FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 24, 1996

MORTON INTERNATIONAL, INC., MORTON SALT	:	
v.	:	Docket Nos. CENT 93-237-RM
	:	CENT 93-259-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CENT 94-49-RM

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), presents the issue of whether 30 C.F.R. §§ 57.22232 and 57.22235(a) (1995) apply to abandoned areas. Administrative Law Judge Gary Melick determined that they do not and vacated two citations that alleged violations of the standards, issued to Morton International, Inc., Morton Salt ("Morton"). 16 FMSHRC 417 (February 1994) (ALJ). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Morton operates the Weeks Island Mine, a domal salt mine in Weeks Island, Louisiana, which has been classified by the Department of Labor's Mine Safety and Health Administration ("MSHA") as a Subcategory II-A mine, i.e., a "domal salt [mine] where an outburst . . . has occurred."[1] J. Ex. 1, Stips. 1, 7; 30 C.F.R. § 57.22003(a)(2)(i).

[1] An outburst is a "sudden, violent release of solids and high-pressure occluded gases, including methane." 30 C.F.R. § 57.22002. Methane outburst cavities "can range in size from small baseball sized roof cavities, to large roof cavities shaped like inverted cones." J. Ex. 1, Stip. 19.

On August 12, 1989, the mine experienced a methane outburst in the 10 EWN heading. J. Ex. 1, Stip. 18. Approximately three months later, after the outburst materials had been removed and the area had been ventilated, Morton abandoned the 10 EWN heading and constructed a berm across the entrance to prohibit entry. J. Ex. 1, Stip. 18; Tr. 69, 78-80. The berm extended from rib to rib and was approximately 8-9 feet in height and 12 feet in width at its base. Tr. 78; Lara depo. at 52.

On June 15, 1993, during an inspection, MSHA Inspector Benny Lara climbed to the top of the berm and took a methane reading that indicated the presence of 1% methane. J. Ex. 1, Stip. 8. An extension pole was then used to obtain methane readings at approximately 24 feet. Lara depo. at 20, 22-23, 43-44; Citation No. 3897764. As the pole was extended, the methane readings increased to 3.25%, at which time the methane detector was turned off. J. Ex. 1, Stip. 8. There were no ignition sources, personnel, or equipment in the area. J. Ex. 1, Stips. 26, 27, 47. The inspector issued a citation alleging a violation of section 57.22235(a).[2]

On June 22, 1993, after the area was ventilated and MSHA Inspector Joseph Olivier obtained a methane reading of 0.1% at the top of the berm, the citation was terminated. J. Ex. 1, Stip. 10. To abate the citation, miners had entered the abandoned area, conducted scaling, and installed a diesel generator to ventilate the area. J. Ex. 1, Stip. 11.

Morton challenged the citation and the matter was heard by Judge Melick. During the hearing, the parties agreed that, based upon the same facts, an additional citation, alleging a violation of section 57.22232,[3] would be issued to Morton in order to avoid repetition in a subsequent proceeding to determine the requirements of section 57.22232. Tr. 18-19; M. Br. at

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[2] 30 C.F.R. § 57.22235 is entitled "Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines)" and subsection (a) provides:

> If methane reaches 1.0 percent in the mine atmosphere, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

[3] 30 C.F.R. § 57.22232, entitled "Actions at 0.5 percent methane (I-B, II-A, II-B, IV, V-B, and VI mines)," provides:

> If methane reaches 0.5 percent in the mine atmosphere, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by MSHA to be intrinsically safe under 30 C.F.R. Part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

2-3. On November 23, 1993, MSHA issued that citation, which Morton contested, and the cases were consolidated. M. Br. at 3.

