April 1989

Petitions for Modification of MSHA Safety Standards: Process, Problems and a Proposal for Reform

Timothy M. Biddle
Crowell & Moring

Thomas C. Means
Crowell & Moring

Susan E. Chetlin
Crowell & Moring

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Administrative Law Commons, and the Business Organizations Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol91/iss3/7

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
PETITIONS FOR MODIFICATION OF MSHA SAFETY STANDARDS: PROCESS, PROBLEMS AND A PROPOSAL FOR REFORM

TIMOTHY M. BIDDLE*
THOMAS C. MEANS**
SUSAN E. CHETLIN***

I. INTRODUCTION.................................................... 898
II. THE PETITION PROCESS—AN OVERVIEW .................... 901
   A. The Petition................................................. 901
   B. The MSHA Consideration Process ....................... 902
   C. The Hearing and Appeal Stage ......................... 904
III. PROBLEMS IN THE PETITION PROCESS .................... 907
   A. Unclear Statutory Burdens............................... 907
      1. The Alternative Method Standard................... 907
      2. The Diminution of Safety Standard................. 911
      3. Must Both the Diminution of Safety and Alternative Method Tests Be Satisfied?........... 913
   B. Procedural Morass ........................................ 917
      1. The Department of Labor ALJs ....................... 917
      2. Protracted Nature of Litigation .................... 919
      3. Unintended Uses of the Petition Process .......... 922
   C. Interim Relief and Relief Pending Appeal ............. 924
      1. Interim Relief ......................................... 925
      2. Relief Pending Appeal ............................... 928
   D. The New Remedy: Emergency Relief ..................... 930
IV. SOLUTIONS ..................................................... 932

---


Although the authors represented mining companies in some of the cases cited in this article, the views expressed here are solely those of the authors.
I. INTRODUCTION

A series of coal mining disasters in the early 1960's led Congress to "protect the safety and health of our nation's miners" by enacting the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"). Then, with less than a decade of experience under the 1969 Act, Congress enacted even more comprehensive mine safety legislation, the Federal Mine Safety and Health Act of 1977 ("Act" or "1977 Act"). The 1977 Act, for the first time, brought the full panoply of federal powers to bear in the battle to protect miners in all the nation's mines.

Instead of setting goals and giving a federal agency broad powers to carry out its legislative intent, Congress regulated mine safety and health in the 1969 Act by legislating comprehensive "interim mandatory safety and health standards;" Congress left these interim standards unchanged in the 1977 Act. Congress recognized, as the term "interim" suggests, that the legislated interim standards should not remain static; rather, safety of the miners required that such standards evolve "to provide increased safety and, when necessary, to meet changes in technology and mining conditions and systems."


https://researchrepository.wvu.edu/wvlr/vol91/iss3/7
The 1977 Act authorizes the Secretary of Labor ("Secretary") to employ two procedures for changing the statutory interim mandatory safety standards. The first procedure is a rulemaking process by which the Secretary can promulgate new, "improved" industry-wide safety and health standards, subject to the limitation that any new or revised standard not "reduce the protection" afforded by an existing standard. The second procedure allows individual mining companies or miner representatives to "petition for modification" of a particular interim safety standard if local conditions warrant. This novel procedure reflected congressional appreciation that the diversity and dynamic nature of mining, as well as the anticipated evolution of mining technology, meant that rote application of existing mandatory safety standards might not best ensure miner safety under all conditions. This petition procedure authorizes the Secretary to modify application of a mandatory safety standard on a mine-specific basis under either of two circum-

7. Under the 1969 Act, the Secretary of the Interior was responsible for enforcement. See 30 U.S.C. § 802(a) (1976). In 1977, Congress changed the implementing agency to the Department of Labor. References to the "Secretary" throughout the 1977 Act are to the Secretary of Labor. 30 U.S.C. § 802(a) (1982). See infra notes 112-16 and accompanying text. The Secretary of Labor's delegate for carrying out his responsibilities under the 1977 Act is the Mine Safety and Health Administration ("MSHA").

12. See infra notes 92-94 and accompanying text.

A petition for modification proceeding cannot be used to challenge the applicability of a mandatory safety standard at a particular mine or the validity
stances: 1) where there is an alternative to a safety standard that does not reduce the level of safety afforded by the standard in the mine, or 2) where the standard, as applied in the mine, diminishes safety.\textsuperscript{15}

The petition for modification process, which began as a well-intentioned and necessary vehicle for ensuring miner safety, has not achieved its purpose. A combination of seriously deficient implementing regulations,\textsuperscript{16} agency delays, and a cumbersome litigation process has so hampered the petition process that it may no longer be a viable form of relief. However, for all the reasons that Congress recognized, the need for a safety standard modification is often critical if safe mining operations are to be maintained within the bounds of the law. Procedural reform to overcome the present impediments to modification is vitally necessary, and movement in that direction has already begun. This article will survey the petition process, examine its problems, and evaluate present efforts at reform.

of MSHA's interpretation of a particular mandatory standard. Oneida Mining Co., 6 I.B.M.A. 343, 348-49 (1976); Itmann Coal Co., 6 I.B.M.A. 121, 126-129 (1976); See also Kaiser Coal Corp., 10 F.M.S.H.R.C. 1165 (1988) (separate declaratory relief action was brought before the Federal Mine Safety and Health Review Commission to challenge the applicability of a regulation while a petition to modify that regulation was pending before a Department of Labor administrative law judge). In a petition proceeding, the applicability and validity of a mandatory safety standard must be presumed; challenges to the applicability or validity of a mandatory safety standard must be made in the context of an enforcement proceeding under § 105(d) of the Act. 30 U.S.C. § 815(d) (1982). See Oneida, 6 I.B.M.A. at 349-50; Itmann, 6 I.B.M.A. at 129.

Mine operators can seek to modify the terms of various mine plans (e.g., roof control plans, 30 C.F.R. § 75.220 (1988), and ventilation and methane and dust control plans, 30 C.F.R. § 75.316 (1988)) through the petition for modification process. See Affinity Mining Co., 6 I.B.M.A. 100 (1976) (on reconsideration) (because mine plan is enforceable as a mandatory standard, operator can file a petition for modification to change it); cf. Old Ben Coal Co., 6 I.B.M.A. 163, 165-166 (1976) (regulations establishing criteria for plan approvals are not mandatory standards and, therefore, cannot be modified in a petition for modification proceeding). As a practical matter, the mine specific nature of these plans coupled with the opportunity to revise them following comments from MSHA suggests that petitions to modify plans are unnecessary. Indeed, the recently promulgated roof control regulations make very clear the Secretary's view that the plan approval process is the one that operators must use to seek plan revisions. See 30 C.F.R. §§ 75.220, 75.223 (1988); MSHA Program Policy Letter No. 88-V-1 (Aug. 19, 1988). However, if MSHA refuses to accept a plan revision, filing a petition for modification may result in adjudication of the plan dispute issue without the enforcement action generally necessary to litigate such disputes. See infra note 144.


II. The Petition Process: An Overview

An understanding of the current petition process is necessary to appreciate its problems. Thus, we first review the mechanics for modifying a mandatory safety standard.

A. The Petition

A petition for modification may be filed with the Assistant Secretary for Mine Safety and Health ("Assistant Secretary") by a mine operator or by the representative of the miners at a particular mine. If the petition is filed by the mine operator, it must be served personally or by certified mail on the representative of the miners; a petition filed by the miners' representative must be served in a like manner on the operator.

Section 101(c) of the Act provides that a petition for modification may be granted if

the Secretary determines [1] that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or [2] that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition to the requirement that one or both of the statutory prerequisites be alleged in a petition, the Secretary's regulations state that a petition must contain 1) the petitioner's name and address; 2) the mine identification number and location of the mine or mines affected; 3) the mandatory safety standard sought to be modified; 4) "[a] concise statement of the modification requested" including whether the petitioner intends to show the safety of the

17. 30 U.S.C. § 811(c) (1986); 30 C.F.R. § 44.10 (1988). Until very recently, only mine operators filed petitions for modification either when they (like Ford) "had a better idea" for achieving the result of the mandatory standard without decreasing its level of safety, or when application of the mandatory safety standard actually would diminish the safety of the miners. Last year, however, the United Mine Workers of America ("UMWA") filed several petitions for modification in an attempt to require mine operators to implement safety measures in addition to those otherwise required by a particular mandatory safety standard. See infra notes 137-92 and accompanying text.
18. 30 C.F.R. § 44.10 (1988).
20. 30 C.F.R. § 44.11(a)(1)-(4) (1988).
alternative method, diminution of safety, or both; 5) a statement of facts to support the grounds alleged to warrant the modification; and 6) identification of the representative of the miners if the petitioner is a mine operator. A petition may be filed for more than one mine where identical issues of law or fact are involved, but it cannot be filed for more than one operator or seek modification of more than one mandatory safety standard.

After a petition is filed, the Mine Safety and Health Administration (MSHA) must publish a notice and summary of it in the Federal Register and allow thirty days for “interested parties” to comment on the petition in writing. The statute provides that any “interested party” may participate in a petition proceeding by filing a request for hearing. However, a “person claiming a right of participation as an interested party” must first apply for party status to the Assistant Secretary. If, after a hearing has been requested, others claim to be “interested parties,” they must apply for party status to the Chief Administrative Law Judge of the Department of Labor Office of Administrative Law Judges.

B. The MSHA Consideration Process

MSHA is responsible for “investigating” the petition pursuant to section 101(c), which requires that the Secretary “shall cause such investigation to be made [of the petition] as he deems appropriate.” Under the statute, that investigation must include an opportunity for a hearing. The Secretary’s implementing regulations have translated this “investigation” phase into a two-stage process.

22. 30 C.F.R. § 44.11(b) (1988).
23. 30 C.F.R. § 44.12 (1988); see also 30 U.S.C. § 811(c) (1986).
If a petition for modification is amended, the petition as amended must be republished in the Federal Register. Gateway Coal Co., 2 I.B.M.A. 107, 112 (1973).
25. When a party requesting a hearing has actual notice of a proceeding and does not participate, that party will be deemed to have waived its participation rights. Gateway, 2 I.B.M.A. at 112-14.
26. 30 C.F.R. § 44.3 (1988).
27. See infra notes 41-57 and accompanying text for a discussion of the hearing process.
28. 30 C.F.R. § 44.3 (1988).
30. Id.
The initial stage of the process takes place before the appropriate MSHA Administrator (either for Coal Mine Safety and Health or for Metal and Nonmetal Mine Safety and Health) ("Administrator"), who must make the first-line decision as to whether the petition should be granted.\(^{31}\) But, as the Secretary no doubt recognized in promulgating regulations, the Administrator cannot make that decision based solely upon allegations in the petition.\(^{32}\) "Upon receipt of a petition for modification," MSHA begins an investigation, generally including a field investigation, of those allegations.\(^{33}\) Although the regulations do not specifically require it,\(^{34}\) following its investigation, MSHA prepares an investigative report which contains the investigators' findings as well as a draft proposed decision and order reflecting the investigators' recommendation to the Administrator to either grant or deny the petition. Typically, the investigative report is served on the mine operator, the miners' representative, and others within MSHA, each of whom has thirty days to submit written comments.

