UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1124

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

Petitioner,

v.

TWENTYMILE COAL COMPANY

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

REPLY BRIEF FOR THE SECRETARY OF LABOR

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

ALJ	Commission Administrative Law Judge
APA	Administrative Procedure Act
App.	Appendix
Commission	Federal Mine Safety and Health Review Commission
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
Tr.	Transcript
Twentymile	Twentymile Coal Company

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the bound Addendum to the Secretary's opening brief beginning at page A 1.

SUMMARY OF ARGUMENT

1. This Court, every other Circuit that has addressed the question, and the Commission itself have long held that the Mine Act gives the Secretary discretionary authority to cite the owner or production operator of a mine for violations committed by an independent contractor performing services at the mine. Nothing identified in Twentymile's brief compels a different result. The statutory language, the legislative history, and the statutory purpose all support holding the owner or production operator liable for violations committed by the independent contractor.

2. Nothing in Twentymile's brief undercuts the Secretary's argument that her enforcement decision as to which operator or operators to cite in a particular case is unreviewable. Twentymile's argument that the Secretary's decision to cite it in this case was reviewable because Congress intended the Commission to play a co-equal role with the Secretary and to have the authority to second-guess the Secretary's policy-based decisions is unpersuasive. Both this Court and the Fourth

Circuit have held that Section 113 of the Mine Act, 30 U.S.C. § 823, does not give the Commission such a policy-setting role -- and even if it did, nothing in Section 113, and nothing elsewhere in the Act, provides any meaningful standards by which the Secretary's decision to cite Twentymile could be reviewed.

The "consistent with the purposes and policies of the Act" standard applied by the Commission is not a standard provided by the Act and, in any event, is nothing more than a "boilerplate truism" that would apply to every agency action taken pursuant to a statute. The fact that Twentymile can only come up with an extra-statutory and effectively meaningless standard underscores the correctness of the Secretary's argument that the Act provides no meaningful standards.

3. If the Secretary's decision to cite Twentymile was reviewable, the Secretary's decision was not an abuse of discretion because the Secretary set forth a discernible rationale for her decision. Twentymile argues that the Commission majority's finding that the Secretary abused her discretion should be affirmed, but nothing in Twentymile's brief supports affirmance. Twentymile asks the Court to affirm the view of the facts which the Commission impermissibly substituted for that reasonably reached by the ALJ, and to affirm the

demanding and nondeferential standard applied by the Commission majority which is a significant departure from its own case law and contrary to the case law of this Court. The ALJ applied the correct standard, his decision is supported by substantial evidence, and should have been affirmed.

ARGUMENT

THE COMMISSION ERRED IN VACATING THE CITATIONS ISSUED TO TWENTYMILE ON THE GROUND THAT THE SECRETARY ABUSED HER DISCRETION IN CITING TWENTYMILE FOR VIOLATIONS COMMITTED BY AN INDEPENDENT CONTRACTOR ENGAGED BY TWENTYMILE TO PERFORM SERVICES AT TWENTYMILE'S MINE

A. The Mine Act Gives the Secretary Discretionary Authority to Cite the Owner or Production Operator of a Mine for Violations Committed by an Independent Contractor Performing Services at the Mine

1. Standard of review

When a court reviews an agency's interpretation of a statute the agency administers, if the statute is clear and unambiguous, the court, as well as the agency, must give effect to the "unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If the statute is silent or ambiguous with respect to a specific issue, the court should give deference to the agency's interpretation of the statute as long as the agency's interpretation is permissible -- that is, as long as it

makes sense of the statutory provision and is consistent with the purpose and the history of the statute. Chevron, 467 U.S. at 843-45. See Secretary of Labor v. Twentymile Coal Co., 411 F.3d 256, 261-62 (D.C. Cir. 2005) (according deference to the Secretary's interpretation of Section 105(a) of the Mine Act, 30 U.S.C. § 815(a)); Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (according deference to the Secretary's interpretation of Section 202 of the Mine Act, 30 U.S.C. § 842).

