FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 5, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 90-126
DRUMMOND COMPANY, INC.	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), involves the validity of the Secretary of Labor's interim "excessive history" program as applied to the proposal of civil penalties under the Mine Act against Drummond Company, Inc. ("Drummond"). This decision is the lead opinion in a group of seven decisions concerning the Secretary's excessive history program.[2]

In all seven proceedings, the mine operators filed motions with the presiding Commission administrative law judges requesting that the proposed penalties be remanded to the Secretary of Labor for recalculation. The operators contended that the proposed penalties were improper because they were not based on the Secretary's civil penalty regulations set forth at 30 C.F.R. Part 100 ("Part 100") but, instead, were computed in accordance with the interim excessive history program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which, the operators asserted, had been unlawfully implemented outside the notice-and-comment process required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1988)("APA"). Following hearings on the motions, the judges reached conflicting decisions as to the validity of the PPL and whether the proposed civil penalties ought to be remanded to the Secretary. In the present case, Commission Chief Administrative Law Judge Paul Merlin concluded, inter alia,

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[1] Chairman Ford did not participate in the consideration or disposition of this matter.

[2] The other excessive history decisions are: Drummond Co., Inc., Nos. SE 90-125, etc; Zeigler Coal Co., No. LAKE 91-2; Texas Utilities Mining Co., No. CENT 91-26; Utah Power & Light Co., Mining Div., Nos. WEST 90-320, etc.; Hobet Mining, Inc., No. WEVA 91-65; and Cyprus Plateau Mining Corp., Nos. WEST 91-44, etc.

that the PPL had been invalidly implemented. Judge Merlin remanded the proposed civil penalties to the Secretary with instructions to recalculate them without reference to the PPL. 13 FMSHRC 339 (March 1991)(ALJ).

The aggrieved parties filed petitions for interlocutory or discretionary review, seeking review of the same general issues: (A) whether the Commission has subject matter jurisdiction to consider the validity of the PPL; (B) whether the Secretary acted arbitrarily in proposing civil penalties on the basis of the PPL, an issue that involves an examination of whether the PPL exceeds the interim mandate of the United States Court of Appeals for the District of Columbia Circuit in Coal Employment Project v. Dole, 889 F.2d 1127 (1989)("Coal Employment Project I"); and whether the PPL was adopted in contravention of the APA's notice-and-comment requirements; and (C) whether the excessive history provisions of the PPL are impermissibly retroactive. The Commission granted the petitions for review and heard consolidated oral argument in this and two other proceedings.

For the reasons that follow, we conclude that the Commission has jurisdiction under the Mine Act to review the validity of the PPL in the context of these civil penalty proceedings. We conclude that the PPL exceeded the Court's interim mandate in Coal Employment Project I and was issued in contravention of the APA. In light of these conclusions, we need not reach the retroactivity issue. Accordingly, we affirm Judge Merlin's decision herein and remand to the Secretary for recalculation of the civil penalty proposals.

I.

Background

A. General Legal and Regulatory Background

The Mine Act establishes a bificurated civil penalty system. The Secretary proposes and this Commission assesses all civil penalties for violations of the Act and of the mandatory safety and health standards and other regulations thereunder. See 30 U.S.C. §§ 815(a) & (d) & 820(a) & (i). Section 105(a) of the Act provides in relevant part that, after the Secretary issues a citation or withdrawal order to a mine operator for an alleged violation, she "shall ... notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited...." The operator has 30 days within which "to contest ... the proposed assessment of penalty." 30 U.S.C. § 815(a) (emphasis added). If the operator does not contest the Secretary's proposed penalty, the proposed assessment becomes a final "order of the Commission" not subject to review by any court or agency. Id.

If the operator contests the Secretary's proposed assessment of penalty, Commission jurisdiction over the matter attaches. 30 U.S.C. § 815(d). The Commission then affords an opportunity for a hearing, and "thereafter ... issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty or directing other appropriate relief." Id. Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties

provided in this [Act]." 30 U.S.C. § 820(i).[3]

1. The Secretary's Part 100 Regulations

Section 508 of the Mine Act authorizes the Secretary to issue "such regulations as [she] deems appropriate" to carry out any provision of the Act. 30 U.S.C. § 957. To implement the Act's civil penalty scheme, the Secretary, acting through the Department of Labor's Mine Safety and Health Administration ("MSHA"), promulgated regulations at 30 C.F.R. Part 100. These regulations establish three methods for calculating proposed civil penalties: the regular assessment (30 C.F.R. § 100.3), the single penalty assessment (30 C.F.R. § 100.4), and the special assessment (30 C.F.R. § 100.5).[4]

MSHA calculates regular assessments on the basis of a formula derived from the six penalty criteria set forth in the Mine Act (n. 3, supra), including "[t]he operator's history of previous violations." 30 C.F.R. § 100.3(a)(2). MSHA promulgated these regulations in 1978 and 1982, establishing the single penalty assessment in 1982. See Coal Employment Project I, 889 F.2d at 1129-30.

Under the Part 100 scheme, MSHA could assess a single penalty -- in the amount of $20 at the time these cases arose -- for a timely abated non-significant and substantial violation ("non-S&S"). 30 C.F.R. § 100.4.[5] If

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[3] Section 110(i) provides in part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). These same six penalty criteria are also referenced at 30 U.S.C. § 815(b)(1)(B) in connection with the Secretary's penalty proposal powers.

[4] As discussed below, the Secretary has recently amended the Part 100 regulations in certain respects not directly relevant to the issues presented in these cases. See 57 Fed. Reg. 2968 (January 29, 1992). Unless otherwise noted, references to the Part 100 regulations denote the rules applicable during the operative time frame in these proceedings.

[5] The S&S terminology is taken from section 104(d) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. § 814(d)(1).

the violation was not timely abated, MSHA could propose either a regular or special penalty. Id. Proposed single penalty assessments that were timely paid by an operator were not included in the "history of previous violations" component of a regular assessment. 30 C.F.R. § 100.3(c).

Section 100.5 provides that "MSHA may elect to waive the regular assessment formula ([section] 100.3) or the single assessment provision ([section] 100.4) if [it] determines that conditions surrounding the violation warrant a special assessment." Section 100.5 also sets forth certain categories of violations that "may be of such a nature or seriousness that it is not possible to determine an appropriate penalty" in a routine manner under the regular or single penalty assessment provisions.

2. Coal Employment Project I

In the Coal Employment Project I litigation in 1988, a group of petitioners, including the Coal Employment Project and the United Mine Workers of America ("UMWA"), challenged the validity of the Part 100 single penalty assessment provisions. The petitioners asserted that the Secretary had acted unreasonably in construing the Mine Act so as not to require individualized consideration of the six statutory penalty criteria in connection with proposed assessment of a single penalty. See 889 F.2d at 1134. They contended that MSHA was required by the Mine Act to consider each of the six criteria individually when assessing a single penalty. The petition was filed originally in the District Court for the District of Columbia, which concluded that jurisdiction over the challenge lay with the D.C. Circuit and, accordingly, transferred the case to that Court. Coal Employment Project, et al. v. McLaughlin, et al., No. CA 88-402 (D.D.C. Sept. 27, 1988).

The D.C. Circuit, in a decision issued on November 21, 1989, first concluded that the Secretary's assessment of penalties according to "group classifications" based on the presence or absence of specific criteria was a "reasonable interpretation" of the Mine Act. 889 F.2d at 1134. The Court further held that, in calculating a penalty assessment, MSHA was not bound to engage in "individualized" or "full scale fact-finding on each criterion in every case...." Id. In that regard, the Court determined that, in general, the single penalty assessment program "reasonably account[ed]" for the criteria of operator size and negligence. 889 F.2d at 1134-35.

However, the Court expressed far different views over what it perceived as the failure of the single penalty program to take into account the criterion of violation history. Referring to the Mine Act's legislative history, the Court indicated that "the operator's violation history was an especially important criterion in Congress' eyes." 889 F.2d at 1136. The Court pointed out that violation history related to the validity of the single penalty assessment in two ways: (1) its presence or absence in the single penalty assessment itself; and (2) the omission of single penalty assessments from an operator's history when applying the regular and special assessment formulas. Id.

