ORAL ARGUMENT NOT SCHEDULED

15-1391

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SMALL MINE DEVELOPMENT

Petitioner,

v.

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

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

SECRETARY OF LABOR'S RESPONSE BRIEF

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

(A) Parties and *Amici*: The parties appearing below before the Federal Mine Safety and Health Review Commission were the Secretary of Labor, Mine Safety and Health Administration ("MSHA"), and Small Mine Development. The parties appearing before this Court are the same two parties that appeared before the Commission, plus (as required by Fed. R. App. Pro. 15) the Commission.

(B) Rulings Under Review: References to the rulings at issue appear in the brief for Small Mine Development.

(C) Related Cases: This case has not previously been on review before this Court or any other court, and there are no related cases pending in this Court or any other court.

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GLOSSARY OF TERMS

ALJ	Administrative Law Judge
Commission	Federal Mine Safety and Health Review Commission
JA	Joint Appendix
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
SMD	Small Mine Development
S&S	Significant and Substantial

JURISDICTIONAL STATEMENT

The Secretary is satisfied with Small Mine Development's jurisdictional statement.

STATEMENT OF THE ISSUES

1. An underground metal mine operator generally must provide two separate escapeways to the surface, and must provide a method of refuge while a second opening to the surface is being developed. 30 C.F.R. § 57.11050(a). A mine is not required to provide a second escapeway during exploration or development of an ore body. *Id.* Is an exploration or development mine that chooses not to provide a second escapeway required to provide a method of refuge?

2. A violation of a safety standard is "significant and substantial" when the violation contributes to a hazard that is reasonably likely to result in serious injury. The ALJ found that the operator's violation contributed to a hazard, *i.e.*, miners having no alternative means of survival in the event of an emergency blocking the only escapeway, that was reasonably likely to result in serious injury. Does substantial evidence support the ALJ's finding?

PERTINENT STATUTES AND REGULATIONS

The pertinent regulation is set forth in the text below at page 4.

STATEMENT OF THE CASE

1. Statutory Framework

This case arises under the Federal Mine Safety and Health Act (the "Mine Act") of 1977, as amended. 30 U.S.C. §§ 801 *et seq*. The Mine Act, which was enacted to improve and promote safety and health in the Nation's mines, 30 U.S.C. § 801, authorizes the Secretary of Labor to promulgate mandatory health and safety standards for mines; to conduct regular inspections of mines; to issue citations and orders for violations of the Act, standards, and other regulations; and to propose civil monetary penalties for such violations. 30 U.S.C. §§ 811(a), 813(a), 814(a), 815(a), 820(a); *see generally Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-09 (1994). The Secretary administers and enforces the Mine Act through his agency, the Mine Safety and Health Administration ("MSHA"). 29 U.S.C. § 557a.

When an MSHA inspector determines that a mine operator has violated a mandatory safety or health standard, the inspector must issue a citation. 30 U.S.C. § 814(a). A violation is "significant and

substantial" ("S&S") when it "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). An S&S designation may serve as a predicate for enhanced enforcement in the form of a withdrawal order under Section 104(d) or (e) (30 U.S.C. § 814(d), (e)), and as the basis for an increased civil monetary penalty under Section 110(i) (30 U.S.C. § 820(i)). In this case, the S&S designation was a factor in the amount of the civil penalty assessed ($8,893), but no withdrawal order was issued. To establish that a violation is S&S, the Secretary must show that the violation contributes to a hazard that, if realized, would be "reasonably likely" to result in an injury-causing event in which the injury is reasonably serious. *E.g., Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013).

2. The Regulatory Framework

The standard in question, 30 C.F.R. § 57.11050, states in relevant part as follows:

> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface . . . . A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.
>
> (b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

30 C.F.R. § 57.11050.[1]

In 2007, MSHA issued guidance in the form of a Program Information Bulletin to clarify the requirements of Section 57.11050(a). Joint Appendix ("JA") 170-72. The Bulletin stated that "mine areas awaiting the establishment of a second escapeway or

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[1] A "refuge area" must be: (a) "[o]f fire-resistant construction, preferably in untimbered areas of the mine," (b) "[l]arge enough to accommodate readily the normal number of persons in the particular area of the mine," (c) "[c]onstructed so they can be made gastight," and (d) "[p]rovided with compressed air lines, waterlines, suitable handtools, and stopping materials." 30 C.F.R. § 57.11052.

areas of exploration or development must have at least one escapeway and one method of refuge if miners cannot reach the surface by two separate escapeways." JA 170 (emphasis added). The Bulletin emphasized that "the ability of underground miners to escape or find shelter in times of emergency is critical." *Id.* at 171. MSHA reissued the Bulletin in 2009, using virtually identical language. JA 173-75.[2]

3. Statement of the Facts

Newmont Gold owns and operates the Vista Mine, an underground gold mine near Winnemucca, Nevada, which began exploration and development operations in March 2011. JA 10-11, 22, 122. On June 7, 2011, an MSHA inspector went to the mine to conduct an inspection. JA 21. The mine then consisted of one exploration drift[3] that was approximately 16 feet wide and 16 feet tall. JA 22, 24. The drift itself was the mine's only escapeway, and there was no refuge chamber underground. JA 195.

