

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 31 2017

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

v.

Docket Nos. WEST 2015-64
WEST 2014-930-R

PEABODY TWENTYMILE MINING, LLC

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:¹

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). It concerns Citation No. 8481807, which was issued to Peabody Twentymile Mining, LLC (“Peabody Twentymile” or “Peabody”), by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) for an alleged violation of 30 C.F.R. § 75.333(e)(1)(i).² The citation stated that Peabody had improperly used

¹ The votes of the four Commission members regarding whether to affirm the judgment below were evenly divided. All four members join in the Factual and Procedural Background section of this decision. However, Commissioners Cohen and Jordan, writing separately, urge affirmance of the Judge’s decision, while Acting Chairman Althen and Commissioner Young join in one opinion urging reversal.

² Section 75.333(e)(1)(i) provides in relevant part that

[e]xcept as provided in paragraphs (e)(2), (3) and (4) of this section all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls. . . . In-mine tests shall be designed to demonstrate the comparative strength of the proposed construction and a traditionally accepted in-mine control.

polyurethane spray foam to seal the perimeter of a concrete block ventilation stopping. MSHA issued the citation under section 104(a) of the Mine Act and designated that it was the result of moderate negligence and was unlikely to cause a lost workday or restricted duty injury. The citation was not marked as significant and substantial. Pursuant to these designations, MSHA proposed that Peabody Twentymile pay a civil penalty of \$162.

Peabody Twentymile contested the citation and the proposed penalties before a Commission Administrative Law Judge. After a hearing on the merits, the Judge issued a decision on November 30, 2015, finding that Peabody violated section 75.333(e)(1)(i) and assessed a \$162 penalty against the operator for that violation.³ 37 FMSHRC 2635 (Nov. 2015) (ALJ). Peabody filed a petition for discretionary review of the Judge's decision, which we granted.

As stated in footnote one, two Commission members vote to affirm the Judge's decision, and two Commission members vote to reverse the Judge's decision. As a result of this vote split, the Judge's decision will stand as if affirmed. *Pa. Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Factual Background

Peabody operates the Foidel Creek Mine, a large underground coal mine in Colorado. The mine contains over 1,000 ventilation stoppings, which separate intake air from return/belt air, in order to protect miners working at the face from noxious air and to maintain the integrity of miners' designated escapeways. Tr. 30, 48-49, 98, 100, 104.

The mine's approved ventilation plan recognizes that Peabody constructs two types of stoppings: temporary metal panel stoppings, known as Kennedy stoppings; and permanent concrete block stoppings. Construction of Kennedy stoppings involves inserting vertically adjustable 12-inch wide metal panels into the entry forming a wall and then using sheet-metal flagging at the edges to get the stopping snug against the ribs. *See* Tr. 35-36; Peabody Ex. D, p. 5 (diagrams of Kennedy stopping). MSHA has recognized that a Kennedy stopping may be sealed with polyurethane foam, a non-strength-enhancing material. Tr. 35-37, 39, 53.

30 C.F.R. § 75.333(e)(1)(i).

³ The docket containing Citation No. 8481807 originally contained a total of six issuances related to conditions at Foidel Creek Mine, which the operator contested. In his decision, the Judge also approved a partial settlement of the five other violations that were contained in the docket, and assessed a total penalty of \$3,020 for all six violations.

The method of constructing dry-stacked concrete block stoppings at the mine was very different from that used to construct the Kennedy stoppings. Block stoppings were created by: (1) scaling down loose material on the ribs and roof, including old roof control material; (2) creating a level base on the mine floor; (3) dry-stacking rows of three-inch thick cinder blocks (eight-inch wide “half blocks”); (4) placing wooden wedges between the last cinder block on each row and the adjacent rib, and between the top of the final row and the roof; (5) applying mortar or other strength enhancing sealant material with a trowel to cover the face of the cinder blocks; and (6) prior to the issuance of the citation in this case, sealing the perimeter of the stoppings (sides and top) by injecting the same polyurethane foam used in the Kennedy stoppings. *See* Tr. 32-35, 44, 116-18, 125; Peabody Ex. B, at 1-3.

The perimeter of a stopping is sealed to ensure that air does not leak through the stopping, i.e., to ensure to the extent practicable that the air travelling through adjacent air courses remains separated and does not mix, so that the working face and escapeways do not become “contaminat[ed] . . . with harmful gases.” Tr. 30-31, 35. Because they use panels and flagging, the Kennedy stoppings create a tighter fit along the ribs and roof than do concrete block stoppings. The gaps in a Kennedy stopping can vary from a “small seam” where the panels are butted tight onto the rib or roof to up to four inches depending on the shape of the rib and the conditions in the mine. Tr. 36. The gaps with the block stoppings generally range from 0 to 6 inches so that as a general matter the gaps at their widest points may have been up to 2 inches wider than with a Kennedy stopping at their wide points. Tr. 47. The purpose of the polyurethane foam is to seal the perimeter of the stopping to prevent air from flowing through it. Tr. 39.

On August 5, 2014, MSHA Inspector Yasser Akbarzadeh observed that the perimeter of a block stopping separating the intake entry from the belt entry on the 13 Left working section, MMU 008-0, was sealed with Touch 'n Seal foam. Sec. Ex. 2, at 13-15 (inspector notes). On the following day, Inspector Akbarzadeh issued Citation No. 8481807, alleging a violation of 30 C.F.R. § 75.333(e)(1)(i), for failure to construct the stopping using “a traditionally accepted method.” Sec. Ex. 1, at 1-3 (citation/modified citation). After consulting with MSHA District Manager Russell Roytee and Assistant District Manager James Preece (who had accompanied Akbarzadeh on the inspection and pointed out the violative condition), the inspector modified the citation later the same day to allege, among other things, that the perimeter of a “cinder block stopping” was not “sealed with mortar,” but instead “sealed with touch N seal [sic] foam measuring approximately 0 to 6 inches along the ribs and roof.” Sec. Ex. 1, at 1-3; Tr. 19-22, 43. On August 12, 2014, Peabody contested the citation.

Before the issuance of the disputed citation, Peabody had consistently used polyurethane foam to seal the edges of both its block stoppings and Kennedy stoppings. In 1983, the original ventilation plan for the mine allowed for sealing with “other approved sealants” which the operator’s witnesses testified included polyurethane foam. Tr. 139-40, 144. In 1991, MSHA approved a ventilation plan that explicitly allowed for the use of polyurethane foam. Tr. 138-39; Peabody Ex. D. The MSHA-approved plan provided: “Foam application for ventilation devices will be limited to sealing cracks and perimeters of ventilation devices.” Peabody Ex. D, at 7. That application was approved in subsequent plans, including ones in 2000 and 2011. Peabody Ex. D, at 9; Sec. Ex. 3; Sec. Ex. 11, at 2; Tr. 138-39.

The 2011 Plan was in effect at the time of the citation and, with regard to polyurethane foam, provides: "Application of foam for ventilation device installation will be limited to sealing the perimeter and joints of such devices. Foam may be used to repair ventilation device doors and holes in stoppings up to 4 inches by 4 inches in size." Tr. 91, 108; Sec. Ex. 3 (June 8, 2011, ventilation plan, p. 11). That language does not limit the application of polyurethane foam to metal Kennedy stoppings. Tr. 91. At the hearing, Assistant District Manager Preece testified that this language was implicitly limited to Kennedy stoppings because polyurethane foam is, "approved for Kennedy stoppings and not block stoppings." Tr. 49. However, he stated that the plan should not have been approved "because it doesn't differentiate between the two." Tr. 59-60. Witnesses for the operator testified that they uniformly believed that there was no limitation on using the foam on block stoppings. Tr. 107-08.

Witnesses for the operator testified that MSHA had never cited the mine or required management to change the construction method in the past despite this history and the fact that hundreds, or even thousands, of block stoppings at Foidel Mine were sealed with polyurethane foam and inspected by MSHA. Tr. 107-08, 123. Preece testified that he had inspected the mine "multiple times" over the years, yet he had never issued a citation before. Tr. 42. MSHA Inspector Barry Grosely had also inspected the mine on numerous previous occasions and had issued only one citation for sealing block stoppings with polyurethane foam. Tr. 166.⁴

⁴ Inspector Grosely testified that during the years Peabody used the polyurethane foam, he cited Peabody on one occasion for an excessive application of Touch 'n Seal foam at a Kennedy stopping because in some places it had applied 16 or 17 inches of the material. Sec. Ex. 9 (citation); Tr. 71-73, 75, 76. In discussing the use of polyurethane foam to seal stoppings at the mine, Inspector Grosely testified that his concerns went beyond workmanship of the single stopping cited and concerned the method of construction for both Kennedy and block stoppings. Tr. 169. Inspector Grosely testified that he "was very adamant" about telling Peabody that the polyurethane foam "wasn't doing anything for the stability of the stopping . . . , and with a block stopping it would not enhance . . . the strength of the stopping." Tr. 169-70. Grosely testified that he told Peabody that foam should only be used in block stoppings as a secondary sealant material to address minor cracks occurring in the face and perimeter areas after perimeters were properly constructed with a primary sealant of strength-enhancing bonding material (such as mortar). Grosely told Peabody that "the interface between where the block meets the coal rib . . . should be filled with mortar or some strength enhanced material." Tr. 78.

Mine Foreman Ronald Hockett was familiar with this citation. He testified that the company had been cited because "there was lack of workmanship in the stopping, and there was an excessive amount of foam that was used." Tr. 120. He asserted that it was not a typical stopping built in the mine. In short, he asserted that the problem was a single, poorly made stopping rather than a systemic problem with the nature of construction. His understanding was that foam sealant could be used on the perimeter of stoppings, but not in excess. Tr. 120, 123-24.

Regardless of this enforcement history at Foidel Mine, Preece testified that he had always used strength-enhancing mortar to seal the perimeter of block stoppings. Tr. 34-35, 64-65. Preece testified that polyurethane foam was not strength-enhancing, which was especially important when stoppings were constructed of dry-stacked blocks, and was not fire-rated, which meant that it could burn out in the event of a fire and allow the spread of smoke. Preece noted that the manufacturer's brochure states that the "Touch 'n Seal Mine Foam Ventilation Control System" is a "non-strength enhancing mine sealant" used to "[s]eal metal stoppings" and "[r]epair damaged block stoppings." Sec. Ex. 11, at 1-2 (brochure); Tr. 38-39. Grosely testified that it is possible to install the foam insulation in a "superficial" manner that does not fill the gaps or create a tight seal. Tr. 164, 167.

Preece testified that polyurethane foam could be used along the perimeter of Kennedy stoppings because any gaps in the tight-fitting metal panels were small. By contrast, on block stoppings, polyurethane foam could only be used "as a repair [of] minor cracks and holes" and "is not used on [the] initial build of the stopping[s]." Tr. 44. Preece stated that the traditionally accepted method of constructing block stoppings, after stacking and wedging the blocks, is to apply a bonding material to the face of the blocks and to the perimeter of the stoppings. Indeed, Preece indicated that, if properly constructed, newly constructed block seals should not require the application of any foam at all. In sum, Preece testified that application of Touch 'n Seal is not a traditionally accepted method of sealing the perimeter of block stoppings. Tr. 39, 44-45, 47 (Preece), 78 (Grosely), 156-57 (Preece).

B. The Judge's Decision

In his November 30, 2015, decision, the Judge stressed that section 75.333(e)(1)(i) provides that permanent stoppings shall be constructed in a "traditionally accepted method" with "materials that have been demonstrated to perform adequately." 37 FMSHRC at 2643. Because the standard does not define what constitutes a "traditionally accepted method" of constructing stoppings, the Judge took administrative notice of the preamble to the standard for guidance in interpreting that ambiguous term. The Judge found that the list of five "traditionally accepted methods" set forth in the preamble "is exhaustive," and concluded that any methods not set forth in the preamble would require engineering tests before such methods could be adopted by an operator in lieu of the five methods enumerated. 37 FMSHRC at 2643; *see* Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783-84 (Mar. 11, 1996). The Judge further noted that the preamble requires that the "perimeter" of cementitious masonry blocks be constructed of "strength enhancing sealant *suitable for dry-stacked stoppings*." 37 FMSHRC at 2644 (emphasis added by the Judge). The Judge noted that Touch 'n Seal, although approved by MSHA as a sealant for ventilation controls, is "non-strength-enhancing." *Id.*

The Judge held that "prior or even longstanding use of a particular sealant or construction method within a mine is irrelevant to whether a stopping is built according to 'traditionally accepted construction methods.'" *Id.* at 2643. The Judge also rejected Peabody's attempt to analogize the sealing of perimeters of its block stoppings to the sealing of the perimeters of metal Kennedy stoppings. The Judge concluded that Peabody's block stoppings are "much more similar to lightweight cementitious block stoppings than [to] metal panel stoppings." *Id.* at 2644.

Finally, the Judge rejected Peabody's argument that the language of the mine's ventilation plan permitted it to construct block stoppings in the manner for which it was cited. The Judge noted that the language in the plan did not clearly permit Peabody to use polyurethane foam as a primary sealant of the perimeter of block stoppings. The Judge held, moreover, that the language of a mine-specific plan cannot in any event be elevated to render meaningless the language of a specific applicable standard. *Id.* at 2645. Finally, he held that "any inquiry into prior MSHA inspectors' acceptance of similar construction techniques at the Twentymile Mine is immaterial." *Id.* As a result, the Judge concluded that Peabody violated section 75.333(e)(1)(i) when it sealed the perimeter of the cited block stopping with non-strength-enhancing foam rather than strength-enhancing mortar, and affirmed the citation. *Id.* The Judge also upheld MSHA's negligence and gravity designations and assessed the penalty proposed by the Secretary of Labor. *Id.* at 2645-47.

