

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 30, 1997

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| | : | |
| v. | : | Docket No. KENT 95-214 |
| | : | |
| ISLAND CREEK COAL COMPANY | : | |

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners¹

DECISION

BY: Jordan, Chairman; Marks and Riley, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@or AAct@). At issue is the finding of Administrative Law Judge T. Todd Hodgdon that an escape of methane onto a working section from a cut-through core drill hole did not constitute an unplanned inundation of gas, and that therefore Island Creek Coal Company (AIsland Creek@) did not violate 30 C.F.R. ' 50.10, which requires operators to immediately report certain accidents to the Department of Labor's Mine Safety and Health Administration (AMSHA@). 18 FMSHRC 1498 (August 1996) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination. For the reasons that follow, we reverse and remand for assessment of an appropriate civil penalty.

¹ Commissioner Beatty assumed office after this case had been considered and decided at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

I.

Factual and Procedural Background

Island Creek operates the Ohio No. 11 Mine, an underground coal mine with four working sections. 18 FMSHRC at 1500. At around 6:45 p.m. on April 7, 1994, while mining a crosscut between the No. 5 and 6 entries on the 004 section, a continuous miner cut through a core drill hole.² *Id.*; Tr. 41. The core drill hole went from the No. 11 seam, where mining was taking place, to the No. 9 seam below it. 18 FMSHRC at 1500. The No. 9 seam had been sealed for years and contained methane gas under pressure. *Id.*; Gatlin Dep. 15-16, 19.³

² As the judge explained:

A core drill is a mechanism designed to rotate and cause an annular-shaped rock cutting bit to penetrate rock formations, produce cylindrical cores of the formations penetrated, and lift such cores to the surface, where they may be collected and examined. Thus, a core drill hole is the hole remaining after the core has been removed.

18 FMSHRC at 1500 n.1 (quoting U.S. Dept of Interior, *Dictionary of Mining, Mineral, and Related Terms* 266 (1968)).

³ General mine foreman Tommy Gatlin did not attend the April 10, 1996, hearing in this matter. Tr. 26-32. Gatlin was deposed on May 7, 1996, and his deposition was admitted into evidence as Govt Ex. 3. Tr. 213.

When the cut-through occurred, methane from the No. 9 seam poured onto the 004 section. 18 FMSHRC at 1500. The continuous mining machine shut down when its methane monitor detected 1.5 to 2 % methane. Tr. 25; Gatlin Dep. 12. Eleven miners were at work on the 004 section at the time of the cut-through. Tr. 23.

The second shift foreman, John Cambron, measured 3 to 3.5 % methane in an area adjacent to the crosscut where the core drill hole was cut. 18 FMSHRC at 1500; Tr. 135. Cambron then directed that the ventilation curtain be extended in the No. 5 entry and, after 3 minutes, took a methane reading that showed less than 1 % methane. 18 FMSHRC at 1500; Tr. 135-37. Cambron then sent the crew to the No. 5 section, except for three miners whom he retained to help him deal with the methane. Tr. 137. Next, Cambron had timbers set on the miner itself so that ventilation curtains could be hung to deflect methane away from the immobilized equipment. Tr. 137-40. At about 9:00 p.m., before attempting to move the miner, Cambron called his superior, Tommy Gatlin, General Mine Foreman, to inform him of the situation.⁴ Tr. 138; Gatlin Dep. 4-5, 13; Gov. Ex. 2, at p.1. Cambron told Gatlin that he thought he had hit a bleeder, and that he would keep him informed. Gatlin Dep. 11. Gatlin understood Cambron to mean that methane was being released from the coal being mined. *Id.*

Cambron then attempted to move the miner, which was being operated by remote control, out of the crosscut. Tr. 139-40. Cambron had power restored to the miner and began backing it out of the crosscut, but after moving it about 10 feet, the timbers holding the ventilation curtain became dislodged, the curtain fell, and the miner shut down due to higher methane concentrations recorded by the miner's methane monitor. Tr. 140. The timbers were then reset and the curtain rehung, the methane level dropped below 1 %, and Cambron again attempted to move the miner out of the crosscut. *Id.* Again, the miner moved about 10 feet before the timbers and curtain fell and the miner shut down. Tr. 140-41. Cambron once again had the timbers and curtain replaced and, on the third attempt, was able to back the miner out of the crosscut. Tr. 141. He then had timbers set and curtains hung to within about 9 feet of the source of the methane. *Id.* The volume of air was also increased from 16,000 cfm to over 29,000 cfm. Tr. 65, 147. Aside from the occasions when the ventilation controls were dislodged, and the 3.5% reading when Cambron initially came onto the section, Cambron did not encounter more than 1 % methane at any point where he tested for methane. Tr. 143.

At about midnight, Cambron called Gatlin to update him on efforts to control the methane. Gatlin Dep. 13-14. He reported that stoppings were being built, and that the source of the methane was a bore hole.⁵ *Id.* Gatlin then proceeded to the mine, arriving at 12:45 a.m. on April 8. *Id.* at 14. When he got to the section, Gatlin could hear the methane blowing out of the core drill hole from 200 feet away. *Id.* at 15. He then realized that the situation was more serious than Cambron had first indicated, because this was not a bleeder, meaning liberation of methane

⁴ Gatlin was at home at the time of the incident. Gatlin Dep. 10-11.