Before the judge, Morton argued that the cited standards were not intended to apply to abandoned areas of mines and that the Secretary's interpretation is inconsistent with the language of the regulations and plainly erroneous. 16 FMSHRC at 419. The Secretary argued that the term "mine atmosphere" referenced in the standards does not distinguish between active and abandoned areas in setting forth the locations where methane readings are to be taken. *Id.*

The judge determined that the Secretary's interpretation as to applicability of sections 57.22232 and 57.22235(a), requiring operators to take action if excessive methane were detected in any part of the "mine atmosphere" including abandoned areas, was not of controlling weight because it was inconsistent with the standards and plainly erroneous. *Id.* The judge concluded that the definition of "mine atmosphere" refers only to active areas. *Id.* at 420. He noted that all the corrective actions required by sections 57.22232 and 57.22235(a), except ventilation changes, are relevant only to active areas and "are meaningless in abandoned areas where work and travel have already been prohibited." *Id.* He also noted that the regulations in fact permit unsealed abandoned areas to exist in Subcategory II-A mines, do not specifically require that such areas be tested for methane or ventilated, and that the regulations require ventilation of unsealed abandoned areas only in Subcategory III mines. *Id.* The judge concluded that, because other regulations set forth specific locations for methane testing and ventilation that do not include unsealed, abandoned areas in Subcategory II-A mines, such requirements were intentionally omitted as to these locations. *Id.* at 420-21. The judge also found that the Secretary's interpretation was inconsistent with pertinent regulatory history and prior enforcement history. *Id.* at 421-22. Accordingly, the judge concluded that the standards do not apply to abandoned areas and vacated the citations. *Id.* at 423.

The Commission granted the Secretary's petition for review of the judge's decision and heard oral argument.

II.

Disposition

The Secretary argues that sections 57.22232 and 57.22235(a) are clear on their face to the effect that they apply to all unsealed parts of a mine and that the existence of excessive methane gives rise to violation of these regulations. S. Br. at 4-7; Oral Arg. Tr. at 7, 14-15. He asserts, in the alternative, that, if the standards are ambiguous, his interpretation is reasonable and entitled to deference. S. Br. at 8-9. Morton argues that the standards do not apply to abandoned areas and

that the judge correctly rejected the Secretary's interpretation.[4] M. Br. at 1-2. It also argues that the standards give no notice of applicability to abandoned areas. Oral Arg. Tr. at 44-45.

Section 57.22232 is entitled "Actions at 0.5 percent methane (I-B, II-A, II-B, IV, V-B, and VI mines)" and provides that, if methane in the mine atmosphere reaches that level, ventilation changes shall be made and, until methane is reduced below that level, electrical power shall be deenergized in the affected areas, diesel equipment shall be shut off or removed, and no other work shall be permitted in the area. Section 57.22235 is entitled "Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines)" and section (a) provides that, if methane in the mine atmosphere reaches that level, all persons except those necessary to make ventilation changes shall be removed from the affected area until methane is reduced below 0.5%.

We conclude that the language of both standards is clear as to the actions that must be taken if methane reaches specified levels. We do not, however, find that the standards clearly apply to abandoned areas or clearly provide that the existence of methane at the stated levels, in itself, gives rise to a violation. Consequently, we must determine whether the Secretary's interpretation of the regulations is a reasonable one and whether the operator had notice of that interpretation.

The judge found that the Secretary's construction of the standards' applicability to abandoned areas is inconsistent with the scheme of Mine Act regulations pertaining to gassy metal and nonmetal mines. 16 FMSHRC at 420. The Secretary argues that the judge erred in comparing the standards in issue with other regulations because these standards are performance standards. S. Br. at 14.[5] We reject the Secretary's argument. It is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions. *See* 2 Am. Jur. 2d "Administrative Law" § 239 (2d ed. 1994); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987). The judge appropriately considered other regulations relating to methane testing and ventilation in determining whether the Secretary's interpretation was reasonable.

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[4] Morton argues that the Secretary, by excluding sealed areas from his interpretation of "mine atmosphere," has improperly departed from his position before the judge that the term encompassed "any point in any mine [more than a foot away from the roof, face, back or floor]." M. Br. at 21. The Secretary's definition excluding sealed areas is implicit in his position before the judge; thus, it may properly be considered by the Commission. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (August 1992) (citations omitted).

[5] Morton argues that the Commission may not consider the Secretary's argument because it was raised for the first time on review. M. Br. at 14. The Secretary could not have raised this argument before the judge because it pertains to the legal analysis set forth in the judge's decision; thus, we may address it.