II.

Disposition

Commissioner Cohen would affirm the Judge's finding that the stoppings at the Foidel Creek Mine were not constructed using a "traditionally accepted method" and that, as a result, the operator violated 30 C.F.R. § 75.333(e)(1)(i). In affirming the Judge, he would hold that the Secretary's interpretation of the cited standard is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but not under *Auer v. Robbins*, 519 U.S. 452 (1997).

Commissioner Jordan would also affirm the decision of the Judge below but, unlike Commissioner Cohen, would hold that the Secretary's interpretation is entitled to *Auer*, as opposed to *Skidmore*, deference.

Acting Chairman Althen and Commissioner Young would reverse the Judge. They would find that the requirement for construction of stoppings in a "traditionally accepted method" has a plain meaning and that the operator's use of polyurethane foam clearly meets the standard. They would also hold that, even if section 75.333(e)(1)(i) were ambiguous, the Secretary's interpretation would not be entitled to deference.

Commissioner Cohen, in favor of affirming the Judge:

I would affirm the Judge's finding that the stoppings at Foidel Creek Mine were not constructed using a "traditionally accepted method" and that, as a result, the operator violated 30 C.F.R. § 75.333(e)(1)(i). In affirming the Judge, I would find that the Secretary's interpretation of the cited standard is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) but not *Auer v. Robbins*, 519 U.S. 452 (1997).

The regulation at issue in this proceeding provides in relevant part:

[A]ll overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after June 10, 1996, shall be constructed in a traditionally accepted method and of materials that have been demonstrated to perform adequately or in a method and of materials that have been tested and shown to have a minimum strength equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80, "Standard Methods of Conducting Strength Tests of Panels for Building Construction" (Section 12 – Transverse Load – Specimen Vertical, load, only), or the operator may conduct comparative in-mine tests. . . .

30 C.F.R. § 75.333(e)(1)(i). Peabody Twentymile routinely constructed permanent block stoppings at Foidel Creek Mine by dry-stacking concrete blocks, placing wedges around the perimeter to hold the stopping in place, applying mortar or other strength-enhancing sealant on the face of the blocks, and then sealing the perimeter of the stopping with non-strength enhancing polyurethane foam.

The dispute here is whether Peabody Twentymile's stoppings were made using a "traditionally accepted method" of construction within the meaning of the regulation. In reaching that issue, the Judge implicitly held that the regulation was ambiguous. While the Judge did not specifically state that the regulation was unclear, he noted that it did not define what methods or materials are "traditionally accepted," and used the language of the regulatory preamble as an aid in determining the meaning of the term. This indicates that he did not believe the meaning was plain. As discussed *infra*, I agree.

The regulatory preamble lists seven methods of construction that MSHA determined were traditionally accepted and had performed adequately to separate air courses. MSHA stated, "[t]hese traditionally accepted construction methods are:"

- 1) 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints;
- 2) 8-inch and 6-inch concrete blocks dry-stacked and coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings;
- 3) 8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings;

- 4) Steel stoppings (minimum 20-gauge) with seams sealed using manufacturer's recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant;
- 5) Lightweight incombustible cementitious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings
- 6) Four-inch concrete blocks may be used in the above applications in seam heights less than 48 inches; and
- 7) Tongue and groove 4-inch concrete blocks coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings may be used in coal seams of any height

Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783-84 (Mar. 11, 1996) (hereinafter "the preamble").

The Judge determined that this list of "traditionally accepted methods" of construction was "exhaustive." Because the method used by Peabody Twentymile at Foidel Creek Mine is not among those listed, the Judge determined that it was not a "traditionally accepted method" and upheld the citation. On appeal, the Secretary asserts that this is also his interpretation of the standard and argued that it is reasonable and entitled to deference.

Peabody Twentymile asserts that the Secretary's interpretation is not entitled to deference because the regulation has a plain meaning and the Secretary's interpretation is at variance with that meaning. The operator also argues that the Secretary has utilized other, inconsistent interpretations of the term "traditionally accepted methods" in the past. The operator argues that, to the extent the Judge granted deference to the Secretary's interpretation, his decision is erroneous and should be overturned.

Under the Supreme Court's decision in *Auer*, an agency's interpretation of its own ambiguous regulation is generally entitled to controlling deference. *Auer*, 519 U.S. at 461; *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). However, this interpretive power is not unlimited. In fact, in *Auer* itself the Court listed several limitations on agencies' ability to create controlling interpretations. Specifically, the court held that controlling deference would not be granted if the interpretation offered was "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

In addition, the Court also indicated that deference should not be granted when an agency's interpretation does not "reflect the agency's fair and considered judgment." *Id.* at 462-63. In *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012), the Court elaborated on the kinds of interpretations that would not reflect the agency's "fair and considered judgment." Such interpretations would include those that conflict with prior interpretations, those that are nothing more than convenient litigation positions, and those that are *post hoc*

rationalizations advanced by an agency seeking to defend past agency action.¹ 132 S.Ct. at 2166-67.

The two arguments advanced by Peabody Twentymile and described above implicate two of the limitations placed on *Auer* deference. Specifically, the operator essentially argues that the Secretary's interpretation is plainly erroneous or inconsistent with the regulation because that interpretation ignores the plain meaning that can be determined without recourse to the regulatory preamble. The operator also argues that the Secretary's interpretation does not reflect the agency's fair and considered judgment because it conflicts with prior interpretations.

I reject Peabody Twentymile's first argument. The Secretary's interpretation is not plainly erroneous but instead reasonable, and indeed persuasive, in light of the ambiguous regulatory language, the history of the creation of section 75.333(e)(1), and the Secretary's proper concern for miners' safety. That issue will be discussed at greater length *infra*.

The operator's second argument, that the Secretary's interpretation conflicts with past interpretations used by the agency, is a more complicated issue. Courts will refuse to grant *Auer* deference to an agency regulatory interpretation when that agency has advanced more than one interpretation of a given provision and those interpretations are not harmonious. *See, e.g., Perez v. Loren Cook Co.*, 803 F.3d 935, 941-42 (8th Cir. 2015) (the court refused to grant *Auer* deference because, "the Secretary has failed to produce a single citation, publication, or interpretation that could fairly be characterized as similar to the position the Secretary announced [here]," and its previously published interpretations differed considerably from the litigation position advanced in the case); *see also In re Estate of Covington*, 450 F.3d 917, 922 (9th Cir. 2006); and *Hudgens v. McDonald*, 823 F.3d 630, 638 (Fed. Cir. 2016).

Courts are concerned about the proliferation of inconsistent interpretations because of the possibility of unfair surprise. *See Independent Training and Apprenticeship Program v. California Dept. of Indus. Relations*, 730 F.3d 1024, 1034-35 (9th Cir. 2013) (an earlier agency interpretation of a regulation was wholly opposed to the litigation position and therefore created significant potential for unfair surprise). Courts are also reluctant to grant *Auer* deference to new, inconsistent interpretations because parties may rely on earlier, discarded reasonable interpretations. *See Thornton v. Graphic Communications Conference of Intern. Broth. of Teamsters*, 566 F.3d 597 (6th Cir. 2009). However, it is important to note that agencies are entitled to change their interpretations and positions over time; it is only a concern when the inconsistent interpretations creates the impression that the agency has not appropriately considered the matter. *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 878-79 (8th Cir. 2011).

¹ The Court did not newly create these categories, but instead referred to earlier Supreme Court and circuit court cases. In addition to those listed, courts have developed still further indicia that an agency's interpretation does not reflect its fair and considered judgment. *See e.g. Gonzalez v. Oregon*, 546 U.S. 243 (2006) ("anti-parroting" principle denying deference when regulation repeated language of the statute verbatim); and *Elgin Nursing Rehabilitation Center v. Department of Health and Human Services*, 718 F.3d 488 (5th Cir. 2013) (an interpretation of an ambiguous interpretation of a regulation not granted deference).

I am reluctant to grant *Auer* deference to the Secretary's interpretation of 30 C.F.R. § 75.333(e)(1)(i). There is evidence that the Secretary's application of the cited standard has been inconsistent. In this matter, the Secretary asserted that the use of polyurethane foam as a sealant around the perimeter of a block stopping is not a traditionally accepted method of construction. S. Resp. Brief at 16. However, the enforcement history shows that MSHA did not cite block stoppings sealed in this manner at this mine for over 30 years. Moreover, the Secretary routinely approved ventilation plans at the mine that permitted the use of polyurethane foam around the perimeter of stoppings. In light of the enforcement and approval history at the mine, one could conclude, as Peabody Twentymile did, that the Secretary interpreted the standard such that this construction method was considered "traditionally accepted." Such an interpretation is not consistent with the one the Secretary now asserts.

On the other hand, the evidence does not contain any unequivocal previous interpretations used by the Secretary that explicitly states that the use of polyurethane foam sealant is a "traditionally accepted method" for sealing the perimeter of stoppings constructed of dry-stacked concrete blocks. That is merely an inference that can be drawn from the enforcement history at this particular mine. An equally valid inference might be that allowing the operator to use the foam sealant was an error made by a single MSHA office and does not reflect the Secretary's general interpretation of the standard.²

However, the Secretary failed to establish that there was a consistent, nationally-enforced interpretation that prohibited the use of polyurethane foam around the perimeter of stoppings constructed of dry-stacked concrete blocks.³ While it is possible that such an interpretation existed (and the lack of enforcement at Foidel Creek Mine was the result of a mistake or confusion by a single district office), there is insufficient evidence in the record to reach that conclusion. As a result, I do not believe that *Auer* deference is warranted.

² The testimony from the Secretary's witness Preece that MSHA missed these violations for 30+ years because the inspectors were inexperienced was belied by the fact that he conceded that several experienced inspectors (including himself) inspected the mine. Groseley's testimony that other inspectors did not cite the condition because they were not intelligent enough to notice is offensive to the skilled, knowledgeable, and dedicated inspectors employed by MSHA and is likely not a principle the Secretary of Labor wants to extend into other cases.

³ Contrary to Commissioner Jordan's footnote 2, I am not suggesting that the Secretary generally has a burden to establish that an interpretation be consistently enforced on a national basis in order to be accorded *Auer* deference. But here, the interpretation for which the Secretary seeks *Auer* deference was not applied at the Foidel Creek Mine at any relevant time, and the unique question in this case is whether Peabody Twentymile's use of polyurethane foam as a sealant around the perimeter of a dry-stacked block stopping is a "traditionally accepted" method of construction. As described *infra*, footnote 8, the phrase "traditionally accepted" is almost never used in federal rule making. Unlike specific descriptions of conduct which are prescribed or proscribed, the phrase "traditionally accepted" suggests an analysis which is comparative in nature. In these very unique circumstances, evidence of the Secretary's policy in other coal districts would have been useful.

However, the fact that *Auer* deference is not warranted does not mean the Secretary's interpretation is necessarily rejected; it is not even the end of the discussion regarding deference. In *Christopher*, the Court held that if *Auer* deference was not warranted for an agency's interpretation of its own regulations, it would still grant some level of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control. 132 S.Ct. at 2169 citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) and *Skidmore*, 323 U.S. at 140. In addition to these four factors, the Supreme Court in *Mead* added several other important considerations in determining the correct level of deference, including the degree of the agency's care, the formality of the pronouncement, the agency's relative "expertness" and specialized experience, and the highly detailed nature of the regulatory scheme and the value of uniformity in the agency's understanding of what a national law requires. 533 U.S. at 228, 234. The application of these factors can produce "a spectrum of judicial responses, from great respect at one end, see e.g. *Aluminum Co. of America v. Central Lincoln People's Util. Dist.*, 467 U.S. 380, 389-90 (1984) . . . to near indifference at the other, see e.g. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988)." *Id.* at 228.

The Commission has previously held that if the Secretary's interpretation is reasonable and persuasive it can be entitled to deference under *Skidmore*, regardless of whether it would meet the standard for *Auer* deference. *Resolution Copper Mining, LLC*, 37 FMSHRC 2244, 2247 n. 5 (Oct. 2015). Similarly, various circuit courts have stated that an agency's interpretation of its own ambiguous regulations may be entitled to *Skidmore* deference when *Auer* deference is not warranted. See *Independent*, 730 F.3d at 1035-36; *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432 (1st Cir. 2013); *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72 (2nd Cir. 2009).

In the instant case, after considering the *Skidmore* and *Mead* factors together, I find the Secretary's interpretation of the standard to be reasonable and persuasive. As discussed above, I would find that the interpretation is not consistent with earlier pronouncements. However, many of the other factors in *Skidmore* and *Mead* cut strongly in favor of the Secretary's interpretation.

With respect to the thoroughness and validity of reasoning, I find that the Secretary's interpretation is reasonable. In fact, in light of the circumstances, I find it to be the most reasonable and persuasive interpretation of the standard. The Secretary's interpretation best comports with the language of the regulation, especially when the regulation is considered in the proper context. The Secretary's interpretation also is the most protective of the health and safety of miners.

