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Division of Mine Safety & Health
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ON APPEAL TO
THE COMMISSION

VIA OVERNIGHT MAIL

August 11, 2014

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health
Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

Re: Sec'y of Labor v. The American Coal Company, LAKE 2011-13

Dear Ms. Boyd:

Enclosed for filing please find the original and six copies of the Secretary's opening brief.

Thank you for promptly bringing this filing to the attention of the Commission.

Sincerely,

Sara L. Johnson
Attorney

cc: Gary M. Broadbent, Esq.

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	
Petitioner,	)	
v.	)	Docket No. LAKE 2011-13
THE AMERICAN COAL COMPANY,	)	
Respondent.	)	

BRIEF FOR THE SECRETARY OF LABOR

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INTRODUCTION

In a number of cases decided since the Commission's decision in Black Beauty Coal Co., 34 FMSHRC 1856 (Aug. 2012), Commission administrative law judges have rejected settlement agreements submitted by the Secretary for approval or have requested that the Secretary supply additional facts to justify proposed settlements.[1]

Under the split-enforcement scheme created by the Federal Mine Safety and Health Act of 1977, the Secretary has the exclusive authority to enforce and the primary authority to interpret the Act, subject to deferential Commission and court review. See, e.g., Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Sec'y of Labor v. Mutual Mining, Inc., 80 F.3d 110, 114 (4th Cir. 1996). The Commission is "the equivalent of a court" - it is responsible for adjudication and has no policymaking role. See Jeroski v. Sec'y of Labor, 697 F.3d 651, 653 (7th Cir. 2012); Speed Mining, Inc. v. FMSHRC, 528 F.3d 310, 319 (4th Cir. 2008); Sec'y of Labor v. Twentymile Coal Co., 456 F.3d 151, 159 (D.C. Cir. 2006).

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[1] See, e.g., Mot. for Recon., Gov't Ex. A, February 21, 2013 Order Rejecting Amended Settlement Motion, Dickenson-Russell Coal Company, LLC, Docket No. VA 2012-397 (Feb. 21, 2013); Mot. for Recon., Gov't Ex. B, October 17, 2012 Order Rejecting Settlement Motion and Notice of Hearing, Dominion Coal Corp., Docket No. VA 2012-227 (Oct. 17, 2012).

Commission judges' denials of settlement motions raise the important question of how the Secretary's and the Commission's distinct enforcement and adjudicatory roles should be performed when the parties reach a settlement and the Commission reviews the compromise under Section 110(k) of the Mine Act.

Section 110(k) of the Mine Act provides for Commission approval when the Secretary seeks to settle a proposed penalty. It states in full:

> No proposed penalty which has been contested before the Commission under section 105(a) [30 U.S.C. § 815(a)] shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k).

The Commission, and the administrative law judge in this case, have read these words to confer broad authority on the Commission to reject settlement agreements reached by the parties in Mine Act disputes and to require that the Secretary supply extensive information to justify proposed settlements. Under the broad view announced in Black Beauty, the Commission's role in reviewing settlements is part of its authority to assess civil penalties under Section 110(i). See 34 FMSHRC at 1862. According to that view, the Commission's role under Section 110(k) is therefore not to give deferential review to the parties' compromise, but rather to independently assess an

appropriate civil penalty in light of the six statutory penalty factors in Section 110(i) and the deterrent purpose underlying the Mine Act's civil penalty scheme. Id. at 1863-68; see also Knox County Stone Co., 3 FMSHRC 2478, 2480 (1981) (Commission's approval or rejection of proposed settlement should be "fully supported by the record" and "consistent with the statutory penalty criteria"); Tazco, Inc., 3 FMSHRC 1895, 1898 (1981) ("[I]f a judge disagrees with a stipulated penalty amount in a settlement, he is free to reject the settlement and direct the matter for hearing.").

In contrast, the Secretary takes a different view of the Commission's role under Section 110(k). Courts and court-like agencies typically exercise a more deferential role when reviewing enforcement agencies' settlement decisions because "compromise is the essence of settlement" and settlement decisions involve policy choices that the U.S. Constitution vests in the political branches. SEC v. Citigroup Global Markets, Inc., 752 F.3d 285, 294 (2nd Cir. 2014) ("Citigroup II") (articulating deferential standard of review for agency consent judgments); New York State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (concluding that "an agency's decision to settle or dismiss an enforcement action is nonreviewable"). Section 110(k) must be interpreted in light of these background principles because the Mine Act's provision for

Commission "approval" of settlement agreements does not articulate any "meaningful standards" for judicial review. See Heckler v. Chaney, 470 U.S. 821, 834 (1985). Moreover, under any standard of review, Section 110(k) does not prohibit settlements structured as an across-the-board percentage reduction of civil penalties like the one presented here.

In light of these differing views, the Secretary, through this litigation, respectfully seeks to clarify the proper standard of review under Section 110(k) so that all participants - including the enforcement agency, the regulated community, the adjudicators, and other interested parties - know what the governing principles are. The safety and health of miners depends on the fair and expeditious resolution of Mine Act disputes. Such fair and expeditious resolution can only be achieved if some disputes can be resolved, where appropriate, through the compromise of the parties instead of full adjudication on the merits. In other words, settlement is an indispensable part of a well-functioning enforcement and adjudicatory regime, and the Secretary seeks to clarify what rules apply when the parties reach a settlement.

ISSUES

Whether the judge erred in denying the Secretary's motion to approve settlement, including:

I. Whether the judge erred in identifying the proper standard of review for Commission administrative law judges to apply when reviewing proposed settlement agreements under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k);

II. Whether, under any standard of review, Section 110(k) prohibits settlements structured as an across-the-board percentage reduction of civil penalties; and

III. Whether the judge erred in applying the proper standard to the proposed settlement terms in this case.

FACTS AND PROCEDURAL HISTORY

This docket involves 32 citations issued by five different MSHA inspectors between July 13, 2010, and August 12, 2010. Mot. for Recon. at 5. Of the 32 citations, 31 were issued under Section 104(a) of the Mine Act and one was issued under Section 104(g)(1). Id. The parties reached a proposed settlement in which The American Coal Company ("American Coal") has agreed, for purposes of settlement, to accept the citations as issued by the MSHA inspectors, including the levels of gravity and negligence alleged. Id. at 5-6. American Coal has also agreed to pay $31,063, or 70 percent, of the $44,376 original penalty total proposed by MSHA. Id. at 6.

On February 8, 2013, the Secretary, represented by a Conference and Litigation Representative ("CLR"), submitted an initial motion to approve settlement reflecting the compromise described above. Feb. 8, 2013 Settlement Mot. at 1-3. On February 11, 2013, the administrative law judge issued a decision denying settlement and declining to accept the appearance of the CLR. Feb. 11, 2013 Order at 1. The Secretary subsequently transferred the docket to the Office of the Solicitor. Feb. 27, 2013 Notice of Appearance at 1-2.