Small Mine Development ("SMD"), the primary contractor on site,

[2] The only notable difference between the 2007 and 2009 Bulletins is the new contact person and contact information listed.

[3] The Secretary agrees with the definitions of technical mining terms provided in Small Mine Development's Brief at 4 n.2.

was performing the exploration and development work to determine whether the gold ore body was mineable. JA 22, 24. Three SMD miners worked at the mine on two 12-hour shifts, seven days a week. JA 25. In driving the drift, SMD miners were drilling, hauling explosives in and out of the mine, blasting, hauling mucking material to the surface, and bolting and shotcreting the ribs and roof. JA 24-25. Another contractor was diamond drilling for core samples at the mine. JA 24.

On June 7, 2011, the drift was approximately 1,000 feet deep and had been blasted past the fourth crosscut, which was not yet complete. JA 26. The first crosscut was "basically empty," the second crosscut had a diamond drill station in it, and the third crosscut was also "basically empty." JA 27. A refuge area could have been placed in the open crosscuts. JA 85. SMD had a refuge chamber waiting on the surface to be installed in the fourth cross-cut upon the latter's imminent completion. JA 26, 57-58, 123, 125-27; *see* JA 169 (enlarged mine map).

The inspector observed a forklift and a dump truck travel out of the mine portal. JA 27. He also observed numerous pieces of equipment

on the surface of the mine, including a dump truck, a fuel truck, a powder truck, and a mucker. JA 28. The majority of the equipment was diesel-powered. JA 23-29. All of the equipment except for the fuel truck was brought underground. JA 29, 141-42, 147. The equipment ranged in size from six to twelve feet wide. JA 29.

The inspector declined to go underground on June 7 because he believed that, absent a refuge, the mine was unsafe. JA 27. Based on his observations, the inspector issued a citation alleging a violation of 30 C.F.R. § 57.11050(b) consisting of having only one escapeway and not having a refuge chamber. JA 158. Before the hearing, however, the ALJ granted the Secretary's motion to amend the citation to allege, in the alternative, a violation of 30 C.F.R. § 57.11050(a). JA 303. The inspector designated the violation to be S&S. JA 158. He did so because, in the event of an accident blocking the escapeway, a miner's chances of survival would be "very limited" absent a refuge area. JA 32-34. He testified that a ground fall (*i.e.*, a roof or rib fall) could occur from drift drilling, core drilling, equipment vibration, or changes to the airflow from the ventilation system. JA 33. He further explained that if a ground fall blocked the one escapeway, the mine typically would lose

ventilation. JA 34. The inspector also explained that the large equipment coming in and out of the mine had a tendency to blow hydraulic lines and have electric fires. JA 33. Such a fire, the inspector testified, would render the one escapeway impassable. *Id.*

4. The ALJ's Decision

The ALJ found that the standard was ambiguous, and held that the Secretary's interpretation was entitled to full deference. JA 309-315. The ALJ accepted the Secretary's interpretation of Section 57.11050(a) as requiring mines during exploration and development to have either two escapeways or one escapeway and a method of refuge. *Id.* The ALJ also rejected SMD's assertion that the Secretary's interpretation was not entitled to deference because it had changed. JA 313. The ALJ found that the record contained no history of the Secretary changing his interpretation or taking inconsistent enforcement actions. *Id.* The ALJ also determined that a Program Information Bulletin issued by the Secretary before the citation in this case was issued was "entirely clear" as to the Secretary's interpretation. JA 313-14.

The ALJ also affirmed the inspector's S&S determination. JA 315-18. Applying the analytic framework established by the Commission

in *Sec'y of Labor v. Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2367 (2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013), for evaluating whether violations of emergency standards are S&S, the ALJ assumed a mine emergency during which the one escapeway was unavailable. JA 316-17.

Recognizing that miners worked at the mine around the clock, performing drilling, blasting, bolting, and shotcreting, and operating mobile equipment, the ALJ found that miners were routinely exposed to the mine atmosphere and its accompanying risks. JA 317. The ALJ credited the Secretary's witnesses' testimony that unexpected roof falls and equipment fires occurred in other nearby mines. *Id.* Given the size of the equipment, the ALJ found, a fire would leave miners little room to maneuver up the drift past the equipment and out of the mine. *Id.*

In the event of an emergency that blocked the single escapeway and compromised the ventilation, the ALJ found, miners would be at the mercy of the elements, including fire, smoke, lack of breathable air, and lack of water. *Id.* Under such circumstances, the ALJ found that without a method of refuge, miners' means of survival would be

extremely limited such that one would reasonably expect fatal injuries. *Id.* Accordingly, the ALJ affirmed the S&S designation and assessed a civil penalty of $8,893. JA 318.