The Secretary's interpretation of the standards to the effect that an operator is required to test for methane in unsealed abandoned areas of Subcategory II-A mines and also to ventilate such areas is inconsistent with the regulatory scheme the Secretary has promulgated under the Mine Act. *See Local Union 1261 v. Federal Mine Safety and Health Review Comm'n,* 917 F.2d 42, 45 (D.C. Cir. 1990). The standards applicable to Subcategory II-A mines, which set forth specific and extensive testing and ventilation requirements such as testing in active workings in the event of a main ventilation failure (30 C.F.R. § 57.22206) and maintaining air flow across working faces sufficient to carry away methane accumulations (30 C.F.R.§ 57.22212), do not require the testing of abandoned areas or their ventilation. In contrast, *Subcategory III mines* are specifically required to ventilate unsealed abandoned areas (30 C.F.R. § 57.22223). Further, 30 C.F.R. § 57.22220 requires the testing of air *after* it has passed by or through unsealed abandoned areas of Subcategory II-A mines and, if it contains 0.25% or more methane, it must be tested daily and coursed directly to a return airway. The preshift examination standard for Subcategory II-A mines requires that the *mine atmosphere* be tested for methane at "all work places," at "each active working face," and at "each face blasted" (30 C.F.R. § 57.22228(b), (c), & (d)), but makes no mention of abandoned areas. Likewise, the weekly testing standard for Subcategory II-A mines requires that the *mine atmosphere* be tested for methane at specific locations: active mining faces, main returns, returns from idle workings, returns from abandoned workings, and at seals (30 C.F.R. § 57.22230(a)); that standard as well contains no requirement that abandoned areas themselves be tested.

Immediately following these testing standards are those setting forth the actions to be taken if methane in the mine atmosphere reaches certain levels. "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States,* 508 U.S. 223, 233 (1993). Giving comprehensive, harmonious meaning to these provisions, we cannot conclude that the Secretary's interpretations of sections 57.22232 and 57.22235(a) to apply to abandoned areas, which are not required to be tested, is a reasonable one. Further, as the judge recognized, in abandoned areas, there are no miners to be withdrawn, no electrical power to be deenergized, no diesel equipment to be turned off or removed, and there is no "other work" being done.[6] 16 FMSHRC at 420. We conclude that, when read in this context, the standards cannot reasonably be interpreted to include abandoned areas of the mine.

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[6] The Secretary argues that, because the "affected areas" requiring corrective action may be working sections adjacent to an abandoned area, the judge erred in concluding that the standards could apply only to active workings. S. Br. at 17-18. We reject the Secretary's argument. Clearly, the cited standards apply in the event excessive methane is found in an active area. There is no evidence that this was the case here; rather, the evidence is to the contrary. Inspector Lara took numerous methane readings along the perimeter roadway directly adjacent to the berm, which was an active area and was ventilated. J. Ex. 1, Stip. 17, 23. He obtained readings below 0.5% at all locations along the perimeter roadway and at all other locations where measurements were taken. J. Ex. 1, Stips. 22, 24.

In addition, the Secretary's interpretation of the standards in this litigation is, as the judge found, inconsistent with regulatory history. It is also inconsistent with statements published by the Secretary in rulemaking. For nearly 20 years, 30 C.F.R. Part 57 contained a requirement that "[a]bandoned areas shall be sealed or ventilated." 30 C.F.R. § 57.21-43 (1969) (*See* 34 Fed. Reg. 12517, 12527 (July 31, 1969)).[7] MSHA's 1985 proposed rules revising standards for gassy metal and nonmetal mines repeated this requirement in proposed section 57.34214, applicable to Subcategory II-A mines. 50 Fed. Reg. 23612, 23644 (June 4, 1985). In publishing the final rules, however, MSHA deleted this section, explaining: "This standard, which provided safety protection from potential methane emissions in abandoned areas, is duplicative of the requirements and protection afforded by existing § 57.8528." 52 Fed. Reg. 24924, 24926 (July 1, 1987). Thus, MSHA expressly declined to promulgate as to Subcategory II-A mines the proposed standard, which would have continued a longstanding requirement that operators ventilate unsealed abandoned areas. As the judge noted, the Secretary is now essentially attempting to enforce a provision that he proposed but rejected. 14 FMSHRC at 422. At oral argument, counsel for the Secretary argued that the deletion of proposed section 57.34214 had been in error because the requirements of section 57.8528 and proposed section 57.34214 were not, in fact, duplicative. Oral Arg. Tr. at 15. It is generally recognized, however, that the consideration and rejection of a proposed provision demonstrates an intent to exclude the requirement. 2A Norman J. Singer, Sutherland Stat. Constr. §§ 48.04, 48.18 (5th ed. 1992).