⁵ Witnesses used the terms bore hole and core drill hole interchangeably.

built up in the coal bed. Instead, it was a core drill[] hole that was drilled below the No. 11 seam, and [Gatlin] wasn't sure how far down it went.@ *Id.* at 15-16. Cambron testified that, in 25 years of mining, he had never cut into a hole that blew as hard, or for as long, as this one. Tr. 162. Gatlin took several methane readings while on the section. Gatlin Dep. 19. On the return side of the wing curtain, he encountered 1.5 or 1.6 % methane. *Id.* Standing on top of the hole, Gatlin measured 5 % methane, in the explosive range. *Id.* at 19-20. Gatlin then shut off his detector. *Id.* at 19.

Gatlin made several unsuccessful attempts to staunch the flow of methane from the core drill hole. Gatlin Dep. 17-18. First, he tried to plug the hole with a trolley pole. *Id.* at 17. When that proved unsuccessful, he tried to cover the hole with a board and piece of steel pipe. *Id.* That attempt also failed; Gatlin couldn't actually see the hole because the escaping methane blew coal fines, mixed with water that had come from the roof and accumulated on the floor, in Gatlin's face. *Id.* at 17-18, 26-27.

At 1:30 a.m. and 5:45 a.m. on April 8, Gatlin telephoned his superior, David Bruce Beaven, Superintendent of the Ohio No. 11 Mine, who was in Mt. Vernon, Illinois, at the time. Gatlin Dep. 24-25; Tr. 169. He related the incident to Beaven, and the two concluded that, because there were no injuries and no hazard to employees, MSHA need not be called. Tr. 181-82; Gatlin Dep. 25. However, Beaven told Gatlin to inform MSHA as a courtesy@because the incident was a little out of the usual.@ Tr. 183-84. Beaven himself reported the incident to Island Creek's Regional Manager and Regional Safety Director. *Id.* at 184, 198.

At around 7:00 a.m. on April 8, Gatlin called the local MSHA office as a courtesy@to report the incident. 18 FMSHRC at 1500. MSHA Inspector Robert Jaco thereupon issued a verbal withdrawal order under section 103(k) of the Mine Act, 30 U.S.C. ' 813(k), and he and MSHA Inspector Archie Coburn proceeded to the mine. *Id.* at 1500-01; Gatlin Dep. 28. When they reached the No. 2 entry on 004 section, they could hear a roaring sound@coming from the face. Tr. 42. Inspector Coburn took a methane reading in the last open crosscut between the No. 5 and 6 entries and recorded 1 to 1.5 % methane. *Id.* at 65-66. Inspector Jaco measured 2.5 to 2.6 % methane 10 feet from the core drill hole. *Id.* at 80-81, 102. Bottle samples taken in the No. 6 entry between the first two crosscuts, and in the last open crosscut between the No. 5 and 6 entries, showed .62 and .96 % methane, respectively. *Id.* at 118-21.

At 11:30 a.m. on April 8, Coburn issued Citation No. 3859779 to Island Creek under section 104(a) of the Mine Act for a significant and substantial (AS&S@) violation of section 50.10. The citation states:

Mine Management failed to notify MSHA immediately after the mine experienced a non-injury accident on April 7, 1994 at 1845 hrs. A core drill hole was cut through on the 004-0 MMU. MSHA was notified by phone on April 8, 1994 at 0700 a.m.

Jt. Ex. 1.

Island Creek made additional attempts to plug the flow of methane. First, a mortared block-wall seal was built over the hole; however, methane migrated onto the section through the cinder blocks. Tr. 25-26, 191. A second seal was then built in front of the first seal, and the space between them was filled with foam. Tr. 25-26. This attempt was also unsuccessful. Tr. 26. On April 13, 1994, Island Creek succeeded in stemming the flow of methane by drilling a hole to the surface to vent the pressurized gas. 18 FMSHRC at 1501.

The judge concluded that the core drill hole incident did not constitute an *unplanned inundation of a mine* under 30 C.F.R. § 50.2(h)(4), and therefore was not an *accident* that had to be immediately reported to MSHA pursuant to section 50.10. 18 FMSHRC at 1501. The judge determined that a *reasonably prudent person* would not have known that section 50.10 required the reporting of the incident because section 50.2(h)(4), on its face, *speaks of the inundation of a mine, not a part, sections, entries or crosscuts of a mine.* *Id.* at 1501-02. Reasoning that *the gases released did not flood the entire mine or even a large section of the workings,* the judge concluded that Island Creek did not violate section 50.10 by not immediately reporting the incident. *Id.* at 1502.

II.

Disposition

The Secretary argues that the judge erred in construing *inundation* to refer only to inundation of the entire mine. S. Br. at 6. Urging the Commission to defer to her interpretation of her own regulations, the Secretary notes that section 50.2(h)(4) does not refer to inundation of an *entire mine*. *Id.* at 6-8. The Secretary observes that the inrush of gas in this case is consistent with the dictionary definition of *inundation*, and that *mine* is defined in Part 50 to include enumerated portions of an entire mining facility. *Id.* at 9-10. She contends that her interpretation of *inundation* as including an inrush of gas that is less than mine-wide is consistent with the other specifications of *accident* contained in section 50.2, none of which describe mine-wide incidents. *Id.* at 11-12. The Secretary also argues that her interpretation of *inundation* is consistent with the safety-promoting purpose of the regulation. *Id.* at 12-15.

Island Creek responds that the Secretary's interpretation of *inundation* is not entitled to deference because it was not shown to be well established or consistently applied, and *was not conceived until after the decision below had been entered.* I.C. Br. at 5-7. Island Creek contends that it never received fair notice of the Secretary's interpretation of *inundation.* *Id.* at 7. The operator asserts that, contrary to the Secretary's argument, the judge did not interpret *inundation* to apply only to mine-wide incidents, noting that the judge found that the inrush of gas did not flood *a large section of the workings.* *Id.* at 9 (citation omitted). Island Creek argues that, under the Secretary's interpretation, every methane release, no matter how small in magnitude, would constitute a reportable accident. *Id.* at 11.

