FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 24, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 94-23
	:	PENN 94-166
CYPRUS EMERALD RESOURCES CORPORATION	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; and Beatty, Commissioner[1]

These civil penalty cases, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), present the issues of whether the placement of coal refuse by Cyprus Emerald Resources Corporation (AEmerald@) was a Arefuse pile@ under 30 C.F.R. ' 77.215(f) and (h); whether the accident-reporting and investigating standards in 30 C.F.R. '' 50.10 and 50.11 were triggered by a collapse of that coal refuse pile; whether Emerald violated 30 C.F.R. ' 77.1608, requiring trucks to dump a safe distance from the edge of the bank when on unstable ground; and whether certain of the violations were significant and substantial (AS&S@) and due to Emerald=s unwarrantable failure to comply with the standards. Emerald petitioned the Commission to review Administrative Law Judge William Fauver=s determinations that Emerald violated the standards, and challenged his S&S and unwarrantable failure findings. *See* 17 FMSHRC 2086 (Nov. 1995) (ALJ). The Commission granted review. For the reasons that follow, we affirm in part, vacate and remand in part, and reverse in part the judge=s decision.

[1] Chairman Jordan and Commissioner Beatty are in the majority on all issues presented. Commissioner Marks joins in all parts of the decision, except for section II. E., from which he dissents. Commissioners Riley and Verheggen join in all parts of the decision, except for sections II. B.2.a. and II. B. 2.b., from which they dissent.

I.

Factual and Procedural Background

Emerald owns and operates the Emerald No. 1 Mine, a coal mine located in Greene County, Pennsylvania. 17 FMSHRC at 2087. Emerald had an MSHA-approved impoundment plan for disposing of refuse from its coal preparation plant. *Id*. The impoundment plan entailed four stages of construction of an impoundment embankment built from refuse material. *Id*. at 2087; R. Ex. 7. Under the plan, the impoundment embankment served to initially impound a slurry pond,[2] which in its final stages would be completely filled in with refuse. Tr. 466. The plan provided that each layer of the impounding embankment should be compacted, and provided for specific Alift@ limitations in Stages II and III.[3] 17 FMSHRC at 2088. Stage IV development was expected to be completed in the year 2002. *Id.* In May and June 1993, the time of the subject citations and orders, the impoundment was in Stage III. Tr. 400.

At that time, refuse material, along with raw coal, was brought by conveyor belts from the Emerald mine to the preparation plant located on the surface. 17 FMSHRC at 2088. There, the coal and rock were separated by washing. *Id*. The refuse material was loaded on the refuse belt, which carried it to a 500-ton refuse storage bin. *Id.* At the bin, 35-ton dump trucks picked up the refuse and disposed of it. Tr. 45. Constant disposal of the refuse in the bin was essential for the preparation plant=s production; the plant could operate no more than one hour without a

[2] ASlurry@ is the fine carbonaceous discharge from a mine washery. American Geological Institute, *Dictionary of Mining, Minerals and Related Terms* at 516 (2d ed. 1997) (A*DMMRT*@). A Aslurry pond@ is any natural or artificial pond or lagoon for settling and draining the solids from washery slurry. *Id*. at 517.

[3] A Alift@ is the distance between any two levels. *DMMRT* at 311. The impoundment plan provided that, at Stage II, A[a]fter placing the initial five-foot layer embankment, construction should consist of lifts of coarse coal refuse which are a maximum of two feet thick and compacted . . . .@ R. Ex. 7, at 5-7. Stage III also required placement of refuse in two-foot maximum lifts and compaction. *Id.* at 5-8.

functioning bin. Tr. 184-85. The dump trucks picked up and disposed of approximately 70 loads of refuse material per shift. Tr. 229. The mine worked three shifts per day. Tr. 250.

Under the impoundment plan, refuse was hauled to the impoundment embankment for use in its construction. 17 FMSHRC at 2088.[4] There it was to be placed in lifts and compacted pursuant to the impoundment plan. 17 FMSHRC at 2088-89.

In inclement weather or when the road to the embankment impoundment was too icy, snowy, muddy, or dusty to travel, refuse was hauled to a location southwest of the bin known as the Ashort haul@ area. *Id*. at 2089; Tr. 210-11, 228-29, 560, 674-76. It was situated on top of a naturally occurring embankment which abutted the shoreline of the slurry pond. 17 FMSHRC at 2089. At Stage IV, a portion of the short haul area was projected to become part of the impoundment structure. Tr. 365, 417-19.

After the dump trucks dumped their loads at the short haul area, bulldozers spread the resulting piles, pushing refuse over the edge of the embankment towards the slurry pond. 17 FMSHRC at 2089. This practice continued for 18 years and, by April 1993, the accumulation of refuse material in the short haul area extended 1,000 feet in length, 60 to 80 feet in height, and 300 feet in width. *Id.*

[4] The impoundment area, commonly referred to as the Aregular lay down@ area, was located down a slope about a mile from the preparation plant, a five or six-minute drive from the bin. 17 FMSHRC at 2088; Tr. 183-84, 228-29, 573, 695.

On April 2, 1993, MSHA received a complaint under section 103(g)(1)[5] of the Act concerning a partial collapse of the short haul area. *Id*. at 2087. MSHA inspector Walter Daniel, responding to the complaint, went to the mine and observed that a section of the refuse pile measuring about 350 feet long, 60 feet high, and 40 feet wide had broken off, caved in, and slid into the slurry pond. *Id*. at 2087, 2090. Because the pile was unstable with large cracks in it, he issued an imminent danger order under Mine Act section 107(a)[6] closing off the refuse pile. *Id.* at 2087, 2093-94; Tr. 35-37.

On April 5, 1993, Inspector Daniel, accompanied by MSHA engineering specialists, resumed inspection of the mine and issued three S&S citations under section 104(a) alleging violations of section 77.215(f), for failure to construct the refuse pile in such a manner as to prevent accidental sliding and shifting of material (Citation No. 3658639); section 77.215(h), for failure to construct the refuse pile in compacted layers not exceeding 2 feet in thickness and with

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[5] Section 103(g)(1) provides in pertinent part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. ' 813(g)(1) .

[6] Section 107(a) provides in part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. ' 817(a).

a slope not exceeding 27 degrees (Citation No. 3658640); and section 77.1608(b), for operating mobile equipment in the area that collapsed (Citation No. 3658700). 17 FMSHRC at 2087, 2101, 2103, 2106-07; Tr. 38-39. MSHA later issued special assessments in conjunction with all three citations. Gov=t Ex. 2, 5, 6.

During the investigation on April 5, Inspector Daniel received another section 103(g) complaint alleging an earlier failure of the same refuse pile on December 27, 1992, when a 35-foot wide section of the refuse pile broke off and slid toward the slurry pond. 17 FMSHRC at 2090. Miner Ike Bihun was operating a bulldozer on the part of the refuse pile that failed. *Id.*; Tr. 75-76. The bulldozer slid about 30 feet down the refuse pile toward the slurry pond and was partially buried in refuse material. 17 FMSHRC at 2090; Tr. 553-54. Ropes were thrown down to the trapped miner to help him climb up the slope of the refuse pile. 17 FMSHRC at 2090.

As a result of investigating the December complaint, Inspector Daniel issued Citations Nos. 3658682 and 3658696, alleging violations of sections 50.10 and 50.11(b) for failure to notify MSHA of the December incident and for failure to investigate it. *Id.* at 2094, 2096. He indicated that the section 50.11(b) violation was S&S and attached a special assessment to the citation. Gov=t Ex. 10. Inspector Daniel also issued Order No. 3768690 and Citation No. 3658683, under section 104(d)(1), alleging S&S and unwarrantable violations of sections 77.215(f) and 77.215(h) as a result of the December incident. 17 FMSHRC at 2100, 2104; Gov=t Ex. 8, 11. The inspector also issued Order No. 3658698 pursuant to section 104(d)(1) alleging an S&S and unwarrantable failure violation of section 77.1608(b) based on the December accident. 17 FMSHRC at 2105-06; Gov=t Ex. 7.

II.

Disposition

A. Whether the Material at Issue Was a Refuse Pile

The judge found that the refuse material was a refuse pile that had built up over many years. 17 FMSHRC at 2095. Emerald argues that the judge erred in characterizing the refuse material at issue as a Arefuse pile.@ E. Br. at 12-18. It asserts that the short haul area does not meet the requirement set forth in 30 C.F.R. ' 77.217(e). *Id.* at 13. Emerald argues that the material was only temporarily stockpiled and was part of the impoundment area, which did not fail. *Id*. at 12-17; PDR at 9-10, 13 n.4. The Secretary responds that substantial evidence supports the judge=s finding that the material at issue was a refuse pile, not a temporary stockpile nor part of the impoundment structure. S. Br. at 13-19. Moreover, the Secretary asserts that because MSHA, in the past, did not treat the refuse material as a violative refuse pile does not estop the agency from citing a violation on this occasion. *Id*. at 18 n.4.

ARefuse pile@ is defined in section 77.217(e) as

> [A] deposit of coal mine waste . . . excavated during mining operations or separated from mined coal and disposed of on the surface as waste byproducts of either coal mining or preparation operations. Refuse pile does not mean temporary spoil piles of removed overburden material associated with surface mining operations.

The Alanguage of a regulation . . . is the starting point for its interpretation.@ *Dyer* v. *United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Product Safety Comm=n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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. *Id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Under the plain terms of section 77.217(e), the short haul area qualified as a refuse pile. The pile was an extremely large deposit of coal mine waste that had been Adisposed of on the surface as waste byproducts@ of Emerald=s preparation plant, as set forth in the regulation. We reject Emerald=s argument that, because the refuse was only temporarily stockpiled, it was not Afinally@ disposed as contemplated in section 77.217(e). E. Br. at 13-14. That section does not require that the material be *finally* disposed. In addition, substantial evidence[7] supports the

[7] When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C.

judge=s finding that the material at the short haul area was not in a temporary stockpile, as Emerald asserts. 17 FMSHRC at 2089. The refuse pile accumulated over eighteen years. Tr. 676. The enormous size of the refuse pile also belies its characterization as Atemporary.@ MSHA engineer Mazzei estimated that the volume of the refuse pile was between 750,000 to 1 million tons. Tr. 332. *Compare RNS Services, Inc.*, 18 FMSHRC 523, 524 (April 1996) (refuse pile 1,200 feet long, 500 feet wide, 90 feet high), *aff=d*, 115 F.2d 182 (3rd Cir. 1997). The heavy equipment operators testified that, although some of the refuse was moved from the short haul area to the impoundment structure, this occurred only on Sundays or on off days and that a great portion of the refuse was never moved from the pile. Tr. 208-12, 219, 230. Emerald=s long-term practice of bulldozing the refuse over the edge of the embankment also indicates that Emerald did not treat the refuse pile as a temporary stockpile. Accordingly, we conclude that substantial evidence supports the judge=s finding that, A[a]lthough a small part of the refuse on the refuse pile was used at times to build up the impoundment embankment, the great majority of the refuse deposited on the refuse pile was pushed over the edge toward the slurry pond to make room for more refuse material.@ *See* 17 FMSHRC at 2089-90.

