Chapter 9

“Flagrant” Violations Under the MINER Act: What’s a Little More Ambiguity Among Friends?

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§ 9.01. Introduction.
[1] — The MINER Act, Passed in 2006, Provided for a New Enhanced Penalty of Up to $220,000 for Violations of Mine Safety and Health Standards Deemed to Be “Flagrant.”

In the aftermath of the Sago and Aracoma mine disasters, the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) created new stringent enforcement measures with the announced goal of promoting safer mining practices. One of these measures allows the Mine Safety and Health Administration (MSHA) to issue individual penalties of up to $220,000 for violations of mine safety or health standards deemed to be “flagrant.”

1 These actions are sometimes referred to in this chapter as a “flagrant violation” or “flagrant violations.” It is important to note at the outset that MSHA inspectors are granted
Since the effective date of the MINER Act, MSHA has used the flagrant violation regime, described in detail in this chapter, as a means of further elevating its enforcement goal. Flagrant violations, along with patterns of violation and increased regular penalty assessments, are on the rise. Unfortunately, there is no clear interpretation of the flagrant violation criteria. As a result, mine operators must be proactive in avoiding and defending against the issuance of flagrant violations. In order to fully be prepared against these enforcement actions, operators must be aware of the uncertain and tenuous nature of MSHA’s interpretation of § 110(b) of the MINER Act, be aware of § 104(d) unwarrantable failure and § 104(b) failure to abate authority in order to determine possible case outcomes, and develop several different legal defenses.


The grant of flagrant violation assessment power to MSHA has put one more elevated enforcement tool into its arsenal. According to Richard Sticker, the former Assistant Secretary of Labor, when the MINER Act passed, MSHA believed that “Congress gave us powerful new tools to strengthen mine safety, and we are going to use them fully.”\(^2\) The agency also explained that “[m]ine operators that show reckless disregard for the well-being of their workers must be held accountable for their actions. MSHA will not hesitate to assess stiff penalties against coal companies that fail to comply with safety and health regulations.”\(^3\) According to MSHA, then, flagrant violations are

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2 Press Release, Mine Safety and Health Administration, MSHA Assistant Secretary Issues New Procedures for Evaluating Flagrant Violations (October 26, 2006)(on file with authors).
3 Press Release, Mine Safety and Health Administration, Mine is First to Be Fined under Flagrant Violation Provision of MINER Act (April 12, 2007)(on file with authors).
an effective complement to § 104(a) citations, § 104(d) citations and orders, § 104(b) failure to abate orders, and the pattern of violations: each action gradually increases in severity and penalty amount as a means to compel operator compliance. It remains to be seen just how useful flagrant violations, as interpreted and enforced by the agency, will become in MSHA’s future enforcement scheme.

[3]— MSHA Has Already Begun Using Flagrant Violations in Earnest.

Since flagrant violations were first enacted in the MINER Act in May, 2006, MSHA has already assessed 91 violations.\(^4\) When this number is compared to the 464,587 violations assessed during the same period, 2006 to 2008, the number of flagrant violations seems miniscule.\(^5\) At the same time, the penalties and ramifications of the accusations contained in flagrant violations make each one inestimably more significant than other enforcement actions.

For the balance of 2006, after the effective date of the MINER Act, 12 violations were assessed as flagrant.\(^6\) By the end of 2007, a total of 44 violations were assessed under the flagrant provisions.\(^7\) The violations assessed as flagrant in 2007 seemed to garner much publicity through MSHA press releases and the subsequent media stories.\(^8\) By August of 2008, 35 flagrants had been issued, and numerous others were issued by the agency


\(^6\) MSHA FOIA Response.

\(^7\) MSHA FOIA Response. In several instances MSHA chose to issue press releases before the operator had received its penalty assessment notification.

\(^8\) Id; MSHA News Release, Press Release, Mine Safety and Health Administration, MSHA Assistant Secretary Issues New Procedures for Evaluating Flagrant Violations (October 26, 2006)(on file with authors). Press Release, Mine Safety and Health Administration, Mine is First to Be Fined under Flagrant Violation Provision of MINER Act (April 12, 2007)(on file with authors).
in 2008 that have either yet to be assessed or are not yet tracked in MSHA’s database.9

Surprisingly, the majority of these initial violations assessed as flagrant have been issued during regular inspections, and not during fatality investigations as the severity of the enforcement action would have many infer. In fact, 65 of the 91 flagrant violations originated in regularly scheduled inspections.10 Only 15 of the 91 violations were issued as a result of fatality investigations.11 Of these, only a few were judged as a contributing factor in the fatal accident, and others were found to be non-contributory.12 This discrepancy between flagrant violations issued during regular versus fatality investigations begs the question of whether MSHA is employing the newly created enforcement action as Congress intended. In addition, non-fatal accident investigations constituted only three flagrant violations, § 103(i) spot inspections spurred four violations, and written and verbal hazard complaints accounted for the issuance of five of the flagrant violations.13

While flagrant violations have a statutory range from $70,000 to $220,000, MSHA has spurned the lower penalty amounts for higher dollars. Of all the flagrant violations issued, 15 were listed and assessed at the maximum penalty of $220,000.14 None of the actions were issued at the minimum amount, and most hovered between $93,400 and the maximum amount.15 For less than three full years, MSHA has assessed a total of $14,346,900 in flagrant violation penalties.16 This number is certain to continue rising as MSHA inspectors and assessors become accustomed to issuing such fines.

Some MSHA districts have become more comfortable with issuing flagrant violations than others. District 7, for example, which encompasses

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9 MSHA FOIA Response.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
central Kentucky, North Carolina, South Carolina and Tennessee, drafted and assessed 27 “flagrants” in the 2006 through 2008 period, the most of any district.\textsuperscript{17} Western states in District 9 were hit with a total of 19 flagrant violations, and District 3, responsible for mines in Maryland, Ohio, and Northern West Virginia, had 13 flagrant violations.\textsuperscript{18} The other MSHA districts also issued flagrant violations, but not to the same degree as the top three issuers.\textsuperscript{19} This discrepancy may be as a result of differing personnel opinions, diverging mine conditions, or various mine operators in the area. As flagrant violations become more frequent, new trends may emerge.

These statistics create a vision of the future of MSHA’s enforcement regime. Now that the agency is provided with such a draconian enforcement measure that generates not only large revenues but lasting publicity, flagrant violations are likely to play a large part in inspections, mine citation history, and perhaps even the issuance of potential pattern of violation notices. To counter such an increased enforcement climate, mine operators must be prepared to avoid, address, and advocate against the issuance of flagrant violations. Unfortunately, the only guidance and authority that exists to interpret and defend against flagrant violations is MSHA policy; the federal courts, the Federal Mine Safety and Health Review Commission (“Commission”), and the Commission’s administrative law judges have yet to review flagrant violations and create a supporting jurisprudence for the regime. As a result, mine operators that have been hit with flagrant violations have new ground to plow in discovering, understanding and developing their legal positions. This chapter will discuss the regulatory and policy interpretations of the flagrant violation standard, examine possible legal precedent, and suggest specific defenses that may be available to use when contesting these violations.

