FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	Docket No. PENN 2007-251-E
v.	:	
EMERALD COAL RESOURCES, LP	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	Docket No. PENN 2007-252-E
v.	:	
CUMBERLAND COAL RESOURCES, LP	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

These consolidated cases are before the Commission on referrals of emergency response plan disputes by the Secretary of Labor pursuant to Commission Rule 24(a), 29 C.F.R § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 876(b)(2)(G), 120 Stat. 493, 495-96. This proceeding involves citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Emerald Coal Resources, LP ("Emerald") and Cumberland Coal Resources, LP ("Cumberland") (collectively referred to as the "Operators").[1] Administrative Law Judge

[1] Emerald and Cumberland are affiliated companies of Foundation Coal Group. 29 FMSHRC at 544 n.3. Each operator submitted its own emergency response plan to MSHA, but

Michael Zielinski affirmed the citations at issue and directed the Operators to submit purchase orders for refuge chambers with their emergency response plans within 10 days of his decision. 29 FMSHRC 542, 556 (June 2007) (ALJ). The Operators filed a petition for discretionary review that the Commission granted. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

A. The Statutory and Regulatory Backdrop

Section 2 of the MINER Act, which became effective on June 15, 2006, amends section 316 of the Mine Act, 30 U.S.C. § 876, to require underground coal mine operators to develop and submit for MSHA approval[2] and periodic review an emergency response and preparedness plan ("Emergency Response Plan" or "ERP"). 29 FMSHRC at 543; *see* 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to evacuate miners who are endangered by a mine emergency; and to maintain miners who are trapped underground and are not able to evacuate. 30 U.S.C. § 876(b)(2)(B)(i) and (ii). The MINER Act specifies that operators develop ERPs and submit them for approval by the Secretary within 60 days after the date of the statute's enactment

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their efforts to comply with the MINER Act and their interactions with MSHA "have been substantially identical." *Id.*

[2] Section 316(b)(2)(C) provides:

> (C) PLAN APPROVAL. – The accident response plan . . . shall be subject to review and approval by the Secretary. In determining whether to approve a particular plan the Secretary shall take into consideration all comments submitted by miners or their representatives. Approved plans shall —
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> (i) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
> (ii) reflect the most recent credible scientific research;
> (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
> (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. § 876(b)(2)(C).

(June 15, 2006). *Id.* § 876(b)(2)(A), (C). Thus, mine operators were required to submit ERPs to MSHA by August 14, 2006.

In an effort to enhance the chances of survivability of miners who are trapped underground following a mine accident, the MINER Act specifies that all ERPs must contain, inter alia, provisions addressing post-accident communications, tracking of miners, lifelines, and breathable air. *Id.* § 876(b)(2)(E)(i) – (vi). With regard to post-accident breathable air, the MINER Act specifies:

> (iii) POST-ACCIDENT BREATHABLE AIR. – The plan shall provide for –
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> (I) emergency supplies of breathable air for individuals trapped underground sufficient *to maintain such individuals for a sustained period of time*. . . .

Id. § 876(b)(2)(E)(iii) (emphasis added).

As required by the MINER Act, on August 14, 2006, the Operators submitted initial ERPs for MSHA approval. 29 FMSHRC at 544-45. The Operators addressed the breathable air requirement by proposing to provide caches of self-contained self-rescuers (SCSRs) sufficient to allow for five or six hours of air for each miner. *Id.* at 546.

On August 30, 2006, MSHA published a "Request for Information" in the Federal Register in which MSHA sought information from the mining community on the topic of post-accident breathable air that would be sufficient to maintain miners for a sustained period. *Id.* at 546; Gov't Ex. 2. Thereafter, on February 8, 2007, the Secretary issued a policy directive specifying her interpretation of the quantity of air necessary to maintain trapped miners for "a sustained period of time," until a mine rescue team could reach them. Program Information Bulletin, No. P07-03, at 1-2 (Feb. 8, 2007) (hereafter "PIB") (Gov't Ex. 5). The PIB directed mine operators to include in their ERPs a provision specifying how breathable air will be maintained. *Id.* at 2. In addition, the PIB specified several "options that may satisfy the breathable air requirement," including that "each miner should be provided a 96-hour supply of breathable air located within 2,000 feet of the working section." *Id.* The PIB concluded by stating that operators "must submit" the portion of their ERPs relating to breathable air within 30 days. *Id.* at 3.

Prior to the deadline for the submission of ERPs established in the PIB, the West Virginia Office of Miners' Health, Safety & Training had issued a list of "approved shelters" that would provide 96 hours of breathable air. 29 FMSHRC at 547; Resp't Ex. 109. MSHA adopted a policy of accepting operators' use of these state approved shelters or chambers. 29 FMSHRC at 547.

B. Events Leading to the Citations

On March 12, 2007, the Operators submitted revised ERPs to MSHA for its approval as specified in the February 8 PIB. Their ERPs stated that refuge chambers or rescue shelters, rather than SCSRs, would be used to provide breathable air to trapped miners. 29 FMSHRC at 547. Officials of Foundation Coal, the parent company of Emerald and Cumberland, believed that prefabricated refuge chambers could be more effectively used by miners in an emergency situation than barricades that would have to be constructed by the miners during an emergency. *Id.* On March 28, Cumberland submitted a further revised ERP that specified that refuge chambers that could provide up to 96 hours of breathable air would be maintained within 2,000 feet of each working section. *Id.* at 547, Gov't Ex. 9 par. 3.a. Emerald submitted a substantially similar revised plan on April 2. 29 FMSHRC at 547; Gov't Ex. 22 III.1.

Both Cumberland's and Emerald's revised ERPs provided that the refuge chambers would be ordered within 60 days of MSHA's approval of the plans. 29 FMSHRC at 547. At the time of the submission of the revised ERPs, the manufacturing companies that had successfully tested models of refuge chambers had none in production. *Id.* In contrast, all the materials necessary to provide a sustained supply of breathable air in barricade-type shelters were readily available with the exception of carbon dioxide scrubbing materials that had some delivery problems. *Id.* at 553.

MSHA responded to the Operators' submissions by indicating its approval of the use of refuge chambers to protect miners from a hazardous environment and to provide breathable air. *Id.* at 547-48. However, MSHA indicated that it would not approve the ERPs without a purchase order for the refuge chambers. *Id.* at 548. Thereafter, Foundation Coal solicited bids on an expedited basis from three companies that could provide the chambers. *Id.*

On April 18,[3] the Operators submitted revised ERPs in which they stated that they were ordering refuge chambers and specified a model number. *Id.* Cumberland also submitted with its ERP a memorandum explaining that it was still working out terms of its order with the manufacturer and that a purchase order would be written as soon as an agreement could be reached. *Id.* MSHA believed that a purchase order would be supplied within a few days. However, by May 3 Cumberland had not supplied a purchase order, and MSHA requested Cumberland to supply one, along with a scheduled delivery date, within five working days. *Id.*; Gov't Ex. 16.