We are not persuaded by Emerald=s argument that, because the area was eventually to become part of the impoundment and was covered by an impoundment permit number, it should have been considered as an impoundment structure, not a refuse pile. E. Br. at 14-15. AImpounding structure@ is defined in 30 C.F.R. ' 77.217(c) as Aa structure which is used to impound water, sediment, slurry, or any combination of such materials.@ Substantial evidence supports the judge=s finding that the refuse pile was not intended to be and did not serve as an impounding structure. 17 FMSHRC at 2090. Although at Stage IV, a portion of the area where the refuse pile stood would become part of the impoundment, at that point the material would have to be re-graded and compacted to conform to the impoundment plan. Tr. 419, 672, 683. MSHA=s engineer testified that in April 1993, there was no indication of the operator=s intention to comply with the impoundment plan because the pile was well beyond the area where the impoundment slope was to be located and the conditions of the pile were very different from those outlined in the plan. Tr. 409-10, 449. Emerald senior engineer Terry Dayton testified that the refuse material in April 1993 was not intended to impound the slurry pond. Tr. 637, 672-73. Emerald preparation plant manager Alan White testified that there was Ano doubt@ that the refuse was piled beyond what was intended in the impoundment plan. Tr. 520, 542. Likewise, MSHA engineers Daniel Mazzei and George Gardner testified that the pile of refuse at the short haul area

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' 823(d)(2)(A)(ii)(1). ASubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 304 U.S. 197, 229 (1938)).

did not serve to impound, but instead, Afulfilled all the definitions of a refuse pile.@ Tr. 314, 382, 409-10, 431-32, 445.

The record also does not support Emerald=s contentions that, because MSHA only required a small portion of the refuse pile to be reworked to abate the violative condition, the refuse pile met the Secretary=s requirements. E. Br. at 17. Substantial evidence establishes that the slope that failed was cut down and regraded to an appropriate slope and the entire area was compacted with waste material placed in two-foot lifts. Tr. 360, 429-30. MSHA engineer Gardner, who reviewed the plans for regrading the area, testified that Emerald was also required to provide continued engineering oversight of the area and to install equipment to constantly measure the core pressures in the pile. Tr. 430. Finally, Emerald=s assertion that MSHA previously had not treated the short haul area as a refuse pile is not persuasive. It is well established that estoppel does not operate against the government=s enforcement powers. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); *accord Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984).

In sum, we affirm the judge=s conclusion that the material at issue constituted a refuse pile.

2. Part 50 Violations

The judge found that the failure of the refuse pile on December 27, 1992, qualified as a reportable accident under section 50.2(h)(10). 17 FMSHRC at 2095. He then determined that Emerald violated section 50.10 when it did not contact MSHA after learning that part of the refuse pile failed on December 27. *Id*. at 2095-96. Finding that the violation was Adue to high negligence,@ the judge assessed a penalty of $400. *Id.* at 2096. The judge also found that Emerald violated section 50.11(b) by not investigating and developing a report of the December failure, including measures needed to prevent a recurrence. *Id.* at 2098. In addition, the judge determined that the section 50.11(b) violation was S&S, reasoning that A[c]ontinued operations without investigating the causes of a failure of a refuse pile and the measures needed to prevent a recurrence could contribute significantly and substantially to another failure of the refuse pile with a risk of serious injury.@ *Id.* at 2099. Concluding that the violation was due to high negligence, the judge assessed a penalty of $3,000. *Id.* at 2099-2100.

According to Emerald, because no refuse pile existed, the judge erred in finding violations of sections 50.10 and 50.11(b). PDR at 9. Further, Emerald maintains that the judge=s finding of a violation of section 50.11(b) is not supported by substantial evidence because it prepared and submitted a report to MSHA in April 1993, nearly two months before the issuance of the citation. *Id.* at 11; E. Br at 25 n.9. Emerald also argues that, if the Commission accepts MSHA=s interpretation of the incident as an accident, then sections 50.10 and 50.11(b) are impermissibly vague because no other operator was aware of the reporting requirement for such events. E. Br. at 24 n.8. Emerald also submits that the judge erred in holding that the violation of section 50.11(b) was S&S because Part 50 is not a mandatory safety or health standard and section 104(d)(1) only provides for S&S findings with respect to such standards. PDR at 12; E. Br. at 25.

The Secretary responds that the judge correctly determined the December failure to be a reportable accident under section 50.10. S. Br. at 19-25. According to the Secretary, under the plain meaning of the section and its regulatory purpose, the failure of the refuse pile constituted an accident. *Id.* at 19-24. Alternatively, the Secretary asks for deference to her reasonable interpretation of section 50.10. *Id.* at 20. Thus, the Secretary asserts, Emerald=s failure to immediately report and investigate the accident constituted violations of sections 50.10 and 50.11(b). *Id.* at 25-28. The Secretary contends that a violation of section 50.11(b) may properly be designated S&S under section 104(d) of the Mine Act and argues that her interpretation is reasonable and entitled to deference. *Id.* at 28-35.

1. Whether the December Incident Was an AAccident@ Under Part 50

AAccident@ is defined in Part 50 as A[a]n unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or *failure of* an impoundment, *refuse pile* or culm bank.@ 30 C.F.R. ' 50.2(h)(10) (emphasis added). Under the plain terms of this definition, failure of a refuse pile qualifies as an accident. Thus, the failure of the pile on December 27, 1992, when a 35-foot portion of the pile collapsed, causing a bulldozer to slide down 30 feet and become partially buried, qualified as an accident.

We reject Emerald=s argument that, for a refuse pile failure to constitute an accident, it must require emergency action and involve a failure of a significant portion of the pile. PDR at 10; E. Br. at 21-25. Emerald reads into section 50.2(h)(10) requirements that are not in the provision. Similarly, we find unconvincing Emerald=s argument that MSHA=s revision of section 50.2(h) to exclude various events from the accident definition somehow indicates that the December collapse of the refuse pile does not qualify as a reportable accident. E. Br. at 21-23. Emerald overlooks the simple fact that, in the present section 50.2(h), MSHA specifically added the failure of a refuse pile to the definition of Aaccident.@ Further, Emerald incorrectly asserts that the term Aaccident@ in section 50.2(h) should be narrowly construed because its companion section 50.12 requires preservation of an accident site, often compelling an operator to shut down production. E. Br. at 23-24. Emerald=s proposed construction directly contravenes the Commission=s long-held principle that the Mine Act and its regulations must be broadly construed to further the Act=s remedial goals. *See, e.g., Hanna Mining Co.*, 3 FMSHRC 2045, 2048 (Sept. 1981); *accord Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (ACongress intended the [Mine] Act to be liberally construed@).

Further, we are not persuaded by Emerald=s second estoppel argument based on the fact that MSHA has not previously cited operators for neglecting to report similar refuse pile failures. *See King Knob*, 3 FMSHRC at 1421-22. In addition, we reject Emerald=s argument that, because no other operators have reported such accidents, the regulation is impermissibly vague. From our conclusion that the definition of accident in section 50.2 is plain, it follows that section 50.10

provided the operator with adequate notice of its requirements.[8] *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (adequate notice provided by unambiguous regulation).

Accordingly, we affirm the judge=s conclusion that the December failure was an accident. It was undisputed that Emerald failed to immediately report the accident to MSHA. 17 FMSHRC at 2095; Tr. 491-92. We therefore affirm that Emerald violated section 50.10, requiring immediate notification of accidents.

2. Violation of Section 50.11(b)

[8] Section 50.10 provides in pertinent part that A[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine.@

Section 50.11(b) requires that an operator investigate all accidents and prepare a report that includes, inter alia, the steps the operator will take to prevent a recurrence.[9] Substantial evidence supports the judge=s finding that Emerald did not investigate the December incident until after MSHA began its investigation in April 1993. 17 FMSHRC at 2098; Tr. 564-65, 610-12, 618-20. We reject Emerald=s argument that, because section 50.11(b) establishes no time frame for preparation and submission of the report and because it submitted a report to MSHA in April 1993, no violation occurred. E. Br. at 25 n. 9. In *Steele Branch Mining*, 15 FMSHRC 597, 602 (Apr. 1993), the Commission construed section 50.11(b) to require operators to investigate all accidents and to develop a report of each investigation within a reasonable period of time. The Commission reasoned that the purpose of the regulation A>is to >ensure that operators are in fact investigating accidents and injuries and are engaged in the constant upgrading of health and safety practices.=@ *Id.* (quoting introduction to final rule at 42 Fed. Reg. 65,534 (1977)). In *Steele Branch,* the Commission addressed the question of how much time an operator has to submit an investigation report after MSHA=s request. The Commission held that A[w]here a standard is silent as to the period of time required for compliance, the Commission has imputed a reasonable time.@ 15 FMSHRC at 601. The Commission determined that a report submitted less than a month after an accident satisfied the reasonableness requirement, especially in view of the operator=s oral notification to MSHA less than a week after the accident of the Acritical portion of the report, i.e., the preventive steps [the operator] would take to avoid a similar accident.@ *Id*. at 602. Emerald=s preparation and submission of its report, initiated only after a second accident four months after the incident, does not fall within the bounds of reasonableness. We also find somewhat disingenuous Emerald=s assertion that, because it submitted a report for the December accident on April 8, more than a month before the citation was issued, it did not violate the regulation.

Nor are we persuaded by Emerald=s argument that the judge erred by construing section 50.11(b) to require immediate submission of the report. E. Br. at 25 n.9. We do not read the judge=s decision as requiring immediate submission of the report. The judge determined that Emerald violated the regulation because it did not investigate the December failure until prompted

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[9] Section 50.11(b) provides in pertinent part:

> Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator shall develop a report of such investigation. . . . An operator shall submit a copy of an investigation report to MSHA at its request. Each report prepared by the operator shall include,
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> . . . .
>
> (8) A description of steps taken to prevent a similar occurrence in the future; . . .

by MSHA four months after the accident. 17 FMSHRC at 2099. Accordingly, we affirm the judge=s conclusion that Emerald violated section 50.11(b).

a. Whether This Violation May Be Designated S&S

Emerald contends that, because this violation involves a regulation which is not a mandatory health or safety standard, it may not be designated S&S.[10] E. Br. at 25. Emerald relies on section 104(d) of the Mine Act, which states in relevant part:

> If . . . the Secretary finds that there has been a violation of *any mandatory health or safety standard* . . . and such violation is of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health

[10] Mandatory health and safety standards are defined as Athe interim standards established by [titles] II and III of this [Act] and the standards promulgated pursuant to [title] I of this [Act].@ 30 U.S.C. ' 802(*l*). The standard at issue was promulgated under section 508, which is located in Title V of the Mine Act and provides that A[t]he Secretary, the Secretary of Health and Human Services, the Commissioner of Social Security, and the [Interim Compliance] Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this [Act].@ 30 U.S.C. ' 957.

> hazard, . . . he shall include such finding in any citation given to the operator under this [Act].

