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JUDGES GRAPPLE WITH NEW MINE SAFETY ISSUES (AND ONE OLD ONE)

by Tim Biddle and Dan Wolff

In this article we report on notable federal mine safety and health decisions issued over the past year by federal courts and the Federal Mine Safety and Health Review Commission. We summarize two important decisions from the U.S. Court of Appeals for the District of Columbia Circuit, one upholding the validity of MSHA's emergency response plan regulations and the other addressing MSHA's jurisdiction over a mine access road used for non-mining purposes; and a very recent Fourth Circuit decision on the discretion of MSHA to cite production-operators for Mine Act violations created solely by their independent contractors, a decision which largely tracks a 2006 decision from the D.C. Circuit. We also point out a decision from the federal district court in Utah holding that the media have no right of access to MSHA accident investigation interviews. And from the Commission we highlight two decisions of procedural importance, as well as a decision clarifying an operator's obligation to provide clear access to escapeways from longwall faces.

Emergency Temporary Standard for SCSRs Upheld

One of MSHA's regulatory actions following the Sago and Aracoma mine disasters in January 2006 set the stage for the first decision we review, the D.C. Circuit's 2008 ruling in *National Mining Association v. MSHA*. Following those accidents in West Virginia, MSHA published an emergency temporary standard ("ETS") in March 2006 requiring mine operators to, among other things, store additional self-contained self-rescuers ("SCSR") in a mine's escapeways. Under the Federal Mine Safety and Health Act ("Mine Act"), MSHA can issue an ETS without providing industry a preliminary opportunity to comment on the agency's rationale for the rule. The Mine Act does, however, provide an opportunity for public comment following publication, with the understanding that MSHA will address any concerns raised in a revised and "final" rule that it must publish within nine months of the ETS. Following that timeframe, MSHA received comments on the ETS during the spring and summer of 2006, and the final rule was published in December.

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Spotting several legal deficiencies in the final rule, including inconsistencies between the rule and the Mine Improvement and New Emergency Response Act ("MINER Act") which Congress had enacted in June 2006, NMA challenged the rule in the U.S. Court of Appeals for the D.C. Circuit. Of chief concern was the final rule's requirement that individual caches of SCSRs be stored in *each* escapeway, as compared to a "common cache" of SCSRs that could be built in the stoppings between parallel escapeways – something proposed by industry and other health and safety experts – unless the common cache was designed to the same explosion-force criteria as seals. MSHA referred to this as the "hardened room."

NMA raised several objections. First, it argued that the MINER Act permitted the use of common caches other than the so-called hardened room, and that MSHA's rule therefore was invalid to the extent it was superseded by the newly enacted statute. Next, NMA contended that MSHA failed to give industry sufficient notice that the agency would be advancing the hardened room rule because that concept was not mentioned in the ETS. Finally, NMA said the final rule was arbitrary and capricious because it was far safer to store SCSRs in a common cache inside stoppings than to store them directly in each escapeway, where the devices would be directly exposed to mine emergency hazards such as fire, smoke, or explosion forces.

The court did not address the merits of the first argument even though it was central to NMA's challenge. The court said that the argument had not been raised during the rulemaking process and had therefore been waived. The court also rejected the notice and arbitrary-and-capricious arguments. It held that industry was given sufficient notice of the potential for a hardened room rule, as evidenced by the comments of many operators suggesting a less demanding common cache – the court reasoned that if operators knew enough from the text of the ETS to propose a common cache, surely they could have anticipated that MSHA might adopt a rule requiring any common cache to satisfy the hardened room requirements. The court noted that although this feature of the rule was not proposed as a rule per se, MSHA did solicit feedback at several public hearings on the idea of a "hardened room." The court also agreed with MSHA that requiring two sets of SCSRs – one in each escapeway – would provide for redundancy in the event one escapeway became impassable, and that in the absence of such redundant capacity, it was reasonable to require operators to store SCSRs in a "hardened" room that could withstand explosion forces.

A Road Is Not a "Mine," or Is It?

The second ruling from the D.C. Circuit concerns the very important question of MSHA jurisdiction over a road that is the exclusive access route to a mine, but also is used and traveled by entities and individuals other than the operator and its miners. The Mine Act defines "mine" to include "private ways and roads appurtenant to" mineral extraction areas. The National Cement Company of California, Inc. operates a quarry and cement processing plant on land leased from the Tejon Ranchcorp. To access its mine property, National Cement has a right-of-way over a 4.3-mile stretch of a 2-lane road extending from a state highway to the cement plant's entrance. What adds spice to this arrangement is that National Cement's right-of-way is not exclusive – the road is regularly used for multiple other purposes, by ranchers, sportsmen, the California Department of Water Resources, and even Hollywood film crews, among others. Although it is not contractually obligated to do so, as a matter of course National Cement has maintained the road over the years. In 1992, MSHA cited National Cement for not erecting berms or guardrails on the road but then vacated the citation on its own on the ground that the access road was not part of National Cement's mine.

In 2003, MSHA renewed its effort to regulate the road as a "mine" and again issued a citation to National Cement for failing to erect berms or guardrails. When asked about the inconsistency between issuing this citation and vacating the 1992 citation, MSHA agreed to vacate the later citation but then promptly wrote a letter to National Cement to give it "notice" that henceforth the road would be treated and regulated as a "mine." Sure enough, in 2004, MSHA issued another citation on the same grounds. National Cement challenged MSHA's jurisdiction to regulate the road, and Tejon intervened in support of that position. In agency proceedings, an administrative law judge ruled in MSHA's favor, but the Commission reversed, holding that if the road were a "mine" then National Cement would be strictly liable under the Mine Act for the acts of other parties over which it had no control (such as Tejon or the State Department of Water Resources), or those parties themselves could be potentially liable as "operators" if MSHA determined they exercised control over any portion of the road. Because either of those results would be absurd, the Commission held that Congress could not have intended for this road to be treated as a "mine."