\section{Regulation and Policy Interpretation.}

As with any new statutory provision, the implementation of the flagrant violation system was shrouded with uncertainty. Unlike most provisions,
however, MSHA’s promulgation of 30 C.F.R. § 100.5(e) did little to assuage such ambiguity.\footnote{30 C.F.R. § 100.5(e).} No real criteria for assessing flagrant violations were created until MSHA issued its own policy guidance without further notice and comment rulemaking. As one federal judge noted, “[i]nterpretation is a chameleon that takes its color from its context.”\footnote{Am. Mining Cong. v. MSHA, 990 F.2d 1106 (D.C. Cir. 1993).} The issuance of flagrant violations certainly proves this statement to be true; without properly promulgated regulatory criteria and jurisprudence, mine operators are faced with further uncertainty in predicting how their operations will fare any given day in the regulatory compliance arena.


While the authority for flagrant violations emanated from the MINER Act, the Act and its legislative history do not lend much interpretive assistance. The MINER Act was quickly passed and enacted in the aftermath of the Sago and Aracoma disasters in 2006, and even though this juxtaposition is widely recognized, these disasters were not mentioned specifically as the reason for the creation of flagrant violation assessments.\footnote{Committee on Health, Education, Labor, and Pensions, S. Rep. No. 109-365, Mine Improvement and New Emergency Response Act 2006, at 2 (2006) [hereinafter cited as S. Rep. No. 109-365].}

The MINER Act at § 110(b) creates the flagrant violation assessment.\footnote{Federal Mine Safety and Health Act of 1977 as amended, 29 U.S.C. § 820 (2009).} Despite the inclusion of many terms of art and vaguely familiar phrases, the provision leaves much room for interpretation. It provides, in its entirety,

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term ‘flagrant’ with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death, or serious bodily injury.\footnote{Id.}
This language leaves much to the imagination. The Act does not define ‘flagrant,’ ‘reckless failure,’ ‘repeated failure,’ ‘known violation,’ or ‘substantially and proximately caused.’ Without a standard understanding of these essential terms, neither MSHA nor the mine operator can predict with any certainty the outcome of an enforcement action commenced under this provision.

Often, an act’s legislative history can shed interpretive light on the origin of a statutory provisions and the way in which Congress intended to implement it. In this instance, however, the MINER Act’s history does little to dispel the ambiguity surrounding § 110(b). The report mentions the Sago, Alma, and Darby disasters and the resulting increase in the deaths of miners. It then surmises, “Improvements in safety come about because of a continued re-examination and revision of safety and regulatory practices in light of experience. These tragedies serve as a somber reminder that even that which has been done well can always be done better.” This sentiment suggests that Congress was unhappy with the current enforcement regime, even when it obtained satisfactory results, and planned on exerting more regulatory force upon the mining industry.

The report does explicitly state, however, that the MINER Act’s goal is to “increase enforcement and compliance to improve mine safety.” Estimates from the Congressional Budget Office lend an idea of the magnitude of expected increased penalties including flagrant violation assessments. Specifically, the report estimates that all the penalty increases included in the MINER Act will increase government revenues by $53 million by 2016. Given that more than $14 million in penalties for flagrant violations alone were assessed between 2006 and 2008, flagrant violations may have been intended to play an increasingly prominent role in MSHA’s new enforcement push.

26 Id.
27 Id. at 1.
28 Id. at 11.
All the information in the legislative history and the Act’s provision itself do not divulge any keys to interpreting the terms and consequences of the flagrant violation system. In addition, MSHA’s promulgated rule and ad hoc policy guidance does little to alleviate the inherent ambiguity created by the MINER Act. As a result, mine operators will be forced to scramble for other ways to predict and defend against the issuance of flagrant violation assessments.


[a] — 30 C.F.R. § 100.5(e) Merely Repeats the Statutory Language.

In 2006, MSHA’s final rule on flagrant violation assessment was issued. Much like the statutory provision, the flagrant violation rule leaves more questions than providing answers and merely echoes the sparse explanation of the MINER Act. 30 C.F.R. § 100.5(e) provides in its entirety,

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than $220,000. For purposes of this section, a flagrant violation means “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

Again, the regulation does not define ‘flagrant,’ ‘reckless failure,’ ‘repeated failure,’ ‘known violation,’ or ‘substantially and proximately caused.’ In essence, the rule does nothing more than codify the statutory provision into MSHA’s assessment regulations.


Despite the promulgation of 30 C.F.R. § 100.5(e), MSHA did not further clarify its enforcement of flagrant violations until it issued its Procedure Instruction Letter.

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29 30 C.F.R. § 100.5(e).
30 Letter from Bruce Watzman, National Mining Association, to Patricia Silvey, MSHA (Nov. 8, 2006)(on file with authors).
Instruction Letters ("PIL") that created requirements to define reckless and repeated failure.\textsuperscript{31} Procedure Instruction Letter I08-III-2 declares that an inspector has the initial power to designate a violation of a mandatory safety or health standard as flagrant based on his observations of the facts surrounding the conditions. This procedure appears to be at odds with usual MSHA penalty assessment procedure since the Office of Assessments issues penalties.\textsuperscript{32} The fact that an inspector can control the issuance of a flagrant violation may indicate that MSHA views the regime more as an elevated enforcement action than as a penalty provision as the plain language of the provision indicates. Understanding the agency’s classification of § 110(b)(2) as another enforcement option as opposed to an after-the-fact penalty assessment will assist mine operators and their representatives in avoiding and contesting these actions.

Pursuant to PIL I08-III-2, after an inspector issues a flagrant violation, the proposed action must be reviewed thoroughly by every management level in the District, including the district manager.\textsuperscript{33} The MSHA Administrator must also evaluate every proposed flagrant violation. The MSHA mandated evaluation process demonstrates just how much the agency depends upon this new class of violation to fulfill its increased enforcement goals. In addition, the penalty will always be considered specially assessed using a special flagrant violation penalty assessment form.\textsuperscript{34}

\textbf{[i] — MSHA’s Policy Creates Individual Criteria for “Reckless” and “Repeated” Failure Designations.}

Procedure Instruction Letter I08-III-2 outlines the requirements for a violation to be considered a reckless failure. Far from quashing the ambiguity


\textsuperscript{33} Procedure Instruction Letter I08-III-2.