On April 30, 2014, the Secretary filed a motion for reconsideration that asked the judge to reconsider his legal conclusions that Section 110(k) compelled the judge to reject the proposed settlement agreement for lack of factual support, and that Section 110(k) does not permit the Secretary to negotiate settlement agreements structured as a uniform percentage reduction of civil penalties. Mot. for Recon. at 1. The Secretary also asked the judge to approve the settlement. Id. The Secretary's motion affirmed that the Office of the Solicitor had reviewed and endorsed the settlement as negotiated by the CLR:

> After the Court rejected the Secretary's settlement motion, the case was transferred to the undersigned attorney in the Office of the Solicitor. The attorney independently reviewed the docket at issue, including all 32 citations, the inspectors' notes, recommendations from the CLR, and American Coal's position statement. Exercising her professional

> judgment as a representative of the Secretary, she considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial. The Secretary, through the undersigned counsel, represents that the proposed settlement is in the public interest and is compatible with MSHA's enforcement goals.

Mot. for Recon. at 4.

The Secretary's motion presented three questions for the judge's resolution: (1) whether Section 110(k) provides any "meaningful standards" within the meaning of Heckler v. Chaney, 470 U.S. 821, 831 (1985), to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions; (2) what standard of review applies when the Commission or a court of appeals reviews the Secretary's settlement agreements under Section 110(k); and (3) whether the settlement proposed satisfies the applicable standard. Mot. for Recon. at 6. The Secretary also argued that the Secretary has previously negotiated, and the Commission has previously approved, settlements structured as an across-the-board percentage reduction of civil penalties, and that Section 110(k) presents no statutory barrier to such settlements.

On May 13, 2014, the judge issued an order denying the Secretary's motion and directing the Secretary to either submit a more extensively supported motion for approval of settlement

or prepare for trial on the matters in the docket within 30 days. May 13, 2014 Order at 1, 13.

On June 9, 2014, the Secretary moved to certify the judge's May 13, 2014 order for interlocutory review. The Secretary also moved the judge to stay the proceedings pending a final decision by the Commission on the proper standard of review and the adequacy of the proposed settlement agreement in this case.

On July 1, 2014, the judge issued an order denying the Secretary's motion to certify, along with a certification by the judge upon his own motion that his interlocutory ruling involved a controlling question of law. The order also denied the Secretary's request for a stay.

On July 8, 2014, the Secretary filed a petition for interlocutory review with the Commission, along with motions to expedite the Commission's consideration of the petition and to stay proceedings below pending a final decision on the issues presented for interlocutory review.

On July 11, 2014, the Commission granted interlocutory review "[u]pon consideration of the Judge's certification and the Secretary's petition." July 11, 2014 Order at 1. The Commission stated that "[t]he issue on review is whether the Judge erred in denying the Secretary's motion to approve settlement." Id. The Commission also granted the Secretary's

motion to stay the proceedings below pending the Commission's interlocutory review.

THE JUDGE'S DECISIONS

The judge's first decision rejected the parties' proposed compromise as incompatible with Section 110(k) of the Mine Act, as well as with the Commission's decision in Black Beauty and Commission Procedural Rule 31. Feb. 11, 2013 Order at 2-3. The judge rejected the proposed settlement because of its structure as a uniform, across-the-board percentage reduction without any changes to the underlying citations. The decision explained:

> The Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of [a] yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

Id. at 1.

In addition to rejecting the concept of uniform penalty reductions for multiple citations, the judge took issue with the fact that the penalties were reduced even though American Coal had agreed to accept the citations as written and the Secretary had not made changes to the gravity or negligence for any of the citations. Id. at 2. The judge also faulted the motion for failing to justify the reductions in proposed penalties with adequate factual support. Id. at 1-3.

Finally, the judge declined to accept the CLR's representation in the matter, stating that the CLR's position "demonstrate[d] a lack of understanding about the operation of the Mine Act's requirements." Id. at 3.

The judge's decision on reconsideration reached the same conclusions. See May 13, 2014 Order. The judge's decision did not directly answer the question of what standard of review applies when a judge reviews a proposed settlement, or identify any "meaningful standard" contained in Section 110(k). The decision did, however, include several statements indicating the judge's view of the Commission's role.

Consistent with the Commission's decision in Black Beauty, the judge stated that:

- The Commission and the Courts must "assure that the public interest is adequately protected before approval of any reduction in penalties." Id. at 9 (quoting legislative history and Black Beauty, 34 FMSHRC at 1861) (emphasis omitted).
- The Commission's authority in Section 110(i) to assess civil penalties "clearly includes contested penalties that are the subject of a settlement agreement." Id. at 9 (quoting Black Beauty, 34 FMSHRC at 1862).
- It is part of the Commission's role under Section 110(k) to ensure that settlements are not "based on the need to

save litigation and collection expenses and that these factors should play no role in determining settlement amounts." Id. at 5 (citing legislative history); see also Black Beauty, 34 FMSHRC at 1865.

- Commission judges may consider "the deterrent purposes of the statutory penalty scheme in reviewing a settlement proposal." Id. at 10 (quoting Black Beauty, 34 FMSHRC at 1864).

In addition to relying on the principles articulated in Black Beauty, the judge stated that:

- "[T]he parties' settlement motion needs to relate the factual or legal disputes [for each individual citation or order] that underpin their decision to settle." May 13, 2014 Order at 4 n.8.
- It is part of the Commission's role under Section 110(k) to ensure that the proposed settlement would not "weaken [the Secretary's] enforcement capabilities and thereby 'jeopardize the health and safety of miners.'" May 13, 2014 Order at 5 (emphasis in original omitted) (quoting Amax Lead Co., 4 FMSHRC 975, 978 (1982)).
- "[U]nder a 'principle of proportionality,' the greater the reduction sought for a proposed penalty, the greater the amount of information that should be provided to explain the basis for the reduction." Id. at 12.

In light of these principles, the judge rejected the proposed settlement because he concluded that the Secretary had not provided sufficient information to justify the penalty reductions. Id. at 12-13.

STANDARD OF REVIEW

The Commission reviews a judge's decision to reject a proposed settlement under Section 110(k) for abuse of discretion. Shemwell v. Armstrong Coal Co., 36 FMSHRC ___, KENT 2013-362-D, slip op. at *5 (May 13, 2014); Black Beauty, 34 FMSHRC at 1863. The Commission may find an abuse of discretion when "there is no evidence to support the [judge's] decision or if the decision is based on an improper understanding of the law." Shemwell, slip op. at *5 (quoting Azko Nobel Salt, Inc., 19 FMSHRC 1254, 1258 n.3 (1997)). The Commission gives de novo review to an administrative law judge's conclusions of law. Contractors Sand & Gravel, Inc., 20 FMSHRC 960, 967 (1998), rev'd on other grounds, 199 F.3d 1334 (D.C. Cir. 2000).