In resolving "whether the single penalty's non-individualized treatment

of violation history is a reasonable approach to deter repeat violators," the Court considered two scenarios: (1) operators who commit and timely abate a series of non-S&S violations, "incurring only a string of $20 penalties;" and (2) operators who commit an S&S violation after committing and abating a series of non-S&S violations. Id. With respect to the first scenario, the Court determined that MSHA's regulations "do not appear to provide a reasonable and consistent method for imposing higher penalties against operators who commit numerous non-significant-and-substantial violations." 889 F.2d at 1137. The Court determined that this "regulatory failure runs so contrary to a principal purpose of the Mine Act as to render MSHA's regulation unreasonable." 889 F.2d at 1137-38. Concerning the second scenario, the Court noted that, if a later violation is not "repetitious of" the earlier non-S&S violations, MSHA's regulations and policies seem to imply that the later S&S violation would receive only a regular assessment not reflecting the earlier violations. 889 F.2d at 1138. The Court similarly concluded that such a result "would run contrary to the indications ... that Congress intended to impose higher penalties on operators with a record of past violations." Id.

Accordingly, the Court remanded the case to MSHA for reconsideration and revision of its Part 100 Regulations. The Court directed MSHA:

> (1) to resolve the inconsistency between the MSHA regulations as written and MSHA's written and oral representations to the court, so as to ensure that MSHA does take account of past single penalty violations in deciding whether a special assessment is required in a case where the violation itself might qualify for another single penalty; and (2) to amend or establish regulations, as necessary, that clarify how administration of the single penalty standard will take account of the history of violations of mandatory health and safety standards that do and do not pose significant and substantial threats to miners' safety.

889 F.2d at 1138.

The Court also directed MSHA to take certain interim actions pending full compliance with the remand. These instructions provided:

> In the interim, until MSHA formally complies with our remand, we direct MSHA to instruct its field personnel in assessing single penalties to consider an operator's history of non-significant-and-substantial violations, and to consider an operator's history of past single penalty assessments when imposing regular assessments against operators who commit a significant-and-substantial violation after

having committed a series of non-significant-and-substantial violations.

Id. (emphasis added).[6]

3. MSHA's interim response and Coal Employment Project II

MSHA, responding to the Court's decision, published an interim regulation in the Federal Register on December 29, 1989, implementing two actions: "(1) [t]emporarily revising its assessment policies to instruct its field personnel to review non-[S&S] violations involving high negligence and an excessive history of the same type of violation for possible special assessment under 30 C.F.R. [§] 100.5; and, (2) temporarily suspending the sentence in 30 C.F.R. [§] 100.3(c) which excludes timely paid single penalty assessments from an operator's history of violations for regular assessment purposes." Criteria and Procedures for Proposed Assessment of Civil Penalties, 54 Fed. Reg. 53609, 53610 (1989).

Petitioners Coal Employment Project and UMWA challenged the first of these actions in the D.C. Circuit on the grounds that it was nonresponsive to the Court's remand. In a decision dated April 12, 1990, the D.C. Circuit agreed, stating that the "high negligence" requirement seemed inconsistent with its concerns as articulated in Coal Employment Project I. Coal Employment Project v. Dole, 900 F.2d 367, 368 ("Coal Employment Project II"). The Court explained that "[i]n light of MSHA's substantial discretion in determining what constitutes 'high negligence,' we fear that even a series of identical non-[S&S] violations may not require MSHA to invoke the violation history criterion and may not generate more than a single penalty each time." Id. Accordingly, the Court ordered MSHA "to devise a suitable interim replacement responding to [these] concerns within 45 days." Id. The Court also "note[d] MSHA's present intention to publish a proposed final rule [in compliance with Coal Employment Project I] by August 1990," and "underscore[d] [its] hope and expectation that MSHA [would] act consistently with its own plan." Id.

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[6] The Court's formal conclusion stated:

> [I]t is hereby [further ordered] that until MSHA complies formally with said remand, MSHA direct its field personnel in assessing single penalties for non-significant-and-substantial violations to take account of the past history on the part of the mine operators of non-significant-and-substantial violations, and to take into account past single penalty assessments in imposing regular assessments against operators who have previously committed a series of non-significant-and substantial violations.

889 F.2d at 1139.

4. The Program Policy Letter

The Secretary issued the PPL, the focus of the dispute in these cases, to all operators on May 29, 1990, within 45 days of the D.C. Circuit's decision in Coal Employment Project II. It became effective that same day, but was not published in the Federal Register. The PPL "implement[s] a program for higher civil penalty assessments at mines with an excessive history of violations." PPL at 1. The PPL notes that MSHA calculates violation history using the tables in section 100.3, which assign penalty points based on the average number of past violations per inspection day. Id. The PPL defines "excessive history" as "either (1) 16 or more penalty points for overall violation history (out of a possible 20), based on a 2-year period, or (2) 11 or more repeat violations of the same health or safety standard in a preceding 1-year period." Id.

The PPL provides that non-S&S violations, if associated with excessive history, are no longer eligible for single penalty assessment but will, instead, be assessed under the regular formula set forth in section 100.3. PPL at 2. The PPL also provides that operators with excessive history who previously would have received a regular assessment for S&S violations will receive a "special history" assessment. Id. The special history assessment is based upon the regular formula point system, plus a percentage increase of 20%, 30%, or 40%, depending on the degree of excessive history. The PPL also states that violations that previously would have received a special assessment will continue to do so, but an additional penalty will be added where there is an excessive history. Id.

The PPL's definition of excessive history does not distinguish between S&S and non-S&S violations. The PPL expressly states that "[i]ncreased assessments at mines with an excessive history of both S&S and non-S&S violations should serve as a more effective deterrent...." PPL at 2 (emphasis added). The PPL explains that, in addition to providing a more effective deterrent to violations, it meets the Coal Employment Project I remand order and responds to an internal report of the Department of Labor's Office of the Inspector General recommending increased assessments for repeat violations. Id.

5. The Secretary's first proposed excessive history rules

The Secretary published proposed rules in the Federal Register entitled Criteria and Procedures for Proposed Assessment of Civil Penalties on December 28, 1990. 55 Fed. Reg. 53482. In the preamble, the Secretary summarized the legal background of the proposed rules, referring to the D.C. Circuit's mandates in Coal Employment Project I and II. Id. The preamble stated that the PPL implemented "a program of increased penalties for a mine with an 'excessive history' of both S&S and non-S&S violations." Id. The proposed rules generally reflected the excessive history definition and approach announced in the PPL. See 55 Fed. Reg. at 53483. However, the preamble indicated that, in applying the final version of the rules, only citations and orders issued on or after January 1, 1991, would be used in determining excessive history. 55 Fed. Reg. at 53483. Additionally, the proposed rules increased the penalty levels in the Part 100 regulations to

conform with the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388 ("Omnibus Budget Act"), which amended the Mine Act to increase the maximum civil penalties that may be assessed. See 55 Fed. Reg. at 53482-83 & 53484-85. (This latter action is not relevant to the issues in these cases.) The Secretary states in her brief that the rulemaking record was closed on April 2, 1991, and that she was targeting July 1991 for promulgation of a final rule. Sec. Br. at 9.[7]

6. The Secretary's second proposed excessive history rules and second Program Policy Letter

The Secretary published certain final rules in the Federal Register dealing with the Part 100 regulations on January 24, 1992. 57 Fed. Reg. 2968. These rules contain the final version of the Part 100 penalty increases mandated by the Omnibus Budget Act, as well as the final version of the interim action that included single penalties in an operator's history of violations for regular assessments. 57 Fed. Reg. at 2968-71. At the same time, the Secretary also published a revised version of proposed excessive history rules. 57 Fed. Reg. at 2972-77.

The new excessive history rules propose to continue the approach of "[i]ncreased assessments at mines with an excessive history of violations, including both S&S and non-S&S violations" but would significantly change the methods of excessive history calculations. 57 Fed. Reg. at 2973-77. In these 1992 proposals, the Secretary again set January 1, 1991, as the effective date for counting violations for excessive history purposes. 57 Fed. Reg. at 2975. The Secretary allowed 60 days for comments on the new proposed rules, and subsequently extended the comment period an additional 30 days (57 Fed. Reg. 9518 (March 19, 1992)). We note that the Secretary's most recent Semiannual Regulatory Agenda indicates that final action is expected in August 1992. 57 Fed. Reg. 16981 (April 27, 1992).