Beginning in mid-April, while the Operators were submitting their ERPs for approval, concerns arose regarding use of the carbon dioxide scrubbing systems in refuge chambers. 29 FMSHRC at 548. Carbon dioxide scrubbing systems can be either active (where air is fan driven

[3] The judge inadvertently referred to the date of submission as April 28 (29 FMSHRC at 548); however, the ERPs are clearly dated April 18, as is the cover memorandum from Cumberland. *See* Gov't Exs. 10, 15, and 23.

across chemicals) or passive (where chemicals are laid out and exposed to air), but both use a chemical compound, either soda lime or lithium hydroxide, to absorb carbon dioxide from the air. *Id.* The chemical compounds are caustic, and MSHA became concerned that handling the chemicals in a closed environment might pose an unacceptable risk to miners. *Id.* By April 25, MSHA advised its district managers not to approve any post-accident breathable air provisions in ERPs that used bulk soda lime for carbon dioxide scrubbing. *Id.*; Resp't Ex. 47. Within seven to ten days, manufacturers promptly responded to MSHA's concerns by encapsulating the soda lime, thereby eliminating the bulk handling problem.[4] 29 FMSHRC at 548-49; Gov't Ex. 37

The Operators also became concerned about the temperature in the refuge chambers. 29 FMSHRC at 549. MSHA had determined that the temperature in shelters should not exceed 95 degrees. *Id.* Lithium hydroxide gives off heat, and the Operators believed that such heat generation might lead to excessive temperatures in the chambers. *Id.* However, testing did not substantiate this concern. *Id.* Heat was not an issue in a larger barricaded area. *Id.* at 554.

In light of the issues that arose with regard to the carbon dioxide scrubbing systems, the Operators reevaluated their plans to purchase refuge chambers from a manufacturer that used bulk soda lime. *Id.* at 549. On April 19, the State of West Virginia requested that the National Institute of Occupational Safety and Health ("NIOSH") conduct tests on shelters that the state had approved.[5] *Id.*; Resp't Ex. 126. Foundation Coal decided to conduct its own testing of the carbon dioxide scrubbing systems. 29 FMSHRC at 549 & n.8.

On May 9, Cumberland submitted a revised ERP in which it stated that it was testing and evaluating rescue chambers from three manufacturers, and that once testing of the carbon dioxide scrubbing systems had been completed it would complete a purchase order to procure the chambers. *Id.* at 549; Gov't Ex. 11 3.a. MSHA viewed the ERP as a retreat from Cumberland's earlier plan in which it committed to purchase specified refuge chambers. 29 FMSHRC at 549. Other mine operators in MSHA District 2 where the Operators were located had submitted purchase orders with their ERPs, if the plans provided for refuge chambers. MSHA believed that the Operators should as well. *Id.*

By letter dated May 14, MSHA advised Cumberland that its ERP would not be approved and that it had to be revised "to explicitly provide that you will purchase and install designated rescue chambers." *Id.*; Gov't Ex. 17. MSHA rejected Cumberland's intent to test the carbon dioxide scrubbing systems, stating: "MSHA has reviewed these issues and has determined that

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[4] It is not apparent from the record when the Operators became aware of this. 29 FMSHRC at 549. *See* Tr. 317.

[5] Section 13 of the MINER Act also requires NIOSH to conduct research and testing into refuge chambers and submit a report to the Secretary by December 2007. 120 Stat. at 504. Within six months thereafter, the Secretary must determine what action, if any, to take in light of the report. *Id.*

scrubbing systems that efficiently remove carbon dioxide . . . are currently commercially available." *Id.* The letter concluded by asking Cumberland to submit a revised ERP by May 18. *Id.* On May 16, MSHA made a similar request to Emerald. 29 FMSHRC at 549.

On May 18, the Operators submitted revised ERPs in which they stated that they were evaluating shelters and that they would submit purchase orders within 60 days of MSHA's approval of the plans. *Id.* at 550. In the cover letters that accompanied the ERPs, the Operators requested information on carbon dioxide scrubbing systems and objected to the requirement for submission of purchase orders. *Id.*; Gov't Exs. 14, 29. The Operators also noted that NIOSH testing of refuge chambers was not scheduled to be completed until December 2007 and that the Secretary would subsequently issue a report on proposed regulatory changes.[6] Gov't Exs. 14, 29. The Operators concluded that MSHA was "pushing the envelope by requiring purchase orders for rescue chambers from operators." *Id.*

On May 22, MSHA advised Cumberland that an impasse may have been reached on the post-accident breathable air requirement in its ERP. 29 FMSHRC at 550. On the same day, Cumberland submitted a revised ERP that contained the provision for obtaining a purchase order for refuge chambers 60 days after plan approval. *Id.* Emerald had similar communications with MSHA that culminated with Emerald submitting, on May 24, a revised ERP with a similar provision for obtaining a purchase order for refuge chambers 60 days after plan approval. *Id.*

On May 23 and 25, MSHA notified Cumberland and Emerald, respectively, that the post-accident breathable air provisions in their revised ERPs were approved with the exception of the section providing for obtaining purchase orders for refuge chambers 60 days after approval of the plans. *Id.* Instead, MSHA requested that the period for obtaining purchase orders be shortened to two days. *Id.* Neither Cumberland nor Emerald would agree to this proposal. *Id.*

On May 25, 2007, MSHA issued citations to the Operators arising from their failures to submit approved ERPs that timely provided for supplies of post-accident breathable air. *Id.* at 543, 545 & n.4. On May 30, the Secretary filed referrals with the Commission, pursuant to Commission Procedural Rule 24,[7] in which she asked the judge to affirm her refusal to approve

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[6] Foundation Coal ceased efforts to test the carbon dioxide scrubbing systems when it encountered delivery problems for materials used in the system. 29 FMSHRC at 549 & n.8.