ARGUMENT

I. THE JUDGE ERRED BY FAILING TO IDENTIFY THE PROPER STANDARD OF REVIEW

A. Separation of Powers Principles Inform the Meaning of Section 110(k)

The proper standard of review for the Commission to apply to the Secretary's settlement agreements, and the permissibility of settlements structured as an across-the-board percentage

reduction in civil penalties, both turn on the interpretation of Section 110(k). In addition to the traditional tools of statutory interpretation - text, structure, purpose, and legislative history - Section 110(k) must also be construed in light of judicial precedent applying separation of powers principles when courts determine the reviewability of agency settlement agreements or when they review agency consent judgments. See, e.g., Natural Res. Def. Council, Inc. v. FDA, 12-2106-CV L, 2014 WL 3636283 (2d Cir. July 24, 2014) ("We take some comfort from the fact that our interpretation of the statutory text is consistent with ordinary understandings of administrative and judicial litigation processes."); United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (In interpreting a statute, courts generally presume that "Congress . . . legislated against the background of our traditional legal concepts.").

In other statutory schemes, agencies' decisions to settle enforcement actions are not reviewable by the courts. The Administrative Procedure Act ("APA") precludes judicial review of "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Moreover, the Supreme Court has held that an agency's decision not to exercise its enforcement authority, or to exercise its enforcement authority in a particular way, is committed to its absolute discretion, unless

Congress has otherwise provided. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

The D.C. Circuit has concluded that enforcement agencies are generally presumed to have the unreviewable discretion to settle enforcement actions because settlements are, in essence, a decision not to pursue an enforcement action as originally charged. See New York State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (concluding that "an agency's decision to settle or dismiss an enforcement action is nonreviewable"); see also Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1031-33 (D.C. Cir. 2007) (EPA's decision to enter into consent agreements with animal feeding operations was within agency's nonreviewable discretion); Baltimore Gas & Elec. Co v. FERC, 252 F.3d 456, 459 (D.C. Cir. 2001) (FERC's decision to settle enforcement action was within agency's nonreviewable discretion).

When agencies seek to make settlement agreements enforceable through the injunctive power of the courts, courts give some judicial review to the proposed settlement agreement, but do so in a very deferential manner. See, e.g., Citigroup II, 752 F.3d at 294; see also United States v. Microsoft Corp., 56 F.3d 1448, 1460-62 (D.C. Cir. 1995); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126-27 (D.C. Cir. 1983). For example, the Second Circuit recently held, in a high-profile

securities case, that a court reviewing a consent decree should evaluate the proposed decree for "fairness and reasonableness." Citigroup II, 752 F.3d at 294. The fairness and reasonableness inquiry includes: "(1) the basic legality of the decree; (2) whether the terms of the decree, including its enforcement mechanism, are clear; (3) whether the consent decree reflects a resolution of the actual claims in the complaint; and (4) whether the consent decree is tainted by improper collusion or corruption of some kind." Id. at 294-95 (citations omitted). "The primary focus of the inquiry . . . should be on ensuring the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the [agency's] discretionary authority to settle on a particular set of terms." Id. at 295 (emphasis added).

In light of these background principles, the exclusive roles established by the Mine Act's split-enforcement scheme would, in the absence of Section 110(k), lead to the inevitable conclusion that the Commission has no authority to review the Secretary's decisions to settle enforcement actions under the Act. Indeed, under the highly analogous Occupational Safety and Health Act, which contains no provision like Section 110(k), the Supreme Court has held that the Secretary's authority to settle enforcement actions is unreviewable. See Cuyahoga Valley Railway Co. v. United Transp. Union, 474 U.S. 3, 7 (1985) (the Secretary

must have the unreviewable authority to withdraw citations and settle cases under the analogous Occupational Safety and Health Act to avoid a "commingling of [prosecutorial and adjudicatory] roles that Congress did not intend").

Of course, the "presumption of unreviewability" of agency settlement agreements by courts or court-like adjudicatory agencies can be overcome if Congress has otherwise provided. See Chaney, 470 U.S. at 834; see also Twentymile, 456 F.3d at 157 (applying Chaney to the Mine Act); Speed Mining, 528 F.3d at 316-19 (same). The default presumption of unreviewability is overcome, however, only where the controlling statute both (1) "indicate[s] an intent to circumscribe agency enforcement discretion", and (2) "provide[s] meaningful standards for defining the limits of that discretion." Chaney, 470 U.S. at 834.

B. The Commission Should Review the Secretary's Settlement Agreements Under the Consent Judgment Standard of Review

Section 110(k) indicates congressional intent to circumscribe agency enforcement discretion insofar as it establishes a procedural mechanism for Commission "approval" of the Secretary's settlement agreements. Section 110(k) does not, however, satisfy the second part of the Chaney test because the statute provides no meaningful or substantive standards that

limit the Secretary's prosecutorial discretion when the Secretary negotiates settlement agreements.

The Commission should therefore approach this problem as a court would and conclude that, because Congress gave it no "law to apply" when reviewing the Secretary's settlement agreements, see 5 U.S.C. § 701(a)(2), the scope of its reviewing function is, at best, limited. The Secretary submits that the consent judgment standard of review, which rejects the idea that the reviewing court is a mere "rubber stamp," see Citigroup II, 752 F.3d at 293, but nonetheless gives "significant deference" to the enforcement agency's determination of the public interest, id. at 296, provides an appropriate yardstick for the Commission to apply when reviewing settlement agreements submitted for approval by the Secretary. The consent judgment standard of review strikes an appropriate statutory balance because it preserves the Secretary's prosecutorial discretion, but also recognizes the Commission's important review authority.

C. The Consent Judgment Standard of Review is Warranted Because Section 110(k) Suggests Congressional Intent that the Commission Review Settlements, But Provides No Meaningful Standards For Review

If a statute fails to provide meaningful standards to limit agency discretion, "judicial review is impossible, and agency action is shielded from the scrutiny of the courts." Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002). A statute fails to

provide meaningful standards where it is "utterly silent on the manner in which the [enforcement agency] is to proceed against a particular transgressor," Baltimore Gas, 252 F.3d at 461, or where it does nothing to "circumscribe[] the government's power to discriminate among" enforcement options, Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003). In other words, meaningful standards are lacking when the adjudicator has no "legal norms" or "law to apply." Chaney, 470 U.S. at 834-35; Twentymile, 456 F.3d at 156. Neither "boilerplate truisms" nor broadly applicable standards of review (such as the APA's "substantial evidence" standard) are sufficient to limit an enforcement agency's discretion in the absence of more meaningful guidance from Congress. Twentymile, 456 F.3d at 158. In contrast, when a statute provides "clearly defined factors" to guide an enforcement agency's decision, the presumption of unreviewability may be overcome. See Chaney, 470 U.S.at 833-35 (explaining that the LMRDA's requirement that the Secretary shall bring a civil action when she "finds probable cause to believe that a violation . . . has occurred" provides a sufficient standard for limited judicial review).