The Judge did not err in resolving the textual ambiguity of the regulation by looking to the preamble for guidance. Context, including indications of the agency's intent at the time of the regulation's promulgation, is an important consideration in determining the meaning of a regulation. See *Gardebring v. Jenkins*, 485 U.S. 415, 429-430 (1988); see also *Northshore Min. Co. v. Secretary of Labor*, 709 F.3d 706 (8th Cir. 2013). In fact, courts have specifically used regulatory preambles to interpret the meaning of ambiguous regulations. See *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728-29 (8th Cir. 2003) ("we will consult the Standard's Preamble to

decipher the ambiguous language); *Albemarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000); and *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 53 (D.C. Cir. 1999) (“While language in the preamble of a regulation is not controlling over the language of the regulation itself. . . we have often recognized that the preamble to a regulation is evidence of an agency’s contemporaneous understanding of its proposed rules.”).

In order to understand the meaning of the term “traditionally accepted” in context, it is necessary to look not only at the preamble of the current iteration of 30 C.F.R. § 75.333(e)(2), but also the regulatory history that led to the current language. MSHA initially proposed a rule regarding the construction of stoppings in 1988. In the preamble to those proposed regulations, MSHA proposed requiring that “permanent stoppings be made of durable and noncombustible material, such as . . . concrete block, brick, cinder block, or tile.” Safety Standards for Underground Coal Mine Ventilation, 53 Fed. Reg. 2382-01, 2392 (Jan. 27, 1988). The agency proposed to define “durable” material as “material that is structurally equivalent to an 8-inch hollow-core concrete block stopping with mortared joints, as tested in accordance with section 12 of the American Society for Testing and Materials (ASTM), Standard Method of Test E-72” *Id.* at 2393. The purported reason for this definition was that an agency taskforce had determined that “8-inch hollow-core concrete block is typical of construction material used for ventilation controls in underground coal mines.” *Id.* To pass the ASTM E-72 test, a stopping would need to be able to withstand the same or greater static pressure as a concrete block, which was approximately 39 pounds per square foot. *Id.* In 1992, MSHA finalized the rule, maintaining the use of the phrase “durable and noncombustible” as well as the definition of “durable,” with its inclusion of the term “mortared joints” and its reference to ASTM E72-80 Section 12. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20868-01, 20884 (May 15, 1992).⁴

However, there were apparently issues with the application of the standard and by 1994 revisions to the rule were being proposed. In those proposed rules, MSHA noted, “[t]he Agency has become aware of questions on the part of a segment of the industry relative to what are acceptable construction methods . . . for the construction of permanent ventilation controls . . . that will result in controls that satisfy the definition of durable” Safety Standards for Underground Coal Mine Ventilation, 59 Fed. Reg. 26356-01, 26369 (May 19, 1994). MSHA proposed to address those questions by eliminating the definition of “durable” contained in the 1992 rule, and would instead simply require the controls be constructed to show a minimum strength of 39 pounds per square inch as tested under ASTM E72-80 Section 12. *Id.* The new rule would also allow for “alternative constructions” of ventilation controls, provided they showed the requisite minimum strength upon testing. *Id.* MSHA agreed to accept documentation showing that previously-tested controls met the strength standard. *Id.* MSHA proposed to keep a list of construction methods that met the requirements and a list of methods that did not. *Id.* MSHA also noted that dry-stacked stoppings plastered on only one side had not

⁴ While the reference was to section 12 of ASTM standard “E-72” in the preamble to the 1988 proposed rule, it became section 12 of ASTM standard “E72-80” in the 1992 final rule. The requirements of the standard remained the same.

been shown to have the requisite strength and, barring the creation of a stronger plaster, would not be acceptable. *Id.*

In 1996, MSHA issued the current final rule regarding the construction of permanent stoppings. As a result of “numerous comments,” the final rule was considerably different from the proposed rule. 61 Fed. Reg. at 9783. The final rule eliminated the reference to “8-inch hollow core concrete blocks” and set the definition for stoppings made with “new materials or methods” as requiring durability of 39 pounds per square inch. 61 Fed. Reg. at 9783, 9834. However, it also allowed for the construction of “traditionally accepted” methods of construction that did not necessarily meet the 39 pounds per square inch durability requirement. *Id.* In justifying this decision, MSHA noted:

Commenters questioned the appropriateness of a strength requirement of 39 pounds per square foot and the relevance of this value to the in-mine conditions. After review, MSHA continues to believe that use of the ASTM E72-80 test to determine that the relative strength of a ventilation control construction is appropriate and the final rule retains this standard.⁵ However, MSHA sees merit in some of the suggestions made by commenters. Commenters suggested that some constructions cannot be tested according to the ASTM test, some constructions that are widely used in coal mines do not meet the 39 pound per square foot threshold, and the ASTM test can only be run at a limited number of locations nationwide.

61 Fed. Reg. at 9783. MSHA further stated that since the inception of the Mine Act, a number of “traditionally accepted construction methods” had been shown to be adequate for their intended function. *Id.*

It then stated, “[t]hese traditionally accepted construction methods *are*:” and listed the seven types of construction shown above. *Id.* (emphasis added). This paragraph of the preamble concluded by saying, “[t]he final rule would continue to permit *these* traditionally accepted construction methods to be acceptable for the construction of ventilation controls.” 61 Fed. Reg. at 9783-84 (emphasis added). The next paragraph began, “[f]or new construction methods or materials other than those used *for the traditionally accepted constructions identified above*, the final rule requires that the strength be equal to or greater than the traditionally accepted in-mine controls. Tests may be performed under ASTM E72-80 Section 12” 61 Fed. Reg. at 9784 (emphasis added).

With this context in mind, MSHA’s intent in drafting the current language in the standard becomes clearer and the Secretary’s current interpretation is shown to be persuasive. MSHA had initially promulgated a rule that required stoppings to be made with 8-inch hollow-core concrete block stopping with mortared joints or equivalent constructions meeting a strength requirement of 39 pounds per square foot. However, upon promulgating this standard, the Agency received

⁵ My colleagues’ description of this paragraph of the preamble, at pages 31-32 of this opinion, omits this sentence. Slip op. at 31-32.

complaints from operators who were unsure about whether their traditional methods of construction would meet the strength requirements. MSHA proposed a new rule that made the strength requirements clearer and provided for “alternative constructions” with equivalent strength. However, operators continued to object to the durability standard, claiming that they had “traditional methods” of construction which were adequate, but would not meet the test.

Taking into account operators’ complaints, MSHA decided to maintain its objective strength standard, but carved out an exception for stoppings created using “traditionally accepted methods.” In order to emphasize the limited nature of that exception, MSHA explicitly defined the particular methods of construction that it considered traditionally accepted. As the Judge noted, 37 FMSHRC at 2643, MSHA indicated that this list constituted the universe of accepted construction methods by noting that “traditionally accepted construction methods *are*” those listed (rather than “includes” those listed). After listing the seven methods, MSHA referred to them as “*these* traditionally accepted methods . . . acceptable for ventilation controls.” Then MSHA referred to the seven methods as “the traditionally accepted constructions *indicated above*.” Thus, MSHA, in three separate sentences, denoted the seven listed methods – and only those methods – as what would be deemed to be included in the category of “traditionally accepted methods.”

When seen in this context, the drafters’ intent is clear and provides a reasonable basis for determining the meaning of the ambiguous phrase. The Secretary intended to create a broadly applicable, general rule regarding the strength of stopping constructions. In light of complaints regarding that rule, the Secretary created a narrow exception. To limit the scope of that exception, the Secretary explicitly defined the excepted methods.

All of the methods on the list which apply to dry-stacked concrete blocks require a coating of strength enhancing sealant.⁶ However, as the Judge noted, the polyurethane foam sealant used by Peabody Twentymile is not strength enhancing. 37 FMSHRC at 2644. Therefore, the Secretary reasonably found in this case that the operator violated the standard. The strength of the Secretary’s reasoning and the support shown for that reasoning in the regulatory history indicates that his view should be given weight.

In its brief, Peabody Twentymile argues that using the preamble to resolve the ambiguity in the regulation is unreasonable because (1) the plain dictionary meaning of the words are sufficient to determine the meaning and (2) the preamble is not a part of the promulgated rule and therefore cannot create a binding “exhaustive” list of construction methods.

My colleagues Acting Chairman Althen and Commissioner Young assert that the words “traditionally accepted” have a plain meaning. In support of this point, they provide unobjectionable dictionary definitions of “tradition” and “accepted.” Slip op. at 25-26. However, the dictionary definitions of “tradition” and “accepted” do not make the regulatory language clear since they do not consider the phrase “traditionally accepted” in the context of 30 C.F.R.

⁶ See *supra*, slip op. at 7-8.

§ 75.333(e)(1)(i).⁷

As an illustration of the regulation’s ambiguity, the term “traditionally accepted,” taken on its face without reference to the history of its creation, could mean either the methods traditionally accepted in the industry as a whole or the methods traditionally accepted at a particular mine. While Peabody Twentymile and my colleagues look to dictionary definitions of “traditional” and “accepted” in asserting that the phrase must be given the latter interpretation, those same definitions could easily be used to support the former interpretation. The term “traditionally accepted methods” is broad enough to easily bear either meaning.⁸ But there is

⁷ By way of example, in *Yates v. United States*, 135 S.Ct. 1074 (2015), a commercial fisherman was charged with violation of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, when, after being apprehended by the National Marine Fisheries Service for possession of undersized grouper, he caused the grouper to be thrown overboard before returning to port. The fisherman was convicted under Sarbanes-Oxley of destroying and concealing a “tangible object” (*i.e.*, the fish) with the intent to impede or obstruct the government’s investigation. In reversing the Eleventh Circuit, which had affirmed the conviction, the Supreme Court’s plurality opinion recognized that under the dictionary definitions relied on by the Court of Appeals, the statutory term “tangible object” encompassed the fish. However, looking at the context of the term in the Sarbanes-Oxley Act – legislation designed to protect investors from financial fraud following collapse of the Enron Corporation – the Court rejected reliance on the dictionary definitions. The plurality opinion stated:

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). See also *Deal v. United States*, 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (it is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

135 S.Ct. at 1081-82. The plurality opinion quoted with approval the statement by Judge Learned Hand in *Commissioner v. National Carbide Corp.*, 167 F. 2d 304, 306 (2nd Cir. 1948): “words are chameleons, which reflect the color of their environment.” 135 S.Ct. at 1083.

⁸ Perhaps this inherent vagueness in the term “traditionally accepted” explains why it is so infrequently used in the context of federal regulations. In Title 30, 30 C.F.R. § 75.333 is the only standard that uses the phrase “traditionally accepted.” In fact, in the entire Code of Federal Regulation, the phrase “traditionally accepted” is used only twice; once in section 75.333 and once in 14 C.F.R. Pt. 60, App. B, to describe qualification performance standards in airplane

nothing in the record to support an assertion that non-strength enhancing polyurethane foam is “traditionally accepted” across the country to seal the perimeters of dry-stacked concrete block stoppings.⁹ As noted above, the preamble cannot control the interpretation of the standard, but it provides valuable insight into an agency’s intent at the time of promulgation. Given the ambiguity here, it was reasonable for the Secretary to look to the preamble to clarify the regulatory language.

I stress here again that I believe that the relevant portion of this regulation is ambiguous. My colleagues contend that because I believe the Secretary is not entitled to *Auer* deference, that I effectively agree that the words of the regulation have a plain meaning, namely the meaning they ascribe to it. Slip op. at 38. They state that I find ambiguity “not in the terms of the regulation, but in its application.” *Id.*

training devices. The ambiguous phrase seems to be used here to bridge the gap between what MSHA originally believed the standard should be and the complaints made by commenters.

⁹ My colleagues cite the ALJ decision in *Twentymile Coal Co.*, 33 FMSHRC 1885, 1929, 1930 (Aug. 2011) (ALJ), *rev’d in part on other grounds*, 36 FMSHRC 2009 (Aug. 2014), as evidence that the use of polyurethane foam to seal the perimeters of dry-stacked concrete block stoppings is “traditionally accepted.” Slip op. at 27. However, this case involved the storage of the polyurethane foam used at the Twentymile Foidel Creek Mine, and not the actual use of the foam. The use of polyurethane foam was not at issue in the case, and there is nothing in either the evidence or the decision to suggest that polyurethane foam is used for the sealing of perimeters of dry-stacked concrete block stoppings anywhere other than the Foidel Creek Mine.

In this context, my colleagues cite the testimony of Assistant District Manager Preece that polyurethane foam is used to seal the perimeter of Kennedy stoppings across the country. 33 FMSHRC at 1929. Kennedy stoppings are recognized in the fourth “traditionally accepted construction method” listed in the preamble (understanding that “Kennedy stoppings” is another phrasing for the “steel stoppings” referenced in the preamble, Tr. 9.) My colleagues assert that “Kennedy stoppings have gaps at the perimeter substantially equivalent to those around the perimeter of block stoppings.” Slip op. at 27. But Preece did not testify that the gaps at the perimeters of Kennedy and block stoppings are “substantially equivalent.” According to Preece, openings sealed with foam at the perimeter of Kennedy stoppings are only two to four inches, while the gaps in the cited block stopping sealed with foam measured up to six inches. Tr. 37, 46-47. The assertion that the perimeter gaps are “substantially equivalent” is speculation on the part of my colleagues. It is refuted by MSHA’s expertise, as demonstrated in the preamble to section 75.333. The fourth “traditionally accepted construction method” listed in the preamble permits “suitable” mine sealants, which do not have to be strength enhancing, for “steel stoppings.” 61 Fed. Reg. at 9783. However, dry-stacked concrete blocks do require sealants which are strength enhancing. *Id.* The “substantial equivalen[ce]” my colleagues assert is not present.