\textsuperscript{34} \textit{Id.} See Appendix, Sample Special Assessment Form derived from MSHA \textit{Citation and Order Writing Handbook}, Mar. 2008 (on file with authors).
surrounding interpretation of § 110(b)(2), the policy creates even more questions. According to MSHA, an operator “recklessly” failed to make reasonable efforts to eliminate a known safety or health violation under these circumstances:

(a) A citation or order is evaluated as significant and substantial;

(b) The citation or order is evaluated as having the potential to cause an injury that is reasonably likely to be at least permanently disabling;

(c) The citation or order is designated as an unwarrantable failure to comply with a mandatory safety or health standard under § 104(d) of the Mine Act; and

(d) The negligence designation of the action is designated as reckless disregard of a mandatory safety or health standard.35

Together, these four criteria distinguish a “reckless failure” flagrant violation from a “repeated failure” one. The second classification of flagrant violations under MSHA policy is a “repeated failure.” MSHA considers an operator to have “repeatedly failed” to make reasonable efforts to eliminate a known violation under these circumstances:

(a) A citation or order is evaluated as significant and substantial;

(b) The citation or order is evaluated as having the potential to cause an injury that is reasonably likely to be at least permanently disabling;

(c) The citation or order is evaluated as an unwarrantable failure to comply with a mandatory safety or health standard under § 104(d) of the Mine Act; and

(d) At least two prior “unwarrantable failure” violations of the same mandatory safety or health standard have been cited within the past 15 months.36

35 Procedure Instruction Letter.
36 Id.
Without more information on Congressional intent, it is difficult to know whether the MINER Act intended the “reckless or repeated failure” language to be parsed into two separate standards. A more logically consistent reading suggests that “a reckless or repeated failure” be read in the conjunctive, not disjunctive. Reading the phrase as a single failure would make the flagrant violation criteria akin to an elevated § 104(b) failure to abate order, a better fit within the MSHA graduated enforcement system.

[ii] — MSHA’s Policy Creates a New Proximate Cause Standard.

In addition to the individual criteria for each category of violation, the proposed flagrant violation must be evaluated for proximate cause. Somewhat awkwardly, MSHA’s flagrant violation policy charges mine inspectors with the responsibility to make this legal judgment before passing the proximate cause assessment to agency management. Specifically, the inspectors must find that the condition cited as a flagrant violation could have reasonably been expected to cause death or serious bodily injury. At first glance, this standard appears to be something similar to the significant and substantial analysis so widely discussed in the MSHA realm. However, the Procedure Instruction Letter states further that, for MSHA’s purposes, a “proximate cause is one which directly produces the injury or death and without which the injury or death would not have occurred.” These divergent approaches to proximate cause will likely lead to protracted and costly litigation; the former would create a new brand of proximate cause determination that could be applied to almost all enforcement actions, and the latter would create a higher threshold for the issuance of flagrant violations.

37 Procedure Instruction Letter. Such an observation was made by the National Mining Association to MSHA in November 2006 with a request that MSHA provide public notice and opportunity to comment on the PIL that would offer guidance on flagrant assessments — a plea that fell on deaf ears. See Watzman Comment Letter, supra note 30. This reading would also seem to be consistent with the § 110(b) language “a known violation” again indicating a specific problem or specific condition to a pattern or group of problems or conditions, even failures to abate those same conditions. Id.

38 Id.

39 Id.
FLAGRANT VIOLATIONS UNDER MINER ACT


Despite the far-reaching provisions in MSHA’s Procedure Instruction Letter that will effectively allow ad hoc issuance of flagrant violations, the document is virtually bereft of any procedural safeguards for mine operators. MSHA does direct inspectors to document mitigating circumstances that may alleviate some liability for flagrant violations. At the same time, the Procedure Instruction Letter suggests these circumstances may include factors such as personnel changes where these new individuals, either new mine owners or safety officials, “have shown an increased commitment to improving compliance.”

MSHA’s Procedure Instruction Letter notes that these circumstances are not meant to be exhaustive, yet the specificity of the examples may prove troublesome for operators attempting to defend against a flagrant violation. Just as in the significant and substantial (S&S) and unwarrantable failure jurisprudence, operators may find that “mitigating circumstances” are frequently in dispute, not well-understood by rank and file inspectors, and appear too often to be considered on the whim of MSHA officials.

District managers are also encouraged to notify or warn mine operators and miner’s representatives when the mine’s enforcement history makes it eligible for the issuance of flagrant violations. This policy, however, is limited by the caveat that this need only be done when possible and appropriate. Unfortunately, it appears that this advance notification would be too little too late; based on MSHA’s policy in the PIL, “reckless failure” violations can be issued on the spot without any reference to history, and “repeated failure” violations only require two similar unwarrantable failure

40 Procedure Instruction Letter. The plain language of § 110(b) does not include any reference to mitigating circumstances but the Agency’s inclusion of the concept in the PIL is something all operators should take note of and seek to utilize in defensive efforts.

41 Id.

42 Id.

43 Id.

44 Id.
actions. As a consequence, these operator protections will do little to ensure operators are adequately prepared to avoid or contest flagrant violations. This uncertain enforcement climate cannot effectuate MSHA’s professed goal to increase compliance since operators will not know what is expected of them beforehand.


The Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq., generally governs MSHA’s notice and comment rulemaking procedures. Since MSHA has been particularly active in drafting policy documents outside the formal rulemaking requirements of the APA, there has been considerable controversy concerning whether these agency policy documents can be judged as authoritative and binding authority. Knowing the exact measure of MSHA policy authority is integral to a mine operator’s attempts to avoid or defend against the issuance of flagrant violations, especially until the Commission and other judiciary bodies rule on these ambiguities.

[a] — MSHA’s Policy May Have Invoked Administrative Procedure Act Requirements.

Notice and comment rulemaking is required under the Administrative Procedure Act to promulgate rules, with certain exceptions, that are presented by an agency. The APA prescribes the steps an agency must undertake to properly enact a regulation. First, a notice of the proposed rule must appear in the federal register that includes:

1. a statement of the time, place, and nature of public rulemaking proceedings;
2. reference to the legal authority under which the rule is proposed; and
3. either the terms or substance of the proposed rule or a description of the subjects and issues involved.\(^45\)

Advance notice of the proposed rule does not apply “(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice” or when notice and comment is “impracticable, unnecessary, or contrary to the public interest.” Arguably, MSHA’s Procedure Instruction Letter is not an interpretive rule, as discussed in Section II.C.ii, and certainly publishing the policy on flagrant violations was not impracticable since it was sent to all operators anyway, and it was necessary to put operators on notice.

Once the agency publishes its notice in the Federal Register, it must then allow public comment on the rule under § 553(c). After the comment period has closed, the agency must consider the relevant comments made by the public and adopt a “concise general statement of their basis and purpose.” Finally, the substantive, adapted rule must be published 30 days or more before the effective date of the regulation; interpretive rules, however, have no such time constraint.