5. The Commission's Decision

The Commission, by a 3-2 margin, affirmed the ALJ's decision. JA 320-39.

The majority held that Section 57.11050(a) is ambiguous because "it does not directly state whether mines are required to have a refuge chamber during the exploration or development of an ore body when only one escapeway will be developed." JA 322. The majority explained that "[i]t is unclear the extent to which each sentence should be read in conjunction with one another or how the general requirements of the first two sentences are impacted by the third sentence." *Id.* Recognizing that the standard does not explicitly require a refuge chamber whenever there is only one escapeway, the Commission held that "the standard, by virtue of its silence, leaves open th[at] question." *Id.*

The majority applied this Court's standard of review as stated in *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005), which requires deference to the Secretary's interpretation of his own

ambiguous regulations "unless it is plainly erroneous or inconsistent with the regulations." JA 324. The Secretary's interpretation of a regulation is reasonable, the Commission held, where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *Id.* (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995)). In determining the meaning of a regulation, the Commission stated that it "avoids focusing on an isolated phrase at the expense of the overall intent of the regulators and the safety objectives that the regulation is attempting to achieve." JA 324.

The Commission held that, upon examination of the standard as a whole, "it is reasonable to conclude that the drafters intended for miners to have more than one method of survival in case of an emergency." *Id.* In light of the importance the standard places on "providing duplicative means of survival in an emergency," the Commission explained, "it makes sense that the same protections be extended to miners who are engaged in exploration or development work, which carries with it many of the same dangers as production mining." *Id.* Additionally, the Commission held that the record lacked

sufficient evidence to support SMD's claim that the Secretary's interpretation departed from agency precedent and should have been subjected to notice-and-comment rulemaking. *Id.* Finally, the Commission held that even if the Secretary's interpretation departed from agency practice, notice-and-comment rulemaking was not required, and the Secretary published Bulletins in 2007 and 2009 stating his interpretation. *Id.* at 325. Accordingly, the Commission held that the Secretary's interpretation represented a "long standing, considered exercise of the Secretary's policy making authority" entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 462 (1997). JA 325.[4]

Turning to the S&S issue, the majority also affirmed the ALJ's S&S finding. JA 325-27. Because this case involved a violation of an emergency standard, the majority applied this Court's decision in *Cumberland Coal*, 717 at 1027-28, which held that the existence of an emergency must be assumed in evaluating whether a violation of an emergency standard is S&S. In the context of a roof fall or fire that impedes passage through the mine's sole escapeway, the Commission

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[4] The dissent argued that Section 57.11050(a) unambiguously exempts a one-escapeway exploratory or development mine from having to provide a method of refuge, and that even if the standard was ambiguous, the Secretary's interpretation was unreasonable. JA 327-35.

reasoned, the lack of a refuge chamber "clearly contributes to the hazards posed by miners not having a safe location to await rescue." JA 326. Without the fresh air and water supply and protection from fire and hazardous gases that a refuge chamber provides, the Commission concluded, "there [was] a reasonable likelihood that miners would suffer serious, potentially fatal injuries before they [could] be rescued." JA 326. Lastly, the majority rejected SMD's contention that other safety measures, such as fire suppression systems and emergency air and water tubing, precluded an S&S finding. *Id.* at 326-27. Accordingly, the Commission affirmed the ALJ's S&S finding.[5]

SUMMARY OF THE ARGUMENT

Each sentence in subsection (a) of Section 57.11050 must be read in the context of the other sentences in that subsection, the other subsection in that standard, and the overall regulatory framework of the Mine Act. Doing so melts away the plain meaning that SMD ascribes to subsection (a)'s second sentence and reveals the sentence's ambiguity. In light of that ambiguity, the Secretary's interpretation of

[5] The dissent argued that the inspector's S&S determination was speculative, and therefore not supported by substantial evidence. JA 335-36.

his own standard is controlling unless it is plainly erroneous or inconsistent with the regulation.

Section 57.11050 as a whole evinces an intent to ensure that miners always have an alternative means of survival in the event of an emergency. In some instances, that alternative must be a second escapeway; in other instances, that alternative must be a refuge. Section 57.11050, however, does not definitively answer the specific question before the Court: whether a mine operator that chooses not to provide a second escapeway during exploration and development must at least provide a refuge.

