stated correctly “[a] sound ventilation plan is essential to maintaining adequate ventilation and respirable dust control in the mine.” MSHA Handbook Series, Handbook Number PH13-V-2, Mine Ventilation Plan Approval Procedures (Apr. 2013). MSHA further correctly identified the test for acceptance stating, “[p]lans adopted by the mine operator and approved by the district manager define minimum safety and health requirements for the mine.” *Id.* Therefore, a suitable ventilation plan — a plan that MSHA must approve — is one that

¹ “Substantial evidence” means “such relevant evidence as reasonable minds might accept as adequate to support [the Judge’s] conclusion even if it is possible to draw two inconsistent conclusions from the evidence.” *Landes Const. Co. v. Royal*, 833 F.2d 1365, 1371 (9th Cir. 1987); *see also Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

² Signal Peak was issued a technical citation alleging a violation of 30 C.F.R. § 75.370(a)(1), which mirrors the language of the Mine Act and provides in relevant part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager” and that “[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.”

achieves safety and health requirements for adequate ventilation and respirable dust control at the specific mine.³

The obligation that a plan must be appropriate for its purpose (suitable) is a consistent and repeated theme in the Mine Act and underground coal mine regulations. Title III of the Mine Act contains 14 specific requirements for “suitable” equipment or a “suitable” plan. The regulations of underground coal mines at 30 C.F.R. Subchapter O, Part 75 contain more than 30 “suitability” requirements.

When an operator presents a ventilation plan to MSHA for approval, the only question for MSHA is whether the plan provides adequate safety and health protections for the specific mine. MSHA has promulgated extensive mandatory standards for ventilation. 30 C.F.R. §§ 75.300-75.389. Those regulations establish mandatory standards that a ventilation plan must meet in order to be suitable. Given the purpose and effect of those standards, a ventilation plan that is adequate for operation of the mine in compliance with those regulations achieves the conditions for maintaining adequate ventilation and respirable dust control in the specific mine. Such a plan is therefore suitable.

This case turns upon the issue of substantial evidence — namely, whether substantial evidence supports the Judge’s decision. Nonetheless, it is useful to review briefly the development of burden of proof issues in plan approval cases so that we may place the substantial evidence issue in the proper context.

Unquestionably, the Secretary bears the burden of proof in Commission suitability proceedings. However, the Commission has taken shifting positions on the standard of proof. Prior to 2012, the Commission consistently held that the Secretary bore the burden of establishing by a preponderance of the evidence that the operator’s plan was unsuitable for the mine in question. *See, e.g., Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) (“*Peabody I*”); *Peabody Coal Co.*, 15 FMSHRC 381, 388 (Mar. 1993) (“*Peabody I*”) (“[t]he Secretary bears the burden of proving that the plan provision at issue was suitable to the mines in question”); *C.W. Mining Co.*, 18 FMSHRC 1740, 1748-53 (Oct. 1996).

³ Use of the term “minimum” by MSHA in conjunction with safety and health requirements appropriately gives one pause. But the agency’s use of the term “minimum” most certainly does not connote in any way an insufficient system. It means, as MSHA says, that the ventilation plan must maintain adequate ventilation and respirable dust control in the mine. If the plan maintains adequate ventilation and respirable dust control, it is suitable. MSHA obviously and correctly recognizes that there may be many ways of accomplishing a goal. The critical requirement is that the ventilation plan is appropriate and fit for providing a safe and healthful atmospheric condition in the specific mine. In this matter, the agency has not analyzed the operator’s plan from that standpoint, nor has it made a persuasive case that it fully considered the relative health and safety benefits of the operator’s plan in a way that is not self-contradictory or superficial.

In a 3–2 decision issued in 2012, a Commission majority held that the Secretary’s burden consisted of showing that MSHA’s disapproval of the suitability of a plan was not an abuse of his discretion and was not arbitrary and capricious. *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff’d*, 728 F.3d 643, 658 (7th Cir. 2013). That standard requires that the Secretary show MSHA “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* at 1790-91, *citing Twentymile Coal Co.*, 30 FMSHRC 736, 754, 773-74 (Aug. 2008). The decision did not remove the burden of proof from the Secretary, but adjusted the standard of proof to an abuse of discretion test. The abuse of discretion standard of proof does not affect the application of the substantial evidence test as applied to a Judge’s findings of fact.

The Commission reaffirmed *Mach* in *Prairie State Generating Co., LLC*, 35 FMSHRC 1985, 1989 (July 2013). Subsequently, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission’s decision. *Prairie State Generating Co., LLC v. Sec’y of Labor*, 792 F.3d 82, 92 (D.C. Cir. 2015).⁴ The circuit court did not find the Mine Act mandated use of the abuse of discretion standard, but instead accepted the Commission’s deferential use of that standard stating “[w]e therefore hold that the standard of review applied by the Commission was at least a permissible one.” *Id.* at 93. Again, the circuit court’s decision left in place the substantial evidence requirement that requires MSHA to support a denial of a plan through presentation of facts pertaining to the proffered plan that sustain a reasonable conclusion that the plan did not provide for the safety and health requirements at the specific mine.⁵

⁴ In doing so, the circuit court commented upon the expertise of MSHA in reviewing ventilation plans. With all respect for the circuit court, the Commission and its Judges often deal with complex issues involving expert witnesses. For example, disputes regarding whether a violation is significant and substantial turn on the evidence for the Secretary and operator of the reasonable likelihood of a hazard and the reasonable likelihood of an injury if the hazard occurs. In S&S cases, the Secretary must establish a preponderance of the evidence demonstrating the reasonable likelihood of a hazard or injury. Often this involves disputed testimony between contending experts. Such inquiries call for determinations by Judges very much in the nature of whether a ventilation plan is fit for providing ventilation in accordance with MSHA’s mandatory standards.