[7] The MINER Act provides for referral to the Commission of disputes arising over ERPs, and Rule 24 implements the referral process by providing for the expeditious resolution of disputes that come before the Commission. Briefly, if there is a dispute between an operator and the Secretary over a plan provision, the Secretary must issue a citation. 30 U.S.C. § 876(b)(2)(G)(ii). Thereafter, Rule 24 provides for the filing of a referral of the citation with the Commission within two days. 29 C.F.R. § 2700.24(a). The rule further provides for the submission of materials relevant to the dispute, or a hearing, within 15 days of the referral. *Id.* § 2700.24(e). Within 15 days of the judge's receipt of materials or hearing testimony, he or she

the breathable air provision within the 60-day period for providing purchase orders and to order the Operators to provide for a 10-day period within which to obtain and provide purchase orders. S.'s Ref. of Emerald Dispute at 4-5; S.'s Ref. of Cumberland Dispute at 4-5. The Operators filed a motion to consolidate the two referrals and a request for a hearing, which were both granted. Order of Consolidation, Notice of Hearing, June 4, 2007. On June 12, a hearing was held in Pittsburgh, Pennsylvania. 29 FMSHRC at 543.

On June 27, the judge issued his decision in which he affirmed the citations. In affirming the citations, the judge ruled that the Secretary had carried her burden of showing that the refusals to approve the disputed ERP provisions were not arbitrary and capricious.[8] *Id.* at 543, 555-56. The judge also rejected consideration of the Operators' constitutional challenge to the MINER Act, which was based on lack of notice of the statute's requirements, and their challenge to MSHA's issuance of the PIB, which the Operators argued involved improper rulemaking. *Id.* at 551. The judge held that the Operators had actual notice of MSHA's requirement for purchase orders. *Id.* at 551 n.11.

In his opinion, the judge noted that the Secretary bore the burden of proving that MSHA's refusals to approve the ERPs and its requirement that the citations be abated by providing purchase orders within 10 days were not arbitrary and capricious. *Id.* at 551. The judge reviewed the history of the MINER Act and noted that a main purpose of the legislation is to increase the amount of post-accident breathable air available to trapped miners. *Id.* at 552-53. The judge noted that mine operators essentially had to choose to provide breathable air in either barricaded areas or refuge chambers and that the Operators chose to use chambers, which were a newer development with no production models then available. *Id.* at 553. The judge further noted that, in light of the delivery delays with the refuge chambers, the MSHA District Manager decided to make purchase orders for the chambers a part of ERPs to ensure that plans were fully implemented.[9] *Id.* Other operators in the district where the Operators were located had complied with the request. *Id.* at 553-54. The judge further found that questions concerning the carbon dioxide scrubbing systems that would be used in either barricades or refuge chambers had been

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must issue a decision. *Id.* § 2700.24(f)(1). Thereafter, if the judge rules in the Secretary's favor, the disputed provision must be included in the ERP unless the judge or the Commission grants a stay. *Id.* § 2700.24(f)(2). Following issuance of the judge's decision, a party may seek review of the judge's decision by filing a petition for discretionary review. *Id.* § 2700.24(g).

[8] The judge did not address special findings sought by the Secretary in the event that penalties were imposed in separate proceedings resulting from the citations issued. 29 FMSHRC at 550. In rejecting the Secretary's request to impose penalties, the judge stated that the MINER Act limited the hearing to expeditiously addressing disputes over the contents of the ERPs. *Id.*

[9] The judge noted that MSHA had followed a similar procedure in requiring purchase orders when manufacturers were overwhelmed with orders for self-contained self-rescuers with ensuing delivery problems. *Id.*

resolved. *Id.* at 554. The judge noted that, in light of the delay since the March 12 submission of the ERPs and the fact that 14 other operators within MSHA District 2 had submitted purchase orders with their plans, the District Manager's insistence on the submission of ERPs with purchase orders was reasonable and not arbitrary or capricious. *Id.* at 555-56.

The judge affirmed the citations and ordered that the Operators include purchase orders for refuge chambers in their ERPs by July 9, 2007, the next business day following 10 days from the date of the decision. *Id.* at 556. Finally, the judge stated that he would not grant a stay of the order in light of the time that had passed since the last submission of the ERPs but that the 10-day period to submit ERPs with purchase orders would provide the Operators ample time to seek a stay from the Commission. *Id.* & n.16.

II.

Disposition

Before the Commission, the Operators argue that the judge erred when he applied an "arbitrary or capricious" standard of review in upholding the Secretary's insistence that the Operators submit a purchase order for refuge chambers in order to obtain approval of their ERPs, rather than within 60 days of plan approval. O. Br. at 12; O. Reply Br. at 8-9. The Operators contend that other MSHA districts do not require a similar provision in ERPs submitted to those offices, that MSHA is acting arbitrarily in requiring such a submission, and that the requirement is inconsistent with the MINER Act. O. Br. at 13-15. The Operators further argue that technological changes in the carbon dioxide scrubbing systems used in refuge chambers resulted in the Operators' reevaluating plans to buy the chambers that they had initially ordered and that they wanted more time to wait for the completion of testing. *Id.* at 15-20. The Operators challenge the judge's finding that carbon dioxide scrubbing systems are effective on grounds that there is no substantial evidence to support it and also challenge his holding that it was not reasonable for the Operators to wait until testing was completed. *Id.* at 20-21. The Operators finally contend that the MINER Act provision addressing the requirement of breathable air is unconstitutionally vague because it fails to give operators fair notice of what is required in ERPs. *Id.* at 21-28. In further support of this position, the Operators argue that the Secretary should have engaged in rulemaking because the MINER Act failed to define fundamental terms necessary to its implementation.[10] O. Reply Br. at 2-7.

[10] The Operators do not directly challenge the requirement of the PIB that ERPs provide for four days of breathable air, but rather they challenge the Secretary's insistence on the Operators' submission of purchase orders with their ERPs without engaging in rulemaking. *See* PDR at 8; O. Br. at 14-17; O. Reply Br. at 4-7; *see also* 29 FMSHRC at 551 n.12 ("[T]he disputed plan provisions do not implicate the PIB."). Moreover, in this proceeding, the Operators do not seek review of whether the PIB constituted improper rulemaking. PDR at 7 n.4.

In response, the Secretary argues that the breathable air provision of the MINER Act is not unconstitutionally vague. S. Br. at 14. The Secretary points to MSHA's efforts to provide guidance in complying with the statutory requirement and notes that the Operators engaged in extensive negotiations over the submission of their ERPs and thereby received actual notice of what was required. *Id.* at 15-18. The Secretary argues that MSHA was not required to engage in notice-and-comment rulemaking to implement the breathable air requirements of the MINER Act because nothing in the statute mandates it and the time frames for submission of ERPs did not permit it. *Id.* at 18-19. The Secretary contends that the judge's approval of the District Manager's refusal to approve the Operators' ERPs without purchase orders was not unreasonable. *Id.* at 19-20. In support, the Secretary argues that MSHA's actions involve agency discretion that should be reviewed under an arbitrary and capricious standard. *Id.* at 20-29. The Secretary also contends that the Operators cannot raise an equal protection argument because it was not raised before the judge. *Id.* at 29-30. Finally, the Secretary argues that the proceeding is not moot in light of the pending underlying merits proceedings. *Id.* at 33-34.