The Secretary's answer to that question, *i.e.*, that such an operator must provide a refuge, is consistent with the intent underlying Section 57.11050 as reflected by its full text and the regulatory history showing the drafters' intent. The Secretary's interpretation is also consistent with the Mine Act's express "first priority" of protecting the health and safety of the mining industry's "most precious resource—the miner." 30 U.S.C. § 801(a). SMD offers no rationale for why an exploration or development mine—and only such a mine—should be excused from providing its miners with the protection that miners in all other

underground metal and non-metal mines enjoy: an alternative means of survival in the event of an emergency. Indeed, SMD itself recognized the practical necessity of a refuge—if not its legal necessity—as evidenced by the fact that SMD had a refuge chamber on the surface awaiting installation. Thus, the Court should affirm the finding below that SMD violated Section 57.11050(a) by failing to provide a method of refuge.

The only remaining issue is whether that violation was "significant and substantial." That issue is easily resolved by a straightforward application of this Court's decision in *Cumberland Coal*, 717 F.3d at 1020, which yields the conclusion that substantial evidence supports the ALJ's S&S finding. SMD's failure to provide a refuge contributed to a hazard—the lack of an alternative means of survival in the event of an emergency—that was reasonably likely to result in a serious injury. Accordingly, the Court should also affirm the finding below that SMD's violation of Section 57.11050(a) was S&S.

ARGUMENT

I.

A ONE-ESCAPEWAY EXPLORATION OR DEVELOPMENT MINE MUST PROVIDE A METHOD OF REFUGE

A. The Standard of Review

This Court reviews the Commission's legal conclusions *de novo*, and reviews the Commission's factual findings for substantial evidence. *E.g., The American Coal Co. v. FMSHRC*, 796 F.3d 18, 23 (D.C. Cir. 2015); 30 U.S.C. § 816(a)(1).

Where, as here, the Secretary's interpretation of his own regulation is challenged, the plain meaning—if there is one—controls. *Sec'y of Labor v. Ohio Valley Coal Co.*, 359 F.3d 531, 534 (D.C. Cir. 2004); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (ambiguity is a prerequisite to deferring to an agency's interpretation of its own regulation). In determining whether a regulation's meaning is plain, the Court applies the traditional tools of construction, *i.e.*, the text, structure, purpose, and history of the regulation. *American Coal*, 796 F.3d at 26 ("the plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader

context of the statute as a whole"); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (the Court considers "the structure and purpose of the . . . regulations taken as a whole"); *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (the Court must defer to the Secretary's interpretation unless "an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation"). Moreover, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Where the regulation is silent or ambiguous, the Secretary's interpretation of his own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotes omitted); *Ohio Valley Coal Co.*, 359 F.3d at 534. The Secretary is "emphatically due this respect when [he] interprets [his] own regulations." *Sec'y of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989). Such deference to the Secretary is "most compelling" when the Secretary's interpretation "rests upon matters

peculiarly within the [Secretary's] field of expertise." *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.3d 318, 321 (D.C. Cir. 1990). Additionally, in the context of a remedial health and safety statute whose primary purpose is to protect miners, the Court is "all the more obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable." *American Coal Co.*, 796 F.3d at 24.

B. The Text of Section 57.11050(a) Is Ambiguous

The Court must read the words of Section 57.11050 "in their context and with a view to their place in the overall statutory scheme." *American Coal*, 796 F.3d at 23 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)).

Section 57.11050 consists of two subsections, the first of which contains three sentences. Subsection (a)'s first sentence requires every mine "to have two or more separate, properly maintained escapeways to the surface . . . ." 30 C.F.R. § 57.11050(a).[6] The second sentence states

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[6] In *Akzo Nobel Salt, Inc. v. FMSRHC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000), this Court held that the phrase "properly maintained" in the first sentence of Section 57.11050(a) was ambiguous inasmuch as it did not definitively answer "what the standard requires when only one escapeway is functional."

that "[a] method of refuge shall be provided while a second opening to the surface is being developed." *Id.* The third sentence states that a second escapeway is not required "during the exploration or development of an ore body." *Id.*

The second subsection, 30 C.F.R. § 57.11050(b), contains two sentences. The first sentence states that "[i]n addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within . . . one hour." *Id.* The second sentence requires such refuges to be "positioned so that the employee can reach one of them within 30 minutes . . . ." *Id.*

The question before the Court is whether a one-escapeway exploration or development mine must provide a method of refuge. The text of Section 57.11050(a), standing alone, does not definitively answer this question. The second sentence requires a method of refuge "while a second opening to the surface is being developed," but does not mention exploration and development mines. The third sentence exempts exploration and development mines from providing a second escapeway, but does not mention methods of refuge.

SMD concedes that absent the third sentence, Section 57.11050(a) would have required it to provide a refuge. SMD Br. at 21. SMD claims, however, that the third sentence excused it from that refuge requirement. SMD Br. at 21. The absence of any mention of a method of refuge in the third sentence, however, contradicts SMD's contention that its interpretation is compelled by the plain language of Section 57.11050(a). At best, SMD's interpretation depends on the same silence in Section 57.11050(a) on which the Secretary's interpretation depends.