2. Twentymile has identified no reason that warrants overturning the Secretary's longstanding interpretation, which has been accepted by the Commission, this Court, and every other Circuit that has addressed the question

This Court, every other Circuit that has addressed the question, and the Commission itself have long held that the Mine Act gives the Secretary discretionary authority to cite the owner or production operator of a mine for violations committed by an independent contractor performing services at the mine. See Secretary's Opening Brief at 24-26 (citing, inter alia, Int'l Union, UMWA v. FMSHRC, 840 F.2d 77, 83-84 (D.C. Cir. 1988), and Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535 (D.C. Cir. 1986)). Those holdings are based on comprehensive and accurate analyses of the language, the

history, and the purpose of the Act, and Twentymile identifies no reason those holdings should now be overturned.

The Statutory Language

The enforcement provisions of the Mine Act all use the term "operator." Under Sections 104(a), (b), and (d) and 107(a) of the Act, citations and orders are issued to the "operator" for violations of the Act or standards and situations requiring withdrawal. 30 U.S.C. §§ 814(a), (b), & (d) and 817(a). Under Sections 105(a) and 110(a) of the Act, civil penalties are assessed against the "operator." 30 U.S.C. §§ 815(a), 820(a).

Section 3(d) of the Mine Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a [ ] mine or any independent contractor performing services or construction at such mine[.]" 30 U.S.C. § 802(d) (emphasis added). Section 3(d), which this Court has described as a "critical element of the statutory scheme," UMWA, 840 F.2d at 79, has consistently been read as indicating that both the owner or production operator of a mine and an independent contractor performing services at the mine can be an "operator" under the Act. See, e.g., Harman Mining Corp v. FMSHRC, 671 F.2d 794, 797 (4th Cir. 1981); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981); Bituminous Coal

Operators' Ass'n ("BCOA") v. Secretary of Interior, 547 F.2d 240, 246 (4th Cir. 1977) (construing the predecessor provision in the Coal Act, which did not include the phrase "any independent contractor performing services ... at such mine"). Section 110(a) of the Act, 30 U.S.C. § 820(a), which this Court has recognized as establishing "the mechanism for encouraging operator compliance with safety and health standards," Coal Employment Project v. Dole, 889 F.2d 1127, 1132 (D.C. Cir. 1989) (citation to legislative history and internal quotation marks omitted), states that the "operator" of a mine "in which a violation occurs ... shall be assessed a civil penalty ...." Section 110(a) has consistently been read as indicating that the owner or production operator of a mine is liable without regard to its own fault for violations committed by an independent contractor. See, e.g., UMWA, 840 F.2d at 83; Harman Mining, 671 F.2d at 797; BCOA, 547 F.2d at 246-47 (construing the predecessor provision in the Coal Act).

Reading the relevant provisions of the Act in conjunction with each other, the Courts and the Commission have always held that the Secretary may cite both the owner or production operator and the independent contractor for violations committed by the independent contractor. See, e.g., UMWA, 840 F.2d at 82-

84; Harman Mining, 671 F.2d at 797; Cyprus Industrial, 664 F.2d at 1118-19; BCOA, 547 F.2d at 246-47 (construing the Coal Act); Old Ben Coal Co., 1 FMSHRC 1480, 1482-83 (Oct. 1979).

Focusing exclusively on Section 104(a) of the Act, 30 U.S.C. § 814(a), Twentymile argues that the Secretary can only cite the operator who committed the violation because Section 104(a) says that, if an MSHA inspector believes that "an operator" has committed a violation, he shall issue a citation to "the operator." Twentymile Brief at 26-29. Twentymile's argument should be rejected because it violates the cardinal principle that, when the Court is charged "with understanding the relationship between two different provisions within a statute, [it] must analyze the language of each to make sense of the whole." Bell Atlantic Telephone Cos. V. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (rejecting a "plain meaning" argument that read the language of one provision in isolation from that of related provisions). Twentymile's truncated reading of the Act is especially egregious because it effectively reads out of the statute two of its most important provisions -- Section 3(d), which defines the term "operator" throughout the Act, and Section 110(a), which establishes the primary enforcement mechanism of the Act. See 30 U.S.C. §§ 802(d) and 820(a). If