Section 110(k) provides no meaningful standards to limit the Secretary's settlement authority: it is "utterly silent" as to how the Secretary should exercise his prosecutorial discretion to settle or how the Commission should review the

Secretary's settlement proposals. Cf. Twentymile, 456 F.3d at 158. Section 110(k) does not establish any legal standards for evaluating the Secretary's proposed compromise or supply any criteria for either the Secretary or the Commission to apply to settlement decisions. It does not define the term "approval" or signal when approval or rejection is appropriate. Indeed, the Commission itself has acknowledged that Section 110(k)'s statutory language "contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal." Black Beauty, 34 FMSHRC at 9 (emphasis added).

The only clue that Section 110(k) offers is its suggestion that the Commission's role is no different from an Article III court's. Section 110(k) uses identical language to describe the Commission's role in reviewing settlement proposals before it has issued a final agency order, and the Court of Appeals' role in reviewing settlement proposals once a final agency order has been issued. The statute therefore suggests that the Commission should define its role as a generalist court would when exercising its responsibilities under the Act. See, e.g., Erlenbaugh v. U.S., 409 U.S. 239, 243 (1972) (The canon of in pari materia reflects that "a legislative body generally uses a particular word with a consistent meaning in a given context."); see also Order Approving Settlement, Mountain Edge Mining, Inc. v. FMSHRC, Docket No. 11-1777 (4th Cir. 2012) (summarily

granting the parties' joint motion to approve settlement); Twentymile, 46 F.3d at 161 ("[L]ike a court, the Commission is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion.") (emphasis added). Indeed, in similar cases the Commission has looked to the Court of Appeals' reviewing role to determine its own approach. Cf. Stansley Mineral Resources, Inc., 35 FMSHRC 1177, 1180 (2013) (concluding that the Commission is required to assess statutory minimum penalties for Section 104(d) citations and orders in part because the Act requires a Court of Appeals to do so, and therefore would require the Court of Appeals to reverse the Commission's imposition of less than the minimum).

The overall structure of the Mine Act likewise provides no meaningful standards that either the Commission or a court can apply to the Secretary's settlement decisions. On the contrary, the overall structure of the Act supports the conclusion that the decision to settle most appropriately falls within the Secretary's prosecutorial functions under the split-enforcement model, because such decisions are grounded in discretionary policy choices and an assessment of the public interest. See SEC v. Citgroup Global Markets, Inc., 673 F.3d 158, 163-64 (2d Cir. 2012)("Citigroup I") (discussing policy-based nature of settlement decisions), Citigroup II, 752 F.3d at 296-97 (same); see also Cuyahoga Valley, 474 U.S. at 7 (settlement within

exclusive province of the Secretary under the analogous Occupational Safety and Health Act); Mechanicsville Concrete, Inc., 18 FMSHRC 877, 879 (1996) (Secretary has the unreviewable discretion to designate a violation as S&S in the first instance); RBK Construction, Inc., 15 FMSHRC 2099, 2101 (1993) (Secretary has the unreviewable discretion to vacate a citation).

D. Section 110(i) Cannot Supply the Standard that Section 110(k) Does Not Provide

Section 110(i) and Section 110(k) serve distinct and different functions: Section 110(k) governs the Commission's approval of the Secretary's settlement agreements, whereas Section 110(i) governs the Commission's assessment of civil penalties after adjudication on the merits. Section 110(i) does not apply when the Commission reviews the Secretary's proposed settlements, and therefore cannot supply the meaningful standard that Section 110(k) does not provide.

Section 110(i) establishes six statutory penalty criteria that apply whenever the Commission assesses a civil penalty after adjudication. It states: "In assessing civil monetary penalties, the Commission shall consider [the six statutory penalty criteria]." 30 U.S.C. § 820(i) (emphasis added). In contrast, Section 110(k) specifically governs the Commission's "approval" of proposed penalties that are "compromised,

mitigated, or settled" by the Secretary. 30 U.S.C. § 820(k) (emphasis added). Congress's use of two different verbs - "assess" in Section 110(i) and "approve" in Section 110(k) - indicates that the two functions are distinct. See, e.g., Corley v. United States, 556 U.S. 303, 304 (2009) ("There is [] every reason to believe that Congress used the distinct terms deliberately."); Russello v. United States, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."). Moreover, the fact that Congress used the specific phrase "compromised, mitigated, or settled" in Section 110(k), but not in Section 110(i), indicates that that former provision pertains to the Commission's review of settlement agreements, but the latter does not.

Congress's decision to establish two different review functions reflects the reality that the exercise of assessing a penalty after factfinding is fundamentally different from the exercise of reviewing a compromise that has already been reached. When the Commission adjudicates a penalty contest, it makes findings of fact under each of the civil penalty factors. 29 C.F.R. § 2700.30; see also Cantera Green, 22 FMSHRC 616, 620 (2000). In contrast, when the Secretary and a mine operator settle an enforcement action, the parties agree to the ultimate

consequences of the Secretary's underlying allegations, but they may agree to disagree about the factual or legal disputes giving rise to the proceeding in the first place. Cf. Citigroup II, 752 F.3d at 295 ("Trials are primarily about the truth. Consent decrees are primarily about pragmatism."); Citizens for a Better Env't, 718 F.2d at 1126 ("The court's duty when passing upon a settlement agreement is fundamentally different from its duty in trying a case on the merits."). When the Secretary then seeks Commission "approval" of such a settlement agreement, the Commission's task should not be to engage in factfinding to assess civil penalties under Section 110(i), but rather to simply approve or reject the compromise before it - a different role.

The role of an adjudicator is different when reviewing a proposed compromise because the adjudicator cannot assume from the existence of the compromise that the enforcement agency's underlying allegations are correct, or that the regulated entity did in fact fail to meet its statutory or regulatory obligations. See Citigroup I, 673 F.3d at 163 (criticizing district court's order refusing to approve SEC's proposed settlement because the order "prejudges the fact that [the defendant] had in fact misled investors, and assumes that the [agency] would succeed at trial"); Microsoft, 56 F.3d at 1460-61 ("[W]hen a consent decree is brought to a district judge,

because it is a settlement, there are no findings that the defendant has actually engaged in illegal practices. It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial.") (emphasis in original) (internal citations omitted); see also Maryland v. United States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting from summary affirmance) ("The District Court seems to have assumed first that there was an antitrust violation and second that it knew the scope and effects of the violation. But the parties have settled the case and thereby avoided the necessity for such findings.").

This logic is equally applicable in the Mine Act context. Though existing Commission precedent holds that the Secretary cannot agree to exculpatory language that prevents the Secretary from relying on a settled citation for subsequent Mine Act enforcement purposes (including history of violations under Section 110(i), pattern of violations under Section 104(e) or 108(a)(2), and unwarrantable failure chain of violations under Sections 104(d)(1) and 104(d)(2)), that same precedent recognizes that "parties are free to admit or to deny the fact of a violation in settlement agreements." Amax Lead Co., 4 FMSHRC 975, 977 (1982). Indeed, in reaching this conclusion, the Commission noted that such denials are part and parcel of many settlements:

> Inherent in the concept of settlement is that the parties find and agree upon a mutually acceptable position that resolves the dispute and that obviates the need for further proceedings. Whether that mutual position involves an admission or denial of a violation under the Mine Act will normally be left to the parties.