The central issue in this proceeding is whether, in enforcing the breathable air requirements of the MINER Act, MSHA's requirement that the Operators submit purchase orders within two days[11] of plan approval and MSHA's refusal to approve provisions in the Operators' ERPs that provided for the acquisition of purchase orders for refuge chambers within 60 days of plan approval were arbitrary and capricious. The Operators also challenge section 316(b)(2) of the amended Mine Act as being impermissibly vague and therefore unconstitutional because the provision fails to provide operators notice of what is required.

A. Legislative Background

Passed in response to the tragic loss of life in several mine accidents in 2006, the MINER Act took a multi-faceted approach to enhancing safety and managing risk in underground coal mines. S. Rep. No. 109-365, 109th Cong., at 1-2 (Dec. 6, 2006) (hereafter "*S. Rep.*"). Section 2 of the MINER Act requires that each underground coal mine operator adopt a written Emergency Response Plan. 30 U.S.C. § 876(b)(1), (2). Thus, the MINER Act requires the development of plans, "which must provide for the evacuation of miners who may be endangered in an emergency or, if miners cannot evacuate, provide for their maintenance underground." *S. Rep.* at 2. The MINER Act further specifies certain minimum requirements in each plan, including a provision for post-accident "breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time." 30 U.S.C. § 876(b)(2)(E)(iii)(I).

[11] In reviewing the reasonableness of MSHA's actions, the judge used the ten-day period within which MSHA allowed the Operators to abate the citations and provide purchase orders. 29 FMSHRC at 552. However, during negotiations between MSHA and the Operators, MSHA requested that the Operators provide purchase orders at the time of plan approval. In the final week prior to the citations, MSHA was willing to give the Operators a two-day period in which to present purchase orders following plan approval. *Id.*

With regard to the drafting and approval of ERPs, the legislative history of the MINER Act states, "In order to facilitate implementation of the [MINER] [A]ct's revisions, the [Senate Committee] decided to make use of the 'plan' model since all parties were familiar with its use in other contexts." *S. Rep.* at 2. Thus, Congress intended that the principles governing the process of formulating ERPs be similar to those governing other mine plans under the Mine Act. With regard to mine plans, the Commission has long held, "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." *Peabody Coal Co.*, 15 FMSHRC 381, 386 (Mar. 1993) ("*Peabody I*"). However, in addition to mine-specific provisions in plans, the MINER Act provides for the inclusion in ERPs of six "areas of concern that have universal applicability and are therefore susceptible of more generalized regulation." *S. Rep.* at 3. *See* 30 U.S.C. § 876(b)(2)(E)(i) - (vi). One of these areas of general applicability is post-accident breathable air. *Id.* (iii).

B. General Legal Principles – Standard of Review

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Below, the Operators challenged the judge's use of an arbitrary and capricious standard to review the Secretary's refusal to approve the 60-day purchase order provision in the ERPs and her requirement for purchase orders within two days of plan approval. 29 FMSHRC at 550. On review, the Operators continue to argue against an arbitrary and capricious standard, stating that "such standard ignores the statutory criteria and is too weighted in the Secretary's favor." PDR at 10 n.5. However, in their briefs, the Operators offer no alternative standard of review or

Commission precedent that would support a different standard of review. O. Br. at 12-21; O. Reply Br. at 8-9.

We conclude that the judge's framing of the standard of review of the Secretary's actions as "arbitrary and capricious" is in accordance with Commission precedent. The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In this regard, the Commission's decision in *Monterey Coal* is instructive. In affirming a citation for failing to supply data relating to impoundment pond construction, the Commission applied the "arbitrary and capricious" standard in reviewing MSHA's withdrawal of its approval of an impoundment plan:

> We cannot conclude that MSHA's use of the Table [of recommended minimum design storm criteria] or its act of withdrawing the plan approval was arbitrary and capricious. . . . [P]rior to issuance of the citation Monterey was given unequivocal notice of and a reasonable opportunity to comply with MSHA's interpretation and use of the Table. In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.

Monterey Coal, 5 FMSHRC at 1019 (citation and footnote omitted); *accord Peabody II,* 18 FMSHRC at 692 n.6 (in reviewing the Secretary's refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard). This standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test.[12] *See Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted). We therefore affirm the judge's application of the arbitrary and capricious standard to the plan review.

C. Whether MSHA's Decision Was Arbitrary, Capricious, or an Abuse of Discretion

The relatively narrow disagreement between the Operators and MSHA presented on review essentially concerns whether purchase orders should be provided in two days or 60 days after

[12] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

approval of the ERPs. This dispute does not involve any substantive provisions of the ERPs or the question of whether the Operators had agreed to enter into purchase orders at some point.

Based on our review of the record, it is apparent that MSHA's refusals to approve the Operators' ERPs were not arbitrary, capricious, or an abuse of discretion. Rather, we conclude that the record amply demonstrates adequate notice and discussion by MSHA regarding the disputed ERP provisions, that the negotiations were conducted in good faith, and that MSHA's decision not to approve the ERPs as submitted was supported by the circumstances before the MSHA District Manager.

Beginning with the February 8, 2007 issuance of the PIB, the Operators submitted no fewer than six plans addressing the breathable air requirement over a three-month period. As the judge noted, MSHA's District Manager determined to require submission of purchase orders "to secure assurance that the operator was actually proceeding to implement the plan" because refuge chambers were commercially unavailable at that time. 29 FMSHRC at 553. The record reflects notice of MSHA's position with regard to breathable air, communication between MSHA and the Operators over the disputed provisions in the ERPs, and discussion of the differing positions. MSHA was responsive to the Operators' expressed concerns as to the effectiveness of both the refuge chambers and carbon dioxide scrubbing systems. Finally, in an apparent effort to accommodate the Operators' need for additional time to obtain purchase orders, MSHA modified its initial position requiring purchase orders at the time of the submission of the ERPs, to two days after plan approval.[13] As the Commission noted in *C.W. Mining*, "We discern in these events adequate notice and discussion by MSHA officials. Nothing in the record suggests bad faith by MSHA, and we perceive no course of arbitrary conduct." 18 FMSHRC at 1747.