Congress intended the phrase "the operator" in Section 104(a) to mean something different than it means in Sections 3(d) and 110(a), it could have said so explicitly -- for example, by using the phrase "such operator" or the phrase "the operator who committed the violation." Cf. UMWA, 840 F.2d at 82 (reading the second and third sentences of Section 111 of the Act, 30 U.S.C. § 821, in conjunction with the first sentence). It did not.

The legislative history

In BCOA, the Fourth Circuit, construing the Coal Act's definition of "operator," held (1) that both the owner or production operator of a mine and an independent contractor performing services at the mine could be an "operator," and (2) that the owner or production operator could be cited for the independent contractor's violations. BCOA, 547 F.2d at 247. In expanding the definition of "operator" in the Mine Act, the Senate Committee Report stated:

> ... [T]he definition of mine "operator" is expanded to include "any independent contractor performing services or construction at such mine." It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of

> the [Mine Act]. In enforcing this Act, the Secretary should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of Interior, 547 F.2d 240 (C.A. 4, 1977).

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978) (emphasis added). The quoted passage has been read as indicating that, in enacting the Mine Act, Congress approved the Fourth Circuit's holding in BCOA that the Secretary may cite the owner or production operator, the independent contractor, or both for violations committed by the independent contractor. Cyprus Industrial, 664 F.2d at 1119; National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 703 (3d Cir. 1979); Old Ben, 1 FMSHRC at 1481.

Twentymile argues that the quoted passage should be read as referring only to the first holding in BCOA and not to the second. Twentymile Brief at 31-32. The quoted passage, however, draws no such distinction -- and even if it did, that would make no difference. When Congress is aware of an existing

interpretation of a statute and either reenacts the statute or incorporates its relevant sections into a new statute without change, it is presumed to have adopted that interpretation. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978); AFL-CIO v. Brock, 835 F.2d 912, 915 (D.C. Cir. 1987). Here, it is self-evident that Congress was aware of the decision in BCOA -- and that it did nothing to disavow either one of its holdings. On the contrary, the only change Congress signaled in enacting the Mine Act was to expand the statutory definition of "operator" so as to explicitly include independent contractors. See Harman, 671 F.2d at 797 n.2; Cyprus Industrial, 664 F.2d at 1119.

The statutory purpose

Finally, there are "sound policy reasons" for holding the owner or production operator liable for violations committed by the independent contractor. Cyprus Industrial, 664 F.2d at 1119. As the Ninth Circuit has explained:

> For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances.

Ibid. Accord Republic Steel Corp., 1 FMSHRC 5, 11 (April 1979), cited and quoted in Cyprus Industrial, 660 F.2d at 1120.

Contrary to Twentymile's argument, Twentymile Brief at 32-33, nothing the Secretary said in promulgating her rule regarding independent contractors suggests otherwise. In the preamble to the rule, the Secretary stressed that production operators "remain ultimately responsible for the safety and health of persons working at the mine" and may be cited for an independent contractor's violations "in appropriate circumstances." 45 Fed. Reg. 44,494, 44,494 (July 1, 1980), cited in Cathedral Bluffs, 796 F.2d at 534. In the Enforcement Guidelines accompanying the rule, the Secretary stressed that production operators retain "overall compliance responsibility," including "assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine[,]" and that "independent contractors and production-operators both are responsible for compliance ...." Id. at 44,497, quoted in Cathedral Bluffs, 796 F.2d at 538.

In sum, Twentymile has identified no reason to warrant overturning an interpretation that has been espoused by the Secretary throughout the history of the Mine Act and has been

accepted by the Commission, this Court, and every other Circuit that has addressed the question. See Excel Mining, 334 F.3d at 7 (according "special deference" to an interpretation the Secretary had consistently espoused for more than 25 years).