Following the close of the comment period, the Administrator issues a proposed decision and order "based upon all available information, including the results of the investigation."\(^{35}\) That decision becomes final for the Secretary after thirty days unless a hearing is requested.\(^{36}\)

If no request for hearing is filed, a petition which has been granted by the Administrator becomes final,\(^{37}\) thus becoming a new man-

---

31. 30 C.F.R. § 44.13 (1988). The Administrator issues a written decision on a petition in the form of a proposed decision and order. Id.
32. See 30 C.F.R. § 44.13 (1988).
33. Id.
34. Cf. 30 C.F.R. § 44.13 (1988) (The proposed decision and order shall be based on "the results of the investigation," inter alia).
35. 30 C.F.R. § 44.13.
36. Id. If the request for hearing is not timely filed, the Administrator's proposed decision and order will take effect. Beth Elkhorn Coal Corp., No. 80-MS-4 (July 20, 1980) (ALJ Ramsey).
In a case where a proposed decision and order grants the petition, filing a request for hearing prevents the granted petition from becoming effective. 30 C.F.R. §§ 44.13, 44.50(a) (1988). However, if request for hearing is filed, a successful petitioner can file for relief pending appeal to give effect to the Administrator's proposed decision and order while the "appeal" is being decided. 30 C.F.R. § 44.50(b) (1988). See infra notes 169-81 and accompanying text.
37. 30 C.F.R. § 44.4(b) (1988).
mandatory standard for the mine.\textsuperscript{38} As is the case with all other mandatory standards, failure to comply with terms and conditions\textsuperscript{39} of a granted petition will subject an operator to MSHA enforcement action.\textsuperscript{40}

C. The Hearing and Appeal Stage

A party's request for hearing triggers the second stage of the petition process. Jurisdiction over the petition moves from the Administrator to the Department of Labor Office of Administrative Law Judges.\textsuperscript{41} A request for hearing must be filed with the appropriate Administrator within thirty days after service of the proposed decision and order.\textsuperscript{42} When a request for hearing is filed, the petition and the administrative record are referred to the Chief Judge of the Department of Labor Office of Administrative Law Judges, who assigns the petition to an administrative law judge ("ALJ") for hearing.\textsuperscript{43} Hearings are conducted in accordance with Part 44 of Title

\textsuperscript{38} See Int'l Union, UMWA v. MSHA (Kaiser Coal Corp.), 4823 F.2d 608, 615 n.5 (D.C. Cir. 1978) (D.C. Circuit jurisdiction under 30 U.S.C. § 811(d) to hear appeals concerning the promulgation of a mandatory safety includes modifications of a mandatory safety standard) [hereinafter Int'l Union/(Kaiser)].

\textsuperscript{39} The "terms and conditions" of a petition consist of the petitioner's alternative method or proposed "substitute" measures, see infra note 106, plus whatever additional conditions may be required to ensure that the granted petition is no less safe than the standard.

\textsuperscript{40} See, e.g., 30 U.S.C. §§ 814(a), 814(d), 820(a), 820(c), 820(d) (1986).

One question that may arise is whether a granted petition can be modified to address changing mining conditions. The regulations answer only part of that question. If changed circumstances render the findings which justified granting the petition invalid, any party to the petition proceedings may file for revocation of the petition. 30 C.F.R. § 44.52 (1988). See, e.g., Order of Dismissal, Empire Energy Corp., No. 85-MSA-8 (Nov. 14, 1985) (ALJ Thomas) (revocation granted based on material change in circumstances). However, that section does not provide for the modification of a petition; thus, it fails to address a situation where the need for the petition is just as real as when it was granted, but mining conditions or advances in technology mean that one or two of the conditions imposed in the granted petition should be changed. Arguably, a petitioner could file to revoke an offending condition in a granted petition, although § 44.52 does not specifically provide for the partial revocation of a petition. In addition, since the petition for modification becomes a new mandatory standard for that mine and since mandatory standards may only be changed through the petition process, 30 U.S.C. § 811(c) (1986), it seems that the granted petition could be modified by filing a new petition.

\textsuperscript{41} 30 C.F.R. § 44.15 (1988).

\textsuperscript{42} 30 C.F.R. §§ 44.13, 44.14 (1988).

\textsuperscript{43} 30 C.F.R. §§ 44.15, 44.20 (1988).

Preliminary issues such as motions for summary decision or jurisdictional issues may be referred to an ALJ for resolution of that limited dispute before the petition case in chief is even assigned. See, e.g., Decision and Order, Kaiser Coal Corp., No. 86-MSA-1 (Dec. 6, 1985) (ALJ Levin) (jurisdictional issue decided before a request for hearing was filed).
30 of the Code of Federal Regulations, and, in the absence of an applicable regulation under Part 44, in accordance with the rules of practice and procedure for administrative hearings before the Department of Labor Office of Administrative Law Judges. After a hearing has been held, the ALJ must issue a written initial decision and order granting or denying the petition. That decision will be-

47. The presiding ALJ may require the parties to file and serve findings of fact and conclusions of law, together with a supporting briefs. 30 C.F.R. § 44.31 (1988).
48. 30 C.F.R. § 44.32(a) (1988).

Although petition proceedings involve a hearing, the question has been raised as to whether they are adjudications or rulemakings. In one petition case, the ALJ disagreed with MSHA's contention that petition proceedings are in the nature of mine-specific rulemakings. Kaiser Coal, No. 86-MSA-1, slip op. at 9-12 (July 7, 1988) (ALJ Rosenzweig, appeal pending before Assistant Secretary (filed Aug. 5, 1988)). The ALJ reached that conclusion because the petition subsection, § 101(c), refers to § 554 of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1982) ("APA"), entitled "Adjudications," but the general rulemaking provisions of the Act, beginning at § 101(a), refer to § 553 of the APA entitled "Rule making." In addition, the ALJ placed considerable emphasis on cases holding that adjudications are appropriate for individual cases, while rulemakings are appropriate for broad policy issues.

Labeling the petition process as an "adjudication" or a "rulemaking" appears to make little practical difference. As Professor Davis points out, the more important issue is selecting the proper procedure to fit the task:

Whether a proceeding is rulemaking or adjudication, a dispute about specific facts pertaining to a particular party calls for trial procedure. Whether a proceeding is rulemaking or adjudication, an issue about broad and general facts may usually best be determined by written submissions, but a particular judgment should be made on the question whether an identified question of specific fact not pertaining to a particular party may best be resolved by trial procedure. Whether a proceeding is rulemaking or adjudication, the appropriate procedure for interpreting law or policy involves written submissions or oral arguments or both, and the same is true of creating new law or policy in the absence of factual issues.

2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.5 at 324-25 (2d ed. 1979).

Although the hearing stage before the ALJ is conducted as an adjudicatory proceeding, the outcome of the petition process is ultimately the same as a rulemaking, regardless of the type of procedures used, because it establishes a new mandatory standard for a mine.

Moreover, calling a petition proceeding an adjudication or a rulemaking seems to make no practical difference as to review in the United States Court of Appeals for the District of Columbia Circuit. 30 U.S.C. § 811(d) (1982). Section 101(d), 30 U.S.C. § 811(d) (1986), requires that any challenge to a mandatory standard—whether an industry-wide or mine specific standard—be brought in the appropriate court of appeals 30 U.S.C. § 811(d) (1986). And, regardless of whether the standard of review is whether the agency action was "arbitrary and capricious" (rulemaking) or supported by "substantial evidence" (adjudication), the D.C. Circuit has held that there is little practical difference between the two standards. Int'l Union, UMWA v. MSHA (Emerald Mine Corp.), 830 F.2d 289, 293 n.6 (D.C. Cir. 1987) [hereinafter Int'l Union/(Emerald)]. See infra note 57.
come final within thirty days unless an appeal is taken to the Assistant Secretary.\(^49\)

If any party remains dissatisfied following issuance of the ALJ's initial decision and order, it can appeal, thus transferring jurisdiction over the petition to the Office of the Assistant Secretary.\(^50\) As with the initial "appeal" to the ALJ, the petition, even if granted by the ALJ, will not become effective during pendency of the appeal to the Assistant Secretary unless a request for relief pending appeal is filed and granted.\(^51\) Once an appeal has been filed, the entire record of the proceeding is transmitted to the Assistant Secretary.\(^52\) The parties then file statements in support of their positions.\(^53\) "[B]ased upon consideration of the entire record of the proceedings transmitted, together with the statements submitted by the parties,"\(^54\) the Assistant Secretary issues a decision affirming, modifying, or setting aside all or part of the ALJ's decision.\(^55\) The Assistant Secretary's decision is final and becomes effective when issued; appeal from that decision is taken to the United States Court of Appeals for the District of Columbia Circuit or the Circuit where the appellant resides or has his principal place of business,\(^56\) where the standard of review is whether the decision was arbitrary, capricious, or an abuse of discretion.\(^57\)

\(49\) 30 C.F.R. §§ 44.32(a), 44.33(a) (1988). If the initial decision grants the petition and a party appeals, the petitioner can also file for relief pending appeal at this stage of the proceedings. 30 C.F.R. § 44.50 (1988). See supra note 36; see infra notes 168-81 and accompanying text.

\(50\) 30 C.F.R. §§ 44.33 - 44.35 (1988).

\(51\) 30 C.F.R. § 44. See supra notes 36, 49; see infra notes 168-73 and accompanying text.

\(52\) 30 C.F.R. § 44.34 (1988). The "record" includes: the petition, request for hearing, motions and rulings, hearing transcript, exhibits, briefs and the ALJ's initial decision and order. \textit{Id.}

\(53\) 30 C.F.R. § 44.33(b), (c) (1988).

\(54\) 30 C.F.R. § 44.35 (1988).

\(55\) 30 C.F.R. § 44.35 (1988). The Assistant Secretary must explain the reasons for his decision. \textit{Id.} The D.C. Circuit has held, "In an area as important as mine safety, the Assistant Secretary must show that he relied on substantial evidence in granting a petition for modification of a mandatory safety standard." \textit{Int'l Union/(Emerald)}, 830 F.2d at 293.

\(56\) 30 C.F.R. § 44.51 (1988); 30 U.S.C. § 811(d) (1986).

\(57\) \textit{Int'l Union/(Emerald)}, 830 F.2d at 292 (citing 5 U.S.C. § 706(2)(A) (1982)). However, the D.C. Circuit stated:

This court has recognized that "the distinction between the arbitrary and capricious standard and substantial evidence review is largely semantic." \textit{Pacific Legal Foundation v. Dept' of Transportation}, 593 F.2d 1338, 1343 n.35 (D.C. Cir.), \textit{cert. denied}, 444 U.S. 830 (1979). \textit{Id.} at 293 n.6.
III. PROBLEMS IN THE PETITION PROCESS

Procedures for modifying a mandatory safety standard, as described in the regulations, seem straightforward, but major problems have developed with them in practice. Unclear statutory burdens, cumbersome procedures, and lack of any interim relief from enforcement of a mandatory standard during pendency of a petition have transmogrified what should be a relatively simple process into an unwieldy and largely unsatisfactory method of dispute resolution.

A. Unclear Statutory Burdens

The regulations provide that a petitioner bears the burden of proving at a hearing that it has fulfilled either the alternative method or diminution of safety standard required by the statute. That is a significant burden because those statutory standards are not defined in the statute and have never been defined by the Assistant Secretary. Even if the petitioner does satisfy those burdens, its petition may not be granted because the granting of petitions is within the Secretary's discretion.

1. The Alternative Method Standard

Section 101(c) permits the granting of a petition if, *inter alia*, "the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of

58. To address at least some of the major problems, the Secretary is revising the Part 44 regulations. Proposed rules were released in May, 1989. 54 Fed. Reg. 19,492 (1989).
59. 30 C.F.R. § 44.30(b) (1988); 30 U.S.C. § 811(c) (1986).
60. See, e.g., *Int'l Union/(Emerald)*, 830 F.2d at 293 (remanded to Assistant Secretary to define the statutory standards).

In deciding a petition for modification case, one ALJ lamented as follows:

The issues here raised are among the most difficult I have ever faced.

My task has been made more difficult by the unavailability of precedent, by a statute with limited reported legislative history relating to the standard at issue, and by regulations which, at times, provide more questions than answers.

*Kaiser Coal*, No. 86-MSA-1, slip op. at 5.

such mine by such standard . . . .' The statute, providing no further guidance as to what that language requires, gives rise to a number of disputes over its meaning. The unions, mining companies, and MSHA have argued vigorously about the meaning of the phrase "achieving the result of such standard." The UMWA has suggested that, in order to achieve the result of the standard, a proposed alternative method must provide the same "design" or "physical" protections that the standard requires. Mining companies (as well as MSHA) have taken the position that "achieving the result of such standard," like "measure of protection," refers to the overall measure of safety protection that the standard provides and not to the incidental means which the standard requires for achieving it.

One ALJ has twice rejected the UMWA's suggested construction of the "result" language of section 101(c):

It is clear that Congress wished to provide a mechanism for the use of alternative methods to achieve the same measure of protection afforded by the standard . . . . That standard may be changed, however, if the new method will guarantee

63. Id.
64. See Int'l Union/(Emerald), 830 F.2d at 292; Kaiser Coal, No. 86-MSA-1, slip op. at 14 n.9; Quarto Mining Co., No. 83-MSA-0016, slip op. at 11-12 (Apr. 30, 1986) (ALJ Rosenzweig, appeal pending before Assistant Secretary (filed May 29, 1986)).