Recognizing that the language is not so plain, SMD seeks clarification in the principle of *expressio unius est exclusio alterius*. That principle, however, "must be applied with great caution, since its application depends so much on context." Scalia & Garner, Reading Law: The Interpretation of Legal Texts 107 (2012). Justice Scalia and Professor Garner further cautioned that: "The doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *Id.*

Attempting to apply that principle, SMD falls into the trap against which Justice Scalia and Professor Garner cautioned. Quoting

Christensen, 529 U.S. at 583, for the proposition that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode," SMD asserts that subsection (a)'s second sentence plainly means that the refuge requirement applies *only* "when a second opening to the surface is being developed." SMD Br. at 20. Subsection (b), however, plainly refutes that claim by providing another circumstance in which a refuge is required, *i.e.*, whenever a miner cannot reach the surface through at least two separate escapeways within one hour. Additionally, contrary to SMD's contention Section 57.11050's "thing to be done" is to provide at least *two* means of survival during a mine emergency, and Section 57.11050's "mode" for doing that thing is either providing a second escapeway and/or, in certain circumstances, providing a method of refuge. The heading of the section confirms as much: "Escapeways and refuges." *See, e.g., Porter v. Nussle*, 534 U.S. 516, 527-28 (2002) (the heading of a section is a tool available for resolution of doubt about its meaning).

Despite having paid lip service to the principle that a regulation's meaning must be evaluated "in the context of the regulation as a whole," SMD Br. at 20, SMD ultimately relies on a single sentence

plucked from its place in Section 57.11050, which, in turn, SMD fails to read in the context of the overall regulatory framework of the Mine Act. SMD's overly literalistic reading of subsection (a)'s second sentence in isolation leads SMD to read subsection (a)'s third sentence to excuse that which Section 57.11050 as a whole requires, *i.e.*, alternative means of survival in the event of an emergency.[7] SMD's interpretation is all the more illogical because the overriding purpose of the Mine Act is to protect the safety and health of miners, and SMD fails to identify any countervailing consideration that could conceivably weigh in favor of its interpretation. SMD's interpretation has nothing to commend it other than a slavish adherence to a type of literalistic interpretation that this Court has rejected. *See, e.g., Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 404-05 (D.C. Cir. 1976) (rejecting a "strict literal reading" that would "greatly impair the statute's effectiveness as a tool for bringing about improvements in mine safety and health conditions"). SMD misses the

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[7] SMD's contention that the Secretary's interpretation renders Section 57.11050(a)'s third sentence superfluous is plainly erroneous. But for the third sentence, SMD would have been obligated not only to provide a method of refuge but also to develop a second opening to the surface. Indeed, absent the third sentence, the issue before this Court could not even have arisen.

forest for the leaves. *See American Coal*, 796 F.3d at 23 ("[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context").

Accordingly, Section 57.11050(a) is ambiguous inasmuch as it does not definitively answer the question of whether an exploratory or development mine that chooses not to provide a second escapeway must at least provide a method of refuge. The Secretary's interpretation, therefore, is controlling unless plainly erroneous or inconsistent with standard's language. *Auer*, 519 U.S. at 461.

C. The Secretary's Interpretation is Consistent With Section 57.11050's Language, Structure, Purpose and History as a Whole

As stated above, the Court must read the words of Section 57.11050 "in their context and with a view to their place in the overall statutory scheme." *American Coal*, 796 F.3d at 23 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132-33). Thus, subsection (a) must, at the very least, be read together with subsection (b). The two subsections read together demonstrate an intent that mine operators always provide their miners with alternative means of survival during a mine emergency in the event that: (1) miners cannot exit via the one and only escapeway because it has been compromised, blocked, or destroyed, or

(2) miners cannot reach the surface via at least two separate escapeways within 60 minutes travel time from their workplaces. The two subsections read together also provide two methods by which such alternative means of survival may be provided: (1) a second escapeway, which is generally required; and (2) a method of refuge, which is permitted in lieu of a second escapeway in certain circumstances, and which is required in addition to a second escapeway in other circumstances.

The logic of subsection (a)'s requirement of a refuge "while a second opening to the surface is being developed," like subsection (b)'s requirement of a refuge when miners cannot reach two existing escapeways within one hour, applies with equal force to a one-escapeway exploration or development mine. Exploration and development are preliminary steps which may or may not lead to a producing mine. Exempting such a mine from the two-escapeway requirement makes sense because it is uncertain whether production mining will ever occur. In contrast, exempting such a mine from the refuge requirement would frustrate the purpose of Section 57.11050 by leaving miners without an alternative means of survival if the one and

only escapeway was destroyed, blocked, or compromised. Reading the two subsections together, therefore, leads to the interpretation that a one-escapeway exploration and development mine must provide a method of refuge.

