ORAL ARGUMENT NOT SCHEDULED
Cases No. 14-1285 and 14-1286

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROSEBUD MINING COMPANY and PARKWOOD RESOURCES, INC.,
Petitioners, Case No. 14-1285, and

CANYON FUEL COMPANY, LLC, MOUNTAIN COAL COMPANY, LLC,
BOWIE RESOURCES, LLC, and PEABODY SAGE CREEK MINING, LLC,
Petitioners, Case No. 14-1286,

v.

MINE SAFETY AND HEALTH ADMINISTRATION ("MSHA") and
JOSEPH A. MAIN, ASSISTANT SECRETARY OF LABOR FOR MINE
SAFETY AND HEALTH, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Review of Decisions of the
Assistant Secretary of Labor for Mine Safety and Health

CONSOLIDATED BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), I hereby certify the following:

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Assistant Secretary of Labor for Mine Safety and Health, United States Department of Labor ("the Assistant Secretary"), and in this Court are listed in the brief for the Petitioners; however, the Petitioners erroneously included the Secretary of Labor as a Respondent (*see* P. Br. ii).

(B) Rulings under Review. References to the rulings at issue appear in the brief for the Petitioners; however, for *In re Parkwood and Rosebud*, the Petitioners incorrectly referenced the date of the Assistant Secretary's November 14, 2013, decision and the docket number 2011-MSA-00012 (*see* P. Br. ii). No official citations to the rulings exist, but the rulings are reproduced in the Joint Appendix as follows:

In re Parkwood and Rosebud Page

(C) Related Cases. These cases have not previously been before this Court or any other Court, and no related cases are currently pending in this Court or any other Court. *In re Consolidation Coal Company et al.* (2013-MSA-00018 etc.), a case involving similar issues but different mine operators at other mines, is on stay before the Assistant Secretary pending resolution of these cases, and a number of cases involving similar issues but different mine operators at other mines are pending before Administrative Law Judges.

July 10, 2015

/s/Lynne B. Dunbar
LYNNE B. DUNBAR
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* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES AND CODES

MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Administrator	Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration ("MSHA"), United States Department of Labor
ALJ or judge	Administrative Law Judge, Office of Administrative Law Judges, United States Department of Labor
APA	Administrative Procedure Act
Assistant Secretary	Assistant Secretary of Labor for Mine Safety and Health, United States Department of Labor
CFTC	Commodity Futures Trading Commission
GX	Government Exhibit
JA	Joint Appendix
JX	Joint Exhibit
Mine Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration ("MSHA"), United States Department of Labor
MX	MSHA Exhibit
P. Br.	Brief for the Petitioners
Petitioners or mine operators or operators	Rosebud Mining Company, Parkwood Resources, Inc., Canyon Fuel Company, LLC, Mountain Coal Company, LLC, Bowie Resources, LLC, and Peabody Sage Creek Mining, LLC
PDO	Proposed decision and order
PX	Petitioner Exhibit

RBX	Rosebud Exhibit
Respondents	Mine Safety and Health Administration (“MSHA”) and Joseph A. Main, Assistant Secretary of Labor for Mine Safety and Health, United States Department of Labor
SA	Supplemental Appendix
Secretary	Secretary of Labor, United States Department of Labor

STATEMENT OF JURISDICTION

This Court has jurisdiction under Section 101(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 811(d), to review the promulgation by the Secretary of Labor ("the Secretary"), acting through the Assistant Secretary of Labor for Mine Safety and Health, United States Department of Labor ("the Assistant Secretary"), of mandatory safety standards. In this case, the Assistant Secretary promulgated decisions granting petitions for modification of the application of mandatory safety standards to the mines in question. The Assistant Secretary had jurisdiction over the matter under Section 101(c) of the Mine Act, 30 U.S.C. § 811(c), which authorizes the Secretary, acting through the Assistant Secretary, to modify the application of any mandatory safety standard to a mine if specified conditions are met. The Assistant Secretary's decisions, which constitute final agency actions for purposes of judicial review,[1] were issued on November 24, 2014, and the Petitioners timely filed petitions for review with this Court on December 15, 2014.[2]

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[1] The Secretary's rules of practice for petitions for modification of mandatory safety standards state, "Only a decision by the Assistant Secretary shall be deemed final agency action for purposes of judicial review." 30 C.F.R. § 44.51.

[2] In correction of the facts included in the Petitioners' jurisdictional statement (P. Br. 1), the *In re Parkwood and Rosebud* cases involved 15 underground coal mines and, in the *In re Canyon Fuel et al.* cases, Bowie Resources, LLC filed one

STATEMENT OF THE ISSUE

Whether the Assistant Secretary's decisions granting the petitions for modification with added conditions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

PERTINENT STATUTES AND REGULATIONS

The text of pertinent statutes and regulations are set forth in the addendum filed concurrently with this brief.

STATEMENT OF THE CASE

These matters are before the Court on the petitions for review of Rosebud Mining Company, Parkwood Resources, Inc., Canyon Fuel Company, LLC, Mountain Coal Company, LLC, Bowie Resources, LLC, and Peabody Sage Creek Mining, LLC ("the Petitioners" or "the mine operators" or "the operators").

A. Statutory and Regulatory Framework

Section 101(c) of the Mine Act, 30 U.S.C. § 811(c), authorizes the Secretary, acting through the Assistant Secretary, to modify the application of any mandatory safety standard to a mine "if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will

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petition for modification for its underground coal mine. *See* Statement of the Case, *infra*.

result in a diminution of safety to the miners in such mine." Title 30 of the Code of Federal Regulations Part 44, 30 C.F.R. §§44.1 – 44.53, sets forth the Secretary's rules of practice for petitions for modification of mandatory safety standards. The rules provide, *inter alia*, for:

- the filing of a petition for modification with MSHA, MSHA's publishing of a notice of the petition for modification in the Federal Register, MSHA's investigation of the merits of the petition for modification, and the MSHA Administrator's issuance of a proposed decision and order granting or denying the petition for modification;
- the filing of a request for hearing before an Administrative Law Judge, hearing procedures, and the Administrative Law Judge's issuance of a decision; and
- the filing of a notice of appeal and a statement of objections before the Assistant Secretary, the filing of a responding statement before the Assistant Secretary, and the Assistant Secretary's issuance of a decision.

Section 44.35 of the Secretary's rules authorizes the Assistant Secretary to "affirm, modify, or set aside, in whole or [in] part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge" based on the entire record of the proceedings together with the statements of the parties, and requires the Assistant Secretary to state the reasons for his action. 30

C.F.R. § 44.35. Section 44.35 also allows the Assistant Secretary to remand the matter to the judge for additional legal or factual determinations. *Id.*

B. The Facts

The mine operators filed several petitions for modification of the application of the Mine Safety and Health Administration's ("MSHA's") mandatory safety standards at 30 C.F.R. §§ 75.500(d), 75.507-1(a), and 75.1002(a)[3] involving permissibility requirements for the use of electrical equipment in underground coal mines. "Permissible" is defined, in part, as:

> *Permissible*. (1) As applied to electric face equipment, all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, *to assure that such equipment will not cause a mine explosion or mine fire*, and the

[3] Section 75.500, entitled "Permissible electric equipment," states: "(d) All other electric face equipment which is taken into or used inby the last crosscut of any coal mine, except a coal mine referred to in § 75.501, which has not been classified under any provision of law as a gassy mine prior to March 30, 1970, shall be permissible."

Section 75.507-1, entitled "Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements," states: "(a) All electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section."

Section 75.1002, entitled "Installation of electric equipment and conductors; permissibility," states "(a) Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar workings or longwall faces."

> other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment. . . .
>
> (2) As applied to equipment other than permissible electric face equipment: (i) Equipment used in the operation of a coal mine to which an approval plate, label, or other device is attached as authorized by the Secretary and which meets specifications which are prescribed by the Secretary for the construction and maintenance of such equipment and are designed *to assure that such equipment will not cause a mine explosion or a mine fire*. (ii) The manner of use of equipment means the manner of use prescribed by the Secretary.

30 C.F.R. § 75.2 (emphases added). "Permissible equipment" is defined, in part, as:

> *Permissible equipment* means a completely assembled electrical machine or accessory for which a formal approval has been issued, as authorized by the . . . Assistant Secretary under the Federal Mine Safety and Health Act of 1977 . . . .

30 C.F.R. § 18.2.

Operators Parkwood and Rosebud filed 30 petitions for modification of the application of two mandatory safety standards for underground coal mines -- Section 75.500(d) and Section 75.507-1(a) -- to allow the use of non-permissible battery-powered (electronic) surveying equipment in or inby the last crosscut and in return air. Parkwood sought modifications for the Cherry Tree Mine,[4] and Rosebud sought modifications for 14 mines: Beaver Valley Mine, Brush Valley Mine, Clementine Mine, Darmac No. 2 Mine, Dutch Run Mine, Heilwood Mine,

[4] MSHA Dockets No. M-2008-054-C (30 C.F.R. § 75.500(d)) and M-2008-055-C (30 C.F.R. § 75.507-1(a)) are the lead dockets in *In re Parkwood and Rosebud* and these petitions for modification are reproduced in the Joint Appendix at JA292 and JA686.

Little Toby Mine, Logansport Mine, Lowry Mine, Mine 78, Penfield Mine, Tom's Run Mine, Tracy Lynne Mine, and Twin Rocks Mine.[5]

Operators Canyon Fuel and Mountain Coal filed 12 petitions for modification of the application of three mandatory safety standards for underground coal mines -- Section 75.500(d), Section 75.507-1(a), and Section 75.1002(a) -- to allow the use of non-permissible battery-powered (electronic) surveying equipment in or inby the last crosscut, in return air, and within 150 feet of pillar workings or longwall faces. Canyon Fuel sought modifications for the Sufco Mine, Skyline Mine #3, and Dugout Canyon Mine,[6] and Mountain Coal sought modifications for the West Elk Mine.[7]

In addition, operator Bowie Resources filed a petition for modification of the application of Section 75.500(d) to allow the use of non-permissible battery-powered (electronic) surveying equipment in or inby the last crosscut for the

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[5] MSHA Dockets No. M-2009-001-C and M-2009-002-C.

[6] MSHA Dockets No. M-2009-025-C, M-2009-026-C, M-2009-027-C, M-2009-031-C, M-2009-032-C, M-2009-033-C, M-2009-034-C, M-2009-035-C, and M-2009-036-C. MSHA Dockets M-2009-025-C (30 C.F.R. § 75.500(d)), M-2009-026-C (30 C.F.R. § 75.507-1(a)), and M-2009-027-C (30 C.F.R. § 75.1002(a)) are the lead dockets in *In re Canyon Fuel et al.* and these petitions for modification are reproduced in the Joint Appendix at JA305, JA930, and JA935.

[7] MSHA Dockets No. M-2009-028-C, M-2009-029-C, and M-2009-030-C.