For example, the UMWA has pressed the "physical protection" argument in opposing petitions for modification of 30 C.F.R. § 75.326. Id. That regulation in effect requires that underground coal mine tunnels (called "entries") containing conveyor belts must be physically isolated from entries carrying fresh air to working areas (intake entries) and entries exhausting air from working areas to the surface (return entries) and cannot be used for ventilation purposes; thus, a minimum of three entries must be developed in coal mines and no positive ventilation can be used in the conveyor belt entry. The UMWA has contended that the three-entry standard cannot be modified because modifications would not achieve the "result" of 30 C.F.R. § 75.326 maintaining the physical separation between belt and return entries, or maintaining a low velocity of air in the belt entry. See, e.g., UMWA Statement of Objections, Kaiser Coal, No. 86-MSA-1 (filed Sept. 9, 1988); Int'l Union/(Emerald), 830 F.2d at 292-93.
66. Id.
67. See Int'l Union/(Emerald), 830 F.2d at 293; Kaiser Coal, No. 86-MSA-1, slip op. at 14 n.9; Quarto, No. 83-MSA-0016, slip op. at 11-12. In these petitions for modification of 30 C.F.R. § 75.326, mine operators have argued that the alternative method of employing two-entry longwall mining or increasing air velocity in belt entries will provide at least the same, if not more, protection for the miners from the point of view of fire propagation, early fire warning and detection, and float coal dust hazards, as would application of 30 C.F.R. § 75.326 at their mines.
no less than the same measure of protection than the legislated standard. I find that the use of the word "standard," in the legislative context under consideration herein, is conceptually equivalent to "method." I further find that the phrase "measure of protection" relates to the hazards that the legislated standard is enacted to forestall. Thus, in the legislative history . . . [of § 303(y) of the Act or 30 C.F.R. § 75.326], then Representative Dent's references to mine fire propagation, lessening of escape time, and float dust control all relate to the "measure of protection" concept. It is this legislative concept ("measure of protection") which must remain immutable,12/ although the method ("standard") of achieving it may change (through a modification proceeding).

12/ Congress, may, of course, legislatively alter the "measure of protection" it wishes to impose.68

In one petition for modification case, the D.C. Circuit was asked to consider the "result" language of section 101(c); it declined to do so, remanding the case to the Assistant Secretary with specific instructions, inter alia, to define the phrase, "achieving the result of such standard," and to explain the difference, if any, between that language and the phrase, "no less than the same measure of protection."69

Aside from its connection to the "result" language of the statute, the phrase "no less than the same measure of protection" raises separate questions. If an alternative method must provide no less than the same measure of protection as the standard at a particular mine, then the safety benefits of the alternative method arguably should be compared to the safety benefits of the mandatory standard at a particular mine. One ALJ, in the Kaiser70 case, has held that, because a mandatory standard represents "MSHA's authorized level of safety,"71 it must be presumed to be safe unless the protections it was intended to provide are challenged on diminution of safety grounds.72 That means that a mandatory standard (for example, 30 C.F.R. section 75.326, a ventilation standard intended to provide protections related to fire propagation, escape, and float coal dust control) must be presumed to be safe at least as far as those specific

69. Int'l Union/(Emerald), 830 F.2d at 293.
70. Kaiser Coal, No. 86-MSA-1.
71. Id., slip op. at 19.
72. Id.
ventilation protections are concerned unless they are challenged on diminution of safety grounds.\textsuperscript{73}

However, the ALJ recognized that the level of safety of any mandatory standard is not an absolute one industry-wide and that, in meeting its burden under section 101(c), a petitioner may put on evidence to show the level of safety that the mandatory standard provides at its mine. The proposed alternative method may then be compared against that mine-specific level of safety. \textsuperscript{74} Although it is unclear whether the "presumption" of safety of the standard sought to be modified can be rebutted by showing a level of diminished safety caused by application of that standard at a particular mine, the approach set forth by the ALJ in the Kaiser\textsuperscript{75} case seems logical and calculated to ensure miner safety, given the purpose of section 101(c).\textsuperscript{76}

While some evaluation of the alternative method in light of the mine-specific level of safety of the mandatory standard must be required, the precise form of that "measuring" remains uncertain. Early in the development of the law in this area, the Board of Mine Operations Appeals ("Board")\textsuperscript{77} first rejected\textsuperscript{78} and later apparently embraced an approach which "balanced" the safety of the alternative method against the mandatory standard sought to be modified.\textsuperscript{79} In Quarto\textsuperscript{80} and Kaiser,\textsuperscript{81} the ALJ refined that analysis. She 1) identified the specific protections which the standard sought to be modified was intended to provide, based on its legislative history; 2) evaluated the level of safety of those protections provided at the petitioner's mine; and 3) then compared the level of safety of the petitioner's alternative method to that mine-specific level of safety. Based on that analysis, the ALJ granted the petitions in both cases

\textsuperscript{73} Id. See \textit{supra} note 64; see \textit{infra} notes 92-94 and accompanying text.
\textsuperscript{74} Kaiser Coal, No. 86-MSA-1, slip op. at 19.
\textsuperscript{75} Kaiser Coal, No. 86-MSA-1.
\textsuperscript{77} See \textit{infra} note 112 and accompanying text.
\textsuperscript{78} Kentland-Elkhorn Coal Corp., 4 I.B.M.A. 130, 135 (1975).
\textsuperscript{79} Southern Ohio Coal Co., 7 I.B.M.A. 331 (1977); see Quarto Mining Co., M 77-48 (Dec. 5, 1977) (ALJ Michels).
\textsuperscript{80} Quarto, No. 83-MSA-0016.
\textsuperscript{81} Kaiser Coal, No. 86-MSA-1.
after concluding that the alternative methods were as safe as compliance with the standard. 82

The same approach with a slightly different gloss has been followed in other cases. In *Emerald Mines Co.*, 83 for example, the Assistant Secretary granted a petition because the proposed alternative provided the same protections as the standard plus some additional safety benefits which were arguably unrelated to the particular safety standard at issue. 84 The propriety of that approach remains an open question: in *Emerald Mines Co.*, 85 the D.C. Circuit ordered the Assistant Secretary on remand "to analyze the extent to which the language of section 101(c) permits him to consider safety benefits derived from the proposed modification that are unrelated to the objectives of the standard." 86

2. The Diminution of Safety Standard

Although the diminution of safety standard appears clear, application of that standard has been a major issue in recent petition proceedings. It has been held that the "diminution of safety" test is satisfied if a petitioner can show that there "is a realistic probability" 87 that application of the mandatory standard at the petitioner's mine will diminish mine safety. Petitions often have been granted although the hazard causing diminution of safety was not one covered by the standard sought to be modified. For example, mining companies often seek, and are granted, modification of 30

82. *Kaiser Coal*, No. 86-MSA-1, slip op. at 15-20; *Quarto*, No. 83-MSA-0016, slip op. at 12. In *Quarto*, the ALJ held that the safety of an alternative method as decided in one petition case cannot be used to demonstrate the safety of the same alternative method in another case involving a different mine run by a different operator. *Quarto*, No. 83-MSA-0016, slip op. at 16-17. The ALJ explained that "[t]he issue of whether an alternative method provides equivalent protection must be determined within the factual context of each case and is based on the conditions at each mine." *Id.* at 16. See also *Double Q Corp.*, No. 81-MS-1, slip op. at 4 (Jan. 20, 1982) (ALJ Thomas).


84. *Int'l Union/(Emerald)*, 830 F.2d at 292-93.

85. *Id.*

86. *Id.* at 293.

C.F.R. section 75.305—a ventilation standard—based on proof that compliance with that ventilation standard exposes miners to unnecessary risk of injury or death from roof falls. Mining activities and natural “settling” may cause deterioration of the roof in return air courses which must be examined for adequate ventilation (among other hazardous conditions) on a weekly basis under section 75.305; if deteriorating roof conditions pose a hazard to the weekly examiner, the company may file a petition for modification of this ventilation standard on diminution of safety grounds to relieve it of the obligation to examine the air courses by physical inspection.

Similarly, several mine operators have petitioned for modification of 30 C.F.R. section 75.326—a ventilation standard—because compliance with the standard would create roof fall hazards thereby endangering the miners. In one case which reached the hearing stage, the UMWA argued in opposition to the petition that “[i]f an operator could obtain a modification of a standard intended to protect ventilation, merely by showing that application of the standard would diminish safety from a ground control perspective, miners would be deprived of the ventilation protection Congress provided by statute.” The ALJ in Kaiser rejected that argument

88. Section 75.305 is a ventilation standard which requires, inter alia, that at least one entry of each intake and return air course be thoroughly examined each week for hazardous conditions, including the presence of methane. 30 C.F.R. § 75.305 (1988).

89. See, e.g., Order, Island Creek Coal Co., No. 88-MSA-17 (Sept. 20, 1988) (ALJ Miller); Bethlehem Mines Corp., No. 78-MS-47 (Jan. 30, 1979) (ALJ Devaney); Kentland-Elkhorn Corp., No. M 76-489 (Oct. 8, 1978) (ALJ Stewart); Consolidation Coal Co., No. M 77-234, (Mar. 8, 1978) (ALJ Cook); Eastern Associated Coal Corp., No. M 75-134 (Jan. 4, 1977) (ALJ Broderick). In these cases, the companies proved that the return air courses at issue could not be rehabilitated safely.

90. See also supra notes 64, 67.

91. Kaiser Coal, No. 86-MSA-1, slip op. at 6 (quoting the UMWA Brief at 4-5).

The same argument was also raised in another petition case. Brief of the UMWA at 5 (filed Oct. 21, 1987), Utah Power & Light Co., Mining Division, No. 86-MSA-3.

Since the time this article was written, the Assistant Secretary has issued his decision reversing the ALJ’s November 23, 1987 denial of the petition. While the ALJ never addressed this issue, the Assistant Secretary did and rejected the UMWA’s argument, saying I find that there is nothing in the Legislative history of § 101(c) of the Act or in the statutory language itself that restricts me to considering only safety factors relating to the purpose of the standard in question in determining whether application of the standard will result in a diminution of safety.


and granted a petition which provided roof control benefits, inter alia, through modification of a ventilation standard. The ALJ apparently found that such a modification was consistent with the Act based on Congress’s recognition that section 101(c) should be imbued with a certain amount of flexibility to improve safety. "While clear that the protection afforded miners may not be sacrificed in the name of progress, it is also apparent that Congress did not intend to place an insurmountable burden on the incorporation of scientific and technological advances into the mining process."

3. Must Both the Diminution of Safety and Alternative Method Tests Be Satisfied?

Despite use of the disjunctive word "or" in the statute to separate the two tests for modifying safety standards, there has been considerable debate over whether both the diminution of safety and alternative method tests must be satisfied before a petition can be granted. The question is complicated by the fact that, ultimately, the grant of modifications is discretionary with the Secretary.

Section 101(c) provides that a petition may be granted if the alternative method or diminution of safety test is satisfied. It has been argued that a petition could only be granted if both tests were satisfied because the word "or" in the statute really means "and." Significantly, and despite the fact that pure alternative method petitions have often been granted over the years, this argument appears to have been raised only where both diminution of safety and alternative method grounds have been alleged in the petition. Although the Assistant Secretary has yet to resolve this issue expressly, two ALJs have done so. Their views differ sharply.
One ALJ has concluded that the safety of the alternative method must be satisfied in all petition cases but must be conditioned on proof of diminution of safety to justify the modification.\textsuperscript{99} He discussed this "justification" concept as follows:

Thus, it is logical to conclude that modification is warranted only when application of the regulation frustrates the statutory objective by reducing safety. It would therefore seem that the UMWA's assertion [that both diminution of safety and the safety of the alternative method must be shown] is the proper [one for] the majority of cases. Indeed, one can envision only a rare case where satisfying only one part of the safety standard would be sufficient to justify modification.\textsuperscript{100}

The ALJ's analysis poses fundamental problems. To say that "a rare case" would justify satisfaction of only one statutory burden is to ignore the statute, as recognized by the United States Court of Appeals. In addressing a challenge to the Assistant Secretary's grant of a petition based solely upon the safety of the alternative method, the D.C. Circuit noted that section 101(c) "\textit{also} allows such a modification"\textsuperscript{101} on diminution of safety grounds, but that "[t]his portion of section 101(c) did not serve as the basis for the Assistant Secretary's decision and is not at issue on appeal."\textsuperscript{102} In addition, the ALJ's conclusion apparently did not take account of the numerous petition cases granted solely because the petitioner's alternative method was found to be as safe as the standard.\textsuperscript{103} Moreover,

---

both the Congressional intent and the plain language of the statute support the conclusion that modification may be granted if a petition meets the burden of establishing either that an alternative method exists which will at all times guarantee no less than the same measure of protection afforded the miners by the standard or that application of the standard will result in diminution of safety. \textit{Utah Power \\& Light}, No. 86-MSA-3, slip. op. at 8 (Jul. 14, 1989) (Asst. Sec'y O'Neal).