SMD acknowledges that there is nothing about an exploration or development mine that inherently precludes it from providing a refuge. On the contrary, SMD concedes that such a mine *must* provide a refuge if it chooses to develop a second opening to the surface. *See* SMD Br. at 21. Indeed, SMD itself had a refuge chamber on the surface awaiting installation in the fourth cross-cut at the time the citation was issued; and SMD promptly installed the refuge chamber in the third cross-cut in order to abate the cited violation.

Further, under SMD's interpretation, an exploration and development mine that chooses not to provide a second escapeway would have no obligation to provide a method of refuge, while an exploration and development mine that chooses to improve safety by providing a second escapeway would incur the additional obligation to provide a method of refuge until the second escapeway was available. SMD's interpretation, therefore, not only treats similarly situated mines differently for no

apparent reason, but ensures that no good deed would go unpunished. Such an interpretation should be rejected. *See NRDC v. EPA*, 907 F.2d 1146, 1156 (D.C. Cir. 1990) (rejecting as an "anomaly" an interpretation that would have treated equally hazardous substances differently); *UMWA v. FMSHRC*, 651 F.2d 615, 625-26 (D.C. Cir. 1982) (rejecting as "paradoxical" an interpretation that would have treated similar mine inspections differently).

Additionally, in contrast to SMD's interpretation, the Secretary's interpretation is consistent with the legislative history of the Mine Act. The Senate Report accompanying the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, recognized the importance of a second escapeway in the event the primary escapeway was cut off during an emergency, citing a March 1968 accident in which 21 salt miners died "because a second escapeway was not provided." S. Rep. No. 91-411, 91st Cong., 1st Sess. 83 (1969), *reprinted in* 94th Cong., 1st Sess., Sen. Subcommittee on Labor, Committee on Labor and Public Welfare, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975). Although having a second escapeway is preferred, a refuge area serves the same purpose: it

provides an alternative means of survival should the primary escapeway be compromised.

Any remaining doubt is resolved by the regulatory history of Section 57.11050. As originally promulgated in 1970 by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. § 725(a) (1976)), the standard consisted of a single sentence:

> Every mine shall have two separate properly maintained escapeways to the surface . . . or a method of refuge shall be provided when only one opening to the surface is possible.

30 C.F.R. § 57.11-50 (35 Fed. Reg. 3675 (Feb. 25, 1970)). In 1971, an Advisory Committee recommended revising the standard. The Committee's proposal comprised two sentences, the first of which contained the two-escapeway requirement, and the second of which was identical to the current rule's second sentence: "A method of refuge shall be provided while a second opening to the surface is being developed." JA 248.

The Advisory Committee explained that the proposed change was intended to address the problem of operators who were using refuges "in place of a second escapeway." *Id.* The Committee recognized that "in some circumstances such as shaft *development and exploration*, only

one opening to the surface is possible." *Id.* (emphasis added). The Committee concluded that the proposed revision would clarify that a refuge was intended to be used only in situations where a second escapeway was impossible, and specifically identified exploration and development as an example of such a situation: "a refuge chamber cannot be used as a substitute for a second opening to the surface except when a second opening is not possible *such as during exploration or development work*." *Id.* (emphasis added). The Secretary of the Interior proposed the rule as recommended by the Committee. 36 Fed. Reg. 24044, 24045 (Dec. 17, 1971).

While the proposed rule was pending, the Committee issued a Report of Actions in 1972 further explaining that the proposed rule "[was] better than the [then-existing] standard, because it recognize[d] that the refuge area should serve as a temporary expedient." JA 252-53. The Committee further stated that "[i]t is universally accepted that there be available for reasons of safety more than one method of access and egress from any underground mine operation where it is possible to meet the requirement." JA 253. Thus, far from intending to excuse one-escapeway exploration and development mines from the refuge

requirement, the drafters expressly recognized such mines as requiring a refuge as a necessary alternative until the development of a second escapeway became possible.

The proposal was still pending when, in 1977, Congress passed the Mine Act, which combined the previously separate coal and metal/nonmetal mine statutes and transferred administration and enforcement to the Secretary of Labor. That same year, the Secretary of Labor proposed and promulgated Section 57.11050 as currently written. 42 Fed. Reg. 5546 (Jan. 28, 1977) (proposed); 42 Fed. Reg. 57038 (Oct. 31, 1977) (final). The final rule added a new third sentence—exempting exploration and development mines from the two-escapeway requirement—thereby making explicit the Advisory Committee's intent in its original proposal. The final rule also added the language now contained in subsection (b).[8] Nothing in the new third sentence or the language that later became subsection (b) can reasonably be read as

[8] The first two sentences of the final rule contained minor wording changes—irrelevant here—from the Committee's earlier proposal. The division of Section 57.11050 into two subsections occurred in during a recodification of existing standards in 1985, without any change to the language. 50 Fed. Reg. 4048, 4110-11 (Jan. 29, 1985).

detracting from the Committee's expressed intent that one-escapeway exploration and development mines must provide a method of refuge.