30 U.S.C. ' 814(d)(1) (emphasis added).[11]

In addition, Emerald points out that the Commission has held that to find a violation S&S, the Secretary must prove: (1) *the underlying violation of a mandatory health or 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 injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. E. Br. at 25 (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (emphasis added)).

In response, the Secretary argues that, in issuing the particular citation under review, she relied on the broad authority granted by section 104(a), which provides:

> If . . . the Secretary believes that an operator of [a] . . . mine . . . has *violated this* [*Act*], *or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this* [*Act*], he shall, with reasonable promptness, issue a citation

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[11] The other relevant provision of the Mine Act referring to an S&S designation is section 104(e), which provides in part:

> If an operator has a pattern of violations of *mandatory health or safety standards* in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. ' 814(e) (emphasis added).

> to the operator. Each citation shall be in writing and *shall describe* with particularity *the nature of the violation* . . . .

30 U.S.C. ' 814(a) (emphasis added). *See* S. Br. at 28-35.

The Secretary notes further that the Commission has previously held that a section 104(a) citation may be designated S&S as a way of describing the nature of the violation. *Id*. (citing *Consolidation Coal Co.*, 6 FMSHRC 189, 192 (Feb. 1984)). The Secretary contends that the reference to Amandatory health or safety standard@ in sections 104(d) and (e) was not intended to shield other serious violations from the enforcement mechanisms that Congress provided in those statutory provisions. S. Br. at 29-35.

The judge below found that an allegation of a significant and substantial violation in a 104(a) citation is simply an Aallegation of gravity, not an assertion of jurisdiction to apply the sanctions of [section] 104(d).@ 17 FMSHRC at 2099. The judge therefore declined to reach the issue of Awhether the sanctions of [section] 104(d) apply to a violation of Part 50.@[12] *Id.*

On appeal, the parties have urged us to decide whether the Secretary is precluded from attaching the S&S designation to a violation if the underlying regulation does not meet the statutory definition of a mandatory health or safety standard. Emerald argues that the designation of S&S is more than an allegation of gravity affecting the amount of the penalty proposed, since it allows the violation to be included in a determination of whether the operator has engaged in a pattern of violations under section 104(e). E. Br. at 26. Moreover, although the enforcement sanctions available in section 104(d) were not sought in the instant case, the Secretary disputes Emerald=s assertion that she cannot apply that provision to a violation that does not involve a mandatory health or safety standard. S. Br. at 31-34. We will therefore address the issue squarely raised by the parties and consider whether the reference to mandatory health or safety standard in sections 104(d) and 104(e) precludes the Secretary from attaching the S&S designation to a violation of another regulatory requirement, regardless of the risk of harm that the violation may pose.

The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question in issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal* Co., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). The

[12] Regulations contained in Part 50 of 30 C.F.R. pertain to ANotification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Coal Production in Mines[.]@

examination to determine whether there is such a clear Congressional intent is commonly referred to as a A*Chevron I*@ analysis. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir 1989); *Thunder Basin*, 18 FMSHRC at 584*; Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). In conducting our analysis, we utilize traditional tools of construction, including an examination of the particular statutory language at issue, and the language and design of the statute as a whole. *Thunder Basin*, 18 FMSHRC at 584 (quoting *K Mart Corp. v. Cartier, Inc.*, 496 U.S. 281, 291 (1988)). If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a A*Chevron II*@ analysis, is required to determine whether an agency=s interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal* Co., 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

Although section 104(d) refers explicitly to Aa violation of any mandatory health or safety standard,@ that same provision authorizes the Secretary to include her S&S designation Ain *any citation* given to the operator under@ the Mine Act. 30 U.S.C. ' 814(d)(1) (emphasis added). The particular citation under review refers to section 104(a), which instructs the Secretary to cite violations of the Act, as well as violations of Aany mandatory health or safety standard, rule, order, or regulation promulgated pursuant to@ the Mine Act. 30 U.S.C. ' 814(a). This provision treats a violation of a mandatory health or safety standard identically to a violation of the Act and to violations of other rules, orders or regulations promulgated pursuant to the Act. Moreover, section 104(a) provides that each citation Ashall describe with particularity the nature of the violation.@ *Id*. As the Commission has held, A[t]he >nature= of a violation refers to its characteristics and properties. . . . [and] [t]hat one of those characteristics may be whether the violation is significant and substantial is made clear by section 104(d)(1).@ *Consolidation*, 6 FMSHRC at 192.[13] Thus pursuant to section 104(a), a citation alleging a violation of a regulatory requirement could be designated S&S if the violation posed a reasonable likelihood of injury.

The Commission has made clear that any citation issued under the Act is issued pursuant to the broad authority granted to the Secretary by section 104(a). Although citations and orders issued under section 104(d) contain special findings, they are nevertheless derived from and are a part of the Secretary=s general authority to issue citations under section 104(a). This view was articulated in *Utah Power and Light Co.*, 11 FMSHRC 953, 956 (June 1989) (A*UP&L*@), where the Commission held that section 104(d) is not a separate basis for the issuance of a citation independent from section 104(a). The Commission explained that A[s]ection 104(a) is the source of the Secretary=s power to issue citations@ and that Athe statutory language makes clear that >significant and substantial= and >unwarrantable failure= determinations by MSHA inspectors constitute special findings that are >*includ[ed]*= in any citation@ issued under the authority of

[13] The partial dissent of Commissioners Riley and Verheggen erroneously contends that the holding of *Consolidation*, 6 FMSHRC at 192, must be linked to violations of mandatory health or safety standards. Slip op. at 39. The case simply never presented the question of whether violations of other regulations cited under section 104(a) could be S&S.

section 104(a). *Id.* (emphasis and alteration in original). *UP&L* expressly approved *Nacco Mining Co.*, 9 FMSHRC 1541, 1545 & n. 6 (Sept. 1987), and clarified that a Asection 104(d)(1) citation@ is only a term of convenience, and that it refers to a section 104(a) citation with the special findings described in section 104(d). 11 FMSHRC at 957. Likewise, a pattern notice under section 104(e) is based on the number of prior S&S citations the operator has received under section 104(a). *See Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1078 (D.C. Cir 1987).

Thus, we cannot consider sections 104(d) and 104(e) in isolation from section 104(a) when deciding whether Congress intended to restrict the application of sections 104(d) and 104(e) to certain kinds of standards.[14] Reading sections 104(d) and 104(e) together with section 104(a) gives rise to an ambiguity as to whether Congress intended the Secretary=s enforcement ability to depend on the fact that the violation concerned a standard promulgated under section 101 of the Act, as opposed to one contained in the Act itself or one promulgated pursuant to section 508 of the Act.[15]

Because the statute is ambiguous on this point, we must determine whether the Secretary=s interpretation is reasonable, and thus entitled to deference. Deference is accorded to Aan agency=s interpretation of the statute it is charged with administering when that interpretation is reasonable.@ *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency=s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997); *see also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Secretary argues that the Mine Act must be read as one harmonious whole. S. Br. at 35. She contends that, consistent with the statute=s graduated enforcement scheme, violations

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[14] In *Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987), *aff=d*, 863 F.2d 51 (D.C. Cir. 1988), the Commission similarly declined to construe section 104(d) apart from the enforcement authority granted by section 104(a). The operator in that case unsuccessfully contended that, since section 104(d) referred to unwarrantable failure violations found Aupon any inspection,@ a section 104(d) citation could not be based upon a violation discovered through an Ainvestigation.@ *Id*. at 1594. In affirming the Commission, the Court of Appeals considered the fact that sections 104(a) and 107(a) authorize citations and withdrawal orders for violations found Aupon inspection or investigation@ and concluded that the Secretary was not limited to issuing a section 104(d) citation for only a violation discovered during the course of an inspection. 863 F.2d at 55.

[15] The partial dissent of Commissioners Riley and Verheggen characterizes section 104(d) as a separate prosecutorial tool, apart from section 104(a), and analogous to those contained in sections 110(c) or 110(d). Slip op. at 37. This characterization, however, overlooks a fundamental fact **C** sections 104(a) and 104(d) are subsections of the same section of the Mine Act. This provides even more support for interpreting the two subsections harmoniously.

posing a likelihood of harm can be designated S&S, regardless of whether they involve a mandatory health or safety standard or some other mandatory requirement under the Act. *Id*.

The citation under review charges a violation of 30 C.F.R. ' 50.11(b), which states in pertinent part that A[e]ach operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator shall develop a report of each investigation.@

We note at the outset that the cited conduct in this case involves a failure to comply with a requirement specified in the statute itself. The Part 50 standard at issue here implements the language of section 103(d) of the Act, which states that A[a]ll accidents . . . shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary . . . .@ 30 U.S.C. ' 813(d). In explaining this statutory requirement, the report of the Senate Committee on Human Resources, the committee responsible for drafting the Mine Act (ASenate Committee@), emphasized that:

> This provision reasserts the Committee=s view that the primary responsibility for mine safety and health is the operator=s and requires the operator to maintain a continuing program for mine safety and health. Such accidents may forwarn mine operators of potential hazards, and they should thus be investigated, and remedial action should be taken regardless of whether actual injuries occurred. The operator is required to keep a record of his actions to prevent recurrence of similar accidents. . . .
>
> . . . [T]he Committee recognizes that adequate investigation of accidents by operators assists operators to develop responsive and responsible in-house safety and health programs.

S. Rep. No. 95-181, at 28 (1977) (ASenate Report@), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978) (A*Legis. Hist.*@).

If we determine, therefore, that the Secretary can never apply the sanctions contained in sections 104(d) and 104(e) to violations involving a failure to investigate the cause of an accident, we must of necessity conclude that Congress intended the Secretary to have less enforcement tools at her disposal when the violation involves a safety requirement that Congress saw fit to include in Title I of the Act than when the violation involves a requirement

promulgated by the Secretary under that title, that is, a mandatory health or safety standard. We are reluctant to ascribe such an illogical approach to the statute=s drafters.[16]

There is nothing in the legislative history of the Mine Act that indicates Congress was more concerned about the origin of the standard violated as opposed to the potential danger created by the violation, or the kind of conduct that caused the violation. And there is certainly no indication that the drafters of the statute intended a regulation promulgated by the Secretary under Title I of the Act to be subject to more stringent enforcement than a requirement specified in that title by the drafters themselves. In fact, the terms Aviolations of the law@ and Amandatory health and safety standards@ are used interchangeably throughout the legislative history of the Mine Act. For example, when discussing the newly enacted training requirements contained in Title I, 30 U.S.C. ' 825, the Senate Committee continually refers to this provision of the Act as a Amandatory safety and health training standard.@ S. Rep. No. 95-181, at 49, *Legis. Hist.* at 637. In discussing unwarrantable failure closure orders, the Senate Committee explained: A[t]he unwarrantable failure order recognizes that the law should not tolerate miners continuing to work

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[16] As Chairman Jordan and Commissioner Marks noted in *Topper Coal Co.*, 20 FMSHRC 344 (Apr. 1998):

> It is plainly illogical for a standard promulgated pursuant to title I of the Mine Act to be subject to more stringent enforcement than a prohibition inserted in that title by the drafters themselves. . . . If the Secretary can apply the full panoply of the Mine Act=s enforcement scheme to any regulation she promulgates pursuant to title I of the Act, surely she should be able to do the same regarding behavior that the lawmakers themselves took the trouble to prohibit.