Concurrently with the publication of the final and the proposed rules in the Federal Register, MSHA also issued Program Policy Letter No. P92-III-1 (January 29, 1992)("PPL-II"), which superseded the first PPL. PPL-II mirrors the new proposed excessive history rules. Like the first PPL, PPL-II was not published in the Federal Register. Neither PPL-II nor the new proposed rules changes the general approach to excessive history reflected in the first PPL and the original proposed rules -- inclusion of both S&S and non-S&S violations in determinations of excessive history and an increase in assessments for both S&S and non-S&S violations, based on excessive history.

B. Factual and Procedural Background

1. Factual Background

The relevant facts involved in this case were stipulated to by the parties. See 13 FMSHRC at 339-40. During the period from May 9 through 23,

[7] Unless otherwise noted, references herein to the Secretary's brief are to her opening brief filed in this case.

1990, MSHA issued six citations to Drummond alleging two violations of 30 C.F.R. § 75.400 and four violations of 30 C.F.R. § 75.503. The Secretary then filed a penalty assessment petition for the six citations, calculating the proposed penalties according to the provisions of the PPL, and including, as part of Drummond's history, single penalty and other violations for the previous two years. The penalty proposals for four of the violations were derived from the regular penalty formula in section 100.3, with a 20% increase in that amount for excessive history. The penalty proposals for the remaining two violations were derived from the regular penalty formula with a 30% increase for excessive history.

Drummond objected to MSHA's augmentation of the proposed penalties pursuant to the PPL and filed a motion with the judge to remand the proposed penalties to the Secretary for recalculation. Judge Merlin granted the motion.

2. Judge's Decision

In his decision, Judge Merlin first examined whether the Commission possessed jurisdiction to consider the issues involved in this case. 13 FMSHRC at 344-46. The judge relied on the Commission's decision in Youghiogheny & Ohio Coal Company, 9 FMSHRC 673 (April 1987)("Y&O"), in which the Commission held, in part, that in "certain limited circumstances" it could require the Secretary to repropose penalties in a manner consistent with the Part 100 regulations. 13 FMSHRC at 345, citing Y&O, 9 FMSHRC at 679. These "limited circumstances" refer to "appropriate" contexts where, prior to an evidentiary hearing, an operator would be permitted to establish that the Secretary had failed to comply with the Part 100 penalty regulations in proposing the penalty at issue. 9 FMSHRC at 679. The judge determined that the present case fell within the purview of Y&O because there had been no hearing on the merits and because Drummond was essentially arguing that the Secretary had followed the PPL instead of complying with the Part 100 regulations in proposing the penalties. 13 FMSHRC at 345-46. Thus, the judge concluded that he possessed jurisdiction under Y&O to entertain the operator's request for a remand to the Secretary.

In considering the validity of the method employed by MSHA to calculate the proposed penalties, the judge first concluded that the PPL exceeded the D.C. Circuit's interim mandate in Coal Employment Project I. 13 FMSHRC at 346-48. The judge observed that the D.C. Circuit, in its interim mandate, directed the Secretary to consider only an operator's history of non-S&S violations when calculating regular and single penalty assessments. The judge found that the PPL also takes into consideration an operator's history of S&S violations. 13 FMSHRC at 347. The judge found no warrant in the Court's decision for the inclusion of S&S history during the period of compliance with the Court's interim mandate. He found further that the PPL goes beyond the terms of the Court's interim mandate by establishing a new category of special history assessment for S&S violations. 13 FMSHRC at 347-48.

The judge then considered whether the PPL could "stand on its own without reliance upon the court's interim mandate." 13 FMSHRC at 348-49. The judge determined that resolution of that question would turn on whether

the Secretary was required by the APA to engage in notice-and-comment procedures when issuing the PPL. The judge explained that although interpretive rules, general statements of policy, and rules of agency organization, procedure or practice are excepted from notice-and-comment procedures by virtue of section 553(b)(3)(A) of the APA, the provisions of the PPL constituted substantive rules subject to the notice-and-comment process. 13 FMSHRC at 349-53. The judge concluded that notice-and-comment procedures were required and that, until they were followed by MSHA, the PPL could not be applied. 13 FMSHRC at 354.

The judge explained that "[a] particularly salient characteristic of agency action subject to notice and comment is the reduction or elimination of agency discretion." 13 FMSHRC at 350. The judge concluded that the PPL was so specific as to remove the element of agency discretion. 13 FMSHRC at 351-52. He further explained that agency action that "establishes a binding norm and is finally determinative of the issues or rights to which it is addressed" would also be subject to the notice-and-comment process. 13 FMSHRC at 351. Applying these principles to evaluation of the PPL, the judge concluded that "[b]y every measure, the precepts laid down by the [PPL] must be held to be substantive and not merely a general statement of policy as asserted by the [Secretary]." Id. Accordingly, the judge concluded that the PPL was a substantive rule subject to the notice-and-comment process, not merely interpretative material or a statement of general policy. Id.

Next, the judge rejected the Secretary's contention that notice-and-comment rulemaking was not required because the PPL did not change the overall penalty proposal and assessment scheme. The judge explained that the procedural framework for determination of penalty amounts was not at issue. 13 FMSHRC at 352. He also rejected the Secretary's argument that notice-and-comment rulemaking was not required because the Secretary's penalty proposals are not final in nature. 13 FMSHRC at 352. The judge reasoned that, although the Commission may assess penalties on a de novo basis, the vast majority of the Secretary's penalty proposals actually become final because they are not contested before the Commission. 13 FMSHRC at 352-53.

Finally, the judge rejected the contention that notice-and-comment rulemaking could be excused on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). He noted that the Secretary's initial response to the Court's mandate in Coal Employment Project I was to issue interim regulations, which expressly relied upon the Court's remand as constituting good cause for dispensing with notice-and-comment procedures. In contrast, the PPL made no reference to the good cause exception. 13 FMSHRC at 354. The judge also rejected the Secretary's argument that the PPL was justified because it accomplished the result ordered by the Court. He found that the PPL exceeds the Court's instructions. Id. Based on the foregoing determinations, the judge granted Drummond's motion to remand.

II.

Disposition of Issues

A. Commission Jurisdiction

These cases present the question of whether the Commission possesses subject matter jurisdiction, in the context of these contested civil penalty proceedings, to determine whether the PPL was validly promulgated. Invalidity of the PPL, under which the penalties in question were proposed, would serve as the basis for a remand of these proposed penalties to the Secretary.

1. Parties' Arguments[8]

The Secretary's principal contention is that the Commission lacks subject matter jurisdiction to consider the operators' challenge to the PPL. The Secretary views the PPL as an extension of the Mine Act's regulatory civil penalty scheme. She submits that section 101(d) of the Mine Act confers exclusive jurisdiction over the operators' challenge to her regulatory methods upon the United States Courts of Appeals.[9]

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[8] The Commission permitted amicus curiae briefing by the American Mining Congress and United Safety Associates, mining industry trade associations. Reference in this decision to the arguments advanced by the operators includes the arguments of amici as well.

[9] Section 101(a) of the Mine Act authorizes the Secretary, in accordance with the APA's notice-and-comment procedures, to promulgate "improved mandatory health or safety standards...." 30 U.S.C. § 811(a). Section 101(d) of the Act provides for judicial review of any such "mandatory health or safety standard" as follows:

> Judicial review
>
> Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. ... No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown. ... The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.

30 U.S.C. § 811(d)(emphasis added).

The Secretary further contends that Judge Merlin's reliance upon the Commission's decision in Y&O is misplaced because that decision dealt with a distinguishable procedural challenge, i.e., that the Secretary had failed to follow her civil penalty assessment scheme, rather than a claim that some segment of that scheme had been unlawfully adopted. The Secretary argues that the present cases arose because the manner in which she weighs violation history was changed, not because she incorrectly applied her method of proposing penalties to the facts in these cases. She also asserts that the Mine Act does not otherwise authorize the Commission to determine the validity of the Secretary's rules or procedures for proposing civil penalties.[10]

The operators respond that the method by which the Secretary now calculates proposed penalties conflicts with the method set forth in her published regulations. They assert that the Mine Act affords an operator aggrieved by a penalty proposed pursuant to the PPL a valid basis for contesting that penalty before the Commission and for seeking its remand to the Secretary for recalculation under the published rules.