⁵ We continue to believe that *Prairie State Generating Co.*, 35 FMSHRC 1985 (July 2013), *aff’d*, 792 F.3d 82 (D.C. Cir. 2015) and *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff’d*, 728 F.3d 643 (7th Cir. 2013), were wrongly decided. Contrary to our colleagues’ assertions (slip op. at 7 n.2), we recognize that those decisions were upheld by the circuit courts as permissible interpretations by the Commission, and we do not “reject” the holdings in those decisions because it is unnecessary to do so. Here, the outcome does not turn upon the standard of review but rather the fact, demonstrated below, that MSHA’s decision to reject the operator’s proposed plan was not analyzed under the safety standard provided by the statute and was not supported by substantial evidence.

Most recently, in a case particularly relevant here, the United States Court of Appeals for the Tenth Circuit reviewed a Commission decision regarding whether an escapeway met the suitability requirements of 30 C.F.R. § 75.380(d)(5).⁶ The Commission, by a 2–2 vote, left standing an Administrative Law Judge’s finding that the escapeway used by the operator was not the most direct, safe and practical route to the nearest mine opening “suitable” for the safe evacuation of miners. *Canyon Fuel Co., LLC*, 39 FMSHRC 1578, 1578-79 (Aug. 2017), *aff’d in part and vacated in part*, 894 F.3d 1279 (10th Cir. 2018).

On appeal, the circuit court addressed the Secretary’s burden of establishing a violation of the escapeway standard:

To establish a violation of § 75.380(d)(5), however, “[i]t is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation.” *S. Ohio Coal*, 14 FMSHRC at 1785. Rather, “it is the Secretary’s burden to prove that, as compared to the designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard’s requirement.” *Id.*

894 F.3d at 1295-96. The circuit court then turned to an analysis of whether the Secretary had presented substantial evidence in support of its position. The court found that the Secretary had failed to carry his burden and reversed the Judge’s decision. *Id.* at 1296-1300.

Pertinent to this case, the circuit court soundly rejected any notion that a Judge or the Commission must accept MSHA disapproval of a plan merely because MSHA finds another plan to be preferable. Even more pertinent, the court’s decision illustrates a point of fundamental importance to this case — namely, the test of suitability is not which plan MSHA might prefer, but instead whether the plan (i.e., route in *Canyon Fuel*) proffered by the operator is suitable. In other words, the suitability determination is not an opportunity for MSHA to design a route or develop a plan for the operator. MSHA’s duty is to review the plan submitted by the operator and determine whether it achieves the requisite safety and health requirements at the specific mine.⁷

⁶ 30 C.F.R. § 75.380(d)(5) provides “[e]ach escapeway shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners.”

⁷ Section 75.380(d)(5) is an unusual suitability provision. It does not require MSHA to determine only whether an escapeway is sufficient to reach a mine opening “suitable” for safe evacuation. Instead, if there are more than one escapeways to a suitable evacuation point, MSHA must decide whether the escapeway designated by the operator is “the most direct, safe and practical route.” Therefore, unlike section 303(o) that mandates only that the ventilation plan be suitable, section 75.380(d)(5) may require comparison of alternative “suitable” escapeways. In the present case, MSHA has not analyzed the operator’s plan in terms of its suitability. As in *Canyon Fuel*, this is a fatal flaw. It is self-evident from the record evidence in the case and the specious and, at times, contradictory, rationales offered by the agency that the District Manager made up his mind that he preferred the existing plan and then cobbled together

The circuit court's first inquiry in examining the substantial evidence issue was whether the operator's exit point was suitable when examined on its own and without reference to the MSHA plan. After the court determined that the point of exit under the operator's plan was suitable, it then turned to the unique aspect of comparing routes of exit under the governing standard. *Id.* at 1297-98.

In *Canyon Fuel*, there was no dispute that the escapeway preferred by the Secretary provided a preferable location for exiting the mine. It had more room and quicker access to medical assistance. However, the operator's escapeway was "suitable" notwithstanding the better conditions at the point of exit under MSHA's preferred route.

Canyon Fuel, therefore, perfectly illustrates that MSHA must make its suitability determination based on the operator's specific plan. Even in the unusual circumstances where the mandatory safety standard required a comparison of escapeways, MSHA could not conclude an escapeway was unsuitable because it preferred certain characteristics of an alternate escapeway. It could not compare escapeways and find one "more suitable" than the other. The court required an initial determination of whether the escapeway developed by the operator was suitable. Only then did the comparison aspect of this specific regulation come into play.