A. Violation

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted). See also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. See *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (Agency's interpretation . . . is of controlling weight unless it is plainly erroneous or inconsistent with the regulation) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)). See also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

Section 50.10 provides that A[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. Section 50.2(h) defines Accident to mean any of 12 events. One of those definitions, set forth in section 50.2(h)(4), states that Accident means A[a]n unplanned inundation of a mine by a liquid or gas. Before the judge, it was undisputed that the core drill hole incident was not immediately reported to MSHA, and that the cut-through was Aunplanned within the meaning of section 50.2(h)(4). 18 FMSHRC at 1501; Tr. 59. Thus, the main issue below was whether the flow of methane onto the section constituted an AInundation of a mine.

The regulations do not define AInundation. In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). AInundate and AInundation are defined as Aa rising and spreading of water over land not usu[ally] submerged: FLOOD . . . DELUGE and ASUBMERGE . . . to overwhelm by great numbers or a superfluity of something: SWAMP[.] Webster's Third New Int'l Dictionary (Unabridged) 1188 (1986). AFlood is in turn defined, in relevant part, as Aan outpouring of considerable extent . . . a great stream of something . . . that flows in a steady course . . . a large quantity widely diffused: SUPERABUNDANCE[.] Id. at 873. ADeluge is defined as Aan irresistible rush of something (as in overwhelming numbers, quantity, or volume) . . . a forceful jet of water (as from a fire hose)[.] Id. at 598.

Because the meaning of the term "inundation" as used in the regulation is open to alternative interpretations, as reflected in the dictionary definitions, we conclude that it is in some respects ambiguous. See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."). As the Court stated in *Boston & Maine*, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." 503 U.S. at 418. Our conclusion that "inundation" is ambiguous as applied to the methane inrush at the Ohio No. 11 Mine requires us to decide whether the Secretary's interpretation of the provision is reasonable. The judge essentially skipped this primary inquiry of whether the Secretary has advanced a permissible interpretation of the regulation, and proceeded directly to analyze the fair notice issue. Our precedent makes clear, however, that these questions are distinct. See, e.g., *Morton Int'l, Inc.*, 18 FMSHRC 533, 538-39 (April 1996).

The Secretary interprets "inundation" to include less than mine-wide methane flows such as occurred in this case. S. Br. at 6. The Secretary argues that the focus of the ordinary meaning of "inundation" is on "the process of the water flowing in" not, as the judge's interpretation does, on whether the water has already spread so as to submerge all land not usually submerged. *Id.* at 9. The judge, and Island Creek, rely on the definition of "inundation" contained in the U.S. Dept. of Interior, *Dictionary of Mining, Mineral, and Related Terms* (DMMRT). 18 FMSHRC at 1502; I.C. Br. at 8 n.5.

The Secretary correctly focuses on the process of inundation, apparently arguing that the relevant fact was the "rising" and "spreading" of the gas that constituted the inundation, not the size of the area where the substance eventually landed. S. Br. at 9. Furthermore, the definition of "deluge" is consistent with the situation on the 004 section on April 7-8, as the core drill hole essentially released a "forceful jet" of methane.

We note that other elements of the definitions include "swamping" or "overwhelming" of the inundated area and the "considerable extent" and "widely diffused" nature of the inrushing material. This last characteristic is featured in the DMMRT definition of "inundation."⁶ However, the Secretary is not required to cover every aspect of the definitions, as long as her interpretation is consistent with common usage and ordinary meaning.

Thus, although the judge appears to have relied on the DMMRT definition of "inundation," the Secretary is not obliged to adopt it in interpreting the regulation. It is true, as the judge stated, that the Commission took note of this definition in *Aluminum Co. of America*, 15 FMSHRC 1821, 1825 n.8. (September 1993). 18 FMSHRC at 1502. As Island Creek concedes, however, that case "did not turn upon the definition of inundation," I.C. Br. at 8 n.5, and, as the

⁶ The DMMRT defines "inundation" as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." DMMRT at 587.

Secretary points out, the Commission did not expressly adopt the *DMMRT* reading.⁷ S. Br. at 10 n.3. In any case, while the *DMMRT* definition may be plausible, the Commission does not substitute its judgment for the Secretary's so long as the Secretary's interpretation is reasonable. See, e.g., *General Elec.*, 53 F.3d at 1327.

The dissent, relying on several dictionaries and a thesaurus, mistakenly asserts that *inundation* has only been defined to mean the *swamp[ing]* or *overwhelm[ing]* of a generally a large area. Slip op. at 14. While the reference works cited by the dissent contain this reading of *inundation*, some also include another sense of the term that supports the Secretary's interpretation. For example, *Webster's* at 1188, the *Random House Dictionary of the English Language (Unabridged)* 1002 (2d ed. 1987) and the *Random House Thesaurus* 393 (College ed. 1984) include the sense of *deluge* which, according to the *Thesaurus*, *id.* at 193, is synonymous with *arrage*, *torrent*, and *spate*. *Torrent* is in turn defined in a sense similar to that of *deluge*, i.e., *a stream of water flowing with great rapidity and violence[;] a rushing, violent, or abundant and unceasing stream of anything[.]* *Random House Dictionary* at 1999; see also *Webster's* at 2413 (*a violent stream of a liquid*).