In contrast to MSHA's conduct, the Operators retreated from their April agreement to provide purchase orders at the time of submission of the ERPs, to proposing submission 60 days after plan approval. As the judge noted, in any event, the additional 60-day period that the Operators sought was insufficient to conduct testing into carbon dioxide scrubbing systems or the

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[13] Our dissenting colleague finds troublesome that four operators in District 2, including the Operators in this case, were not required to submit purchase orders prior to plan approval. His concerns stem from MSHA's insistence that all other operators in that district submit purchase orders prior to plan approval. Slip op. at 20. We view this as reasonable flexibility on the part of MSHA. The record before us does not explain why the other two operators were not required to submit their purchase orders prior to plan approval. The record does show that a "grace period" was offered to the Operators in this case to allow them additional time to obtain purchase orders. The District Manager, in pursuit of a reasonable assurance that the required equipment would be ordered as soon as possible, was satisfied with this proposal. Tr. 75. Accordingly, we do not find that MSHA's failure to treat every operator in the same district identically rises to arbitrary and capricious action by the agency. This is particularly true when mine-specific factors and differences in the substance and timing of negotiating processes are taken into account.

refuge systems themselves. 29 FMSHRC at 555; Tr. 276; *see also* Oral Arg. Tr. 20. Nor was it likely that NIOSH, which had greater access to demonstration models, could begin and complete its testing on shelters during this period. 29 FMSHRC at 549, 555. Indeed, as the judge found, NIOSH did not submit a protocol for testing refuge chambers until June 1, 2007, after these proceedings were initiated. *Id.* at 549 n.8. Moreover, as previously noted, NIOSH was not statutorily mandated to complete its testing of refuge chambers until the end of 2007.[14] *See* n.5, supra. In addition, the Operators seemingly began to question the efficacy of the refuge chambers that they had chosen to use by indicating that they wanted to delay the purchase of the chambers until after testing had been completed later in 2007. *See* 29 FMSHRC at 549. In response to Cumberland's position, MSHA stated that it would not approve its ERP, which committed to "purchase . . . essential protective mechanisms at an undetermined and distant future date." Gov't Ex. 17.

We agree with the judge's observation that "[t]here is no question that Congress intended to promptly secure a substantial increase in the amount of post-accident breathable air available to trapped miners." 29 FMSHRC at 553. Accordingly, we must review MSHA's disapproval of the Operators' final revised ERPs in light of this Congressional purpose, the 60-day deadline for submitting ERPs, and the expedited process contained in the statute.

In determining whether MSHA's determinations were arbitrary and capricious, we examine the circumstances before the MSHA District Manager when he considered the Operators' final revised ERPs in late May. The discussions and negotiations between the Operators and MSHA had extended from March 14 (when revised ERPs addressing the 96-hour breathable air requirement were submitted) until May 25 (when MSHA disapproved the ERPs) and had involved changes in position by the Operators. We note that this period itself was longer than the 60-day statutory period for submitting ERPs after enactment of the MINER Act. During this period, the Operators raised certain potential problems concerning the safety and efficacy of refuge chambers, and those problems had been resolved. Although the Operators requested 60 days from plan approval in which to enter into purchase orders so that additional testing could be conducted, it was unlikely that any meaningful test results would become available until much later in 2007.

At the time MSHA disapproved the Operators' ERPs, 31 of the 33 underground coal mine operators in District 2 had already had their ERPs approved—the only exceptions being Emerald and Cumberland. Significantly, 14 of the 31 approved ERPs proposed the use of refuge chambers, and all 14 of those operators had agreed to submit purchase orders with their ERPs or within a few days afterwards. Tr. 74-75. According to Donald Foster, MSHA's lead reviewer of ERPs for District 2, the MSHA District Manager wanted the Operators to enter into purchase orders without a substantial additional delay to ensure that the Operators "were going to follow through with"

[14] Trial testimony from Foundation Coal's vice president for safety indicated that NIOSH testing might be completed as early as August 31 (Tr. 249-50), still well beyond the 60-day period in which the Operators sought to execute purchase orders.

their statements that they would obtain refuge chambers. Tr. 75.[15] His concerns were based in part on the amount of time that had already elapsed and the fact that the Operators had backtracked in certain respects on their commitment to obtain particular refuge chambers. Tr. 104.

Based on the totality of these circumstances, we conclude that MSHA's response to the Operators' desire for more time to put purchase orders in place was reasonable.[16] *See Monterey Coal*, 5 FMSHRC at 1019. We cannot conclude that the Secretary's insistence on a plan provision that is designed to enhance miner safety is indicative of bad faith, or arbitrary and capricious conduct, particularly in light of the circumstances surrounding the passage of the MINER Act.[17]

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[15] We note that MSHA's use of purchase order requirements to implement new safety devices has been approved by the courts. In *Consolidation Coal Co. v. Donovan*, 656 F.2d 910 (3d Cir. 1981), the Court heard a challenge to MSHA's failure to amend regulations governing the use of self-contained self-rescue devices (SCSRs). It observed that "operators had been reluctant to place orders [for the SCSRs] so long as there was a possibility of delaying the rule. As a result, the manufacturers lacked the incentive to increase production." 656 F.2d at 912 n.2 (citing *Council of Southern Mountains v. Donovan*, 653 F.2d 573, 579 n.24 (D.C. Cir. 1981)). Nonetheless, the Court, in addressing MSHA's requirement that operators obtain purchase orders for SCSRs, ruled that "mine operators will be impelled to supply whatever devices are available and order additional devices." 653 F.2d at 915 (quoting *Council of Southern Mountains,* 653 F.2d at 578 n.10.

Although the factual situation in that case was different, with MSHA requiring use of a specific technology for SCSRs by rule, the decision recognizes purchase order requirements as an appropriate inducement for operators and equipment manufacturers to develop and install new safety technology expeditiously. In fact, the Court acknowledged that "[a]lthough the SCSRs now available are neither the perfect nor the final solution to the problem, all studies indicated that they represent a substantial improvement over the filter-type rescuers. Such a development, with its significant life-saving potential, must be hailed, despite its shortcomings." 656 F.2d at 916-17.

[16] Our dissenting colleague notes that the Operators "have provided sound reasons for their concerns as to the ultimate feasibility of underground refuge chambers." Slip op. at 22. However, our review in this proceeding is directed at the reasonableness of the *Secretary,* in refusing after three months of negotiations with the Operators, to approve a plan whereby purchase orders were submitted some 60 days later. Moreover, if the Operators doubted the efficacy of refuge chambers, they could have simply replaced chambers with barricades, which were readily available, or some other proven technology.