This is a critical point for this case. Here, MSHA's duty was not to determine which of two plans it preferred or to evaluate the proffered plan as though it were a possible alternative to the existing plan. MSHA's task was to determine whether the plan submitted by the operator was suitable. This task does not require or permit formulation by MSHA of a new plan or comparison by MSHA with an existing plan. The operator's presentation of the plan calls for a freestanding, fact-based determination of whether the proffered plan is suitable — that is, whether it is appropriate for achieving the safety and health requirements at the specific mine. Where, as in this case, there has been no finding or evidence showing that the operator's plan has failed to meet those requirements, MSHA's rejection of the operator's suitable plan and demand of a different plan, even applying the *Prairie State* standard, is an abuse of discretion.⁸

whatever support he could find to purport that MSHA's plan was preferable, without holding the operator's plan to be unsuitable. Contrary to our colleagues' claim in footnote 3 of their opinion, MSHA never made a determination that safety would be unacceptably compromised, taking into account the relative risks and benefits of both plans. The agency relied on evidence that does not support its position, such as the fan test results; dismisses without explanation legitimate and evidence-based concerns about material handling safety concerns; and asserts simultaneously that its plan is superior – again, using the wrong standard – because it provides better response to spontaneous combustion, while diminishing the operator's concerns about the occurrence of spontaneous combustion – which is better addressed by the operator's plan. In short, the decision is hobbled by the kind of incoherent and erratic rationalizing that marks arbitrary and capricious agency actions.

⁸ To be sure, because good faith negotiations are required before MSHA rejects a plan, if MSHA does not find a plan suitable, MSHA must discuss the plan and suggest changes that would satisfy its concerns with achieving the requisite safety and health. But MSHA may not

From the foregoing, we discern that the outcome of a suitability determination in this case does not depend upon a didactic characterization of the standard of review as beyond a preponderance of the evidence or abuse of discretion. Instead, at the end of the day, MSHA must base a refusal to accept a ventilation plan only upon substantial evidence that the proffered plan would not meet the safety and health requirements at the specific mine. Certain principles become clear.

First, the Secretary bears the burden of introducing evidence to support the proposition that the proffered plan does not achieve the safety and health ventilation requirements at the specific mine.

Second, there is not a presumption that the Secretary's opinion is correct. Under any standard of proof, the Secretary must present substantial evidence to support his position. That evidence must be sufficient for a reasonable person to conclude that usage of the plan under review is not appropriate to achieve the safety and health ventilation requirements at the specific mine.

Third, in reviewing a proposed ventilation plan, MSHA does not have a right or responsibility to determine whether an alternative plan — or even an existing plan — would also achieve the safety and health ventilation requirements at the specific mine. Section 303(o) expressly divides responsibilities between the operator and MSHA. The operator has the duty to develop a plan for maintaining adequate ventilation and respirable dust control in the specific mine. MSHA has the duty to review the plan. But the mine is not federal property: it is the operator's investment-backed business, and under the law it retains the right to have its mining plans approved unless they fail to conform to duly-promulgated federal and state standards and regulations, including the health and safety standards imposed by and under the Mine Act.

An operator's desire to maximize mining efficiency is thus acceptable — or "suitable" — provided it maintains adequate ventilation and respirable dust control in the specific mine. Section 303(o) does not require, and indeed does not permit, MSHA to design the ventilation plan. Section 303(o) does not call for a "comparability" analysis of potentially different ventilation plans. Thus, section 303(o) does not call for MSHA to develop a plan of its own and impose such plan upon the operator. Suitability is the standard. If the operator's plan is suitable — that is, is appropriate for maintaining adequate ventilation and respirable dust control, then it meets the requirements of section 303(o).

The Judge's error here is that she failed to evaluate the District Manager's decision and the evidence in support of that decision under the correct legal standard, i.e., whether the operator's plan was suitable, and instead, simply considered whether MSHA abused its discretion in rejecting the operator's plan. The problem with this analysis is that it ignores the language of the statute and implementing standard and conflates the District Manager's decision with the Secretary's burden of proof at trial. If the Secretary is permitted to simply endorse the District Manager's decision with post hoc rationalization and evidence adduced at trial, then an

reject a suitable plan — that is, one that will achieve adequate ventilation and respirable dust control in the specific mine — simply because MSHA prefers a different plan.

operator would never prevail where the agency has rejected its proposed plan.⁹

Application of Legal Principles

The record in this case reveals that MSHA did not review the operator's plan for suitability. Instead, MSHA compared the proffered plan to the existing plan and decided it preferred for the operator to maintain the existing plan. MSHA made a comparability analysis rather than a suitability analysis. The Secretary did not find, or even offer evidence showing the new plan proposed by the operator was not suitable — that is, would not meet the requirements for a safe and healthful environment.

MSHA refused to approve the operator's proposed plan, despite the fact that the evidence shows it addressed well the major concerns of the standard, provided a lower risk of spontaneous combustion, lower risk of exposure to roof control hazards, better adaptability to the escapeway plan, and equivalent insufficiency to the dual-entry system in terms of what the fan stoppage test revealed — a problem of noxious gases and low oxygen that MSHA's alternative plan also failed to satisfy and that the operator committed to fix. Tr. 50, 70-72, 79, 118-19, 120, 126, 128, 163; RH Tr. 78-79, 89-90; Sec. Ex. 15(a).

MSHA based its denial of the operator's proposed plan, and the Judge and our colleagues base their approving opinions, on comparison-based claims — namely, that (1) the dual-entry system was more effective at removing noxious gases from the tailgate area where miners work, (2) the dual-entry system enabled better monitoring of conditions in the gob and earlier detection of noxious gases before the gases reach the working face, (3) the dual-entry system did not present substantially greater material handling hazards, (4) there was a suitably low risk of spontaneous combustion under the dual-entry system, and (5) fan stoppage tests did not strongly favor either plan.