These formalities, while unimposing, provide notice and an opportunity for the operators to be heard. In other words, these requirements allow the mining industry to advise, avoid, and advocate — three important tenets of administrative due process. MSHA promulgated 30 C.F.R. § 100.5(e) properly under the formal rulemaking procedure, but its policy document was not published, opened for comment, or modified. Whether or not courts view this ad hoc policy as acceptable, the PIL loses credibility when juxtaposed with the APA’s goals and requirements.

Beyond the notice and comment rulemaking procedure, Section 552(a)(2) of the APA requires an agency to make available to the public “(B) those statements of policy and interpretations which have been adopted by the agency and are published in the Federal Register; [and] (C) administrative staff manuals and instructions to staff that affect a member of the public.”

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48  Letter from Bruce Watzman, National Mining Association, to Patricia Silvey, MSHA (Nov. 8, 2006)(on file with authors).
There are arguments both for and against classifying MSHA’s flagrant criteria endeavors as a substantive or interpretive rule. Section 552 demonstrates congressional intent to leave administrative decision-making processes open and accessible to all. MSHA’s attempt to fashion new regulations without previous knowledge or input transgresses this intent. Thus, the language of the APA in § 552 seems to indicate through implication that general policy documents, such as those creating criteria for flagrant violations, are merely informal policy that can be disregarded by the Commission and federal courts. At the same time, the APA acknowledges in § 552(a)(2)(C) that the public should be able to view and rely upon established agency policy.49

[b] — MSHA’s Policy Document May Not Be Binding.

Considerable controversy also exists over whether agency documents, such as PIL I08-III-2, have legal effect without undergoing formal notice and comment rulemaking. In United States v. Picciotto,50 the United States District Court for the District of Columbia Circuit held that avoiding required notice and comment rulemaking through the issuance of policy statements was invalid. When an agency amends a properly promulgated rule with additional conditions that were not published or discussed previously, the agency is creating substantive rules without adherence to the rulemaking requirements in § 553 of the Administrative Procedure Act. Since neither the MINER Act nor 30 C.F.R. § 100.5(e) specifically or impliedly authorize MSHA to publish new criteria for determining flagrant violations, I08-III-2 may be construed as invalid by a federal court.

On the other hand, in a case that posed the question of whether Program Policy Letters were properly promulgated rules that carried enough authority to be subject to judicial review, the Court of Appeals for the District of Columbia Circuit held that PPLs (and by implication the other policy documents issued by MSHA) were interpretive rules created within the agency’s authority.51 American Mining Congress v. MSHA held that

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51 Am. Mining Cong. v. MSHA, 990 F.2d at 1113.
interpretive rules can escape formal, binding regulatory process under § 553 of the APA because under that provision, the agency need not grant notice or public hearing before passing “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .” These convoluted discussions and definitions demonstrate that the documents’ status within the agency will remain, in the words of the court, “enshrouded in considerable smog.”


The future of mine safety and health enforcement has never been so uncertain, nor the protections against the draconian penalties so tenuous. Until the Commission, its administrative law judges, and various federal courts have begun to rule en masse on the ambiguities presented by the flagrant violation recipe, mine operators will face uncertain costs, expenses and business risks with each violation issued, whether warranted or not. As a result, operators must do their best to predict and be poised to address the legal issues presented by § 110(b)(2) of the Mine Act.

[a] — Defining the Ambiguous Terms of § 110(B) of the Mine Act and 30 C.F.R. § 100.5(E) May Be the Focus of Future Litigation.

Due to the lack of interpretive guidance in the Act, regulations, policy, and Commission jurisprudence, it is evident that legal issues emanating from the issuance of flagrant violations will focus on defining the ambiguous terms found in the Mine Act and MSHA regulations. These essential terms and phrases include “reckless or repeated failure,” “reckless failure,” “repeated failure,” “mitigating circumstances,” “proximate cause,” and “flagrant.” Finding and creating definitions for these terms can only be accomplished through litigation since MSHA’s policy and regulations failed to resolve the ambiguity of the MINER Act. Litigation originating in such etymology is also likely to increase the already flourishing unwarrantable failure and significant and substantial caseload.
When a statute and regulations do not contain definitions of terms that are essential to the operation of the provision, statutory construction provides for the use of the ordinary meaning of the terms. While “[t]he language of a regulation or statute is the starting point for its interpretation,” mine operators do not have the luxury of wallowing in dense or descriptive statutory language in § 110(b).53 Here, the provision creating flagrant violations provides a negligible starting point. Another means of giving definition to terms is the tenet that “[t]he plain meaning governs unless a clearly expressed legislative intent is to the contrary, or unless such a plain meaning would lead to absurd results.” [citations omitted].54

In the case of flagrant violations, employing the dictionary definitions of the major terms does not extinguish the latent ambiguities. Using Black’s Law Dictionary, reckless is defined to include, “careless, heedless, inattentive; indifferent to consequences.”55 In addition, it could mean “desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent” in certain circumstances.56 Finally, the definition notes that, “for conduct to be reckless, it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.”57 Merriam-Webster defines reckless as “marked by lack of proper caution; careless of consequences.”58 Perhaps the most useful definition of “reckless” for operators defending against a flagrant allegation is found at 30 C.F.R. § 100(d), Table X (Civil Penalty Criteria) where “reckless disregard” is defined to mean “The operator

54  Id. at 1064. See also Bowles v. Seminole Rock and Sand Co. 325 U.S. 410 (1945)(finding that “a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . [b]ut the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”).
56  Id.
57  Id.
58  Merriam-Webster’s Online Dictionary, Reckless.
displayed conduct which exhibits the absence of the slightest degree of care.” While these explanations for the single word *reckless* are similar, many of the nuanced descriptions of the word are very different when applied to penalties, mine safety regulations, and enforcement actions. The divergent sets of definitions for *reckless* could establish three different levels of responsibility for mine operators. Without more clarity, mine operators, lawyers, administrative law judges, or even MSHA inspectors may use inconsistent definitions.

Just as is the case for *reckless*, defining *repeated* in the context of the flagrant violation language is elusive. Since many in the industry have construed § 110(b)(2) to create a type of elevated § 104(b) failure to abate order, narrowing the meaning of the phrase “reckless or repeated failure” is especially important.\(^{59}\) Unfortunately, Merriam-Webster’s definition of *repeated* leaves much to be desired in this case; it simply states that *repeated* is something that has been “renewed or recurring again and again,” or “said, done, or presented again.”\(^{60}\) The degree of recurrence or the specificity of what is renewed is not found in the dictionary definition of *repeated*, further complicating the resolution of the ambiguity of flagrant violation language.