Id. at 359.

in the face of hazards resulting from conditions *violative of the Act.*@ S. Rep. No. 95-181, at 31, *Legis. Hist.* at 619 (emphasis added). A withdrawal order under section 104(d)(1), 30 U.S.C. ' 814(d)(1), is triggered by a violation that is both S&S and unwarrantable. Therefore, if a violation of the Act can trigger a withdrawal order under this section, MSHA must have the authority to cite it as S&S as well as unwarrantable.

The Senate Committee expressly disapproved the Aunnecessarily and improperly strict view@ of S&S taken by the Commission=s predecessor under the 1969 Coal Act, the Interior Board of Mine Operations Appeals, in *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974). S. Rep. No. 95-181, at 31, *Legis. Hist.* at 619. In *Eastern Associated*, the Board based its narrow reading of S&S in part on the Aexplicit restriction to infractions of the mandatory standard.@ 3 IBMA at 349. The Senate Report indicated, moreover, that even violations of a technical provision (many of which are contained in Part 50) could trigger sanctions under section 104(d), when the Aviolations do pose a health or safety danger to miners, and are the result of an >unwarranted failure.=@ S. Rep. No. 95-181, at 31, *Legis Hist.* at 619.[17]

Preventing the Secretary from designating violations of Part 50 regulations as S&S also defeats the objectives of the Mine Act because a failure to investigate and report an accident may often lead to significant safety consequences. No better example exists than the facts of the instant case. As we explain below, if Emerald had complied with section 50.11(b) by investigating the failure of the refuse pile in December 1992, it could have likely prevented the failure of the refuse pile in April 1993, an incident that needlessly exposed miners to a serious risk of harm. Moreover, the cases that Emerald relies on to attempt to demonstrate that violations of these regulations are not hazardous are inconclusive and do not address this point directly. In fact, in one of those cases, *LJ=s Coal Corp.*, 14 FMSHRC 1225 (Aug. 1992), the Commission implicitly accepted that Part 50 violations may be S&S; that case was remanded for determination of whether a violation of section 50.10 was S&S. *See* 14 FMSHRC at 1230.

The Secretary=s position is consistent with numerous court and Commission cases that have declined to embrace a literal application of the term Amandatory health or safety standard.@ For example, in *Consolidation Coal Co.*, 14 FMSHRC 956 (June 1992), the Commission rejected an argument, similar to the one Emerald makes here, that the Secretary was without authority to propose a civil penalty for a violation of a Part 50 regulation because it was not a mandatory health or safety standard. *Id.* at 963-65. The operator relied on Section 110(a), which requires the Secretary to assess a civil penalty against A[t]he operator of a . . . mine in which a violation occurs of a *mandatory health or safety standard* or who violates any other provision of this [Act] . . . .@ 30 U.S.C. ' 820(a) (emphasis added). Observing that A[s]ection 110(a), if read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards,@ the Commission adopted instead an approach that harmonized sections 104(a), 105(a) and 110(a), and concluded that civil penalties should be assessed for violations of any

[17] The Senate Report also indicated simply that Aviolations@ should be designated S&S, without referring to any specific type of violation. S. Rep. No. 95-181, at 31, *Legis Hist.* at 619.

regulation, not just mandatory safety and health standards. 14 FMSHRC at 964-65. The Commission held that A[e]ach part of a statute should be construed in connection with the other parts >so as to produce a harmonious whole,=@ and concluded that the Secretary=s interpretation, allowing civil penalties for violations of Part 50 regulations, Aadvance[d] the goals of the Act and maintain[ed] the importance of civil penalties as a deterrence.@ *Id*. at 965 (quoting 2A *Sutherland Statutory Construction* ' 46.05, at 103 (Singer 5th ed. 1992 rev.)).

Similarly, in *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 405 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976), the D.C. Circuit rejected a literal reading of the Federal Coal Mine Health and Safety Act (ACoal Act@) that would have permitted the Secretary to issue citations only for violations of mandatory health or safety standards. In *Zeigler*, the operator argued that, because a ventilation plan provision was not a mandatory health and safety standard, the provision was unenforceable. *Id*. at 401. The court acknowledged that, under the plain meaning of the Coal Act, the operator was correct, but rejected such a Adeceptively simple resolution of the problem.@ *Id*. at 405.[18] The court foresaw that A[a] strict literal reading of the statute=s definition provision@ would render unenforceable many other protective provisions of the Coal Act that did not conform to the definition of a mandatory health or safety standard. This was a Aresult@ that ACongress could hardly have intended@ since it Awould greatly impair the statute=s effectiveness as a tool for bringing about improvements in mine health and safety conditions.@ 536 F.2d at 405.[19] Congress expressly approved the reasoning in *Zeigler* when it enacted the Mine Act. S. Rep. No. 95-181, at 25, *Legis. Hist*. at 613. The partial dissent of Commissioners Riley and Verheggen fails to acknowledge the precedential value of the long line of Commission and court cases that decline to narrowly interpret the Mine Act, including the D.C. Circuit=s refusal in *Zeigler* to narrowly confine the term mandatory health or safety standard.

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[18] The language of section 104(b) and other enforcement provisions of the Coal Act limited their application to violations of Aany mandatory health or safety standard.@ 30 U.S.C. ' 814(b) (1976).

[19] *See also Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) (A[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.@).

Having determined that the reference in sections 104(d) and 104(e) to Amandatory health or safety standard@ does not reflect a Congressional intent to prevent the Secretary from applying those provisions to violations of other requirements, we also reject Emerald=s contention that our *Mathies* decision requires us to vacate the S&S designation from this violation.[20] In *Mathies*, the Commission held that the Secretary must prove the following to establish that a violation is S&S: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard **C** that is, a measure of danger to safety **C** contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4. In *Mathies*, however, only the second and third elements were at issue. *Id.* at 4. Since the violation was conceded by the operator, there was no need for the Commission to elaborate on its reference to Amandatory safety standard,@ which was presumably derived from the language of section 104(d).

Ironically, the regulation that was violated in *Mathies* was not a Amandatory health or safety standard,@ as that term is defined in section 3(*l*) of the Act. The *Mathies* citation involved a failure to comply with a safeguard notice. *Id*. at 1-2.[21] Those requirements are issued under the authority granted by section 314(b) of the Act, a provision located in Title III that states that A[o]ther safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.@ 30 U.S.C. ' 874(b). Safeguards allow the Secretary to impose a requirement at a particular mine Awhen the inspector observes a transportation hazard that is not addressed by an existing mandatory standard.@ *Southern Ohio Coal Co.*,14 FMSHRC 1, 10 (Jan. 1992) (A*SOCCO II*@).

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[20] Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission=s *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission=s narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id*. at 20,217. Commissioner Marks is curious as to MSHA=s change in position on the S&S question and requests that the Secretary promptly advise this Commission as well as the mining community on this important issue.

[21] The particular provisions at issue included 30 C.F.R. ' 75.1403 (identical to the statutory provision at section 314(b), 30 U.S.C. ' 874(b)), 30 C.F.R. ' 75.1403-1 (permitting inspector to require safeguards on mine-by-mine basis, in addition to those required in sections 75.1403-2 through 75.1403-11), and 30 C.F.R. ' 75.1403-6(b)(3) (listing criteria designed to guide inspector in requiring other safeguards and including provision that track mounted personnel carriers should be equipped with sanding devices). *Id*. at 1 n.1. The safeguard at issue in *Mathies* required that Aall mantrips at this mine will be provided with properly maintained sanding devices sufficient to sand all wheels in both directions of travel.@ *Id*. at 2 n.2.

We have held that a safeguard Amay be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date.@ *Id.* at 7.

Although we have recognized that section 314(b) allows the Secretary to create Awhat are, *in effect*, mandatory safety standards . . .[,]@ we have also recognized a Acrucial difference in the rules of interpretation applicable to mandatory standards promulgated by the Secretary [under Title I] and those applicable to >safeguard notices= issued by his inspector.@ *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (A*SOCCO I*@) (emphasis added). In *SOCCO I*, we held that while mandatory standards Ashould be construed in a manner that effectuates, rather than frustrates their intended goal[,]@ safeguards are issued without resort to the normally required rulemaking process, and therefore Aa narrow construction of the terms of the safeguard and its intended reach is required.@ *Id.*[22] Furthermore, in *SOCCO II*, the Commission cited with approval MSHA=s *Program Policy Manual*, which emphasized that Athe criteria of sections 75.1403-2 through -11 are *not* mandatory standards.@ 14 FMSHRC at 7 (emphasis added). Accordingly, the *Mathies* decision, involving precisely these criteria, does not restrict the Secretary to applying an S&S designation only to a citation involving a mandatory safety or health standard.

Finally, the assertion of our dissenting colleagues Riley and Verheggen that the S&S designation in this case has no legal impact is based upon a literal reading of the Mine Act that ignores the historical role the S&S designation has played, as a practical matter, in Mine Act enforcement. *See* slip op. at 40. The designation of S&S has served as MSHA=s dividing line between violations that are treated in a perfunctory fashion, and those that are subjected to more individualized scrutiny. The D.C. Circuit recognized the significance of an S&S designation in *Consolidation*, 824 F.2d at 1077-79. In discussing the impact of a section 104(a) violation that was designated S&S, the court found that MSHA routinely applied a flat $20 penalty to non-S&S violations and excluded them from the operator=s history of violations.[23] *Id.* at 1078. The court noted that the A[d]esignation of [section 104(a)] violations as significant and substantial . . . is necessary if the more severe sanctions available under [section] 104(e) are ever to be applied.@ *Id.* This differential treatment for 104(a) violations designated S&S led the court to conclude that the

[22] Commissioners Riley and Verheggen=s partial dissent wrongly asserts that the majority Aconcede[s]@ that safeguards are treated as mandatory safety standards (slip op. at 39-40), failing to apprehend the crucial distinction that exists between mandatory health or safety standards and safeguards. A safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard.

[23] The Secretary=s current practice is to apply a flat penalty of $55 to non-S&S violations (63 Fed. Reg. 20,035 (1998) (amending 30 C.F.R. ' 100.4)), but the violations are now included in an operator=s history as a result of the ruling in *Coal Employment Project*, 889 F.2d at 1138, that the policy of excluding such violations from an operator=s history itself violates section 110(i).

operator had suffered a Acognizable injury under the Act.@ *Id*. at 1079. In addition, Congress provided for the issuance of a withdrawal order for repeated S&S violations under Mine Act section 104(e). Thus, the S&S designation is much more than a Aterm of art@ for gravity as our dissenting colleagues incorrectly suggest. *See* slip op. at 40.