MSHA petitioned the D.C. Circuit to review the Commission's decision. In *Secretary of Labor v.*

National Cement Company of California, Inc., the court ruled in 2007 that the Mine Act's definition of "mine" was ambiguous with respect to roads such as that used by National Cement. Moreover, it largely agreed with the concerns raised by National Cement and Tejon with treating the road as a mine. Nevertheless, proceeding very cautiously in light of the general rule that agency interpretations of statutes they are charged with administering are entitled to deference if the statute is ambiguous, the court vacated the Commission's order and instructed MSHA to try again to explain why its interpretation should be given deference. In doing so, the court observed that it would be "difficult" for MSHA to harmonize its interpretation with the overall enforcement scheme of the Mine Act (given the concerns the Commission had raised) but said MSHA should at least be given another chance to do so.

Stay tuned for more on this case – the matter has been briefed to the Commission on remand and a decision is pending. There is a very good chance that whichever side does not prevail before the Commission will seek further review by the D.C. Circuit.

Production-Operators Always on the Hook for Conduct of Independent Contractors

Since the days of the 1969 Coal Act, production-operators have grappled with liability for the conduct of their independent contractors. A seminal case from the Fourth Circuit held that, under the Coal Act, independent contractors could be cited as "operators" in their own right, but also that production-operators would remain on the hook regardless of whether they were at fault for any part of the violation. With the passage of the Mine Act in 1977, and Congress's express inclusion of independent contractors within the definition of "operator" (which was not the case under the Coal Act), production-operators held out hope that the Commission and courts would recognize that Congress intended independent contractors to stand on equal footing with production-operators, and thus to bear sole responsibility for violations they caused in any case where the production-operator itself had nothing to with the violation.

Alas, such a plain and logical reading of the Mine Act did not come to pass. But all was not lost, and production-operators took solace in longstanding Commission precedent that recognized a right of production-operators to seek review of citations issued to them for violations caused by independent contractors under an abuse-of-discretion defense. This meant that not only could a production-operator challenge the fact of violation and the appropriateness of any consequent civil penalty, but it could also challenge MSHA's discretionary decision to cite it for conduct attributable to an independent contractor. And for almost 30 years there was peace in the valley.

But this peace was a restless one, for MSHA did not like the rule – in its opinion, the Commission had no business "second-guessing" its decision to cite a production-operator. Ever. Unfortunately for MSHA, it could never get a federal court of appeals to address the issue because it always seemed to win the "discretion" battle before the Commission or the ALJ. But in 2005, it lost: Twentymile Coal Company challenged several citations on abuse-of-discretion grounds and the Commission, applying its longstanding precedent, agreed with Twentymile and vacated the citations, observing that the violations were the result of the conduct of an independent contractor, whose operations Twentymile was not in a position to control. MSHA didn't like that decision and appealed to the D.C. Circuit.

Meanwhile, in West Virginia, Speed Mining, Inc. ("SMI") faced a similar situation – an independent contractor with extensive experience in sinking mine elevator shafts overlooked several safety violations involving a crane. The crane hoist failed and created a severe safety risk by causing a six-ton bucket to fall and land only a few feet from the mine shaft opening where five of the contractor's employees were working at the time. Taking the view that SMI should have exercised greater oversight over its *independent* contractor, MSHA cited both SMI and the contractor for the violations. SMI challenged the citations, invoking Commission precedent as had just been reiterated in the *Twentymile* decision. Following that precedent, the ALJ agreed with SMI and vacated the citations issued to it. Again MSHA sought review by the Commission, which granted review but immediately stayed the case in lieu of the *Twentymile* appeal pending before the D.C. Circuit.

Then the bottom fell out. In 2006, the D.C. Circuit reversed the Commission in *Twentymile* and held that the Commission and courts are without authority to review MSHA's discretionary decisions to cite production-operators for violations caused by independent contractors. SMI was caught in the wake of *Twentymile* – the Commission remanded SMI's case to the ALJ to apply the rule as articulated by the D.C. Circuit. But

the fight did not end there. Recognizing that the D.C. Circuit is not the final authority on what the Mine Act allows, SMI maintained its defenses. As expected in light of *Twentymile*, the ALJ ruled in favor of MSHA and assessed civil penalties, and a subsequent petition to the Commission for review was denied. The stage was set for appeal to the Fourth Circuit in Richmond, and SMI had the audacity of hope – hope that another court would read the statute for what it says, and not feel constrained by the decision of the D.C. Circuit.

Before the Fourth Circuit, SMI struck at the very premise of MSHA's discretion to cite production-operators when they had nothing to do with causing the violation, contending that the Mine Act permits MSHA to cite only the operator responsible for the violation. Although SMI acknowledged that liability under the Mine Act is "strict," that form of liability usually only runs to an entity that had control over the conditions giving rise to the violation; without control, there should be no liability. In so arguing, SMI asked the court to recognize that its Coal Act precedent was neither on point nor binding in light of the amendment Congress made in 1977 to include independent contractors in the definition of "operator." SMI also repeated its argument that to the extent MSHA had the discretion to cite production-operators in such cases, the Commission and courts could review MSHA's decision to do so for abuse of discretion.

But in *Speed Mining, Inc. v. FMSHRC*, the Fourth Circuit took the easy path, siding with the D.C. Circuit and following its own Coal Act precedent in refusing to grant SMI the interpretation of the Mine Act it sought. It said that the Mine Act defines "operator" to include many different entities, and that all operators are strictly liable under the Mine Act, meaning that there is an implicit discretionary right of MSHA to cite whichever operator the agency chooses should be held responsible for a violation, even if that particular operator had nothing to do with causing the violation. It also held that MSHA's discretionary decisions cannot be reviewed because to do so would be to second-guess the policy choices of MSHA, a role that Congress did not intend the Commission or courts to play, and that they are not equipped to play.

No Right of Media Access to Accident Investigation Interviews

As sure as day follows night, the media will cover a major mine accident and will want to attend MSHA's accident investigation interviews of miners. But, as has the been the case in every accident investigation since 1985, MSHA will not allow media reporters to attend its investigation interviews. This scenario was repeated following the Crandall Canyon Mine accident in August 2007. This time, however, the media went to federal district court in Salt Lake City seeking an order compelling MSHA to let the media attend the accident investigation interviews.

In *Salt Lake Tribune v. Chao*, media lawyers argued that the public has a right under the First Amendment of the Constitution to attend (via a media reporter) MSHA's investigation interviews. The media had to elevate the argument to a constitutional one because there is nothing in the Mine Act or any other statute that limits MSHA's authority to restrict attendance at its accident investigation interviews.