The definition of *failure* faces the same consequences as *reckless* and *repeated*. Black’s Law Dictionary defines *failure* as “abandonment or defeat; failure of duty or obligation; lapse; deficiency, want, or lack; ineffectualness; inefficiency. . .; an unsuccessful attempt.” The explanation of lapse cannot be more opposed to abandonment; one evinces negligence, another wanton willful conduct. On the other hand, Merriam-Webster’s definition of *failure* is slightly more forgiving; it encompasses an “omission of occurrence or performance;” “an abrupt cessation of normal functioning;” a “lack of success;” or “a falling short.”\(^{61}\) This discrepancy between definitions and

\(^{59}\) Letter from Bruce Watzman, National Mining Association, to Patricia Silvey, MSHA (Nov. 8, 2006)(on file with authors).

\(^{60}\) Merriam-Webster’s Online Dictionary, *Repeated*.

\(^{61}\) Merriam-Webster’s Online Dictionary, *Failure*. 
even between descriptions leaves much to be desired on the interpretive front.

While using ordinary and plain definitions of terms in a statute or regulation is a widely recognized means of interpreting and understanding the requirements of the rule, employing definitions of the essential terms will not secure any further lucidity on flagrant violation standards. Despite the fact that a flagrant violation of the safety and health standards should be “conspicuously offensive”\(^{62}\) and apply to errors “so bad that they can neither escape notice nor be condoned,”\(^{63}\) the proper criteria for issuing these assessments cannot be discovered in any multitude of dictionaries.

With the failure of all these interpretive tools to justify MSHA’s policy documents, there is a strong argument that MSHA is not interpreting the flagrant violation in the most beneficial way to the statute. Had MSHA determined that the language “reckless or repeated failure” meant an elevated failure to abate order or penalty, the agency could have taken the opportunity to more directly create an elevated failure to abate order. This approach would have been much more certain and justifiable than ad hoc penalty increases that MSHA created under the policy documents. In fact, “[t]he Commission has repeatedly recognized that a regulation must be interpreted so as to harmonize and not to conflict with the objective of the statute it implements.”\(^{64}\) Certainly, creating redundant penalty provisions is not in harmony with the aim of the Mine and MINER Act; it decreases the credibility and incentives the agency worked so hard to foster.

**[b] — A Wholesale Increase in Caseloads Due to Flagrant Violation Contests Is Very Certain.**

The latent and patent ambiguity of § 110(b)(2) is calculated to lead to a very appreciable increase in enforcement contests. Richard Stickler,

\(^{62}\) Merriam-Webster’s Online Dictionary, *Flagrant*.

\(^{63}\) *Id.*

the former Assistant Secretary of Labor, testified in 2008 that the flagrant violations’ penalties are the largest penalties proposed in the agency’s history.65 Assessment of flagrant violations alone resulted in a doubling of MSHA’s issued civil penalties from $35 million in the 2006 calendar year to $75 million in 2007.66 Common sense dictates that with the increased penalties will come increased penalty contests, protracted litigation, and a potential for clarification or obfuscation of the flagrant violation standard. After all, flagrant violations play an integral role in MSHA’s publicized “comprehensive enforcement approach,” and its aim to “increas[e] penalties to a level that truly gets an operator’s attention.”67 No industry or agency insider has been able to predict with certainty the outcome of MSHA’s policy creation; the Regulatory Economic Analysis for MSHA’s final rule on civil penalties admits that “the Agency cannot estimate, at this point in the rulemaking process, the specific impact of this new requirement in the MINER Act. The Agency does, however, anticipate that penalties will increase due to this provision.”68

The Federal Mine Safety and Health Review Commission appreciates just how large an increase in adjudication flagrant violations will cause. In its 2007-2012 Strategic Plan, flagrant violations are preeminently featured because they, along with mandatory minimums for unwarrantable failure violations, “are expected to increase the number of operator contests filed

65 Changes and Enhancements of the Mine Safety and Health Administration: Statement before the Subcommittee on Employment and Workforce Safety, Committee on Health, Employment, Labor and Pensions (June 19, 2008)(statement of Richard Stickler, Acting Assistant Secretary of Labor)[hereinafter cited as Stickler Statement].
66 Id.
67 Stickler Statement. MSHA’s comprehensive enforcement scheme “consists of increasing MSHA’s presence at mine sites, improving the quality of each MSHA inspection, increasing the amount of penalties and aggressively going after scofflaw mine operators.” Id. MSHA asserts that it has “increased our number of enforcement personnel; implemented a new inspection tracking system; improved inspector training; enhanced overall inspection quality; and better utilized enforcement tools to aggressively deal with flagrant and repeat violators.” (emphasis added).
with the Commission and may affect the number of cases that go to hearing rather than to settlement."\(^{69}\) Specifically, the penalty changes, including flagrant violation assessments, have already been the cause of the dramatic increase in the number of contest cases at the Commission. While 2,440 cases were filed with the Commission in 2005, the number increased to 3,360 filed in fiscal year 2006, and exponentially jumped to 4,097 filed in 2007.\(^{70}\) It remains to be discovered whether these increased contests will serve to establish a clear doctrine for § 110(b)(2) actions or plunge them into further obscurity.

§ 9.03. Possible Legal Precedent.

The ambiguity inherent in the flagrant violation statutory, regulatory, and interpretive language is not resolved through authority from the administrative law judges, Commission, or federal courts. This vacuum of legal authority interpreting § 110(b)(2) has the potential to be very detrimental to those mine operators at the forefront of defending flagrant violations. Fortunately, the standards for flagrant violations are sufficiently similar to unwarrantable failure and failure to abate actions to allow legal comparisons to be drawn.


Despite the 91 flagrant violations issued since 2006, no legal interpretation of the provisions has developed by virtue of administrative law judges, the Federal Mine Safety and Health Review Commission, or the various federal courts that assert jurisdiction over MSHA proceedings. As a result, mine operators that have already been assessed flagrant violations must look to other authority to shape a defense to these violations and be vigilant for new case developments.

So far, at least three of the flagrant violations issued in 2006 have settled. While these proceedings do not develop a body of interpretation, at the very

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\(^{70}\) *Id.*
least they can serve as examples and forecast future issues. In *McElroy Coal Company*, Docket No. WEVA 2008-987 (Mar. 16, 2009), Judge Weisberger granted a motion for settlement of a flagrant violation issued in November, 2007. The settlement motion sheds light on the type of proceeding mine operators can expect until the ambiguity surrounding the flagrant violation process is alleviated. The flagrant violation being contested in *McElroy* took the form of a § 104(d)(2) order alleging a violation of 30 C.F.R. § 75.400 with high negligence. The violation asserted that coal dust, loose coal, and float coal dust ranging from 18-24 inches deep, 12 feet wide and 12 to 35 feet long was allowed to accumulate in front, under, and around the tailpiece, along the conveyor beltline, and on the belt itself. The motion mentions that the mine had been issued 364 violations for non-compliance with § 75.400 in the previous 24-month period.