The fan stoppage tests were inconclusive and at best, favored the operator's plan.¹⁰ As to points 3 and 4 above, those factors demonstrate that MSHA was making a comparability analysis rather than a suitability analysis. These factors consider whether the operator's plan has benefits that make it “more suitable” than the plan preferred by MSHA.¹¹ The only issue that bears upon

⁹ Even under the more deferential standard applied in *Mach and Prairie State*, substantial evidence does not support the Judge's conclusion that MSHA's District Manager Riley did not abuse his discretion in rejecting the operator's proposed plan in this case because he failed to consider whether the operator's proposed plan was suitable under section 303(o).

¹⁰ The results of the fan stoppage tests were inconclusive and certainly did not support that the operator's single-entry system was unsuitable to the conditions at the mine. The Secretary's own witness, MSHA engineer Thomas Morley, concluded that the fan stoppage test results for both the dual-entry and single-entry system were similar — which undermines Riley's testimony that the dual-entry system is better at preventing gob air from coming out onto the face than the single-entry system. Tr. 70-72.

the suitability of the operator's single-entry plan is whether substantial evidence shows that the operator's plan is not sufficient to achieve safety and health requirements related to the possibility of entry of noxious gases into areas where miners work.¹²

Rather, MSHA's disapproval of the operator's proposed plan was based largely on the conclusion that the single-entry plan doesn't justify that it will be "as effective at minimizing risks" and thus "[w]e *feel*" that the dual-entry return is the "best option." Sec. Ex. 4 (emphasis added). Further considering the pros and cons, MSHA stated in a subsequent rejection that "it has been decided that dual tailgate entry is in the best interest for health and safety of the miners" in part because "air course resistance of the tailgate would be four times the value of a dual return." Sec. Ex. 7. MSHA provided no explanation as to how this makes the operator's plan "unsuitable," and the record does not support a conclusion that it is.

Citing a report prepared by Dennis Beiter, MSHA's Senior Mining Engineer in the Ventilation Division ("Beiter's report"), finding that the dual tailgate return resulted in better protection of miners through earlier detection of spontaneous combustion, MSHA rejected the operator's plan Sec. Ex. 10; Sec. Ex. 10a (the Beiter report). This finding makes no sense. MSHA found that the risk of spontaneous combustion under the existing blowing system was so low that the advantage of the operator's plan to the prevention of a spontaneous combustion was irrelevant. Beiter expressly testified "the present system is effectively slowing the potential for spon com to occur in the workout areas of the longwall panels." Tr. 106. Then, having found very little or no risk of spontaneous combustion and no reason for a plan providing additional preventative advantages, the agency cites possible better detection of a potential combustion as a reason for preferring its plan. Therefore, in the agency's view, outright protection was not useful but earlier detection was. It is impossible to reconcile these theories.¹³

Beiter's report did not find or even suggest that the operator's ventilation plan was not suitable. It reads from beginning to end as a "comparison" report. Substantial evidence does not support that the operator's plan was unsuitable, or even that MSHA's plan was more suitable. Rather, the evidence will indicate that District Manager Riley's decision to reject Signal Peak's

¹¹ As *Canyon Fuel* illustrates, if the operator's plan was unsuitable, the cited benefits would not make it suitable. In *Canyon Fuel*, if the exit point of the operator's route were not suitable, the much better conditions of the route of egress would not have made it the most direct route to a suitable exit. *Canyon Fuel, supra*, 849 F.3d at 1295-96.

¹² Nonetheless, we must comment that the Secretary and Judge's casual disregard for the possibility of a spontaneous combustion in a mine with the potential for and history of such events is troubling. Having had a combustion event, the operator took prudent steps to reduce the chance of a repeat event. We would not easily dismiss any prudent steps at further reducing the possibility of such an event.

¹³ As a matter of commonsense as well as safety, the operator clearly desires and designs a system that provides the best chance of avoiding spontaneous combustion. In response to a question of why any heating incident is a major event, Fairnelli responded, "[b]ecause [of] the potential it has to catastrophically destroy the mine and, also, the danger it presents to every person underground." Tr. 119.

proposed plan was arbitrarily driven by a preference for MSHA's dual-entry system, as MSHA Official Kevin Stricklin had instructed Riley not to approve the operator's plan regardless of the results of the fan stoppage test. Tr. 161-62.

Detection and Removal of Noxious Gases

The Judge found that District Manager Riley had explained in his testimony and letters to Signal Peak that the dual-entry system is "more effective" because it helps to prevent noxious gas accumulations in the gob from entering the working areas. 39 FMSHRC at 652. Note the clear determination that MSHA and the Judge engaged in a comparison study rather than suitability analysis. MSHA provided no evidence that Signal Peak's plan was not adequate for operation of the mine in compliance with all mandatory safety standards for ventilation. In particular, the Judge cited three different events that MSHA said could cause the release of noxious gases or low oxygen to occur: (1) a fan stoppage; (2) the air pressure in the tailgate entries and face becoming lower than the gob's air pressure — which would create a path of least resistance for the gases to travel from the gob to the working areas — or (3) a delayed rock fall that could push gob air out on the face. RH Tr. 36-37, 111-12.