Bowie No. 2 Mine,[8] and operator Peabody Sage Creek filed three petitions for modification of the application of Section 75.500(d), Section 75.507-1(a), and Section 75.1002(a) to allow the use of non-permissible battery-powered (electronic) surveying equipment in or inby the last crosscut, in return air, and within 150 feet of pillar workings or longwall faces for the Peabody Sage Creek Mine.[9]

In the petitions for modification, the operators asserted that application of the standards results in a diminution of safety for miners and that the operators' proposed alternative method of compliance will provide the same measure of protection to miners as the standards. *E.g.*, JA293, JA687, JA306, JA931, JA936. The operators proposed a number of protections for using the non-permissible battery-powered (electronic) surveying equipment and, in *In re Parkwood and Rosebud*, the operator included the proposal that "[n]on-permissible surveying equipment shall not be used where float coal dust is in suspension." JA294-95, JA688-89, JA306-08, JA931-33, JA936-38. In *In re Canyon Fuel et al.*, the operator included the proposal that "[n]on-permissible electronic surveying equipment may be used when equivalent permissible electronic surveying equipment is not available." JA306, JA931, JA936.

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[8] MSHA Docket No. M-2011-044-C.

[9] MSHA Dockets No. M-2012-056-C, M-2012-057-C, and M-2012-058-C.

1. The Administrator's Proposed Decisions and Orders Denying the Petitions for Modification

Following investigations of the merits of the petitions for modification by MSHA district personnel, the MSHA Administrator for Coal Mine Safety and Health ("the Administrator") issued proposed decisions and orders ("PDOs") denying the petitions for modification on the ground that application of the standards does not result in a diminution of safety for miners and that the proposed alternative method will not provide the same measure of protection to miners as the standards.[10] The Administrator determined that the working sections and all return air courses in the mines would be directly affected by the petitions for modification and that, although only surveyors would use the proposed non-permissible equipment, all miners would be affected by any modification. JA299, JA792, JA313, JA984, JA999.

Regarding his finding that application of the standards does not result in a diminution of safety for miners, the Administrator explained that MSHA determined that levels of accuracy fully capable of protecting miners can be achieved using optical non-electronic surveying equipment and that such

[10] *E.g.*, JA296 (JX-1), JA782 (JX-2), JA789 (JX-3), JA799 (JX-4) (investigative reports and proposed decisions and orders in *In re Parkwood and Rosebud*, M-2008-054-C and M-2008-055-C); JA310 (JX-1), JA975 (JX-2), JA981 (JX-3), JA990 (JX-4), JA996 (JX-5), JA1007 (JX-6) (investigative reports and proposed decisions and orders in *In re Canyon Fuel et al.*, M-2009-025-C, M-2009-026-C, and M-2009-027-C).

equipment can achieve even higher levels of accuracy through repetition of measurements and statistical applications. JA300, JA793, JA313, JA984, JA999. Additionally, MSHA determined that, when using high-accuracy total stations (non-permissible electronic surveying equipment), the equipment need not be taken within 150 feet of the pillar workings or longwall faces, into return air, or inby the last crosscut if the surveying is carefully coordinated with the mining activity. *Id.*

Regarding his finding that the operators' proposed alternative method will not provide the same measure of protection to miners as the standards, the Administrator explained that the electronic surveying equipment is neither permissible nor intrinsically safe[11] and that the proposed protections in the petitions for modification do not compensate for the hazards created by using non-permissible equipment. JA300, JA793-94, JA314, JA985, JA1000. The Administrator explained that MSHA's requirements for permissible or intrinsically safe equipment are intended to prevent mine explosions resulting from unpredicted methane accumulations, methane outbursts, or float coal dust in suspension by

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[11] "Intrinsically safe" is defined as:

> *Instrinsically safe* means incapable of releasing enough electrical or thermal energy under normal or abnormal conditions to cause ignition of a flammable mixture of methane or natural gas and air of the most easily ignitable composition.

30 C.F.R. § 75.2.

removing a possible ignition source. *Id.* The Administrator cited safety warnings in the electronic surveying equipment instruction manuals warning against using the equipment in coal mines and in areas that produce explosive gas. JA300-01, JA794, JA314-15, JA985-86, JA1000-01; *see* JA805 (GX-1), JA807 (GX-2), JA810 (GX-3), JA815 (GX-4) (GTS-210 series and GTS-220 series electronic total stations, DT104L digital theodolite, and DT200/200L series digital theodolites manufactured by Topcon Corporation ("Topcon"), and SA1 (MX-10) (GPT-3100W series electronic total stations manufactured by Topcon).[12] He found that the operators' mines have a history of producing methane gas and that use of the non-permissible equipment would create a safety hazard. *Id.* He found that most of the proposed protections would provide little or no additional protection to offset the hazards created by using non-permissible equipment. JA300-02, JA794-96, JA314-16, JA985-87, JA1000-02.

With regard to the operator's proposal in *In re Parkwood and Rosebud* that non-permissible electronic surveying equipment shall not be used where float coal dust is in suspension, the Administrator found that the proposal is not possible to implement, explaining:

> Float coal dust is defined in 30 C.F.R. § 75.400-1(b) as "coal dust consisting of particles of coal that can pass a No. 200 sieve." MSHA

[12] Two exhibits that were designated for inclusion in the Joint Appendix were omitted so the exhibits are included in the Supplemental Appendix ("SA") filed concurrently with this brief. SA1 (MX-10), SA4 (PX-44B).

> is of the opinion that it is not possible for the petitioner to implement this action item. *Float coal dust cannot be entirely eliminated during the cutting process of mining. The operator contends that even with the use of a scrubber, "float coal dust in the return air courses is minimal," conceding that it exists. Unless all mining were to cease, float coal dust would be generated from the mining process and contribute to the potential of an ignition hazard, fire, or explosion.* In addition, MSHA is of the opinion that this petitioner may have particular difficulty in eliminating float coal dust because the petitioner has received 14 citations in the past 2 years for violations of the approved ventilation plan under 30 C.F.R. § 75.370. Failure to comply with the ventilation plan creates additional hazards such as reducing or short-circuiting necessary ventilation, which in turn allows float coal dust to be in suspension.

JA301-02, JA795 (emphasis added).[13]

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[13] MSHA's comments in the *In re Parkwood and Rosebud* investigative reports stated:

> To entirely eliminate float coal dust in suspension, the cutting of coal in that air split must cease. The operator contends that if the ventilation plan is being followed, by properly operating the scrubbers on the continuous miners, the amount of coal float dust in the return air courses is minimal. Cherry Tree Mine has been cited 14 times in the past 2 years for 30 CFR 75.370 . . . .

JA786, JA802. MSHA also stated:

> The distance from the face to the surveying equipment in a return air course is often far enough that the coal dust has fallen out of suspension and is no longer a factor.

JA802. Additionally, MSHA recommended that the petitions for modification include a condition that the non-permissible electronic surveying equipment shall be used only until equivalent permissible equipment, i.e., approved by MSHA's Approval and Certification Center, is available. JA784, JA800. MSHA's comments in the *In re Canyon Fuel et al.* investigative reports recommended that the petitions for modification include conditions that non-permissible electronic

Although the petitions for modification in *In re Parkwood and Rosebud* included distance meters and laptop computers (*see* JA292-93, JA686-87), the Administrator found that a distance meter is integrated in the total station, so the request to use a distance meter is not a request to use a separate piece of equipment and, that, during MSHA's investigation, the petitioner stated that the laptop computer should be removed from the petitions for modification. JA301 n.1, JA794 n.3; *see* JA784, JA800 (investigative reports). Similarly, although the petitions for modification in *In re Canyon Fuel et al.* included distance meters (*see* JA305-06, JA930-31, JA935-36), the Administrator found that a distance meter is integrated in the total station and that an external distance meter with a permissible enclosure is currently available. JA314 n.1, JA985 n.2, JA1000 n.2. In addition, the Administrator found that data loggers and laptop computers are items which are not essential to conducting surveying in areas where permissible equipment is required, and that data loggers, laptop computers, and distance meters which are external to the survey instrument can be used in an area of intake air where permissible equipment is not required. JA314, JA985, JA1000.

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surveying equipment shall not be used when float coal dust is in suspension or used in the face of the mining section or longwall during coal production, and a condition that limits the maximum voltage of non-permissible electronic surveying equipment. JA980, JA995, JA1012.

Accordingly, the Administrator denied the petitions for modification. The operators filed requests for hearings on the Administrator's proposed decisions and orders.

2. *In re Parkwood and Rosebud*

a. The Administrative Law Judge's Decision Granting the Petitions for Modification

The *In re Parkwood and Rosebud* cases were consolidated before Administrative Law Judge Michael Lesniak of the United States Department of Labor's Office of Administrative Law Judges and a hearing was commenced on September 13-15, 2011, continued on August 27-29, 2012, and concluded on November 6, 2012. The judge issued a decision granting the petitions for modification on April 11, 2013. JA64.

In his decision, the judge determined (1) that non-permissible electronic surveying equipment, when used in conjunction with conditions of use specified in his order, will at all times guarantee no less than the same measure of protection afforded by the standards and (2) that granting the petitions for modification of the standards will achieve equal or greater overall mine safety. JA65, JA77-78, *citing United Mine Workers of America, International Union v. MSHA (Southern Ohio Coal Co.)*, 928 F.2d 1200, 1202 (D.C. Cir. 1991); *International Union, United Mine Workers of America v. MSHA (Cyprus Emerald Resources Corp.)*, 920 F.2d 960, 963 (D.C. Cir. 1990). The judge imposed essentially the same conditions of

use proposed in the petitions for modification except that he modified and added conditions, finding that the use of non-permissible electronic surveying equipment, when subject to the conditions, will not pose a significant risk of explosion due to methane. JA67-68, JA78-81. The judge also found that the conditions of use specified in his order, including the adoption of the operator's proposal that "[n]on-permissible surveying equipment shall not be used where float coal dust is in suspension," will make the likelihood of coal dust ignition nearly non-existent. JA69, JA78, JA80.

The judge noted MSHA's consent to an order in *In re Twentymile Coal Company* permitting the use of non-permissible electronic surveying equipment inby the last crosscut and in return air when equivalent permissible equipment does not exist, and stated that the conditions of use specified in his order were similar to those contained in the consent order. JA67 n.5, *citing* RBX-7 (*In re Twentymile Coal Co.*, 2007-MSA-00002) (JA886). The judge declined to give weight to the manufacturer's safety warnings that the electronic surveying equipment should not be used in an explosive or dusty environment or in an underground coal mine because Topcon's global project manager had no idea how or why the warnings were included in the instruction manuals. JA66-69, JA77, *citing* GX-II-7 (Deposition of Raymond Kerwin) (JA609-13, JA868-85). The judge further found that the use of non-permissible electronic surveying equipment is safer than the use

of mechanical surveying equipment because it is more accurate and surveyors are no longer trained to use mechanical equipment. JA78.

Accordingly, the judge granted the use of specific 6-volt theodolites and 7.2-volt total stations manufactured by Topcon, as well as similar low voltage electronic surveying equipment, in accordance with the conditions of use set forth in his order. JA79-81.

b. The Assistant Secretary's November 14, 2013, Decision and Order Granting the Petitions for Modification, and the Assistant Secretary's December 5, 2013, Order of Remand and Stay

The Administrator filed with the Assistant Secretary a notice of appeal and a statement of objections regarding the judge's decision, and the operator filed a responding statement requesting that the judge's decision be affirmed. On November 14, 2013, the Assistant Secretary issued a decision and order affirming the judge's decision, as modified and supplemented by conditions of use set forth in his decision and order, and granting the petitions for modification. JA101.

In his decision, the Assistant Secretary determined (1) that the operator's proposed alternative method, including the modifications and additional conditions of use in the judge's decision, as modified and supplemented by the conditions of use in his decision, will promote the same safety goals as the standards with no less than the same degree of success and (2) that the overall effect of the proposed alternative method, including the modifications and additional conditions in the

judge's decision, as modified and supplemented by the conditions in his decision, will achieve at least a net equivalence in overall mine safety. JA113-14, JA135-47, *citing United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202; *International Union (Cyprus Emerald Resources Corp.)*, 920 F.2d at 963.