\textsuperscript{99} The ALJ's conclusion about the construction of "or" in the statute was dicta as he found that the petitioner failed to satisfy either statutory burden. \textit{Utah Power \\& Light}, No. 86-MSA-3, slip op. at 5 n.3 (Nov. 27, 1987) (ALJ Matera), rev'd (Jul. 14, 1989) (Asst. Sec'y O'Neal).

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Int'l Union/(Emerald)}, 830 F.2d at 290-91 n.1 (emphasis added). See also 30 C.F.R. § 44.11 (1988).

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} Petitions for modification to implement an alternative method as safe, or safer, than the mandatory standard are far more common that petitions alleging both diminution of safety and the safety of the alternative method. These alternative method petitions are often filed so that technological advances can be implemented. Some examples are modifications of 1) 30 C.F.R. § 75.326 to permit use of belt air to ventilate mining faces, and 2) 30 C.F.R. § 75.1103-4(a) to install low level carbon monoxide early warning fire detection systems instead of point-type heat sensors. See, e.g., Pyro Mining Co., No. 86-MSA-5 (Sept. 23, 1987) (ALJ Rosenzweig); \textit{Quarto Mining}, No. M 77-48; 53 Fed. Reg. 10161-68 (1988) (list of petitions granted by the Administrator).
if a petition could only be granted by showing both diminution of safety and the safety of the alternative method, then improvements in technology could never be introduced into the mining industry through the petition process, as Congress apparently intended, except where a diminution of safety also existed.  

The other ALJ used a different analysis. She construed "or" in the statute literally—to mean that a petitioner could have its petition granted if either the diminution of safety or the alternative method test were satisfied. In analyzing the diminution of safety standard, however, she recognized that, because any modification must not reduce the protections afforded the miners, existence of a safe alternative (or substitute measure) must always be demonstrated where diminution of safety is alleged.

The ALJ refused to adopt the "justification" theory of modification which would require the petitioner to demonstrate diminution of safety as a condition precedent to the grant of any petition. In addressing MSHA's "justification" argument in Kaiser, she discussed the interplay between satisfaction of statutory burdens and the extent of the ALJ's discretion:

MSHA correctly states that a grant of a petition for modification is a discretionary act. However, MSHA makes an incorrect assumption as to how that discretion ought to function. The language of section 101(c) clearly provides that if either burden—alternative method or diminution of safety—is met, the Secretary "may"

---


106. Id. at 13-14, 18 n.18, 22-24, 183.

107. Id. The phraseology of the ALJ's analysis—concluding that a safe "alternative" must be offered—may, at first glance, confuse the issue. Since the statute makes "alternative method" one of the standards for the grant of a petition, the evidence of the efficacy (or insufficiency) of a replacement measure in a pure alternative method case may be different, indeed, from the evidence supporting (or contesting) an allegation that the alternative method test is met in a diminution of safety case. This semantic problem would be solved if the measures offered to replace a standard that diminishes safety were called "replacement" or "substitute" measures.

The Assistant Secretary, in granting a petition solely on diminution of safety grounds, held that he need not consider whether the alternative method test was also satisfied; however, he did in his discretion include in his order granting the petition "special terms and conditions to assume adequate protection to the miners." Utah Power & Light, No. 86-MSA-3, slip op. at 9-10 (Jul. 14, 1989) (Asst. Sec'y O'Neal).

108. Id.
modify the mandatory safety standard in question. MSHA's interpretation, however, refashions these burdens in a manner inconsistent with the purposes of the Act. Thus, the discretion provided by the statute does not extend to a reconstruction of the statutory burdens so as to make satisfaction of one burden (alternative method) dependent upon satisfaction of the other (diminution of safety). 109

Instead of finding that satisfaction of one burden was conditioned on the other, 110 ALJ Rosenzweig found that satisfaction of one burden—alternative method—permitted her to use her discretion to consider the other—diminution of safety—as an additional basis upon which to grant the petition. 111

The conclusion in this regard is somewhat strained, but necessarily so, given the practicalities of the petition process—MSHA will no doubt always require that an alternative (or substitute) method be proposed. If "or" in the statute really means "or," then it should make no difference which standard the petitioner satisfies: diminution of safety or safety of the alternative method. But if only diminution of safety were alleged and proved so that the mandatory standard would not be enforced at a particular mine, the question arises as to what should take the mandatory standard's place, assuming that the protections afforded by that standard are not sufficiently addressed by compliance with other mandatory safety standards. Answering that question would not be problematic if petitions were decided at the hearing stage by a trier of fact with expertise in mine safety. Such a trier of fact could use that expertise

109. Id. at 22.
111. Id. at 13-14, 18 n.18, 22-24, 183.

One ALJ used his discretion to require a petitioner to comply with additional conditions to make the alternative method in its original petition safer than the standard:

The Act authorizes the Secretary of Labor to permit modifications of regulated standards if the miner is afforded the same measure of protection under the alternative method. However, it is within the Act's contemplation that if MSHA determines that a few economically and technologically feasible extra features will improve the safety of an existing mandatory standard, it can require that those features be added. Double Q, No. 81-MS-1, slip op. at 8. This kind of reasoning seems to take too far the "technology forcing" goal of the Act. While it makes sense to permit operators to petition for modification of a mandatory standard to implement technological improvements, it is yet another thing to suggest that MSHA be permitted to impose technological improvements beyond the requirements of the mandatory safety standard sought to be modified without following the procedures of § 101(a) rulemaking. See infra 137-42 and accompanying text.
to develop conditions for an alternative/substitute method, much as the Administrator does now when changing or adding to conditions proposed by the petitioner in its alternative/substitute method. However, many Department of Labor ALJs do not have that expertise.\textsuperscript{112} Moreover, from a practical point of view, most petitioners who allege diminution of safety will propose substitute safety measures in their petitions to avoid giving MSHA an opportunity to impose measures that might be impossible to implement.

At present, it is unclear what must be proved to satisfy the statutory burdens in a petition case. Thus, parties suffer because no one can be sure what it takes to prove a petition case, as judges have trouble figuring out what the law requires. At best, the consequence is a long, laborious presentation of testimony and exhibits by each party in an attempt to support its side of the case; at worst, good ideas may not be implemented, and miners may continue to be exposed to unnecessary risks.

B. Procedural Morass

In addition to the confusion over satisfaction of the statutory burdens, the petition process itself can be a procedural morass characterized by delays in litigation and decision making replete with unresolved issues.

1. The Department of Labor ALJs

Under the 1969 Act, petition for modification cases were decided by the Secretary of the Interior through his delegate, the Interior Board of Mine Operations Appeals—the same agency which decided mine safety enforcement, discrimination, and compensation cases.\textsuperscript{113}

\textsuperscript{112} See infra notes 112-20 and accompanying text.

Because both enforcement cases and petition cases were decided by the Board, under the 1969 Act, an operator could have a petition for modification considered as part of an enforcement proceeding. For example, in Carbon Fuel Co., 6 I.B.M.A. 20 (1976), the mine operator challenged an alleged violation of 30 C.F.R. § 75.1712-2, which provided that bath house facilities be convenient and centrally located. 30 C.F.R. § 75.1712-2 (1988). In addition, claiming that the time set for abatement of the alleged violation was unreasonable, the operator filed a motion for extension of abatement.
Decisionmakers in petition for modification proceedings thus developed both technical and legal expertise in mine safety and health matters. However, under the 1977 Act, administration of the Act was transferred from the Department of the Interior to the Department of Labor, and jurisdiction over most mine safety disputes was transferred to the Federal Mine Safety and Health Review Commission ("Commission"), an independent federal adjudicatory agency with judges experienced in mine safety.\(^\text{114}\) Section 301(c) of the 1969 Act\(^\text{115}\) was recodified verbatim as section 101(c) of the 1977 Act,\(^\text{116}\) but under the 1977 Act, "Secretary" means Secretary of Labor, not Secretary of the Interior.\(^\text{117}\) Jurisdiction to consider petitions for modification thus moved to the Secretary of Labor, and adjudication of petition disputes was not transferred along with other mine safety disputes to the Commission, where judicial expertise in this technical field lies.

The Department of Labor’s Office of Administrative Law Judges now hears petition for modification disputes. These ALJs typically hear black lung benefits cases,\(^\text{118}\) longshoremens’ compensation cases,\(^\text{119}\) job training partnership (formerly "CETA") discrimination and audit cases,\(^\text{120}\) and whistle-blower cases brought under a number of other statutes.\(^\text{121}\) Most of these ALJs are not familiar with mining operations, much less with the statutory burdens for petitions, the Part 44 procedural rules, mining terminology, or the whole mine safety law milieu. A major burden is imposed on the parties in petition for modification cases since they must "teach" the ALJ

\(^{114}\) The first Commission ALJs were transferred from the Secretary of Interior’s Office of Hearings and Appeals, which had, inter alia, jurisdiction to decide mine safety disputes and contested petitions for modification arising under the 1969 Act. 30 U.S.C. § 823(b)(2) (1982).


about the rudiments of mining (including the basics of such disciplines as geology, rock mechanics, mine ventilation, electricity, equipment maintenance, mining procedures, and safety measures in relevant areas) before the ALJ can begin to understand the issues. This foundational phase can be time-consuming because the parties dare not omit any preliminary material which may affect the ALJ’s understanding of the ultimate issues in the case. Moreover, not only does laying an extensive conceptual foundation delay relief and add to overall litigation costs, but it also leads to frustration on the part of the parties as well as the judge as it tends to bury the real issues in a heap of general mining lore. At bottom, this “educational” process complicates and extends petition hearings and could result in decisions that may suffer from a serious lack of perspective, even if they are not internally inconsistent or otherwise functionally defective.

2. Protracted Nature of Litigation

The petition process should ensure that worthy petitions will be granted quickly. With respect to petitions based on diminution of safety, for example, mining should be able to proceed safely without forcing mining companies to make a Hobson’s choice: if the petition is not granted, the company can either 1) choose not to comply with the mandatory standard and risk MSHA enforcement action, 2) comply with the standard and risk endangering the miners, or 3) shut down operations and lay off the workforce until the petition is decided. In alternative method cases, the company may be forced to use a “second best” method of mining to comply with a standard while awaiting a decision that will enable a superior method to be used. As it stands now, the petition process is unresponsive to these dilemmas.\(^\text{122}\)

The petition process can take years. For example, in *Quarto Mining Co.*,\(^\text{123}\) the petition was filed on September 27, 1982. It was

---

122. Interim relief from enforcement of a mandatory standard while a petition is pending is no longer available. Int’l Union, UMWA v. MSHA, (Kaiser Coal Corp.), 823 F.2d 608 (D.C. Cir. 1987) [hereinafter Int’l Union/(Kaiser)]. See infra notes 143-67 and accompanying text.

referred for investigation on December 16, 1982; the notice of investigative report was issued on January 18, 1983. The Administrator denied the petition on July 6, 1983, and Quarto requested a hearing. The case was heard in June, 1985 and decided on April 30, 1986. Cross-appeals from that decision were filed on May 29 and 30, 1986 and were still pending before the Assistant Secretary in the spring of 1989—over six years after the petition was filed.\textsuperscript{124} The system works more quickly, however, if a hearing is not requested.