MSHA's rejection of the single-entry system was premised on the erroneous assumption that a single-entry would permit low-oxygen gob air to enter the face. Tr. 79, 131, 143, 145-46. The Beiter report is based upon "expectations." However, these expectations failed to take into account the nature of the blowing ventilation system employed at Signal Peak. As Signal Peak pointed out, the blowing ventilation system was distinguishable from an exhausting ventilation system.¹⁴ In the latter, it is more common to encounter higher levels of methane at the tailgate drive, because the tendency is to pull air from the gob.¹⁵ SP Br. at 21-22; Tr. 131. In fact, prior to employing the blowing ventilation system, the operator did experience lower levels of oxygen coming out of the gob onto the face, prompting the change from the exhausting system to the blowing system. Tr. 188. Because the air pressure at the face is greater than in the gob, under normal mining, noxious gases do not leak out of the gob onto the face under the blowing system. Tr. 130, 143.

Moreover, very importantly, the actual conduct of the fan stoppage tests demonstrated that even when the system was not functional, the oxygen levels were better with the single-entry system, contrary to MSHA's unsubstantiated speculation. Tr. 163; RH Tr. 89-90; Sec. Ex. 15(a). The actual tests, therefore, contradict the "expectation" basis for the incorrect supposition in the Beiter report thereby undercutting MSHA's rationale for preferring the dual entry system. Certainly, they do not support a finding that the single entry system was not suitable in the context of this case.

¹⁴ An "exhausting system" means a fan pulls or draws air through the mine. The danger of an exhausting system, however, is that it may pull air into the gob through cracks in the mine surface, which increases the danger of spontaneous combustion in the gob. Tr. 250-51. Under the current "blowing system," this danger is reduced when fans push and direct the air through the mine.

¹⁵ Significantly, Signal Peak's mine did not have elevated levels of methane. *See* Stip. 3.

MSHA presented no evidence other than a wholly theoretical opinion without any supporting data, examples, other similar mines, or prior events about a possibility to support that theory.¹⁶ MSHA's witnesses provided conclusory opinions as to the potential of noxious gases exiting onto the face in a single-entry system. However, their opinion testimony fails to consider the evidence pertaining to the air pressure differential employed in the blowing ventilation system, the high volume of air being pushed across the face in the blowing system, or the fact that no noxious gases exited the gob during the fan stoppage tests. Tr. 79, 131, 143, 145-46.

Farinelli explained that the operator had a carbon monoxide detection unit at the mouth of the panel and that it detected not only the amount of carbon monoxide in the airflow but more importantly the quantity of carbon monoxide. Tr. 149. Therefore, it created a baseline for the amount of carbon monoxide. Tr. 149. With that information, the operator could trend the amount of carbon monoxide separate from just measuring amounts in airflow at any given point. Tr. 149. As the testimony established it is important to know the quantity of CO present in the gob and the sensor in the No. 1 entry makes that determination. Tr. 148.

The evidence supports that the single-entry system was more effective at addressing the potential concerns MSHA identified. One type of event posited by MSHA as disrupting the operator's ventilation system and potentially allowing for the release of noxious gases was a fan stoppage.¹⁷ As noted above, fan stoppage tests did not show an advantage for the existing plan. In fact, the test revealed that the results were slightly better under the operator's single-entry plan. District Manager Riley acknowledged that the oxygen levels fell to a slightly lesser degree under the test for the single-entry plan. Tr. 163; RH Tr. 89-90; Sec. Ex. 15(a). Thomas Morley, MSHA Mining Engineer in the Ventilation Division, who performed the fan stoppage tests, acknowledged on cross-examination that, if miners are "traveling . . . coming off the longwall face and turning right [onto tailgate entry number 1], . . . if there are contaminants coming out of the gob at that corner, the more air there is to dilute them, [which would exist under the single-entry system], the better." Tr. 79. This evidence does not support the decision to prefer the dual

¹⁶ Riley testified about one instance of a concentration of carbon monoxide at the headgate (opposite side of the longwall from the tailgate) in 2011 before the mine switched to the blowing ventilation system to help alleviate the danger of a spontaneous combustion. There is no evidence that MSHA even considered this information in preferring the double entry system.

¹⁷ Although the Secretary disputes the results of the fan stoppage tests, his theory is unfounded and speculative. It is undisputed that the tests were still run three days apart, and that the gob gases had the entire three-day period of time to build back up after the first test, consistent with the test plan protocols. Sec. Ex. 15. The Secretary has adduced no evidence to suggest that the gas build-up was affected in any way by the operator's half-day delay in converting the tailgate into a single-entry system. In fact, the testimony shows the opposite to be more likely. The Secretary's own witness, MSHA engineer Morley, conceded on cross-examination that normal mining operations occurred for all three days in between the tests, as planned. Tr. 70-71. Furthermore, Morley conceded that having one of the three days of mining being run as "normal" (i.e., under a dual-entry system) should not have negatively impacted the gob's ability to have a sufficient build-up of noxious gases by the time the second test was due. Tr. 70-72. As such, it seems highly unlikely that the operator's slight deviation from the testing protocol in any way interfered with the validity of the test results.

entry system and detracts from the Judge's finding that the dual-entry system was better suited at preventing gob air from coming out onto the face. Most importantly, there is not a finding or evidence that the volume of air would not be suitable for the miners. The Judge accepted an unproven MSHA preference and failed to cite substantial evidence that the single entry system would not provide suitable atmospheric conditions.