For the foregoing reasons, we hold that the Secretary is not precluded from designating this violation of section 50.11(b) as S&S.

b. Whether the Violation of Section 50.11(b) Was S&S

Emerald argues in a footnote in its brief that, even if the Secretary has the authority to make S&S findings for Part 50 violations, application of the Commission=s S&S test, as articulated in *Mathies*, does not support such a conclusion here. E. Br. at 29-30 n.13. Emerald essentially argues that the failure to prepare a report of the investigation was not reasonably likely to result in injury. *Id*. It also asserts that, because the Secretary alleged that the violation of section 50.10 for the failure to report the accident was of low gravity and not likely to cause injury or illness, the Secretary was inconsistent in alleging that the violation of section 50.11(b) was reasonably likely to cause injury. *Id.*

The judge found that Emerald=s violation of section 50.11(b) was S&S because A[c]ontinued operations without investigating the causes of a failure of a refuse pile and the measures needed to prevent a recurrence could contribute significantly and substantially to another failure of the refuse pile with a risk of serious injury@ a little more than three months after the December failure. 17 FMSHRC at 2099. We agree with the judge that Emerald=s failure to investigate and prepare a report on the December accident prior to the April collapse was reasonably likely to, and did in fact, result in a similar event that posed a high risk of danger. Indeed, a larger collapse of the refuse pile occurred in April for which an imminent danger order was issued. Gov=t Ex. 1. If Emerald had properly investigated and reported the December accident it would have been required under section 50.11(b)(8) to include a Adescription of steps taken to prevent a similar occurrence in the future.@ No such steps were taken and as a consequence the condition of the refuse pile worsened in the intervening months between December and April during which the dangerous practice of operating trucks and bulldozers on an unstable refuse pile continued. 17 FMSHRC at 2098; Tr. 214-19, 230-31, 663-64. Thus, we view the failure to investigate as closely linked to the subsequent accident.

Moreover, we are not persuaded by Emerald=s argument that the fact that MSHA determined that one violation of a Part 50 regulation was not reasonably likely to result in injury is somehow inconsistent with determining that another violation of a different Part 50 regulation was reasonably likely to result in injury. MSHA was citing Emerald for different omissions under different sections, and the nature of one violation is not determinative of the nature of the other. We therefore affirm the judge=s finding that the section 50.11(b) violation was S&S.

C. Section 77.215(f) and (h)[24]

The judge determined that, based on the December 1992 incident, Emerald committed an S&S and unwarrantable violation of section 77.215(f) for constructing the refuse pile Awithout an engineering plan and without adherence to accepted engineering practices to prevent accidental sliding and shifting of materials.@ *Id.* at 2100-01. Finding that the violation was due to high negligence, he assessed a penalty of $8,000. *Id.* at 2101. The judge further found an S&S and unwarrantable violation of section 77.215(h) because the refuse pile was not constructed, compacted, or graded according to the requirements in that section. *Id.* at 2104. He assessed a $7,000 penalty for the violation. *Id.*

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[24] Section 77.215 provides in pertinent part:

> (f) Refuse piles shall be constructed in such a manner as to prevent accidental sliding and shifting of materials.
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> . . . .
>
> (h) . . .[N]ew refuse piles and additions to existing refuse piles[ ]shall be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal to 1 vertical (approximately 27 [degrees]) except that the District Manager may approve construction of a refuse pile in compacted layers exceeding 2 feet in thickness and with slopes exceeding 27 [degrees] where engineering data substantiates that a minimum safety factor of 1.5 for the refuse pile will be attained.

Concerning the April 2, 1993, incident, the judge found an S&S violation of section 77.215(f) because a portion of the refuse pile, measuring 350 feet long, 60 feet high, and 40 feet wide, shifted and slid into the slurry pond. *Id*. at 2101-02. He reasoned that the Arefuse pile had been constructed over the years without an engineering plan to prevent the refuse material from shifting and sliding.@ *Id*. at 2102. He found that although the violation was due to high negligence, Emerald=s conduct did not amount to Areckless disregard@ for the safety of the employees as alleged in the citation and he modified the citation accordingly. *Id.* He assessed a penalty of $8,500. *Id.* The judge also found a violation of section 77.215(h) because the refuse pile was not compacted and constructed in lifts so as not to exceed a 27 degree slope, as required by that standard. *Id.* at 2103. He found the violation to be S&S and a result of Emerald=s high negligence and unwarrantable failure and assessed a penalty of $8,500. *Id.* at 2103-04. The judge also affirmed an imminent danger order under section 107(a) issued as a result of the April incident. *Id.* at 2108.

Emerald contends that, because the entire area at issue was part of the impoundment and not a refuse pile, the judge erred in finding four violations of section 77.215. PDR at 13; E. Br. at 12-18. Additionally, Emerald argues that the unwarrantable failure determinations for three of the section 77.215 violations should be reversed because the judge disregarded important evidence showing the necessity of stockpiling the refuse material. PDR at 14-17; E. Br. at 31-34. Emerald notes that it had never been cited before for this practice and MSHA had inspected just a month prior to the April incident. E. Br. 33 n.15. In a footnote, Emerald argues that the S&S determinations for the section 77.215 violations were improper because the record does not establish a likelihood of injury. PDR at 17 n.5; E. Br. at 34 n.16.

The Secretary responds that the judge=s findings of four violations of section 77.215 are supported by substantial evidence. S. Br. at 39-41. She asserts that substantial evidence also backs the judge=s determinations that the section 77.215(f) and (h) violations on December 27 and the section 77.215(h) violation on April 2 were unwarrantable. *Id*. at 42-46. The Secretary contends that, contrary to Emerald=s assertion, the judge did not find that the April 2 violation of section 77.215(f) resulted from unwarrantable failure, but rather determined that it was due to high negligence, a finding that the Secretary asserts is supported by substantial evidence. *Id.* at 43 n.12, 46.

1. Violations of Section 77.215(f) and (h)

Substantial evidence supports the judge=s determinations that the two failures of the refuse pile in December and April constituted violations of section 77.215(f) and (h). On December 27, 1992, a 35-foot wide portion of the refuse pile broke away and slid down the slope causing a bulldozer to slide down the slope 30 feet toward the slurry pond. 17 FMSHRC at 2090. On April 2, 1993, an area of the refuse pile measuring 350 feet long, 60 to 80 feet high, and 40 feet wide shifted, caved in and slid into the slurry pond. *Id.* MSHA experts testified that the failure of the refuse pile was caused by its improper construction. Tr. 334-35, 338-43, 346-49, 416-18, 421, 423, 426-28. MSHA=s engineering experts testified that the material had built up over

several years without adequate compaction and foundation. Tr. 337, 341-42, 345, 349, 358, 399, 427-28. The miners testified that they had never used a compactor on the refuse pile. Tr. 229-30, 254. As observed by a number of witnesses, Emerald=s practice of pushing the refuse over the edge of the embarkment did not compact the material and caused a steep incline. Tr. 182, 450, 472-73. MSHA=s engineering experts testified that the pile=s slope, 35 to 37 degrees, was steeper than permitted by the standard. Tr. 337, 341-42, 345, 358, 427-28. In addition, there was no evidence that Emerald sought permission from the district manager pursuant to section 77.215(h) to deviate from the requirements of that section.

In light of this evidence, we conclude that substantial evidence supports the judge=s finding that the refuse pile failed in December 1992 and April 1993, as a result of the Aunsafe manner in which the pile was constructed,@ i.e., by pushing refuse over the edge toward the slurry pond, without compaction, proper grading of the slope or adherence to an engineering plan or accepted engineering practices. 17 FMSHRC at 2100-04. Accordingly, we affirm the judge=s determinations that Emerald violated section 77.215(f) and (h).

2. Unwarrantable Failure (December Section 77.215 Violations)

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission=s unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator=s efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator=s knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

The Secretary alleged, and the judge found, that the two December section 77.215 violations were a result of unwarrantable failure. The judge=s unwarrantable findings with respect to the December violations rest on Emerald=s A[knowledge] that the refuse pile was developed

without an engineering plan to prevent accidental sliding and shifting of refuse materials@ and on the high risk posed to miners working on the refuse pile. 17 FMSHRC at 2101, 2104.

Substantial evidence supports the judge=s findings concerning Emerald=s knowledge that it was not following the proper construction procedure. Emerald=s Senior Environmental Engineer Terry Dayton, who was responsible for inspecting the impoundment area and assisting the foremen in the development of the refuse disposal site at the time of the citations, testified that the material placed on the refuse pile was not compacted or placed in horizontal lifts in December 1992. Tr. 637-40, 674-79, 682-83. Dayton testified that there was a significant amount of refuse in the short haul area in December 1992. Tr. 676. In addition, as the judge found, before the failure in December 1992, Emerald submitted a report for the Pennsylvania Department of Environmental Resources noting that refuse material was being deposited on the refuse pile. 17 FMSHRC at 2092; R. Ex. 11. Foreman John Meyers, who was responsible for the refuse impoundment on the afternoon and evening shifts, testified that, in December 1992, conditions in the short haul area were Areally bad@ and the area was full of refuse piles. Tr. 548-50, 560-61, 569. Likewise, equipment operator Leonard Hamilton testified that management officials were out at the site and observed conditions there. Tr. 208, 215. Accordingly, we conclude that substantial evidence establishes Emerald=s awareness of the condition of the refuse pile.

Substantial evidence also supports the judge=s conclusion that, despite its knowledge that a significant pile had accumulated by December 1992, Emerald put the miners at risk by taking no steps to either construct the pile in a safe manner or to restrict miners from dumping on the pile. 17 FMSHRC at 2101, 2103-04; Tr. 562. Foreman Meyers testified that in December 1992, when the bulldozer went over the edge, something had to be done with the accumulating refuse and management provided no guidance or alternatives for placing refuse. Tr. 561-62. The record establishes that Emerald neglected the short haul area and implicitly permitted the practice of bulldozing the refuse piles over the edge of the embankment to accommodate more refuse. Tr. 179-81, 553-55, 560-61, 709-10. The miners testified that the refuse disposal operation suffered because of a shortage of manpower and a lack of supervision. Tr. 228, 231-32, 264, 469-71, 481-83. In addition, Emerald had permitted this very large refuse pile **C** estimated by MSHA to be as much as 1 million tons **C** to develop over 18 years without attention to commonly accepted engineering principles. 17 FMSHRC at 2089; Tr. 676. With respect to the level of danger, MSHA engineer Mazzei testified that the refuse pile created a hazard to anyone working on it, because it lacked a solid foundation, and Emerald engineer Dayton acknowledged it presented a danger to trucks going out on the pile. Tr. 340, 349, 679. The duration, extensiveness and obviousness of the violative condition **C** as well as the danger it posed **C** all support the judge=s unwarrantable determination.

Emerald=s defenses to the unwarrantable charge are not persuasive. Emerald argues that it had a valid safety reason for placing the refuse material in the short haul area, i.e., that the refuse was wet and could not be safely compacted and included on the impoundment. E. Br. at 31-32. Emerald=s contention is based on its position that the short haul area was merely a temporary stockpile to dry out materials, and not a refuse pile. We have already rejected this

contention (*see* slip op. at 5-7). Additionally, for the same reasons that uncompacted refuse could not be safely added to the impoundment, it could not be safely added to the unstable refuse pile in the short haul area. Thus, we reject Emerald=s argument, based on its asserted good faith belief that a hazard would exist if it did not place the material in the refuse pile, because its belief was unreasonable under the circumstances. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (Aug. 1994) (operator=s good faith belief that cited conduct is safest method of compliance must be reasonable).[25] Emerald=s argument that the bulldozer operator was operating in an unauthorized fashion at the time of the December failure (E. Br. at 33) overlooks the fact that Emerald was required under section 77.215 to construct its refuse pile so as to prevent it from sliding. The bulldozer operator=s actions are not a defense to the allegation of unwarrantably failing to construct the pile correctly.