This case is thus readily distinguishable from *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), cited by the dissent (see slip op. at 16). *MCI* involved the *arity* of a meaning set forth in a single dictionary . . . which not only *supplements* the meaning contained in all other dictionaries, but *contradicts* one of the meanings contained in virtually all other dictionaries. 512 U.S. at 227. Here, the connotation of *inundation* as an inrush of material is present in more than one source. In any case, the alternate definition of *inundation* as a *deluge* and characterized by a *rising* and *swelling* of material does not contradict the sense of *swamping* or *overwhelming* a given area, but rather supplements that aspect of the definition.

We note further that many of the dictionary definitions focus on *inundation* by water or liquid. Being a gas that is lighter than air, methane is not constrained by the physical laws of fluid hydrodynamics. Therefore it need not *swamp* or *overwhelm* a very large area of a mine in order to accumulate in a specific location in sufficient concentration to be dangerously explosive.

Moreover, in determining whether the judge correctly concluded that there was no *inundation* of a mine within the meaning of section 50.2(h)(4), we must also consider related regulatory definitions, keeping in mind that *regulations* should be read as a whole, giving comprehensive, harmonious meaning to all provisions. *Morton*, 18 FMSHRC at 536. We therefore turn to the definition of the term *mine*. Section 50.2(a), which tracks the definition of the term in section 3(h)(1) of the Mine Act, 30 U.S.C. ' 802(h)(1), defines *mine* to include

⁷ See also *Local 2333, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 365-66 (March 1990) (less than mine-wide release of methane due to roof fall described as *inundation*.)

underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other property . . . , on the surface or underground, used in . . . the work of extracting . . . minerals from their natural deposits

30 C.F.R. ' 50.2(a). Interpreting similar language in the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (Coal Act), the Fourth Circuit noted: "A single shaft, tunnel, or tippel, and the land on which each of these facilities is located, can constitute a separate coal mine within the [Coal] Act's definition." *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977). Citing *Bituminous Coal Operators'*, the Commission recently held that "there can be multiple mines at a single site." *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 n.9 (September 1996). The crosscut containing the cut core drill hole appears to be a "working[] . . . or other property . . . underground, used in . . . extracting . . . minerals . . ." under section 50.2(a) and, thus, a "mine" within the meaning of that provision.

In maintaining the position that "there was no 'inundation' of methane as that term is used in the sense of a large volume of gas covering a large area," the dissent remains mum on these key "contextual indications" supporting the Secretary's interpretation to the effect that the inundation need not cover an extensive area. *See MCI*, 512 U.S. at 226. The dissent's silence on the statutory and regulatory definition of "mine" does not alter the import of those provisions. Notably, the dissent does not dispute that the cross-cut containing the core drill hole is a "mine" under the Act and regulations. This area, then, and not the entire mine property, is the proper focus of the analysis of whether the Secretary's interpretation of "inundation" is entitled to deference. Thus, contrary to the dissent, unless extant definitions of "mine" are to be thrown overboard, even a relatively small area constituting a "mine," such as the crosscut at issue here, may be subject to an "inundation" within the meaning of section 50.2(h)(4).⁸

In addition, as the Secretary points out (S. Br. at 11-12), none of the other meanings of "accident" set forth in section 50.2(h) appear to contain a "mine-wide" component. *See, e.g.*, 30 C.F.R. ' 50.2(h)(5) ("unplanned ignition or explosion of gas or dust"); 30 C.F.R. ' 50.2(h)(6) ("unplanned mine fire not extinguished within 30 minutes of discovery"). Reading the Secretary's regulations as a whole and giving them comprehensive, harmonious meaning, we cannot say that

⁸ We are not comforted by the dissent's observation that there was "only a single reading of methane at an explosive concentration . . ." Slip op. at 16. First, it should not be necessary to point out that methane in the explosive range presents a serious hazard. *Island Creek Coal Co.*, 15 FMSHRC 339, 341 n.3 (March 1993) (citations omitted). Such a hazard could affect miners in other parts of the mine as well. *Cf. Buck Creek Coal Co.*, 17 FMSHRC 8, 14 (January 1995). Moreover, Gatlin eliminated his chances of taking further readings in the explosive range by shutting off his methane detector after the first such reading. Gatlin Dep. 19.

the Secretary's reading of "inundation" to encompass less than mine-wide methane releases is unreasonable.

In construing the Secretary's Part 50 regulations, we are mindful of the well-established maxim that regulations must be interpreted in a manner consonant with the safety-promoting purposes of the Mine Act. *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (citing *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). MSHA needs to know immediately about inrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life. Notification is one of the necessary first steps following an accident that enables MSHA to take appropriate action. See, e.g., 30 C.F.R. § 50.11(a) (following notification, MSHA must promptly decide whether to conduct an accident investigation which, if under taken, must commence "within 24 hours of notification"); 58 Fed. Reg. 63,528 (1993) (MSHA toll-free telephone number for accident notification will be staffed by "24-hour answering service [that] will respond to calls."); Section 103(j) of the Mine Act, 30 U.S.C. § 813(j), also requires operators to notify the Secretary of accidents.⁹ Congress recognized that the Secretary must have maximum latitude to take protective measures in response to mining accidents. The section of the Senate report dealing with what became section 103 of the Mine Act stated:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority in section [103(j)] to take appropriate actions and in section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 29 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