My colleagues misunderstand the thrust of my opinion. As I noted *supra*, my colleagues use dictionary definitions of “tradition” and “accepted” to support their plain meaning argument. But in noting that those definitions were unobjectionable I also stated that they were not dispositive. Instead of resolving the issue, those definitions show why there is no plain meaning to this regulation. “Traditionally accepted” within the context of the regulation can mean multiple things. The relevant interpretations here are that the method was accepted at this particular mine or that the method was accepted at all mines. The language of the regulation does not indicate which of those interpretations is correct. Thus, the language of the regulation is ambiguous. Therefore, I looked to the preamble and the regulatory history of the provision to determine the drafters’ intent. This is a process of looking at the meaning of the regulatory language in context.

Indeed, I fail to understand my colleagues’ distinction between finding ambiguity in the “terms” of a regulation and in its “application.” A regulation may be ambiguous in its terms (especially if poorly drafted) or it may be ambiguous (as here) because it is susceptible to different, and inconsistent, meanings.

Similarly, my colleagues state that I “implicitly concede” that MSHA “traditionally accepted” the use of polyurethane foam at the mine. Slip op. at 38. I do not concede that point. I agree with my colleagues that MSHA failed to cite the operator for using the foam for a long period of time, and that MSHA approved the use of foam in the mine’s ventilation plans. That was the reason I determined that *Auer* deference was not warranted here. It is fair to say that the Secretary accepted the condition at the mine for some time. But I do not agree that acceptance of polyurethane foam around the perimeter of block stoppings at a single mine necessarily amounts to “traditional acceptance” of that method within the meaning of the regulation. What constitutes “traditionally accepted” is the crux of the case. With the context discussed *supra* in mind, I do not believe, as my colleagues apparently do, that “traditionally accepted,” as used in section 75.333(e)(1)(i), necessarily means, “accepted at an individual mine for a long time.”

The strengths of the Secretary’s current interpretation go beyond the textual analysis outlined above. The Secretary’s interpretation also demonstrates thorough and valid reasoning because the evidence demonstrates it produces safer results. At hearing, Assistant District Manager James Preece echoed MSHA’s concerns contained in various rulemaking documents regarding the strength and durability of permanent stoppings. He testified that he was concerned about the use of foam because it is not strength-enhancing. Tr. 45-46. Both Preece and Inspector Barry Grosely testified that the perimeter of the blocks toppings must, like the face of the blocks, be sealed with mortar or other strength-enhancing material. Tr. 39, 44-45, 78, 169.

Nothing in the language of the regulation itself or the preamble indicates that any distinction is made between the face and the perimeter of cement block stoppings with respect to the overall strength of the stopping. Stoppings must simply be constructed with the requisite strength.¹⁰ Thus, Preece testified that the perimeter of the stopping should have the same

¹⁰ My colleagues take issue with my statement that the law makes no distinction between the face and perimeter of block stoppings. They note that the perimeter of the stopping is “set off at a ninety-degree angle from the face and oriented toward the rib and roof” and therefore not

strength as the face. Tr. 65. Similarly, Adam Patterson, Peabody's Continuous Miner Coordinator, agreed that "stoppings have to be of equal strength in the center and the perimeter." Tr. 103.

My colleagues contend that "Peabody Twentymile's stoppings meet the requirements specified within the third of the seven categories of stoppings in the preamble: '8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings.'"¹¹ Slip op. at 34. Thus, my colleagues propose that a

on the high pressure side. Slip op. at 34, n. 13. I note that the perimeter of the stopping, after the blocks are laid up, includes a gap between the stopping and the rib and roof. If that gap is left open, air would be free to move past the face of the stopping and into the next entry. When that gap is sealed, the sealant becomes part of the face of the stopping. That sealant is exposed to the high pressure side of the stopping. Hence, my colleagues are incorrect in their assertion that the perimeter of the stopping is not part of the face or a side of the stopping. *Id.*

My colleagues also note that two of the construction methods listed in the preamble, "steel stoppings" and stoppings made of "lightweight cementitious masonry block" specifically state what sealants must be used around the perimeter. They argue that this shows a distinction is made between the face and the perimeter of stoppings generally. However, I see the text of the preamble cutting in the opposite direction. The fact that the perimeter is mentioned with respect to certain kinds of stoppings but not others indicates that the distinction is only made in those specific circumstances where it is raised. The drafters clearly knew how to differentiate between the face and perimeter when that distinction was relevant. *See Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 930-31 (Sept. 1998) (use of the term "complainant" in some contexts and not others indicates that the drafters were making a distinction and knew how to use particular terms when they intended to do so); *see also Emery Mining Corp.*, 10 FMSHRC 1337, 1350 (Aug. 1988) (ALJ).

For example, the preamble refers to the perimeter of steel stoppings because there is a relevant difference between the face and the perimeter of those stoppings. Steel stoppings necessarily require some sort of additional sealant around the perimeter because, unlike concrete block stoppings, no particular sealant would be used over the entire face of the stopping. The use of polyurethane foam around the perimeter of the metal stoppings at Foidel Creek Mine is appropriate because, as Preece testified, the foam is approved for use on those stoppings. Tr. 39, 49, 53. The preamble lists other types of stoppings, including dry-stacked concrete block stoppings, with no distinction between the perimeter and the face. As demonstrated with respect to steel stoppings, the drafters were able to make such a distinction when necessary. The fact that they did not do so with respect to dry-stacked concrete stoppings indicates that they did not intend for the perimeter to be treated distinctly from the face of those kinds of stoppings. According to the preamble, a concrete block stopping should simply be coated in a strength-enhancing sealant, and that includes the perimeter.

¹¹ My colleagues erroneously assert that the "[t]he Judge clearly erred in applying the requirements for lightweight block stoppings to Peabody Twentymile's construction method

stopping is “traditionally accepted” if it is sufficiently strong on its face but relatively weak at the perimeter. This interpretation is inconsistent with the testimony of both Preece and Peabody’s own witness, Patterson. It is also inconsistent with the position taken by Peabody Twentymile during oral argument before the Commission. At oral argument, Peabody Twentymile’s counsel argued that the Judge committed error in relying on the preamble. Oral Arg. Tr. 10. In so arguing, he conceded that if the Secretary had promulgated a definition of “traditionally accepted method” in section 75.333(e)(1)(i) and that definition was identical to the language of the preamble, he “would not have an argument” that the mine’s stoppings complied with the standard. Oral Arg. Tr. 22-23. Hence, Peabody Twentymile itself recognizes that its stopping construction method did not comply with any of the categories of stoppings listed in the preamble.¹²

It is uncontested that the foam insulation was not strength enhancing. The manufacturer’s brochure states that Touch ’n Seal Foam Ventilation Control System is a “[n]on-strength-enhancing mine sealant” used to “[r]epair damaged block stoppings.” Sec. Ex. 11, p. 2 (brochure). Inspector Grosely testified that he could push his sounding stick through the foam. Tr. 73. Also, Grosely testified that polyurethane foam degrades at a much quicker rate than mortar.¹³ Tr. 81.

...” Slip op. at 33. In so saying, they erect a straw man. The Judge was obviously aware that the mine used concrete blocks rather than lightweight cementitious blocks for its stoppings. 37 FMSHRC at 2636, 2644. He referred to lightweight cementitious blocks because Peabody Twentymile had argued that a sealant which works for steel stoppings will also work for concrete block stoppings. The Judge’s point was that lightweight cementitious block stoppings, which require a strength enhancing sealant for the perimeter, are more similar to concrete block stoppings than are steel stoppings. *Id.* at 2644.

¹² My colleagues vigorously dispute the significance of the statement by Peabody Twentymile’s counsel at oral argument, but are curiously silent about the testimony of the operator’s Continuous Miner Coordinator, Adam Patterson, that “stoppings must be of equal strength in the center and the perimeter.” Tr. 103. I note that Peabody Twentymile itself, unlike my colleagues, does not contend that its method of constructing stoppings is consistent with any of the methods of construction specified in the preamble.

¹³ My colleagues argue that the fact that polyurethane foam is not strength enhancing is inconsequential. Slip op. at 41. They note that the Secretary presented no evidence showing that stoppings made without strength enhancing material around the perimeter are not “sufficiently strong.” However, Preece testified that block bond enhances the strength of a stopping. Tr. 39. He also testified that polyurethane foam would not do so, it would only seal the stopping. Tr. 39. That was among the many issues that concerned Preece regarding the stopping construction method used in this mine. Further, my colleagues can point to no evidence demonstrating that concrete stoppings constructed without strength enhancing material at the perimeter are “sufficiently strong.” Instead, they only cite to testimony (disputed by the Secretary’s witnesses) that the foam creates a better seal. Slip op. at 41, n. 22.

Additionally, Preece noted that in a fire, foam could burn out, “merg[ing] the two [adjacent] airways together and compromis[ing] your escapeways” and so exposing miners to “smoke [and] gases from the polyurethane.” Tr. 46, 50. While block bond has passed flammability tests, Tr. 34-35, polyurethane foam has not, Tr. 40-41.

The evidence shows that the durability and flammability of the stopping is important to the health and safety of miners. The perimeter of a stopping is sealed to ensure as far as possible that air traveling in adjacent air courses remains separate. Tr. 30, 35. If a ventilation control is inadequate for this purpose, miners would be exposed to harmful gases. Tr. 30-31. Of particular concern would be the failure of a stopping that results in noxious gases at the face or in an escapeway. Tr. 30-31. Because stoppings constructed with polyurethane foam around the perimeter would be weaker and more flammable than a stopping constructed solely with mortar or other strength-enhancing material, it would be more likely to fail and expose miners to hazards. Therefore, the Secretary’s interpretation of the standard such that it bars the use of polyurethane foam as the sole sealant on the perimeter of block stoppings is both reasonable and persuasive.

My colleagues argue that I raise the “false specter” of flammability to support my belief that the Secretary’s interpretation is persuasive. Slip op. at 39. They note that MSHA permits polyurethane foam to be used around Kennedy stoppings, despite the fact that they have not passed the fire test. They contend that this indicates that polyurethane foam poses no hazard when used on block stoppings. As has been discussed *supra*, metal stoppings are fundamentally different from permanent block stoppings, including with respect to the size of the gaps in the perimeter. The Secretary is in the best position to determine the safety hazards associated with the use of polyurethane foam on various, substantially different types of stoppings. The use of polyurethane foam on Kennedy stoppings, therefore, does not fundamentally impact the Secretary’s determination that using the foam was hazardous here.

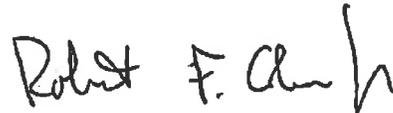
Thus, having determined that the Secretary’s reasoning was valid and thorough, I turn next to the agency’s relative “expertness” and specialized experience. Congress delegated authority to regulate mine health and safety to the Secretary of Labor. 30 U.S.C. § 811. MSHA was created to exercise that authority and has developed a considerable body of experience and expertise on mine safety issues. The regulation at issue here, 30 C.F.R. § 75.333(e)(1)(i), is a safety standard promulgated under the Secretary’s authority and utilizing MSHA’s expertise. In short, this regulation is at the very heart of the agency’s mission. MSHA is in the best position to determine what is, or is not, safe in the nation’s mines. With respect to this standard, if MSHA believes that the use of foam as a perimeter sealant is unsafe, its view should be accorded weight.

The next *Skidmore/Mead* factor is an analysis of the highly detailed nature of the regulatory scheme. We have, in the past, recognized that mining is a heavily regulated industry. *Brody Mining, LLC*, 37 FMSHRC 1914, 1948 (Sept. 2015). Indeed, the Commission has described the regulatory scheme administered by MSHA as “pervasive.” *Id.* Further, the obligations created by the regulations are complementary and overlapping, meaning changes in the interpretation of one standard may have an impact on others. Given the size and complexity

of MSHA's role in the mining industry, its views regarding the implementation of its regulations should receive at least some weight.

Finally, I turn to the value of uniformity in the agency's understanding of what a national law requires. As noted above, MSHA has done a poor job of consistently applying this particular regulation at this particular mine. However, if it is MSHA's expert opinion that the use of foam sealant in the manner cited is unsafe, it is important that MSHA not be precluded from applying this prohibition in all of the nation's underground coal mines. As a general matter, it cannot be the case that the practice is safe at Peabody Twentymile and unsafe in other mines. But the position taken by Acting Chairman Althen and Commissioner Young implies the further conclusion that based on MSHA's past enforcement practice at this one mine, MSHA would be barred from applying a safety-enhancing policy which it may presently be using at other mines around the country. This is potentially dangerous to mine safety nationwide. Given the need for uniformity in interpretation of Mine Act regulations, the Secretary's position is entitled to weight.