The operators also maintain that the Courts of Appeals are not the exclusive forums for challenging regulatory pronouncements such as the PPL. They assert that section 101(d) of the Mine Act provides for judicial review only of mandatory safety and health standards promulgated under section 101 and does not apply to regulations, such as the Part 100 regulations, promulgated under section 508 of the Act to implement statutory provisions, such as sections 105 and 110. The operators contend that they are not challenging the validity of the Secretary's Part 100 regulatory scheme but, rather, the failure to operate within that framework.

According to the operators, jurisdiction to remand to the Secretary has been established by Y&O and is supported by section 105(d) of the Mine Act, which authorizes the Commission, in contested penalty cases, to "direc[t] other appropriate relief." The referral of this issue to the Courts of Appeals would, the operators argue, contravene the statute's policy of speedy administrative resolution of mine safety and health disputes. They contend that remand to the Secretary fosters expeditious resolution of many penalty disputes without resort to de novo Commission review.

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[10] The Secretary notes that the D.C. Circuit retained jurisdiction over the Coal Employment Project case until the remand is complete. 889 F.2d at 1138. Our decisions in these seven excessive history cases do not purport to, nor, in our opinion, do they intrude upon the Court's jurisdiction in the Coal Employment Project case. These cases have been instituted as civil penalty proceedings within the Commission's delineated statutory authority, as discussed below.

2. Analysis

a. Statutory Considerations

In enforcing and construing the Mine Act, the Secretary, this Commission, and the Courts of Appeals must give effect to the "unambiguously expressed intent of Congress." See Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 843 (1984). Section 101(d) clearly vests jurisdiction over challenges to the validity of mandatory safety and health standards exclusively with the United States Courts of Appeals.[11] As the Secretary acknowledges, Part 100 regulations are not mandatory standards but, rather, are regulations adopted pursuant to section 508 of the Act.[12] The distinction between mandatory standards and section 508 regulations is well recognized. See, e.g., UMWA v. Dole, 870 F.2d 662, 668 (D.C. Cir. 1989).

According to the Secretary, the PPL is not a section 508 regulation or a "binding" substantive or legislative rule but, rather, is a "non-binding" agency pronouncement issued as an extension of the Part 100 regulatory scheme. The Secretary variously identifies the PPL more specifically as an "interpretation," "policy statement," or an "internal procedure." See Sec. Br. at 18-32. The text of section 101(d) neither states nor implies that its provision for exclusive judicial review extends to section 508 regulations or to challenges to non-binding agency pronouncements.[13]

Congress lodged further exclusive jurisdiction in the appellate courts for judicial review of Commission decisions. Section 106, 30 U.S.C. § 816. Although Congress carved out these two areas of exclusive jurisdiction in the Mine Act for Court of Appeals review, there is no indication that Congress intended to confer exclusive jurisdiction with respect to the kind of challenges before us in these proceedings. Neither section 101(d), section 508, nor any other provision of the statute precludes such challenges in the context of enforcement proceedings.

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[11] The Act defines "mandatory health or safety standard[s]" as "the interim mandatory health or safety standards established by [Titles] II and III of this [Act], and the standards promulgated pursuant to [Title] I of this [Act]." 30 U.S.C. § 802(1). Title I of the Act, in section 101, grants the Secretary the authority to promulgate "improved" standards (n. 9, supra).

[12] Both proposed excessive history rules (December 1990 and January 1992) cited sections 508, 105, and 110 of the Act as their statutory authority. 55 Fed. Reg., supra, at 53484; 57 Fed. Reg. at 2977.

[13] The relatively brief legislative history pertaining to section 101(d) confirms Congress' intent that the provision applies only to challenges to mandatory standards. See S. Rep. No. 181, 95th Cong., 1st Sess. 20-21, 63 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 608-09, 651 (1978)("Legis. Hist."); Conf. Rep. No. 461, 95th Cong., 1st Sess. 43, reprinted in Legis. Hist. at 1321.

Indeed, the statute as a whole makes clear that Commission jurisdiction properly attaches over the challenges raised in these cases.[14] A number of the Act's provisions confer subject matter jurisdiction on the Commission "by establishing specific enforcement and contest proceedings and other forms of action or proceeding over which the Commission judicially presides...." Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Among such proceedings are contests of the Secretary's proposed civil penalties pursuant to section 105(d) of the Act -- the actions involved in these cases. Further, where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief -- in short, to dispose fully of cases committed to Commission jurisdiction. See, e.g., 30 U.S.C. §§ 815(c) (2) & (3) (Commission judicial powers with regard to discrimination complaints); 30 U.S.C. § 815(d) (Commission judicial powers with respect to citation and penalty contests); 30 U.S.C. § 817(e)(1) (Commission judicial powers over imminent danger contests); and 30 U.S.C. § 823 (general judicial powers of Commission judges and Commission). Significantly, section 105(d) broadly authorizes the Commission to direct "other appropriate relief." Thus, for example, the Commission, with Court of Appeals concurrence, has cited this language in section 105(d) as implicit authority for granting declaratory relief, as appropriate, in contest proceedings. Kaiser, 10 FMSHRC at 1171; Climax Molybdenum Co. v. Secretary, 703 F.2d 447, 452 (10th Cir. 1983).

In such contest proceedings, the Secretary's less formal, "non-binding" regulatory pronouncements fall within the Commission's jurisdictional purview. In fact, the Commission has often been asked by the Secretary to give weight or defer to such pronouncements. In appropriate cases, the Commission has examined such materials as evidence of the Secretary's policies and practices and of the consistency in her legal positions. See, e.g., Mettiki Coal Corp., 13 FMSHRC 760, 766-67 & nn. 6 & 7 (May 1991); cf. Coal Employment Project I, 889 F.2d at 1130 n. 5. The Commission also has refused to accord effect to such material when it represents an improper attempt to amend mandatory standards or implementing regulations outside the notice-and-comment process. King Knob Coal Co., 3 FMSHRC 1417, 1420-21 (June 1981).

The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review sua sponte of matters that are "contrary to ... Commission policy" or that present a

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[14] This Commission, in general, is obliged to accord "weight" to the Secretary's interpretations of the statute and her own regulations. S. Rep. No. 181 at 49, reprinted in Legis. Hist. at 637. However, we perceive no indication in the statute or its legislative history, or in sound policy, that deference to the Secretary's views of Commission jurisdiction is required. If deference applies in determining jurisdiction, it should be accorded to the Commission's interpretation of its own jurisdiction under the Mine Act. The question of whether Chevron applies in the context of an agency's determination of its own statutory jurisdiction is unsettled. See, e.g., The Business Roundtable v. S.E.C., 905 F.2d 406, 408 (D.C. Cir. 1990).

"novel question of policy...." Sections 113(d)(2)(A)(ii)(IV) & (B), 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). Since Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them.[15] It would be anomalous if the Commission were deemed to lack the judicial power necessary to examine the effect of the PPL in these proceedings. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. See S. Rep. at 47, reprinted in Legis. Hist. at 635. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

The one extensive judicial discussion of this issue to date accords with the foregoing analysis. In Bituminous Coal Operators' Ass'n, Inc. v. Marshall, 82 F.R.D. 350 (D.D.C. 1979) ("BCOA"), the District Court determined that it lacked subject matter jurisdiction over a pre-enforcement challenge to a Secretarial "Interpretative Bulletin" dealing with the subject of miners' "walkaround" rights under section 103(f) of the Mine Act, 30 U.S.C. § 813(f). Among the challenges raised by the plaintiff was the claim that the Bulletin had been issued in violation of the APA's notice-and-comment requirements. The Court reviewed the administrative enforcement and adjudicative structure of the Act. BCOA, 82 F.R.D. at 352-53. Summarizing that scheme, the Court stated:

> The Act contemplates that the Secretary issue citations and occasionally orders to mine operators when he has reason to believe that any mandatory safety and health regulation or any provision of the Act is being violated. Review of every such citation, once followed by a proposed penalty, and of every such order is vested first in the ... Commission ... and then in the Federal Courts of

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[15] No comparable policy jurisdiction was expressly granted to the Occupational Safety and Health Review Commission ("OSHRC") under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988)("OSHAct"), which, like the Mine Act, is a "split-enforcement" statute dividing judicial and enforcement functions between two separate agencies. In Martin v. OSHRC, 499 U.S. ____, 113 L.Ed. 2d 117 (1991), which did not address the issue under consideration here, namely, the scope of an adjudicative agency's subject matter jurisdiction under a "split-enforcement" statute, the Supreme Court held that, with respect to ambiguous regulations promulgated under the OSHAct by the Secretary, reviewing courts are required to defer to the Secretary's reasonable interpretations of such regulations rather than to OSHRC's interpretations. Martin, 113 L.Ed. 2d at 127-33. Martin made clear that it applied only to the "division of powers between the Secretary and the Commission under the [OSHAct]." 113 L.Ed. at 132. The Mine Act's express conferral of policy jurisdiction upon this Commission is a crucial distinction between these two "split-enforcement" regulatory schemes and may be one reason the Court delimited the scope of its holding.