Moreover, we have previously noted that Congress's concern over the presence of high levels of methane in mines was the basis of provisions in both the Mine Act and its predecessor, the Coal Act. E.g., *Wyoming Fuel Co.*, 13 FMSHRC 1210, 1214 (August 1991) (citing S. Rep. No. 411, 91st Cong., 1st Sess. 59 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 185 (1975) ("Coal Act Legis. Hist."); see also 30 U.S.C. § 813(i) (spot inspections for mines with excess methane liberation); S. Rep. No. 411, at 25-35, *reprinted in Coal Act Legis. Hist.* at 151-161. In sum, the Secretary's interpretation of

⁹ Section 103(j) provides in pertinent part: "In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof" 30 U.S.C. § 813(j).

this regulation, by requiring immediate notification of less than mine-wide inundations, furthers the protective purposes of the notification requirement and the Mine Act.¹⁰

We reject Island Creek's argument that the Secretary's interpretation is not entitled to deference because it was not conceived until after the decision below had been entered. I.C. Br. at 7. First, it has been the Secretary's position throughout the litigation that the inrush of methane at issue was an inundation of a mine within the meaning of section 50.2(h)(4). See, e.g., S. Proposed Findings of Fact and Conclusions of Law at 18-20. In addition, the Supreme Court has held that the Secretary's first-time articulation of an interpretation of analogous regulations in the course of administrative litigation is, if reasonable, entitled to deference. *Martin v. OSHRC*, 499 U.S. 144, 156-58 (1991).

Thus, reading the ordinary definition of inundation together with the regulatory definition of mine, we conclude that an inundation of a mine may include an outpouring of methane affecting a portion of the entire mine. Accordingly, we conclude that the Secretary's interpretation of section 50.2(b)(4) to include an inundation that is less than mine-wide in extent, such as occurred in the present case, is a permissible reading of her regulations. We reverse the judge's implied holding to the contrary.

2. Notice

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received fair notice of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). Due process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986). An agency's interpretation may be permissible but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., whether a reasonably prudent person familiar with the mining industry and the

¹⁰ Contrary to the suggestion of our dissenting colleague, we have neither sanctioned 6-hour delays in dealing with methane accidents nor held that deadly and silent methane releases do not trigger the requirement of immediate notification of MSHA. The Secretary's interpretation of section 50.2(h)(4) to include less than mine-wide inrushes of methane as inundations does not exclude other types of inundations from the sweep of the provision.

protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. @ *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

As to the question whether a reasonably prudent person would have understood the applicability of the reporting requirement of section 50.10 to the facts presented, we have already indicated that some of the elements of the definition of *inundation*, particularly the extent of the outpouring and the *overwhelming* impact on the affected area, appear to be absent here. After Cambron set timbers, hung curtains and increased the flow of air onto the section, elevated methane levels were restricted to the core drill hole and the area adjacent to it. Moreover, this dilution, if not control, of the escaping methane was accomplished within a short period of time following the incident. However, by the time Gatlin contacted Beaven in Illinois, it should have been apparent to Island Creek that it was dealing with a reportable accident. By then, Gatlin knew that Island Creek, despite its efforts, had been unable to stop the flow of methane onto the section, that methane had continue to flow with great force for over 6 hours, and that methane readings were elevated, on one occasion in the explosive range, albeit in a limited area. These conditions presented a safety hazard that should have alerted Island Creek to the necessity of immediately reporting the incident as an accident to MSHA.¹¹

Further, the actions and stated views of Island Creek representatives support the notion that Island Creek should have been aware that the core drill hole cut-through was not a routine methane release, but rather an incident that needed to be reported under section 50.10. The incident was serious enough to prompt the second shift mine foreman (Cambron) to notify the general mine foreman (Gatlin) at home, for the general mine foreman to notify the superintendent (Beaven) in another city, for the superintendent to notify his superior, the regional manager, as well as the regional safety director, for these individuals to discuss whether MSHA should be notified, and for the superintendent to order MSHA contacted on the morning of April 8 as a *courtesy*. @ Gatlin testified that the incident was more serious than initially reported to him, and Cambron testified that in 25 years of mining he had never cut into a hole that blew methane as hard and for as long a time as this core drill hole did. In light of these circumstances, the Secretary's interpretation of sections 50.10 and 50.2(h)(4) as requiring the reporting of the incident as an accident does not seem *so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the operator] of the agency's perspective*. @ *See General Elec.*, 53 F.3d at 1330. This is particularly the case in view of the absence of any

¹¹ Commissioner Marks wishes to express his view that, given the nature of this incident **C** an unexpected, inrush of methane which continued to flow with great force for over 6 hours by the time the superintendent was notified, despite Island Creek's efforts to remedy it **C** there could be no doubt that the operator should have been on notice that this was the type of *unplanned inundation*, as set forth in section 50.2(h)(4), that needed to be reported immediately to MSHA.

evidence that MSHA ever construed these regulations in a manner inconsistent with its position in this case. *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125, 1141-43 (1976).

Island Creek's notice argument is further undercut by the explicit definition of *Amine* in section 50.2(a) and Mine Act section 3(h)(1), as a particularized portion of a larger facility. This definition has gained wide recognition since the *Bituminous Coal Operators* case interpreted similar language under the 1969 Coal Act.

In addition, under the Commission's test, the *Reasonably prudent person* is charged with knowledge of the *Mining industry* and the protective purposes of the standard. *Ideal Cement*, 12 FMSHRC at 2416. Here, the protective purposes of the notification requirement are obvious and important. We therefore conclude based on all the evidence that a person familiar with this purpose would have notified MSHA when faced with the situation at issue here.