The other type of hypothesized events that would disrupt the blowing ventilation system were that a rock fall in the gob might push gob air out on the tailgate area or that, if air pressure in the tailgate entry fell below the gob's air pressure, gases might travel out from the gob to the tailgate where miners occasionally are present. Signal Peak witnesses testified that there was no evidence that a rock fall pushing gases into the tailgate had ever occurred or that such an event was even likely to occur, and the Secretary did not contradict that testimony. Tr. 146, 155 (Farinelli's testimony that no gob air was pushed onto the face due to falls in the gob).

With regard to a change in the air pressure differential allowing gob air to be pushed out into the working area, Vice President of Engineering Farinelli testified that air pressure in the active workings and gob are very similar and that air pressure in the gob would stay lower than at the face. Tr. 145-46. Farinelli testified that even when the barometer has dropped, meaning that the pressure in the gob was greater than in the mine generally, there had not been low oxygen concentrations on the longwall face. Tr. 145. A blowing system avoids this issue by providing air into the mine at higher than atmospheric pressure. Tr. 108, 145-46. Further, the blowing system pushed a large volume of air across the longwall.

The mine typically has approximately 80,000 cubic feet per minute (cfm) of air movement along the longwall face. Tr. 19. MSHA ventilation standards require 30,000 cfm across the face of a longwall. 30 C.F.R. § 75.325(c)(1). In a single return, all 80,000 cfm is sent through one return. MSHA did not provide any evidence showing how a low quantity of nitrogen or some other gas introduced into this flow by a single, never before occurring and highly unlikely rock fall could cause the oxygen on the system to fall below an adequate level. Further, there was no evidence of how long this entirely theoretical shortage of oxygen would exist.

Finally, as for detection, Farinelli testified that in a single-entry system, the operator collects weekly bag samples around the perimeter of the gob and at the tailgate to monitor for early indicators of spontaneous combustion, which would serve the same purpose as the tube bundle under the dual-entry system. Tr. 105-07, 147-48. Signal Peak also tests for air velocity at the mouth of the tailgate. Tr. 147-48. Because the location of the monitoring in the single-entry system is stationary, the operator contends that it would be more effective at providing accurate readings of the trend of carbon monoxide ("CO"), which is a more accurate measure of potential spontaneous combustion, whereas the monitor in the dual-entry system would be continuously moved in the No. 2 entry and hence, less accurate of current trends. S. Br. at 27. Thus, the evidence suggests that the operator's plan would be as effective as the Secretary's at detecting noxious gases. Again, and most importantly, MSHA did not present any evidence that the operator's system was insufficient or not suitable. MSHA states only that it prefers its concept to the operator's, a position that fails to provide the substantial evidence necessary to

sustain the Secretary's burden of proof to show the operator proposed plan was inadequate to maintain adequate ventilation and respirable dust control.

Spontaneous Combustion

Even if one accepts MSHA's inherently contradictory position that prevention of a spontaneous combustion was not important but early detection was, no actual evidence supports a finding that the operator's plan was not suitable — that is, did not achieve the purpose of a ventilation plan. First, as noted, MSHA's witnesses admitted that the risk of spontaneous combustion was low given the operator's change to a bleederless system in January 2010. Tr. 185, 253. The operator did so because it had been experiencing elevated levels of CO in the gob. Stip. 5. The "bleederless" system limits the CO and oxygen in the gob, thus reducing the potential for spontaneous combustion. *Id.*

Second, the introduction of nitrogen into the gob served to reduce the level of oxygen in the gob, thereby further reducing the possibility of spontaneous combustion. Stip. 6; RH Tr. 79-80; Tr. 31. In December 2011, Signal Peak experienced a spontaneous combustion event near the inby end of the headgate on the 2R panel. Tr. 252; Stip. 6. It was caused by oxygen pulled in by the mine's exhausting ventilation system through subsidence cracks on the surface into the rider seam above the main seam being mined. As a result of the event, Signal Peak, with the approval of MSHA, instituted additional measures on subsequent longwall panels, including lowering the gob's oxygen levels by injecting nitrogen into the gob about 10-15 crosscuts inby the face while monitoring the oxygen levels on an ongoing basis. Stip. 6; RH Tr. 79-80; Tr. 31. In addition, in January 2013, the operator replaced its exhausting system with a blowing ventilation system. Tr. 185. By making these changes, the operator has prevented any more occurrences of spontaneous combustion. RH Tr. 176.

As Signal Peak noted, the dual-entry system directs a certain amount of air inby in the No. 1 entry of the tailgate for a distance of one crosscut (approximately 200 feet or more). Tr. 34, 47, 128. This introduces more oxygen into the gob than the single-entry system, which is counter to the goal of reducing oxygen in order to prevent spontaneous combustion. MSHA's witnesses conceded this point. Tr. 50, 128; RH Tr. 78-79. The operator's proposed plan would omit the "T-split" and "back-around return" in the tailgate and seal off the No. 2 entry, and instead have the air leave the mine in just one entry, tailgate No. 1 entry. SP Ex. M. According to Farinelli, the single-entry system would better control spontaneous combustion by reducing the amount of air introduced into the longwall gob both on the headgate side and through the back return. Tr. 118-19, 126. Because in a single-entry system the gob isolation seals would be built during the longwall retreat in the crosscuts between the Nos. 1 and 2 entries, rather than between the Nos. 2 and 3 entries after the longwall face passes, air is not introduced into the gob along the headgate side.¹⁸ Tr. 109-10; RH Tr. 83-86.