The Assistant Secretary applied a de novo standard of review to the judge's decision, recognizing that, under the Mine Act and the Administrative Procedure Act ("the APA"), he may conduct an independent review of the evidence and is not required to accept the judge's credibility determinations. JA111-12, *citing Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509, 514 (3d Cir. 2008); *Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 871 (2005).

The Assistant Secretary recognized that underground coal mines are assumed to liberate methane, which can be released from the coal face, ribs, floor, seals, and roof in a mine, and that the Cherry Tree Mine, whose petitions for modification were designated as the lead petitions in these cases, is a gassy mine. JA114. He recognized that methane is explosive when mixed with oxygen at concentrations between approximately 5 and 15 percent, and that the areas of a mine in or inby the last crosscut and in return air are more likely to have an explosive environment. JA114-15. He also recognized that all underground coal mines contain coal dust, which is combustible, that an ignition of coal dust can

result in a fire, and that an ignition of coal dust in suspension can result in an explosion. JA114-15. He further recognized that coal dust is generated when coal is cut at the face, that accumulations of float coal dust can be rapidly placed in suspension by air movement, and that coal dust can enter non-permissible electronic equipment and cause the equipment to overheat and ignite methane. JA115.

The Assistant Secretary credited the testimony of Chad Huntley, P.E., MSHA electrical engineer, that the Topcon electronic equipment is not intrinsically safe and has an ignition potential that mechanical equipment does not have. JA125-26, *citing* Tr. II at 261-63, 266-68; GX-II-2 (JA462, JA753, JA836). The Assistant Secretary found that Noah Ryder, P.E., vice president of Delta Q Fire and Explosion Consultants, Inc., acknowledged that the Topcon electronic surveying equipment poses a greater hazard for ignition than intrinsically safe equipment poses. JA126, *citing* Tr. II at 203 (JA460). The Assistant Secretary did not accept Ryder's opinion that the instruments are well-sealed against gas and dust and have only a 5 percent or less probability of ignition in the presence of methane, finding the results of Ryder's water immersion and dust swab tests on the instruments suspect for several reasons. JA128-30. The Assistant Secretary also found Ryder's opinion that there is little likelihood that an internal ignition would propagate outwards because the instruments do not have large enough openings

suspect and, instead, credited Huntley's testimony that internal pressures from an ignition could create larger openings. JA130-31, *citing* RBX-30; Tr. II at 313 (JA527, JA762). The Assistant Secretary did not give weight to Ryder's opinion that, under normal use, no dust or only a minimal amount of dust will enter the equipment. JA131-32. The Assistant Secretary rejected the judge's conclusion, based on Ryder's testimony, that using the equipment in the presence of coal dust is not a concern. JA132-33. The Assistant Secretary disagreed with the judge's finding that the likelihood of a coal dust ignition is non-existent based on Ryder's testimony that it would be difficult to see in an environment where there was an ignitable amount of coal dust in suspension. JA133.

The Assistant Secretary found that, in light of Topcon's safety warnings against using its electronic surveying equipment in gassy or dusty environments or in underground coal mines, it is critically important that the conditions of use ensure that the atmosphere in which the equipment is used is free from explosive concentrations of gas or coal dust. JA133-34. The Assistant Secretary recognized that the Mine Act protects against ignition and explosion hazards by requiring multiple layers of protection to miners. JA135. He recognized that, among other things, the Mine Act and its standards and regulations impose ventilation requirements, methane monitoring requirements, de-energization requirements, rock-dusting requirements, and permissibility requirements. JA135. He found

that, because the proposed alternative method eliminates the permissibility requirements for electronic surveying equipment, conditions of use in addition to those imposed by the judge are necessary to offset that loss of protection, and he therefore imposed additional conditions. JA135-45.

The Assistant Secretary determined that, because float coal dust is a concern when using non-permissible electronic surveying equipment, additional conditions of use to protect against coal dust are necessary. JA138. Consistent with the conditions of use set by the Administrator in other granted petitions for modification of permissibility standards that allow non-permissible diagnostic and testing equipment to be used in or inby the last crosscut, the Assistant Secretary required that the non-permissible electronic surveying equipment not be used in or inby the last crosscut or in return air when coal production is occurring on the section. JA138-39, *citing* RBX-16 through RBX-24, RBX-26, RBX-27 (decisions and orders) (JA525-26, JA898-928); *see* JA149 (order). The Assistant Secretary explained that this condition not only will reduce the likelihood that energized non-permissible electronic surveying equipment will encounter float coal dust, it will also reduce the likelihood that energized non-permissible electronic surveying equipment will encounter explosive concentrations of methane because methane is liberated when coal is cut. JA139. The Assistant Secretary noted that surveying can be done on non-production shifts. JA139, *citing* Tr. I at 152, 207 (JA705,

JA708). The Assistant Secretary also noted that the same requirement is contained in the *In re Twentymile* consent order which served as a template for the petitions for modification in these cases. JA139-40, *citing* RBX-7 (*In re Twentymile* consent order) (JA886); Tr. I at 69-70 (JA390).

Among other conditions, the Assistant Secretary included conditions related to verifying adequate air movement and rock-dusting, but he noted that the record did not contain any specific evidence concerning those two conditions, and he therefore invited the parties to file a motion requesting a remand in order to introduce evidence on either of those conditions. JA141-42 n.21, JA143 n.22.

The Assistant Secretary also included a condition that non-permissible electronic surveying equipment only be used until permissible electronic surveying equipment is available, i.e., approved by MSHA's Approval and Certification Center, or until viable new mechanical surveying equipment is available. JA118-24, JA143-45; *see* JA150 (order). The Assistant Secretary noted that, to be viable, the mechanical surveying equipment must be sufficiently accurate and, although he did not need to decide the issue at this time, the record indicates that there are no safety issues when surveying equipment achieves 1-foot-in-10,000-feet accuracy levels. JA144 n.22. The Assistant Secretary explained that, if such equipment becomes available, there would be no need for MSHA's limited resources to be

spent ensuring compliance with the terms and conditions of his decision. JA144-45.

Accordingly, the Assistant Secretary affirmed the judge's decision, as modified and supplemented by conditions of use set forth in his decision and order, and granted the petitions for modification subject to the conditions of use set forth in his decision and order. JA147-51.

Pursuant to the Assistant Secretary's invitation, the operator filed a motion to remand the cases to the Office of Administrative Law Judges[14] for further proceedings on the appropriateness of the conditions of use relating to verifying adequate air movement and rock-dusting. On December 5, 2013, the Assistant Secretary granted the motion, remanding the matter on the limited issues of the two conditions of use and staying implementation of his November 14, 2013, decision and order pending resolution of the remand issues. JA690.

c. The Administrative Law Judge's Decision on Remand

The cases were reassigned to Administrative Law Judge Drew Swank, to whom the parties submitted an agreement resolving the limited issues of the two conditions of use that had been remanded, and the judge issued a decision approving settlement on May 7, 2014, and an erratum on May 16, 2014. JA154, JA695.

[14] Judge Lesniak had since retired.

d. The Assistant Secretary's November 24, 2014, Decision and Order Granting the Petitions for Modification

The operator filed with the Assistant Secretary a notice of appeal and a statement of objections in order to facilitate appellate review of disputed conditions, and the Administrator filed a responding statement. On November 24, 2014, the Assistant Secretary issued a decision and order clarifying and further modifying the judge's decision and granting the petitions for modification. JA172. The Assistant Secretary treated the operator's statement of objections, which asserted that his November 14, 2013, decision and order did not properly apply the standard for granting petitions for modification and that several conditions of use set forth in his decision and order are unnecessary to meet that standard, as in the nature of a motion for reconsideration. JA174-75. The Assistant Secretary was not persuaded by the operator's objections, but he clarified and further modified some of the conditions of use. JA175-87.

Regarding the condition that coal production stop while non-permissible electronic surveying equipment is used in or inby the last crosscut or in return air, the Assistant Secretary stated that nothing asserted by the operator convinced him that the condition is not necessary to promote the same safety goals as the standards with no less than the same degree of success. JA175-81. The Assistant Secretary explained that, because methane is liberated and coal dust is created during production, requiring that surveyors not use non-permissible electronic

surveying equipment in or inby the last crosscut or in return air when production on the section is occurring will protect miners by reducing the likelihood of a methane or dust ignition or explosion. JA176, 178. The Assistant Secretary rejected the operator's arguments and reiterated that the *In re Twentymile* consent order, which the operator used as a general basis for urging that the petitions for modification in these cases be granted, includes the condition that coal production on the section cease. JA175-81.

Regarding the condition prohibiting the use of non-permissible electronic surveying equipment in or inby the last crosscut or in return air where float coal dust is in suspension, the Assistant Secretary stated that nothing asserted by the operator convinced him that the condition is not necessary to promote the same safety goals as the standards with no less than the same degree of success. JA181-83. The Assistant Secretary pointed out that the operator included the condition in its petitions for modification, that the judge included the condition in his decision, and that the operator did not object to the condition, but that after the remand, the operator objected to the condition as unclear and unnecessary. JA181. The Assistant Secretary interpreted the condition to allow for a visual determination of whether there is float coal dust in suspension and found that, because he is requiring that the operator not use non-permissible electronic surveying equipment during coal production on the section, the condition is possible to implement.

JA181-82 & n.7 (referencing the Administrator's finding that the condition is impossible to implement unless all mining ceases because float coal dust is generated during mining). The Assistant Secretary found that the condition is necessary because of concern that explosive amounts of float coal dust can be rapidly placed in suspension, concern that float coal dust might layer on components of the equipment causing overheating and malfunctioning, and Topcon's safety warnings against using the equipment in dusty areas. JA182, *citing* JA131-34 & n.17, JA140. The Assistant Secretary further noted that the condition has been included in other granted petitions for modification which the operator has urged are a basis for granting the petitions for modification in these cases. JA182, *citing* Sept. Stip. 64 (JA338), RBX-16 through RBX-24, RBX-26, RBX-27 (decisions and orders) (JA525-26, JA898-928).

Regarding the condition providing that non-permissible electronic surveying equipment shall not be used if viable new mechanical surveying equipment is available, the Assistant Secretary explained that the condition is necessary because, if viable new mechanical surveying equipment becomes available, there would be no need to spend MSHA's limited resources ensuring compliance with the conditions of use set forth in his order. JA186. The Assistant Secretary reiterated that, to be viable, the equipment must be sufficiently accurate for use in underground coal mines. JA186.

Additionally, the Assistant Secretary addressed conditions of use related to the monitoring of methane, the charging and replacing of batteries, and the description of equipment allowed. JA183-87. He amended a condition of use to clarify that batteries must be fully charged. JA175, JA184-85.

Accordingly, the Assistant Secretary lifted the stay and granted the petitions for modification under the conditions set forth in his November 14, 2013, decision and order, as modified on remand, and as clarified and modified by his November 24, 2014, decision and order. JA187-92.