One reason for such a protracted process is that the regulations impose no time limits on the various stages of decision making. MSHA can take its time investigating the petition; the Administrator can take his time in deciding it; if a hearing is requested, the ALJ can take his time in setting a hearing date, hearing the case, and deciding it;\textsuperscript{125} and the Assistant Secretary can do (and has done)\textsuperscript{126} the same.

As a comparison of timetables in a number of cases reveals, the most serious problem is not with MSHA (at least from the Administrator on down), which seems to be able to decide a petition in about ten months, but rather with the ALJs and especially with the Assistant Secretary. The discovery and hearing process in petition cases is lumbering; from the time a request for hearing is filed until the time an ALJ issues a decision can (and probably will) take years.\textsuperscript{127}

\textsuperscript{124} In \textit{Emerald Mines}, No. 83-MSA-17, the petition was filed on July 29, 1982 and ultimately granted by the Assistant Secretary on October 3, 1985. While an appeal to the D.C. Circuit was pending, the petition took effect, but the D.C. Circuit vacated the Assistant Secretary's grant of the petition and remanded it two years later. \textit{Int'l Union/(Emerald)}, 830 F.2d at 290. Over six years following its filing, that petition is still awaiting decision. \textit{See also} \textit{Kaiser Coal}, No. 86-MSA-1 (petition filed May 7, 1985, appeal pending before Assistant Secretary); \textit{Utah Power \\& Light}, No. 86-MSA-3 (petition filed Aug. 23, 1985, decided by Assistant Secretary, Jul. 14, 1989). Frustrated with the Assistant Secretary's delay in issuing a decision, one mining company has filed a petition for writ of mandamus with the D.C. Circuit, requesting that the Secretary be ordered to decide the petition one way or the other. \textit{In re Utah Power \\& Light Co., Mining Division}, Docket No. 89-1311 (filed D.C. Cir. May 12, 1989). One day before the secretary was required to file her court-ordered response to the mandamus petition, a decision on the merits of the petition was issued by the Assistant Secretary, mooting the mandamus proceeding.

\textsuperscript{125} The Office of Administrative Law Judges has been plagued for years by a major backlog of black lung benefits claims, despite congressional demands that the multi-year delays be eliminated. Petition for modification cases get no priority and must generally take their place in line behind these pending cases.

\textsuperscript{126} \textit{See supra} note 123 and accompanying text.

\textsuperscript{127} \textit{Id.}
Moreover, there is no mechanism under the Part 44 rules for an expedited proceeding.\textsuperscript{128} Even when petitioners have moved for an expedited proceeding under the rules of the Department of Labor's Office of Administrative Law Judges,\textsuperscript{129} that Office has been slow to respond.\textsuperscript{130} Commission procedure offers a sharp contrast.\textsuperscript{131} Commission Rule 52,\textsuperscript{132} which is invoked regularly in mine safety enforcement cases, provides for an expedited hearing before a Commission ALJ on four days' notice or even sooner if all parties agree.

Notwithstanding the snail's pace at which the Office of Administrative Law Judges operates, the real black hole in the petition process is in the Assistant Secretary's office. First, the Assistant Secretary and staff simply do not seem able or willing to decide technical and complicated petition cases.\textsuperscript{133}

Agency records reflect that in the last eleven years, the Assistant Secretary has decided only one petition case on the merits, a decision that was vacated by the D.C. Circuit for an insufficient explanation of reasons. The case is now before the Assistant Secretary again.\textsuperscript{134} Second, in the wake of the Wilberg Mine fire,\textsuperscript{135} MSHA and the Assistant Secretary have been the subject of recent congressional

\textsuperscript{128} See infra notes 223-27 and accompanying text.
\textsuperscript{129} 29 C.F.R. § 18.42 (1988).
\textsuperscript{130} In one case, a motion for expedited proceeding filed on June 24, 1988 requesting a hearing beginning July 12, 1988 was denied because the miners were on vacation during that period; the motion was denied three days after the requested starting date of the hearing. A renewed motion for expedited proceedings was filed on July 29 and was granted. The hearing was held on September 14, 1988—almost three months after the motion for expedited had been filed. See Island Creek, No. 88-MSA-17.
\textsuperscript{131} In another case, the mine operator filed a motion for expedited proceedings based on delays in mining operations and the idleness which would result if the petition were not granted. The ALJ denied the motion, explaining that "[t]hese general statements of possible adverse affects are insufficient to demonstrate that irreparable harm will result if Petitioner's Motion were not granted. Order Denying Motion for Expedited Proceedings, Consolidation Coal Co., No. 88-MSA-1 (Jan. 7, 1988) (ALJ Vittono). As a partial result of that ruling, the mine was idled not long thereafter.
\textsuperscript{132} 29 C.F.R. §§ 2700.1 - 2700.84 (1987).
\textsuperscript{133} See supra note 123 and accompanying text.
\textsuperscript{135} Twenty-seven miners died when a fire broke out in the Wilberg Mine near Orangeville, Utah, on December 19, 1984.
oversight and biting criticism. Like a deer frozen in a hunter’s spotlight, the intensity of congressional oversight has apparently paralyzed the decisionmaking capability of the Assistant Secretary. This paralysis ill serves the nation’s miners and mining companies, who are effectively denied the section 101(c) relief provided by Congress.

3. Unintended Uses of the Petition Process

The petition process suffers from certain deficiencies which permit it to be used in a manner not intended by Congress. Two of those deficiencies are considered below.

First, the system permits one party to exercise its procedural rights in order to prevent a granted petition from being implemented. If the Administrator grants a petition, it will not become effective if the opposing party merely requests a hearing within thirty days or if the opposing party appeals an ALJ’s grant of a petition to the Assistant Secretary. The problem is more significant today than it was when the regulations were promulgated since the original mechanisms for relief from enforcement of a mandatory standard while a petition is pending are no longer available: the regulations authorizing a grant of interim relief have been invalidated, and no applicant has yet been granted relief pending appeal.137 Given the already protracted nature of the process, these automatic roadblocks give one party the ability to hold a petition hostage to that party’s demands, which may or may not be directly cognizable under the law. Second, miners have recently sought to use their right to petition for modification under section 101(c), not to ensure that the protection intended by a standard is not diminished at their mine, but rather to force some mining companies to use equipment or mining methods which the miners believe are safer than the standard requires. These miners’ petitions seem geared toward an industry-wide rewriting of the mandatory standard sought to be modified,


137. See infra notes 143-81 and accompanying text.
rather than to mine-specific problems created by application of the standard. These petitions can therefore be viewed as attempts to circumvent the requirements of section 101(a) rulemaking under the Act. For example, two petitions were filed by miners to modify 30 C.F.R. section 75.1707 at Consolidation Coal's Ireland Mine and Clinchfield Coal's McClure No. 1 Mine. Section 75.1707 requires that intake escapeways be separated from belt entries and trolley haulage entries of a mine. Although nothing in the regulation prohibits use of diesel or battery-powered equipment in those intake entries, these petitions sought such a prohibition. The Administrator held that the petitions were improper and denied them:

The two petitions dismissed by the enclosed orders do not propose to modify the application of 30 C.F.R. § 75.1707 at either mine. These petitions instead propose to revise the standard itself, expanding it to add proscriptions on possible fire sources in intake air escapeways. Indeed, if the operator of either mine removed fire sources from the intake air escapeways as the UMWA proposes, a petition for modification would be unnecessary since the result would be in compliance with the standard. We do not believe that this is a proper application of the Section 101(c) petition for modification procedures. A modification of the standard in the manner proposed by the dismissed petitions is in the nature of general rulemaking under Section 101(a) of the Mine Act.


139. Consolidation Coal, No. 88-MSA-24; Clinchfield Coal, No. 88-MSA-22.

140. 30 C.F.R. § 75.1707 (1988).


142. Cover letter from J. Spicer to M. Jordan (April 25, 1988) (enclosing Orders of Dismissal in Consolidation Coal, No. 88-MSA-24 (May 2, 1988) and Clinchfield Coal, No. 88-MSA-22 (May 2, 1988)).

Nor do there appear to be any mine-specific factors which would warrant granting of the other petition filed by the miners to date. In that case, modification of 30 C.F.R. § 75.1103-4 was sought at the Florence No. 1 Mine. Florence Mining Co. (UMWA), Docket No. M-88-9-C. That regulation requires that point-type heat sensors be installed along each belt flight of a belt line to alert the miners to the presence of a fire. 30 C.F.R. § 75.1103-4 (1988). These sensors respond to the heat generated by a fire. The petition sought to supplement point-type heat sensors with a low level carbon monoxide mine monitoring system in all belt entries used as intake and return air courses and on all belt drives and tailpieces located in intake entries. 53 Fed. Reg. at 4,790-91 (1988). While the new low level carbon monoxide mine monitoring systems represent an advance in technology over point-type heat sensors, heat sensors are all that the current regulations require. 30 C.F.R. § 75.1103-4 (1988); see, e.g., 53 Fed. Reg. 2,397-2,400 (1988) (proposed rules for new ventilation standards). Again,
Since the problem which the miners sought to address in their petitions would be appropriately addressed by industry-wide rule-making, a petition for modification would not be proper.\textsuperscript{143}

C. Interim Relief and Relief Pending Appeal

As discussed above,\textsuperscript{144} a petitioner must continue to operate under the original mandatory standard while its petition is pending—even in cases where MSHA has determined that its proposed alternative is safer than the standard. The need for "interim relief" is particularly acute when the reason for the petition is to protect miners from hazards caused by application of the standard at the affected mine. Although several mechanisms might theoretically provide relief, the availability of interim relief is extremely limited as a practical matter.\textsuperscript{145}

A review of Part 44 suggests that obtaining preliminary relief from enforcement of a mandatory standard prior to issuance of a final decision should not be a problem, especially where the Administrator has already granted the petition. Ostensibly, provision has been made for both interim relief and relief pending appeal, but post-promulgation problems have crippled them. Notwithstanding the regulations, there may be a third option—emergency relief—whose viability has not yet been fully tested.


\textsuperscript{144}See supra note 121 and accompanying text.

\textsuperscript{145}In MSHA Policy Memorandum No. 81-22-C (Jan. 29, 1981), MSHA indicated that enforcement of a mandatory standard may be stayed in effect while a petition is pending. Normally, if an MSHA inspector finds a violation of a mandatory safety standard, the inspector will issue a § 104(a) citation. 30 U.S.C. § 814(a) (1982). Failure to correct the condition cited in the citation will result in a § 104(b), 30 U.S.C. § 814(b) (1982), failure to abate order, closing the mine or the section affected by the order. This scenario would not be altered by the filing of a petition; that is, the pendency of a petition would not prevent MSHA from taking enforcement action for violating the standard sought to be modified. However, the MSHA Policy Memorandum states that, if a citation is issued while a petition is pending, the abatement then may be extended until a decision is reached on the petition "where it is alleged in good faith that application of such standard will result in a diminution of safety to the miners." Id. See Gateway Coal Co., 1 I.B.M.A. 82 (1972); Reliable, 1 I.B.M.A. 97.
1. Interim Relief

Section 44.16\textsuperscript{146} of the regulations provides that interim relief from enforcement of a mandatory standard may be granted if the applicant can clearly show that (1) the petition seeking modification has been filed in good faith, and the applicant is not using the proceeding solely to postpone or avoid abatement; (2) the requested relief will not adversely affect the health or safety of the miners in the affected mine; and (3) there is a substantial likelihood that the decision on the merits of the petition for modification will be favorable to the applicant.\textsuperscript{147}

Under the Secretary's regulation, an application for interim relief can be filed at any stage of the petition proceedings so long as a final decision on the petition has not been issued.\textsuperscript{148} The regulation further provides that the Administrator, Assistant Secretary, or ALJ before whom the application is pending may (but is not required to) hold a hearing before deciding an interim relief request.\textsuperscript{149} Although the regulation permits appeal from a denial of interim relief, it does not permit a disappointed party appeal from a grant of interim relief.\textsuperscript{150}

Despite absence of a regulation permitting it, the UMWA appealed to the Assistant Secretary the Administrator's grant of interim relief to two mining companies who had petitioned for modification of section 75.326 to permit two-entry mining. In both cases, the Assistant Secretary refused to consider the appeals because the regulations made no provision for an appeal from a grant of interim relief.\textsuperscript{151} The UMWA appealed the Assistant Secretary's refusal to the D.C. Circuit.\textsuperscript{152}