The court made short work of the media's arguments, holding in October 2007 that there is nothing in the First Amendment or in any statute that gives the media or the public a right of access to MSHA accident investigation interviews. In short, MSHA is free under the Constitution, as well as federal and Utah law, to restrict its accident investigation interviews to the witness, his or her representative, a state representative, and a court reporter. That means no company, union, or media representative can be present during accident investigation interviews unless MSHA says so.

Commission Reaffirms Two Opportunities the Challenge Enforcement Proceedings

One of the peculiarities of enforcement proceedings under the Mine Act is that an operator has two opportunities to challenge enforcement actions – once when a citation or order is first issued, and later (often many months later) when a civil penalty is proposed. In two recent cases, the Commission grappled with complications that arise under this two-track arrangement.

The first case illustrates the strategy that when mine operators are issued a high number of citations and orders over a short period of time they sometimes exercise their right under § 105(d) of the Mine Act to file a pre-penalty contest to each citation and order within 30 days after the date it was issued but often do not press for a quick hearing. While there may be other reasons for filing a pre-penalty contest, the most common reasons are to get a case underway so the operator can begin discovery and can try to convince an MSHA attorney that the citation or order should be vacated (or the inspector's allegations

of negligence and gravity should be reduced) without waiting the many months it takes for a civil penalty case to commence.

This was the strategy employed by Marfork Coal Co. when it filed pre-penalty contests on three citations and then agreed to continue them until penalties were assessed for the citations. But what Marfork didn't expect was the administrative law judge's "I've had enough of this" reaction: he issued an order to Marfork to explain why the pre-penalty contest cases should not be dismissed because they "constituted a needless and duplicative consumption of Commission resources." When Marfork gave the usual answer ("we want to begin discovery and be able to discuss settlement") the judge responded by dismissing Marfork's pre-penalty cases, saying that the company could have its discovery and plenty of time to discuss settlement after penalties were assessed and contested for the alleged violations. (While that may seem a judicial overreaction for just three citation contests, other judges already had dismissed pre-penalty contests where the operator did not want to go to a hearing rapidly. For instance, in a case decided in November 2006, one operator (Arcoma Mining Co.) had filed 375 contest cases and asked that they all be stayed until penalties were assessed on the contested violations.) Marfork (represented by Robert Beattie, a former Commissioner) appealed to the Commission, which in August 2007 reversed the administrative law judge in *Secretary of Labor (MSHA) v. Marfork Coal Co., Inc.*.

The Commission held that § 105(d) gives mine operators the absolute right to file pre-penalty contests. But to simplify the Commission's handling of large numbers of pre-penalty contest cases where no rapid hearing is desired, the Commission said all § 105(d) pre-penalty contests will be stayed automatically (and not even assigned to an ALJ) until penalties are assessed and contested, unless the operator asks for a pre-penalty hearing. In so holding, the Commission observed that Marfork's reasons for filing pre-penalty contests (initiation of discovery and settlement possibilities) were valid.

Was this much ado about nothing? Hardly. In the first five months of 2007, about 475 pre-penalty contest cases were filed at the Commission. In the first five months of this year, 1168 pre-penalty contests were filed, an increase of about 700 cases. At this rate, by the end of 2008, the Commission estimates that it will have more than 2000 pre-penalty contest cases pending.

The second Commission decision, *United Mine Workers of America v. Maple Creek Mining, Inc.*, examined the inverse of the issue posed in *Marfork*: whether a withdrawal order issued under § 104(b) of the Mine Act could be contested in a civil penalty proceeding even if it had not been contested earlier in a pre-penalty "contest" proceeding. At first blush, one might wonder why the Commission bothered reviewing the case, since it has long recognized that operators have two opportunities to contest violations: either in a pre-penalty "contest" proceeding under § 105(d) or a "civil penalty" proceeding under § 105(a). The distinction of this case rested with the character of the challenged paper – a *withdrawal order* as compared to a *citation*. As it turns out, this was a case of first impression.

The background was that Maple Creek and MSHA entered into a settlement agreement related to multiple violations, pursuant to which Maple Creek agreed to pay a penalty on a § 104(a) citation stemming from a violation caused by an ineffective bleeder system. This was the violation that was the subject of the § 104(b) withdrawal order. The order, in turn, was vacated as part of the settlement agreement which was approved by the administrative law judge. Enter the UMWA. The UMWA had separately filed a claim seeking lost compensation on behalf of the miners who had been idled on account of the withdrawal order. The compensation case was before a different judge. With its settlement order from the penalty case in hand, Maple Creek moved for summary decision in the compensation case, contending that the requirement to pay lost wages can only be triggered by a final withdrawal order, and that because the withdrawal order had been vacated, it could not serve as the basis for UMWA's compensation claim.

The judge in the compensation case ruled for UMWA, finding that the § 104(b) withdrawal order did not allege a separate violation and that MSHA had only actually issued a penalty on the underlying § 104(a) citation, not the § 104(b) withdrawal order. He therefore concluded that the withdrawal order had not properly been part of the civil penalty proceeding, meaning that there really was no withdrawal order to vacate. In the judge's opinion, Maple Creek's sole avenue for contesting the withdrawal order was through a pre-penalty contest proceeding, which it did not file. Concluding that the withdrawal order was still effective, the judge permitted the compensation claim.

The Commission reversed the ALJ in July 2007, pointing out that its precedent and its own rules of procedure do not distinguish between "citations" and "orders" when it

comes to the two opportunities operators have to lodge a challenge. It stated that although operators "have the right under section 105(d) to contest citations and orders earlier instead of waiting for a penalty assessment, that right does not diminish their options under section 105(a)." The Commission also pointed out that the UMWA's position was absurd because it would foreclose an operator from contesting a withdrawal order, and thus require it to pay "lost compensation," even if the § 104(a) citation that preceded the withdrawal order was found to lack merit in a separate contest or civil penalty proceeding.

Escapeways Must Be "Travelable"

In *Secretary of Labor (MSHA) v. The American Coal Co.*, American Coal challenged citations issued for violation of 30 C.F.R. § 75.380 at its Galatia Mine when stage loaders moved during longwall operations into a position that forced face crews to crawl over them to reach the section escapeways. American argued that by its terms the escapeway regulation does not apply inby the section loading point (escapeway required from "each working section"; working section defined to begin at the loading point of a section). Since the area cited was inby the belt tailpiece, which was the section loading point, no violation could have occurred. MSHA said that because escapeways must be maintained in "travelable condition," access to an escapeway must be travelable as well. MSHA argued that "travelable" does not include crawling over a stage loader.