Nor are we persuaded by the Secretary's assertion that the interpretation of the standards he proffers is the only interpretation that promotes safety. Oral Arg. Tr. at 18. As the judge found, the Secretary's interpretation would require miners "to enter the dangerous environment of abandoned areas" in order to ventilate them. 16 FMSHRC at 420. Further, as a result of the Secretary's interpretation, an ignition source, a diesel generator, was required in an area where previously there had been no ignition sources. J. Ex. 1, Stips. 27, 43(i), 43(j). Thus, it is not evident that the Secretary's interpretation did, in fact, result in increased safety. We note, moreover, that the Secretary designated the alleged violations as non-S&S and stipulated that the hazard resulting from the original cited violation was "quite low." J. Ex. 1, Stips. 9, 45.

We agree with the judge that the Secretary's interpretation as to the applicability of sections 57.22232 and 57.22235(a) to unsealed abandoned areas is not reasonable because it is not in harmony with other regulations the Secretary has promulgated under the Mine Act and is inconsistent with the regulatory history.

As to the Secretary's assertion that the existence of methane above certain levels is itself violative, we have noted that the standards do not expressly provide that methane at the

[7] Section 57.21-43 was later recodified as section 57.21043. *See* 50 Fed. Reg. 4032, 4124 (January 29, 1985).

referenced levels gives rise to a violation.[8] Nor do they even suggest that to be the case. Rather, the language of the standards contemplates that methane may reach the referenced levels by specifying actions to be taken *if* that occurs. We conclude that the Secretary's interpretation of the standards to the effect that they are violated by the presence of methane itself is unreasonable because the standards cannot bear the meaning that the Secretary assigns to them. *See Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 324 (D.C. Cir. 1990) (Edwards, J., dissenting).

Moreover, due process requires that a regulation give "fair warning of the conduct it prohibits or requires." *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (August 1995), *quoting Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986). A regulation cannot be construed "to mean what an agency intended but did not adequately express."[9] *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). *Accord General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *Western Fuels*, 900 F.2d at 326 (Edwards, J., dissenting). The Secretary maintains that the industry was placed on notice by the regulatory history that the deleted rule was intended to remain in effect and that the cited standards apply to all areas of a mine. Oral Arg. Tr. at 15-16.

Even if we were to conclude that the Secretary's interpretation of the standards in issue is reasonable and, thus, that the standards apply to abandoned areas, we disagree that operators have received adequate notice of it. The Secretary has published no information bulletin or interpretive memorandum setting forth his interpretation of the standards. Oral Arg. Tr. at 18-19. We reject the Secretary's suggestion that the confused regulatory history and admittedly erroneous preamble provided notice of the Secretary's current interpretation. Moreover, operators should not be held to examining regulatory history to learn the meaning of a standard that appears to be clear on its face. *See generally Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1337 & n.13 (6th Cir. 1978).

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[8] *Cf. VP-5 Mining Co.*, 15 FMSHRC 1531, 1538-39 (August 1993) (no requirement that methane be diluted to a specific level before air in gob enters the connectors); *Island Creek Coal Co.*, 15 FMSHRC 339, 349 (March 1993) (citation vacated where excessive methane was present in the gob but was being ventilated in accordance with mine's ventilation plan).

[9] The Secretary argues that the judge erred in precluding Claude Narramore, the chairman of the MSHA gassy mines committee, from testifying about the intended scope of the standards. We disagree. Testimony as to the intended meaning of rules is generally not considered in construing a standard. 2A Norman J. Singer, Sutherland Stat. Constr. § 48.16 (5th ed. 1992); 2 Am. Jur. 2d "Administrative Law" § 239 (2d ed. 1994) (construction of regulations is generally governed by the same rules of construction that apply to statutes). *See generally Northern Colo. Water Conservancy Dist. v. F.E.R.C.*, 730 F.2d 1509, 1518 (D.C. Cir. 1984).