[17] Commissioner Young notes that at no time did it appear that the Operators were engaged in delay for delay's sake. *See* Oral Arg. Tr. 38. To the contrary, the Operators appear to have been pursuing what they believed to be the best solution for the breathable air portion of its mines' ERPs. However, it did not appear that they would be able to conclusively resolve that

In defense of their position, the Operators additionally argue that the Secretary should have undertaken notice-and-comment rulemaking to implement the ERP provisions of the MINER Act to require purchase orders at the time of plan approval. However, there is no requirement in the MINER Act that mandates the use of rulemaking in this instance, such as there is in the Mine Act for certain other matters. *See, e.g.,* 30 U.S.C. § 825(d) (requiring Secretary to promulgate training regulations). Indeed, the short time period provided for the submission of ERPs following the passage of the MINER Act suggests that Congress did not intend for MSHA to proceed by rulemaking. Further, to the extent that Congress indicated that the development of ERPs should make use of the "model" for ventilation and roof control plans, *S. Rep.* at 2, the provisions of those plans are not limited to provisions in the Mine Act or the Secretary's regulations. *See Peabody II*, 18 FMSHRC at 691-92 (judge did not rest his determination on an assumption that ventilation of deep cuts during roof bolting was required by mandatory standards). The Operators' position that the Secretary can only proceed in implementing the MINER Act by rulemaking, and not through the present referral proceeding, is at odds with basic tenets of administrative law. *See Int'l Union, UMWA v. MSHA*, 920 F.2d 960, 964 (D.C. Cir. 1990) ("[T]he courts have always accorded agencies broad discretion in choosing between rulemaking and adjudication as a means of addressing issues . . .").

Finally, the Operators contend that substantial evidence does not support certain of the judge's findings that he made in connection with his determination that MSHA did not act arbitrarily or capriciously. In particular, the Operators challenge, as contrary to the record, the judge's finding that MSHA had no reason to doubt the effectiveness of the carbon dioxide scrubbing systems. O. Br. at 19. However, MSHA's representative, Donald Foster, who dealt with Cumberland and Emerald on their ERPs, testified without contradiction that MSHA's sole concern with the scrubbing systems was the caustic nature of the chemicals involved. Tr. 85-87; s*ee also* Tr. 168-75 (MSHA engineer Walter Slomski). As the judge found, the concerns over handling of the chemicals used in the carbon dioxide scrubbing systems were "quickly resolved." 29 FMSHRC at 554; Tr. 86-87; Gov't Ex. 37. In these circumstances, it cannot be said that the judge's findings lack record support.

In sum, we conclude that the Secretary's actions in adhering to a position of requiring purchase orders within two days after plan approval and refusing to approve the Operators' ERPs with a provision for submission of purchase orders 60 days after approval were neither arbitrary and capricious nor unreasonable.

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question within the strictures of the MINER Act, as the Secretary has reasonably interpreted it.

D. Constitutional Issues

1. Void for Vagueness

The Operators assert that the breathable air provisions in the MINER Act, 30 U.S.C. § 876(b)(2)(E)(iii), are unconstitutionally vague.[18] O. Br. at 21-27; O. Reply Br. at 2-7. The Operators assert that "due process" precludes the application of a law or regulation that fails to give fair warning of the conduct that it prohibits or requires.

In addressing the Operators' arguments, we must assume that Congress legislated in light of constitutional limitations. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). As the Supreme Court has noted, "The strong presumptive validity that attaches to an act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain . . . offenses fall within their language." *United States. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Thus, the Operators carry a heavy burden to show that the MINER Act is unconstitutionally vague. *See Langston v. Johnson*, 478 F.2d 915, 919 (D.C. Cir. 1973).

Under well-established principles regarding notice, the Operators had actual notice of what is required under the breathable air provisions of the MINER Act. In this regard, the due process requirement is satisfied when an agency gives actual notice of its interpretation prior to enforcement. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation will provide adequate notice). In this proceeding, the events fully support that there was adequate notice of MSHA's position with regard to the submission of purchase orders for refuge chambers. MSHA provided written notification to the Operators as to the deficiency of their plans. *See, e.g.*, Gov't Exs. 16, 17, 18, 19, and 20. Indeed, the record evidence that MSHA acted in good faith in the plan approval process by engaging the Operators on outstanding issues and providing them feedback is also indicative of actual notice.

2. Equal Protection

The Operators argue that MSHA's treatment of operators in requiring purchase orders at the time of plan approval differed from one district to another and, therefore, violated principles of equal protection. O. Br. at 13-14. The Secretary responds that the issue of constitutional equal protection was not raised before the judge. S. Br. at 29-30. We agree with the Secretary's position. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had

[18] The Commission has long held that it has the authority to address constitutional challenges to the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 18-21 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982).

not been afforded an opportunity to pass."). In addition, we also note that the Operators did not timely raise the issue in their petition for discretionary review. "Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition and the Commission *sua sponte*. 30 U.S.C. §§ 823(d)(2)(A)(iii) and (B); 29 C.F.R. § 2700.70(f) (1993)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table). In these circumstances, the Commission cannot reach the Operators' equal protection argument.[19]

E. Mootness

In the Commission's order granting review in this proceeding, we asked the parties to address the issue of mootness. Our concern arose because of the Operators' full performance of the action at issue—presentation of purchase orders with the ERPs—following the judge's order in a referral proceeding under the MINER Act.

Our review of the MINER Act and its legislative history indicates that the present proceeding before the Commission, which occurs at a time when the Operators have complied with the judge's order and supplied the purchase orders, was the type contemplated when the legislation was passed. Section 2(b)(2)(G)(i) to (iii) of the MINER Act clearly provides for the issuance of a citation when a plan provision is disputed; referral to the Commission and litigation before an administrative law judge on an expedited basis; and then "inclusion of the disputed provision in the plan" unless relief is requested by the operator and permitted by the judge. 30 U.S.C. § 876(b)(2)(G)(i) to (iii).

Moreover, our review of the legislative history of the MINER Act also leads us to the conclusion that MINER Act proceedings should not be treated differently from Mine Act proceedings for purposes of mootness. The Senate Report notes that the approach to resolving disputes under the MINER Act will be similar to those used in resolving disputes under the Mine Act.

> Thus, where a dispute regarding the approval or content of a plan arises between the Secretary and operator, the Secretary will issue a citation with regard to the underlying issue. Use of a "technical violation" and accompanying citation is the means by which roof and ventilation plan disputes are traditionally reviewed. . . . The same process is anticipated with regard to safety plan disputes.