Justifying the penalty-only reduction from $154,500 to $85,000, the Secretary of Labor’s attorney noted that the mine operator would advance arguments to mitigate the violation. These contentions included that accumulations were fluid and required pumping in lieu of shoveling to clean, no methane or hot rollers existed to provide an ignition source, the belt had broken down causing spillage, and the operator complied with its approved clean-up plan. While it is impossible to know which arguments would have prevailed at hearing, the solicitor admits that, “Due to the uncertainties of litigation, the parties have chosen to resolve this violation amicably rather than bring it to trial before the Administrative Law Judge.” This admission demonstrates just how ambiguous flagrant violation assessments will remain.

In a case that settled with a far different outcome, the mine operator and Solicitor of Labor agreed to modify the flagrantly assessed § 104(d)(1)

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72 *Id.*
73 *Id.* at 2.
74 *Id.* at 2-3.
75 *Id.* at 3.
76 *Id.*
order to a § 104(a), moderate negligence citation.\textsuperscript{77} In addition to the value concession of a modified flagrant violation, the penalty reduction to $25,000 accompanying the modification was roughly 85 percent of the original assessment of $164,700.\textsuperscript{78} The § 104(d)(1) high negligence citation for a flagrant violation of § 75.400 contended that coal accumulations were stored underground.\textsuperscript{79} Fortunately for the mine operator, it was able to assert that the alleged accumulations were gob, or waste materials, that were permitted to be stored underground.\textsuperscript{80} While the solicitor did not explicitly give credence to these arguments, the recognition of litigation risk, along with the operator’s evidence, were cited as the reasons for the modification.\textsuperscript{81}

Finally, an administrative law judge approved a settlement removing the flagrant classification and modifying the penalty from $151,600 to $45,000.\textsuperscript{82} The violation was issued for contravention of the approved roof control plan’s limitation of crosscuts being advanced only 30 feet beyond the last full row of permanent support.\textsuperscript{83} The operator allegedly advanced a crosscut 13 feet beyond the limitation and MSHA asserted that the condition was a flagrant violation based on previous repeated violations of different provisions of its roof control plan.\textsuperscript{84} In the end, the assessment was modified because MSHA concluded that the operator’s “negligence, while high, does not rise to a level of repeated misconduct that justifies a flagrant violation classification.”\textsuperscript{85} This language sounds as though MSHA decided to issue the flagrant only if an operator refused to comply with previous orders, perhaps as an elevated § 104(b) action, and deviate from its published policy.

Analysis of these settlement decisions brings home the proposition that authority for defending flagrant violations and destroying their ambiguity

\begin{footnotes}
\item[78] Id. at 2.
\item[79] Id.
\item[80] Id.
\item[81] Id. at 1.
\item[83] Id.
\item[84] Id.
\item[85] Id.
\end{footnotes}
may not be entirely created in the near future. With the Secretary of Labor willing to settle flagrant violations for significant amounts when warranted, most mine operators could not afford to take the risk of litigation. Even though both settlement motions asserted that these penalties would not impede the operator’s ability to continue in business, few coal companies would be willing to gamble with such large financial liabilities. As a result of this understandable reticence, mine operators who do choose to defend against their flagrant violations may turn to the established defenses to unwarrantable failure and failure to abate actions for other guidance.


Since the criteria MSHA is drafting for the assessment of flagrant violations includes a requirement that the violation be an unwarrantable failure, basing a defense on the well-established body of § 104(d) decisions may be the most certain tool in an operator’s arsenal. Under MSHA’s policy, if a violation is no longer upheld as an unwarrantable failure citation or order, the violation does not qualify as a flagrant violation. As a result, operators and their counsel whose situations do not qualify as unwarrantable failure under the factors discussed below may be able to defeat a flagrant violation assessment.

The Mine Act provides for an elevated enforcement action in §§ 104(d)(1) and 104(d)(2), colloquially known as the “§ 104(d) chain.”

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could

significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.\(^88\)

Federal courts and the Commission have long acknowledged that the section 104(d) “chain” of citations and withdrawal orders, keyed to the operator’s unwarrantable failure to comply, are “among the Secretary’s most powerful instruments for enforcing mine safety.”\(^89\)

Unlike flagrant violations, unwarrantable failure determinations have been contested for decades. The Commission has honed the criteria for unwarrantable failure actions into a discrete body of authority in which operators can defend their cases. The Federal Mine Safety and Health Review Commission (“Commission”) has determined that unwarrantable failure to comply with mandatory safety or health standards is aggravated conduct constituting more than ordinary negligence, such as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.”\(^90\) In *Emery*, the Commission found that this “forceful incentive” required further explanation, and the Commission determined that *unwarrantable* should be defined as “‘not justified’ or ‘inexcusable’” while *failure* was the “‘neglect of an assigned, expected, or appropriate action.’”\(^91\) Using the ordinary meaning of the terms because it did not lead to an absurd result, as discussed above, the Commission found that construing


\(^{90}\) *Id.* at 2001-2004 (Dec. 1987); San Juan Coal Co., Docket No. CENT 2004-212 (Mar. 2007); Cougar Coal Co., Docket No. KENT 2000-133 (Sept. 2003). *See also* Buck Creek Coal, Inc., v. MSHA, 52 F.3d 13 (7th Cir. 1995) (approving the Commission’s unwarrantable failure determinations).

unwarrantable failure to mean aggravated conduct more than ordinary negligence was in harmony with the Mine Act’s elevated enforcement scheme. Arguably, the treatment of flagrant violation assessments is not in harmony with the Mine Act; MSHA’s faltering interpretation will lead to awkward and disjointed enforcement.

In order to justify a finding of unwarrantable failure, an adjudicative body must determine whether aggravating factors exist. These factors include the extensiveness of the condition that led to the violation, the length of time the condition existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. Use of the unwarrantable failure factors is entirely fact driven; they “must be examined in the context of all relevant facts and circumstances of each case to determine if an operator’s conduct is aggravated, or whether an operator’s negligence should be mitigated.” The Commission and administrative law judges cannot selectively rely on certain factors in their determination; while not all factors may be relevant to a certain situation, a judge cannot exclude a factor in favor of another.

Together, this body of authority on unwarrantable failure could assist mine operators floundering for a well-established means to defend or negotiate against a flagrant violation.

92  Id.
93  Id. “The Mine Act’s use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme.” (citing Cf. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C. Cir. 1984); National Insulation Transp. Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982)).
[3] — Relevancy of § 104(b) Failure to Abate Authority.