We note that, subsequent to the commencement of this action, MSHA published a regulatory agenda "proposing to revise the existing safety standards for metal and nonmetal mines. The proposal would address excessive methane in outburst cavities in abandoned, idle, and worked out areas of Category II-A mines. . . ." 59 Fed. Reg. 57823 (November 14, 1994).[10] Rulemaking is the appropriate means by which to impose the requirement that unsealed abandoned areas must be ventilated. *See generally Southern Ohio Coal Co.*, 14 FMSHRC 978, 985 (June 1992).

III.

Conclusion

For the foregoing reasons, we affirm the judge's vacation of the citations alleging violations of sections 57.22232 and 57.22235(a).

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

James C. Riley, Commissioner

[10] On January 25, 1995, Morton filed a motion requesting the Commission to take judicial notice of this agenda. We have done so.

Chairman Jordan and Commissioner Marks, concurring in the result:

Although we agree that the citations at issue in this case must be vacated, and would therefore affirm the judge in result, we respectfully disagree with our colleagues' determination that the requirements of 30 C.F.R. §§ 57.22232 and 57.22235(a) (1995) do not apply to unsealed abandoned areas of "domal salt mines where an outburst . . . has occurred."[1] These standards specify protective actions an operator must take if methane reaches a certain amount in the "mine atmosphere." Our colleagues have concluded erroneously that the Secretary of Labor cannot reasonably interpret the phrase "mine atmosphere" to include unsealed abandoned areas within a mine.

I.

Whether the Secretary May Apply
Sections 57.22232 and 57.22235(a) to Unsealed Abandoned Areas

The principles requiring the Commission to defer to the Secretary's interpretations of his own standards are well-settled. An agency's interpretation of its own regulations must be given "a high level of deference . . . unless it is plainly wrong." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995), *quoting General Carbon Co. v. Occupational Safety and Health Review Comm'n*, 860 F.2d 479, 483 (D.C. Cir. 1988). *Accord, Udall v. Tallman*, 380 U.S. 1, 15 L. Ed. 2d 616, 85 S.Ct. 792 (1965); *Secretary of Labor v. Western Fuels - Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990). Courts defer to agency interpretations of their regulations so long as they are "logically consistent with the language of the regulation[s] and . . . serve[] a permissible regulatory function." *General Electric*, 53 F.3d at 1327, *quoting Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). As the court noted in *General Electric*:

> The policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. In such circumstances, 'the arguments for deference to administrative expertise are at their strongest.'

Id., quoting Psychiatric Inst. of Washington, D.C. v. Schweiker, 669 F.2d 812, 813-14 (D.C. Cir. 1981).

The Commission, no less than the courts, owes such deference to the Secretary's interpretations of his regulations. *Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989). We defer to the Secretary's interpretation even if it is not the one we would have adopted in deciding the question as a matter of first impression. *Energy West Mining*

[1] Such mines are otherwise known as "Subcategory II - A" mines. 30 C.F.R. § 57.22003(a)(2)(i).

Co. v. Federal Mine Safety & Health Review Comm'n, 40 F.3d 457, 462 (D.C. Cir. 1994), *aff'g* 15 FMSHRC 587 (April 1993). Deferral is appropriate because "it is the agencies . . . that have the technical expertise and political authority to carry out statutory mandates." *General Electric*, 53 F.3d at 1327 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 864-66 (1984)). *See also Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, Nos. 95-1130 & 95-1212, slip op. at 7 (4th Cir. April 3, 1996) (Secretary's promulgation and enforcement of standards brings him into "constant contact with the daily operations of the mines[,]" endowing him with the "'historical familiarity and policymaking expertise' . . . that are the basis for judicial deference to agencies.") (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991)).

In our view, the Secretary's interpretation of "mine atmosphere" in sections 57.22232 and 57.22235(a) to include unsealed, abandoned areas is emphatically entitled to deference. Section 57.22232, entitled "Actions at 0.5 percent methane (I B, II-A, II-B, IV, V-B and VI mines)," provides:

> If methane reaches 0.5 percent *in the mine atmosphere*, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by MSHA to be intrinsically safe under 30 C.F.R. Part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

30 C.F.R. § 57.22232 (emphasis supplied). Section 57.22235 is entitled "Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines)," and subsection (a) provides:

> If methane reaches 1.0 percent *in the mine atmosphere*, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

30 C.F.R. § 57.22235(a) (emphasis supplied). The judge refused to defer to the Secretary's interpretation of "mine atmosphere" to include unsealed, abandoned areas. 16 FMSHRC at 417, 419 (February 1994) (ALJ). He concluded instead that "mine atmosphere" only encompasses active areas. *Id.* at 420.