> Appeals. This avenue for review provides plaintiff's members with two fully adequate forums for the consideration of the claims plaintiff raises here.

82 F.R.D. at 352 (footnote omitted).

The Court specifically indicated that, when the "Secretary acts in a manner which adversely affects an operator, the proper procedure for review of that act [is] to proceed first to the Commission and then to an appropriate Court of Appeals." 82 F.R.D. at 353. The Court found that the Interpretative Bulletin would adversely affect the interests of the plaintiff association's members only if it were actually relied upon by the Secretary in the issuance of citations and proposed penalties. Id. "Once that occurs," the Court observed, "the aforementioned exclusive avenue for review is triggered." Id.

The Court recognized the judicial authority of the Commission to resolve the kinds of issues before us in the present cases:

> The Act, moreover, does not limit the nature of the issues -- be they factual or legal -- which the Commission or the Courts of Appeals may entertain. Consequently, all of the plaintiff's claims may be raised in those forums. This fact further supports the conclusion that the avenues of review provided by the Act are exclusive.
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> Significantly, were the District Courts to entertain actions such as this one, they would lack the aid of the Commission's experience and expertise. A case brought to a Court of Appeals, pursuant to 30 U.S.C. § 816, would, by contrast, usually enjoy the benefit of such aid. Most of the issues raised in the instant action are typical of the questions which Congress wished the Commission to decide in the first instance. Moreover, as tendered here, they could be more effectively considered in the light of some concrete factual circumstances, are in many respects entirely conjectural, and therefore must be deemed not sufficiently ripe for determination by this Federal Court.

82 F.R.D. at 353, 354 (citation omitted).

In sum, we do not perceive any bar in section 101(d), or elsewhere in the Act, to our consideration of the operators' challenge to the PPL in these contest proceedings. To the contrary, we discern substantial statutory indicia that these claims are within our purview.

b. Applicability of Y&O

The Secretary further contends that, apart from whether section 101(d) precludes Commission review of these issues, our decision in Y&O does not reach the issue presented in these cases. We disagree.

Section 105(d)'s authorization to direct "other appropriate relief" underlies the Commission's Y&O holding. Y&O stands for the proposition that, in certain circumstances, the Commission may require the Secretary to repropose penalties in a manner consistent with the Part 100 penalty regulations. Viewing the Secretary's regulations in the context of the Act's bifurcated penalty scheme, the Commission recognized that it is generally neither necessary nor desirable to require the Secretary to repropose a penalty. Y&O, 9 FMSHRC at 679. The Commission rejected such a process where a hearing on the merits of the penalty had already been held before a Commission judge. Id. The Commission concluded, however, that "it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with [her] Part 100 penalty regulations." 9 FMSHRC at 679-80. The rationale for this conclusion was the Commission's role in guarding against arbitrary enforcement by the Secretary. "As has been stated, '[i]t is axiomatic that an agency must adhere to its own regulations.' Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533[, 536] (D.C. Cir. 1986) ..., citing Accardi v. Shaughnessy, 347 U.S. 260, 265-67 (1954)." 9 FMSHRC at 679. The Commission made clear that the scope of its inquiry into the Secretary's actions is limited because the Secretary "need only defend on the ground that [she] did not arbitrarily proceed under ... [her] regulations...." 9 FMSHRC at 680. If the Secretary's manner of proposing penalties is a legitimate concern to an operator and if he can prove the Secretary's departure from her regulations, then intercession by the Commission at an early stage of the litigation could assist in securing fidelity by the Secretary to her regulations. Such relief narrows the penalty issues in Commission proceedings and promotes settlement. Id.

The Secretary asserts that the operators' argument here is not that she has failed to follow her Part 100 civil penalty scheme, the issue in Y&O, but that she has changed that scheme through unlawful adoption of the PPL -- a subject the Secretary views as beyond Y&O and the Commission's authority. However, the Secretary also characterizes the PPL as a valid extension of the Part 100 scheme. The operators complain that the PPL cannot be so viewed and that the penalties proposed according to its provisions conflict with the existing Part 100 regulations. We are satisfied that the operators do not attack the validity of the Secretary's Part 100 regulations but, rather, the Secretary's failure to operate within, and to abide by, those regulations. We agree with the operators and the judge that a failure by the Secretary to comply with her regulations, by reliance upon an invalid PPL, would be within the scope of Y&O.

3. Conclusion on Commission jurisdiction

For the reasons stated above, we hold that the Commission possesses subject matter jurisdiction under the Mine Act and under Commission precedent

to consider the validity of the PPL in these civil penalty contests and we affirm the judge's determination of jurisdiction.

B. Validity of the Program Policy Letter

The validity of the PPL turns on two major issues: whether the PPL is justified by the Court's interim mandate in Coal Employment Project I; and whether the PPL qualifies as an exception to the APA's notice-and-comment requirements. If the PPL was not validly promulgated, it can be accorded no legal effect in these proceedings.[16]

1. Scope of interim mandate in Coal Employment Project I

a. Parties' Arguments

The Secretary maintains that the PPL was issued to comply with the Court's order in Coal Employment Project I as well as to address a concern of the Department's Inspector General that repeat violations receive a higher penalty assessment. S. Br. at 17. According to the Secretary, the Court emphasized that Congress was intent on "assuring that the civil penalties provide an effective deterrent against all offenders [...] with records of past violations" and was "particularly concerned about curbing repeat offenders among mine operators." S. Br. at 34, quoting Coal Employment Project I, 889 F.2d at 1132, 1133. She argues that, given the broad scope of the Court's concerns, it was proper for her to address an operator's history of S&S violations as well as non-S&S violations. The Secretary asserts that, since the Court authorized her to take "immediate interim steps" pending completion of its rulemaking proceeding, her actions did not exceed the Court's mandate.

The operators contend that the Secretary cannot dispute that the PPL is actually beyond the scope of the Court's interim order because the Assistant Secretary has admitted that "MSHA's new program goes far beyond what the court stipulated." Dr. Br. at 29. They maintain that the Court's orders were intended to remedy, in the interim, a specific perceived defect in the Part 100 regulations -- i.e., prior single penalty, non-S&S violations were not being taken into account in determining an operator's history of violations when assessing penalties for subsequent violations. They assert that MSHA has created a new category of "special-history assessments" that arbitrarily increases proposed penalties based on an operator's history of violations. Dr. Br. at 4. They further assert that they are being penalized

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[16] The operators' challenge here is not to the merits of the excessive history program. We note, however, that concerns have been raised about its targeting. At oral argument, reference was made to comments filed in the rulemaking proceeding to the effect that mines without excessive history, as that term is defined by the Secretary, had five times the fatality rate of mines with excessive history. Oral Arg. Tr. 48-49. Officials of the UMWA and the Bituminous Coal Operators' Association have raised the same concern, in a joint letter to the Assistant Secretary for Mine Safety and Health, dated January 15, 1992.

twice for their history of violations because they are being assessed penalty points based on that history in the calculation of their regular assessment, and then assessed a percentage increase under the special history assessment based on that same history of violations. They contend that the PPL overreaches the Court's interim mandate and MSHA's authority and that such changes in penalty calculation required notice-and-comment rulemaking.

b. Analysis

As discussed earlier, the issue in Coal Employment Project I was the validity of the single penalty assessment program. The Court found the exclusion of these violations from an operator's history to be in serious conflict with the purposes of the Mine Act and ordered the Secretary to amend or establish regulations to assure that the single penalty standard would take into account the operator's history of violations. The Court also issued an interim mandate requiring the Secretary to consider the operator's history of non-S&S violations, in assessing single penalties and in assessing regular penalties for S&S violations. 889 F.2d at 1138, 1139.