Accordingly, we reverse the judge's determination that Island Creek did not have notice that section 50.10 would apply to the incident at issue.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Island Creek did not violate 30 C.F.R. ' 50.10 and did not have fair warning of its applicability to Island Creek, and we remand for assessment of an appropriate civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

At issue in this case is whether a release of a mixture of air and methane, confined to a small area of Island Creek's Ohio No. 11 Mine, constituted an inundation as that term is used in 30 C.F.R. § 50.2. My colleagues believe that the release was such an inundation. I respectfully disagree.

The Commission has long held that where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written. . . . *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989). The Commission has also held that, in the absence of a regulatory definition or technical usage of a word, the Commission applies the ordinary meaning of the word. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). I find that the ordinary meaning of the word inundation clearly refers to something much more extensive in size and scope than the release of an air/methane mixture at issue in this case.

The majority quotes several definitions which make this point self-evident. Flood, deluge, submerge, swamp, and overwhelm, terms cited by the majority to characterize an inundation, all signify an event of considerable magnitude and breadth in which a large volume of water or gas has spread across an area, and generally a large area. The essential element of every definition of the term inundation I have found is, in the words of the majority, the swamping or overwhelming of the inundated area (slip op. at 7). Webster's Third New International Dictionary 1188 (1986) (Webster's) (quoted by the majority); Random House Dictionary of the English Language 1002 (2d ed. 1987) (to flood; cover or overspread with water; deluge . . . to overwhelm); Black's Law Dictionary 823 (6th ed. 1990) (to flood or swamp . . . [t]he overflow of waters by coming out of their natural bed or confines); Dictionary of Mining, Mineral, and Related Terms 284 (2d ed. 1997) (DMMR) (inrush of water, on a large scale); 8 Oxford English Dictionary 33 (2d ed. 1989) (OED) (an overflow of water; a flood); see also Random House Thesaurus, College Ed. 393 (1984) (engulf, overflow, fill with water, overspread, drench, submerge, flood, deluge, drown). See Aluminum Company of America, 15 FMSHRC 1821, 1825 n.8 (September 1993) (citing the DMMRT definition of inundation).¹

¹ This essential element of inundation is also reflected in its metaphorical meaning, which the OED defines as [a]n overspreading or overwhelming in superfluous abundance; overflowing, superabundance. *Id.* at 33. The word was used in this sense by President Washington when, in 1798, he wrote: I was inundated with letters, describing the crisis. *Id.*

An inundation thus refers to a quantity of water (or gas) that has swamped or overwhelmed a given area. This essential meaning of the word is conveyed in *Local 2333, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363 (March 1990). In that case, an MSHA inspector discovered explosive methane levels in the tailgate of a longwall section after a large roof fall in a nearby gob area. *Id.* at 365. The inspector believed that the immediate cause of the methane concentration was a sudden inundation resulting from the roof fall. *Id.* Significantly, the inundation overwhelmed the mine's bleeder system, which was unable to dissipate the methane, in part because it was partially blocked by water. *Id.*

Another element commonly appearing in definitions of an inundation is, again in the words of the majority, the "considerable extent" and "widely diffused" nature of the intruding material (slip op. at 7).² This sense of the word is an essential element of the DMMRT definition, which defines an inundation as "[a]n intrush of water . . . that floods the entire mine or a large section of the workings." *Id.* at 284 (emphasis added). In keeping with this sense of the word, Commission Administrative Law Judges have found inundations in the two instances where the meaning of the term as used in section 50.2 was at issue where gases have spread over a wide area. *Silver State Mining Corp.*, 9 FMSHRC 691, 702 (April 1987) (entire interior of mill enveloped in hydrochloric acid fumes); *Helvetia Coal Co.*, 2 FMSHRC 1011, 1030 (April 1980) (methane . . . covered a large, undefined area of the mine). I agree, however, with the Secretary's contention that an inundation need not be mine wide to be reportable. S. Br. at 9-10. This issue is, however, a red herring because first there must be an inundation, which here there clearly was not.

² Webster's, for example, illustrates this sense of the word in the example "A tidal wave [inundate]s the island." *Id.* at 1188. The *OED* cites usages of the word in this sense dating from as early as 1548 ("The ryver rose so high that yt overflowed all the countrey . . . By this inundacion the passages were so closed . . ."). Other usages cited by the *OED* refer to "the period when the Nile inundates Ægypt" (1791), "an annual overflow of the Amazon [that] inundate[s] a great part of Brasil" (1796), and "rivers . . . overflowing their banks and inundating the land" (1898). *Id.* at 33.

Although overwhelming authority establishes that, at the very least, an **inundation** is an event during which water or gas swamps or overwhelms an area, the Secretary argues that **the** dictionary definition of **inundation** focuses on the *process* of the water flowing in **C** not . . . on whether the water has already spread so as to submerge all land not usually submerged. S. Br. at 9 (emphasis in original). As explained by my colleagues, the Secretary **Apparently** means that it **was** the **rising** and **swelling** of the gas that constituted the inundation. Slip. op. at 7. This **interpretation** is at odds with the one common element found in every definition of the term. An inundation may very well include the gush of water or gas that is its source,³ but under the universally accepted common usage of the term, it cannot exclude the accumulation of water or gas resulting from the gush. All the Secretary does is define the source of an inundation and nothing more. Through this peculiar act of deconstruction, the Secretary robs the term **inundation** of its essential character.