With the benefit of hindsight, SMD asserts that when the Secretary proposed the third sentence in 1977, he could have eliminated any ambiguity by proposing "language that mandated a method of refuge in exploration and development mining with one escapeway, specifically separated the method of refuge requirement from the requirement to construct a second escapeway, or simply left the standard as it was prior to 1977." *See* SMD Br. at 26. In 1977, however, the Secretary did not have the luxury of hindsight—a fact which illustrates one reason why courts do not require an agency's interpretation of an ambiguous regulation to be the best or the most natural interpretation, but rather defer to the agency's reasonable interpretation. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146-47 (D.C. Cir. 1989).

Further, when the Secretary promulgated the current rule, he was well aware that Section 101(a)(9) of the Mine Act prohibited him from promulgating standards that "reduce[d] the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. §

811(a)(9); *see UMWA v. Dole*, 870 F.2d 662, 666 (D.C. Cir. 1989) ("[t]he dictates of the no-less protection rule are plainly among the objectives of the Act"). In light of SMD's concession that, absent subsection (a)'s third sentence, SMD would have been required to install a refuge, SMD Br. at 21, SMD's claim that the third sentence undoes that requirement flies in the face of Section 101(a)(9).

That same concession also undermines SMD's contention that subsection (a)'s silence regarding the placement of a refuge—a silence that pre-existed the addition of the third sentence—somehow refutes the Secretary's interpretation. *See* SMD Br. at 31-33. In any event, the placement of the refuge is not in question before the Court; the only issue before the Court is whether SMD had to provide a refuge.

SMD claims that the Secretary's interpretation is absurd because a miner could normally have exited the mine in 10 minutes, and subsection (b)—and/or the Secretary's Bulletins—require that miners be able to reach a refuge within 30 minutes. *See* SMD Br. at 31-33. SMD, however, overlooks the very scenario that Section 57.11050 was intended to address: the unavailability of the single or primary escapeway. The fact that a miner could normally exit the mine in 10

minutes would be of no help to that miner if the only exit is blocked—a scenario that is just as possible when the drift is 1,000 feet deep as when the drift is 3,000 feet deep or more. Even if a 30-minute time limit applied to subsection (a)'s refuge requirement, common sense dictates less than 30 minutes is even better. A refuge must be inside a mine for it to be of any use to a miner. That a miner can normally exit a mine in 10 minutes does not negate the need for a refuge, but rather means that in order for the refuge to be of any use to the miner, the refuge must be placed less than 10 minutes away from the miner. Doing so would be entirely consistent with, and serve the purpose of, Section 57.11050 and the Bulletin.

Finally, SMD's reduction of the Secretary's argument to its logical extreme is unpersuasive. SMD claims that the Secretary's interpretation would require installment of a refuge as soon as a drift extends beyond the portal. *See* SMD Br. at 32. By the same token, SMD's interpretation would permit it to operate without a refuge even if its drift extended 4,000 feet deep and a miner would normally need 40 minutes or more to exit. Certainly some common sense must be used in applying even the clearest regulations, and doing so in either of these

extreme scenarios could reasonably resolve both of those scenarios. Neither of those extreme scenarios, however, is before the Court. Rather, the Vista Mine was a garden-variety exploration and development mine.

D. The Secretary's Interpretation of Section 57.11050 Has Been Consistent and Reflects the Secretary's Fair and Considered Judgment

SMD asserts that the Secretary's interpretation of Section 57.11050(a) "conflicts with 30 years of enforcement history." *See* SMD Br. at 29. On the contrary, the ALJ found that there was no evidence of inconsistent enforcement, JA 313, SMD does not challenge the ALJ's factual finding, and in any event, inconsistent enforcement is not a defense. *See* SMD Br. at 29-30 (failing to mention the ALJ's contrary finding); *see Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1265-66 (D.C. Cir. 2016) (inconsistent enforcement of a regulation does not negate liability for a violation, although it may reduce operator's negligence and the amount of the penalty assessed).

Moreover, the regulatory history recited above shows that Section 57.11050 has been interpreted consistently since its inception. Even if the Secretary did not vigorously enforce that interpretation before 2007,

the Secretary was not estopped from enforcing it in 2007 and subsequently. *Mainline Rock and Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012).