The Commission and administrative law judges have encountered fewer contests of failure to abate withdrawal orders issued under authority of § 104(b), perhaps due to MSHA’s reasoned use of the enforcement tool. However, the concept of § 104(b), when juxtaposed with the new flagrant violation provisions, form a logical case for the proposition that flagrant violations were intended by Congress to be an elevated § 104(b) order. Such an elevated order would sensibly and harmoniously create an avenue for MSHA to punish and even reform those operators who refuse, even after penalties and withdrawal orders, to abate a violative condition.

Section 104(b) of the Mine Act sets forth a graduated enforcement action where an operator fails to resolve, fix, and abate a cited violative condition. It provides,

(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.97

The provision of the failure to abate language in § 104(b) fits seamlessly and harmoniously with the language and aim of flagrant violations, to punish “reckless or repeated failure” to comply with mandatory safety or health standards.

During the open comment period for MSHA’s final rule on civil penalty assessment criteria, the National Mining Association (NMA), among others, appealed to MSHA’s Office of Standard, Regulations, and Variances to see reason. The comment reasoned that the MINER Act § 8(a)(2), the flagrant violation provision, amends § 110(b) and not § 110(a), and as such the rule is “related to penalties for failure to correct a violation described in a citation issued under § 104(a) of the Mine Act.” The NMA argues the proposition that flagrant violations apply to § 104(b) deserves notice and comment rulemaking, “not merely implementation through a policy document, which deprives the industry of the ability to provide comments.” As one comment stated even more succinctly, “[i]t is not reasonable to act on the premise that Congress wanted to give MSHA two avenues to the same end as the proposed regulation and PIL stipulate.”

In addition, a representative Commission opinion discussing the requirements for a properly issued § 104(b) order lends an operator possible defenses to the “repeated” classification of flagrant violation. Mid-Continent Resources determined that MSHA must prove that the allegedly unabated violative condition “continuously existed” from the time of the predicate citation was issued until the issuance of the § 104(b) order. This is much more consistent with the statutory mandate than the “repeated” flagrant violation criteria because a mere two previous orders in 15 months on the same standard does not evidence even a failure to abate order.

Finally, an operator should point an over-zealous MSHA inspector or district manager to its own citation and order writing handbook if faced with a flagrant violation categorized as “repeat failure.” Under its own admission, MSHA has determined, but not publicized, that prior citations for “repeated” flagrants must be citing the identical subsection and be written as § 104(d)(1) or 104(d)(2) enforcement actions. This will be a very helpful defense if an

98 Letter from Bruce Watzman, National Mining Association, to Patricia Silvey, MSHA (Nov. 8, 2006)(on file with authors).
99 Id.
100 Letter from Bruce Springer, Essroc Cement Corp. to Patricia Silvey, MSHA (Nov. 9, 2006)(on file with authors).
inspector writes a flagrant violation for example, on the previous violation of 30 C.F.R. § 75.202(a) and 30 C.F.R. § 75.202(b).

§ 9.04. Possible Specific Legal Defenses.

Due to the high stakes and large penalties associated with flagrant violations, mine operators must be especially vigilant in both avoiding and defending against their issuance. As discussed in this chapter, determining the most opportune legal defense to a flagrant violation will be fraught with hardship; without established legal and regulatory guidance, an operator may struggle to determine the most effective arguments against MSHA’s issuance of the flagrant violation.


Preeminent among the possible defenses to flagrant violations is simple but fail-safe: avoiding issuance of a violation that could be assessed as flagrant in the first place is sure to be effective. This defense is obviously much easier in theory than in practice, but there are several practices a mine can implement to prevent flagrant violations. Continuously seeking to improve compliance efforts and documenting those efforts will be helpful in the defense of flagrant violations.

[a] — Training.

The most important point to ensure miners and managers comprehend is that successful defense of enforcement actions, especially such elevated means as flagrant violations, all emanates from the facts in the mine at the specific time the citation is written. It is absolutely critical for the operator’s representatives to capture the facts contemporaneously with the MSHA inspection; otherwise the only version of the conditions surrounding the issuance of the flagrant violation is the inspector’s construction. To that end, operators attempting to avoid flagrant violations must have a walk-around representative to collect notes and information along with the inspector. This representative cannot impede or otherwise be confrontational with the MSHA inspector, but can effectively serve as a check where an inspector may otherwise feel free to “embellish” the situation. Specific enforcement
avoidance training demonstrates to all responsible miners how to properly accompany an inspector and collect the facts that will help rebuff the finding of liability. By defending the company against over-written and over-issued flagrant violations before and while they are issued, operators can become proactive and the first defense against these enforcement actions.

[b] — Self-Assessment.
A useful complement to thorough and mine-wide safety and enforcement avoidance training is a regular regime of self-assessment. By having a current and accurate grasp of all the mine’s citations and orders, a safety director or other manager will effectively allocate resources to ensure proper compliance. Citation and order tracking that demonstrates weaknesses with compliance with certain regulations will enable the miners to be especially vigilant to ensure that i) the unwarrantable factors are not met, ii) no inspector could impute a reckless disregard level of negligence, and iii) no more than one unwarrantable failure action per regulation is allowed to occur. While this concept appears burdensome and time consuming to managers that have many significant concerns, numerous means of efficient and quick tracking of a mine’s violation history exist. MSHA, as a government agency, provides information on each mine’s citations, orders, inspections, violations, accidents, and production online. This data retrieval system presents the information necessary to track history in an easily accessible cache. Other mines may use their in-house safety directors, directors of human resources, general counsel, or outside counsel to maintain these records in a customized format fitted to the mine’s strengths and weaknesses. Regardless of the means used, a mine must be constantly vigilant of its enforcement history, compliance weaknesses, and safety deficiencies in order to keep operations safe, efficient, and free of burdensome enforcement actions.

[c] — Creative Problem-Solving.
Along with training and self-assessment, creative problem-solving of compliance and mine condition weaknesses will salve the potential for flagrant violations. As the unwarrantable failure case of Emery Mining teaches, taking extraordinary measures beyond those necessary to comply with the letter
of the law will, at the very least, mitigate the circumstances surrounding the violation. Operators must walk a fine line between acknowledging the existence of adverse or violative conditions and attempts to remedy them; in other words, an operator must be sure whatever measures it takes to fix a situation will be effective, and should closely monitor and record the results. Compounded with training and self-assessment, an operator willing to go beyond the requirements of the law to ensure the safety of its miners will insulate itself from flagrant violations.

[a] — Significant and Substantial Modification.