The PPL is not so limited in accordance with the interim judicial mandate. Rather, it takes account of S&S violations as well as non-S&S violations when determining whether the operator's history is "excessive." Under the PPL, an operator with "excessive history" is not eligible for single penalty assessments for non-S&S violations nor for regular assessments of S&S violations. Rather, both types of violations must be assessed higher penalties, non-S&S under the regular assessment formula and S&S under the "special history assessment" created by the PPL.

The Court's immediate concern was with the history of single penalty, non-S&S violations, as that history relates to assessments of subsequent S&S and non-S&S violations. It is clear that the PPL exceeds the Court's interim mandate because it requires consideration of an operator's history of S&S as well as non-S&S violations and because it establishes a new schedule of penalties based on that history.

The PPL's background section explains its motivation as multiple, based on deterrence of violations, meeting the requirements of a court order and responding to a recommendation from the Department of Labor's Office of the Inspector General. In fact, when the PPL was issued, the Department issued a press release stating that this new program to identify mines with an excessive history of violations "goes far beyond what the court stipulated" and would increase penalties for many violations. U.S. Department of Labor Press Release 90-287 (June 5, 1990). Counsel for the Secretary, in responding to a Commissioner's question at oral argument, did not dispute that the PPL took into account not only the Court's interim mandate but the Court's long-term concerns as well. Oral Arg. Tr. 16-17, 55-56. Thus, the record makes clear that the PPL addresses not only the Court's immediate, interim concerns but also broader concerns including those that the Court ordered the Secretary to address through notice-and-comment rulemaking. See 889 F.2d at 1138-39.

We conclude that the PPL goes beyond the Court's interim mandate. Accordingly, we affirm the judge's holding that, by requiring consideration of an operator's S&S history and by imposing special history assessments, the PPL exceeds the scope of the Court's interim mandate in Coal Employment Project I. We reject the Secretary's contention that the PPL finds justification within the Court's interim mandate.

2. Validity of the Program Policy Letter under the Administrative Procedure Act

a. Parties' Arguments

The Secretary argues that the PPL merely implements section 100.5, which states that "MSHA may elect to waive the regular assessment formula (§ 100.3) or the single assessment provision (§ 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment." The Secretary maintains that section 100.5 grants her wide discretion to utilize the special assessment process and that the method set forth in the PPL for proposing "excessive history" penalties is no more than a form of special assessment. The Secretary states that the Commission owes her deference on this issue because this interpretation of her own regulation is reasonable. She contends, more broadly, that since the PPL interprets section 100.5, it is not a substantive rule but is an "interpretative rule" that does not require notice-and-comment rulemaking under the APA. According to the Secretary, the PPL merely addresses the manner in which she weighs one of the six statutory criteria and does not place new binding obligations on operators.

The Secretary further argues that, given the bifurcated penalty scheme of the Act, under which the Commission assesses civil penalties de novo in contested cases, the PPL does not abridge operators' due process rights, and that she was not required under the APA to engage in notice-and-comment rulemaking, particularly because the PPL was issued as a direct result of the Court's order in Coal Employment Project I. The Secretary alternatively classifies the PPL as a policy statement and/or internal procedure, both of which, like interpretative rules, are exempt from the APA notice-and-comment process.

The operators contend that the PPL is not a special assessment procedure implementing section 100.5 but a hybrid creation and that the plain language of section 100.5 authorizes special assessments only when the conditions surrounding a particular violation warrant such an assessment. The operators emphasize that the PPL is inconsistent with Part 100's intent that special assessments not be automatic. They argue that the PPL's excessive history policy substantially exceeds and conflicts with the penalty scheme established by Part 100 and, thus, that the PPL is not merely an interpretation of section 100.5.

The operators further contend that the PPL contains new substantive rules that were established without notice-and-comment, in violation of the APA. They claim that rulemaking was required because the PPL establishes substantive, binding norms that determine an operator's obligations under the

Act and that strictly bind the Secretary's assessment personnel to a precise formula in assessing penalties, without discretion or exception. The operators argue that Judge Merlin was correct in concluding that the PPL does not qualify under any of the exceptions to notice-and-comment rulemaking in 5 U.S.C. § 553(b) -- i.e., the PPL does not qualify as a general statement of policy or a rule of procedure or practice, and does not fall within the "good cause" exception of the APA. They further argue that the fact that the Commission can review contested citations de novo is irrelevant for APA purposes.

b. Analysis

In examining the nature of the PPL, we first discuss MSHA's history of adopting its civil penalty rules through notice-and-comment rulemaking and then delineate the controlling APA framework. We examine the PPL in relation to the exceptions to notice-and-comment rulemaking to determine whether it qualifies under any of them. Finally, we address the Secretary's contention that the PPL establishes a process for special assessments under section 100.5.

(1) Adoption of penalty regulations through notice-and-comment rulemaking

The PPL contrasts with previous formal actions by the Secretary on penalty assessment procedures. Until issuance of the PPL, the Secretary adopted such regulations pursuant to APA notice-and-comment rulemaking under the aegis of section 508 of the Mine Act.

Upon the Mine Act's transfer of mine safety and health enforcement authority to the Department of Labor in 1978, the Secretary undertook notice-and-comment rulemaking to govern the proposed assessment of civil penalties. 43 Fed. Reg. 9120-21 (March 3, 1978). The Secretary announced an intent to carry forward the regulatory approach of the Secretary of Interior under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1976) (amended 1977), in a program of regulations establishing a penalty point formula and a special assessment provision.

The Secretary adopted the regulatory penalty assessment scheme in Part 100. 43 Fed. Reg. 23514 (1978). Following these initial regulatory steps, the Secretary continued to pursue notice-and-comment rulemaking procedures and the policy of seeking wide participation in consideration of proposed changes. When issuing proposed revised regulations, which were later adopted, making significant changes in the civil penalty rules (including the single penalty assessment) in 1980 and 1982, MSHA provided for public comment and held public hearings. See 45 Fed. Reg. 74444 (1980); 47 Fed. Reg. 2335 (1982); 47 Fed. Reg. 22294 (1982). The Secretary has not asserted that she may adopt section 508 implementing regulations outside the APA.

(2) Requirements of the Administrative Procedure Act's notice-and-comment process

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. See American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987). Under the APA, all "rules" must be promulgated through such notice-and-comment rulemaking. "Rule" is defined as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

In his opinion below, Judge Merlin summarized the value of the APA's notice-and-comment process:

> Essential to a proper determination of [this] case is recognition and acknowledgement of the important purposes served by notice and comment. One purpose of the rulemaking process is to insure a thorough exploration of relevant issues culminating in application of agency expertise after interested parties have submitted their arguments. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 39 (D.C. Cir. 1974). Another purpose is to provide that the legislative function of administrative agencies is so far as possible exercised only upon public participation and notice as a means of assuring that an agency's decisions are both informed and responsive. American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). Also, public participation and fairness must be reintroduced to affected parties after governmental authority has been delegated to unrepresentative agencies. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980). Finally, notice and comment are necessary to the scheme of administrative governance established by the APA because they assure the

> legitimacy of administrative norms. Air Transport Association of America v. Department of Transportation, 900 F.2d 369, 375 (D.C. Cir. 1990).

13 FMSHRC at 349-50.

The APA, however, provides that the notice-and-comment process does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The APA also allows an agency to dispense with notice-and-comment procedures if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The D.C. Circuit has articulated two guidelines for determining what may properly be classified as "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." First, in classifying agency action, the administrative agency's own label of the action is "indicative" but not necessarily "dispositive"; instead it is the "substance of what the [agency] has purported to do and has done which is decisive." Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1968)(citations omitted). While the Secretary's views of the nature of her actions under the APA are entitled to "some" weight, the degree of deference to be accorded is "not overwhelming," and of "far greater importance" than the Secretary's characterizations are the actual language and effects of her pronouncements. Cathedral Bluffs, 796 F.2d at 537-38.

Second, the exceptions to notice-and-comment rulemaking are limited in extent and are to be narrowly construed. The D.C. Circuit has explained:

> Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones. The purposes of according notice and comment opportunities were twofold: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," Batterton, [648 F.2d at 703], and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." Guardian Federal Savings & Loan Insurance Corp., 589 F.2d 658, 662 (D.C. Cir. 1978). In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive. See, e.g., Alcaraz v. Block,

> 746 F.2d 593, 612 (D.C. Cir. 1984)("The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced'")(citation omitted)....