The appropriate starting place for determining the scope of sections 57.22232 and 57.22235(a) is the definition of "mine atmosphere" contained in 30 C.F.R. § 57.22002. That provision defines "mine atmosphere" in relevant part as "*any point* at least 12 inches from the back, face, rib and floor in any mine." *Id.* (emphasis added). The definition does not exclude any area of the mine. Therefore, unless an abandoned unsealed area cannot be said to contain a back,

face, rib or floor, the Secretary's decision to include that area within the scope of the term "mine atmosphere" is an interpretation consistent with a straightforward reading of section 57.22002.

Only one of the terms contained in the definition of mine atmosphere is itself the subject of a regulatory definition. 30 C.F.R. § 57.2 describes "face" as "that part of any mine where excavating is progressing or *was last done*." *Id.* (emphasis supplied). Rather than indicating that "face" and "abandoned areas" are mutually exclusive terms, the definition in section 57.2 leads to the opposite conclusion: because a "face" includes an area where excavating "was last done," it may therefore exist in an abandoned area.[2]

The Secretary's refusal to exclude unsealed abandoned areas from requirements pertaining to methane accumulations in the "mine atmosphere" is thus a decision fully consistent with the regulatory definitions pertaining to that term. Accordingly, the judge erred in refusing to defer to the Secretary's interpretation of sections 57.22232 and 57.22235(a).

In considering whether it is permissible for the Secretary to include an unsealed abandoned area within the scope of the term "mine atmosphere," our colleagues ignore the definition of that term contained in section 57.22002. They turn instead to regulations which require methane testing in areas of the mine designated as "active workings," "working faces," "all work places," "each active working face," "each face blasted," "active mining faces," "main returns," "returns from idle workings," and "returns from abandoned workings." *See* 30 C.F.R. §§ 57.22206, 57.22212 and 57.22228(b), (c), and (d). That there is no standard which similarly requires an unsealed abandoned area of a mine to be tested for methane leads our colleagues to conclude that the Secretary cannot reasonably require such an area to be subject to the requirements of sections 57.22232 and 57.22235(a). But the qualification of the term "face" in some of these standards (e.g., the reference in section 57.22228(c) to "active working face"), in the context of active mine operations, further supports the view that an *unqualified* reference to "face" can reasonably be interpreted to include an abandoned unsealed area.

Our colleagues redefine the term "mine atmosphere" and limit it to only those areas of the mine which are regularly required to be tested for methane. Such an approach, in their view, gives a "comprehensive, harmonious meaning to these provisions" and therefore they "cannot conclude that the Secretary's interpretations of sections 57.22232 and 57.22235(a) to apply to abandoned areas, which are not required to be tested, is a reasonable one." Slip op. at 5. As our colleagues' interpretation of "mine atmosphere" is inconsistent with the regulatory definition of that term contained in section 57.22002, and also restricts the areas of the mine in which the Secretary can require the removal of methane, we are puzzled by their claim of providing a more

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[2] In reaching his determination, the judge ignored the regulatory definition in section 57.2 and referred instead to the definition of face contained in U.S. Department of the Interior, *Dictionary of Mining, Mineral and Related Terms* 289 (1968). It is only in the absence of an applicable regulatory definition that a regulatory term may be defined in accordance with its dictionary meaning. *See Pyramid Mining Inc.*, 16 FMSHRC 2037, 2039 (October 1994).

"comprehensive" and "harmonious" interpretation to the provisions under review. In any event, even if we were willing to concede that our colleagues' interpretation of "mine atmosphere" is more "comprehensive" and "harmonious" than the Secretary's, the principles of Commission deference preclude us from rejecting the Secretary's interpretation of his own standard. Our colleagues' preference for their own alternative interpretation does not entitle them to reject the Secretary's construction since "we are not positioned to choose from plausible readings the interpretation we think best." *General Electric*, 53 F.3d at 1327, *quoting American Fed. of Gov't Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985).