Notwithstanding its incoherence, my colleagues defer to the vague and elusive **C** and wrong **C** interpretation offered by the Secretary, insisting that the term **is** open to alternative interpretations. Slip op. at 6. But her interpretation is owed no deference because it has no basis in the common meaning of **inundation**. Moreover, my colleagues err by deferring to the Secretary to ascertain the plain meaning of a word. There is no ambiguity here that gives rise to the issue of deference. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Instead, there is the plain meaning of **inundation** as established by its common usage versus the Secretary's strained focus on a nuance (the **process** of **the rising** and **swelling** of the gas) that blurs the meaning of the term beyond recognition. Taking my colleagues' approach to its logical conclusion, each word in the English language could be considered ambiguous based on only the slightest shades and nuances of meaning, the *true* meaning of which can only be ascertained by the Secretary in the context of a given case, whether or not the Secretary's meaning comports with common, ordinary meaning.

Determining the ordinary meaning of a word is not a matter of such technical complexity that we must give way to the Secretary's expertise. See *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Nor is this a case where we could appropriately defer to the Secretary's choice of one alternative dictionary meaning over another within the same definition. See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-20 (1992). Instead, this case is closer to the Supreme Court's decision in *MCI Telecommunications Corp. v. AT&T*, in which the Court rejected a Federal Communications Commission interpretation of the term **modify** based on a dictionary definition which the Court found was contradicted by **virtually all other** dictionaries. 512 U.S. 218, 225-28 (1994). In the *MCI* case, ordinary meaning was derived from how **virtually all** dictionaries defined **modify**, rather than from an **out-of-step dictionary** containing a definition that robbed the word of any meaning. *Id.* at

³ In a circuitous semantic argument, the majority uses a variety of terms to characterize this element of the term **inundation**, including **torrent**, **spate**, and **barrage**. Slip op. at 7. Notably, none of these terms appear in any of the definitions of **inundation** in the five major dictionaries I have consulted.

226-27. The case thus illustrates the importance of ordinary meaning and warns of the pitfalls of interpreting words in such a way that they have no intrinsic meaning. Here, my colleagues unwisely defer to a deconstructive gloss the Secretary puts on *inundation* a gloss which robs the word of its essential character and is at odds with the word's ordinary meaning.

The conclusion that the release of methane at issue here was an *inundation* as that term is ordinarily used in the sense of a large volume of gas overwhelming a given area has no support in the record. The air flowing into the 004 Section through the core drill hole contained varying quantities of methane, but at no time did methane concentrations reach sustained excessive levels beyond the immediate vicinity of the hole. Tr. 142-44. Indeed, the record contains credible evidence of only a single reading of methane at an explosive concentration, and that was when a reading was taken directly over the hole. Gatlin Dep. Tr. 19-20. As my colleagues concede, elevated methane levels were restricted to the core drill hole and the area adjacent to it. . . . dilution, if not control, of the escaping methane was accomplished within a short period of time following the incident. Slip Op. at 11. Throughout the incident, the operator was never unable to dilute the methane and render it harmless. Tr. 143. Put another way, Island Creek's resources to control the methane contained in the air venting from the core drill hole were never overwhelmed or swamped.

The continuous miner cut through the core drill hole at the end of a cut measuring approximately 30 feet deep by 10 feet wide, the first cut made to drive a crosscut between the number 5 and 6 entries. R. Ex. C.; Tr. 81, 159.⁴ About half of this first cut was quickly placed within the intake aircourse with a curtain, and was thus isolated from the gases venting from the hole. Tr. 159. This enabled the operator to immediately dilute any methane that might have been coming out of the hole (*see* Tr. 165, testimony of Mr. Cambron that he deflected [the venting gases] directly to the return), as evidenced by the fact that at no time were explosive levels of methane detected outby the hole. Tr. 143. As counsel for the Secretary stated at the hearing, what [Island Creek] did was dilute the harmful gases that might have been coming out, regardless of the rate at which the gases were venting out through the hole. Tr. 164.

The only evidence in the record of elevated levels of methane outside the first cut is restricted to readings in the three to four percent range taken in the number 5 entry approximately 10 feet from the tail end of the continuous miner. Tr. 135. The Secretary introduced no evidence of elevated methane levels in any other area of the mine, including the open crosscut between the number 5 and 6 entries closest to the first cut and the number 6 entry itself. The judge's finding that only the number five and six entries and the crosscut between them . . . were impacted (18 FMSHRC at 1502) is thus not supported by substantial evidence; the area actually affected was much smaller. The Secretary's argument that gas from the hole was coursed throughout all

⁴ The area affected by the release of air and methane at issue here was minuscule, no more than part of a partially mined crosscut and a small section of the entry off which it was driven. R. Ex. C & D. This area, to give an idea of the mine's size, lies three miles away from the mine fan. Tr. 186-87.

air which ran past the core drill hole, and [thus] affected all areas of the mine in which it was coursed (S. Br. at 10 n.2) grossly overstates the case. The air that ran past the hole was doing just what it was supposed to be doing: diluting and rendering harmless any methane that was being liberated before that methane had the chance to accumulate *anywhere* beyond the hole itself. I find that the record compels no other conclusion but that there never was *any* area of the mine that could have been characterized as being *inundated* with methane. To conclude otherwise is to turn a deaf ear on the record evidence and to overlook the Secretary's obvious inability to prove that methane accumulated anywhere in the Ohio No. 11 Mine as a result of the breach of the core drill hole.

I therefore dissent from my colleagues' departure from the common sense, ordinary meaning of the term *inundation*. But I find even more extraordinary their finding that Island Creek was on notice of the Secretary's interpretation of that term. Where an agency imposes a fine based on its interpretation of a regulatory provision, a separate inquiry arises concerning whether the respondent has received *fair notice* of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). Once again, my colleagues cite the correct legal authority, but then fail to apply it. Slip op. at 11. Rather than conduct an inquiry as to whether Island Creek was on notice of the Secretary's interpretation under the Commission's *reasonably prudent person* test, my colleagues instead attempt to provide wholly separate reasons why Island Creek should have known the methane release in this case was a reportable accident.⁵ Incredibly, *none* of the reasons provided by my colleagues refer to the Secretary's interpretation of the word *inundation*.