Bowen, 834 F.2d at 1044.

In general, the APA provisions cited above separate administrative pronouncements "that carry the force of law from those that do not." Batterton, 648 F.2d at 701. Advance notice and public comment are required for rules that are substantive or legislative, and thus bear the force of law. Id. In the words of the Batterton Court, legislative rules manifest the following qualities:

> Legislative rules ... implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect.

648 F.2d at 701-02 (footnote omitted).

In contrast to substantive rules, "non-binding agency actions" (the Secretary's characterization of the PPL) do not carry the force of law. In Batterton, the Court described such agency pronouncements as follows:

> Non-binding action, in contrast, merely expresses an agency's interpretation, policy, or internal practice or procedure. Such actions or statements are not determinative of issues or rights addressed. They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not, however, foreclose alternate courses of action or conclusively affect rights of private parties.... Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.

648 F.2d at 702 (footnote omitted).

(3) The PPL as an interpretative rule

An interpretative rule, the first exception set forth in section 553, is an agency statement "as to what [the agency] thinks the statute or regulation means." Bowen, 834 F.2d at 1045; see also Batterton, 648 F.2d at 705. The function of such a pronouncement is "to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." Bowen, 834 F.2d at 1045. Substantive rules grant

rights, impose obligations, or otherwise significantly affect private interests. In contrast, as a form of non-binding action, an interpretative rule seeks merely to clarify or explain existing law. Id. Interpretive pronouncements are "essentially hortatory and instructional." Alcaraz v. Block, 746 F.2d 593, 613 (D.C. Cir. 1984).

It is readily apparent that the PPL cannot qualify as an interpretative rule. From a formal standpoint, the text of the PPL does not contain any such self-identification. We also find no indication in the PPL that it is purporting to explain or interpret any part of the Secretary's existing Part 100 regulations. The PPL does not simply "remind" operators of existing penalty proposal formulas under the Part 100 scheme, but imposes new substantive formulas. Cf. Cabais v. Egger, 690 F.2d 234, 238-39 (D.C. Cir. 1982). Nor does the PPL merely construe a regulatory or statutory term. Cf. APWU v. USPS, 707 F.2d 548, 559 (D.C. Cir. 1983), cert. den., 465 U.S. 1100 (1984).

The PPL's mathematical formula for calculating excessive history constrains discretion in the proposal of penalties. Implementation of the PPL impinges significantly on private interests in the form of higher penalty proposals in the present cases as well as in many others. In response to a question raised by a Commissioner at oral argument, the Secretary submitted data to the Commission on September 17, 1991, indicating that for the period June 1, 1990, to May 31, 1991, actual assessments with excessive history increases would be $2.9 million higher than the estimate of those assessments without excessive history increases. This is an increase of 18%. Accordingly, in terms of its nature, force, and potential impact, we find the PPL's excessive history provisions to be substantive in nature. See Batterton, 648 F.2d at 706 (for similar reasons, Department of Labor's statistical methodology for calculating unemployment statistics found to be substantive, not interpretive); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974)(Board of Parole's guidelines limiting discretion and affecting private interests deemed substantive, not interpretive).

(4) The PPL as a policy statement

A general statement of policy, the second exception set forth in section 553, is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking, or adjudications." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). Its function is to "allow agencies to announce their 'tentative intentions for the future'...." Bowen, 834 F.2d at 1046, quoting Pacific Gas & Electric, 506 F.2d at 38. In the words of the Bowen Court:

> We have previously contrasted "a properly adopted substantive rule" with a "general statement of policy," observing that while a substantive rule "establishes a standard of conduct which has the force of law" in subsequent proceedings,

> [a] general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.
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> Pacific Gas & Electric, 506 F.2d at 38 (footnote omitted); see also Batterton, 648 F.2d at 706-07.

834 F.2d at 1046.

In distinguishing between substantive rules and policy statements, the D.C. Circuit has utilized a "two criteria" test:

> First, courts have said that, unless a pronouncement acts prospectively, it is a binding norm. Thus ... a statement of policy may not have a present effect: "a 'general statement of policy' is one that does not impose any rights and obligations...."
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> * * *
>
> The second criterion is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion.

American Bus Ass'n v. United States, 627 F.2d at 529, (citations and footnote omitted), quoting Texaco v. FPC, 412 F.2d 740, 744 (3d Cir. 1969).

Applying this analytic framework, we find lacking in the PPL an orientation to future, prospective agency action. The challenged provisions have effect now, as these cases demonstrate. By increasing proposed penalties through application of a mathematical formula, the PPL clearly affects private interests in both a substantial and present manner. The PPL sets forth a binding norm that is determinative of the penalty proposal issues (and corresponding operator interests) to which it is addressed. See Pacific Gas & Electric, 506 F.2d at 38. Like the statistical methodology in Batterton, the pronouncement at issue here "does not merely represent [the Secretary's] future intention. It presents the course the agency has selected and followed, resulting in significant changes from the previous method." Batterton, 648 F.2d at 706.

The PPL also circumscribes the Secretary's penalty proposal discretion. Like the statistical methodology in Batterton and the parole guidelines in Pickus, the PPL's excessive history provisions are "formula-like," "effectively direc[t]" the Secretary's discretionary judgment in proposing penalties, and "define a fairly tight framework" to limit and channel the Secretary's broad penalty proposal authority. See Batterton, 648 F.2d at

707, citing Pickus, 507 F.2d at 1113. Judge Merlin delineated this aspect of the PPL:

> By every measure, the precepts laid down by the letter must be held to be substantive and not merely a general statement of policy.... The letter sets forth the exact numerical levels at which an excessive history comes into being and the letter further details precisely what occurs when these levels are attained. Non S&S violations with excessive history are subject to the regular assessment formula and S&S violations with excessive history are subject to a special history assessment formula containing prescribed percentage increments in penalty amounts. The Secretary's broad authority under the Act to propose penalties in accordance with the six criteria is channelled, shaped, and indeed circumscribed in a tight framework. Absent is agency discretion with respect to a large number of cases involving prior history of violations and in place is a rigid mathematical formula which allows no room for maneuver either with respect to the existence or consequences of an excessive history.
>
> Accordingly, if an operator has a certain number and type of violations within a given period it is charged with an excessive history and when it has such a history, its civil penalty liability is increased along prescribed lines. That is what happened in this case. The provisions of the letter were applied and the operator owed more money. Such circumstances demand that interested persons be given notice and opportunity to participate in rulemaking before the letter becomes final.

13 FMSHRC at 351-52 (citations omitted).

The Secretary, in identifying the PPL as a mere expression of policy, points out that the PPL generates only proposed penalties. The Secretary contends that the PPL cannot be regarded as determinative of penalty issues and operators' rights, inasmuch as the Commission possesses de novo penalty assessment authority. However, the vast majority of proposed penalties are not contested but, instead, are paid by the operators. Therefore, in most instances where the PPL would be applied, it would be finally determinative. As Judge Merlin stated:

> I also find misplaced the Solicitor's proposition that notice and comment are not required because the Secretary's penalty proposals are not final. The appealability to the Commission of the Secretary's penalty proposals does not mean that notice and comment are unnecessary. The Secretary's

> proposal function is an indispensable part of the Act's civil penalty scheme. In addition, section 105(a) of the Act ... provides that penalty proposals of the Secretary which are not appealed are final and not subject to any kind of review. In fact, almost all the Secretary's penalty proposals become final under this provision. The appeal rate to the Commission from MSHA proposed assessments were 3.2% in FY'88, 3.7% in FY'89, 4% in FY'90 and 6.7% for the first four months of FY'91. The realities of how the civil penalty system actually works cannot be ignored. Even in cases that come before the Commission, the Solicitor submits sufficient information for the Commission to approve settlements in the amount of the original assessment in a significant percentage of all settlement cases. Thus, in FY'90 the Commission approved settlements in the amount of the Secretary's original proposal in 29% of all settlement cases.

13 FMSHRC at 352-53 (citations and footnotes omitted). We note that for calendar year 1991, the appeal rate from proposed assessments not involving excessive history was 7.1%, and the rate from all proposed assessments, including those involving excessive history, was 13.2%.

We affirm Judge Merlin's determination that the PPL is properly classified as substantive, rather than a mere enunciation of future policy.