3. *In re Canyon Fuel, Mountain Coal, Bowie Resources, and Peabody Sage Creek*

a. The Administrative Law Judge's Decision Granting the Petitions for Modification

The *In re Canyon Fuel and Mountain Coal* cases were consolidated before Administrative Law Judge Stephen Reilly of the United States Department of Labor's Office of Administrative Law Judges. Based on the Assistant Secretary's decision and order in *In re Parkwood and Rosebud* (Nov. 14, 2013), the Administrator submitted that the petitions for modification should be granted with comparable conditions of use. JA200. A hearing was held on December 10-11, 2013, and, subsequently, counsel for Canyon Fuel and Mountain Coal requested that the *In re Bowie Resources* and *In re Peabody Sage Creek* cases be joined for purposes of the judge's decision and the Administrator agreed. JA195 n.1, JA200.

The judge issued a decision granting the petitions for modification on April 3, 2014. JA194.

In his decision, the judge rejected some of the conditions of use in the Assistant Secretary's decision and order in *In re Parkwood and Rosebud*, including that non-permissible electronic surveying equipment must not be used where float coal dust is in suspension (JA213-14) and that the petitions for modification would not apply if viable new mechanical surveying equipment becomes available (JA206-07). In addition, the judge modified the condition of use that non-permissible electronic surveying equipment not be used when coal production is occurring in the section and, instead, required that the equipment not be used along the longwall face during operations of the longwall shearer or inby the last open crosscut in the entry where the continuous miner is actively extracting coal from the face. JA214-16, JA224. Further, regarding the scope of non-permissible electronic surveying equipment permitted under his order, the judge determined that, instead of approving specific models of surveying equipment, he would approve the use of all non-permissible electronic surveying equipment, including distance meters and data loggers/collectors, with 66 or higher ingress protection ("IP") ratings, until permissible electronic surveying equipment becomes available. JA206-07, JA222. The judge presumed that there is an approved laptop computer

for use by surveyors so he did not include a laptop computer under his order. JA206.

Accordingly, the judge granted the use of all non-permissible electronic surveying equipment with IP66 or higher ratings in accordance with the conditions of use set forth in his order. JA207, JA222.

b. The Assistant Secretary's November 24, 2014, Decision and Order Granting the Petitions for Modification

The Administrator filed with the Assistant Secretary a notice of appeal and a statement of objections regarding the judge's decision, and the operators filed a responding statement requesting that the judge's decision be affirmed. In addition, the Administrator filed a motion for leave to reply along with the Administrator's reply to the operators' responding statement, and the operators filed a response to the motion. On November 24, 2014, the Assistant Secretary issued a decision and order modifying and supplementing the conditions of use in the judge's decision and granting the petitions for modification. JA226.

In his decision, the Assistant Secretary determined (1) that the operators' proposed alternative method, including the modifications and additional conditions of use in the judge's decision, standing alone do not promote the same safety goals as the standards with no less than the same degree of success but (2) that the overall effect of the proposed alternative method, including the modifications and additional conditions in the judge's decision, as modified and supplemented by the

conditions in his decision, will achieve at least a net equivalence in overall mine safety. JA248-81, *citing United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202; *International Union (Cyprus Emerald Resources Corp.)*, 920 F.2d at 963.

The Assistant Secretary applied a de novo standard of review to the judge's decision, conducting an independent review of the evidence. JA247-48, *citing Vineland Fireworks*, 544 F.3d at 514; *Kay*, 396 F.3d at 1189.

The Assistant Secretary found that one of the instruments used at Mountain Coal's West Elk Mine is a Topcon total station, the instruction manual for which warns against using near flammable gas or in a coal mine. JA261-62. The Assistant Secretary found that, in light of Topcon's safety warnings, it is critically important that the conditions of use assure that the atmosphere in which the equipment is used is free from explosive concentrations of gas or coal dust. JA262. The Assistant Secretary recognized that fires and explosions in underground coal mines have the potential to injure all miners working underground. JA263. The Assistant Secretary recognized that the Mine Act protects against potentially catastrophic ignition, fire, and explosion hazards by requiring multiple layers of protection to miners. JA263. He recognized that, among other things, the Mine Act and its standards and regulations impose rigorous ventilation requirements, methane monitoring requirements, de-

energization requirements, rock-dusting requirements, and permissibility requirements. JA263. He stated that, because the proposed alternative method eliminates the permissibility requirements for electronic surveying equipment, conditions of use in addition to those imposed by the judge are necessary to offset that loss of protection, and he therefore imposed additional conditions. JA262-63.

The Assistant Secretary found that the condition that coal production stop when non-permissible electronic surveying equipment is used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces is necessary to promote the same safety goals as the standards with no less than the same degree of success. JA264-72. The Assistant Secretary found that the operators relied upon other granted petitions for modification of permissibility standards that allow non-permissible diagnostic and testing equipment to be used in high risk areas, as well as on the *In re Twentymile* consent order that allows non-permissible electronic surveying equipment to be used in or inby the last crosscut. JA265-66, *citing* Tr. 291, 346 (JA951, JA956), PX-4 (*In re Twentymile* consent order), PX-13 through PX-23, PX-41 (decisions and orders) (JA1013-69). The Assistant Secretary stated that those modifications require that coal production be stopped on the sections when non-permissible equipment is used in high risk areas. JA265-66. The Assistant Secretary found that the other conditions of use set forth in his decision are also necessary, but that they do not offset the increased dangers

of using non-permissible electronic surveying equipment in high risk areas when coal is in production and there is an increased danger of methane liberation and coal dust. JA269-72.

Additionally, the Assistant Secretary found that the condition that non-permissible electronic surveying equipment not be used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces when coal dust is in suspension is necessary to promote the same safety goals as the standards with no less than the same degree of success. JA272-74. The Assistant Secretary explained that float coal dust can be placed in suspension rapidly and that visible float coal dust in the air may indicate that ventilation controls are not properly working, that the area is not properly rock-dusted, and/or that more float coal dust might be rapidly placed in suspension. JA273. The Assistant Secretary also found that coal dust entering the equipment is a concern because it may cause overheating. JA273.

The Assistant Secretary found it possible to implement the condition that non-permissible electronic surveying equipment not be used when coal dust is in suspension because he is also requiring that coal production stop when non-permissible electronic surveying equipment is used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces. JA273. The Assistant Secretary recognized that other granted petitions for modification of

permissibility standards that allow non-permissible diagnostic and testing equipment to be used in high risk areas include the condition. JA273-74, *citing* PX-13 through PX-19, PX-22, PX-41, PX-42 (decisions and orders) (JA1025-45, JA1054-56, JA1060-74). The Assistant Secretary pointed out that there is no indication in the record that any of the mines to which those granted petitions for modification apply, including Canyon Fuel's Dugout Canyon Mine and Skyline Mine #3 and Bowie's No. 2 Mine, have been unable to comply with the condition. JA274 & n.24, *citing* PX-14, PX-18, PX-41 (JA1027, JA1040, JA1060).

The Assistant Secretary also found no evidence justifying the inclusion of distance meters and data loggers/collectors among the equipment to which the petitions for modification apply, and he therefore determined that there is no reason for MSHA's limited resources to be spent assuring compliance with the terms of his decision for any non-permissible electronic surveying equipment other than total stations and theodolites. JA275-76. Accordingly, the Assistant Secretary limited the equipment to which the petitions for modification apply to total stations and theodolites currently in use at the mines and similar low voltage battery-powered theodolites and total stations with IP66 or higher ratings having equivalent or greater protection from explosion, ignition, and fire hazards. JA277.

The Assistant Secretary stated that, if permissible electronic surveying equipment becomes available, or if new viable mechanical surveying equipment

becomes available, accurate surveying can be performed under the standards, so there would be no need for MSHA's limited resources to be spent ensuring compliance with the terms and conditions of his decision. JA279-80.

The Assistant Secretary found that the overall effect of the proposed alternative method, including the modifications and additional conditions in his decision and order, will not detract from overall mine safety. JA281. Accordingly, the Assistant Secretary modified the judge's decision and granted the petitions for modification subject to the conditions of use set forth in his decision and order. JA282-88.

C. Rulings Presented for Review

As discussed above, the rulings presented to the Court for review are the Assistant Secretary's November 24, 2014, decisions in *In re Parkwood and Rosebud* (JA172) and *In re Canyon Fuel et al.* (JA226) in which the Assistant Secretary granted the operators' petitions for modification of the application of mandatory safety standards for underground coal mines to allow the use of non-permissible battery-powered (electronic) surveying equipment in or inby the last crosscut, in return air, and within 150 feet of pillar workings or longwall faces.

SUMMARY OF THE ARGUMENT

The Assistant Secretary's decisions granting the operators' petitions for modification with added conditions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Assistant Secretary's decisions satisfy the legal standard for granting the petitions for modification because the Assistant Secretary properly applied the correct legal standard, the Assistant Secretary properly conducted de novo review of the evidence, substantial evidence supports the Assistant Secretary's decisions, and the Assistant Secretary properly exercised his discretion. The operators' contentions to the contrary are inconsistent with established case law and unsupported by the record. Accordingly, the Respondents request that the Court affirm the Assistant Secretary's decisions.

ARGUMENT

THE ASSISTANT SECRETARY'S DECISIONS AND ORDERS GRANTING THE PETITIONS FOR MODIFICATION WITH ADDED CONDITIONS WERE NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW

A. Standard of Review

In reviewing the Assistant Secretary's decisions granting the petitions for modification in these cases, the Court must determine whether the Assistant Secretary's actions, findings, and conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see*

International Union, United Mine Workers of America v. MSHA (Jim Walter Resources, Inc.), 931 F.2d 908, 911 (D.C. Cir. 1991) (applying arbitrary and capricious standard to decision granting modification); *International Union, United Mine Workers of America v. MSHA (Emerald Mine Corp.)*, 830 F.2d 289, 292 (D.C. Cir. 1987) (same). Under the arbitrary and capricious standard, courts "must uphold an agency's action where it 'has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made,'" and has not "relied on [improper] factors." *National Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1036 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). So long as a reviewing court can "'reasonably . . . discern[]' the agency's path," it must uphold the agency's decision, "even if the agency's decision has 'less than ideal clarity.'" *Investment Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 376-77 (D.C. Cir. 2013) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

Agencies are also entitled to deference under the arbitrary and capricious standard when they make "predictive judgments," *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), or act in an area in which they have "special expertise." *Building and Const. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988). When the Assistant Secretary renders a decision concerning a petition for modification, he necessarily makes predictions regarding the safety provided by the proposed modification relative to the safety provided by the mandatory standard. Moreover, this Court has held that, in decisions regarding petitions for modification, "the ultimate conclusion of what is necessary to ensure equivalent safety" is uniquely within MSHA's expertise. *International Union, United Mine Workers of America v. MSHA*, 407 F.3d 1250, 1258 (D.C. Cir. 2005); *see also National Mining Ass'n v. MSHA*, 116 F.3d 520, 543 (D.C. Cir. 1997) (noting that the Court defers to "the Secretary's determination of net effects").

B. Legal Standard for Granting a Petition for Modification

Section 101(c) of the Mine Act authorizes the Secretary to modify the application of any mandatory safety standard to a coal or other mine "if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the

application of such standard to such mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. § 811(c).