⁵ I suspect the reason my colleagues did not conduct the proper inquiry as to whether Island Creek was on notice of the Secretary's interpretation was because the only conclusion they could have reached was that Island Creek had no such notice. Essentially a post hoc rationalization of her enforcement action, this interpretation was never before advanced by the Secretary. In fact, at the hearing, the inspector who cited Island Creek testified that he considered there to be an inundation because *the continuous miner machine cut off*. Tr. 60. But even as further

refined in the course of these proceedings, the Secretary's interpretation regarding the scope of section 50.10 has never been consistent with the common usage of the word "inundation," much less the usage of the word in the mining industry as found in the *DMMRT*. *Id.* at 284. Whether the Commission has adopted it or not, the *DMMRT* definition is relevant for the purpose of determining what a reasonably prudent person in the mining industry would consider to be an inundation. As such, no reasonably prudent person would have known in advance the Secretary's odd interpretation of the word "inundation" such as it is. Indeed, that the incident here could have been an inundation never even crossed the minds of the Island Creek employees involved. Tr. 182.

First, my colleagues argue that Island Creek was on notice because of the length of time C some six hours C the air/methane mixture flowed out of the core drill hole without being stanchd (slip op. at 11 & n.10), notwithstanding the fact that the methane was immediately brought under control through ventilation (Tr. 143).⁶ The majority also finds evidence of notice in how news of the breakthrough passed up the ranks of Island Creek management.⁷ Slip op. at 11-12. In addition, my colleagues note that the unusual nature the incident should have put Island Creek on notice. *Id.* The Secretary's interpretation of this regulation, however, says nothing about duration, internal discussions, or the unusual nature of events. None of the facts offered by my colleagues show why any reasonable person should have known that an inundation was, in actuality, a Aprocess@of Athe xrising= and xswelling= of the gas,@and that the methane release in this case should therefore have been reported.

In the end, my colleagues suggest that Island Creek should have known the incident was reportable since it is charged with knowledge of the protective purposes of the standard. Slip op. at 12. As to the purpose of that standard, the majority sees it as the importance of MSHA knowing AImmediately about inrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life.@ Slip op. at 9. The majority neglects to cite any authority for this proposition. In fact, the Secretary's regulation setting forth the purpose and scope of her Part 50 regulations contains no such statement of purpose. On the contrary, her stated purpose for Part 50 relates strictly to record keeping and the calculation of injury occurrence and severity rates. 30 C.F.R. ' 50.1. Again, this tells Island Creek little about the Secretary's view that an inundation should be viewed as a Aprocess@of Athe xrising= and xswelling= of [a] gas.@ I thus consider the majority's insistence on holding Island Creek liable in the absence of any real notice of the conduct expected of it as a violation of the company's due process rights. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986).

Assuming, however, that the true purpose of the standard (as distinct from its stated purpose) is to provide MSHA with immediate notice of accidents in order for it to take appropri-

⁶ I find unconvincing the argument that after six hours had passed, Island Creek was required to immediately contact MSHA. *See* slip op. at 11 n.10. I fail to see how the passage of six hours somehow transformed the incident into a reportable accident. Instead, I believe that if at anytime, Island Creek had not been able to dilute and render harmless the methane venting from the core drill hole so that an accumulation of methane spread into a large area of the mine, at that point, under the ordinary meaning of Ainundation,@a reportable accident would have occurred.

⁷ This is hardly probative that Island Creek was on notice to report this incident to MSHA. Certainly, Island Creek cannot be faulted for consulting with its regional safety director and others as to what action should be taken. *See Consolidated Coal Co.*, 11 FMSHRC 1935, 1938 (October 1989). That Island Creek conducted thorough internal discussions only proves, if anything, that it was the judgement of Island Creek's management, based on their collective experience, that the incident did not amount to a reportable Ainundation.@ *Cf.* Tr. 182 (AWe hadn't had an ignition, no serious injury and no roof fall, and inundation never crossed our minds.@).

ate remedial action, I believe that my colleagues' opinion sends a mixed message. First, given the very limited scope of this methane release, one might conclude after today that any methane release C regardless of the extent of its impact C should now be reported immediately to MSHA. In the alternative, by focusing on the Aprocess@rather than the magnitude of the methane release, one could read the majority's opinion to say that the critical factor in determining whether there has been a gas inundation is the nature by which the gas was released. Under such a reading, forceful jets or gushes of gas would be reportable events, while silent C and far more deadly C methane releases are not. *See, e.g., Helvetia Coal Co.*, 2 FMSHRC at 1030. By focusing on the duration of the event, my colleagues send the message that operators have up to six hours in which to remedy a situation before it need be reported, a result plainly contradicted by the regulation itself, which requires *immediate* notification. 30 C.F.R. ' 50.10.

Rather than sow these seeds of confusion C and possibly worse C I would affirm the judges' decision based on the ordinary meaning of the word A'inundation.@ I would also urge the Secretary C insofar as she apparently wishes to deviate from this ordinary meaning C to clarify her views, either formally or informally, so that in the future all parties will be on notice as to what events should be reported to MSHA immediately. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (Athe Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards [she] has promulgated@).

Theodore F. Verheggen, Commissioner

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