In a December 2007 decision, the Commission upheld the violations, but not for the reason MSHA had urged. Instead, the Commission held that since § 75.380 requires operators to "provide" escapeways from working sections, any substantial hindrance or condition that impedes miners from accessing escapeways violates the standard. The Commission found that Galatia didn't provide escapeways to its longwall face crews when the location of Galatia's stageloaders required the miners to crawl over them to access the escapeways.

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EXPORTING WITHOUT CROSSING BORDERS: THE "DEEMED EXPORT" RULE

by Lorraine B. Halloway and Sobia Haque

Most companies recognize that U.S. export control laws apply to shipments of products or technical data out of the United States to another country. Despite recent efforts by the U.S. Department of Commerce to increase awareness about how the export control rules apply to other transactions, however, some companies still do not realize that the sharing of technology or source code with a foreign national is also an export – even when the foreign national is within the United States. Under the "deemed export rule" in the Export Administration Regulations (EAR), a transfer of technology or source code (except encryption source code) is "deemed" to be "an export to the home country or countries of the foreign national."

This rule has important implications for any company that employs foreign nationals or has business dealings with foreign companies. Companies that violate the rule with respect to transfers of commercial or dual use technology and software (or parallel prohibitions under the International Traffic in Arms Regulations (ITAR), which applies to exports of military items) risk civil and criminal fines, potential loss of export privileges, and negative publicity. (Although the ITAR does not use the EAR term "deemed export," it incorporates the same rule through its definition of an "export," which includes "[d]isclosing or transferring technical data to a foreign person, whether in the United States or abroad.")

Who Is a Foreign National?

The deemed export rule applies to transfers of technology and source code to all foreign nationals except those who are: (1) granted permanent residence, as demonstrated by the issuance of a permanent resident visa (that is, a Green Card); (2) granted U.S. citizenship; or (3) granted status as a "protected person" under 8 U.S.C. § 1324(b)(a)(3). Thus, the term foreign national includes persons in the U.S. such as employees of U.S. companies, students, businesspeople, scholars, researchers, technical experts, military personnel, diplomats, and tourists. Persons who are citizens of more than one foreign country or who have citizenship in one foreign country and permanent residence in another country present special issues. Generally, under

the EAR (but not the ITAR), the last permanent residence status or citizenship obtained is the one that controls.

How the Deemed Export Rule Works

For purposes of the deemed export rule, technology (or source code) is considered "released" to a foreign national through visual inspection (as with technical specifications, blueprints, and plans), oral communication (as through discussions or presentations), or when it is made available by practice or application under the guidance of persons with knowledge of the technology. "Technology" is broadly defined under EAR to include specific information necessary for the development, production, or use of a product.

A U.S. person must apply for an export license pursuant to the deemed export rule when two conditions are met: (1) the U.S. person intends to transfer controlled technology to a foreign national in the United States; *and* (2) transfer of the same technology to the foreign national's home country would require an export license. Thus, for example, when a mine operator conducts a PowerPoint presentation that is attended by a company employee who is a foreign national or is on a secondment or other assignment from a foreign affiliate, the U.S. company needs to consider whether a license is required under the EAR and its deemed export rule.

Section 740 of the EAR provides for exceptions to the license requirement – for example, License Exception Technology and software-unrestricted (TSU), and License Exception Technology and software under restriction (TSR). The terms of potential license exceptions must be reviewed with respect to a particular transfer to see that they are met before relying on a particular license exception. But if no exception applies, the license must be obtained *prior to* the release of the information to the foreign national. This means that any company transferring technology to a foreign national employee must consider whether it needs to obtain a license, and if so, must allow sufficient time (usually several months) to obtain any required license. Similar considerations must be made whenever a U.S. company invites customers or even an affiliate's employees over for meetings in the U.S. or has technical discussions or other interactions with foreign companies and persons. There are several helpful sources for general information on export licensing and applications, including the websites for the State Department Directorate of Defense Trade Controls (http://pmddtc.state.gov/) and the website for the Department of Commerce's Bureau of Industry and Security (BIS) (http://www.bis.doc.gov/Licensing/).

Recent Enforcement Activity

The deemed export rule is aggressively enforced by the Departments of Commerce and State. For example, in 2004, the State Department fined General Motors Corporation and General Dynamics Corporation (which subsequently acquired GM) $20 million for violations of the Arms Export Control Act and the ITAR. The State Department alleged that GM allowed foreign person employees unlicensed access to ITAR-controlled defense articles, technical data, and defense services on-site at GM Defense London, a division of General Motors of Canada Ltd. and a wholly owned subsidiary of GM. Among the violations described in the charging letter were that many of GM's foreign person engineers and other technical program support personnel had access to various programs and/or drives on which most of the GM Defense technical data – *i.e.*, ITAR-controlled data – was located. A recent Commerce Department list of "Major Cases" includes four cases involving deemed exports, including civil and criminal enforcement actions against individuals, as well as companies.

Penalties

If the recent changes regarding penalties for violations of the EAR's export control rules are any indication of the forecast for enforcement, there is no doubt that the Department of Commerce will be enforcing the "deemed export" rule aggressively and severely. Under The International Emergency Economic Powers Enhancement Act, which was signed into law on October 16, 2007, "a civil penalty may be imposed . . . in an amount not to exceed the greater of – (1) $250,000; or (2) an amount that is twice the amount of the transaction . . . ."

Before passage of this law, the maximum civil penalty had been $50,000. The Enhancement Act also increased criminal penalties from $50,000 to $1,000,000, but left unchanged the 20-year maximum period of imprisonment.

Possible Reform?

In December, 2007, a Commerce Department-established Deemed Export Advisory Committee (DEAC) issued a report concluding that the existing deemed export regulatory regime should be replaced with an approach more attuned to the realities of today's global economy and national security needs. Among other specific steps,

the DEAC recommended simplifying the licensing process for these exports and expanding current educational outreach programs conducted by Commerce to provide greater awareness of the rule in academia, business, and government research communities. The DEAC's full report, entitled "The Deemed Export Rule in the Era of Globalization," is available at http://tac.bis.doc.gov/2007/deacreport.pdf. The Commerce Department is seeking comments by August 18, 2008, on whether the scope of technologies on the Commerce Control List subject to deemed export licensing requirments should be narrowed and, if so, which technologies should be subject to those requirements. Public comments are also sought on whether a more comprehensive set of criteria should be used to assess country affiliation for foreign nationals with respect to deemed exports.