The D.C. Circuit vacated the Administrator's grant of interim relief to the two mining companies. In \textit{International Union, UMWA v. MSHA (Kaiser Coal Corp.)} [hereinafter "\textit{Int'l Union/(Kai-}

\textsuperscript{146} 30 C.F.R. § 44.16 (1988).
\textsuperscript{147} 30 C.F.R. § 44.16(e) (1988).
\textsuperscript{148} 30 C.F.R. § 44.16(a) (1988).
\textsuperscript{149} 30 C.F.R. § 44.16(h) (1988).
\textsuperscript{150} 30 C.F.R. § 44.16(c); \textit{Int'l Union/(Kaiser),} 823 F.2d at 613.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
the court held that the Secretary’s interim relief regulations were inconsistent with section 101(c) of the Act because 1) there was no requirement that a hearing be held before granting interim relief from enforcement of a mandatory standard, 2) the duration of interim relief was not limited by the regulations, and 3) interim relief could be granted on a lesser showing than diminution of safety.\textsuperscript{154}

The Secretary has never formally revoked the interim relief regulations. As a result of the Int’l Union/(Kaiser)\textsuperscript{155} decision, however, it seems clear that the Administrator, the Assistant Secretary, and some ALJs understandably regard the current interim relief regulations as a dead letter.\textsuperscript{156}

Although the D.C. Circuit invalidated the current interim relief regulations, it nonetheless recognized the need for some vehicle to ensure miner safety during the pendency of a petition for modification, particularly when that safety could be compromised by application of the standard at that mine.\textsuperscript{157} Consistent with the purpose of the Act in general and of section 101(c) in particular, the D.C. Circuit left the door open to fill the void in the invalidation of the Secretary’s current interim relief regulations created. The court limited the effect of its decision by saying that it did not address the question “whether [outside of the current interim relief regulations] the Secretary would have authority to grant interim relief . . . when there is a possibility that application of the standard will increase the danger to miners . . . .”\textsuperscript{158} or “in an ‘emergency’ situation.”\textsuperscript{159}

Curiously, the D.C. Circuit’s words harken back to those used by the Board in Gateway Coal Co.\textsuperscript{160} which, prior to promulgation of Part 44, provided for a stay of enforcement of a mandatory

\textsuperscript{153} Id. at 608.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{157} See supra notes 87-93 and accompanying text.
\textsuperscript{158} \textit{Int’l Union/(Kaiser)}, 823 F.2d at 617 n.6.
\textsuperscript{159} Id. See infra notes 182-88 and accompanying text for a discussion of the concept of “emergency relief.”
\textsuperscript{160} Gateway, 1 I.B.M.A. 82.
standard at a mine during the pendency of a petition. In light of the D.C. Circuit's invalidation of the Secretary's interim relief regulations, it may be time for petitioners to dust off and actively pursue the Board's Gateway stay rationale. Before Part 44 even existed, the Board held in Gateway Coal Co. that implicit in section 301(c) of the 1969 Act (mirrored by section 101(c) of the 1977 Act) was the power to grant interim relief from enforcement of a mandatory safety standard "by restraining the Bureau [of Mines, responsible for mine safety enforcement at that time] from enforcement action under section 104(b) of the Act relating to the safety standard which is the subject of a pending petition for modification under section 301(c)." In effect, the Gateway stay was simply an extension of the abatement time specified in a section 104(a) citation (called a "notice of violation" under the 1969 Act) until the petition could be decided. The Board held that interim relief from enforcement of a mandatory standard could be issued during the pendency of a petition after an opportunity for a hearing, if three criteria were met: 1) the petition was filed in good faith and was not used solely to postpone or avoid abatement, 2) the safety of the miners would be ensured "during the period of restraint," and 3) the petitioner would suffer irreparable harm if interim relief were not granted.

A Gateway stay may be a viable option for petitioners to obtain interim relief even though jurisdiction over mine safety disputes now rests with the Commission and not with the Secretary of the Interior.

161. Id.
162. Id.
163. Id. at 91.
164. Gateway, 1 I.B.M.A. 82.
166. At the time Gateway was decided, it was not contemplated that the miners would file petitions for modification. See supra note 17. The three tests stated in Gateway were phrased in terms of the "operator," not the "petitioner," and the question arises as to whether miners, as petitioners, could seek a Gateway stay. The answer is complicated as miners do not have the same rights as mining companies to challenge enforcement actions. Miners may not initiate a challenge to a § 104(a) citation, though they may challenge the reasonableness of abatement time specified in the citation. 30 U.S.C. § 815(d) (1986). Since the Gateway stay is tantamount to an extension of abatement time, the miners' right to challenge the reasonableness of that abatement time arguably should give them sufficient standing to seek such a stay.
as it did under the 1969 Act.\textsuperscript{167} The Board in *Gateway* granted an extension of the abatement time specified in a 1969 Act section 104(a) citation such that no section 104(b) closure order could be issued. The Commission also has that power.\textsuperscript{168}

2. Relief Pending Appeal

The regulations contain another mechanism for relief from enforcement of a mandatory standard while the "appeal" of a petition (from a decision of either the Administrator or an ALJ) is pending.\textsuperscript{169} The availability of such relief is necessary because neither the Administrator’s nor an ALJ’s decision will be effective if an "appeal" is filed.\textsuperscript{170} However, unlike a request for interim relief, which can be filed at any stage before the issuance of a final decision,\textsuperscript{171} relief pending appeal can be filed only after the Administrator or ALJ has issued a decision because the purpose of relief pending appeal is to give effect to that decision during pendency of the appeal.\textsuperscript{172}

The term "appeal" as used in 30 C.F.R. section 44.50 is imprecise because a request for hearing initiates a proceeding *de novo* on the petition itself—not a review of the proposed decision and order—before the Department of Labor ALJ to whom the case is assigned.\textsuperscript{173} Moreover, an appeal to the Assistant Secretary from an

\textsuperscript{167} The *Gateway* decision is still good law. Under the savings provision of the 1977 Act, Board decisions remain in effect until revoked, modified, or superseded by the Commission. 30 U.S.C. § 961(a)(2) (1982). The Commission has never taken any such action with regard to *Gateway*.

\textsuperscript{168} 30 U.S.C. § 815(d) (1986). The Commission has the power to affirm, modify, or vacate a citation, order, or civil penalty, or "[direct] other appropriate relief." *Id.* A petitioner can ask for a *Gateway* stay only in the context of an enforcement proceeding. See description of enforcement proceedings, *supra* note 144.

\textsuperscript{169} 30 C.F.R. § 44.50 (1988).

\textsuperscript{170} 30 C.F.R. § 44.50(a) (1988).

\textsuperscript{171} 30 C.F.R. § 44.16(a) (1988).

\textsuperscript{172} 30 C.F.R. § 44.50(b)(1). The filing deadline for relief pending appeal creates a procedural anomaly. An application for relief pending appeal must be filed within ten days of the issuance of the Administrator’s or ALJ’s decision granting the petition. 30 C.F.R. § 44.50(b)(2) (1988). However, a party opposing the grant of the petition has 30 days in which to file a request for hearing or appeal to the Assistant Secretary. 30 C.F.R. §§ 44.14, 44.33(a) (1988). Thus, a petitioner must file an application for relief pending appeal well before it knows whether a hearing will be requested or an appeal will be filed.

\textsuperscript{173} 30 C.F.R. §§ 44.15, 44.32(b) (1988); *Kaiser Coal*, No. 86-MSA-1, slip op. at 3.
ALJ decision also triggers something more than a mere review of whether that decision was supported by substantial evidence.\textsuperscript{174}

To obtain relief pending appeal, the regulations provide that "[b]efore relief [pending appeal] is granted, the applicant must clearly show that (1) the requested relief will not adversely affect the health or safety of the miners in the affected mine, and (2) there is a substantial likelihood that the decision on appeal will be favorable to the applicant."\textsuperscript{175}

The validity of these regulations has been questioned because they arguably contain some of the same deficiencies that the D.C. Circuit found fatal in the current interim relief regulations.\textsuperscript{176} While validity of the relief pending appeal regulations has never been decided by the Assistant Secretary or the D.C. Circuit,\textsuperscript{177} no petitioner has been granted relief pending appeal since the D.C. Circuit decided \textit{Int'l Union/(Kaiser)}\textsuperscript{178} in July, 1987.

As one ALJ explained in denying an application for relief pending appeal, "I find that the Mine Safety and Health Act of 1977 . . . in light of the Court of Appeals decision in \textit{International Union}—does not confer authority on me to give effect to the relief pending appeal and expedited proceeding regulations found at 30 C.F.R. section 44.50."\textsuperscript{179}

\textsuperscript{174} The regulations provide that the Assistant Secretary, based upon consideration of the entire record of the proceedings[,] . . . may affirm, modify, or set aside, in whole or part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge and shall include a statement of reasons for the action taken.

30 C.F.R. § 44.35 (1988).

175. 30 C.F.R. § 44.50(b)(6) (1988).

176. \textit{See supra} notes 145-67 and accompanying text.


Though she declined to grant relief pending appeal as beyond the scope of her authority, the ALJ took great pains to point out, "I note that I have not found the regulations at issue invalid or unconstitutional—only that the Act and the court's opinion have placed the granting of 'temporary relief' beyond the scope of my authority." Order Denying Petitioner's Application for Relief Pending
Although technically the ALJ, as the Secretary’s delegate, was required to give effect to the Secretary’s regulations governing relief pending appeal, the ultimate result might well have been the same if the case had been appealed to the D.C. Circuit. In any case, it appears that the Secretary is similarly concerned with the validity of her relief pending appeal regulations in light of *Int’l Union/(Kaiser)* and may cure such deficiencies in her soon to be released proposed rules for 30 C.F.R. Part 44.

D. The New Remedy: Emergency Relief

Even though the D.C. Circuit invalidated the Secretary’s interim relief regulations, the court acknowledged that the Secretary’s responsibility for safeguarding the miners may include the power to grant interim relief from enforcement of a mandatory safety standard “if essential to further the purpose of the Mine Act or under other compelling circumstances.” The Assistant Secretary has confirmed that he has that inherent power.

Appeal and Expedited Proceedings at 9 n.6, *Kaiser Coal*, No. 88-MSA-5. Another ALJ denied relief pending appeal based on *Int’l Union/(Kaiser)*, as well as on a strained construction of the phrase “pending appeal.” Order on Application for Relief Pending Appeal, *Utah Power & Light*, No. 86-MSA-3 (Aug. 21, 1987) (ALJ Matera). Because its grant of interim relief had been invalidated by the D.C. Circuit’s ruling in *Int’l Union/(Kaiser)*, *Utah Power & Light* [“UP&L”] filed for relief pending appeal out of time to give effect to the Administrator’s grant of the petition even though a hearing before an ALJ had already been held. UP&L argued, *inter alia*, that the ten-day filing deadline was a procedural one which could be waived by the agency. The ALJ disagreed:

The nature of the relief afforded by § 44.50 is to aid a party during the period of time after a decision has been rendered but before it has been heard by the subsequent appellate tribunal; the regulation is entitled “application for relief pending appeal.” 30 C.F.R. § 44.50(b)(2) (emphasis added). Since in effect the appeal, from the decision of the Administrator, has been taken and the hearing has been had, what is “pending,” for the purposes of this section, is the decision on appeal, not the appeal itself. This whole subpart is designed to operate while the case is between tribunals.

*Utah Power & Light*, No. 86-MSA-3, slip op. at 4. The ALJ appears to have misconstrued the purpose of § 44.50. That section is “designed to operate” while there is no final decision, not while the case is “between tribunals.” In addition, in common legal parlance, “pending appeal” means awaiting a decision on the appeal. The ALJ’s reasoning seems to confuse the concepts of “hearing” and “appeal.” The appeal was, in fact, pending before him, although the hearing had been completed.


181. *Int’l Union/(Kaiser)*, 823 F.2d 608.