After considering the *Skidmore* and *Mead* factors together, I find that the Secretary's interpretation of the standard is both reasonable and persuasive. As a result, I would find that the Secretary's interpretation is entitled to *Skidmore* deference. Therefore, I would uphold the Judge's decision that the citation in this case was properly issued.



Robert F. Cohen, Jr., Commissioner

Commissioner Jordan, in favor of affirming the Judge:

I would affirm the decision of the Judge below, upholding the challenged citation. In reaching this result, I agree in large part with the thoughtful analysis of Commissioner Cohen, and part ways with him in only one respect. Unlike Commissioner Cohen, who would accord deference to the Secretary's interpretation of the regulation at issue here only in so far as that interpretation has the power to persuade (and he has ably set forth the reasons he has found it to be persuasive here), I believe the interpretation is entitled to controlling deference under the standard announced in *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

As Commissioner Cohen and my other colleagues point out, at this mine the Secretary's application of the relevant standard at issue has been inconsistent. Slip op. at 10. Indeed, for over thirty years, MSHA did not cite Peabody when stoppings were constructed at the Twentymile mine in the manner the agency now seeks to prohibit. Specifically, no citations were issued on the occasions when block stoppings were sealed with polyurethane foam. *Id.* Moreover, ventilation plans submitted by the operator which indicated the presence of such stoppings were not rejected. *Id.*

Notwithstanding these facts, I would nevertheless accord *Auer* deference to the Secretary's interpretation of what constitutes "traditionally accepted methods" of constructing ventilation controls. It is common knowledge that inspections of any mine, as well as approval of a mine's ventilation plan, are conducted under the auspices of a particular MSHA District office. In light of this fact, I hesitate to conclude that the prior failure of inspectors to cite this operator or reject the ventilation plan for this mine amounts to conflicting interpretations by MSHA itself. It appears instead that the MSHA District office with jurisdiction over this mine, for whatever reason, failed to enforce the subject regulation in a manner consistent with the position set forth by the National Office when the rule was issued.

When MSHA promulgated the nationwide standard at issue here, the preamble accompanying the final rule contained the agency's explanation as to the meaning of the requirement that stoppings be built using "traditionally accepted methods." The citation under review reflects agency enforcement consistent with that explanation, which specified an exclusive list of permissible construction methods.¹ Thus, in citing this operator, MSHA was adhering to the interpretation it had set forth early on when the rule was promulgated. The fact that a particular MSHA District tolerated a construction method not listed as one of the "traditionally accepted methods" should not, in my view, negate the nationwide reach of the Secretary's notice-and-comment rulemaking authority. Consequently, I find that the Secretary's

¹ The operator never argued on appeal that using foam around the perimeter of concrete block stoppings was one of the traditional methods listed in the preamble, and in fact, conceded in oral argument that its process did not comply with any of these methods. Oral Arg. Tr. 22-23; 49-50. Consequently, I find it unnecessary to address the contention of my colleagues, Acting Chairman Althen and Commissioner Young, that the operator's method could be considered to come within one of the seven permitted by the preamble.

interpretation of the standard, as reflected in the citation under review, and the ability of the agency to require one of the specified construction methods going forward, does reflect the agency's "fair and considered judgment," and that *Auer* deference is therefore due.²

For the reasons set forth above, I would affirm the decision of the Judge.


Mary Lu Jordan, Commissioner

² Commissioner Cohen would require the Secretary "to establish that there was a consistent, nationally-enforced interpretation that prohibited the use of polyurethane foam" as a construction method, slip op. at 10, in order to earn *Auer* deference. I question the feasibility and appropriateness of requiring MSHA to put on evidence of how a safety standard is enforced at every mine in order to prevail in its enforcement of the standard at a particular mine.

Acting Chairman Althen and Commissioner Young, in favor of reversing the Judge:

This case requires an answer to one question: was Peabody Twentymile's use of polyurethane foam around the perimeter of stoppings a "traditionally accepted method" for sealing the perimeter of a stopping within the meaning of 30 C.F.R. § 75.333(e)(1)(i) on August 5, 2014? As set forth below, it was.¹

Peabody Twentymile had used the method for 13 years without any citation or complaint by MSHA before 1996 when MSHA promulgated the regulation approving "traditionally accepted methods." After 1996, for the next 18 years, Peabody Twentymile continued to use polyurethane foam in literally hundreds or perhaps even thousands of stoppings that were subject to hundreds of inspections between 1996 and 2014 without any interpretation of the regulation by MSHA to prohibit such usage.²

Beyond such traditional acceptance in inspections before and after promulgation of the regulation, MSHA accepted the use of the polyurethane foam in reviewing and approving the operator's ventilation plan. Despite MSHA's litigation-driven protestations, it is clear that Peabody Twentymile's MSHA-accepted ventilation plan authorized use of polyurethane foam as a sealant around block stoppings.

By deed and word, therefore, MSHA demonstrated an interpretation of the regulation in a manner that accepted Peabody Twentymile's use of polyurethane foam. MSHA does not offer any convincing argument for a reversal of its long-standing, traditional interpretation.

¹ In his brief, the Secretary asserts the operator is invoking the principle of equitable estoppel. Sec. Br. at 22. Equitable estoppel is "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Estoppel*, *Black's Law Dictionary* (10th ed. 2014). Here, the operator does not assert equitable estoppel; it asserts its use of polyurethane foam complies with the requirement of the regulation.

² Two years before the instant citation, an MSHA inspector who had previously inspected the mine on many occasions did issue a citation for usage of polyurethane to seal a gaping opening between a stopping and coal rib. However, thereafter, the same inspector did not issue any further citations related to use of polyurethane around stoppings despite undertaking further inspections of the mine. The only fair conclusion is that the citation related to the size of the opening rather than the use of polyurethane foam as a perimeter sealant.

I.

30 C.F.R. § 75.333(e)(1)(i) Plainly Permits Peabody Twentymile's Use of Polyurethane Foam.

A. The Terms "Traditional" and "Accepted" Have Plain Meanings.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If so, there is no need for further inquiry. *Id.*

"The same rules of construction apply to administrative rules . . ." *Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers*, 676 F.3d 566, 570 (7th Cir. 2012). Accordingly, the interpretation of a regulation begins with a determination of whether the language of the regulation is plain. If the language is plain, further inquiry is unnecessary and unwarranted. "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008); *cf. Pyles v. Nwaobasi*, 829 F.3d 860, 865 (7th Cir. 2016) ("Where a regulatory term is undefined, we ask first 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' In doing so, we 'giv[e] the words used their ordinary meaning.'" (citations omitted)).

Therefore, our inquiry related to the issue of coverage begins with a straightforward inquiry into the plain meaning of the regulatory requirement that "permanent stoppings . . . installed after June 10, 1996, shall be constructed in a traditionally accepted method." 30 C.F.R. § 75.333(e)(1)(i). Specifically, the issue is whether the hundreds of stoppings with polyurethane foam around the perimeter installed by Peabody Twentymile and inspected by MSHA between 1983 and 2014 fall within that plain meaning. Without doubt, the "method" at issue in this case is the use of polyurethane foam around the perimeters of stoppings. The question, therefore, is what constitutes "traditional acceptance."

As set forth above, our starting point is the dictionary definition of "traditional" and of "accepted." *United States v. Ezeta*, 752 F.3d 1182, 1185 (9th Cir. 2014) ("To determine a word's plain and ordinary meaning, [courts] may refer to standard English language dictionaries." (citing *Smith v. United States*, 508 U.S. 223, 228-29 (1993); *United States v. Carona*, 660 F.3d 360, 367 (9th Cir. 2011))). Contrary to the Secretary's contention that the failure to define the term "traditionally accepted method" necessarily renders the term ambiguous, courts regularly find undefined terms *unambiguous* by giving those terms their plain meaning. *See, e.g., Smith*, 508 U.S. at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

The common, ordinary meaning of "traditional" is clear. "Tradition" means "a long-established or inherited way of thinking or acting," "a continuing pattern of . . . beliefs or practices," or "a customary or characteristic method or manner." *The Random House Dictionary of the English Language* 2006 (2d ed. 1987). "Tradition" is also defined as a "handed-down

. . . custom, . . . typical way, practice, convention, [or] . . . usage,” *The Random House Thesaurus, College Edition* 736 (1984), or “an inherited or established way of thinking, feeling or doing,” *Webster’s Third New International Dictionary Unabridged* 2422 (1993). See also *The American Heritage Dictionary of the English Language* 1829 (4th ed. 2009) (defining “tradition” to mean “[a] mode of . . . behavior followed . . . continuously . . . ; a custom or usage”); *Webster’s New World Dictionary of the American Language, Second College Edition* 1507 (1972) (defining “tradition” as “a long-established custom or practice that has the effect of an unwritten law”).

The common ordinary meaning of “accepted” is equally clear. “Accept” means to “agree to, consent to, grant as satisfactory, accede to, go along with, assent to, receive with approval, acknowledge.” *The Random House Thesaurus* 17. “Accept” is similarly defined to mean to “approve . . . , to agree or consent to, acquiesce in,” *Webster’s New World Dictionary* 8, or “[t]o regard as proper, usual, or right,” *The American Heritage Dictionary* 10.

Because the words “traditional” and “accepted” have plain meanings, under the plain meaning rule, the outcome-determinative issues are whether Peabody Twentymile’s usage of polyurethane foam was traditional — that is, a long-established way of acting — and whether MSHA accepted that usage.³

B. Peabody Twentymile Had an Established Thirty-one Year History of Using Polyurethane Foam to Seal the Perimeter of Stoppings Prior to the Citation.

The testimony of every witness with knowledge of Peabody Twentymile’s construction of stoppings, operator and MSHA alike, supports a finding that Peabody Twentymile had a long-established history of using polyurethane foam. These witnesses include Ronald Hockett, a mine foreman at Peabody Twentymile’s Foidel Creek Mine for 23 years, Adam Patterson, the Continuous Miner Coordinator at the mine, Lincoln Derick, a former safety manager at the mine, and Inspector Grosely, who inspected the mine numerous times, Tr. 71.

Hockett testified that Peabody Twentymile had sealed perimeters of stoppings with polyurethane foam for all 23 years that he worked at the mine. Tr. 114-15, 118-19. In addition, Patterson testified that the use of polyurethane foam was the only way Peabody Twentymile had built concrete block stoppings. Tr. 86-87, 97-98. Similarly, Derick stated that the operator was using polyurethane foam to seal block stoppings ever since he began working at the mine in 1991, Tr. 136-38, and Grosely confirmed that he was aware of the mine’s ongoing use of polyurethane foam on its block stoppings, Tr. 78.

³ Commissioner Cohen asserts that his research shows that the term “traditionally accepted” has rarely been used in regulations and that such limited usage somehow indicates an inherent vagueness. Slip op. at 15 n.8. To the contrary, rare use cuts in favor of a very deliberate usage in this regulation; there is no “inherent vagueness” in the term “traditionally accepted,” and it cannot be considered a regulatory term of art. Evidence showing the attitude of the agency with respect to a particular method readily demonstrates whether the agency accepted the practice.

Moreover, a separate case decided in 2011 involved a citation issued by Inspector Preece in December 2008 for the improper storage, handling, and disposal of polyurethane foam packs — the citation did not allege that the mine’s use of the foam was not “traditionally accepted.” *Twentymile Coal Co.*, 33 FMSHRC 1885, 1929, 1930 (Aug. 2011) (ALJ), *rev’d in part on other grounds*, 36 FMSHRC 2009 (Aug. 2014). In that case, Preece testified to the use of polyurethane foam in Kennedy stoppings across the country. As set forth in the facts, Kennedy stoppings have gaps at the perimeter substantially equivalent to those around the perimeter of block stoppings. The admittedly safe and accepted use of polyurethane foam in such stoppings simply serves to emphasize the suitability of polyurethane foam as a perimeter sealant for block stoppings. There is no doubt that Peabody Twentymile “traditionally” used polyurethane foam to seal the perimeters of block stoppings.

C. MSHA Traditionally Accepted Peabody Twentymile’s Use of Polyurethane Foam.

With respect to the particular dispute in this case, the term “traditionally accepted method” unambiguously includes Peabody Twentymile’s method of stopping construction because MSHA both accepted and approved it for years prior to the promulgation of the rule in 1996 and then approved and accepted the method over the next 18 years.

Until the citation issued in this case in 2014, Peabody Twentymile had used polyurethane foam around the perimeter of hundreds of block stoppings since 1983 without receiving a single citation, even though MSHA conducted numerous spot and four quarterly inspections each year. 37 FMSHRC 2635, 2637, 2641, 2646 (Nov. 2015) (ALJ); Tr. 98, 107-08, 123-24. MSHA’s public records dating back to November 1, 1995, establish that over 800 inspections have occurred at the mine since 1995.⁴ Preece confirmed that, based on the sheer number of inspectors going to the mine, the mine receives “quite a number” of inspection days per average year. Tr. 61-62. Furthermore, Preece and Grosely both testified that they have inspected the mine “multiple” and “numerous times,” i.e., “too many [times] to count.” Tr. 42, 71.⁵ So, dozens of inspectors inspected hundreds of stoppings using polyurethane foam to seal the perimeter of stoppings for thirty years without issuing any citations. Tr. 98. Certainly, MSHA acceded to — that is, accepted — the operator’s method of sealing stoppings.