The "Bottom Line" for U.S. Companies: Beware

Although reforms are under consideration, the deemed export rule remains in full effect, and aggressive enforcement by the Commerce and State Departments continues. Given the broad application of the rule and increased enforcement efforts aimed at technology transfers, it is imperative that U.S. businesses develop internal compliance procedures which enable them to determine when licenses are needed and obtain them quickly for "deemed exports." Such procedures are needed not only to prevent inadvertent violations of the EAR and ITAR, but also to permit U.S. companies to function in the increasingly global marketplace and to hire and collaborate with foreign national employees and consultants on a timely basis.

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WHEN EVERYTHING CHANGED: CIVIL PENALTIES UNDER THE MINER ACT AND THE NEW PART 100

by Willa Perlmutter

Three high-profile underground mine disasters since January 2006 with unprecedented real-time coverage in the general media triggered a public outcry for mine safety reform. The mine disasters, the consequent public uproar, and Congress's response to the clamor to "fix" the mining industry "problem" culminated in the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"). While it is a surprisingly short piece of federal legislation, coming in at just over twelve pages, the MINER Act imposes new civil penalty provisions that have had, and will continue to have, a profound impact on mine operators.

The MINER Act reflects a view that an effective way to improve mine safety is to strengthen MSHA's ability to assess operators for violating mine safety and health regulations. ($236 million, or 71%, of the agency's total budget request for FY 2009 is proposed for enforcement, while only $36 million, or about 10%, would go toward to training.) In a press release accompanying the regulations implementing the Act's penalty provisions, the agency announced: "MSHA has structured the final rule so that higher penalties will induce operators to prevent and correct violations and be more proactive in their overall approach to miner safety and health, as well as target the most serious safety and health violations with escalating penalties."

New Penalties in the MINER Act

In the MINER Act, Congress created a new category of penalty, up to $220,000, for violations deemed "flagrant." New minimum penalties are also required for an unwarrantable failure to comply with safety or health standards: the minimum for citations or orders cited as violations of § 104(d)(1) of the Federal Mine Safety and Health Act ("Mine Act") is $2,000; and for § 104(d)(2) orders, the minimum is $4,000. Criminal penalties for willful violations have increased tenfold, and are up to

$250,000 (from $25,000) and one year imprisonment for a first offense, and up to $500,000 (from $50,000) and five years' imprisonment for subsequent violations. Moreover, for the first time, MSHA can go to U.S. district court to obtain an injunction against any operator that fails to pay its civil penalties. And mining companies now also risk a statutory penalty of between $5,000 and $60,000 if they fail to report within 15 minutes "the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death."

New Civil Penalty Regulations

Effective April 23, 2007, MSHA revised 30 C.F.R. Part 100 to implement the civil penalty provisions of the MINER Act. In addition to the new categories of penalties, MSHA also changed its penalty formula in a way that virtually guarantees increases in assessments for even garden-variety regulatory violations. Under the new rule, MSHA increased the maximum number of possible points in several categories: the size of the operator and its controlling entity can account for 25 points, compared with 15 points in the previous regulation; negligence can now go as high as 50 points, compared with the previous 25; and gravity can now account for as many as 88 points, nearly a threefold increase from the previous 30. Although the maximum penalty of $70,000 is not all that much higher than the previous limit, because of the expanded ranges points now add up much more quickly, as do the corresponding penalties.

Penalties for "Flagrant" Violations

As already noted, when it enacted the MINER Act, Congress imposed stiff penalties for violations deemed "flagrant." In the new law, "flagrant" means a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

The new provision was tacked onto § 110(b) of the Mine Act, the section that also authorizes daily penalties for operators that fail to abate cited conditions within the allotted time. The legislative history of this provision sheds no light on what Congress intended, but industry generally interpreted its inclusion in § 110(b) to mean that Congress intended flagrant penalties to be assessed only when an operator had not timely abated a condition *that had already been cited*. NMA and many companies urged MSHA to incorporate that interpretation into its new penalty regulation. MSHA explicitly rejected that view in the final rule (30 C.F.R. § 100.5(e)), stating that *any* citation or order is subject to treatment as a flagrant violation, and that the phrase "known violation" applies not only when a condition had been cited previously (regardless of abatement status), but also in situations where the condition had not previously been cited. The agency warned that "failure to eliminate a violation which is known to the operator but which has not been cited by MSHA – perhaps because MSHA has not conducted an inspection since the violation arose – can be just as dangerous, and just as deserving of an enhanced penalty, as a violation which is known to the operator and which has been cited."

MSHA issued a Procedure Instruction Letter ("PIL") explaining that violations may be considered flagrant when the operator exhibits a reckless or repeated failure to comply with the regulations. According to the PIL, an inspector can appropriately recommend assessment as a flagrant violation if four elements are met: (1) the citation or order is significant and substantial ("S&S"); (2) the illness or injury that is expected to result, or had resulted, from the violation is projected to be at least permanently disabling (a determination that in most cases corresponds closely to the S&S determination); (3) the inspector believes that the operator unwarrantably failed to comply with a regulation; and (4) the inspector concludes that the level of negligence was "reckless disregard." In other words, particularly considering the blurry line between these last two elements, the violations that MSHA identifies as flagrant, triggering enhanced penalties, fit comfortably within the § 104(d) framework. To find a flagrant violation based on the "repeated failure" criterion, the violation need not be the result of reckless disregard, but there must have been at least two prior "unwarrantable failure" violations of the same safety or health standard ("same" here meaning any subsection of a regulation) within the previous 15 months.