B. The Secretary's Decision to Cite Twentymile Was Not Reviewable

Under the principles set forth in the Secretary's opening brief, an agency's action is unreviewable if there are no meaningful standards, either in the statute in question or in binding statements promulgated by the agency itself, by which that action can be reviewed. See Secretary's Opening Brief at 26-35. There are no meaningful standards by which the Secretary's enforcement decisions at multi-operator mine sites can be reviewed. The Mine Act's enforcement provisions, which have been consistently and correctly construed as authorizing the Secretary to take enforcement action against more than one operator at a multi-operator site, say nothing about which operator or operators the Secretary should take action against in a particular case. See Secretary's Opening Brief at 28-29 (discussing Sections 104(a), 30 U.S.C. § 814(a); 105(a), 30 U.S.C. § 815(a); and 3(d) of the Act, 30 U.S.C. § 802).[1] The

[1] As Twentymile notes, some of the cases cited in the Secretary's opening brief are cases in which the court found

Secretary's Enforcement Guidelines are, as this Court held in Cathedral Bluffs, 796 F.2d at 536-39, not binding on the Secretary. See Secretary's Opening Brief at 31-32.

Twentymile advances a number of arguments to the effect that the Secretary's decision to cite it in this case was reviewable. Twentymile Brief at 14-26. Two of those arguments will be addressed here; the rest are fully addressed in the Secretary's opening brief.

Relying primarily on Section 113 of the Mine Act, 30 U.S.C. § 823, and several quotations from the legislative history, Twentymile argues in effect that the Secretary's decision to cite it was reviewable because Congress intended the Commission to play a co-equal role with the Secretary and to have the authority to second-guess the Secretary's policy-based decisions. Twentymile Brief at 20-24. Both this Court and the

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that an action was unreviewable because the matter was "specifically committed to agency discretion in the language of the authorizing statute." Twentymile Brief at 18-19 (citing cases). Other cases, however, are cases in which the court found that an action was unreviewable because the statute was simply silent on the manner in which the agency was to proceed. See Secretary's Opening Brief at 29 (citing cases). In this case, the statute is "utterly silent on the manner in which the [agency] is to proceed against a particular transgressor." Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456, 461 (D.C. Cir. 2001). If a statute is utterly silent on how an agency is to act, it by definition provides no meaningful standards by which to review how the agency acts.

Fourth Circuit, however, have held that Section 113, 30 U.S.C. § 823, does not give the Commission such a policy-setting role. Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463-64 (D.C. Cir. 1996); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996). Instead, both courts have held, the Commission plays a purely adjudicatory role and owes the Secretary's decisions the same deference adjudicatory bodies normally owe the decisions of agencies that are vested with rulemaking and enforcement authority. Ibid. See also Meredith v. FMSHRC, 177 F.3d 1042, 1054 (D.C. 1999) (stating, in a different context, that the Commission's "sole function" lies in adjudicating claims under the Act and that "responsibility for enforcement of [the Act's] protections" rests with the Secretary and MSHA); Cathedral Bluffs, 796 F.2d at 538 (stating, in finding that the Secretary's Enforcement Guidelines are not binding on the Secretary, that the policies underlying the traditional reluctance of courts to interfere in an enforcement agency's exercise of its enforcement discretion "extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the [Commission]").

In any event, even if the Commission had the extraordinary and extra-adjudicatory authority Twentymile asserts it has, the

Secretary's decision to cite Twentymile would have been unreviewable. A statutory provision that provides for review generally does not render a particular decision reviewable if there are no meaningful standards by which that decision can be reviewed. Steenholdt v. FAA, 314 F.3d 633, 638-39 (D.C. Cir. 2003). More specifically, the determinative question in this case is not whether the Act gives the Commission the general authority to review cases in which an enforcement decision by the Secretary is involved, but whether the Act gives the Commission the actual ability to review the Secretary's enforcement decision itself. As set forth in the Secretary's Opening Brief at 26-35, and in this Brief at 12-14, the answer to that question is no.