Our colleagues claim that to apply the requirements of sections 57.22232 and 57.22235(a) to abandoned areas is to require those areas to be ventilated, a requirement the Secretary "expressly declined to promulgate as to Subcategory II-A mines." Slip op. 6. They argue further that the Secretary's failure to promulgate a standard that would have required unsealed abandoned areas to be ventilated "demonstrates an intent to exclude the requirement." *Id.*

Our colleagues' position is without merit. Relying on a 1985 regulatory change, they infer an intent to not require ventilation of abandoned areas which is contrary to the explanation offered by the Secretary in the preamble to those rules. They then compound the error by interpreting the separately promulgated requirements contained in sections 57.22232 and 57.22235 (a) in accordance with this mythical "intent."

As the majority points out, for nearly 20 years, 30 C.F.R. Part 57 contained the requirement that "abandoned areas shall be sealed or ventilated: areas that are not sealed shall be barricaded and posted against unauthorized entry." 30 C.F.R. § 57.21-43 (1969) (*see* 34 Fed. Reg. 12517 (July 31, 1969)). Under this provision, the operator could either seal or ventilate an abandoned area. An operator that chose to ventilate, however, was also required to barricade and post the area against unauthorized entry. In short, it was not possible for an operator to comply with former section 57.21-43 by following the course of action that Morton International, Inc., Morton Salt ("Morton") followed here, i.e., by simply barricading an unsealed abandoned area.

When the Department of Labor's Mine Safety and Health Administration ("MSHA") later published proposed rules revising the former system of categorizing mines, proposed section 57.34214 (applicable to Subcategory II-A mines) repeated the requirement that an unsealed abandoned area had to be both ventilated and barricaded. See 50 Fed. Reg. 23612, 23644 (June 4, 1985). MSHA omitted this section, however, when publishing the final rules, explaining that "this standard, which provided safety protection from potential methane in abandoned areas, is duplicative of the requirements and protection afforded by existing § 57.8528." 52 Fed. Reg. 24924, 24926 (July 1, 1987).

A comparison of section 57.8528 with proposed section 57.34214 reveals that the drafters were mistaken. Section 57.8528 did not duplicate the requirements of proposed section 57.34214. Section 57.8528 required: "Unventilated areas shall be sealed, or barricaded and posted against entry." Under this remaining regulation (which the Secretary had mistakenly

believed provided the identical protection as the eliminated ventilation requirement), an operator could merely barricade an unsealed abandoned area without ventilating it. Thus, although the Secretary reaffirmed the need for "safety protection from potential methane in abandoned areas," 52 Fed Reg. 24926, he unwittingly eliminated a requirement to ventilate abandoned areas that remained unsealed.

The regulatory history relied on by our colleagues demonstrates that the only reason the specific requirement to ventilate abandoned areas was eliminated was the drafters' erroneous view that the identical protection was already provided under a separate standard. Choosing to ignore this specific evidence of the Secretary's intent, however, our colleagues echo the judge's erroneous reliance on a general rule of statutory construction, contending that "the consideration and rejection of a proposed provision demonstrates an intent to exclude the requirement." Slip op. at 6 (citing 2A Norman J. Singer, Sutherland Stat. Constr. §§ 48.04, 48.18 (5th ed. 1992) ("Sutherland"). *See* 16 FMSHRC at 422.

We cannot agree with our colleagues' conclusion that the Secretary's withdrawal of proposed section 57.34214 establishes his intent to exclude the requirement to ventilate unsealed abandoned areas. That such requirement was removed is not disputed. That such removal was inadvertent is also clear. In the sentence immediately following the one quoted by the majority, the authority cited by them recognized the possibility that the withdrawal of a proposed provision does not always signify the drafters' intent to reject the substance of the rejected provision:

> Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. *However, such rejection may occur because the bill already includes those provisions. Other interpretive aids may indicate that this is the case.*

2A Sutherland § 48.18 (emphasis supplied).