Single Penalty Assessments Eliminated

Under the MINER Act, the days are gone when MSHA assessed a flat $60 penalty for timely-abated violations that would not significantly and substantially contribute to a safety or health hazard ("non-S&S" violations). Now, even non-S&S citations are assessed on the point system, and the point values assigned to each criterion have increased in virtually every category. Whereas previously the minimum penalty based on points (as opposed to a single

penalty assessment) was $72 for citations that accrued 20 points or fewer, the minimum penalty is now $112. That amount, like all penalties under the new scheme, can be reduced by 10% if the operator timely abates the violation. According to MSHA, after eliminating single penalty assessments, penalties will now range from $100 (assuming the 10% reduction) to $14,343 for mines in the metal/non-metal sector, and from $100 to an astounding $21,442 for coal mines. In the preamble to the final rule, however, the agency promised that if the regular point-based assessment produces a result that seems inappropriately high, the penalty will be re-calculated outside of the point system.

Penalties for Repeat Violations

One insidious and potentially costly feature of the new penalty scheme is to add up to 20 points for an operator that violates "the same citable provision of a standard" six times or more in a 15-month period. The number of points awarded in this category is based on the number of repeat violations per inspection day ("RPID"), which MSHA interprets as any day that an inspector spends any time at a mine site (excluding supervisory and trainee time, and time spent in activities other than inspections). Both S&S and non-S&S violations are counted when assessing repeat violations. RPID points are added on top of the points for "excessive history," which is a function of the number of total violations of any kind per inspector day ("VPID"). Repeat violations are therefore counted twice: once in the overall violation history (VPID) and a second time in history of repeat violations (RPID). At the upper end of the points-to-penalty conversion, the extra 20 points can mean thousands of dollars in additional penalties for each violation.

At a recent conference, MSHA representatives confirmed that when determining what violations will count toward RPID, the agency interprets the phrase "the same citable provision of a standard" to mean each and every subpart of the standard. For example, an operator that receives three citations for violating § 77.1605(f) ("guards shall be installed to prevent swaying buckets from hitting towers") and three for § 77.1605(k) ("berms or guards shall be provided on the outer bank of elevated roadways") within 15 months will be treated as a repeat violator, even though in practical and operational terms the violations are unrelated.

According to MSHA, only assessed violations that have been paid or otherwise become final orders count toward RPID. Note, however, that this creates its own problems. Consider this example: Citation 1 is issued June 1, 2007 and is assessed August 1, 2007. Citation 2 is issued December 31, 2008 for an alleged violation of the same regulation. If the operator pays Citation 1 as soon as it is assessed, Citation 1 would not be counted to determine whether Citation 2 is a repeat violation because it became a final order more than 15 months before Citation 2 was written.

What happens, however, if the operator contests the penalty for Citation 1 but the penalty proceedings are not resolved until December 1, 2008? Under those circumstances, it appears that MSHA will count Citation 1 in determining whether Citation 2 is a repeat violation, using the date Citation 1 was ultimately resolved even though Citation 1 was written more than 15 months before Citation 2. MSHA also seems to be including Citation 1 even if the penalty for Citation 2 does not become a final order until more than 15 months after Citation 1 is finally resolved. MSHA is not comparing apples to apples (the dates the two citations were issued) but rather apples to oranges (the issuance date of the second citation and the date of contest resolution of the first). Moreover, in our experience, the delay between the time an operator pays a penalty and the time that MSHA credits the payment, which can extend to several weeks, has also resulted in extra citations being included for RPID purposes. Thus, when deciding whether to contest a penalty calculated in part based on repeat violations, an operator should review every citation and order on which MSHA has relied, taking particular note of not only the issue date but also the date each was paid.

Special Assessments

The regulations used to enumerate eight specific categories of serious violations that would be reviewed for special assessment outside the point-based scoring model, but those categories have been eliminated. Now, the penalties created by the MINER Act (flagrant violations, violations under § 104(d), and violations of the 15-minute reporting rule) must be specially assessed; and all other violations, regardless of gravity, can be recommended for special assessment as well. MSHA no longer needs to justify its decision to specially assess any particular citation or order, and there is no way to know how many or what proportion of the citations or orders written nationwide are being taken out of the regular penalty process to be specially assessed. One thing has not changed: an operator has no way to predict the amount of a specially-assessed

penalty, and no way to know why a particular amount was assessed. Now more than ever, special assessments are the Star Chamber of MSHA's penalty system.

Safety and Health Conferences

One feature of the new penalty rule, combined with a recent shift in MSHA policy, has already had a significant impact on operators of every size and in every industry sector. Before the new rule took effect, an operator could have a safety and health conference with MSHA simply by requesting one within ten days of receiving a citation or order. Although MSHA has always had discretion whether to agree to a conference, it routinely granted them. Now, requests for conferences must be in writing and must explain the operator's reasons for requesting a conference as to each citation and order.

While the additional formalities created a new burden for operators, they did not appreciably change the utility of conferences as an alternative to litigation. But on February 4, 2008, MSHA instructed its district managers that: "[u]ntil further notice, all safety and health conferences … may be limited to unwarrantable failure and high negligence violations. Conference requests that have already been granted and which do not involve unwarrantable failure and high negligence in the violations should be cancelled" although district managers still retain discretion whether to grant conference requests for less-serious cases. Moreover, at a recent industry conference, MSHA representatives disclosed that the agency keeps a list of operators who request a conference for every citation and order they receive, and that requests for safety and heath conferences from those operators will not be honored.

This directive's impact cannot be underestimated. Although it could be argued that their usefulness had decreased in the past few years, informal conferences have historically been an extraordinarily effective way for operators to provide MSHA with mitigating factual information or legal arguments. When on site discussions or a close-out conference failed to produce results, an informal safety and health conference was generally an operator's last opportunity to head off time-consuming and costly proceedings before the Federal Mine Safety and Health Review Commission. It was often an operator's best chance to get a matter resolved without needing to hire a lawyer. With that opportunity gone, operators have but two options: to accept paper as written, with the concomitant penalty; or to litigate the matter before an administrative law judge of the Commission. In light of newly-increased penalties and potential RPID enhancement, the decision to litigate has become less a last resort than a frequent, albeit unfortunate, approach. MSHA officials had hoped to get out from under a punishing conference schedule; now they are being buried in legal proceedings instead.

Abatement

Under the old penalty scheme, an operator would receive a 30% credit against the calculated penalty for abating a cited condition in good faith within the time set by the inspector. In the new regulation, that credit has been reduced to 10%. There is some good news, however: MSHA has eliminated the old 10-point penalty for failing to abate. (Previously, an operator that failed to abate a condition on time would be penalized twice: once by losing the 30% good-faith credit; and a second time by having an additional 10 points tacked onto the total.)