In sum, we agree with the judge that Emerald=s awareness of, and indifference to, the ever-increasing danger of the unstable, improperly constructed refuse pile over a long period of time amounted to aggravated conduct. Accordingly, we affirm, on substantial evidence grounds,

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[25] Commissioner Riley observes that, while estoppel is no defense to a violation of the Mine Act, it may, depending on the surrounding circumstances, offer a limited defense to unwarrantability.

> [T]he Secretary and the Commission interpret the words Aunwarrantable failure@ to require a culpability determination similar to gross negligence or recklessness. . . . Citing the Restatement (2d) of Torts '283 (1965), the Secretary argues that this negligence-based definition of Aunwarrantable failure@ requires consideration of the *surrounding circumstances*. (A[T]he standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man *under the circumstances*.@) (emphasis added).

Secretary of Labor v. *FMSHRC*, 111 F.3d. 913, 919-20 (D.C. Cir. 1997) (citations omitted) (alteration in original). Such mitigating surrounding circumstances could include the fact that Athe duration, extensiveness and obviousness of the violative condition@ (*see* slip op. at 25), were overlooked by MSHA for 18 years, including within a month of the accident that spawned the instant case.

The benefit of the doubt in such situations, however, flows only to the Areasonable man under the circumstances[,]@ not to those who remain clueless despite repeated instances of ground failure nor to those who appear volitionally ignorant, refusing to acknowledge and remediate widespread instability in the auxiliary refuse pile, including bulldozers subsiding into the slurry pond. Such events need not be of seismic proportions to inform a Areasonable@ actor that greater efforts are necessary for compliance.

the judge=s determinations that Emerald=s violations of section 77.215(f) and (h) relating to the December incident were a result of its unwarrantable failure to comply with those standards.

3. S&S (December and April Section 77.215 Violations)

Emerald argues that the judge erred in finding that the four violations of section 77.215 were S&S. E. PDR at 17, n.5; E. Br. at 34 n.16. The Secretary asks the Commission to treat Emerald=s argument as abandoned because it is contained in a two-sentence footnote. S. Br. at 41 n.11.[26] Alternatively, the Secretary argues that the judge=s S&S findings are supported by substantial evidence. *Id*. at n.11.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat=l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Mathies*, 6 FMSHRC at 3-4. We agree with the Secretary that substantial evidence supports the judge=s determination that a failure of a refuse pile with its resultant collapse of ground is reasonably likely to result in serious injury to miners working on the pile. *See* 17 FMSHRC at 2101-04. Inspector Daniel testified that improper construction of the refuse pile created a danger of shifting, sliding, or cracking of the refuse pile having the likelihood to result in a fatal injury. Tr. 53-55, 70-71, 90. Indeed, what happened in this case **C** a large portion of the refuse pile collapsed causing a bulldozer to slide approximately 30 feet down the pile and become partially buried **C** illustrates that these violations were reasonably likely to result in injuries of a very serious nature. We therefore affirm the judge=s findings that the four violations of section 77.215 were S&S.

D. Section 77.1608(b) Violations

[26] Commissioner Marks would grant the Secretary=s request and determine that Emerald has abandoned its challenge to the S&S designations by the skeletal nature of its argument, in line with well-established appellate law. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (declining to entertain appellant=s asserted but unanalyzed claim); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 237 (3rd. Cir. 1987) (unsupported issue is deemed waived); *Dungaree Realty, Inc. v. United States*, 30 F.3d 122, 124 (Fed. Cir. 1994) (characterizing as frivolous argument supported by one sentence in brief); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (issues raised in brief not supported by argument deemed abandoned unless manifestly unjust to do so); *see also Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993) (Commission did not address issue listed in PDR but not discussed in brief).

The judge determined that Emerald violated section 77.1608(b) in December 1992 Aby having dump trucks drive on a refuse pile that might fail to support the weight of a loaded dump truck.@ 17 FMSHRC at 2105-06. The judge also concluded that Emerald violated section 77.1608(b) in April 1993 because loaded dump trucks were operated in an unstable area that might fail to support them and the A[d]ump trucks were dumping loads of coarse coal refuse along the edge of the refuse pile.@ *Id.* at 2107. He determined that both violations were S&S and unwarrantable and assessed penalties of $9,500 for each of them. *Id.* at 2106, 2107-08.

Emerald argues that substantial evidence fails to support the judge=s findings that violations of section 77.1608(b) occurred and that the violations resulted from unwarrantable failure. PDR at 17-20. Emerald also challenges the S&S findings associated with the truck violations. PDR at 8, 19 n.6. The Secretary responds that substantial evidence supports the judge=s findings of violations of section 77.1608(b). S. Br. at 47, 48-49. Further, the Secretary asserts that substantial evidence supports the judge=s finding that Emerald=s December violation of section 77.1608(b) was a result of unwarrantable failure. *Id.* at 47-48. With respect to the S&S findings, the Secretary argues that Emerald has effectively abandoned its challenges to the S&S findings because its entire argument is contained in a two-sentence footnote in its PDR, and, alternatively, that the judge=s findings are supported by substantial record evidence. *Id*. at 48 n.13; *see also id*. at 41-42 n.11.

1. December Violation

Section 77.1608(b) provides that A[w]here the ground at a dumping place may fail to support the weight of a loaded dump truck, trucks shall be dumped a safe distance from the edge of the bank.@

The miners testified that they drove onto the refuse pile and dumped material there. Tr. 162, 166, 185, 310-11. Foreman Meyers testified that trucks were dumping in the short haul area in December 1992. Tr. 560-62. Thus, substantial evidence supports the judge=s finding that Emerald had Adump trucks drive on a refuse pile that might fail to support the weight of a loaded dump truck.@ 17 FMSHRC at 2106. However, the judge did not address how close to the edge the trucks were dumping in December. Under the plain terms of section 77.1608(b), the judge was required to determine not only that the trucks drove on ground that might fail to support them, as he did, but also that the trucks were not dumping a safe distance from the edge of the bank. The judge stated: Dump trucks traveled on unstable parts of the refuse pile, including the area that failed, in order to deposit coarse refuse.@ *Id*. The judge did not explain his reference to Athe area that failed,@ and it is unclear whether this is a finding that the trucks were dumping too close to the edge. For this reason, we believe that a remand on this issue is warranted.

In addition, a remand is necessary because the record supports various conclusions as to how close to the edge the trucks were dumping in December 1992. The witnesses were not specific as to how close the trucks came to the edge at that time. The Secretary does not point us to evidence that the trucks were dumping on the edge in December 1992. *See* S. Br. at 47.

However, there is evidence in the record suggesting that trucks were dumping on the edge as a general practice that was ongoing in December. Inspector Daniel testified that, when investigating the incidents, he received statements from the miners that A[f]or months@ they were Adumping the material on the edge and shoving it over the edge with the dozer.@ Tr. 52-53, 64. He relied on these statements when issuing the citation. Tr. 123. Dozer operator Donald Moore observed truck tracks A[s]omewhat close [t]o . . . the edge.@ Tr. 261. Substitute safety committeeman and haul truck driver Timothy Brown testified that he observed piles that had been dumped Aright on the edge.@ Tr. 160, 311.

A remand is necessary for the judge to sift through this evidence and make the requisite finding. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (judge must analyze and weigh relevant testimony of record, make appropriate findings, and explain reasons for his decision). Accordingly, we vacate the judge=s finding of violation, as well as the related S&S and unwarrantable failure determinations. If the judge finds a violation on remand, he should reexamine the S&S and the unwarrantable determinations and make specific findings explaining the rationale for his decision.[27]

2. April Violation

The judge found that A[d]ump trucks were dumping loads of coarse coal refuse along the edge of the refuse pile@ prior to the April violation. 17 FMSHRC at 2107. Substantial record evidence supports this finding. Photographs taken when the inspector investigated the April failure show truck tire tracks going to the edge of the portion of the refuse pile that broke away. Tr. 62-63, 258-59, 335; Gov=t Ex. 21. Inspector Daniel testified that he observed truck tracks going into the failed area. Tr. 63-64. Equipment operator Hamilton, who had worked with Emerald for 18 years, testified to dumping on the refuse pile in the area that collapsed just before the April failure. Tr. 208, 214.

We do not find persuasive Emerald=s requests that the Commission credit other witnesses who were uncertain how close to the edge the trucks were dumping, and draw a different conclusion from the photographs. PDR at 19. A judge=s credibility determinations are entitled to

[27] The judge determined that Emerald=s violation of section 77.1608(b) was unwarrantable because the operator Aknew of the longstanding practice of dump trucks dumping coarse refuse on the refuse pile@ as well as the danger of the practice as shown by instructions of supervisors to dump the material closer to the bin. 17 FMSHRC at 2106. Although substantial record evidence establishes Emerald=s knowledge of dumping on the pile in December 1992 (Tr. 560-62), the judge made no finding as to when management began instructing drivers to dump close to the bin. Equipment operator Hamilton testified that his foreman Aencourage[d]@ dumping close to the bin. Tr. 215-16. However, it appears that this testimony may relate to events following the December accident. Tr. 215-16. We therefore instruct the judge to address this evidence, as well as any other relevant factors, when he reexamines the unwarrantability question. *Mid-Continent*, 16 FMSHRC at 1222.

great weight and cannot be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). We see no basis for overturning the judge=s credibility determinations here. Based on the credited evidence, including the photographs, we find that substantial evidence supports the judge=s findings.

Because substantial evidence supports the judge=s determination, we affirm the judge=s conclusion that Emerald violated section 77.1608(b) in April 1993.

3. Whether the April Section 77.1608(b) Violation Was S&S

Emerald asserts, without providing any additional argument, that the ALJ erred in finding that the April violation of section 77.1608(b) was properly designated S&S. PDR at 8. The judge found that the violation was S&S, reasoning that A[b]ecause of the instability of the refuse pile, it was reasonably likely that a failure of the refuse pile would occur and cause a dump truck to roll over or fall with collapsed refuse material, resulting in serious injury.@ 17 FMSHRC at 2107. We affirm that conclusion. It is beyond doubt that dump trucks driving on ground that fails to support them near the edge of a bank may be reasonably likely to result in serious injury. The December accident, which involved a refuse pile collapse causing a bulldozer to fall 30 feet down the pile, illustrates the serious hazard contributed to by the violation. In addition, Emerald has presented us with no reason to overturn the judge=s decision. We accordingly affirm the judge=s finding that the April violation of section 77.1608(b) was S&S.[28]

E. The Judge=s Modification of Two Citations

The two S&S citations issued by MSHA charging violations of sections 77.215(h) and 77.1608(b) as a result of the April failure did not include unwarrantable failure allegations. Nonetheless, the judge determined that the April violations were a result of Emerald=s unwarrantable failure. 17 FMSHRC at 2103-04, 2107.[29]

The operator (E. Br. at 34) and the Secretary (S. Br. at 49-51) agree that the judge erred in unilaterally modifying the citations. In *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the Commission determined that its judges may not on their own initiative modify a citation to add an S&S allegation. In *Mettiki Coal Corp.*, 13 FMSHRC 760, 764-65 (May 1991), the Commission held that its judges are not authorized representatives of the Secretary and do not have authority to charge an operator with violations of section 104(b) of the Mine Act.