Id. at 977-78. In this case, consistent with Amax, American Coal accepted the citations as written by the MSHA inspectors for purposes of settlement and subsequent Mine Act enforcement actions. But American Coal neither admitted nor denied in the settlement motion that the citations were valid or that the MSHA inspectors' allegations of gravity and negligence were proper.

Thus, a Commission administrative law judge should not apply Section 110(i) to the contested citations to determine whether the compromise penalty is "appropriate" in light of the statutory penalty factors because the allegations underlying a proposed settlement agreement cannot be treated as if they were findings of fact and conclusions of law after trial. Without judicial factfinding, no particular penalty is "appropriate" - unless the parties have agreed to one.

Likewise, a Commission judge should not conduct an independent evaluation of deterrence when reviewing a proposed settlement. In Black Beauty, the Commission reasoned that "penalties should be used to deter operators" from violating health and safety laws and regulations, and that it is therefore "eminently appropriate for a Judge to acknowledge the need for

deterrence in deciding whether or not to approve a settlement." Black Beauty, 34 FMSHRC at 10. The Commission's reasoning cannot be squared with its role as impartial adjudicator: to consider whether a settlement proposal will sufficiently deter violations is essentially to prejudge or assume the validity of the citation as written by the MSHA inspector. Certainly the Commission would not want to "deter" an operator's lawful conduct if it were to ultimately find that no violation occurred. See Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (1980) ("Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred."). Similarly, the judge cannot evaluate the deterrence value of the settlement without making unjustified assumptions about the nature and extent of the violations.

Put another way, Section 110(i) provides a wholly different kind of standard than the one that Section 110(k) fails to provide and would have to provide to make meaningful review possible. Section 110(k) provides no standard that would allow the Commission to determine "whether the [enforcement agency] has exercised its prosecutorial discretion [to settle] well or perhaps, as well as possible." Maryland, 460 U.S. at 1005 (Rehnquist, J., dissenting from summary affirmance and quoting legislative history to the antitrust Tunney Act). Section

110(i) cannot and does not fill that gap - it serves a different purpose by providing criteria for evaluating a civil penalty in light of stipulated or adjudicated facts. Section 110(i) therefore cannot supply the meaningful standard that Section 110(k) does not provide.

E. The Mine Act's Legislative History Does Not Supply a Meaningful Standard for Limiting the Secretary's Prosecutorial Discretion

The Commission in Black Beauty, and the judge in this case, identified several passages in the Mine Act's legislative history[2] to supplement the statutory text: (1) statements promoting transparency when the Secretary reaches a settlement agreement; (2) a statement that the need to save on collection or litigation expenses "should play no role in determining settlement amounts"; and (3) a statement that the Commission and the courts are responsible for determining the public interest.

The statements about transparency help illuminate Congress's intent in giving the Commission an "approval" function. In contrast, the statements about collection and litigation expenses and the Commission's role in determining the public interest are highly specific criteria that were not

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[2] All quoted passages are from the Senate Committee Report No. 95-181. S.Rep. No. 181, 95th Cong. 1st Sess. 41 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 ("Legis. Hist."), at 589-789 (1978). The Senate Committee on Human Resources reported out Section 111(l), which, without substantive change, ultimately became Section 110(k) of the Mine Act.

included in the statutory text and therefore should not be construed as legal restrictions on the Secretary's prosecutorial discretion to settle. Cf. Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (when Congress fails to impose "legally binding restrictions" in the statutory language, "indicia in committee reports and other legislative history" do not bind the agency); see also Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply."); Scattered Corp. v. Chicago Stock Exch., Inc., 98 F.3d 1004, 1005 (7th Cir. 1996) ("Legislatures express their intents by enacting statutes; an intent without a supporting text is not law."). This is especially so because, as explained above, Section 110(k) must be construed in light of court precedent declining to impose judicial restrictions on agency settlement decisions.

1. Transparency and Public Scrutiny

The Senate Report stresses transparency and public scrutiny as the principal reasons for the Commission's review under Section 110(k). These ideals are instructive - and they can be achieved through Commission approval of proposed settlement agreements even if the Commission does not give judicial review to the aspects of the Secretary's settlement decisions that Congress committed to the Secretary's prosecutorial discretion.

The Senate Report suggests that Congress wanted settlements to be "on the record" and "carried out in public." Legis. Hist. at 632-33. The Report describes MESA's "off the record" negotiations as reducing the efficacy of civil penalties:

> [A]nother factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. Negotiations between operators and Conference Officers of MESA are not on the record. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge. Similarly, there is considerable opportunity for off-the-record settlement negotiations with representatives of the Department of Justice while cases are pending in the district courts.

Legis. Hist. at 632. In describing Section 110(k)'s solution, the Report explains that the purpose of civil penalties is best served when the amount of penalties assessed and collected is made available to the public:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

Legis. Hist. at 633.

The purposes of transparency and public scrutiny identified in these passages are achieved when the Secretary submits a motion to approve settlement to a Commission administrative law judge, regardless of whether the judge rejects the proposed agreement. Even if a settlement agreement is not made public until it is approved, the mere publishing of it will alert the regulated community (industry, labor, and public interest groups) - and indeed Congress itself - to any possibility that the Secretary's settlement practices present cause for concern and warrant comment and correction by the political branches.

Indeed, the Senate Report goes on to acknowledge the important role that settlement plays in an enforcement regime and the modest changes effectuated through the implementation of Section 110(k):

> The Committee recognizes that settlement of penalties often serves a valid enforcement purpose. The provisions of Section 111(1) only require that such settlements be a matter of public record and approved by the Commission or Court.

Legis. Hist. at 633 (emphasis added). This paragraph suggests that Congress did not intend to open up all aspects of prosecutorial decisionmaking to public scrutiny, but rather intended to ensure only that the end result - the settlement agreement as approved by the judge - was available for public inspection and review as a final order of the Commission.

2. Role of Collection and Litigation Expenses

The Commission suggested in Black Beauty, and the judge reiterated here, that part of the Commission's review function under Section 110(k) is to ensure that the Secretary did not take litigation and collection expenses into account when negotiating a settlement agreement. Black Beauty, 34 FMSHRC at 1865; May 13, 2014 Dec. at 10.

The Senate Report made the following observation about the consideration of litigation and collection expenses:

> While the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and collection expenses should play no role in determining settlement amounts.

Legis. Hist. at 632-33 (emphasis added).

Even if this passage means what the Commission suggests that it means - that it is impermissible for the Secretary to consider litigation and collection amounts when making settlement decisions - the Secretary disagrees that it should be incorporated into the Commission's standard of review as if Congress had included it in the statutory text. Moreover, the Secretary disagrees that this ambiguous and internally inconsistent passage should be interpreted to mean that such considerations are in fact impermissible.