An operator faced with a flagrant violation may find it necessary to attack the significant and substantial designation of gravity found in the citation or order. If successful, modification from a significant and substantial designation to a non-significant and substantial one could transform the tenor of the violation. The interpretation of significant and substantial designations has been explained by the Federal Mine Safety and Health Review Commission starting with its decision in Mathies Coal Co.102 Mathies set forth a four part test for determining whether a particular violation should be considered significant and substantial: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

While the first element is relatively self-explanatory, the second, third, and fourth elements have been the subject of much debate and litigation and the Commission has further defined those terms. The Commission has held that the second element that MSHA must prove to show S&S, “discrete safety hazard,” is a “recognition that the violation must be more than a mere technical violation — i.e., that the violation present a measure of danger.”103

Further, the Commission has emphasized that “it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.”

The third element of the Mathies test, the “reasonable likelihood” test is perhaps the most litigated factor and is often combined in the analysis with the fourth factor, whether the injury will be of a reasonably serious nature. The Commission has repeatedly held that significant and substantial determinations must be based upon the particular facts surrounding the violation in issue assuming continued normal mining operations. Conditions in other mines or over extended periods are not relevant. The Commission has emphasized that “[t]he third prong of the test for S&S is whether there exists a reasonable likelihood that the hazard contributed to will (not could) result in an injury or illness of a reasonably serious nature.” This is an important point because inspectors will often phrase their findings by noting what could happen in a worst-case scenario and fail to consider what is actually reasonably likely given the particular facts and circumstances, including mitigating factors, present at the mine. It is important to remember that, just as a baseball player must touch all four bases to score a run, MSHA must prove all four elements to uphold the significant and substantial gravity. If facts can be shown that disprove any one element, then a finding of significant and substantial cannot be sustained, and the flagrant violation may be severely curtailed or even destroyed.

[b] — Unwarrantable Failure Modification.

Fortunately for mine operators, the Commission has vacated numerous unwarrantable failure determinations in which the administrative law judge or MSHA incorrectly examined the unwarrantable factors. In Virginia Slate

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107 San Juan Coal Co., Docket No. CENT 2004-212 (Mar. 2007)(holding that the judge erred in considering the factors as a whole and individually by discounting previous
Company, the Commission vacated and remanded a judge’s unwarrantable failure determinations where the judge offered no specific evidence in support of his determination that an unwarrantable failure had occurred. The Commission held that a judge cannot ignore relevant evidence and analyze other evidence too narrowly when determining whether the unwarrantable failure factors were met.\textsuperscript{108} Defenses to unwarrantable failure determinations have also developed out of the factors listed in Emery Mining. For example, Cyprus Emerald Resources recognized a limited defense of estoppel for unwarrantability based on the factors where MSHA overlooked the condition for 18 years.\textsuperscript{109} In Cyprus, the Commission found unwarrantable failure to comply despite the fact that MSHA had failed to cite the condition for 18 years because, although “‘[t]he standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man under the circumstances,’” the defense does not apply to operators that remain “volitionally ignorant.”\textsuperscript{110} In the foundation case of Emery Mining, the Commission held that an operator did not commit an unwarrantable failure because it took extraordinary measures to provide adequate roof support, lending more credibility to the mitigating circumstances than to the danger factors.\textsuperscript{111}

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\textsuperscript{108} Virginia Slate Co., Docket No. VA 99-8 (June 2002)(vacating and remanding a judge’s unwarrantable failure determinations where the judge offered no specific evidence in support, ignored relevant evidence, and analyzed evidence too narrowly).
\textsuperscript{109} Cyprus Emerald Resources, Docket No. PENN 94-23 (Aug. 1998)(recognizing a limited defense of estoppel for unwarrantability based on the factors where MSHA overlooked the condition for 18 years)(quoting Secretary of Labor v. FMSHRC, 111 F.3d 913, 919-20 (D.C. Cir. 1997)).
\textsuperscript{110} \textit{Id. (quoting Secretary of Labor v. FMSHRC, 111 F.3d 913, 919-20 (D.C. Cir. 1997))}.
\textsuperscript{111} Emery Mining Corp., 9 F.M.S.H.R.C. at 2004-05.

In addition to the legal defenses enumerated, brave mine operators that are willing to contest the manner in which MSHA promulgated its policy on flagrant violations may contend that its due process rights were violated by the improper creation of rules that affect its individual and property rights. The discussion, infra concerning the proper rulemaking procedures were arguably not followed by MSHA, and an operator may prevail at the Commission or federal court level in getting the regulation invalidated. The arbitrary nature of MSHA’s flagrant violation policies may also lend a claim of inadequate notice of enforcement; a regulated individual has a right to know when his behavior transgresses a rule. Without clear standards consistently applied, a mine operator may not know from day to day whether its behavior renders it liable for a flagrant violation. Finally, the fact that the flagrant violation penalties are so large compared to the enforcement action may create an argument for smaller mine operators that the government is depriving it of the ability to stay in business. Penalties of hundreds of thousands of dollars may cause some operators to declare bankruptcy even before the resolution of a contest proceeding. A government agency must give notice and opportunity to be heard before infringing on individual or property rights, and shutting down a mine for failure to pay a penalty or causing bankruptcy is inconsistent with due process and public policy, respectively. Contesting MSHA’s policy and regulations outright is more risky than the more traditional, established defenses to enforcement actions.

§ 9.05. Conclusion.

Flagrant violations are quickly becoming an established enforcement action. The statistics prove that these cumbersome actions will not be used sparingly. With less than clear language and expectations and policy documents purporting to create overly burdensome compliance expectations, mine operators will likely contest these flagrants en masse. Without an established body of authority interpreting § 110(b), its meaning, its proper implementation, or defenses, mine operators will be forced to create and test defenses and interpretations of their own. This uncertainty is unsettling in the face of $220,000 penalties for a single violation, and there is a risk operators
will settle many of these actions, thereby short-circuiting any chance of assuaging the latent ambiguity of the flagrant violation regime.

While no one can peer into the future or anticipate MSHA’s next initiatives when it comes to enforcing flagrant violations, mine operators can control their liability by 1) being proactive with safety campaigns within the company to prevent potential conditions from existing which might substantiate the flagrant assessment criteria, 2) becoming self-aware and tracking violation history, and 3) developing new and innovative means of solving compliance shortcomings (as well as documenting those new means and methods).
Special Assessment Narrative Form

Flagrant Violations

Mine Operator:
Mine Name:
Mine ID/Contractor ID:
Citation/Order No:
Type of Action:
Section 30 CFR:
Mine Act:
Issue date

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<td>Proposed Penalty Amount</td>
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<td></td>
</tr>
<tr>
<td>Special Assessment Calculation from Table(s)</td>
<td>$220,000</td>
<td></td>
</tr>
<tr>
<td>Plus 25%</td>
<td></td>
<td>$220,000</td>
</tr>
<tr>
<td>Minus 25%</td>
<td></td>
<td>$165,000</td>
</tr>
<tr>
<td>Proposed Special Assessment</td>
<td></td>
<td>$220,000</td>
</tr>
</tbody>
</table>

Derived from an issued special assessment form