(5) The PPL as a rule of agency procedure

Section 553's third exception is for rules of agency organization, procedure, or practice. The purpose of this exception is "to ensure that agencies retain latitude in organizing their internal operations." Batterton, 648 F.2d at 707. As the Batterton Court explained:

> A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency.

Id. (footnote omitted). This exemption does not apply where the agency action "trenches on substantial private rights and interests." Batterton, 648 F.2d at 708.

Like the statistical methodology in Batterton, the PPL's excessive history formula "jeopardizes the rights and interests of parties" subjected to its coverage. 648 F.2d at 708. We find dispositive the PPL's actual effect on penalty issues and operators' correlative interests. Thus, we conclude that, viewed from the perspective of the third exception, the PPL is substantive rather than procedural in nature.

(6) Applicability of the "good cause" exception

We further conclude, in agreement with the judge, that the PPL cannot be justified on the basis of the "good cause" exception in 5 U.S.C. § 553(b)(3)(B). The grounds justifying an agency's use of the good cause exception must be incorporated within the agency pronouncement. 5 U.S.C. § 553(b)(3)(B); United States v. Garner, 767 F.2d 104, 120 (5th Cir. 1985). A judicial directive to take immediate action may constitute good cause for a section 553(b)(3)(B) exception. American Federation of Gov. Emp. v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981). Where there is not a judicial directive to take immediate action, "'the mere existence of deadlines for agency action, whether set by statute or court order, does not itself constitute good cause for a § 553(b)(B) exception.'" Id., quoting United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979). The good cause exception is to be read narrowly in order to avoid providing agencies with an escape clause from the rulemaking requirements Congress has prescribed. Garner, 767 F.2d at 120 (5th Cir. 1985).

Unlike the Secretary's interim regulation issued in December 1989 in response to Coal Employment Project I (supra), which formally relied upon the APA's good cause exception and cited a need for immediate action, the PPL is silent as to any claim of good cause under the APA. That defect alone is fatal. Moreover, as Judge Merlin found (13 FMSHRC at 353-54), and we have separately concluded, the PPL goes beyond the Court's interim mandate in Coal Employment Project I. Thus, the good cause exception does not apply.

(7) The Program Policy Letter as a type of special assessment

The Secretary also contends that the PPL is merely a form of, or further construction of, the special assessment procedure provided in section 100.5, supra. The special assessment provision sets forth eight categories of violations justifying individualized consideration, including "(h) Violations involving ... other unique aggravating circumstances." 30 C.F.R. § 100.5(h).[17] The provision requires that "[a]ll findings shall be

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[17] The categories are:

> (a) Violations involving fatalities and serious injuries;
> (b) Unwarrantable failure to comply with mandatory health and safety standards;
> (c) Operation of a mine in the face of a closure order;
> (d) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
> (e) Violations for which individuals are personally liable under Section 110(c) of the Act;
> (f) Violations involving an imminent

in narrative form." 30 C.F.R. § 100.5.

We reject the Secretary's contention that penalty proposals under the PPL "fall squarely within the special assessment formula" of section 100.5(h). S. Br. at 18 (emphasis added). Section 100.5 provides that "some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under [Section 100.3 and Section 100.4]." Id. (emphasis in original). Special assessments are based on the conditions surrounding the violation and "neither the nature nor the seriousness of a particular violation will automatically result in a special assessment." 47 Fed. Reg. 22292 (1982).

Although Secretarial discretion is a cornerstone of the section 100.5 special assessment program, the PPL creates a rigid formula for the proposed assessment of all excessive history cases. MSHA, in attempting to shoehorn violations by operators who meet the "excessive history" criteria into section 100.5(h), seeks to increase each of these assessments based on criteria that are unrelated to the violation itself and to do so without examination of whether there are "unique aggravating circumstances" surrounding the particular violation. The "Narrative Findings for Special Assessment" sent to Drummond were summary and apparently standardized. Identical statements of narrative findings for special assessment accompanied the notices of proposed penalties in the other six excessive history cases. The PPL is not a valid form of special assessment under existing regulations, and the Secretary's interpretation of section 100.5 to that effect is unreasonable. Cf. Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145, 1151 (D.C. Cir. 1987), aff'g, Secretary on behalf of Acton and UMWA v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (September 1985), et seq.

c. APA conclusions

For the reasons discussed above, we reject the Secretary's attempts to justify the PPL under any of the APA's exemptions to notice-and-comment rulemaking. In our opinion, the PPL is a binding norm of present effect. It constrains the Secretary's discretion and infringes upon substantial private interests. Accordingly, the Secretary was required to promulgate it through notice-and-comment rulemaking. As an invalidly issued substantive rule, the PPL can be accorded no legal weight or effect in these proceedings.

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danger;
(g) Discrimination violations under Section 105(c) of the Act; and
(h) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

30 C.F.R. § 100.5(a)-(h).

3. The PPL's relationship to the Part 100 regulations and the merits of a remand

In applying the invalid PPL in the present case to calculate civil penalties, the Secretary acted outside the existing framework of the Part 100 regulations. It is a fundamental principle that an agency must comply with its own regulations, even where the promulgation of such regulations is discretionary. Y&O, 9 FMSHRC at 679. See also Reuters, Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986); California Human Development Corp. v. Brock, 762 F.2d 1044, 1049 (D.C. Cir. 1985). In failing to so comply, the Secretary acted arbitrarily.

Drummond's proposed penalties were based in part on the criteria and penalty points for regular assessment in section 100.3, which assigns points based on history of violations. Excessive history penalty points drawn from the PPL were then applied and percentage increases calculated. No reference to such excessive history criteria or penalty points appears in any Part 100 regulations. Narrative findings accompanying Drummond's notice of proposed penalties stated that the penalty amount was increased by a certain percentage for excessive history. Thus, MSHA computed Drummond's penalties under the regular assessment formula but added to them an additional penalty purportedly under the authority of section 100.5 (special assessments).

We conclude that the civil penalties proposed in this matter are inconsistent with the existing Part 100 regulations, and constitute arbitrary enforcement action. The Commission announced in Y&O that it would guard against such arbitrary governmental action by remanding invalidly proposed penalties to the Secretary for recalculation in accordance with the Part 100 regulations. Under the circumstances presented, we conclude that such a remand qualifies as "other appropriate relief" in this civil penalty proceeding. 30 U.S.C. § 815(d).

C. Retroactivity

Drummond also argues that the excessive history provisions of the PPL were improperly applied retroactively because all but one of the citations in question were issued before the PPL's May 29, 1990, effective date, and because the history of violations includes violations that occurred before issuance of the PPL. Judge Merlin did not reach this issue.

In Bowen v. Georgetown University Hospital, et al., 488 U.S. 204, 208 (1988), the Supreme Court stated:

> Retroactivity is not favored in the law. Thus, congressional enactments and legislative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative

> rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

(Citations omitted). For purposes of determining whether an operator's history is "excessive," the PPL considers violations that occurred well before its issuance. Some of those violations may be ones that an operator chose not to challenge because the violations involved only a $20 penalty and were not considered as part of its history. Given the Supreme Court's admonition in Bowen, the retroactive nature of the PPL's excessive history procedures raises additional issues. The Secretary has not set forth reasons supporting retroactivity and the justification for retroactivity is not readily apparent. We need not resolve now whether the PPL is impermissibly retroactive but we deem it appropriate to signal our concern.

D. Summary

We hold that the Commission possesses subject matter jurisdiction, in these proceedings, to consider the nature and effect of the PPL. We conclude that the PPL exceeds the Court's interim mandate in Coal Employment Project I and contravenes the notice-and-comment provisions of the APA. We also conclude that the Secretary's interpretation of section 100.5(h) to encompass the provisions of the PPL is unreasonable. As an invalidly issued substantive rule, the PPL cannot be accorded legal effect. The penalties proposed against Drummond under the PPL conflict with the Part 100 regulatory scheme and constitute arbitrary agency action. Based on section 105(d) of the Mine Act and in consideration of the Commission's decision in Y&O, we conclude that these proposed penalties should be remanded to the Secretary for recomputation according to the Part 100 regulations and the Court's interim mandate as discussed herein.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision. The proposed penalties in this matter are remanded to the Secretary for recalculation in accordance with the existing Part 100 regulations, without reference to or use of the PPL's "excessive history" provisions. The Secretary remains obligated to comply properly with the D.C. Circuit's mandates in Coal Employment Project I and II, as discussed above.

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