First, Section 110(k) makes no mention that the Secretary's prosecutorial discretion should be limited by this highly specific criterion. Section 110(k)'s silence on the issue is notable because the resources required for litigation are a well-recognized reason that parties, and in particular, government agencies, settle cases. See Citigroup II, 752 F.3d at 295 ("Even if the [S.E.C.'s] case against defendants is strong, proceeding to trial would still be costly. The S.E.C.'s resources are limited, and that is why it often uses consent decrees as a means of enforcement. These assessments are uniquely for the litigants to make.") (internal quotation marks and alterations omitted); Chaney, 470 U.S. at 831-32 (when bringing an enforcement action, an agency "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another . . . and, indeed, whether the agency has enough resources to undertake the action at all"); Ass'n of Irritated Residents, 494 F.3d at 1032 ("These judgments - arising from considerations of resource allocation, agency priorities, and costs of alternatives - are well within the agency's expertise and discretion."); New York State Dep't of Law, 984 F.2d at 1213-16 (agencies rather than courts are "best positioned to weigh the benefits of pursuing an adjudication against the costs"). Agency resources are finite, and allocating such resources within the bounds set by Congress

is an integral part of the Secretary's policymaking function. To say that resources should never be considered when the Secretary decides which cases to take to trial and which cases to settle ignores a practical reality long recognized by the courts - and a reality that is a legitimate part of a focused and effective enforcement program.

Second, the passage itself is ambiguous with regard to the role that litigation and collection expenses may play. It first suggests that such expenses "may be a reason for the compromise of assessed penalties," but then suggests that "the need to save litigation and collection expenses should play no role in determining settlement amounts." Legis. Hist. at 632-33 (emphasis added). Even assuming missing statutory criteria could be supplied through reference to legislative history, the legislative history itself would presumably need to provide a clearer statement of congressional intent to circumscribe the Secretary's prosecutorial discretion in the manner suggested by the Commission.

For these reasons, the relevant passage is best interpreted as a signal to enforcement personnel that Congress was more concerned with optimizing deterrence of violations than it was about collecting penalties for the government coffers. It should not be interpreted as an instruction to the Commission to

second-guess the enforcement agency's prioritization of resources as part of its review of proposed settlements.

3. Protecting the Public Interest

The third and final Senate Report passage quoted by the Commission and the judge in this case can be read as suggesting that the Commission, rather than the Secretary, should be charged with determining the public interest when reviewing proposed settlement agreements. See Black Beauty, 34 FMSHRC at 1861; May 13, 2014 Decision at 9. The Senate Report states: "It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." Legis. Hist. at 633. The Secretary contends that this sentence from the legislative history should not be presumed part of the statutory text for several reasons.

First, under prevailing background principles, enforcement agencies, rather than courts, are charged with determining whether a proposed settlement best serves the public interest. Citigroup II, 752 F.3d at 296-97 ("The job of determining whether the proposed S.E.C. consent decree best serves the public interest . . . rests squarely with the S.E.C., and its decision merits significant deference."). Reviewing courts may consider whether the public interest would be "disserved" when they are asked to issue an injunction, but such courts "may not

. . . find the public interest disserved based on [] disagreement with the [enforcement agency's] decisions on discretionary matters of policy." Id. at 297.

Second, Congress knows how to draft statutes so that the courts are explicitly charged with considering the public interest, and Congress did not do so here. Compare 30 U.S.C. § 820(k) (no statutory instruction for Commission to consider the public interest) with 15 U.S.C. § 16(e)-(f) (antitrust Tunney Act explicitly requires courts to determine that entry of consent judgment is "in the public interest" and lists criteria and procedures for the court to make such a determination). That Congress knows how to draft statutes in such a manner, but did not do so here, cuts against incorporating the public interest standard into the statute. Cf. N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984) (concluding that Congress did not intend to imply an exception when it had explicitly included the same exception in another statute).[3]

Finally, even when Congress speaks clearly to impose a duty on the courts to determine the public-interest effects of a proposed settlement, such provisions raise serious constitutional questions about the separation of powers. See

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[3] Superseded by statute, Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, 98 Stat. 333, as recognized in In re Am. Provision Co., 44 B.R. 907, 908 (Bankr. D. Minn. 1984).

Maryland, 460 U.S. at 1004-06 (Rehnquist, J.) (dissenting from summary affirmance). Thus, even in those rare circumstances in which Congress has explicitly included a public interest charge to the courts in an agency's organic statute, the courts have narrowly construed such standards to avoid constitutional infirmities. See, e.g., Microsoft, 56 F.3d at 1459-61. The better solution in this case - where Congress did not include a public interest charge to the Commission or the courts in the text of the organic statute - would be to avoid the constitutional question by declining to read the Commission's approval function to include a public interest standard. See Clark v. Martinez, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.").

F. There is No Basis in the Act for the Additional Principles Advanced by the Judge

The judge advanced two additional principles not relied on in Black Beauty: (1) that the Commission should ensure that the proposed settlement would not weaken the Secretary's enforcement capabilities; and (2) that under a "principle of proportionality," the amount of information the Secretary must supply increases as the percentage of

the original proposed penalty decreases. Neither principle has any basis in the text of Section 110(k), and both are contradicted by other controlling legal principles.

The first proposed principle is contradicted by all of the cases previously cited that distinguish between the Secretary's prosecutorial function and the Commission's adjudicatory function. See, e.g., Twentymile, 456 F.3d at 158 (Commission may not "substitute its views of enforcement policy for those of the Secretary."). Under those cases, it is up to the enforcement agency, not to a reviewing court, to determine what will make maximum use of the agency's enforcement capabilities.

The second proposed principle is foreclosed by the cases recognizing that settlement remedies should not be evaluated against the assumption that the government would have prevailed in proving all allegations at trial. See Section I-D.

G. Insofar as the Commission's Procedural Rules and Precedent Establish an Extra-Statutory Standard, They are Beyond the Commission's Statutory Authority

Neither the Commission's precedent nor Commission Procedural Rule 31 can change the statutory analysis of whether Section 110(k) provides a meaningful standard for limiting the Secretary's prosecutorial discretion to settle. In contrast to

the Secretary's broad rulemaking authority, Congress granted the Commission rulemaking authority only to establish procedural rules for adjudication. Compare 30 U.S.C. § 957 ("The Secretary . . . [is] authorized to issue such regulations as [he] deems appropriate to carry out any provision of this chapter.") (emphasis added) with 30 U.S.C. § 823 ("The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter . . . .") and 29 C.F.R. Part 2700 (establishing procedural rules for the Commission). The Commission is therefore not statutorily authorized to promulgate substantive rules that displace the Secretary's reasonable interpretations or that set policy - whether through rulemaking or through adjudication. See Twentymile, 456 F.3d at 161. In other words, because the Commission is like a court and possesses no policymaking powers, a Court of Appeals would owe no more deference to the Commission's interpretation of Section 110(k) than it would to a district court's statutory interpretation. See Donovan v. OSHRC, 713 F.2d 918, 930 n.18 (2d Cir. 1983) ("Since the Commission is not a policy-making agency, its rule . . . requiring [OSHRC] review of proposed settlements is not entitled to any special deference from the courts.") (internal quotation marks omitted).