S. Rep. at 2.

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[19] We also note that our prior conclusion that the MSHA's conduct in the plan approval process in requiring the Operators to submit purchase orders was not arbitrary and capricious largely militates against a conclusion that the same conduct contravened principles of equal protection.

In light of the foregoing, we agree with the Operators and the Secretary that the present proceeding is not moot, notwithstanding that the Operators have already entered into purchase orders in compliance with the judge's order.[20]

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

[20] The parties also state that the instant case is not moot because of implications of its disposition on proceedings initiated by the Operators to challenge, under section 105(a) of the Mine Act, 30 U.S.C. § 815(a), the citations that were the basis for the referrals and certain findings contained in those citations. While we express no opinion on the merits of those challenges or the appropriateness of those proceedings, we do note that our decision in this referral proceeding may have legal and factual impacts on issues likely to be raised in the citation contest proceedings.

Chairman Duffy, dissenting:

In the wake of disasters such as those that occurred in January of 2006 in West Virginia and that which occurred most recently in Utah, public shock is understandably followed by a Congressional demand that more be done by industry and its regulators to ensure that such tragedies will not recur. That is the impetus for passage of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") signed into law by the President on June 15, 2006, and the resultant accelerated implementation of the law by the Mine Safety and Health Administration ("MSHA") over the past 18 months.

As is usual in these circumstances, Congress adopts a technology-forcing regulatory framework and demands that the regulators and the regulated bring that framework into prompt fruition. Congressional pressure is brought to bear through oversight hearings and demands for status reports.

Over the years prior to passage of the MINER Act, this paradigm has produced extraordinary results with respect to the coal industry: self-contained self rescuers ("SCSRs"), a substantially reduced respirable coal dust standard, cabs and canopies on underground face equipment, improved monitoring systems, and stricter permissibility standards. It may well be that enlightened self-interest among coal operators and aggressive federal and state regulation would have produced these improvements eventually, but there is no dispute that Congressional impetus brought about these changes much more rapidly.

That is the context within which this case arises. In section 2 of the MINER Act, which amended section 316 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 876, Congress declared that within 60 days after enactment of the legislation, each underground coal mine operator was to submit an Emergency Response Plan ("ERP") for MSHA approval, and that those plans provide "emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time." 30 U.S.C. § 876(b)(2)(E)(iii). Congress also specified, however, that in reviewing these plans, MSHA was to ensure that they "reflect the most credible scientific research[,] be technologically feasible, make use of currently commercially available technology, and account for the specific physical characteristics of the mine." *Id.* § 876(b)(2)(C)(ii) & (iii).

Those, then, are the somewhat countervailing Congressional parameters within which MSHA and the operators were to develop ERPs. By August 14, 2006, Emerald and Cumberland had complied with the requirement to submit their ERPs, but over the next several months MSHA deliberated as to what constituted an acceptable level of breathable air sufficient to maintain trapped miners for a sustained period of time. 29 FMSHRC 542, 545-47 (June 2007) (ALJ). On February 8, 2007, MSHA determined that level to be 96 hours per miner, a level well in excess, by a factor of 16, of what these operators had originally submitted in August. *Id*. at 547; Program Information Bulletin P07-03 ("PIB").

Consequently, from March 12 of this year, MSHA District 2 and the operators negotiated toward agreement over this element of the ERPs until MSHA announced an impasse on May 25, 2007. 29 FMSHRC at 547-50. It is important to note that the agency and the operators, from the beginning, had no dispute over the substantive contents of the plans. MSHA, in its February 8, 2007 PIB, indicated that operators could meet the 96-hour requirement by installing underground refuge chambers within 2,000 feet of working faces. Gov't Exs. 4, 5, 7. Emerald and Cumberland, in their first submissions and in each submission thereafter, indicated that, on the basis of greater safety and efficiency, they would meet the requirement by installing underground refuge chambers.[1] 29 FMSHRC at 547-50. The only dispute between the parties was whether purchase orders for the chambers had to be submitted before or after MSHA approval of the ERPs themselves. *Id*. at 548-50.

In fact, it is fair to say that MSHA, from the beginning until May 25, made purchase orders a condition precedent to its approval of these operators' ERPs, but that was not a consistent agency position within District 2. As the Secretary's brief indicates, two other operators in District 2 were allowed to submit purchase orders after MSHA had approved their ERPs. S. Br. at 7. Admittedly, those purchase orders were provided in less than 60 days—one day and one week, respectively, after MSHA's approval of the operators' ERPs. *Id*. That, however, does not refute the point that an unexplained inconsistency infected the approval policy in District 2. That inconsistency does not necessarily support the operators' equal protection argument (O. Br. at 13-14), but it does weigh heavily with me as to whether the MSHA District 2 Manager acted arbitrarily or unreasonably with respect to Emerald and Cumberland.

The Secretary argues that "[w]ithout the equipment, or a purchase order for the equipment, the District Manager could not be assured that an operator was attempting to implement the breathable air provision of the ERP." S. Br. at 24. It would seem to me that the same rationale would also apply to the two operators whose plans were approved without the preapproval submission of purchase orders. This inconsistency within District 2 supports a conclusion of unreasonableness on the part of the Secretary.[2]

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[1] While it is true the operators could have selected barricades instead of refuge chambers (*see* slip op. at 14 n.16), they rejected that choice on the grounds that miners may not have the time or physical capability to construct barricades in the midst of an emergency. 29 FMSHRC at 547.

[2] The record also discloses that in most MSHA districts, purchase orders for refuge chambers are not required as a precondition for approval of an ERP, but that if, subsequent to approval of an ERP, an inspector finds that a purchase order has not been executed, the operator can be cited for failure to comply with its approved plan. Jt. Stip. No. 26; Resp't Ex. 45. In any event, it is the inconsistency within District 2 that more clearly raises the issue of unreasonableness.

Likewise, on May 22, Cumberland submitted a revised plan with the 60-day purchase order proposal. 29 FMSHRC at 550. MSHA responded on May 23 that the plan would be approved if the purchase order were provided within two days, i.e., May 25. *Id*. On May 24, Emerald submitted a similar proposal, and MSHA responded that the ERP would be approved if Emerald provided a purchase order by May 26. *Id*. Nevertheless, on May 25 the agency issued citations to both operators. *Id*. at 545. I would think that the agency could have postponed issuing citations at least until the new deadlines had passed.[3]

Similarly, the citations indicated that they could be abated if the operators submitted purchase orders within 10 days, which would have been June 4. *Id*. That abatement period is apparently the source of the juxtaposition of 10 days allowed by MSHA for producing purchase orders versus the operators' consistent proposal to provide them within 60 days of approval. That is really not the case, however; for by June 4, the citations had been issued, negotiations had ceased, and the case had moved on to the adjudicative stage pursuant to section 2 of the MINER Act.