182. See infra notes 223-27 and accompanying text.

183. *Int’l Union/(Kaiser)*, 823 F.2d at 619 n.8.


https://researchrepository.wvu.edu/wvlr/vol91/iss3/7
One mining company has asked the Assistant Secretary to issue emergency relief from enforcement of a mandatory standard to ensure the miners' safety during pendency of a petition for modification. That company, UP&L, had petitioned for modification of section 75.326 to permit two-entry mining in its Utah mines. UP&L applied for and was granted interim relief from enforcement of section 75.326, which enabled it to mine with two entries while its petition was pending. The interim relief, however, was limited to a discrete geographic area, and UP&L mined out the longwall panels in the area covered by interim relief. The company asked to extend interim relief for two-entry mining to additional areas, but the ALJ before whom the petition itself was pending denied the request because a hearing on the merits of the petition had not yet been held. The company then appealed the ALJ's denial of interim relief to the Assistant Secretary.

Before the Assistant Secretary could decide the appeal, the D.C. Circuit vacated UP&L's initial grant of interim relief and held the Secretary's interim relief regulations invalid. Nonetheless, the Assistant Secretary held that he still had the authority to grant interim relief to safeguard the miners or in any other emergency situations and remanded the issue to the ALJ for findings.

On remand, the ALJ considered the question of extended interim relief along with the merits of the petition; he denied both. UP&L appealed the ALJ decision on the merits and also applied for emergency relief from enforcement of section 75.326, asking the Assistant Secretary to use his inherent authority under the Act to safeguard the miners. The request for emergency relief has now been pending before the Assistant Secretary for well over a year.

190. After this article was written, the request for emergency relief was rendered moot by the Assistant Secretary's issuance of a decision on the merits of the petition. *Utah Power & Light*, No. 86-MSA-3, slip op. at 1, n.2 (Jul. 14, 1989) (Asst. Sec'y O'Neal).
Thus, the two regulatory mechanisms intended to provide relief while petitions are pending have been rendered useless. But because the need for interim relief still exists, the search is on for a way to obtain it.

IV. Solutions

Experience suggests that three avenues are available to a party whose petition is (or may become) stalled in the procedural quagmire. One solution—settlement—exists within the current petition framework; the others—rulemaking and legislation—entail significant reform of the existing process.

A. Settlement

Settlement may be worthy of consideration in cases where half a loaf today may be worth more than an entire loaf years later. Moreover, where highly technical issues are involved, settlement is often the best method of dispute resolution in a petition case. For example, while the parties will have the background to understand the nuances of the case, the ALJ may not be similarly situated, even after the taking of evidence. Even if a petition is granted, the actual decision may be marred by inconsistencies and defects that may create more safety hazards than it cures when applied at the petitioner’s mine.

Although settling a petition case can be difficult, two mechanisms for settling petition cases have been successfully employed. One works within the strict framework of the regulations;\(^\text{191}\) the other, arguably, does not.

1. Consent Findings

The regulations permit an ALJ to issue consent findings and an order disposing of all or part of a petition case.\(^\text{192}\) There is, however, no corresponding regulation governing settlement when either the

---

191. 30 C.F.R. § 44.27 (1988).
192. 30 C.F.R. § 44.27 (1988).
Administrator\textsuperscript{193} or the Assistant Secretary has jurisdiction over a petition case. Section 44.27\textsuperscript{194} governs consent findings:

(a) \textit{General}. At any time before reception of evidence in any hearing or during any hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceedings. Allowance of such opportunity and the duration thereof shall be in the discretion of the Chief Administrative Law Judge, if no administrative law judge has been assigned, or of the presiding administrative law judge. In deciding whether to afford such an opportunity, the administrative law judge shall consider the nature of the proceeding, requirements of the public interest, representations of the parties, and probability of an agreement which will result in a just disposition of the issues involved.

* * *

(d) \textit{Disposition}. In the event an agreement containing consent findings and rule or order is submitted within the time allowed, the Chief Administrative Law Judge or presiding administrative law judge, as appropriate, may accept the agreement by issuing his decision based upon the agreed findings.\textsuperscript{195}

The language of section 44.27(a) has created a question as to whether an ALJ must make a finding that a settlement is in the "public interest" before granting the petition. It has been argued, based on that language, that the "public interest" finding relates only to the opportunity for negotiation, but not to the approval of a settlement.\textsuperscript{196} One ALJ has rejected that view.

In \textit{Castle Gate Coal Co.},\textsuperscript{197} the ALJ examined the "public interest" language of 30 C.F.R. section 44.27(a) in the context of section 44.27(d) and the purpose of the Act.\textsuperscript{198} She concluded that evaluating the public interest of affording an opportunity to negotiate a settlement, among other factors,\textsuperscript{199} made no sense if the

\textsuperscript{193} Any settlement that could conceivably be reached while the petition was pending before the Administrator would arguably be inconsistent with § 101(c) of the Act. First, it would shortcut the statutorily mandated investigation. Second, it may not afford an opportunity for all parties—MSHA, the mine operators, and the miners—to be involved. See 30 U.S.C. § 811(c) (1982).

\textsuperscript{194} 30 C.F.R. § 44.27 (1988).

\textsuperscript{195} Id.

\textsuperscript{196} See Decision and Order Granting Petition for Modification and Staying Proceeding Pursuant to Consent Findings and Order at 2, Castle Gate Coal Co., No. 88-MSA-2 (June 8, 1988) (ALJ Rosenzweig).

\textsuperscript{197} Id.

\textsuperscript{198} Id. at 2-5.

\textsuperscript{199} The regulations require that four factors be considered in affording the opportunity to "permit negotiation by the parties of an agreement containing consent findings and a rule or order. . .:" 1) nature of the proceedings, 2) the public interest, 3) representations of the parties, and 4) the probability that the agreement will result in a just disposition of the issues. 30 C.F.R. § 44.27(a) (1988).
terms of the agreement were not also considered in light of the public interest.200 She held that a "public interest" finding is a condition precedent to approval of an agreement containing consent findings:

I conclude that finding the mandatory list of considerations a condition precedent to allowing the opportunity for negotiations and settlement, is consistent with the discretion afforded the administrative law judge to allow—or not—such opportunity. Thus, why make the process discretionary if there is no reason to exercise that discretion? Put another way, the four mandatory considerations provide a framework for the exercise of that discretion. Thus, a settlement pursuant to the Act is not an agreement among private parties. It is, rather—or should be—a legal act consistent with the public will as expressed by Congress; and the discretion exercised by the administrative law judge in approving—or not—that settlement must be guided accordingly. These four mandatory considerations provide that guidance.201

In deciding what form the "public interest" finding should take in the petition for modification context, the ALJ relied on the framework set forth in a case where a federal district court approved a settlement between the federal government, a private party, and intervenor state and local governments for hazardous waste cleanup.202 In Castle Gate,203 the ALJ only approved a settlement after considering whether the settlement was 1) consistent with section 44.27204 and the Act, 2) fair and adequate, and 3) reasonable.205

In another case, the ALJ modified the parties' proffered consent agreement to exclude a provision which would have required the Department of Labor Office of Administrative Law Judges to oversee future implementation of the alternative methods proposed in

200. Decision and Order Granting Petition for Modification and Staying Proceeding Pursuant to Consent Findings and Order at 3-4, Castle Gate, No. 88-MSA-2.
201. Id. at 4-5. See also Pyro Mining, No. 86-MSA-5. In that case, without the same degree of analysis used in Castle Gate, the same ALJ rejected a consent agreement and a revised consent agreement submitted for her approval, concluding, "Thus, the regulations [30 C.F.R. § 44.27(a)] appear to recognize that the public interest may, in appropriate circumstances, override a consent agreement in which all parties to a modification proceeding have concurred." Pyro Mining, No. 86-MSA-5, slip op. at 3 n.3.
203. Castle Gate, No. 88-MSA-2.
204. 30 C.F.R. § 44.27 (1988).
205. Decision Order Granting Petition for Modification and Staying Proceeding Pursuant to Consent Finding and Order at 8-9, Castle Gate, No. 88-MSA-2.
a petition. The case involved a petition for modification of 30 C.F.R. section 75.1710, which requires electric equipment used in face areas of a mine to be equipped with cabs or canopies. The consent agreement to grant the petition with conditions contained a clause requiring the mine operator to purchase state-of-the-art equipment that would be compatible with mining heights at the affected mine. The ALJ disallowed that provision because it would have required an ALJ to administer it by resolving future disputes as to whether equipment purchased by the operator was state of the art or was compatible with mining heights at its mine.

The foregoing examples demonstrate the variety of problems which may be encountered in attempting to settle a petition case via the consent finding route. First, the ALJ may not approve a consent agreement. Second, the ALJ may not feel sufficiently competent in the subject at issue to evaluate and approve a settlement responsibly, especially if the agreement containing consent findings and an order is submitted before the hearing. Third, the ALJ may not approve an agreement on the terms reached by the parties. Fourth, settlement is only available as an option when a proceeding is pending before an ALJ—not the Administrator or Assistant Secretary.

2. Withdrawal of the Request for Hearing

Under limited circumstances, a second, more streamlined approach to settlement may apply in a petition case. Although the Part 44 rules provide no specific mechanism for such a procedure, parties have sought to give effect to settlement agreements by having the party opposing the Administrator’s grant of a petition withdraw its request for hearing.

207. 30 C.F.R. § 75.1710 (1988).
209. See supra note 191.
210. In the preamble to the proposed revisions to Part 44, which were released following the completion of this article, the Secretary noted that MSHA is considering amending the existing § 44.27 to permit settlement at any time after a hearing has been requested and even after a hearing has been held. 54 Fed. Reg. 19494 (1989).
211. See Order, Island Creek, No. 88-MSA-17; Quarto, No. 83-MSA-0016, slip op. at 2.
Part 44 does not address the situation where a party who filed a request for hearing to oppose the Administrator’s grant of a petition later seeks to withdraw the request for hearing.\(^{212}\) Presumably, if the request for hearing were withdrawn, the Administrator’s proposed decision and order granting the petition would become effective immediately, assuming thirty days had elapsed after issuance of the Administrator’s decision.\(^{213}\)

This procedure has very limited application. It can only be used where the parties agree, as part of a settlement, that the Administrator’s proposed decision and order can take effect as is, without any changes. In one such case involving a petition for modification of section 75.305,\(^{214}\) the parties settled the case by reaching a two-part agreement. The first part consisted of an agreement between the miners and the company; as consideration for that agreement, the miners agreed, with MSHA’s consent, to withdraw their request for hearing. The ALJ granted the UMWA’s motion for withdrawal of the request for hearing and remanded the case to the Administrator for implementation of the proposed decision and order as of the date it would have become final had no request for hearing been filed.\(^{215}\)

The availability of this simplified approach is not assured, however. In another petition case, the ALJ refused to remand a petition to the Administrator for reconsideration because the Part 44 rules did not provide for such a remand.\(^{216}\)

These two cases can be reconciled despite seemingly different conclusions about the authority of an ALJ to remand a petition case from an ALJ to the Administrator. In *Island Creek*,\(^{217}\) the case was “remanded” to the Administrator solely to implement the granted petition. Because of the MSHA enforcement scheme under the Act,\(^{218}\)

\(^{212}\) 30 C.F.R. pt. 44 (1988); see also Quarto, No. 83-MSA-0016, slip op. at 2.

\(^{213}\) See Order, *Island Creek*, No. 88-MSA-17. Indeed, in *Island Creek*, the ALJ deemed such petition to have taken effect 30 days after the Administrator’s decision, as if no request for hearing had ever been filed. *Id.*

\(^{214}\) *Island Creek*, No. 88-MSA-17.

\(^{215}\) See Order, *Island Creek*, No. 88-MSA-17.

\(^{216}\) Quarto, No. 83-MSA-0016, slip op. at 2.

\(^{217}\) *Island Creek*, No. 88-MSA-17.
every petition granted at any stage ultimately becomes the Administrator's enforcement responsibility. Thus, the "remand" in Island Creek was really not a remand at all because it required no additional findings or reconsideration on the part of the Administrator but only implementation of a decision already made. On the other hand, the remand requested in Quarto did require substantive reconsideration of the petition. Unlike the situation in Island Creek, the remand sought in Quarto was inconsistent with the petition process because it sought two decisions on the merits from the same decisionmaker; the petition scheme, however, contemplates only one decision on the merits from each decisionmaker—the Administrator, ALJ and Assistant Secretary. The "remand" in Island Creek

---

218. Id.
220. Island Creek, No. 88-MSA-17.
222. Despite Part 44's lack of provision for remanding a petition case to the Administrator, several ALJ's have remanded cases to the Administrator. None of these remands seem consistent with procedural scheme of Part 44. 30 C.F.R. pt. 44 at 247 (1987).

