



COALEX STATE INQUIRY REPORT - 279

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TOPIC: OPERATOR/PERMITTEE LIABILITY FOR FEES; OWNERSHIP & CONTROL/APPLICANT VIOLATOR SYSTEM

INQUIRY: The Pennsylvania regulatory authority made a decision not to issue a permit based on an O&C link found on AVS. The perspective permittee disagrees with this decision stating that the RA cannot make permitting decisions based solely on AVS. The O&C link found on AVS related to the failure of a party, a contract mining operator on another job, to pay proper fees. Does the definition of "operator" include contract mining operators as well as permittees in terms of AVS linkage and liability for fees?

SEARCH RESULTS: A number of existing COALEX Reports addressing issues related to this Inquiry were identified. Additional research was conducted using the COALEX Library and other materials available in LEXIS. Retrieved items are listed below. Copies are attached, as noted.

EXISTING COALEX REPORTS

[NOTE: Reports are included without attachments.]

COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control of operations" (1990).

Materials interpreting the phrase "own and control" include Interior and Pennsylvania administrative decisions as well as state and federal cases.

COALEX STATE INQUIRY REPORT - 169, "Ownership and control; applicant violator system" (1991).

Report - 148 was updated with the addition of several Interior administrative decisions and one federal case. Also included are Federal Register preambles to relevant final rules.



COALEX STATE INQUIRY REPORT - 224, "Definition of 'operator' and 'permittee'" (1992).

Most of the Interior administrative cases included as part of this Report date from the early days of SMCRA.

COALEX STATE INQUIRY REPORT - 231, "Ownership and control: 'related parties'" (1992).

Interior administrative decisions included here address such issues as partnerships, "responsible parties" and severing relationship to permit. Federal Register preambles to ownership and control regulations are also part of this Report.

COALEX STATE INQUIRY REPORT - 232, "Definition of 'operator'" (1992).

This is a continuation of Report - 224.

FEDERAL REGISTER NOTICES

58 FR 34652 (JUNE 28, 1993). Proposed rules. Definitions of ownership and control; applicant/violator system; civil penalties for owners and controllers of violators.

Preamble is enclosed for background.

A list of Federal Register Notices relating to federal AVS and O&C rules is attached for background.

OSM DIRECTIVES

DIRECTIVE, Subject No. INE-2, Transmittal No. 688, "Ownership and control information update after receipt of a cessation order" (Issued 9/3/91).

Enclosed for background.

DIRECTIVE, Subject No. INE-32, Transmittal No. 679, "Oversight procedures for states' implementation of the applicant/violator system; Memorandum of understanding" (Issued 7/1/91).

Enclosed for background.

DIRECTIVE, Subject No. INE-33, Transmittal No. 636, "510(c) Permit review procedures for federal permit applications" (Issued 9/18/90).



3. Definitions.

"b. Owned or Controlled and Owns or Controls mean any one or combination of the relationships specified in paragraphs (1) and (2) below.

...

(2) The following relationships are presumed to constitute ownership or control unless the person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(a) Being an officer or director of an entity;
(b) Being the operator of a surface coal mining operation;
(c) Having the ability to commit the financial or real property assets or working resources of an entity;

(d) Being a general partner in a partnership;

(e) ...

(f) Owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

"As used in the Directive, the phrase 'linked through ownership and control' would signify that the persons are related due to one or more of the ownership and control criteria, and that one person's compliance problems will impact on a related person's permit application approval."

DIRECTIVE, Subject No. INE-34, Transmittal No. 659, "Improvidently issued permits" (Issued 2/22/91).

Enclosed for background.

DIRECTIVE, Subject No. INE-42, Transmittal No. 665, "Verification of federal permittee ownership and control information after site disturbance" (Issued 3/26/91).

Enclosed for background.

INTERIOR IBLAs AND ALJs

PAYMENT OF RECLAMATION FEES, GENERALLY

BLACK HAWK COAL CO. v OSM, 112 IBLA 1989 IBLA LEXIS 37 (1989).

Headnotes: "Under the enforcement scheme of the Act and regulations, a variety of procedures is available to OSMRE to collect delinquent reclamation fees from coal operators. These procedures include, among others, the institution of an action at law in



a court of competent jurisdiction and, where appropriate, the issuance of notices of violation and cessation orders to compel payment of the debt."

ASPECTS OF AVS

SPURLOCK MINING CO. v OSM, Docket No. NX 92-13-R (1992).

Spurlock was found ineligible to be an operator in Kentucky - He was on the AVS "block list" due to delinquent civil penalties, an outstanding CO that had not been rectified and outstanding AML fees.

ROBERT L. CLEWELL ET AT., 123 IBLA 253, IBLA 91-321 (1992).

The Board explained the rationale for the AVS permit block system:

"This Department has been required to implement section 1260(c) by establishing a computer system to determine whether there are ownership or control links between applicants for new permits and operators with uncorrected violations.... Because operators may attempt to avoid reclamation costs by dissolving one corporation that has violated SMCRA and using a new corporate entity to apply for a new permit, the effectiveness of this system would be limited if we were to hold that bankruptcy and dissolution of a corporate permittee prevent future action against the bankrupt or its principals for a violation. Because there would then be no record of any violation, they could avoid reclaiming the site while they reentered the coal mining business. The administrative permit block affords some possibility that reclamation will be made if an offending operator seeks to return to the coal mining business."

LANGUAGE APPEARING IN CONSENT DECISIONS

L & D COAL AND LAND CORP. v OSM, Docket Nos. NX 90-22-R, NX 90-51-R (1990).