We cannot treat those 10 days as some new grace period for providing a purchase order since approval was still being withheld. In other words, the condition precedent was back in play. The judge indicates that "[t]he referrals pray that the citations be affirmed and that Respondents be ordered to amend their ERPs to establish a 10-day period within which to provide purchase orders." 29 FMSHRC at 544. In effect, then, the Secretary is only allowing a 10-day post-approval period for obtaining a purchase order if she prevails before the Commission. That option was never realistically on the table prior to the citations being issued.

Unlike my colleagues (slip op. at 14 n.15), I do not believe the decisions in *Consolidation Coal Co. v. Donovan,* 656 F.2d 910 (3d Cir. 1981), and *Council of Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), provide guidance in this case. The circumstances surrounding those decisions are not analogous to those presented here. In *Consolidation Coal* and *Council of Southern Mountains,* the courts upheld MSHA's demand for purchase orders for SCSRs that were mandated through rulemaking and specifically approved by MSHA.[4] The only issue remaining was the speed with which the devices would be manufactured in sufficient numbers to be placed in all underground coal mines. Under the circumstances, the requirement for purchase orders served as a market incentive to ensure that the manufacturers of *approved* SCSRs would begin production on an expedited basis, so as to hasten the implementation of the rule. In those cases the operators were not

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[3] I part company with my colleagues' characterization of the disagreement between MSHA and the operators in this case: "whether purchase orders should be provided in two days or sixty days after approval of the ERPs." Slip op. at 11-12. That would only be the case if MSHA had approved the ERPs on May 25, 2007. Then if the operators had not submitted the purchase orders within two days, MSHA could have filed for review of the matter. Here, MSHA was still withholding approval until the purchase orders were produced, so no post-approval grace period was being provided.

[4] *See generally* 30 C.F.R. § 75.1714.

being asked to buy a pig in a poke, or at least submit a purchase order for one. The SCSRs had been fully vetted through the rulemaking and equipment approval processes of MSHA and the National Institute of Occupational Safety and Health ("NIOSH") before the cases arose.

In contrast, in this case the vetting of underground refuge chambers is still a work in progress. Here, without a rulemaking that would have determined the feasibility of refuge chambers and would have established criteria for MSHA approval, the agency has by policy memorandum authorized the use of refuge chambers to meet the MINER Act's mandate solely on the grounds of West Virginia's hasty approval, an action which that state now appears to be reconsidering. *See* 29 FMSHRC at 547, 549.

The operators have provided sound reasons for their concerns as to the ultimate feasibility of underground refuge chambers during the period of negotiation:

(1) none of the chambers was approved by MSHA (Jt. Stip. No. 28);

(2) for a least a week during the period between late March and late May, MSHA ordered its District Managers not to approve ERPs that utilized refuge chambers equipped with carbon dioxide ("CO_2") scrubbing systems (Resp't Ex. 47);

(3) as cited by the judge, the operators may not have been advised by MSHA that questions regarding the safety of the scrubbing systems had been resolved (29 FMSHRC at 548-49);

(4) notwithstanding the judge's dismissal of the operators' concern about excessive heat being produced by a lithium hydroxide CO_2 scrubbing system as "theoretical" (*id*. at 549), only one test had been performed (Tr. 242), and MSHA could only state that heat was not a problem in large barricaded areas but could not say the same for the more confined space of a refuge chamber (Tr. 280-81); and

(5) West Virginia had second thoughts about its hasty approval of such systems as evidenced by its request to NIOSH for further testing (29 FMSHRC at 547, 549).

The 60-day grace period sought by the operators was not unreasonable and was understandable given the unsettled circumstances set forth above. There were sound reasons for trying to determine whether the promised benefits of underground refuge chambers were real and not theoretical. The operators were understandably concerned about certain problems associated with the chambers that MSHA itself had identified. Thus, the operators undertook to perform their own tests of the chambers but were stymied by a lack of a system to test. Tr. 264-65. Instead, they sought more time to determine how the NIOSH tests were progressing.

In that regard, it must be emphasized that NIOSH does not operate like the College of Cardinals electing a new Pope. MSHA, the industry, and miners do not sit around clueless while waiting for the white puff of smoke signifying a final decision. On the contrary, NIOSH's mine safety and health research is exceedingly transparent—necessarily so—because much of the research has to be conducted in mines under actual conditions. Therefore, the results of the tests are immediately known to the operators and miners in the mines where the testing is taking place. Presumably, that information gets passed on to others.

It was not necessary, therefore, that the NIOSH testing be completed before the testing could provide valuable information to the operators that would enable them to make more informed decisions on whether to utilize refuge chambers to comply with the breathable air requirements. In retrospect, as my colleagues correctly note (slip op. at 13), the research did not begin until June, slightly beyond the 60 days originally sought by the operators, but the operators had no way of knowing that back in March. Finally, as counsel for the Secretary stated at oral argument, MSHA does not believe the operators' requests for additional time to secure the purchase orders were made in bad faith. Oral Arg. Tr. 38.

Underlying all of this are what I view as mixed signals sent by Congress in the amended section 316 of the Mine Act and section 13 of the MINER Act, which orders NIOSH to conduct research and testing into refuge chambers and submit a report to the Secretary of Labor by December 2007. As counsel for the Secretary responded to my question at oral argument, "It almost makes you wonder whether Congress intended that that [refuge chambers] actually be part of what would be required to be submitted." Oral Arg. Tr. 35.

In sum, my basis for reversing the judge comes down to the reasonableness or lack thereof in MSHA's negotiation of ERPs with these particular operators. I find the agency to have been inconsistent, even within District 2, precipitous with respect to the issuance of the citations at issue, and dismissive of legitimate concerns, including some of which were raised by its own personnel.

Moreover, counsel for the operators acknowledged that if the plans had been approved, and even if testing had not been completed during the 60-day grace period, the operators would have secured purchase orders lest they be cited for not following their plans. Oral Arg. Tr. 19-20. That, ironically, appears to be the way it is being enforced throughout most of the country.

So we end up with a situation where both mines would have been in compliance 10 days before the hearing below if MSHA's approval had been issued in the first place. Returning to my observations at the outset of this opinion, Congress has spoken loudly and clearly in the words of the MINER Act, but urgency should not foreclose reasonableness and consistency in carrying out that mandate.

Accordingly, I would reverse the judge.

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Michael F. Duffy, Chairman

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