¹⁸ There is no evidence in the record that Riley considered the operator's concern that the dual-entry system would increase the risk of spontaneous combustion on the tailgate side. Although Beiter testified that he had considered this concern at the time he drafted his report, he conceded that his report failed to explicitly address the issue. Sec. Ex. 10(a) at 2; Tr. 27.

The Judge relied on MSHA's witnesses, who testified about measures to prevent airflow from the gob into the working face in the dual-entry system. However, Beiter stated that "a curtain was typically installed in the crosscut in by the longwall face where the headgate seal would later be constructed. That curtain was described as 'not tight.'" Sec. Ex. 10(a), at 4. In Beiter's view, "[c]onstruction of a more substantial control such as a permanent stopping or framed check curtain (temporary stopping) instead of a curtain described as 'not tight' would reduce the quantity of intake air leaking into the worked-out area." *Id.*; Tr. 10.

While this would prevent air from flowing through any opening into the gob on the headgate side before the seal is constructed, such measure would be temporary and susceptible to failure. Farinelli testified that the operator had tried to tighten the curtain in the past but had encountered difficulties from roof falls occurring behind the longwall face which would blow down the curtain, requiring mine personnel to have to go back in to rebuild it, creating significant safe-access risks for miners. Tr. 153-54.

Thus, based on the record, we conclude that substantial evidence does not support MSHA's preference for the dual entry system let alone support an unmade finding that the single-entry system was not adequate for reducing the potential for spontaneous combustion.

Material Handling and Roof Hazards

While the Judge found that Riley had a reasonable basis to believe that material handling did not pose a significant hazard at the mine and that roof hazards were not more likely to occur under the dual-entry system, 39 FMSHRC at 650, 652, the evidence is uncontroverted that the operator's plan would minimize the risks to miners of material handling and roof control hazards associated with the construction of seals immediately adjacent to the unsupported longwall gob. Sec. Ex. 6 at 2. By not requiring the operator to maintain the tailgate No. 2 entry, miners would not be exposed to roof control hazards. Tr. 82, 120. It appears that the Judge failed to recognize the significant risk involved in maintaining the second entry. Under the operator's current dual-entry plan, over 100 seals are constructed each year immediately adjacent to the gob. Sec. Ex. 6. Beiter even conceded that it is preferable to build the seal in advance of the longwall rather than right next to the gob. Tr. 12, 48.

Although MSHA's witnesses testified that the operator has been doing a "pretty good job" in mitigating the hazards that relate to roof control and material handling, RH Tr. 43-45, 81-83; Tr. 14-15, 49-50, an operator's diligent efforts at ensuring miners' safety is not tantamount to a conclusion that the dual-entry system is itself suitable, let alone support for the conclusion that the single-entry system is unsuitable. Such a conclusion would penalize the operator for its safety record and would undermine the Act's purpose.

Ultimately, we conclude that substantial evidence supports that the Secretary only presented evidence arguing, and even failing there, for MSHA's preference for the MSHA endorsed system and did not introduce substantial evidence to show that, in the words of MSHA's ventilation plan manual, the operator's proposed plan was not appropriate to achieve the safety and health requirements for the mine. This is precisely the same sort of decisionmaking the Tenth Circuit found unacceptable in *Canyon Fuel*. Here, as in that case,

MSHA has utterly failed to address competing risks and benefits or to support its rejection of an operator's plan with competent evidence.