Even if the Bulletin reflected a change in interpretation, an agency is entitled to change its interpretation of a regulation. *Nat'l Cable and Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("An initial agency interpretation is not instantly carved in stone . . . . [T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis"). By publishing the Bulletin before enforcing the interpretation contained in it, the Secretary did exactly what he was supposed to do in order to provide the mining community with fair notice. *See, e.g., Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) (the regulated community must have fair notice of what a regulation requires).[9]

Similarly, in light of the regulatory history discussed above, the Bulletins issued in 2007 and 2009, and the Secretary's undisputedly consistent enforcement of the refuge requirement since 2007, SMD's

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[9] The Secretary privately notified SMD of his interpretation in 2006. JA 105.

assertion that the Secretary's interpretation does not reflect his "fair and considered judgment on the matter in question" is unfounded. *See* SMD Br. at 29-30.

Accordingly, the Secretary urges the Court to hold that Section 57.11050(a) requires a one-escapeway exploration or development mine to provide a method of refuge—and therefore to affirm the Commission's holding that SMD violated Section 57.11050(a).

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDING THAT SMD's VIOLATION OF SECTION 57.11050(a) WAS "SIGNIFICANT AND SUBSTANTIAL"

This Court has recognized and applied the Commission's four-part test for determining whether a violation is S&S. *Cumberland Coal*, 717 F.3d at 1024. Under that test, the Secretary must prove: (1) a violation of a mandatory safety or health standard; (2) a discrete safety hazard—*i.e.*, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be reasonably serious. *Id.* Additionally, this Court has deferred to the Secretary's interpretation of Section 104(d) of the Mine Act (30 U.S.C. § 814(d))—

the source of the term "S&S"—that in evaluating whether a violation of an emergency standard is S&S, the occurrence of the emergency must be assumed. *Cumberland Coal*, 717 F.3d at 1025-26. Therefore, analysis of whether a violation of Section 57.11050(a)'s refuge requirement was S&S must proceed from the premise that the only existing escapeway was unavailable.

SMD's argument consists primarily of various challenges to that premise and is therefore irrelevant. *See* SMD Br. at 35-40. For example, SMD's reliance on *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016)—a case that did not involve an emergency standard—is misplaced. *See* SMD Br. at 37. SMD cites *Knox Creek* for the proposition that, under the second prong of the S&S test, the Secretary must show "that risk of harm was 'at least somewhat likely.'" SMD Br. at 37 (quoting *Knox Creek*, 811 F.3d at 162). The court in *Knox Creek* actually stated that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." 811 F.3d at 162. SMD's argument, however, is not about the contribution of the violation (no refuge) to the hazard (lack of alternative means of survival in the event of a mine emergency), but

rather asserts the unlikelihood of an emergency in the first instance. SMD Br. at 37-38. That argument is foreclosed by *Cumberland Coal*, 717 F.3d at 1027, which the court in *Knox Creek* cited as consistent with its analysis of the second prong of the S&S test. *Knox Creek*, 811 F.3d at 164.

Likewise, SMD's contention that it had fire suppression and roof support systems in place is also irrelevant. *Cumberland Coal*, 717 F.3d at 1029 (redundant safety measures are irrelevant to the S&S inquiry); *accord Knox Creek*, 811 F.3d at 162; *Buck Creek Coal, Inc. v. Sec'y of Labor*, 52 F.3d 133, 136 (7th Cir. 1995).

SMD incorrectly contends that the safety hazard identified by the ALJ—"having no alternative means of survival in the event of an emergency that blocks the single escapeway"—was not the hazard identified in MSHA's citation. *See* SMD Br. at 36-37. On the contrary, the citation stated exactly that:

> There was no secondary escapeway in place or provided for Miners to access *in the event of a rib or back failure blocking access to the portal exit*. In Mines with only one escapeway (those developing a second escapeway or in exploration or development), Miners *must have access to a refuge area*.

JA at 158 (emphases added).

Finally, the fact that the MSHA inspector declined to enter the mine upon learning that there was no refuge inside does not detract from the inspector's S&S determination. *See* SMD Br. at 36. On the contrary, the fact that the inspector refused to enter the mine based on his belief that the mine was too dangerous strongly supports the S&S designation. *See generally Buck Creek*, 52 F.3d at 135 (MSHA inspector's opinion sufficed to support "the common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present").

Accordingly, the Secretary urges the Court to affirm the Commission's holding that SMD's violation of Section 57.11050(a) was S&S.

CONCLUSION

For the reasons discussed above, the Secretary urges the Court to affirm the Commission's decision holding that SMD violated 30 C.F.R. § 57.11050(a) and that the violation was "significant and substantial."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), and D.C. Cir. Rules 28(c) and 32(a)(1), I certify that this Brief for the Secretary of Labor contains 7,485 words as determined by Word, the processing system used to prepare the brief, and was prepared in proportional Century 14 point font.

s/ Edward Waldman
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CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing Response Brief with the Court's Clerk on April 6, 2016, by using the Court's CM/ECF electronic filing system, which will send notice to the following counsel of record via the CM/ECF system:

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