In an effort to rebut the significance of these hundreds of inspections by numerous inspectors, during rebuttal testimony, Preece stated that the regional MSHA inspection unit relied on a number of inexperienced inspectors that were “not . . . intelligent enough” or may not have had adequate training and may not have been paying attention to the perimeter of the stoppings.

⁴ See Mine Inspections, U.S. Department of Labor, Mine Data Retrieval System, <https://arlweb.msha.gov/drs/drshome.htm> (search for Foidel Creek’s Mine ID, “0503836”; then choose “Inspections,” enter “1/1/1995” as the Beginning Date, and click “Get Report”).

⁵ Given that Preece had issued a citation for improper storage of polyurethane foam, he clearly had been aware of the mine’s use of polyurethane foam to seal stoppings since at least 2008 without voicing any protest.

Tr. 157, 163.⁶ MSHA's denial of its acceptance of Peabody Twentymile's usage of polyurethane foam by disparaging its own inspectors is an unseemly effort by MSHA to sacrifice the integrity and ability of its inspectors in order to sustain one citation. It is shameful and, more importantly, wholly unwarranted. On cross-examination, Preece conceded that many experienced inspectors regularly inspected the mine in the years prior to the issuance of the citation. Tr. 158-59. Thus, it is clear that MSHA had experienced inspectors who, by failing to cite the operator for over 30 years, accepted Peabody Twentymile's usage of polyurethane foam.

The demonstration of MSHA's acceptance of Peabody Twentymile's traditional use of polyurethane does not rest solely upon the hundreds of stoppings examined by MSHA inspectors for over 30 years without question or complaint. As importantly, MSHA explicitly approved Peabody Twentymile's usage of polyurethane foam in Peabody Twentymile's ventilation control plans. The mine's 1983 ventilation plan, according to Derick, included the use of polyurethane spray foam to seal the perimeters of ventilation stoppings.⁷ 37 FMSHRC at 2641; Tr. 138-39. In addition, MSHA approved an addendum to the operator's ventilation plan in 1991 entitled "Use of Polyurethane or Phenolic Foams." Peabody Ex. D, at 7. The plan expressly states that the "[f]oam application for ventilation devices will be limited to sealing cracks *and* perimeters of ventilation devices." *Id.* (emphasis added).

The 1991 plan further stated that "only versa-foam . . . will be utilized." *Id.* Preece testified that versa-foam was the type of polyurethane foam used at the mine. Tr. 37-38. Furthermore, both the 2000 and 2011 plans allowed the operator to use foam to "seal[] the perimeter and joints of [ventilation] devices." Peabody Ex. D, at 9, 10. From the outset of the mine's operations, therefore, MSHA clearly and explicitly approved Peabody Twentymile's use of polyurethane foam to seal the perimeters of its stoppings.

MSHA's approval of Peabody's ventilation plan, however, is not restricted to the years mentioned above. Since the inception of the Mine Act, the Secretary has been required to review an operator's ventilation plan at least once every six months. *See* 30 U.S.C. § 863(o). In its present form, this requirement resides at 30 C.F.R. § 75.370(g), which states: "The ventilation

⁶ In a feat of Olympian disingenuity, MSHA asks that we defer to its wisdom in this case while deriding some of its own employees for lacking intelligence or judgment. Similarly, the agency asks that we defer to it now, while urging that the agency's own "acceptance" of the practice at issue here for more than three decades should not determine what is meant by "traditionally accepted." *See* discussion at Section II *infra*, slip op. at 30-42.

⁷ The fact that the 1983 ventilation plan did not specifically list polyurethane foam as an approved primary sealant at the perimeter of block stoppings is irrelevant. 37 FMSHRC at 2641; Tr. 143-44. On cross-examination, the Secretary pressed Derick about the list of acceptable sealants contained in MSHA's approval of the plan and Derick acknowledged that polyurethane foam was not included in the list. Tr. 143-44. Derick asserted, however, that the list relates to "a different type of material," specifically, "the material for . . . the total surface area of a dry stacked block to prevent air leakage through the stopping." Tr. 144. Moreover, as shown above, MSHA's subsequent plans make it clear that polyurethane foam was explicitly approved by MSHA.

plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine.” Thus, in the 31 years in which Peabody Twentymile used its method for sealing the perimeters of its block stoppings, and in the 31 years in which MSHA approved its ventilation plan addendums and did not cite the mine for the practice, a representative of the Secretary reviewed the mine’s ventilation plan at least 60 times without raising the issue that the mine’s use of polyurethane foam was unacceptable.⁸

In short, because MSHA traditionally accepted this method — both implicitly through allowing the longstanding, widespread practice at the Foidel Creek Mine, and explicitly through approving the practice in Peabody Twentymile’s ventilation control plan — it was a “traditionally accepted method.” As such, the term “traditionally accepted method” in 30 C.F.R. § 75.333(e)(1)(i) unambiguously applies to Peabody Twentymile’s use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings.⁹

⁸ Rather mysteriously, Commissioner Cohen characterizes the words “traditionally accepted method” as “comparative.” Slip op. at 10 n.3. More remarkably, he repeatedly and at some length asserts that he cannot determine whether “traditionally accepted” means “in the industry as a whole” or “accepted at a particular mine.” *Id.* at 15, 17. It is difficult to fathom the point. Surely, in promulgating the rule, the agency was not thinking about whether the rule applied to every mine or a given mine, nor was it contemplating Commissioner Cohen’s apparent theory that the agency might mistakenly accept a method for twenty years. It was contemplating exactly what it said — namely, if MSHA traditionally accepted a method, the method could continue to be used. It is traditional acceptance by MSHA that counts, and MSHA unquestionably traditionally accepted the use of polyurethane foam as demonstrated by the more than two dozen years of acceptance by scores of inspectors at thousands of stoppings and the year in, year out MSHA approval of ventilation plans relying upon polyurethane foam. As far as an attempt at finding ambiguity goes, there is no evidence, none in the record, that MSHA did not accept use of polyurethane on the perimeter of concrete block stoppings at any other mine or at any other time, and there is testimony of its use at other mines. Tr. 136. Thus, if it were important, on the record in this case MSHA accepted polyurethane over an extended period at every mine about which any evidence exists.

⁹ Commissioner Cohen argues that the dictionary definitions of “traditional” and “accepted” do not place the phrase traditionally accepted in the context of 30 C.F.R. § 75.333(e)(1)(i). Slip op. at 14-15. Perhaps not, but we do. We consider the phrase not just within the context of its specific subsection, but within the context of the entire regulatory structure. The Secretary has created a comprehensive regulatory scheme for the inspection and approval of stoppings, in which (1) the Secretary inspects each mine quarterly, including its stoppings, (2) mine operators must seek the Secretary’s approval for the manner in which a mine constructs its stoppings, and (3) the Secretary must review that approved method of construction at least once every six months. When presented with the question of whether a practice has been traditionally accepted, the regulatory structure requires the Secretary to continuously review and reaffirm his acceptance of each mine’s method of stopping construction and inspect the actual application of that method. Of course that context is relevant, and we have fully considered it.

II.

Even Were Section 75.333(e)(1)(i) Ambiguous, the Secretary's Interpretation Would Not Be Entitled to Deference.

Even if the regulation were ambiguous, deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), would be unavailable because the Secretary is interpreting his own earlier interpretation in the preamble, and interpretations of interpretations do not receive *Auer* deference. Moreover, rather than supporting the Secretary's argument, the preamble and regulatory history instead demonstrate the Secretary's intent to continue accepting methods of construction that he had accepted before 1996. The Secretary's approval of the mine's ventilation plans provides further evidence that the Secretary's interpretation of the preamble is incorrect.

Under *Auer*, courts generally defer to agency interpretations of their own regulations when the regulation is ambiguous and the agency's interpretation is reasonable.¹⁰ In the present case, the Secretary has asked the Commission to defer to his interpretation contained in the preamble to the regulation, stating that "the list [of traditionally accepted methods] set forth in the preamble should be read to express the Secretary's view of what methods of construction may be considered 'traditional' methods." S. Br. at 14. The list referred to by the Secretary, however, is silent with respect to the perimeters of dry-stacked block stoppings, and the remainder of the preamble and the regulatory history militate against the Secretary's reading.

In 1992, MSHA issued a final rule that partly removed the criteria for approval of ventilation plans under 30 C.F.R. § 75.316-2 from Part 75 and partly moved it into other sections. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20,868, 20,911 (May 15, 1992). The criterion detailing acceptable methods of stopping construction, at section 75.316-2(b), was moved to the newly created section 75.333(e). In relevant part, the requirement was changed to the following: "Except as provided in paragraphs (e)(2) [covering anthracite mines] and (e)(3) [covering timbers in heaving or caving areas], all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators installed after August 15, 1992, shall be constructed of durable and noncombustible material, such as concrete, concrete block, brick, cinder block, tile, or steel." 57 Fed. Reg. at 20,919.

However, we did not stop there and close our eyes to possibly probative evidence of the meaning of "traditionally accepted." We delved into the preamble to ensure that it did not contradict our plain reading. As detailed extensively, *infra*, the preamble allows operators to use polyurethane foam around the perimeter of dry-stacked block stoppings, further supporting the application of the plain meaning of the standard.

¹⁰ This is also known as *Seminole Rock* deference. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

In 1994, MSHA published a proposed rule that would amend section 75.333(e)(1). Safety Standards for Underground Coal Mine Ventilation, 59 Fed. Reg. 26,356 (May 19, 1994). The agency suggested the following change:

(e)(1)(i) Except as provided in paragraphs (e)(2), (e)(3) and (e)(4) all overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after (Insert the effective date of this rule), shall be constructed in a manner and of materials that results in a construction that has been tested and shown to have a minimum strength of 39 pounds per square foot as tested under ASTM E72-80 Section 12—Transverse Load-Specimen Vertical, load only.

Id. at 26,393.

MSHA stated that its reason for the change was to address questions regarding “acceptable construction methods and materials . . . that will result in controls that satisfy the definition of durable given in paragraph (a) of the existing standard.” *Id.* at 26,369. MSHA’s proposed rule would

retain[] the intent and requirement of the existing standard because the 8-inch hollow-core concrete block stopping with mortared joints, to which all other constructions were tied under the definition of durable in the existing standard, has been tested and shown to have a minimum strength of 39 pounds per square foot.

Id. MSHA also noted that “solid concrete block stoppings that are dry-stacked and plastered on only one side” do not meet the 39 pounds per square foot requirement and “[u]nless a stronger plaster is developed, it is unlikely that a stopping plastered on only one side would be acceptable under the current rule or this proposed revision.” *Id.*

In the preamble to the 1996 final rule for section 75.333(e)(1)(i), the standard currently in force, MSHA changed its approach. It addressed questions regarding the applicability of the ASTM test and the fact that some traditionally accepted methods of stopping construction either could not be tested or would not meet the 39 pounds per square foot requirement. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764, 9783 (Mar. 11, 1996). Specifically, MSHA noted that commenters had “questioned the appropriateness of a strength requirement of 39 pounds per square foot and the relevance of this value to the in-mine conditions.” *Id.* MSHA found merit in those comments, stating, “[c]ommenters suggested that some constructions that are widely used in coal mines do not meet the 39 pound per square foot threshold, and the ASTM test can only be run at a limited number of locations nationwide.” *Id.* As a result, MSHA’s final rule “recognize[d] traditionally accepted construction methods for permanent ventilation controls, and retain[ed] the ASTM test for new materials and methods.” *Id.*

In other words, MSHA recognized that methods of stopping construction that had been traditionally accepted would remain acceptable, even if they could not be tested or would not

meet the 39 pounds per square foot requirement. New methods or the use of new materials must meet the ASTM test.

At this point, the preamble effectively echoes the plain language of the regulation: MSHA intended to continue allowing construction methods that it had previously allowed. However, MSHA continued the preamble discussion, enumerating seven categories of construction methods that it considered “traditionally accepted”:

- [1] 8-inch and 6-inch concrete blocks (both hollow-core and solid) with mortared joints;
- [2] 8-inch and 6-inch concrete blocks dry-stacked and coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings;
- [3] 8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings;
- [4] steel stoppings (minimum 20-gauge) with seams sealed using manufacturer’s recommended tape and with the tape and perimeter of the metal stopping coated with a suitable mine sealant; and
- [5] lightweight incombustible cementitious masonry blocks coated on the joints and perimeter with a strength enhancing sealant suitable for dry-stacked stoppings. . . .
- [6] 4-inch concrete blocks may be used in the above applications in seam heights less than 48 inches.
- [7] Tongue and groove 4-inch concrete blocks coated on both sides with a strength enhancing sealant suitable for dry-stacked stoppings may be used in coal seams of any height.

The sealants referred to in this paragraph would be applied in the thickness recommended by the manufacturer. MSHA maintains a list of sealants which may be used for the above applications. This list is available at each MSHA District Office. The final rule would continue to permit these traditionally accepted construction methods to be acceptable for the construction of ventilation controls.

61 Fed. Reg. at 9783-84.

The Secretary's argument based on the preamble language is simple but erroneous. He contends that because Peabody Twentymile's method using polyurethane foam around the perimeter is not one of the enumerated methods in the preamble, it is not a traditionally accepted method. This raises two questions. First, does the list in the preamble actually prohibit the use of polyurethane foam on the perimeter of concrete block stoppings? Second, if not, should we defer to the Secretary's interpretation or recognize that (a) the rule itself permits traditionally accepted methods, and (b) as set forth above, MSHA traditionally accepted, indeed approved, the use of polyurethane as a perimeter sealant by Peabody Twentymile?