Twentymile also argues in effect that the Act must provide a meaningful standard by which the Secretary's enforcement decisions can be reviewed because the Commission has applied a meaningful standard -- i.e., whether the Secretary's decision was "made for reasons consistent with the purposes and policies of the [Act]." Twentymile Brief at 24-26 (citation and internal quotation marks omitted). That standard, however, appears nowhere in the Act, and Twentymile cannot persuasively claim that the Act provides a meaningful standard because the

Commission has come up with a standard the Act does not provide. If Twentymile's logic were correct -- that is, if an adjudicatory body could make an agency action reviewable simply by saying that it is reviewable -- the principles of unreviewability set forth in the Secretary's opening brief could be eliminated in every case by the adjudicatory body's ipse dixit.

In any event, even if the "consistent with the purposes and policies of the Act" standard were provided by the Act and not merely by the Commission itself, it would not be a meaningful standard by which the Secretary's enforcement decisions can be reviewed. By definition, every statute has "purposes and policies." It follows that, if a "purposes and policies of the statute" standard were a meaningful standard of review, every agency action taken pursuant to a statute would be reviewable. Such an approach is unacceptable because, again, it would eliminate the principles of unreviewability traditionally recognized by the courts and encoded in the APA. See Steenholdt, 314 F.3d at 639 (rejecting an argument that the statute's general "substantial evidence" provision provided a standard by which the action in question could be reviewed because, if it did, "there would be 'law to apply' in every

agency action" and "no agency action could ever be committed to agency discretion by law").

In sum, the "consistent with the purposes and policies of the Act" standard is not a standard provided by the Act and, in any event, is nothing more than a "boilerplate truism" that would apply to every agency action taken pursuant to a statute. Baltimore Gas, 252 F.3d at 461 (finding that the assertion that the agency was required to protect "consumer interests," a phrase which did not appear in the statute, was a "boilerplate truism" and not a "discretion-restricting guideline"). The fact that Twentymile can only come up with an extra-statutory and effectively meaningless standard underscores the correctness of the Secretary's contention that the Act provides no meaningful standards.[2]

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[2] Before the Commission, Twentymile itself complained that the Commission's "consistent with the purposes and policies of the Act" standard "provides little concrete guidance" and that the Commission's case law "does not actually illuminate when it is appropriate for the Secretary to cite a production operator for a violation by an independent contractor." Twentymile brief dated October 16, 2003, at 16-17 (explaining why the Act should not be construed as authorizing the Secretary to cite production operators for violations committed by independent contractors).

C. If the Secretary's Decision to Cite Twentymile Was Reviewable, the Commission Erred in Finding That the Secretary's Decision Was an Abuse of Discretion

The Secretary argued in her opening brief that the Commission majority committed two distinct but interrelated errors in reversing the ALJ's finding that the Secretary did not abuse her discretion in citing Twentymile. See Secretary's Opening Brief at 36-44. Specifically, the Secretary asserted that the Commission majority erred (1) by applying an incorrect standard of review to the Secretary's enforcement decision and (2) by discounting the valid and relevant evidence the ALJ relied on and substituting its own competing view of the facts. Ibid. Twentymile argues that the Commission majority's finding that the Secretary abused her enforcement discretion should be affirmed, but nothing in Twentymile's brief supports affirmance.

For example, Twentymile argues that the Commission majority correctly found that the MSHA inspector's belief that there was a "serious problem" with contractor violations at the mine was not an appropriate basis for issuing citations to Twentymile because the evidence shows that the inspector did not make a "reasonable investigation of the facts." Twentymile Brief at 37-38. In support of its argument, Twentymile relies on evidence that it had not had problems with contractor compliance

for the preceding two years, that MSHA had not issued any citations to Precision, the contractor, in the preceding two years, and that Precision had no reportable injuries for the preceding four years. Ibid. Twentymile's argument is unpersuasive because it asks the Court to do what it cannot do -- affirm the view of the facts which the Commission impermissibly substituted for that reasonably reached by the ALJ. See Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90-92 (D.C. Cir. 1983).