The Secretary, through the Assistant Secretary, has developed, and this Court has approved, a two-step process for determining whether petitions for modification based on an alternative method of compliance meet the requirements of Section 101(c). *See United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202; *International Union (Cyprus Emerald Resources Corp.)*, 920 F.2d at 963. Under the first step, the Assistant Secretary determines whether the alternative method "promote[s] the same safety goals as the original standard with no less than the same degree of success." *United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202. Under the second step, the Assistant Secretary must determine whether, "considering all of the effects of the proposed alternative method, both positive and negative, [the] modification would achieve a net gain, or at least equivalence, in overall mine safety." *Id.* To satisfy step two, the Assistant Secretary must "respond reasonably" to any "serious . . . concerns" that are raised "regarding the proposed modification." *Id.* And under steps one and two, the Assistant Secretary must "identif[y] a reasonable basis in the record" for his determination. *International Union (Cyprus Emerald Resources Corp.)*, 920 F.2d at 964.

C. The Assistant Secretary's Decisions Satisfy the Legal Standard for Granting the Petitions for Modification

The Assistant Secretary's decisions in these cases satisfy the legal requirements for granting the petitions for modification of the application of the permissibility requirements at the operators' underground coal mines. As discussed below, the Assistant Secretary properly applied the correct legal standard, the Assistant Secretary properly conducted de novo review of the evidence, the Assistant Secretary's decisions are supported by substantial evidence, and the Assistant Secretary properly exercised his discretion in granting the petitions for modification.

1. The Assistant Secretary Properly Applied the Correct Legal Standard

The operators' argument that the Assistant Secretary erred by misapplying the test for evaluating petitions for modification (P. Br. 38-41) is unpersuasive. In accordance with the two-step analysis discussed above, the Assistant Secretary properly took into account "both advantages and disadvantages of the proposed alternative method, including effects unrelated to the goals of the standards," and determined that, in each case, (1) "the proposed alternative method, including the modifications and additional conditions in the judge's decision, as modified and supplemented by the additional conditions in this decision and order, will at all times promote the same safety goals as the standards with no less than the same

degree of success" and (2) "the overall effect of the proposed alternative method, including the modifications and additional conditions in this order, will not detract from overall mine safety." JA146-47, JA281, *citing United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202. Accordingly, the Assistant Secretary properly applied the correct legal standard. The operators' argument to the contrary amounts to nothing more than a disagreement with how the Assistant Secretary weighed the evidence under that standard.

2. The Assistant Secretary Properly Conducted De Novo Review of the Evidence

The operators' argument that the Assistant Secretary erred by applying a de novo standard of review (P. Br. 74-76) is unavailing. The Assistant Secretary properly applied a de novo standard of review to the judges' decisions, recognizing that, under the Mine Act and the APA, he may conduct an independent review of the evidence and is not required to accept the judges' credibility determinations. JA111-12, JA247-48, *citing Vineland Fireworks*, 544 F.3d at 514; *Kay*, 396 F.3d at 1189.

Section 101(c) of the Mine Act provides in pertinent part that, when a mine operator files a petition for modification of the application of a mandatory safety standard to its mine, "the Secretary shall conduct an investigation, provide an opportunity for a public hearing, make public "the findings of the Secretary or his authorized representative," and issue a decision "incorporating his findings of fact

. . . ." 30 U.S.C. § 811(c). Section 101(c) further specifies that "[a]ny such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code [Section 554 of the APA]." *Id.* Section 554 of the APA in turn provides that such hearings shall be conducted in accordance with Section 556 and, most significantly, Section 557 of the APA. 5 U.S.C. § 554(c)(2).

Section 557 of the APA provides that, when reviewing the decisions of subordinate employees who conduct hearings under Section 554, "the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). The courts have consistently construed Section 557 to mean that, in reviewing the presiding employee's initial decision, an agency may apply a de novo standard of review. *See Miller v. Commodities Futures Trading Comm'n*, 197 F.3d 1227, 1235 (9th Cir. 1999) (upholding de novo review of an Administrative Law Judge's decision); *Ryan v. Commodities Futures Trading Comm'n*, 145 F.3d 910, 917 (7th Cir. 1998) (same). Although the operators claim that "[t]he Assistant Secretary is in the position of a reviewing tribunal" when evaluating an Administrative Law Judge's decision regarding a petition for modification (P. Br. 91), this Court has held that, when an agency reviews an Administrative Law Judge's decision under Section 557 of the APA, "it is *not* in a position analogous to a court of appeals reviewing a case tried to a district court." *Kay*, 396 F.3d at 1189 (emphasis added). Unless an

agency elects to limit its own review through regulations, Section 557 authorizes the agency to conduct an independent review of the evidence, including credibility conflicts, and to draw its own conclusions. *See id.* ("The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge").[15]

The Secretary's regulations clearly preserve the Assistant Secretary's statutorily-conferred authority under Section 557 of the APA, as the Secretary's designated representative, to conduct a de novo review of the evidence when ruling on petitions for modification. Under the Secretary's rules of practice for petitions for modification, parties seeking modification of the Secretary's standards are entitled to three levels of review, culminating in a final decision by the Assistant Secretary. 30 C.F.R. §§ 44.1 – 44.53. First, a mine operator or miners' representative may file a petition for modification with the appropriate MSHA Administrator, either the Administrator for Coal Mine Safety and Health or the Administrator for Metal/Nonmetal Mine Safety and Health. Following an investigation, the Administrator issues a proposed decision and order. *See* 30

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[15] In addition, the legislative history of the APA indicates that, where a judge makes an initial decision, "[i]n making its decision . . . the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." Department of Justice, Attorney General's Manual on the Administrative Procedure Act 83 (1947), *reprinted in* William F. Funk et al., Federal Administrative Procedure Sourcebook 120 (4th ed. 2008).

C.F.R. §§ 44.10, 44.13. Thereafter, any party – including the operator, miners' representative, or Administrator – may request a hearing before a United States Department of Labor Administrative Law Judge on the Administrator's proposed decision; the Administrative Law Judge is authorized to conduct a "fair, full, and impartial hearing" and "make decisions in accordance with the [Mine] Act, this part [rules of practice for petitions for modification of mandatory safety standards], and *section 557* of title 5 of the United States Code." 30 C.F.R. § 44.22(a) (emphasis added). Finally, any party may appeal the decision of the Administrative Law Judge to the Assistant Secretary, 30 C.F.R. § 44.33, who "may affirm, modify, or set aside, in whole or [in] part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge." 30 C.F.R. § 44.35. The Assistant Secretary's decision "shall be based upon consideration of the entire record of the proceedings" transmitted by the Administrative Law Judge, including the decision of the judge, together with the statements submitted by the parties. 30 C.F.R. §§ 44.33, 44.35.

A court's construction of a regulation "must begin with the words in the regulation and their plain meaning," *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984), and in the present case, the meaning of the Secretary's regulations is clear. The Secretary's regulations empower the Assistant Secretary, in accordance with Section 557 of the APA, to make his own findings and reject

any of the findings of the Administrative Law Judge. *See* 30 C.F.R. § 44.35. In reviewing a judge's decision regarding a petition for modification, the Assistant Secretary may apply a de novo standard of review.

The meaning of the Secretary's regulations is made even clearer by the fact that multiple Circuit Courts, including this Court, have held that the Commodity Futures Trading Commission ("CFTC") – whose regulations governing appeals of Administrative Law Judge decisions are almost identical to the Secretary's regulations at issue – may conduct de novo review of Administrative Law Judge decisions. *See Drexel Burnham Lambert Inc. v. Commodities Futures Trading Comm'n*, 850 F.2d 742, 749 (D.C. Cir. 1988) (holding that, although "the Commission and the ALJ disagreed . . . with respect to several critical points," "[b]ecause the Commission's findings are reasonably supported by the record, we are bound to accept these determinations"); *Miller*, 197 F.3d at 1235 (the Commission was "free to decide" an Administrative Law Judge's penalty decision "de novo"); *Ryan*, 145 F.3d at 917 (concluding that there was "no problem with the Commission evaluating an ALJ's findings and determinations with a de novo standard"); *see also Chen v. Gen. Accounting Office*, 821 F.2d 732, 737 (D.C. Cir. 1987) (noting in dicta that the CFTC is among the agencies that "explicitly grant de novo review authority to [its] full board"). Similar to the Secretary's regulations regarding review of Administrative Law Judge decisions under Section

101(c) of the Mine Act, the CFTC's regulations provide that "on review" of an Administrative Law Judge's decision, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the Administrative Law Judge and make any findings or conclusions which in its judgment are proper based on the record in the proceeding." 17 C.F.R. § 10.104(b). Given that the Secretary's regulations plainly do not restrict the Assistant Secretary's review of Administrative Law Judge decisions, and the fact that this and other courts have held that the CFTC's nearly identical regulations give the Commission de novo review authority, this Court should hold that the Assistant Secretary may conduct de novo review of the evidence when issuing decisions under Section 101(c) of the Mine Act.

Even if this Court concludes that the Secretary's regulations are ambiguous, it should still hold that the Assistant Secretary is entitled to conduct de novo review of the evidence when reviewing petitions for modification. The Supreme Court has held that an agency's interpretation of its own ambiguous regulation is entitled to "controlling weight," so long as its interpretation is not "plainly erroneous or inconsistent with the regulation" and "[t]here is . . . no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). According to this Court, an agency's interpretation is not "plainly

erroneous or inconsistent with the regulation" so long as it is "fairly supported by the text of the regulation itself." *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003). When determining whether "there is some reason to believe that [the agency's interpretation] is not 'fair and considered,'" this Court asks whether "the agency's litigation position is consistent with its past statements and actions." *Id.* at 69.

In the present cases, the Secretary's construction of his regulation is amply supported by the text of the regulation. As noted above, the text of the regulation does not in any way limit the authority of the Assistant Secretary to review Administrative Law Judge decisions. *See* 30 C.F.R. § 44.35 ("[t]he decision [of the Assistant Secretary] may affirm, modify, or set aside, in whole or [in] part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge."). Additionally, the Secretary's position is consistent with the Assistant Secretary's longstanding practice, going back to at least 1999, of applying a de novo standard of review when passing on petitions for modification. *See In re ICG Eastern, LLC*, Case No. 2008-MSA-00001, at 12 (June 4, 2009) (Addendum at A47); *In re Mettiki Coal, LLC*, Case No. 1999-MSA-00006, at 2 (Nov. 16, 2000) (Addendum at A69); *In re Freeman United Coal Mining Co.*, Case No. 1998-MSA-00010, at 11 (June 22, 1999) (Addendum at A82). The Secretary's position is neither "plainly erroneous or inconsistent with the regulation," nor is

"[t]here [any] reason to suspect that [it] does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 461-62. Accordingly, even if the Court concludes that the Secretary's regulation governing review of Administrative Law Judge decisions under Section 101(c) of the Mine Act is ambiguous, the Secretary's interpretation of his regulation should be accorded controlling weight.

Moreover, multiple Circuit Courts, including this Court, have indicated that an agency's interpretation of its procedural rules is entitled to deference. *See TRT Telecommunications Corp. v. FCC*, 857 F.2d 1535, 1552 (D.C. Cir. 1988) ("[W]e are presented with a challenge going to the FCC's interpretation and administration of its own *procedural* rules. Needless to say, judicial deference is quite high in respect of such matters, as befits the orderly and appropriate relationship which should obtain between an independent agency and the courts.") (emphasis in original); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 351 (1st Cir. 2004) ("When an agency provides a plausible interpretation of its own procedural rules and there is no record or pattern of contrary conduct a court has no right either to slough off that interpretation or to deem it disingenuous."); *see also Climax Molybdenum Co., a Div. of Amax Inc. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983) (citing *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970)) ("[A]dministrative agencies retain substantial discretion in

formulating, interpreting, and applying their own procedural rules."). The Secretary's Part 44 regulations are rules of agency procedure that set forth how one of his agencies (MSHA) will review petitions for modification, a responsibility that Section 101(c) of the Mine Act clearly confers upon the Secretary. *See* 30 U.S.C. § 811(c); 43 Fed. Reg. 29,516 (July 7, 1978) (stating that the Part 44 regulations are "rule[s] pertain[ing] to agency procedures" under 5 U.S.C. § 553(b)[(3)](A)). Accordingly, the Secretary's construction of his Part 44 regulations is entitled to deference and the Court should affirm the Secretary's reasonable conclusion that the Assistant Secretary may apply a de novo standard of review when passing upon petitions for modification.