The first question requires resolution of Peabody Twentymile's challenge to the Judge's application of the requirements for lightweight incombustible cementitious masonry block stoppings. PDR at 11. The Judge's references to this category of stoppings were integral to his decision because the preamble only addresses the perimeters of two of the seven categories of traditionally accepted stoppings. For Kennedy stoppings, non-strength enhancing sealant is acceptable. On the other hand, the preamble calls for a strength-enhancing sealant for the perimeter of lightweight incombustible cementitious block stoppings. 61 Fed. Reg. at 9783. Mistakenly, rather than categorizing the stoppings in the mine as what they really are, dry-stacked block stoppings with strength-enhancing sealant on one side, the Judge found that Peabody Twentymile's stoppings were similar to lightweight cementitious block stoppings. 37 FMSHRC at 2644.¹¹ Accordingly, the Judge, applying his conception of the preamble language rather than the preamble as written, held that the requirement that strength-enhancing sealant be used around the perimeter of lightweight block stoppings applied to the stoppings used by Peabody Twentymile. *Id.*

The Judge clearly erred in applying the requirements for lightweight block stoppings to Peabody Twentymile's construction method rather than the requirements for the correct category of stopping. Inspector Preece testified that the stopping at issue was a dry-stacked "concrete block" stopping, Tr. 43, and that the stopping was made from eight-inch blocks, Tr. 60-61. The amended citation referred to them as "cinder blocks." Sec. Ex. 1, at 3. Cinder blocks are one type of concrete block made by mixing cement and well-burned coal cinders as aggregate. *Webster's Third New International Dictionary* 407, 472 (cinder block, cinder concrete; concrete); *DMMRT* 90, 117 (cement, concrete).¹²

¹¹ Although the parties did not submit evidence on this point, we may take judicial notice that cement is one ingredient of concrete. Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 90 (2d ed. 1997) (cement) ("*DMMRT*").

¹² Essentially, the Secretary concedes in his response brief that the Judge erred in this regard, agreeing that Peabody used eight-inch wide blocks in its stoppings rather than lightweight cementitious blocks. Sec. Br. at 15 n.19. He asserts, however, that the preamble requires the use of strength-enhancing sealant around the perimeter of both dry-stacked block stoppings and stoppings constructed from lightweight incombustible cementitious masonry blocks. *Id.* at 16. He makes this baseless assertion despite the differences in language — namely, for dry-stacked blocks the preamble requires "coat[ing] on the high pressure side with a strength enhancing sealant" whereas for the lightweight cementitious blocks the preamble

Peabody Twentymile's stoppings, therefore, meet the requirements specified within the third of the seven categories of stoppings in the preamble: "8-inch and 6-inch concrete blocks dry-stacked and coated on the high pressure side with a strength enhancing sealant suitable for dry-stacked stoppings." 61 Fed. Reg. at 9783. Clearly, the preamble does not prohibit the use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings. Equally clearly, it does not require the use of strength-enhancing sealant around the perimeter. Had the Secretary wished to include the use of strength-enhancing sealant around the perimeter of dry-stacked block stoppings in the preamble language, he would have done so, as he explicitly did for lightweight block stoppings. There is no reason to infer for dry-stacked block stoppings an unwritten element that the Secretary explicitly imposes for lightweight block stoppings later in the same sentence.¹³ Cf. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 (5th Cir. 1976) (stating the rule of construction that "where a term is carefully employed in one place and excluded in another, it should not be implied where excluded");¹⁴ see also *Whitman v. Am.*

specifically requires "coat[ing] on the joints *and perimeter* with a strength enhancing sealant." 61 Fed. Reg. at 9783 (emphasis added).

¹³ Commissioner Cohen concludes "[n]othing in the language of the regulation itself or the preamble indicates that any distinction is made between the face and the perimeter of cement block stoppings." Slip op. at 17. We see no reason for an explicit "distinction" when the difference arises from the very words used. Undoubtedly, the Secretary drafted the preamble intending the words to mean what they are commonly understood as meaning. Else, he would have provided definitions. The perimeter of the stopping is not part of the face or a side of the stopping. This distinction is entirely clear. The Secretary specified in the very same sentence what must be used around the "perimeter" of certain types of stoppings. Yet our colleague contends that there is no distinction between the face of a stopping — here, "*the* high pressure side" — and the perimeter of a stopping, which is set off at a ninety-degree angle from the face and oriented toward the ribs and the roof. He asserts that "[W]hen that [perimeter] gap is sealed, the sealant becomes part of the face of the stopping. That sealant is exposed to the high pressure side of the stopping." Slip op. at 17 n.14. According to this tortured reading, if the sealant on the perimeter becomes part of the side of the stopping then, under the words of the regulation that "newly formed" side must itself be coated with sealant. Commissioner Cohen does not consider whether the sealant that he claims has become part of the side must be sealed in an indefinitely continuing repetitive process. Of course, this is purely a pedantic debate, as the perimeter around the outer rim of a side certainly does not thereby become a "side" of the stopping rather than a distinct perimeter sealant. As the regulations clearly differentiate, the "side" is the face of the stopping wall and the perimeter is the space between the top of the side and the coal seam. Additionally, we note that Kennedy stoppings only must be constructed of steel that is a minimum 20-gauge thickness, according to the preamble. This is approximately 3/80 of an inch (0.0375 inches) thick. See <https://www.unc.edu/~rowlett/units/scales/sheetmetal.html>; https://www.tedpella.com/company_html/gauge.htm.

¹⁴ While *Diamond Roofing* concerned language in a regulation rather than a preamble, the Secretary failed to proscribe the conduct at issue in this case in either section 75.333(e)(1)(i) or the preamble.

Trucking Ass'ns, 531 U.S. 457, 467-68 (2001) (refusing to read language into statute that had been expressly stated elsewhere). Indeed, the operator's traditional use of polyurethane foam from 1983 forward supports the Secretary's knowledge of the use of polyurethane foam around the perimeter of dry-stacked blocks.

Additionally, as the Judge found, Peabody Twentymile also uses wooden wedges around the perimeter of its block stoppings. 37 FMSHRC at 2636; *see also* Tr. 34. Under the Secretary's reasoning, in which silence regarding the perimeter should be interpreted as prohibiting the use of anything but strength-enhancing sealant, the use of wooden wedges would be prohibited as well. Yet the Secretary did not cite the operator for that and has, in fact, has long allowed the use of wooden wedges around the perimeter. *See* Peabody Ex. D, at 3 (allowing the use of wedges in the mine's ventilation plan).

The preamble does not contain the Secretary's argued prohibition against the use of polyurethane foam. Therefore, the Secretary, in essence, asks us to defer to his interpretation of the preamble — an interpretation of an interpretation. Deference in such a situation was addressed relatively recently by the Fifth Circuit in *Elgin Nursing and Rehabilitation Center v. U.S. Department of Health and Human Services*, 718 F.3d 488 (5th Cir. 2013). The agency in that case issued 42 C.F.R. § 483.35(i)(2), a regulation requiring long term care facilities to “[s]tore, prepare, distribute, and serve food under sanitary conditions,” and created a manual interpreting the regulation, but the manual was ambiguous as well. 718 F.3d at 491-92. The agency requested *Auer* deference for its interpretation of both the regulation and the manual's ambiguous interpretation of the regulation. *Id.* at 492. The Fifth Circuit declined. *Id.* at 493.

Upon deciding not to grant deference, the court recognized that rather than presenting a case of *Auer* or *Seminole Rock* deference, the agency, “it seems, asks us to go a step further and defer to its interpretation of the [manual]; essentially, it seeks ‘*Seminole Rock* squared’ deference — deferring to its interpretation of its manual interpreting its interpretive regulation.” *Id.* The court identified the chief problems with deferring to the agency's interpretation of its own interpretation:

[First,] it would make it possible for agencies not only to issue ambiguous regulations, but also to write and enforce ambiguous interpretations of them. . . .

Second, granting deference to [the agency's] interpretation of the [manual] would leave no role for the courts — taken to its logical conclusion, it could effectively insulate agency action from judicial review. It is not within the province of the Executive Branch to determine the final meaning of a vague document interpreting a regulation any more than it would be to interpret the final meaning of a contract entered into by the Executive Branch.

Third, extending *Seminole Rock* and *Auer* to apply to agency interpretations of agency interpretations of agency

regulations would allow agencies to punish “wrongdoers” without first giving fair notice of the wrong to be avoided.

Id. As a result, the Fifth Circuit declined to grant deference to the agency’s interpretation of the manual. It proceeded to interpret the manual by “apply[ing] traditional tools of textual interpretation.” *Id.* at 494. In doing so, the court reached a contrary conclusion from that of the agency and rejected the agency’s interpretation of the regulation. *Id.* at 494-95.

The case before us presents similar circumstances to those in *Elgin Nursing*. The Secretary asks for deference to his interpretation, directing us to some of the language of the preamble and ignoring preamble language in which the Secretary recognized that by use of the phrase “traditionally accepted method[s],” he was allowing use of methods that had not been shown to meet pre-existing strength testing requirements. For the reasons stated *supra*, however, the preamble does not support the Secretary’s contention that MSHA intended to prohibit use of non-strength-enhancing sealants, such as polyurethane foam, on the perimeter of concrete block stoppings. Rather, the preamble indicates that operators *may* use such sealants under such scenarios. For the same reasons as those articulated by the Fifth Circuit, we decline to award the Secretary “*Seminole Rock squared*” deference to his interpretation of the preamble.

With *Auer* deference inappropriate, we would afford the Secretary’s interpretation only the amount of deference warranted by the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Secretary’s enforcement history and his prior approval of Peabody Twentymile’s construction method are highly relevant to this inquiry and support our finding that the Secretary has traditionally accepted Peabody Twentymile’s construction method.¹⁵

Since the mine opened in 1983, the Foidel Creek Mine’s ventilation plan has allowed the use of polyurethane foam to seal the perimeters of its ventilation stoppings. 37 FMSHRC at 2641. The Secretary later approved a 1991 ventilation plan addendum allowing the operator to use polyurethane foam to “seal [the] . . . cracks and perimeters of ventilation devices.” Peabody Ex. D, at 7, 15. In 2000, the Secretary again approved a ventilation plan with the following provision: “Application of foam for ventilation devices will be limited to sealing the perimeter and joints of such devices.” *Id.* at 9.

The Secretary fails in his attempt to inject ambiguity into the ventilation plans by arguing that they could be read to refer to repairs rather than actual construction of stoppings. Sec. Br. at 20. The 2011 ventilation plan is unambiguous: “Application of foam for ventilation device installation will be limited to sealing the perimeter and joints of such devices.” Peabody Ex. D,

¹⁵ This case concerns a mandatory standard that allows practices that have been “traditionally accepted,” and MSHA’s acceptance of Peabody’s construction method through ventilation plans is clearly evidence of that traditional acceptance. The Judge should have considered the ventilation plans.

at 10. Using the nominative “installation” to refer to the act of installing, the ventilation plan clearly allows the use of polyurethane foam during the installation phase.

MSHA has traditionally accepted Peabody Twentymile’s method by failing to cite the practice until 2014 and approving ventilation plans allowing the practice since 1983, and neither the regulation nor the preamble prohibits the practice. For those reasons, even if we found the regulation ambiguous, we would find the Secretary’s interpretation wholly unpersuasive due to its inconsistency with the regulation, the preamble, and the Secretary’s own consistent enforcement of the regulation until 2014, and we would not afford it *Skidmore* deference.

Commissioner Jordan does not address our finding that Peabody Twentymile’s method of construction meets the requirements to be traditionally accepted within the language of the preamble, and Commissioner Cohen attempts to do so only in a footnote. *See* slip op. at 16 n.13. Rather than deal with the clear language of the preamble, they principally rely upon an apparent concession by Peabody’s counsel during oral argument that if the list in the preamble were exhaustive and binding, it would not prevail. *See* slip op. at 19 (separate opinion of Commissioner Cohen); slip op. at 22 n.1 (separate opinion of Commissioner Jordan). Counsel did not identify a reason for that concession, and we did not pursue a discussion regarding the plain language of the preamble regarding dry stacked concrete blocks.

Obviously, a concession by Peabody’s counsel carries some weight no matter how improvidently stated. However, unlike factual arguments, we are not bound by a party’s (or even both parties’) erroneous view of the law. *See Kamen v. Kemper Financial Servs. Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”); *see also Flamingo Resort, Inc. v. United States*, 664 F.2d 1387, 1391 n.5 (9th Cir. 1982) (“[W]e are not bound by a party’s erroneous view of the law.”); *United States v. Ginyard*, 444 F.3d 648, 649 (D.C. Cir. 2006) (“Although the United States has conceded error, the court is not bound by that concession on a question of law.”). We place more reliance on the plain wording of the thought-out words of the preamble rather than a spontaneous response during oral argument.¹⁶

The question before us is whether section 75.333(e)(1)(i) prohibits the use of polyurethane foam. The Secretary has offered the preamble as essentially the only basis for his position. The significance of the preamble is a question of law, and the parties’ misreading of

¹⁶ We prefer not to confuse factual questions with legal ones, as Commissioner Cohen does throughout by using non-expert testimony about which construction method is stronger to determine his purportedly legal conclusion of what section 75.333(e)(1)(i) requires. To paraphrase Commissioner Cohen’s opinion, “[I]f MSHA [today] believes that the use of foam as a perimeter sealant is unsafe,” slip op. at 20, then the regulation must be read to prohibit it, regardless of what the regulation and the preamble actually say. Moreover, as set out *infra*, a block stopping in the subject mine is approximately 200 square feet, weighs more than four tons, and is coated with a strength enhancing material on the side. It was with good reason that MSHA did not require the replacement of stoppings after the Judge’s decision.

the preamble *in a hypothetical* does not preclude us from reading it correctly. If our colleagues' view of the scope of our review were accurate, the Commission would be prevented from ever conducting its negligence analysis as described in *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016), simply because both the Secretary and the operator in a given case might prefer the Secretary's definition of negligence to our own.