The ALJ relied on the fact (1) that the MSHA inspector was personally familiar with the high number of contractor violations at the mine in the past, (2) that the inspector believed that the number of violations committed by Precision and found during the August 2001 inspection was an indication that the number of contractor violations at the mine might again be increasing, and (3) that the inspector had previously told Twentymile that the high number of contractor violations needed to be reduced or it would be held responsible for future contractor violations. Under the circumstances, it was perfectly reasonable for the inspector to believe that the number of violations by the contractor in this case signaled another increase in contractor violations at the mine, and to

take prompt enforcement action rather than sit back and wait for another pattern of contractor violations to develop. And it was perfectly consistent with Commission case law for the ALJ to rely on such facts in finding that the Secretary did not abuse her enforcement discretion.[3]

Twentymile's argument that the evidence does not satisfy the criteria the Commission majority required the Secretary to meet in order to establish that she did not abuse her enforcement discretion, Twentymile Brief at 39-47, is fully addressed in the Secretary's opening brief. See Secretary's Opening Brief at 41-44. The criteria the Commission majority required the Secretary to meet -- that Twentymile had significant or special control over the conditions requiring abatement, that Twentymile was in the best position to prevent the violations, and that the Secretary's Enforcement Guidelines

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[3] There is simply no case law to support Twentymile's assertion that the ALJ impermissibly relied on the MSHA inspector's subjective belief because the inspector did not perform an "objective analysis." Twentymile's Brief at 38. In conducting a mine inspection, an MSHA inspector is obligated to make prompt decisions as to what enforcement actions are called for to address safety and health problems he discovers at the mine. Thus, an MSHA inspector's judgment has often been given significant weight by the Commission without any requirement of an "objective analysis." See Secretary's Opening Brief at 41. In this case, the inspector's prompt action on the basis of the information he had was not arbitrary and capricious because it was rationally related to the situation that he was reacting to.

are to be applied and are only satisfied if a "significant threshold," a factor that has never before been required by the Commission, has been reached -- go far beyond the abuse of discretion standard of review the majority assertedly applied. Ibid.

Finally, Twentymile's objection that, if the Secretary is not required to meet the Commission majority's demanding criteria, virtually every production operator could be liable for contractor violations under the less demanding Enforcement Guidelines typically relied on by the Secretary is unpersuasive. Twentymile Brief at 39-40, 43, 45-46. Twentymile's objection is inconsistent with the well-settled case law that the production operator of a mine "is liable without regard to its own fault for violations committed by or dangers created by its independent contractor." UMWA, 840 F.2d at 83-84 (discussing cases). Moreover, Twentymile's concern is purely speculative and is unlikely to occur because, if the Secretary's enforcement decision is reviewable under the abuse of discretion standard, the Secretary is required to establish a rational connection between the facts found and the choice made to cite a production operator for a violation committed by a contractor at a multi-operator mine site. In this case, the Secretary established

just such a connection.

CONCLUSION

For the reasons stated above and in the Secretary's opening brief, the Secretary requests that the Court reverse the portion of the decision of the Commission finding that the Secretary's enforcement decision was reviewable. If the Court declines to do so, the Secretary requests that it reverse that portion of the Commission's decision finding that the Secretary abused her discretion in citing Twentymile for the violations committed by Precision. In either event, the Secretary requests that the Court vacate the Commission's decision so as to leave the ALJ's decision standing as affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(d) and 32(a)(2), I certify that this Reply Brief for the Secretary of Labor contains 4,590 words as determined by Word, the processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that two copies of the Reply Brief for the Secretary of Labor were served by overnight delivery on November 28, 2005, on:

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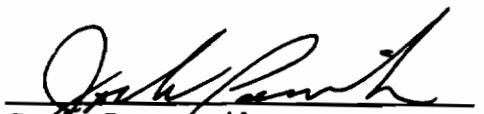

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