3. Substantial Evidence Supports the Assistant Secretary's Decisions

The operators' arguments that the Assistant Secretary's conditions on the cessation of production and float coal dust in suspension are unnecessary to meet the test for granting petitions for modification, and that the Assistant Secretary's condition on the use of viable new mechanical surveying equipment ignores the test (P. Br. 41-73), are unpersuasive. As discussed below, the Assistant Secretary thoroughly analyzed the record evidence and the operators' arguments, and substantial evidence supports the Assistant Secretary's decisions.

a. The Conditions on Cessation of Production and Float Coal Dust in Suspension are Necessary to Meet the Test for Granting Petitions for Modification

As discussed above, the Assistant Secretary found that the condition that coal production stop when non-permissible electronic surveying equipment is used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces is necessary to promote the same safety goals as the standards with no less than the same degree of success. JA138-40, JA175-81, JA264-72. In addition, the Assistant Secretary found that the condition that non-permissible electronic surveying equipment not be used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces when coal dust is in suspension is necessary to promote the same safety goals as the standards with no less than the same degree of success. JA181-83, JA272-74. The Assistant Secretary further found that the overall effect of the proposed alternative method, including the modifications and additional conditions in his orders, will not detract from overall mine safety. JA146-47, JA281.

The Assistant Secretary recognized that underground coal mines are assumed to liberate methane, which can be released from the coal face, ribs, floor, and roof in a mine, and he noted the methane liberation rates at the mines in these cases. JA114, JA251-52. He recognized that methane is explosive when mixed with oxygen at concentrations between approximately 5 and 15 percent, and that

the areas of a mine in or inby the last crosscut, in return air, and within 150 feet of pillar workings or longwall faces are more likely to have an explosive environment. JA114-15, JA251-52. He also recognized that all underground coal mines contain coal dust, which is combustible, and that an ignition of coal dust in suspension can result in an explosion. JA114-15, JA252. The Assistant Secretary found that coal dust, including float coal dust, is generated when coal is being cut at the face, and that accumulations of float coal dust can be rapidly placed in suspension by air movement. JA115, JA252.

Regarding the operators' argument that surveying equipment is not used at the working face during the extraction process (P. Br. 42-44), the Assistant Secretary pointed out that the permissibility standards apply both to electric equipment that cuts into coal and to electric equipment that does not cut into coal. JA178-81, *citing* RBX-7, RBX-16 through RBX-24, RBX-26, RBX-27 (JA525-26, JA886-928) (requiring that, except for time necessary to troubleshoot under actual mining conditions, production on the section cease when using the equipment). The Assistant Secretary found that using non-permissible electronic surveying equipment in high risk areas has the potential to cause catastrophic mine accidents (JA266) and noted that neither the granted modifications for non-permissible testing and diagnostic equipment, on which the operators rely to support their petitions for modification, nor the *In re Twentymile* consent order involve

equipment that cuts into coal. JA266 n.16, *citing* PX-13 through PX-18, PX-20, PX-21 (JA1025-40, JA1046-53); Jt. Stip. 55 (JA352-53). Accordingly, the Assistant Secretary rejected the argument that, because surveying equipment does not cut into coal and liberate methane or generate coal dust, it is not necessary to stop production on the section.

Regarding the operators' argument that, even during production, methane and dust do not go over the surveying instruments (P. Br. 44-48), the Assistant Secretary considered the surveying practices and the ventilation systems in use at the mines. In *In re Parkwood and Rosebud*, regarding the operators' assertion that surveying will not be conducted in an entry where production is occurring, the Assistant Secretary found that, although initially stating that he did not survey in the entry where the continuous miner is mining, Michael Groff, Rosebud's surveying manager, testified that "*usually* we coordinate ourselves in different entries," so it was unclear what entries he may have been surveying in. JA175 n.2, *citing* Tr. I at 128 (JA401) (emphasis in original). Regarding the operators' assertion that surveying will not be set up close to the face, the Assistant Secretary found the evidence unpersuasive because Groff testified that he has taken shots as close as 50 feet from the face. JA175 n.3, *citing* Tr. I at 467-68 (JA734).

Regarding the operators' assertions that surveying generally will be upwind of the continuous mining machine and, even when it is downwind, methane and

dust will be removed by the ventilation system and scrubbers on the continuous mining machines, and that, in the return, float coal dust will precipitate out of the air flow or be dispersed by the ventilation, the Assistant Secretary found that Rosebud largely failed to provide record cites so he did not need to consider the assertions. JA175-76, *citing* 30 C.F.R. § 44.33(c). The Assistant Secretary also found that, to the extent Rosebud properly raised the assertions and there was any record support for them, they were unpersuasive. JA176. The Assistant Secretary stated that, to protect against fires, ignitions, and explosions, the Mine Act and its standards require redundant safety measures, including ventilation and permissibility requirements, and that ventilation systems and scrubbers are safety measures that are present regardless of whether surveyors use mechanical, permissible, or non-permissible electronic surveying equipment. JA176-77. The Assistant Secretary recognized that, because using non-permissible electronic surveying equipment increases the risk of an ignition, ventilation systems that are already in place do not offset the decrease in safety from using such equipment; rather, they reflect requirements that provide an added margin of safety in any underground coal mine. JA176-77. The Assistant Secretary further found that ventilation systems do not always work effectively and that operators do not always comply with ventilation requirements. JA177.

The Assistant Secretary found that neither the petitions for modification nor the judge's decision precluded surveyors from surveying in entries where production is occurring, surveying close to the face, or surveying downwind of the continuous mining machine. JA177. In addition, the Assistant Secretary found that, regardless of whether surveying occurs in entries where production is occurring, the petitions for modification allow surveying in returns which have ventilated the working face and where float coal dust tends to collect. JA177, *citing* 76 Fed. Reg. 35,968-69 (June 21, 2011); RBX-31 (JA608); Tr. II at 11 (JA438).

Similarly, in *In re Canyon Fuel et al.*, regarding the operators' assertion that the mines' use of ventilation tubing, which assertedly captures and contains any dust or methane produced during the mining process, and the Dugout Canyon Mine's ventilation system, which does not use ventilation tubing, will adequately protect against methane and dust, the Assistant Secretary found that a mine's ventilation system is one of the redundant safety features that is in place to protect against methane and dust ignitions and explosions whether mechanical, permissible, or non-permissible electronic surveying equipment is used. JA264. The Assistant Secretary found that the operators acknowledged that using non-permissible electronic surveying equipment increases the risk of an ignition at least to some degree. JA264, *citing* Tr. 395-96 (JA962). Accordingly, the Assistant

Secretary found that a mine's ventilation system is not an additional protection that offsets the decrease in safety from using non-permissible electronic equipment. JA264-65.

Moreover, although the ventilation system may capture a significant amount of dust and methane produced while coal is being cut, the Assistant Secretary did not believe that it totally eliminates it, noting that the end of the ventilation tube may be set up some distance from the face and that common sense suggests that some dust and methane may therefore not enter the tube. JA265 & n.14, *citing* Tr. 164 (JA943). Further, the Assistant Secretary noted that ventilation tubing or curtains may be set up incorrectly so that air recirculates into the intake airway, and that there may be breaches in the tubing or curtains. JA265. The Assistant Secretary pointed out that one of the most frequently cited violations is the failure to comply with ventilation requirements, and that ventilation violations have caused major mine accidents. JA265, *citing* Tr. 422, 455 (JA965, JA970).

The Assistant Secretary was not convinced by the operators' argument that because in most instances surveying will be upwind of the continuous miner that generates dust and may liberate methane, the requirement that production cease is unnecessary. JA267. The Assistant Secretary found that nothing in the conditions requires that surveying occur upwind and that the operators' argument acknowledges that sometimes surveying may occur downwind. JA267-68. The

Assistant Secretary noted the testimony Gary Hartsog, P.E., president of Alpha Engineering Services, Inc., that "the instrument is seldom, if ever, used downstream of cutting coal" – implying that there may be times when the equipment is used downstream – and that when one surveys in the longwall tailgate return production is "most always" upstream. JA267-68 n.18, *citing* Tr. 354 (JA651).

The Assistant Secretary further recognized that ventilation may fail. JA267-68. The Assistant Secretary recognized that the petitions for modification allow surveying in the returns and that, as Peter Saint, MSHA Acting Assistant District Manager, testified, when production is occurring, the returns may have a greater accumulation of methane and dust because the ventilation tubes are hooked up to multiple faces and are dumping methane and dust from multiple faces into the returns. JA268, *citing* Tr. 432 (JA967).

Regarding the operators' argument that surveying is not done where methane accumulates because equipment is used in the middle of the entry where there may be more air flow (P. Br. 49-52), the Assistant Secretary found the evidence in *In re Parkwood and Rosebud* unpersuasive, noting that Groff acknowledged that he does not always set up in the middle of the entry. JA178 n.4, *citing* Tr. I at 120 (JA399). The Assistant Secretary also rejected the operators' suggestion that the judge's conditions of use were adequate to ensure

that methane will not reach explosive levels because the area where the equipment is used is continuously monitored for methane and, if 1 percent methane is detected, the equipment must be shut off. JA179. Apart from his finding that methane detectors may fail and may be improperly calibrated, the Assistant Secretary credited Huntley's testimony that there is a lag time in methane detectors and that, if there were a sudden inundation of methane, there might, by the time the methane detector registered 1 percent methane, and by the time the surveyor reacted to shut off the surveying equipment, already be an explosive amount of methane surrounding the equipment. JA179, *citing* Tr. I at 337-38 (JA724). Further, the Assistant Secretary found that, as Huntley testified, the act of shutting off the equipment might itself create a spark. JA179, *citing* Tr. I at 338 (JA724).

In *In re Canyon Fuel et al.*, the Assistant Secretary rejected the same argument, finding that nothing in the petitions for modification or the judge's decision required that the surveying equipment be used in the middle of the entry. JA266-67. The Assistant Secretary also noted that Taylon Earl, Canyon Fuel's Skyline Mine engineer tech and former surveyor, testified that he normally sets up surveying equipment at the outby edge of the rib line in the crosscut. JA267 n.17, *citing* Tr. 135 (JA942).

Regarding the operators' argument that electronic surveying instruments have a low potential for ignition (P. Br. 52-56), the Assistant Secretary credited

Huntley's testimony that the Topcon electronic surveying equipment is not intrinsically safe and has an ignition potential that mechanical equipment does not have. JA125-26. The Assistant Secretary found that Ryder acknowledged that the Topcon electronic surveying equipment poses a greater hazard for ignition than intrinsically safe equipment. JA126-28.