An operator has another financial incentive for abating a cited condition within the time set by the inspector. If an operator does not meet the deadline for abatement and does not have a satisfactory explanation for failing to do so, the inspector can use his authority under § 104(b) of the Mine Act to order the cited area or equipment shut down and miners withdrawn; in addition, in circumstances where a failure to abate order will not be effective, pursuant to § 110(b), MSHA can assess a penalty up to $7,500 for each day of non-compliance.

Other Penalty-Related Developments

In February 2008, MSHA adjusted some civil penalties to compensate for inflation. For high-end violations – where the assigned points total 144 or more – the maximum civil penalty increased from $60,000 to $70,000. Where the point total is 140 or fewer, penalties have not changed. The maximum daily penalty for failing to correct cited conditions within the abatement period went from $6,500 to $7,500, and the maximum penalty for violations relating to smoking and smoking materials was raised from $275 to $375.

Finally, on February 5, 2008, the Acting Assistant Secretary for Mine Safety and Health announced a new initiative to ensure that all citations and orders are assessed. In the past ten years penalties apparently were assessed, on average, for 99.6% of citations and orders written. Now, according to the Acting Assistant Secretary,

100% of citations and orders will be assessed. At the risk of sounding cynical, it seems that a 99.6% record is not bad. One wonders whether focusing on catching up that last 0.4%, rather than on efforts more directly related to safety and health, can be justified in light of MSHA's mandate.

Conclusion

The world has changed for mine operators and the mine safety community. The legislative and regulatory response to recent disasters has been swift and far reaching. Now, in addition to constantly striving to improve safety, operators must also be mindful of the numerous ways in which MSHA's enforcement authority has been enhanced in determining whether, and how, to respond to penalty assessments and to the factual allegations contained in citations and orders. Increased penalties, drastic cutbacks in safety and health conferences, new penalties for "repeat violators," new special assessment rules, and the possibility of incurring enhanced penalties for a flagrant violation have all upped the ante for operators. If the watchwords "compliance or else" have been common in the industry for many years, Congress has given MSHA bigger and sharper teeth to make the "or else" considerably more meaningful.

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CLEAN WATER ACT ENFORCEMENT SETTLEMENT MAY BE HARBINGER FOR REST OF COAL INDUSTRY

by Kirsten Nathanson and David Ross

In April 2008, Judge Copenhaver of the U.S. District Court for the Southern District of West Virginia approved a settlement agreement between the United States and A.T. Massey Coal Company that resolved allegations of substantial violations of the Clean Water Act ("CWA") across many of the company's facilities. The action focused on the company's wastewater discharge practices, which are regulated by National Pollutant Discharge Elimination System ("NPDES") permits. Massey paid $20 million in civil penalties, one of the largest CWA penalties ever collected by the federal government, and certainly the largest ever collected against a coal mining company. The original complaint filed by the Department of Justice ("DOJ") in May 2007 alleged over 60,000 separate violations of the Act and the underlying NPDES permits, which totaled nearly $2 billion in potential penalties. In addition to paying the civil penalty, Massey must implement various environmental auditing programs, such as an electronic tracking system for its numerous discharge monitoring reports ("DMRs"), and undertake supplemental environmental projects, including 20 stream remediation projects and conservation easements for 200 acres of land.

Other coal companies should take notice of Massey's experience, because the U.S. Environmental Protection Agency ("EPA") typically engages in industry sector enforcement initiatives, starting with the largest companies in a particular sector for maximum enforcement visibility. We expect EPA to move to other coal companies next for further investigations and enforcement actions, and indeed, there are indications that it already has. Companies should take the opportunity now to assess NPDES compliance at their facilities. Only then can the company take the necessary steps either to approach EPA voluntarily (pursuant to EPA's voluntary disclosure policy), or, if enforcement is already under way, to decide on defenses and strategy for upcoming negotiations with EPA and/or DOJ. We highlight below some of the issues to consider

when working through a CWA enforcement investigation, negotiation, or other similar action with the federal government.

Section 308 Requests

A company's first notice of falling under EPA's radar will likely be a CWA § 308 information request letter. These letters should be taken seriously, but companies are usually able to discuss with EPA the exact timing and scope of a response. Keep in mind that EPA has broad authority under § 308, but is limited to requests that are reasonable. For example, is it reasonable for EPA to demand that a company not only turn over all of its DMRs, but also analyze, synthesize, and summarize the data for EPA in an easy-to-read spreadsheet? Arguably, a company should only be required to turn over the data it maintains in the ordinary course of business and not be required to create EPA's enforcement work product. That argument is untested thus far in the courts, and a company will have to balance the costs of complying with EPA's onerous request with the risks of litigating whether EPA has overstepped § 308's limit on reasonableness.

Three other aspects of § 308 requests also warrant mention. First, EPA will not disclose confidential business information ("CBI") submitted under § 308 to third parties. This is valuable protection for companies targeted by private organizations that seek to delay, halt, or frustrate the company's activities. Second, § 308 is not self-enforcing. If a company refuses to comply with a § 308 request, EPA must seek enforcement in federal district court. Thus, should a company refuse to comply with certain unreasonable portions of EPA's request, EPA must also balance whether to acquiesce or expend its resources on litigating the issue. EPA has no automatic enforcement option in § 308. Finally, EPA has authority under § 308 to seek and act upon an ex parte administrative search warrant.

Administrative Compliance Orders

Not all CWA enforcement matters become civil or criminal cases involving DOJ, as occurred with Massey. Often, EPA chooses to handles enforcement internally, utilizing the tools and authority granted in CWA § 309. Under § 309(a), EPA has discretion to issue an administrative compliance order ("ACO") for violations of the CWA. ACOs are orders that declare a CWA violation has occurred, demand compliance with the Act, and impose various affirmative obligations, including costly compliance initiatives. Failure to comply with an ACO can trigger civil penalties of up to $32,500 per day per violation.

There is a fundamental legal flaw in the ACO statutory scheme – ACOs are issued without adjudication or meaningful judicial review. In other words, the liability determination lies solely with EPA, and there is no opportunity for a company to contest the facts or the law underlying the allegations of a violation. What's more, ACOs can be issued on the basis of "any information" available to EPA – from the media, anonymous tips, or other sources – well short of a probable cause standard. If a company disagrees with whether a CWA violation occurred or whether EPA has CWA jurisdiction over the matter set forth in the ACO, there is no opportunity for judicial review of the legal or factual underpinnings of the order. If a company wants to challenge an ACO, it must violate or fail to implement it and draw the agency into court through a subsequent enforcement proceeding. And the resulting adjudication over penalties will only review whether the ACO was violated, not whether the ACO was properly issued in the first instance.