H. The Consent Judgment Standard of Review Would Implement the Commission's Approval Function Without Imposing Extra-Statutory Limits on the Secretary's Prosecutorial Discretion

In light of the lack of meaningful standards in either Section 110(k) or the legislative history, the Secretary and the Commission face a conundrum under the Mine Act: Congress intended to give the Commission a role in reviewing the Secretary's settlement proposals, but it did not provide any meaningful standards for limiting the Secretary's prosecutorial discretion. To resolve the contradiction, the Secretary submits that Section 110(k)'s adjudicatory approval function should be analogous to the courts' approval function when reviewing agency consent judgments. In other words, the Commission's inquiry would consist of ensuring that the proposed settlement (1) is legally sound, (2) is clear, (3) resolves the claims in the penalty petition, and (4) is not tainted by improper collusion or corruption.[4] Under this standard, the Secretary would submit proposed settlement agreements to the Commission for approval, but the Commission's role would not be to evaluate the wisdom of the compromise. Rather, the Commission's role would be to

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[4] The Secretary agrees with the Second Circuit that the consent judgment standard of review should not include an inquiry into the "adequacy" of the proposed settlement. See Citigroup II, 752 F.3d at 294. Settlements under the Mine Act, like consent decrees under the Securities and Exchange Act, do not pose the same concerns that class action settlements do. See id.

confirm the clarity and enforceability of the agreement as submitted.

Relying on the consent judgment standard of review would balance Section 110(k)'s provision for judicial approval of settlement agreement terms with Congress's delegation of exclusive enforcement responsibility to the Secretary under the Mine Act's split-enforcement scheme. It would also satisfy the legislative history's suggestion that transparency and public scrutiny are Section 110(k)'s principal objectives. Finally, it would be consistent with the text of Section 110(k) because it would give the Commission an approval function without imposing extra-statutory limits on the Secretary's prosecutorial discretion to settle enforcement actions.

II. EVEN ASSUMING MORE SEARCHING REVIEW, SECTION 110(K) PERMITS PERCENTAGE-REDUCTION SETTLEMENT OF MULTIPLE CITATIONS WITHOUT CITATION-BY-CITATION JUSTIFICATION

Even assuming that the wisdom of the Secretary's settlement decisions is judicially reviewable under a more searching standard, the judge's rejection of the proposed settlement in this case was nonetheless erroneous because Section 110(k) neither prohibits nor requires any particular form of settlement. Section 110(k) therefore cannot present a bar to the proposed settlement, which is structured as a uniform, across-the-board percentage reduction of all of the civil penalties at issue.

In practice, the Secretary uses more than one method to settle civil penalty contests under the Mine Act. In some cases, the Secretary negotiates settlements that are closely tied to MSHA's civil penalty formula found in 30 C.F.R. Part 100. In such "penalty formula settlements," the Secretary agrees to modify the citation to reflect revised factual allegations with regard to negligence, gravity, or some other factor. The proposed penalty is then recalculated by applying the Part 100 penalty formula to the citation as revised. In other cases, such as this "percentage-reduction settlement," the Secretary and the operator reach a compromise where the operator agrees to accept the citation as written along with a percentage reduction in civil penalty. The resulting penalty is not directly tied to MSHA's Part 100 formula. Percentage-reduction settlements often occur, for practical and legitimate reasons, when the parties are negotiating settlements encompassing a larger numbers of citations or multiple dockets.

The judge's decisions denying settlement conclude that percentage-reduction settlements are, in and of themselves, suspect, if not wholly incompatible with Section 110(k) of the Mine Act. See Feb. 11, 2013 Dec. at 1-2; May 13, 2014 Order at 10-13. The decisions also suggest that the Secretary may only negotiate penalty formula settlements that include adjusted gravity and negligence levels to account for the penalty

reductions agreed to by the parties. See May 13, 2014 Order at 4-5 n.8 & Appendices. The judge's proposed requirement that the Secretary justify every settlement with citation-by-citation adjustments to the alleged penalty-related facts, supplemented by a statement of legal or factual "disputes," is tantamount to a requirement that the parties stipulate to facts in support of each settlement penalty. In other words, the judge's settlement rules would transform settlement from an exercise in compromise into an adjudication by stipulation.

Section 110(k) imposes no such limitations on the Secretary's discretion to structure proposed settlements. Section 110(k) does not indicate any Congressional intent to limit the Secretary's prosecutorial discretion to negotiate percentage-reduction settlements, let alone provide meaningful standards for defining the limits of that discretion. Nor does Section 110(k) indicate any intent to require that the parties enter into stipulations to support settlements. The judge's decision reads highly specific and substantive limitations into a provision that contains no limitations at all. Cf. Thunder Basin Coal Co v. FMSHRC, 56 F.3d 1275, 1281 (10th Cir. 1995); Hercules, Inc. v. EPA, 938 F.2d 276, 281 (D.C. Cir. 1991).

In addition, the judge's stipulation requirement is unworkable, undesirable, and contrary to precedent. Such a requirement is unworkable because the parties settle for many

reasons not captured in "adjustments" to the alleged facts. Settlement may be reached because of practical, legitimate, and common litigation concerns such as the availability or credibility of witnesses or the perceived viewpoints of a particular judge. Settlement may reflect a compromise of a legal dispute rather of than a factual one. Or, settlement may reflect changed circumstances - such as a change in mine ownership or affirmative holistic efforts by an operator to improve compliance. Finally, as discussed above, settlement may reflect legitimate policy decisions about resource allocation. The parties have little incentive to present these kinds of settlement "facts" to the judge, especially when they run the risk that the reviewing judge, having been made aware of each parties' litigation weaknesses (and having forced each party to divulge those weaknesses to the other party), may deny the settlement and order the parties to proceed to trial on the merits before the same judge.

Moreover, the stipulation requirement is undesirable because it would eliminate an important enforcement tool. When an operator accepts the violations as issued and all agency findings are affirmed, the operator is on notice of expected future compliance, and a history of violations is established for future enforcement actions. Safety and health is not compromised because abatement has already occurred. Percentage-

reduction settlements therefore permit the efficient and effective resolution of multiple violations - at a time when the contest rate remains at about 25 percent of all citations issued[5] - while still advancing the purposes of the Mine Act's enforcement scheme.

Finally, the stipulation requirement is contrary to precedent. In the consent judgment context, the Second and D.C. Circuits have held that it is inappropriate for a judge to demand that the parties support proposed consent judgments with "'cold, hard, solid facts, established either by admissions or by trials' as to the truth of the allegations in the complaint as a condition for approving a consent decree." Citigroup II, 752 F.3d at 295 (quoting the district court); see also Microsoft, 56 F.3d at 1461 ("We think the district judge's criticism of Microsoft for declining to admit that the practices charged in the complaint actually violated the antitrust laws was . . . unjustified.").