First, cases, have been remanded to the Administrator for reconsideration of the petition 1) in light of a new alternative method proposed by the petitioner; 2) because the Administrator agreed to change certain conditions in a proposed decision and order to which the petitioner objected; and 3) in light of pending revision to the mandatory standard sought to be modified. See Order of Remand, Dominion Coal Corp., No. 87-MSA-12 (Dec. 8, 1987) (ALJ Vittone); Order of Remand, Peabody Coal Co., No. 87-MSA-4 (Nov. 24, 1987) (ALJ Vittone); Order of Remand, Consolidation Coal Co., No. 87-MSA-6 (Nov. 24, 1987) (ALJ Vittone); Order of Remand, Homestake Mining Co., No. 82-MSA-13 (Jun. 1, 1983) (ALJ Matera); Order of Remand, Helevtia Coal Co., No. 82-MSA-18, et al. (Feb. 8, 1983) (ALJ Murty). Part 44 does not contemplate such remands for reconsideration; it provides for one decision on the merits at each stage of the petition process.

Second, cases have been remanded to the Administrator because idemment of the affected mine has made it impossible to conduct a hearing of the case. See Order of Remand, Price River Coal Co., No. 84-MSA-5 (Aug. 7, 1985) (ALJ Matera); Order of Remand, A&E Coal Co., No. 82-MSA-7 (Jun. 30, 1983) (ALJ Williams); Order of Remand, Everidge & Nease Coal Co., No. 81-MSA-7 (Jun. 30, 1983), vacated (Aug. 19, 1983) (ALJ Williams) (mine no longer idle). From a procedural point of view, it makes no sense for a case to be remanded to the Administrator for anything other than implementation of a proposed decision and order. See supra notes 214-20 and accompanying text. Nor do the rules provide for such a remand. If a case cannot be set for hearing due to idemment or changed circumstances, the jurisdiction of the Office of Administrative Law Judges over the case is not affected, such that remand to the Administrator is required. Rather, the proper procedure would seem to be for the presiding ALJ to stay the proceeding until such time as a hearing could be set, or in the proper case, to dismiss the proceeding as moot. See Decision and Order Granting Petition for Modification and Staying Proceeding Pursuant to Consent Finding and Order at 10, Castle Gate, No. 88-MSA-2.

One way for the Administrator to "reconsider" the petition while skirting this "remand" issue would be for the petitioner to withdraw its petition and file it anew. Nothing in the rules or the
falls within the framework of the petition process because the request for hearing was withdrawn before the second-stage decisionmaker—the ALJ—could issue an initial decision; the withdrawal merely revived a decision already reached.

Given the protracted litigation over petitions for modification, settlement agreements provide a significant benefit. Granted petitions become effective immediately without the time delays involved in the hearing, briefing, and appeals processes.

B. Rulemaking

Although settlement may offer a case-by-case solution, problems in the petition process are systemic and could be substantially resolved through comprehensive rulemaking. Some of the defects in the present process are caused by the Secretary's regulations: for example, the lack of decision-forcing time limits for various stages of the process, the effect of mere filing of an appeal or request for hearing in staying agency action, and a requirement that an application for relief pending appeal must be filed long before the appeal is filed. Other problems have resulted from post-promulgation decisions. Both types of problems could be rectified by rulemaking.

Already steps are being taken in that direction. The Department of Labor advises that it will soon release proposed revisions to the Part 44 rules.224 These proposed rules are expected to address interim relief in light of Int'l Union/(Kaiser),225 as well as the concerns raised

---

223. Island Creek, No. 88-MSA-17.
224. Since this article was written, the Secretary has published proposed revisions to Part 44. 54 Fed. Reg. 19,492 (1989).
225. Int'l Union/(Kaiser), 823 F.2d 608. See supra note 153 and accompanying text. The proposed rules address the issue of interim relief by effectively eliminating it. 54 Fed. Reg. 19492-93 (1989). The mild palliative offered by the Secretary under the proposed rules would permit a party whose petition has been granted by the Administrator to request that the Administrator's proposed decision and order be given effect during the thirty day period in which parties can request a hearing under § 44.14. This truncated form of relief would constitute no relief at all in contested petition cases, because one showing necessary to have such relief granted is that no party disagrees with the
in a petition for rulemaking filed by one trade association. That petition for rulemaking focuses upon expedition of the petition process in appropriate cases.\textsuperscript{226} Under the trade association proposal, if a petitioner applied for expedited treatment of its petition and that motion were granted, strict time limits would be imposed at each stage in the petition process so that a final agency decision (including an appeal to the Assistant Secretary)\textsuperscript{227} would be issued within 115 days after filing the petition.\textsuperscript{228} The proposal would also provide for appeal of any decision denying expedited consideration of a petition.

The trade association proposal clearly was intended to mitigate the adverse effect of the void left by the D.C. Circuit's invalidation of the interim relief regulations. Much more needs to be done to improve the petition process, however. For example, the trade association proposal does not set forth any criteria for granting expedited consideration of a petition. If expedited consideration could be granted only upon a diminution of safety showing, as the pro-

Administrators proposed decision and order.

Under the proposed rules, relief pending appeal would be eliminated as a remedy. The Secretary believes that the proposed expedited timetable for deciding petitions would make relief pending appeal a superfluous remedy. She stated:

Since an application for relief pending appeal amounts to little more than a motion to expedite a decision on the petition for modification, the Agency believes that the relief pending appeal rule would serve no additional purpose and therefore should be deleted. 54 Fed. Reg. 19,495 (1989).

Despite the proposed elimination of interim relief under the rules, the preamble to the proposed rules gives continued vitality to the emergency relief concept. See supra notes 182-188 and accompanying text. It states, "MSHA continues to interpret the Court of Appeals decision [in Int'l Union/ (Kaiser)] to permit carefully tailored, short-term remedies in cases where application of the standard at a mine endangers miners." 54 Fed. Reg. 19,493 (1989).

\textsuperscript{226} National Coal Association ("NCA"), Petition for Rulemaking (June 14, 1988).

\textsuperscript{227} New Coal Association ("NCA"), Petition for Rulemaking (June 14, 1988).

\textsuperscript{228} In the preamble to the proposed Part 44 revisions, the Secretary states:

The proposal goes beyond the NCA petition and incorporates a time schedule for all stages of decisionmaking on petitions. Also, at various stages in the petition process, the proposal would permit interested parties to submit requests to expedite or extend the time schedule, which may be granted in the discretion of the decisionmakers.

posal implies,\(^\text{229}\) it would be of limited value, leaving petitioners who allege the safety of an alternative method to wait out the normal, protracted petition process. However, if either diminution of safety or the safety of an alternative method could support expedited consideration, then special, but as yet unidentified criteria may have to be satisfied in addition to the statutory standards to warrant expedited consideration. Since the existing preliminary relief regulations now in limbo (interim relief and relief pending appeal) provided for expedited consideration upon a showing of exigent circumstances, any expedited proceedings provision in the upcoming rules may be similarly conditioned.\(^\text{230}\)

Regardless of the form in which they appear, the proposed revisions to Part 44 represent an important opportunity for the mining community to cure many of the defects in the present process. All parties interested in mine safety must carefully study the system and propose the kinds of changes needed to revitalize the petition process so that it can serve the critical safety function which Congress intended.

C. Legislation

By far the most promising method for curing the deficiencies in the current petition process, albeit the most difficult to accomplish, would be legislation to amend section 101(c) of the Act to transfer jurisdiction over petition cases to the Commission.\(^\text{231}\)

The petition process which would follow from such a legislative change would be virtually identical to the current one in form, except that Commission ALJs, instead of Department of Labor ALJs, would hear petition cases and issue an initial decision, and the Commission, instead of the Assistant Secretary, would decide appeals from the

\(^{229}\) The NCA petition states, "Such a procedure [for expedited proceedings, as proposed,] should address situations where the routine one to three year delay prevents the continuation or initiation of safe and effective mining."

\(^{230}\) Under the proposed rules, the matter of expediting proceedings upon request of a party is purely discretionary with the decisionmaker. No standards for the granting of expedited consideration are provided. 54 Fed. Reg. 19,492, 19,495-96 (1989).

\(^{231}\) See supra note 7 and notes 112-20 and accompanying text.
initial decision and issue a final decision. Judicial review would be in the federal courts of appeal, as with all other Commission decisions.\textsuperscript{232}

Transferring jurisdiction over petition hearings to the Commission need not change the current procedure under which the Administrator investigates a petition and issues a recommended decision which becomes final unless a request for hearing is filed, much as MSHA’s civil penalty assessments become final Commission orders unless contested.\textsuperscript{233} Under the suggested change, a request for hearing following the Administrator’s decision would be referred to the Commission for assignment to a Commission ALJ, instead of to the Chief Administrative Law Judge of the Department of Labor Office of Administrative Law Judges.

Transferring jurisdiction from the Department of Labor ALJs and the Assistant Secretary to the Commission and its ALJs offers numerous advantages. First, that action would place jurisdiction over all disputed mine safety cases in the hands of the Commission, which has expertise in mine safety. Second, the right to have a petition decided before the abatement time on a citation expires\textsuperscript{234} would take on renewed vitality because the Commission ALJ would be able to decide the petition in the context of an enforcement proceeding.\textsuperscript{235} Third, any questions about whether a particular standard even applied to a mine could also be decided in the course of a consolidated case before one Commission ALJ. The ALJ would be better positioned to do justice and promote mine safety because, in a combined petition and enforcement proceeding, it would be possible to determine, for example, whether a particular standard ought to be invalidated or merely modified with respect to the peculiar conditions of the mine in question. Fourth, by strict adherence to the requirements and spirit of Commission Rule 52,\textsuperscript{236} the Commission

\textsuperscript{232} 30 U.S.C. § 816(a)(1), (b) (1982).
\textsuperscript{233} 30 U.S.C. §§ 815(a) (1982).
\textsuperscript{234} Gateway, 1 I.B.M.A. 82; Reliable, 1 I.B.M.A. 97.
\textsuperscript{235} In Reliable, 1 I.B.M.A. 97, a mining company’s petition and its challenge to enforcement action taken under the standard sought to be modified were tried in the same proceeding before a Board hearing examiner and ultimately decided on appeal by the Board. See supra note 112.
\textsuperscript{236} 29 C.F.R. § 2700.52 (1988).
and its ALJs have demonstrated that they can act surely and swiftly. Indeed, a side benefit to such a legislative solution would be that the Part 44 rules could be eliminated. They could be replaced altogether, with a few modifications, by the Commission's existing rules.

In the interest of fairness to all and the safety of miners, it is time to cure the statutory anomaly in section 101(c) of the Act, which left jurisdiction over petition cases with the Secretary although all other mine safety cases were transferred to the Commission.

V. CONCLUSION

Conceived by Congress as vehicle for providing the flexibility to maximize safety in the context of changing mining conditions and technology, the petition for modification process, in practice, has been sapped of its vitality. One ALJ has said of a petition case before her, "[i]t may well be that the difficulties presented by this case exist merely because society asks that its judges render perfect decisions for an imperfect world."238 There can be no doubt that the present petition process manifests that imperfection.

Faced with unconscionable delays in obtaining approval of a petition for modification where a hearing is requested by another party, and without practical recourse in the form of preliminary relief, petitioners have had to agree to settlements in their cases to get any relief at all this side of the millennium. Proposed changes in regulations are anticipated to provide some help in streamlining the process. Moreover, some of the issues discussed in this article have now, for the most part, been well ventilated in proceedings before ALJs and are on appeal to the Assistant Secretary. The Assistant Secretary's long awaited decisions may remove some of the uncertainties from the petition process, as may the eventual decisions of the Court of Appeals. Nonetheless, the only sure cure is statutory reform transferring to the Commission the responsibility for deciding contested petitions for modification. There may be no perfect de-

237. See supra notes 126-31 and accompanying text.
238. Kaiser Coal, No. 86-MSA-1, slip op. at 217.
cisions in an imperfect world, but at least the odds are better when the decisionmaker has expertise in the matters to be decided.