[28] Commissioner Marks would affirm the judge=s S&S determination on the grounds that Emerald has abandoned its argument to the Commission. *Carducci*, 714 F.2d at 177*; Jackson*; 826 F.2d at 237; *Dungaree Realty*, 30 F.3d at 124.

[29] The judge found that MSHA modified the section 77.215(h) citation to a section 104(d)(1) citation (*id*. at 2103); however, the citation does not show such a modification. *See* Gov=t Ex. 2.

Under this reasoning, the judge erred in modifying the above citations to allege unwarrantable failure violations. Accordingly, we reverse the judge=s modification of the two April citations.

Nonetheless, our holding does not cause us to disturb the judge=s penalty assessments for these two citations. *See, e.g., Mechanicsville,* 18 FMSHRC at 881-82 (penalty affirmed even though Commission held judge lacked authority to sua sponte find violation was S&S). In reviewing a judge=s penalty assessment, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. AWhile a judge=s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . .@ *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). We conclude that the judge=s findings that the two violations were the result of Emerald=s high negligence are supported by substantial evidence.

The evidence discussed in sections C and D that Emerald was aware of the unsafe condition of the refuse pile in April, continued to use unsafe practices in the construction of that pile, permitted trucks to dump close to the edge of the unsafe pile, and that the conditions on the refuse pile posed a high danger, provides substantial support for the judge=s determination that Emerald=s violations of sections 77.215(h) and 77.1608(b) were characterized by high negligence. The high negligence findings are further supported because Emerald did not take steps to bring the refuse pile in compliance with section 77.215, nor did it stop the unsafe practice of trucks dumping on the pile, even after the December failure. The high negligence of the April violation of section 77.1608(b) is also buttressed by the fact that, in March 1993, Emerald engineer Dayton specifically warned the foreman in charge to keep the truck drivers close to the bin and to keep the trucks off the refuse pile because of the danger. Tr. 230-31, 556-57, 663. Accordingly, we affirm the penalty assessments as supported by substantial evidence.

III.

Conclusion

For Citation Nos. 3658682 and 3658696, we affirm the judge=s conclusions that the refuse material in the short haul area constituted a Arefuse pile,@ and that Emerald violated sections 50.10 and 50.11(b). We affirm the judge=s determination that the section 50.11(b) violation was S&S.

With respect to Order No. 3768690 and Citation Nos. 3658639, 3658640, 3658683, we affirm all section 77.215 violations and that they were S&S. We affirm the determination that the December section 77.215 violations were a result of unwarrantable failure. We reverse the judge=s unwarrantable determination as to the April section 77.215(h) violation contained in Citation No. 3658640, and affirm the judge=s assessment of penalties for all section 77.215 violations.

As to Order No. 3658698, we vacate the judge=s conclusion that Emerald violated section 77.1608(b) in December 1992, and remand for reanalysis and, if necessary, S&S and unwarrantable determinations. We also remand for reassessment of penalty, if any.

As to Citation No. 3658700, we affirm the judge=s determinations that Emerald violated section 77.1608(b) in April 1993, and that the violation was S&S. We reverse the judge=s unwarrantable determination, and affirm the penalty assessed by the judge.

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Mary Lu Jordan, Chairman

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Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in all parts of the majority=s decision with the exception of section E. In that section, the majority has determined that the judge did not have the authority to conclude that a violation is a result of unwarrantable failure when the Secretary has failed to formally make such a charge. I disagree and dissent on this issue.

As I reasoned in my partial dissent in *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 883 (June 1996), the Commission has recognized that Mine Act section 105(d), 30 U.S.C. ' 815(d), authorizes the judge to modify citations Aso long as the essential allegations necessary to sustain the modified enforcement action are contained in the original citation or order.@ *Id.* at 880 (citing *Consolidation Coal Co.*, 4 FMSHRC 1791, 1793-94 (Oct. 1982)). For reasons explained below, I conclude that is precisely what occurred in this case, i.e., the judge=s rulings are based on allegations contained in the citations. Therefore, I find that the judge acted within his authority and in accordance with his duty as an administrative law judge when he concluded that the subject violations were a result of unwarrantable failure.

The two violations at issue stem from the April collapse of the refuse pile, which also resulted in the issuance of an imminent danger order under Mine Act section 107. Gov=t Ex. 1. In both citations, the inspector marked that Emerald=s negligence was Areckless disregard,@ which is the highest level of negligence on a MSHA citation or order. Gov=t Ex. 2, 5.[1] Both citations indicate that Afatal@ injuries were Ahighly likely@ to result from the violations. *Id*. Both citations include special assessments which allege in detail that Emerald was alerted to the dangers of the unsafe refuse pile and of allowing the trucks on the pile and, despite the awareness of these dangers, the operator continued the practice of operating trucks on the unstable pile. *Id*.

[1] The citation alleging a section 77.215(h) violation was modified twice to raise the level of operator negligence **C** from Amoderate@ to Ahigh@ to Areckless disregard.@ Gov=t Ex. 2. MSHA Inspector Daniel testified that he raised the level of operator negligence because his investigation revealed that, prior to the April collapse, Emerald Engineer Terry Dayton warned the Emerald foreman in charge of the refuse pile, Jim Graznik, about the danger of how Ahis people were piling the mine refuse, the way they were bulldozing over the edge.@ Tr. 55-56.

Both citations were issued under section 104(a) and specifically indicate that they were issued in conjunction with an imminent danger order. *Id*. The inspector=s testimony suggests that he issued the two citations under section 104(a), rather than as unwarrantable under section 104(d), not because they were not a result of unwarrantable failure, but because the citations were issued in conjunction with an imminent danger order. Tr. 92.[2] The inspector=s apparent view that the imminent danger order precluded issuance of a citation alleging unwarrantable failure was erroneous. *See Eastern Associated*

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[2] The inspector was apparently relying on the language of Mine Act Section 104(d), which provides:

> (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]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. ' 814(d) (emphasis added).

Coal Corp., 13 FMSHRC 902, 907-911 (June 1991) (section 104(d)(2) unwarrantable failure order can be issued in conjunction with imminent danger order). In *Eastern*, the Commission construed the language of section 104(d) so as not to limit the Secretary=s enforcement authority, especially in cases involving imminent danger. There, the Commission stated: ATo read out of the Act the protections and incentives of a section 104(d)(2) order on the basis that the hazard created by the violation is so great that it creates an imminent danger would seem peculiar on its face and would blunt the effectiveness of this sanction.@ 13 FMSHRC at 910. Although the holding of *Eastern* was limited to section 104(d)(2) orders, its reasoning is instructive and applicable here. Inspector Daniel=s choice to not issue a citation alleging unwarrantable failure does seem peculiar, if not absurd, under the facts of this case. He failed to issue a citation, which would trigger the more serious enforcement sanctions under the Mine Act, because the violative condition was of such a high level of gravity that it qualified as an imminent danger. The majority now blindly affirms this absurdity by refusing to look at the contents of the citations, especially in the context of a record that reveals conduct that could not be anything but an unwarrantable failure.

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.* at 2003-04. The contents of both citations charge Emerald for violative conduct constituting more than ordinary negligence. Both citations charge Emerald with Areckless disregard@ and provide, in the accompanying special assessments, the details to back that up. Gov=t Ex. 2, 5. Accordingly, the judge was well within his authority under section 105(d) to modify the citations to charge unwarrantable failure. *See Consolidation*, 4 FMSHRC at 1793-97. Further, Emerald could in no way be prejudiced by such a modification because it was on notice from the face of the citations that it was being charged with the highest level of culpability for these very serious violations.

In addition, the record overwhelmingly supports the judge=s determinations of unwarrantable failure. Indeed, the majority affirms the judge=s determinations of high negligence for the very reasons that support the unwarrantable failure charges. Slip op. at 31. The record in this case supports the judge=s conclusion that the conditions of the refuse pile posed a high danger. 17 FMSHRC at 2101-02, 2103; Tr. 340, 349. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (unwarrantable failure finding supported by high danger posed by violation). Emerald was aware of the unsafe condition of the refuse pile in April, but continued to use unsafe practices in the construction of that pile and permitted trucks to dump close to the edge of the unsafe pile. Tr. 62-63, 214, 335-36, 556-57, 663-64. The judge=s conclusion that Emerald engaged in aggravated conduct is further supported because Emerald did not take steps to bring the refuse pile in compliance with section 77.215, nor did it stop the unsafe practice of trucks dumping on the pile, even after the December failure of the refuse pile. 17 FMSHRC at 2103, 2107. Emerald=s own engineer warned the foreman about the dangers of this growing and unstable refuse pile. Tr. 663-64; *see Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992) (unwarrantable failure finding supported by circumstances that show that operator was aware of violative conditions but failed to take effective measures to remedy them).

Substantial evidence in the record in this case supports the judge=s determinations that Emerald=s violations of section 77.215(h) and 77.1608(b) were a result of its aggravated conduct.

Accordingly, I dissent and would affirm the judge=s determinations that the subject violations resulted from unwarrantable failure.

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Marc Lincoln Marks, Commissioner

Commissioners Riley and Verheggen, in favor of reversing the judge=s finding that Emerald=s violation of 30 C.F.R. ' 50.11(b) was S&S:

We join in the decision of Chairman Jordan and Commissioner Beatty with the exception of sections II.B.2.a and II.B.2.b, from which we dissent. We agree with Emerald=s contention that its violation of section 50.11(b) may not be designated S&S because the regulation cited is not a mandatory health or safety standard.

The first element of the *Mathies* test requires the Secretary to prove an Aunderlying violation of a *mandatory safety standard*.@ 6 FMSHRC at 3-4 (emphasis added). But here, the Secretary has proven a violation of a regulation that is not a mandatory safety standard. Her allegation of S&S thus fails to meet the first element of the *Mathies* test. Although we agree with the judge=s statement that the S&S allegation at issue here was merely an Aallegation of gravity, not an assertion of jurisdiction to apply the sanctions of [section] 104(d)@ (17 FMSHRC at 2099), for the following reasons, we find that the judge erred in finding the violation S&S.

Section 104(a) of the Mine Act grants the Secretary the authority to cite violations of the A[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act.]@ 30 U.S.C. ' 814(a). The S&S terminology, on the other hand, appears only in sections 104(d)(1) and 104(e) of the Mine Act, both of which are limited in scope to violations of Amandatory health or safety standards.@ 30 U.S.C. ' 814(d)(1), (e). Here, by their plain terms, sections 104(d)(1) and 104(e) are limited in application to violations of mandatory health or safety standards. *Chevron*, 467 U.S. at 842-43 (if a statute is clear and unambiguous, effect must be given to its language).