The constitutional infirmities here are obvious – companies are denied full due process before having to incur substantial penalties for violating an ACO. While courts have not yet had opportunity to rule on the legality of the CWA's scheme, the ACO scheme under the Clean Air Act, which is nearly identical to the CWA civil scheme, has been ruled unconstitutional in *TVA v. Whitman*. No case has yet been decided that definitively extends the TVA analysis to the CWA ACO scheme.

In April 2008, a case was filed in Idaho district court that may provide the proper framework for a decision on the constitutionality of ACOs under the CWA. In that case, EPA determined that plaintiffs' wetlands were subject to CWA jurisdiction, that plaintiffs violated the CWA by filling those wetlands, and that plaintiffs must immediately begin "substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched." Plaintiffs filed suit seeking a declaration that their wetlands are outside CWA jurisdiction and that the ACO violates their procedural and substantive due process rights for failing to give them an opportunity to contest the factual and legal basis for the ACO. This case may produce the result that CWA-regulated entities have been seeking.

Referral to the Justice Department – Consent Decree or Trial?

If EPA determines based on its review of the § 308 information and other evidence that there have been significant violations of the CWA at a facility, it may refer the case to DOJ for civil or criminal enforcement. EPA is more likely to refer a case if it detects a pattern of significant noncompliance at multiple facilities. The steps in a civil enforcement case are:

(1) Issuance of a notice letter outlining the alleged violations and the potential civil penalty the government could seek if the case goes to trial. The letter will invite the company to negotiate a settlement usually under a compressed schedule.

(2) Assessment of liability and defenses, followed by determination of strategy. Companies should assume a litigation posture regarding document retention policies, privilege and confidentially issues, and engage counsel and other consultants.

(3) Settlement negotiations – the government will seek:

(a) a compliance program that it will embody in a consent decree to ensure that compliance improves in the future;

(b) stipulated penalties for future violations of the consent decree; and

(c) a civil penalty, the amount of which will be based in part on EPA's "Clean Water Act Civil Penalty Policy," discussed below.

(4) Settlement – filing of a complaint and lodging of the proposed consent decree in a U.S. district court. DOJ will next publish the proposed settlement in the Federal Register and will give the public 30 days to comment.

DOJ will instruct the court not to take action on the complaint until after the public comment period has expired. After the comment period has ended, DOJ will file a statement with the court summarizing those comments and will move for entry of the consent decree as an order of the court.

EPA's Clean Water Act Civil Penalty Policy

EPA's "Clean Water Act Civil Penalty Policy" establishes a framework for calculating a "bottom line" settlement amount it will accept in CWA enforcement actions. The minimum penalty generally seeks to recapture the violator's economic benefit of noncompliance plus an additional gravity-based component to serve as a deterrent for future behavior. The principal factors that EPA will consider in calculating the minimum settlement amount include:

(1) the economic benefit of noncompliance;

(2) the significance of the violations;

(3) whether the violations present actual or potential harm to human health or the environment; and

(4) any history of recalcitrance.

If an enforcement action proceeds to trial, EPA will not use its penalty policy as the basis for the penalty amount it seeks. EPA will instead seek penalties that are higher than what it would have accepted in settlement, as it did in the Massey federal district court complaint.

Penalties at Trial –Statutory Civil Penalty Factors

In assessing a civil penalty, courts typically begin by calculating the statutory maximum penalty by multiplying $32,500 (the current maximum per day per violation civil penalty) by the number of days of violation for each category of violation. Courts then use the following six statutory factors under § 309(d) to calculate an actual penalty given the specific facts and circumstances of each case:

(1) the seriousness of the violation;

(2) any economic benefit gained through noncompliance with the law;

(3) the defendant's history of CWA violations;

(4) good faith efforts at compliance;

(5) the potential economic impact of the penalty on the defendant; and

(6) such other matters as justice may require.

This calculus is performed using one of two principal techniques: (1) a "top down" method or (2) a "bottom up" method." The "top down" method uses the statutory maximum penalty as the "departure point" and then reduces the civil penalty as appropriate based on the six factors. The "bottom up" method uses the economic benefit factor from § 309(d) to establish a baseline penalty and then adjusts that penalty upward based on the five remaining factors.

Regardless of the method of calculation, CWA civil penalty cases clearly demonstrate that the statutory maximum often bears little resemblance to the final civil penalty assessment, as the federal courts have substantial discretion when imposing civil penalties under CWA § 309(d). For example, in one case the maximum penalty was $63,249,000 but the court assessed a penalty of $5,749,000. In fact, it is not unusual for courts to impose penalties at a fraction of what the statutory maximum provided. In one case, a court imposed a penalty of $186,070 out of a maximum penalty of $40,225,000; in another case, the court imposed $450,000 out of a maximum $25,830,000.

Settlements with State CWA Regulators

In the wake of the Massey settlement, some companies have entered into consent settlement agreements with their state regulators, asserting that such settlements will protect them from EPA and citizen enforcement. Unfortunately, the response to that assertion is limited to a "maybe." In CWA § 402(i), EPA retains authority to enforce permits in states that administer their own delegated or approved NPDES programs. Thus, it is critical when negotiating a settlement with a state regulator to be sure that the penalty amount is substantially adequate in light of the scope of violations subject to the settlement. If EPA perceives a "sweetheart deal," it will not hesitate to pursue its own action for penalties, particularly in an industry sector subject to an enforcement initiative.

Finally, a word about the interaction of settlements with state regulators and private citizen suits. While it is true that citizens are barred from enforcing violations that have been diligently prosecuted by EPA or the state, and courts will work from a strong presumption of diligence, a consent settlement agreement with the state will not always qualify as "diligent prosecution" if the court finds the negotiated penalties and/or injunctive relief inadequate. It is vital that companies analyze the adequacy of settlement agreements against the standards that both EPA and the courts will utilize, paying particular attention to the relationship between the penalty paid and the economic benefit enjoyed from the CWA violations.

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