Our colleagues, however, conclude that the removal of a provision which expressly required the ventilation of unsealed abandoned areas also prevents the Secretary from interpreting the *separate* standards in a manner that could lead to the ventilation of those areas. Hence, they claim that an interpretation of sections 57.22232 and 57.22235(a) that results in an operator ventilating an abandoned area to reduce the level of methane is unreasonable. By restricting the scope of sections 57.22232 or 57.22235(a) in accordance with what they have erroneously determined to be an overriding Secretarial intent to eliminate any requirement of ventilation of abandoned unsealed areas, instead of interpreting those standards in accordance with their ordinary meaning, our colleagues are allowing the tail to wag the dog. The standards clearly provide that the protective actions specified therein are triggered whenever methane reaches certain levels in the "mine atmosphere." Since the abandoned area in question can reasonably be considered part of the "mine atmosphere," the Secretary can apply sections 57.22232 and

57.22235(a) to such an area, notwithstanding the Secretary's prior removal of a *separate* requirement pertaining to the ventilation of abandoned areas in a Subcategory II - A mine.

II.

Whether the Secretary Carried His Burden
Of Proving That Morton Violated Sections 57.22232 and 57.22235(a)

Having concluded that the Secretary can apply the requirements of sections 57.22232 and 57.22235(a) to an unsealed abandoned area, we must next determine whether Morton violated those requirements in the instant case. There is no dispute that, at a minimum, the standards require an operator to take certain precautionary steps once methane reaches specified levels in the mine atmosphere. Section 57.22232 requires ventilation changes, deenergization of electrical power, shutoff or removal of diesel equipment and cessation of work in affected areas once methane reaches 0.5% in the mine atmosphere. Section 57.22235(a) requires withdrawal of all persons from affected areas if methane reaches 1.0% in the mine atmosphere.

Although Morton was cited under section 57.22235, the Secretary concedes that Morton did not fail to withdraw anyone from "affected areas." As to the stipulated citation under section 57.22232, we agree with the majority that there was no electrical power to deenergize and no diesel equipment to shut off or remove when Inspector Lara detected 3.25% methane. After learning of the presence of methane, Morton took steps to reduce the level of the gas. Miners conducted scaling and installed a diesel generator to ventilate the abandoned area. J. Ex. 1, Stip. 11. In our view, the Secretary has not demonstrated that Morton failed to properly respond once it learned of the presence of methane in excess of allowable levels.

At oral argument, however, the Secretary asserted, for the first time, that sections 57.22232 and 57.22235(a) were clear on their face that the existence of methane in excess of the specified levels, in and of itself, gave rise to a violation.[3] Oral Arg. Tr. 13-14. The Commission

[3] The Secretary's Petition for Discretionary Review assigned error only to:

> the administrative law judge['s] . . . finding that Morton Salt did not violate 30 C.F.R. 57.22235 and 57.22232 *when it failed to remove persons* when methane reached 1.0 percent and *failed to make ventilation changes* when methane reached 0.5 percent in its mine atmosphere.

PDR at 1-2 (emphasis supplied). In his brief, the Secretary described the issue presented as:

> Whether the administrative law judge erred in finding that Morton Salt did not violate 30 C.F.R. 57.22232 and 57.22235(a) *when it failed to make ventilation changes* when methane reached 0.5

need not consider arguments raised for the first time at oral argument. *See Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982) ("It is not the task of this court to consider all of the implications of a theory vaguely raised for the first time at oral argument on appeal . . . ." 684 F.2d at 7, n.17; *see also Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (August 1992); *cf. Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11, n.7 (January 1994). We therefore do not address the Secretary's contention that the presence of methane above the specified levels gives rise to a violation of sections 57.22235(a) and 57.22232.[4]

Because the Secretary is unable to demonstrate that Morton failed to take any of the protective actions required by the standards for which it was cited, we agree that the judge's vacation of the citations alleging violations of sections 57.22232 and 57.22235(a) should be affirmed.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner

> percent in its mine atmosphere and *failed to remove persons* when methane reached 1.0 percent in its mine atmosphere.

S. Br. at 1 (emphasis supplied).

[4] We note, however, that the Secretary has recently rejected such an interpretation in connection with the corresponding requirements for underground coal mines. In discussing the provisions of 30 C.F.R. § 75.323, entitled "Actions for Excessive Methane," the drafters of the recently revised ventilation standards explain: "[o]nly the failure to properly respond once being made aware of the presence of methane in excess of allowable levels is a violation." 61 Fed. Reg. 9778 (March 11, 1996).