"No entity which is in an ownership or control relationship with [the applicants] shall be entitled to a permit until the above-referenced balance of unpaid civil penalties and interest is paid in full. [Applicants] realize and fully understand that they will remain on the OSM's AVS for the unpaid civil penalty lawsuit amounts."

"OSM agrees to accept from [applicant] the sum of \$[X] as partial payment of the AML fees and prejudgment charges listed above, provided, however that neither [applicant] shall be eligible to obtain or operate on any surface or underground coal mining permit until the entire remaining balance of the judgment plus applicable post-judgment interest is paid in full. [Applicants] realize and fully understand that they will remain on the OSM's AVS for the above-referenced unpaid AML fee amounts."

AARON W. BRASHEAR v OSM, Docket Nos. NX 1-95-R, NX 5-125-R (1990).



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Purpose of the settlement agreement was to set forth terms for the pending litigation. Applicant paid a compromise civil penalty sum. While the case is pending, the amount of the compromise debt will remain on OSM's AVS.

ERNEST VAN HOOSE, (AVS) PA 92-03, IBLA 93-147 (1993).

This is enclosed as an example of how objections to linkage found in AVS may be addressed.

Excerpts from a number of other OHA decisions are also enclosed.

FEDERAL CASES

U.S. v FIRE RING FUELS, INC., 788 F Supp 330 (ED Ky 1992).

The court upheld the finding that Fire Ring, a contract miner, was an operator liable for reclamation fees "under the criteria set forth in United States v. Rapoca Energy Co., 613 F. Supp. 1161 (W.D. Va 1985)." [See COALEX Report - 148 - Copy of Rapoca is attached.]

"It is apparent that the Rapoca court intended ultimate liability for reclamation fees to lie with the owner of the right to extract. However, this does not preclude the assessment of liability to more than one operator.... [It was] Congressional intent to impose joint and several liability for reclamation fees where more than one operator is found to exist."

THE PITSTON CO. AND CLINCHFIELD COAL CO. v LUJAN, 798 F Supp 344 (WD Va 1992).

OSM notified Pittston Co. that contract miners hired by Clinchfield Coal Co., an indirect wholly-owned subsidiary of Pittston, had outstanding violations of SMCRA (delinquent AML fees). The contract miners were blocked from obtaining permits and once the information in the AVS system was updated, "Pittston would also be blocked from obtaining permits unless (1) each violation to which Pittston was linked had been abated to the satisfaction of the agency having jurisdiction over such violation, (2) an agreement to resolve such violation had been entered into and was being implemented, or (3) OSM's determination of ownership and control had been successfully rebutted."

The court denied Pittston's motion for a permanent injunction, finding that Pittston's assertions were a challenge to the constitutionality of a regulation which could only be brought in the District Court for the District of Columbia.

ANNOTATION, "Liability for Reclamation Fees under Sec. 402 of SMCRA", 117 ALR Fed 377 (1994).

Enclosed for background.



ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control of operations" (1990).
- B. COALEX STATE INQUIRY REPORT - 169, "Ownership and control; applicant violator system" (1991).
- C. COALEX STATE INQUIRY REPORT - 224, "Definition of 'operator' and 'permittee'" (1992).
- D. COALEX STATE INQUIRY REPORT - 231, "Ownership and control: 'related parties'" (1992).
- E. COALEX STATE INQUIRY REPORT - 232, "Definition of 'operator'" (1992).
- F. 58 FR 34652 (JUNE 28, 1993). Proposed rules. Definitions of ownership and control; applicant/violator system; civil penalties for owners and controllers of violators.
- G. List of Federal Register Notices relating to federal AVS and O&C rules.
- H. OSM DIRECTIVE, Subject No. INE-2, Transmittal No. 688, "Ownership and control information update after receipt of a cessation order" (Issued 9/3/91).
- I. OSM DIRECTIVE, Subject No. INE-32, Transmittal No. 679, "Oversight procedures for states' implementation of the applicant/violator system; Memorandum of understanding" (Issued 7/1/91).
- J. OSM DIRECTIVE, Subject No. INE-33, Transmittal No. 636, "510(c) Permit review procedures for federal permit applications" (Issued 9/18/90).
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- L. OSM DIRECTIVE, Subject No. INE-42, Transmittal No. 665, "Verification of federal permittee ownership and control information after site disturbance" (Issued 3/26/91).
- M. BLACK HAWK COAL CO. v OSM, 112 IBLA 1989 IBLA LEXIS 37 (1989).
- N. SPURLOCK MINING CO. v OSM, Docket No. NX 92-13-R (1992).
- O. ROBERT L. CLEWELL ET AT., 123 IBLA 253, IBLA 91-321 (1992).
- P. L & D COAL AND LAND CORP. v OSM, Docket Nos. NX 90-22-R, NX 90-51-R (1990).
- Q. AARON W. BRASHEAR v OSM, Docket Nos. NX 1-95-R, NX 5-125-R (1990).
- R. ERNEST VAN HOOSE, (AVS) PA 92-03, IBLA 93-147 (1993).
- S. Excerpts from a number of OHA decisions.
- T. U.S. v FIRE RING FUELS, INC., 788 F Supp 330 (ED Ky 1992).
- U. UNITED STATES v. RAPOCA ENERGY CO., 613 F. Supp. 1161 (W.D. Va 1985).
- V. THE PITTSTON CO. AND CLINCHFIELD COAL CO. v LUJAN, 798 F Supp 344 (WD Va 1992).
- W. ANNOTATION, "Liability for Reclamation Fees under Sec. 402 of SMCRA", 117 ALR Fed 377 (1994).