The Assistant Secretary also found unconvincing Ryder's and Hartsog's opinions that, if there were internal overheating or a malfunction, the equipment would not function because their opinions were not supported with test results. JA260-61. The Assistant Secretary noted Ryder's opinion that, if there were sufficient openings, it was possible that dust could layer inside the equipment and cause it to overheat and that, if there is significant overheating, components inside the devices would likely fail, the equipment would not function, and there would be no safety hazard. JA260, *citing* Tr. 320-21 (JA952). However, the Assistant Secretary found that Ryder did not support his opinion that the equipment would likely fail with test results. JA260. The Assistant Secretary also noted Hartsog's similar opinion that the instruments are designed so that they will automatically go through a series of internal checks and will not operate if there is a malfunction. JA261, *citing* PX-45 at 8 (JA1083). However, the Assistant Secretary found that Hartsog also did not support his opinion that the instruments will not operate with test results or data. JA261. Regarding both Ryder and Hartsog themselves, the

Assistant Secretary questioned whether they were qualified to testify about the internal workings of electronic surveying equipment. JA261 n.13. In any event, the Assistant Secretary found that fail safe devices on equipment may themselves not function. JA261. The Assistant Secretary also noted the testimony of Keith Bigelow, Canyon Fuel's Sufco Mine engineer, that, if there were internal sparking or overheating, it would not be detected. JA261, *citing* Tr. 180 (JA945).

Regarding the operators' argument that electronic surveying equipment does not create sparks (P. Br. 53, 63), the Assistant Secretary disagreed with the judge that there is no evidence that non-permissible electronic surveying equipment has the potential to spark, even under abnormal circumstances. JA253 n.8. The Assistant Secretary noted that Ryder conceded that ignition by non-permissible electronic surveying equipment was possible and that the equipment can spark if there is something wrong with the device, such as a loose connection. JA253 n.8, *citing* Tr. 278-79, 395; PX-44B at 17-18 (JA646, JA962, SA20-21); *see* JA255-56 (finding that Ryder acknowledged electronic surveying equipment has a potential for ignition). The Assistant Secretary also noted the testimony of John Arrington, MSHA Coal Division of Safety petition coordinator, that batteries in the equipment can short out and cause an arc. JA253 n.8, *citing* Tr. 408, 429, 432-33 (JA653, JA966-67).

Regarding the operators' argument that there is a low potential for methane or dust entering any compartment of the electronic surveying instruments (P. Br. 56-58), in *In re Parkwood and Rosebud*, the Assistant Secretary rejected Ryder's opinion that the instruments are well-sealed against gas and dust and have only a 5 percent or less probability of ignition in the presence of methane, finding Ryder's water immersion and dust swab tests suspect. JA128-33. The Assistant Secretary pointed out that Ryder's tests were not performed on the specific instruments identified in the petitions for modification and that water is not a proper surrogate for gas and that, in any event, moisture was detected inside all of the pieces of used equipment that Ryder tested. JA129-30. The Assistant Secretary also rejected Ryder's opinion that there is little likelihood that an internal ignition would propagate outwards because the instruments do not have large enough openings, crediting instead Huntley's common-sense testimony that internal pressures from an ignition could create larger openings. JA130-31.

The Assistant Secretary gave no weight to Ryder's opinion that "dust swab testing showed that even for the instruments that had been in active use [] minimal dust was present in the instruments" and that "minimal ingress of particulates will occur under normal operating conditions." JA131, *citing* RBX-30 at 13 (JA539). The Assistant Secretary found that Ryder acknowledged that the used instruments he tested had previously been removed from service and that he did not know the

frequency with which the instruments had been used underground since their last servicing. JA131, *citing* Tr. II at 155-56 (JA739). The Assistant Secretary found that, because the evidence does not indicate the frequency with which the instruments were used in a dusty environment after their last servicing, the fact that there was no, or minimal, dust inside the equipment does not establish that under normal use dust will not enter the equipment, or only a minimal amount of dust will enter the equipment. Indeed, the Assistant Secretary found that the fact that Ryder detected some amount of dust inside three of the four pieces of equipment tends to show the opposite. JA131-32, *citing* RBX-30 at 13 (JA539).

The Assistant Secretary credited Huntley's testimony that a concern with coal dust is that it can enter non-permissible electronic equipment, layer itself on internal components, and cause the equipment to overheat and ignite methane. JA132, *citing* Tr. II at 285-86, 307 (JA757, JA760). The Assistant Secretary credited Huntley's testimony that, based on a visual examination, the connection between the battery pack and the equipment did not appear to be gasketed to prevent dust or gas from entering the equipment. JA132, *citing* Tr. II at 272 (JA463). The Assistant Secretary disagreed with the judge that, because the equipment has internal thermal breakers that are designed to de-energize the battery pack at a temperature below the ignition temperature of methane, coal dust layering on the internal components of the equipment is not a concern. JA132-33.

The Assistant Secretary recognized that internal components like thermal breakers can fail, and that there is no evidence concerning their reliability. JA133.

Similarly, in *In re Canyon Fuel et al.*, the Assistant Secretary rejected Ryder's opinion that the instruments are well-sealed against gas and dust and have only a 5 percent or less probability of ignition in the presence of methane, finding Ryder's water immersion and dust swab tests suspect. JA256-62. The Assistant Secretary questioned whether water is a proper surrogate for gas and found that, in any event, moisture was detected inside all of the pieces of used equipment that Ryder tested. JA257-58 & n.11. The Assistant Secretary also questioned Ryder's opinion that there is little likelihood that an internal ignition would propagate outwards because Ryder's report indicates that there were larger openings in several of the instruments and that some larger openings may not be sealed or covered during normal use and operation. JA258-59. The Assistant Secretary noted Ryder's testimony that, if the seals were degraded, dust would primarily get into the battery compartment over time and that, if there were sufficient openings, dust could layer inside the equipment and cause it to overheat. JA259-60.

Regarding the operators' argument that other petitions for modification involving testing and diagnostic equipment are distinguishable (P. Br. 58-60), the Assistant Secretary rejected the argument in *In re Parkwood and Rosebud* that, because production necessarily stops when diagnostic and testing equipment is

used, it is irrelevant that MSHA included similar conditions in other granted modifications under which operators may use diagnostic and testing equipment in high-risk areas under certain conditions. JA180. The Assistant Secretary found that if, in fact, production must stop to use the diagnostic and testing equipment in question, that would not mean that a requirement that stopping production is unnecessary to meet the standard for granting petitions for modification. JA180. In addition, the Assistant Secretary was not convinced by the argument in *In re Canyon Fuel et al.* that the requirement that coal production stop on the section is unnecessary because of other conditions required by the judge's decision that were not included in other granted modifications. JA269. The Assistant Secretary found the other conditions important to assure that using electronic surveying equipment is safer, but nothing in the record convinced him that those conditions offset the increased dangers of using non-permissible electronic surveying equipment in high-risk areas during periods when coal is in production and where there is an increased danger of methane liberation and coal dust. JA269-70.

Regarding the operators' argument that it is irrelevant that, if production is shut down, surveyors are less likely to be hit by moving equipment and that, at some mines, surveying is conducted during non-production (P. Br. 60-61), the Assistant Secretary accepted Saint's testimony that because there is more activity during production, there is a higher risk that surveyors working in the section

during production will be injured. JA269 n.20, *citing* Tr. 470 (JA974). Additionally, the Assistant Secretary was not convinced that it would be overly burdensome to perform electronic surveying in high-risk areas when coal is not being produced on the section. JA268. The Assistant Secretary accepted Arrington's testimony that surveying is often done on non-production shifts. JA268 n.19, *citing* Tr. 407, 425 (JA653, JA965). The Assistant Secretary also found that the record suggests that surveying in or inby the last crosscut or in returns is not an extensive part of the surveyors' work. JA268, *citing* Tr. 378-81 (JA959). Although the Assistant Secretary recognized that it may be more efficient to use non-permissible electronic surveying equipment while coal is being produced on the section, he did not believe that the asserted inefficiencies offset the risks of operating non-permissible equipment in high-risk areas when coal is being produced and there is a greater likelihood of liberating methane or producing float coal dust and a greater potential for a catastrophic explosion. JA268-69.

Regarding the operators' argument that the Assistant Secretary's reliance upon Topcon's safety warnings is misplaced (P. Br. 61), in *In re Parkwood and Rosebud*, the Assistant Secretary found that the judge erred in discounting Topcon's safety warnings against using the electronic surveying equipment in dusty and gassy environments. JA133-34, *citing* GX-1 through GX-4 (JA805-20). In *In re Canyon Fuel et al.*, the Assistant Secretary also found that one of the

instruments used at Mountain Coal's West Elk Mine is a Topcon total station, the instruction manual for which warns against use near flammable gas or in a coal mine. JA261-62, *citing* MX-10 (SA1). The Assistant Secretary found that Topcon is in the best position to know about the ignition risks of the electronic surveying equipment it manufactures, and that the warnings reflect Topcon's recognition that the equipment poses an explosion hazard in the presence of gas or dust or in underground coal mines. JA134, JA262. Thus, the Assistant Secretary found, "Particularly in light of the warnings, it is critically important that the conditions of use ensure that the atmosphere in which the equipment is used is free from explosive concentrations of gas or coal dust." JA134 & n.18, *citing* GX-1, GX-4 (JA805, JA815).

Regarding the operators' argument that the condition on float coal dust in suspension is unclear (P. Br. 62), in *In re Parkwood and Rosebud*, the Assistant Secretary pointed out that the operator included the condition in its petitions for modification, that the judge included the condition in his decision, and that the operator did not object to the condition until after the remand. JA181. The Assistant Secretary interpreted the condition to allow for a visual determination of whether there is float coal dust in suspension and found that, because he is requiring that the operator not use non-permissible electronic surveying equipment during coal production on the section, the condition is possible to implement.

JA181-82 & n.7 (referencing the Administrator's finding that the condition is impossible to implement unless all mining ceases because float coal dust is generated during mining). The Assistant Secretary found that the condition is necessary because of concern that explosive amounts of float coal dust can be rapidly placed in suspension, because float coal dust might layer on components of the equipment causing overheating and malfunctioning, and because of Topcon's safety warnings against using the equipment in dusty areas. JA182, *citing* JA131-34 & n.17, JA140. Further, the Assistant Secretary noted that the condition has been included in other granted petitions for modification which the operator has urged are a basis for granting the petitions for modification in these cases. JA182, *citing* Sept. Stip. 64 (JA338), RBX-16 through RBX-24, RBX-26, RBX-27 (decisions and orders) (JA525-26, JA898-928); *see also* JA139-40, RBX-7 at 4 (*In re Twentymile* consent order including the condition) (JA889).

Regarding the operators' argument that the condition on float coal dust in suspension is unnecessary because the visibility needed to survey disappears well before float coal dust reaches the explosive level (P. Br. 48-49, 62-65), the Assistant Secretary disagreed, finding that explosive amounts of coal dust can be rapidly placed in suspension by air movement from, for example, methane explosions, bumps, fans, roof falls, brushing up against insufficiently rock-dusted float coal dust, and the exhaust from large pieces of equipment. JA133, JA177-78,

JA252, JA259-60, JA272-73, *citing* 76 Fed. Reg. 35,968, 35,970-71; Tr. 332-33, 468-70 (JA954, JA973-74). The Assistant Secretary credited Saint's testimony that a very thin layer of suspended coal dust may ignite. JA260, *citing* Tr. 468 (JA973); 76 Fed. Reg. 35,971. The Assistant Secretary found that, if coal dust is rapidly placed in suspension, even a vigilant surveyor may not have the time to de-energize his instrument before it encounters an explosive concentration of coal dust. JA114-15, JA133, JA260.