The Secretary=s power to cite mine operators originates in section 104(a). In various sections of the Act, Congress then set forth additional prosecutorial tools for the Secretary to use in connection with specific actors and offenses, such as sections 110(c) and 110(d) addressing individual civil and criminal liability, section 110(e) addressing advance notice of inspections, section 110(f) addressing false statements made to the Secretary, and section 110(g) addressing smoking in mines. *See* 30 U.S. C. ' 820(c), (d), (e), (f), (g). In section 104(d), Congress provided the Secretary with the power to make *special findings* when issuing a citation under section 104(a) as to one broad category of offenses, violations of mandatory health or safety standards. These findings are made when violations are Aof such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard@ or Acaused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards.@ 30 U.S.C. ' 814(d)(1). The authority to make special findings under section 104(d) applies, by the plain terms of the section, to only one category of the types of violations enumerated in section 104(a): violations of mandatory health or safety standards.[1] Read

[1] Our colleagues state that section 104(d) Aauthorizes the Secretary to include her S&S designation >in *any citation* given to the operator under= the Mine Act.@ Slip op. at 13 (majority=s emphasis). But the *findings* which section 104(d) authorizes the Secretary to make **C** findings of S&S and unwarrantable failure **C** are clearly and unequivocally predicated upon the Secretary first

together, sections 104(a) and 104(d) create a hierarchy of enforcement under which the Secretary can bring additional enforcement sanctions to bear on operators who violate mandatory health or safety standards. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (AThe 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*@) (emphasis added).

In *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987), the D.C. Circuit very clearly sketched out the graduated enforcement scheme set forth in section 104 of the Mine Act. The court stated:

> In [section] 104 . . . Congress established a detailed scheme for enforcement of mine health and safety standards promulgated by the Secretary of Labor. That statutory scheme specifically provided for findings by the Secretary that certain violations of *health and safety standards* were [S&S]. 30 U.S.C. ' 814(d), (e). Pursuant to *that statutory authorization* [i.e., section 104(d)], the Secretary designates violations as [S&S] in citations issued under [section] 104(a).

824 F.2d at 1077-78 (emphasis added). Section 104 thus includes what the D.C. Circuit called Athe initial [section] 104(a) citation stage@ (*id.*) for any violation, then a special finding stage for violations of mandatory health or safety standards when the Secretary determines, among other things, whether the violations are S&S.

Congress may have created these additional separate enforcement sanctions beyond section 104(a) because it considered violations of mandatory health or safety standards as particularly serious. But whatever Congress=s intent **C** and the legislative history is silent on this issue[2] **C** we find the Act to be plain on its face, unambiguous, and setting forth an eminently

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finding Athat there has been a violation of any mandatory health or safety standard.@ The language of the Act is inescapable on this point. *See* 30 U.S.C. ' 814(d)(1).

[2] Congressional Asilence@ on this specific issue cannot be construed one way or the other beyond the plain and unambiguous terms of the Act itself. As the Supreme Court has noted, Acongressional silence >lacks persuasive significance,= particularly where administrative regulations [or practices, as in this case] are inconsistent with the controlling statute.@ *Brown v. Gardner*,

sensible scheme of ratcheting up the consequences of wrongdoing for particular classes of violations.

The majority argues that it is illogical for section 103(d) of the Act, which requires operators to report mine accidents, to receive less enforcement significance than mandatory health and safety standards. Slip op. at 15-16. Although 30 C.F.R. ' 50.11(b) is at issue in this case and not section 103(d) of the Act, insofar as section 103(d) may be indirectly implicated, Congress placed many standards in Titles II and III of the Act, clearly designating them as *mandatory health or safety standards*. Congress then singled out such Amandatory health or safety standards@ in sections 104(d) and 104(e) as meriting different, more severe sanctions when an operator has violated them repeatedly. Section 103(d), in contrast, appears in Title I of the Act, and violations of the section are thus not subject to the sanctions of sections 104(d) and 104(e). Nor, for that matter, does Part 50 contain any mandatory health or safety standards **C** it too is outside the scope of sections 104(d) and 104(e). The Act and its implementing regulations speak for themselves, and have their own internal logic **C** a graduated enforcement scheme that imposes more severe sanctions on violations of mandatory health or safety standards than on violations of reporting requirements.

The majority cites a case in which the Commission concluded that Athe required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding . . . that the violation is significant and substantial.@ *Consolidation Coal Co.*, 6 FMSHRC at 192 (cited by majority, slip op. at 13). This holding, however, is limited to violations of mandatory health or safety standards cited as S&S under section 104(a) **C** whereas here, a violation of a Part 50 regulation that is not a mandatory health or safety standard has been cited as S&S under section 104(a). Similarly, at issue in the D.C. Circuit case cited by the majority to illustrate Athe historical role the S&S designation has played . . . in Mine Act enforcement@ was a violation of a mandatory health standard. Slip op. at 20 (citing *Consolidation Coal Co. v FMSHRC*, 824 F.2d 1071).

We believe that *LJ=s Coal Corp.*, remanding a Part 50 violation for an S&S analysis and cited by the majority for the proposition that Athe Commission implicitly accepted that Part 50 violations may be S&S@ (slip op. at 17), was wrongly decided on this particular point. As for the *Consol* case cited by the majority in which the Commission addressed the scope of penalties assessed under the Act (slip op. at 17, citing 14 FMSHRC at 963-65), section 110(a) provides that penalties be assessed against A[t]he operator of a . . . mine in which a violation occurs of a mandatory health or safety standard or [an operator] *who violates any other provision of this* [*Act*].@ 30 U.S.C. ' 820(a) (emphasis added). The expansive language of section 110(a) is a far cry indeed from the much more limited language of section 104(d)(1), which makes no mention of any provision of the Act other than mandatory health or safety standards.

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513 U.S. 115, 121 (1994) (citations omitted).

Finally, the majority comments at some length on the irony of the *Mathies* test having been formulated in a case involving a safeguard notice, which they appear to view as something other than a mandatory health or safety standard. Slip op. at 19-20. But as they concede, the Commission views safeguard notices as being A>*in effect*, mandatory safety standards.=@ *Id*. at 19 (citing 7 FMSHRC at 512) (majority=s emphasis).[3]

[3] Indeed, safeguard notices are issued pursuant to section 314(b) of the Act, which appears in Title III, captioned AInterim Mandatory Safety Standards for Underground Coal Mines,@ and various implementing provisions of Part 75 of 30 C.F.R., captioned AMandatory Safety Standards **C** Underground Coal Mines.@

As we stated in *Topper Coal Co.*, 20 FMSHRC 344, 376-77 (Apr. 1998), we are also troubled by the policy implications of the Secretary=s insistence on citing violations of provisions other than mandatory safety or health standards as S&S. As the judge correctly noted here, A[a]n allegation of a >significant and substantial= violation in a ' 104(a) citation is an allegation of gravity, not an assertion of jurisdiction to apply the sanctions of ' 104(d).@ 17 FMSHRC at 2099. A section 104(a) S&S designation is nothing more than an allegation that a particular violation is serious. No legal consequences flow from such a designation that the Secretary could not more efficiently accomplish under her Part 100 civil penalty regulations,[4] including her broad discretion to impose special assessments (*see* 30 C.F.R. ' 100.5). We believe that the Secretary has wasted her resources and those of the Commission by resorting to a term of art[5] under sections 104(d) and 104(e) to measure the gravity of a violation of a Part 50 regulation charged under section 104(a).

Our colleagues state that our Aassertion . . . that the S&S designation in this case has no legal impact is based upon a literal reading of the Mine Act that ignores the historical role the S&S designation has played, as a practical matter, in Mine Act enforcement.@ Slip op. at 20. Our colleagues, however, can point to not one legal impact flowing from the S&S designation at issue here. They fail to demonstrate how the judge erred (as they would presumably hold) when he stated that this S&S allegation is merely an Aallegation of gravity.@ 17 FMSHRC at 2099; *cf. Consolidation Coal Co. v. FMSHRC*, 824 F.2d at 1084 (Athe fact that a particular violation has

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[4] Although the majority notes that MSHA=s Acurrent practice is to apply a flat penalty of $55 to non-S&S violations (slip op. at 20 n.23, citing amended 30 C.F.R. ' 100.4), they neglect to mention that this practice is purely discretionary and that under the single penalty assessment regulation they cite, the Secretary has broad discretion to assess a penalty based upon the unique circumstances of each case, notwithstanding whether a citation has been designated S&S. *See* 30 C.F.R. ' 100.5.

[5] Our colleagues incorrectly state that we Asuggest@ that an S&S designation is Aa >term of art= for gravity.@ Slip op. at 20. Instead, we are saying that S&S is a term of art used in sections 104(d) and 104(e) to describe violations which the Secretary finds are serious enough to trigger the additional sanctions of these sections.

been designated as [S&S], without more, does not result in the imposition of any additional sanction under the Mine Act@).

As for the Ahistorical role@ of S&S in Mine Act enforcement, section 104 clearly sets forth where S&S fits in **C** as violations of mandatory health or safety standards impinge more significantly and substantially on the safety of miners, the legal consequences become more severe. Thus, the sanctions of sections 104(d), triggered by an S&S finding, were designed by Congress to be more severe than sanctions available to address a violation of, for example, a reporting requirement which is not set forth in a mandatory health or safety standard. That the Secretary has historically ignored this scheme by blurring the lines so clearly drawn by Congress **C** a mistake she made in this case when she designated a Part 50 violation as S&S **C** is no excuse for this Commission to ignore the plain language of the Act. As the Supreme Court has held, the age of an agency interpretation of its enabling statute Ais no antidote to clear inconsistency with [the] statute.@ *Brown v. Gardner*, 513 U.S. at 122 (striking down Department of Veterans Affairs regulation that had been on books for 60 years). If an agency interpretation Aflies against the plain language of the statutory text, [this] exempts courts from any obligation to defer to it.@ *Id*.

We hasten to add that we do not consider this violation of section 50.11(b) anything other than serious. We agree with our colleagues that had Emerald complied with the cited standard when its refuse pile failed in December 1992, a similar accident might not have occurred in April 1993. *See* 30 C.F.R. ' 50.11(b)(8) (requiring accident reports to include Adescription of steps taken to prevent a similar occurrence in the future@). But it does not follow that the violation must be designated S&S. Such a designation is simply at odds with the Act=s plainly articulated graduated enforcement scheme. Instead, the Secretary ought to have relied upon her broad discretion under Part 100 to address the seriousness of this violation. Furthermore, also at issue here are underlying violations, all of which we find to be S&S, and which we believe are the proper vehicle for the Secretary to have brought down upon Emerald the sanctions of section 104(d).

Accordingly, we would reverse the judge=s finding that Emerald=s violation of section 50.11(b) was S&S, and dissent from our colleagues= holding to the contrary.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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