CONCLUSION

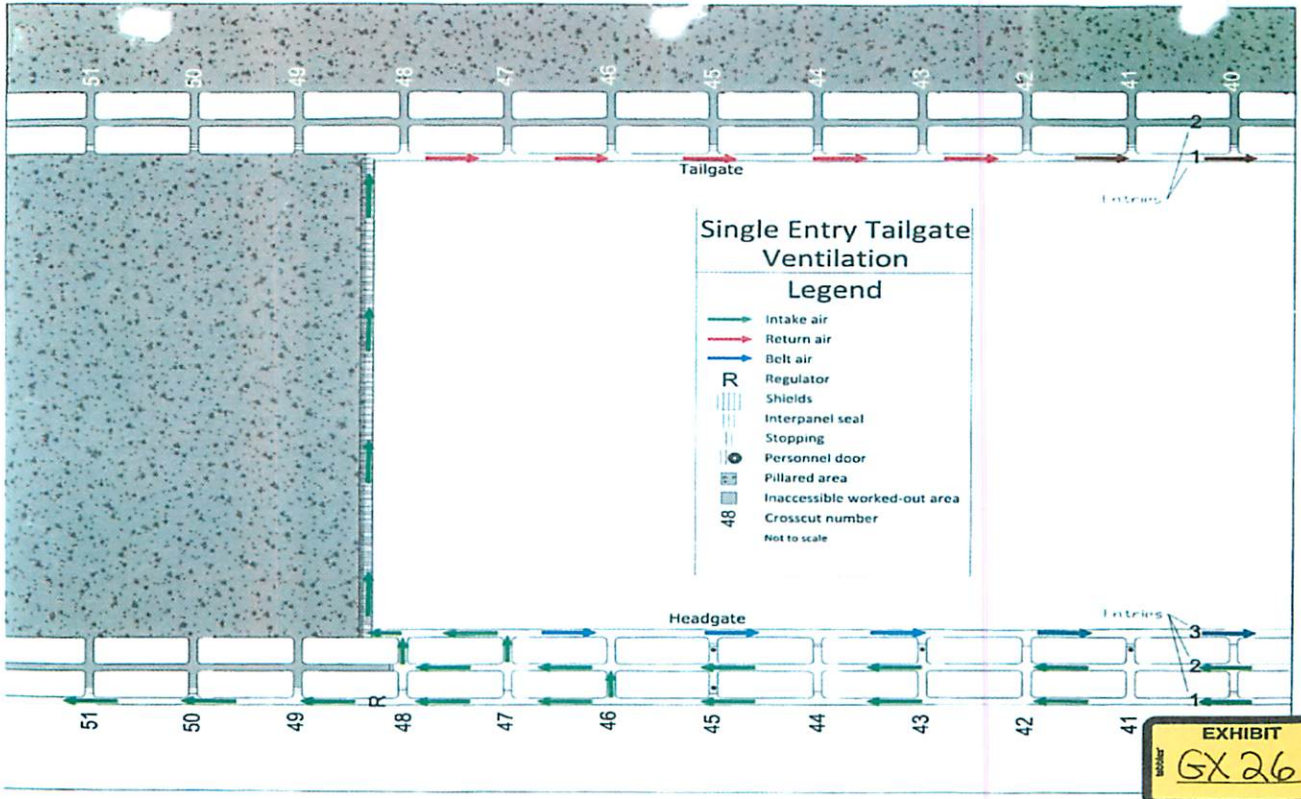
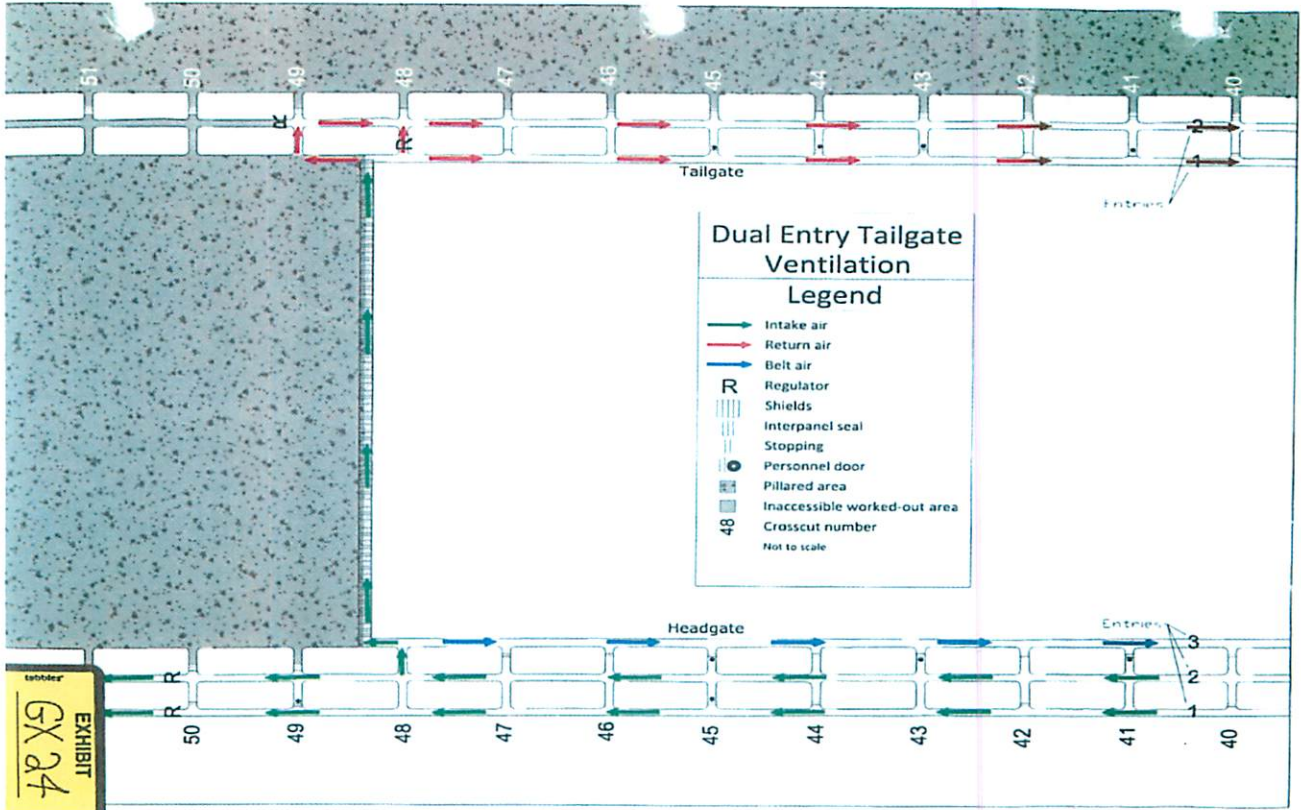
Based on the foregoing, we conclude that the Judge erred in applying the wrong legal standard and conclude that substantial evidence does not support that the operator's ventilation plan was not suitable. Accordingly, we would vacate and reverse the Judge's decision.



William I. Althen, Acting Chairman



Michael G. Young, Commissioner



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