In practice, the Commission has affirmatively approved numerous percentage-reduction settlements.[6] Indeed, as part of

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[5] Statistics Single Source Page - Citation/Violation Statistics, Mine Safety and Health Administration, http://www.msha.gov/stats/statistics.htm (last visited August 4, 2014).

[6] See, e.g., Mot. for Recon., Ex. C, Order to Modify Decision Approving Settlement, Genwal Resources, Inc., Docket No. 2008-1422-R et al. (Oct. 12, 2012); Mot. for Recon., Ex. D, Decision

the joint U.S. Department of Labor-Commission efforts to reduce the backlog of Mine Act cases, the Commission adopted a strategy of facilitating "global settlements" that "dispose of cases expeditiously" by resolving multiple citations contained in "more than one docket."[7] The concept of global settlements promoted in these reports - i.e., the efficient resolution of multiple dockets through settlement - is no less applicable to settlements like this one that expeditiously resolve multiple citations within the same docket.

For all of these reasons, the Commission should hold that the judge erred in rejecting a percentage-reduction settlement and by requiring citation-by-citation adjustments to the penalty criteria consistent with the parties' factual disputes.

III. THE JUDGE ERRED IN REJECTING THE PROPOSED SETTLEMENT

The proposed settlement agreement satisfies the consent judgment standard of review and should be approved.

Approving Settlement, Pine Ridge Coal Co., Docket No. WEVA 2009-71 et al. (Feb. 12, 2013).

[7] See Ex. E, Federal Mine Safety and Health Review Commission and U.S. Department of Labor, Final Report on the Targeted Caseload Backlog Reduction Project at 6-7 *available at* http://www.fmshrc.gov/ 4DOL_FMSHRC_report.pdf (reporting 17 global settlement conferences involving 99 cases and 854 citations in the fourth quarter of 2011); *see also* Ex. F, Case Backlog Reduction Project Joint Operating Plan at 14 (Sept. 7, 2010), available at http://www.fmshrc.gov/ jointoperatingplan.pdf (adopting "global settlement conferences" facilitated by Commission judges as a backlog-reduction strategy).

A. The Proposed Settlement is Legally Sound, Is Clear, and Resolves the Claims in the Penalty Petition

Under the consent judgment standard of review, the first factor for the Commission to evaluate is "the basic legality of the [settlement]." Citigroup II, 752 F.3d at 294-95. A proposed settlement agreement could fail to meet this standard if it presented a conflict with constitutional or statutory requirements outside of Section 110(k) itself. Citigroup II cited the example of a consent decree under the Prison Litigation Reform Act that was rendered impermissible by stricter requirements imposed by subsequent legislation. Id. (citing Benjamin v. Jacobson, 172 F.3d 144, 155-59 (2d Cir. 1999)). In the Mine Act context, this factor could, for example, require the Commission to evaluate the legality of holistic terms. See Madison Branch Mgmt, 17 FMSHRC 859, 867-68 (1995) (Chairman Jordan and Comm'r Marks) (Commission judges should review both monetary and non-monetary aspects of a proposed settlement agreement under Section 110(k)); see also Aracoma Coal Co., 32 FMSHRC 1639, 1644 (2010)(Chairman Jordan) (same).

In this case, the proposed settlement is legally sound. As discussed in Section II, Section 110(k) does not prohibit settlements, like the one proposed here, that are structured as an across-the-board percentage reduction of civil penalties.

Moreover, no other legal standards are offended by the proposed settlement.

The second factor for the Commission to consider is "whether the terms of the [settlement], including its enforcement mechanism, are clear." Citigroup II, 752 F.3d at 295; see also Microsoft, 56 F.3d at 1461-62 ("A district judge pondering a proposed consent decree understandably would and should pay special attention to the decree's clarity."). In other words, the terms of the proposed settlement should be articulated in such a manner that the parties, the Commission, and the public all understand the compromise reached.

In this case, the proposed settlement is clear. The Motion to Approve Settlement clearly describes the terms of the parties' compromise - there is no doubt about the penalties that American Coal has agreed to pay or the effect of the conceded violations on American Coal's history of violations. See Feb. 11, 2013 Order at 2 ("The only thing that the motion gets right is the math; each of the 32 alleged violations was reduced by 30 percent.").

The third factor for the Commission to consider is "whether the [settlement] reflects a resolution of the actual claims in the [petition for assessment of penalty]." Citigroup II, 752 F.3d at 295. If the parties were to omit a citation or order in the docket, or include a citation or order from another docket,

the Commission should identify such an error and require the parties to correct it. In this case, the proposed settlement resolves the all of the citations and orders in Docket No. 2011-13.

B. The Proposed Settlement is Not Tainted by Improper Collusion or Corruption

Under the Second Circuit's consent judgment standard of review, the fourth factor for the Commission to consider is "whether the [settlement] is tainted by improper collusion or corruption of some kind." Citigroup II, 752 F.3d 295. The Second Circuit did not elaborate on this factor in any way. The case citation that follows - to Kozlowksi v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989) - does not refer to an improper collusion or corruption case, but rather to a case articulating a three-part test for review of consent judgments that is similar to the overall test articulated by the Court.

To the extent that the fourth factor is an appropriate component of the Commission's inquiry under Section 110(k), it should be construed narrowly to apply only where a party or intervenor[8] who has not agreed to the settlement makes a credible showing of improper collusion or corruption between the

[8] Section 105(d) of the Mine Act authorizes the Commission to promulgate rules providing affected miners or representatives of affected miners an opportunity to participate as parties to hearings. 30 U.S.C. § 815(d). Commission Procedural Rule 4(b) establishes procedures for such intervention. 29 C.F.R. § 2700.4(b).

Secretary and the operator. Cf. United States v. Armstrong, 517 U.S. 456, 470 (1996) (to obtain discovery of selective prosecution claim, party claiming selective prosecution must make a "credible showing of different treatment of similarly situated persons"); see also Microsoft, 56 F.3d at 1459 (admonishing trial court to focus on review of the "decree itself" rather than the "actions or behavior" of agency officials absent a "credible showing of bad faith"); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made.") (citations omitted). Government agencies are entitled to a "presumption of regularity," and in the absence of "clear evidence to the contrary," courts presume that agency officials "have properly discharged their official duties." Sussman v. U.S. Marshals Service, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (internal citations and quotation marks omitted).

The proposed settlement in this case is not tainted by improper collusion or corruption. Under a "credible showing" requirement, a settlement for 70 percent of the penalties proposed would not be a valid reason to call the enforcement

agency's good faith into question. See Microsoft, 56 F.3d at 1461. ("Remedies which appear less than vigorous may well reflect an underlying weakness in the government's case, and for the [reviewing] judge to assume that the allegations in the complaint have been formally made out is quite unwarranted."). The judge had no reason to doubt the integrity of the negotiated settlement, and should have approved it.

CONCLUSION

The Secretary urges the Commission to reverse the administrative law judge and approve the proposed settlement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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