Regarding the operators' argument that the condition on float coal dust in suspension is impossible to implement (P. Br. 62), the Assistant Secretary found it possible to implement the condition because he is also requiring that coal production stop when non-permissible electronic surveying equipment is used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces. JA273. The Assistant Secretary pointed out that other granted petitions for modification of permissibility standards that allow non-permissible diagnostic and testing equipment to be used in high-risk areas include the condition. JA273-74, *citing* PX-13 through PX-19, PX-22, PX-41, PX-42 (decisions and orders) (JA1025-45, JA1054-56, JA1060-74); *see also* PX-4 at 4 (*In re Twentymile* consent order including the condition) (JA1016). The Assistant Secretary also pointed out that there is no indication in the record that any of the mines to which those granted petitions for modification apply, including Canyon

Fuel's Dugout Canyon Mine and Skyline Mine #3 and Bowie's No. 2 Mine, have been unable to comply with the condition. JA274 & n.24, *citing* PX-14, PX-18, PX-41 (JA1027, JA1040, JA1060).[16]

In sum, the Assistant Secretary was concerned about energized non-permissible electronic surveying equipment encountering explosive concentrations of methane, and explosive amounts of float coal dust being rapidly placed into suspension and float coal dust layering on internal components of the equipment and causing it to overheat and ignite methane. As the Assistant Secretary explained, in light of the manufacturer's safety warnings against using the equipment in underground coal mines and in gassy and dusty areas, it is critically important to ensure that the atmosphere in which the equipment is used is free from explosive concentrations of methane and high amounts of float coal dust.

Because float coal dust and methane are generated when coal is cut, the Assistant Secretary's requirements that non-permissible electronic surveying equipment not be used in or inby the last crosscut, in return air, or within 150 feet of pillar workings or longwall faces when coal production is occurring in the section and where float coal dust is in suspension will indeed reduce the likelihood

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[16] The operators improperly rely on Judge Swank's decision in *In re Consolidation Coal Company et al.* (2013-MSA-00018 etc.) (Dec. 16, 2014) (P. Br. 63 n.24), which the Administrator has appealed to the Assistant Secretary and which is currently on stay pending resolution of these cases.

that the equipment will encounter float coal dust and explosive concentrations of methane. Based on the foregoing, substantial evidence supports the Assistant Secretary's findings that the conditions are necessary to offset the hazards created by using non-permissible electronic surveying equipment and meet the standard for granting petitions for modification.

b. The Condition on Viable New Mechanical Surveying Equipment Does Not Ignore the Test for Granting Petitions for Modification

As discussed above, the Assistant Secretary's decisions included the condition that non-permissible electronic surveying equipment only be used until permissible electronic surveying equipment is available, i.e., approved by MSHA's Approval and Certification Center, or until viable new mechanical surveying equipment is available.[17] JA143-45, JA279-80; *see* JA150, JA283 (orders). The Assistant Secretary noted that, to be viable, new mechanical surveying equipment must be sufficiently accurate and that, although he did not need to decide the issue at this time, the record indicates that there are no safety issues when surveying equipment achieves 1-foot-in-10,000-feet accuracy, which is the minimum

[17] The operators improperly rely on Judge Lesniak's finding in *In re Parkwood and Rosebud* that MSHA has permitted the use of non-permissible electronic surveying equipment for years without any conditions. P. Br. 73, *citing* JA76. The Assistant Secretary specifically rejected the judge's finding, stating "There is no evidence that MSHA was aware of Rosebud's violative conduct and, as the Administrator points out, MSHA has cited other operators for using non-permissible electronic surveying equipment." JA124 n.11.

distance error rate under the Pennsylvania Bituminous Coal Mine Safety Act.[18] JA144 n.22, *citing* Tr. I at 384 (JA424); *see* JA116-19 (discussing Pennsylvania's accuracy requirements); JA186, JA280. As the Assistant Secretary explained, his reason for including the condition is that, if such equipment becomes available, accurate surveying can be performed under the standards, so there would be no need for MSHA's limited resources to be spent ensuring compliance with the terms and conditions of these decisions.[19] JA144-45, JA186, JA279-80.

The Assistant Secretary certainly considered the safety benefits of surveying with electronic equipment. *See* P. Br. 40, 70 (asserting that he failed to do so). The Assistant Secretary recognized that electronic surveying equipment is more accurate and efficient than mechanical surveying equipment. JA118, JA254. In *In re Parkwood and Rosebud*, however, the Assistant Secretary rejected the judge's finding that mechanical surveying equipment is less safe than electronic surveying equipment because electronic surveying is more efficient and reduces the exposure of surveying personnel to mine hazards. JA145 n.25, *citing* Dec. at 15 (JA78).

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[18] Accordingly, contrary to the operators' assertion (P. Br. 66-67), any new mechanical surveying equipment that "is far less accurate than the electronic surveying equipment" would not be viable for purposes of the condition.

[19] Contrary to the operators' assertion (P. Br. 67), the condition does not "require a return to outmoded, obsolete technology." Rather, the condition reasonably allows for the possibility that permissible electronic surveying equipment and/or viable new mechanical surveying equipment could become available, in which event, accurate surveying can be performed under the standards.

The Assistant Secretary found that "[t]he evidence concerning the increased likelihood of injury from the asserted increase in exposure time is general and not quantified and does not establish that the increase in exposure time would result in anything more than an insubstantial decrease in safety." *Id.*, *citing* Tr. I at 146-47, 176-78, 464-66 (JA405, JA409-10, JA432). The Assistant Secretary further found that "[t]he argument also does not consider the additional time needed to comply with the conditions for use in this decision and order -- conditions that are necessary to ensure that the alternative method promotes the same safety goals as the standards with . . . no less than the same degree of success." *Id.* In *In re Canyon Fuel et al.*, the Assistant Secretary similarly found, "Nothing in the record convinces me that any increased likelihood of injury from an increase in surveyors' exposure time from using mechanical equipment would be anything but de minimis. Indeed, the argument concerning an increased likelihood of injury from increased exposure time is general and unquantified. The argument also does not address increased exposure time from complying with the conditions of use in this order." JA280.

Thus, the Assistant Secretary properly took into account "both advantages and disadvantages of the proposed alternative method, including effects unrelated to the goals of the standards," and determined that, in each case, (1) "the proposed alternative method, including the modifications and additional conditions in the

judge's decision, as modified and supplemented by the additional conditions in this decision and order, will at all times promote the same safety goals as the standards with no less than the same degree of success," and (2) "the overall effect of the proposed alternative method, including the modifications and additional conditions in this order, will not detract from overall mine safety." JA146-47, JA281, *citing United Mine Workers (Southern Ohio Coal Co.)*, 928 F.2d at 1202. Accordingly, the Assistant Secretary's inclusion of the condition on viable new mechanical surveying equipment does not ignore the test for granting petitions for modification.[20]

[20] Regarding the operators' argument that, in *In re Canyon Fuel et al.*, the Assistant Secretary improperly rejected the inclusion of data loggers/collectors and distance meters among the equipment to which the petitions for modification apply (P. Br. 40-41 & n.14, 57 n.21), the Assistant Secretary found no evidence justifying the inclusion, so he determined that there is no reason for MSHA's limited resources to be spent assuring compliance with the terms of his decision for any non-permissible electronic surveying equipment other than total stations and theodolites. JA275-76. Therefore, the Assistant Secretary properly limited the equipment to which the petitions for modification apply to total stations and theodolites currently in use at the mines and similar-low voltage battery-powered theodolites and total stations with IP66 or higher ratings having equivalent or greater protection from explosion, ignition, and fire hazards. JA277.

4. The Assistant Secretary Properly Exercised His Discretion

Because the Assistant Secretary properly applied the correct legal standard and properly conducted de novo review of the evidence, and because the Assistant Secretary's decisions are supported by substantial evidence, the Assistant Secretary properly exercised his discretion in granting the petitions for modification with added conditions. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (requiring a "rational connection between the facts found and the choice made"). Moreover, the Assistant Secretary's decisions are entitled to deference because they involve his predictive judgments regarding the safety provided by the operators' proposed alternative method relative to the safety provided by MSHA's mandatory safety standards, an area in which the Assistant Secretary has special expertise. *See Rural Cellular Ass'n*, 588 F.3d at 1105 ("The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments . . ."); *Building and Const. Trades Dep't*, 838 F.2d at 1266 ("When called upon to review technical determinations on matters to which the agency lays claim to special expertise, the courts are at their most deferential.").

As shown above, the Assistant Secretary granted the petitions for modification with added conditions based on the records of the proceedings together with the statements of the parties, and he thoroughly explained his reasons for so doing. The Assistant Secretary explained that, because the proposed

alternative method eliminates the permissibility requirements for electronic surveying equipment, conditions of use in addition to those imposed by the judges are necessary to offset that loss of protection. The Assistant Secretary found that the conditions on cessation of production and float coal dust in suspension are necessary to protect miners by reducing the likelihood of a methane or dust ignition or explosion. In addition, the Assistant Secretary found that the condition on viable new mechanical surveying equipment is necessary because, if such equipment becomes available, accurate surveying can be performed under the standards, so there would be no need to expend MSHA's limited resources ensuring compliance with the terms and conditions of these decisions.

After carefully reviewing the record evidence and the parties' contentions, the Assistant Secretary determined that, in each case, (1) "the proposed alternative method, including the modifications and additional conditions in the judge's decision, as modified and supplemented by the additional conditions in this decision and order, will at all times promote the same safety goals as the standards with no less than the same degree of success," and (2) "the overall effect of the proposed alternative method, including the modifications and additional conditions in this order, will not detract from overall mine safety." JA146-47, JA281. Because the Assistant Secretary's determination of the conditions necessary to ensure equivalent safety is uniquely within his expertise, the Court should defer to

his determination of the net effects of the proposed alternative method on overall mine safety. *See International Union*, 407 F.3d at 1258, *citing National Mining Ass'n*, 116 F.3d at 543 ("the ultimate conclusion of what is necessary to ensure equivalent safety" is uniquely "within the Secretary's expertise").

CONCLUSION

For all of the reasons stated above, the Assistant Secretary's decisions granting the petitions for modification with added conditions were not arbitrary, capricious, or an abuse of discretion, and otherwise accord with the law. Accordingly, the Respondents request that the Assistant Secretary's decisions be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPEFACE AND TYPE STYLE REQUIREMENTS

Pursuant to the Court's orders dated March 30, 2015, and June 18, 2015, and Rule 32(a) of the Federal Rules of Appellate Procedure and the rules of this Court, I hereby certify that the Respondents' Brief is in compliance with the type-volume limitation and typeface and type style requirements. This brief contains 16,737 words as determined by Microsoft Word, the processing system used to prepare this brief, and was prepared in proportional Times New Roman 14-point type.

July 10, 2015

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CERTIFICATE OF COMPLIANCE WITH
ELECTRONIC CASE FILING (ECF) REQUIREMENTS

I hereby certify that the Respondents' Brief is in portable document format (PDF) which is text searchable and that this brief was electronically scanned for viruses using McAfee VirusScan Enterprise + Antispyware Enterprise 8.8 and, according to the program, is free of viruses.

July 10, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, a copy of the foregoing Respondents' Brief was served through the Court's electronic case filing (ECF) system, and two copies were sent by regular mail, to:

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