Commissioner Cohen's opinion actually conforms in important and outcome-determinative respects to our opinion. He recognizes that the Secretary is not entitled to *Auer* deference. He effectively agrees that the words of the regulation are plain and, properly defined, mean exactly what we have said. He finds ambiguity not in the terms of the regulation but in its application. Thus, he does not find the terms or language of the regulation ambiguous but finds the regulation ambiguous because, to him, it could mean traditionally accepted in the industry as a whole or at a particular mine. Slip op. at 15.¹⁷

In proposing this ambiguity, he implicitly concedes, as he must, that MSHA traditionally accepted the use of polyurethane at the Peabody Twentymile mine.¹⁸ Rather than apply the plain words of the regulation to the long usage at the subject mine, Commissioner Cohen asserts that a "valid inference might be that allowing the operator to use the foam sealant was an error made

¹⁷ The only mine considered in this case or in the evidence is Peabody Twentymile's mine. A Peabody witness testified that he knew other mines used polyurethane as a sealant around stoppings. The Secretary did not present any evidence about the use of polyurethane foam at other mines. Commissioner Cohen acknowledges this point saying that he is concerned about MSHA not using a safety practice that "it *may presently be using* at other mines around the country." Slip op. at 15 (emphasis added). If the Secretary wants to impose a new nationwide requirement, there is a legally sound way to do so, consistent with the APA: make a rule.

¹⁸ We recognize that dictionary definitions are not always outcome determinative if, read in the context as a whole, they are clearly inappropriate. Here, the "context" of the regulation demonstrates that the dictionary definitions are most appropriate. Indeed, the entire context is that if an operator was using a methodology that MSHA had accepted, it could continue doing so. Commissioner Cohen's reliance upon *Yates v. United States*, 135 S. Ct. 1074 (2015), actually shows the meaning of "read in context." *Yates* was a criminal case in which a plurality of four Justices expressly relied upon the rule of lenity to require any ambiguity to be resolved in the defendant's favor. More importantly, for present purposes, the plurality emphasized, *inter alia*, the title of the specific section allegedly violated, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," and the title of the section of the Sarbanes-Oxley Act that contained the specific section allegedly violated, "Criminal penalties for altering documents." *Id.* at 1083. Further, the plurality relied upon rules of statutory construction to find that the term "tangible object" was limited by surrounding reference to "objects used to record or preserve information." *Id.* at 1077. Using these tools, the plurality writes, "It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087. In this case, MSHA approved previously used and accepted methods going forward. The context and the words are in full alignment.

by a single MSHA office.” Slip op. at 10. Of course, it strains credulity to characterize MSHA’s continuous approval of Peabody Twentymile’s use of polyurethane foam for over 31 years as “an error” when that approval took the form of explicit approval of its ventilation plans, at least 60 reviews of that plan, and hundreds of inspections covering hundreds of block stoppings without issuing a single citation. In turn, it defies credulity to assert that MSHA allowed an unsafe practice to exist for three decades in a large and important underground coal mine. Yet, Commissioner Cohen simply asserts that the use of polyurethane foam around the perimeter of block stoppings is “weaker and more flammable,” and concludes from that assertion that the Secretary’s interpretation is therefore reasonable. Slip op. at 20.

Commissioner Cohen raises a false specter of the flammability of polyurethane foam to support his finding that the Secretary’s interpretation is persuasive.¹⁹ Such assertion conflicts with the facts that (1) polyurethane foam is accepted by MSHA as flame resistant, (2) MSHA recognizes and permits the use of polyurethane as a sealant around the perimeter of Kennedy stoppings that have wide gaps at the perimeter, and (3) Inspector Preece confused fire tests required for stoppings with flammability tests required for sealants.

Preece repeatedly acknowledged that polyurethane foam meets MSHA’s test for flammability. Tr. 41, 53-54, 66-67. Under 30 C.F.R. § 75.333(f), sealants are required to pass a flammability test. Polyurethane foam has passed this test, it has been accepted by MSHA as a sealant for use in mines, and MSHA has specifically approved it as flame resistant. Tr. 53-54.

Preece offered confused and errant testimony by referring to a “fire test” at various points in his testimony. A “fire test” is not required by section 75.333(e). The record clearly reflects this fact.

Preece’s confusion and misapprehension, which serve to undercut his testimony, apparently arise from his misunderstanding of a communication between him and MSHA personnel with actual expertise regarding stoppings and sealants. When Peabody Twentymile’s counsel pointed out that section 75.333(e)(1)(i) only specified a strength test, Preece stated that “Mr. Cramer in technical support sent us some documentation which showed the three tests that are performed *on stoppings*. That’s what they test with.” Tr. 67 (emphasis added). Without doubt, Preece was not testifying from his own knowledge or expertise but rather was testifying only to an impression gained from talking with someone else. The regulations do not support his misimpression.

¹⁹ Commissioner Cohen states that “[w]hile block bond has passed flammability tests, Tr. 34-35, polyurethane foam has not,” crediting the testimony of Inspector Preece. Slip op. at 20.

In fact, section 75.333(e)(1)(ii) requires a fire test only for *stopping construction material* and does not deal with the flammability of sealants.²⁰ Nobody asserts that polyurethane foam is a stopping construction material. It is used to seal the perimeter and any holes to prevent air passage around, over, or through the stopping. Preece clearly confused the requirements for stopping construction materials and for sealants.

The regulation requires that stopping construction materials, “includ[ing] concrete, concrete block, brick, cinder block, tile, or steel,” must “be constructed of noncombustible material.” 30 C.F.R. § 75.333(e)(1)(ii). The term “noncombustible material” is defined in section 75.301 as material that, “when used to construct a ventilation control, results in a control that will continue to serve its intended function for 1 hour when subjected to a *fire test* incorporating an ASTM E119-88 time/temperature heat input, or equivalent.” 30 C.F.R. § 75.301 (emphasis added). Section 75.333(e)(1)(ii) does not mention sealants because they are not construction materials that must meet the fire test. Instead, sealants such as polyurethane foam must meet the flammability test identified in section 75.333(f), which specifies the fire-resistance standards for sealants.

Separately, and from a practical standpoint more persuasively, mines permissibly use polyurethane foam to seal not just the perimeter but also the joints of metal Kennedy stoppings, which are widely used in the Foidel Creek Mine. Kennedy stoppings typically have gaps of 0 to 4 inches between the stopping and rib or roof and block stoppings typically have gaps of 0 to 6 inches. Tr. 36-37; Tr. 46-47.²¹ The permitted use of polyurethane foam for these stoppings at the mine demonstrates that, in fact, MSHA actually does permit use of polyurethane foam as a perimeter sealant with stoppings without concern that use of the sealant creates a danger for miners of air leakage through openings at the perimeter.

Even were the sufficiency of polyurethane foam not obvious from the regulations themselves and its permissible use with Kennedy stoppings, a paper presented by an MSHA official at the 11th U.S./North American Mine Ventilation Symposium in 2006 confirms it. The

²⁰ Section 75.333(e)(1)(ii) provides in relevant part:

All overcasts, undercasts, shaft partitions, permanent stoppings, and regulators, installed after November 15, 1992, shall be constructed of noncombustible material. Materials that are suitable for the construction of overcasts, undercasts, shaft partitions, permanent stoppings, and regulators include concrete, concrete block, brick, cinder block, tile, or steel.

²¹ Commissioner Cohen says that our conclusion that these gaps are “substantially similar” amounts to “speculation,” slip op. at 16 n.9, and that Kennedy stoppings are “fundamentally different” in the gaps in the perimeter. Slip op. at 20. We leave it to the common sense of the reasonable person to gauge whether, with respect to preventing the passage of air through the same approved sealant, an occasional difference of 2 inches is “fundamentally” different. No evidence supports the notion of such fundamental difference.

paper, which discussed nontraditional construction materials, specifies first that section 75.333 “requires that . . . permanent stoppings . . . be constructed of noncombustible material.” Harry C. Verakis, Technical Support, Approval & Certification Center, MSHA, *Stoppings: Technology Developments and Mine Safety Engineering Evaluations 1* (2006), available at <https://arlweb.msha.gov/S&HINFO/TECHRPT/minewste/stoppingstechnologydevelopment.pdf>. Then, the paper states that these newer materials must meet the strength test identified in section 75.333(e)(1), the “ASTM E-72-80.” *Id.* The next sentence of the paper states clearly that sealants must only meet the flammability test contained in section 75.333(f): “Also, sealants or coatings applied to ventilation controls to reduce air leakage must have a flame spread index of 25 or less. The flame spread index test specified in Part 75.333 is the ASTM E-162-87.” *Id.* at 1-2 (footnote omitted). Polyurethane foam meets this standard, and Inspector Preece’s confused testimony must not trump our ability to read, independently, what the Secretary’s regulations require.

The only other asserted safety basis for not applying the regulation’s words in accordance with their plain meaning and the context within which they were written is that polyurethane foam is not strength-enhancing. Of course, the undemonstrated premise of this objection must be that a thin coating of an inch or so around the perimeter of a stopping is critical to a stopping’s physical strength.

With respect to the “strength” issue, we start with the dimensions of a stopping in the subject mine. Generally, stoppings in the Peabody Twentymile mine are 17 to 23 feet wide and 8 to 12 feet tall. Tr. 116. They are composed of dry stacked concrete blocks coated on the high-pressure side with a strength-enhancing material and are wedged against the ribs and the roof. Tr. 117. The blocks weigh over 39 pounds. Verakis, *supra*, at 2 (providing measurements and weight in metric format). Assuming an average stopping is 20 feet wide and 10 feet tall and uses 8 x 8 x 16 inch blocks, the stopping will contain 225 blocks. Thus, the block stopping is an approximately 200 square-foot wall of strength-enhanced concrete blocks weighing 8,775 pounds.

The Secretary presented no evidence that Peabody Twentymile’s block stoppings are not sufficiently strong, opting instead to rely on conclusory reasoning that a 200 square foot, four ton concrete block stopping with an inch or so of polyurethane at the perimeter is dangerously weaker than one that uses mortar subject to drying and cracking and stuffed by hand in small openings. There simply is no evidence in this case to support such a supposition.²²

If one were to conclude that the traditional Peabody stopping is insufficiently strong, as Commissioner Cohen does, then for over 30 years MSHA has permitted the construction of hundreds of structurally insufficient block stoppings. If that were true, then MSHA has been

²² Contrary to Preece’s unsupported supposition, there is testimony that in the Foidel Creek Mine and another mine, which have pronounced cleavage and rib sloughage, polyurethane foam creates a better seal than mortar or grout because it expands to fill the space around the perimeter of stoppings rather than shrinking and cracking. Tr. 140.

scandalously negligent. Given that stoppings made with Peabody's traditionally accepted method will be allowed to remain unchanged in the mine, *see* Oral Arg. Tr. 72, MSHA does not find such stoppings as posing a threat to the safety of miners.²³ We prefer to find the obvious truth that MSHA has traditionally recognized and accepted that Peabody's coated, strength-enhanced concrete stoppings have been traditionally accepted as adequately performing the task of providing a strong stopping in accordance with the regulation.

III.

Conclusion

Peabody Twentymile's method of construction was traditionally accepted by MSHA for 13 years prior to the promulgation of the regulation and for almost 20 years thereafter. Under the plain meaning of the regulation, such a traditional and accepted method complies with the regulation. Further, even if there were doubt, we need not defer to the Secretary's interpretation of the term "traditionally accepted method" of construction in section 75.333(e)(1)(i) because it unambiguously includes Peabody Twentymile's use of polyurethane foam around the perimeter of dry-stacked concrete block stoppings. However, even if the standard were ambiguous, the *Auer* framework would not apply to the Secretary's interpretation because the preamble does not support his argument, rendering it an interpretation of an interpretation, and under *Skidmore*, the Secretary's interpretation lacks the power to persuade given the facts of Peabody Twentymile's traditional usage not objected to by MSHA.

For these reasons, we would reverse the Judge's decision and find that Peabody Twentymile's construction of dry-stacked block stoppings is a "traditionally accepted method."



William I. Althen, Acting Chairman



Michael G. Young, Commissioner

²³ Were the contrary true, the Secretary would be able to assert, consistent with the text of section 75.333(e)(1), that the stoppings at the mine were *not* constructed "of materials that have been demonstrated to perform adequately." MSHA did not argue this or offer any competent evidence that the sealant here failed that test, so we must assume there is no evidence of this fact and that the Secretary's suggestion of potential danger based on deficient strength is weightless.

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