



U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
DIRECTIVES SYSTEM

Subject Number:

INE-40

Transmittal Number:

600

Date: March 1, 1990

Subject: Individual Civil Penalty Assessment

Approval: *[Signature]* Title: Director

1. Purpose. This Directive establishes policy and procedures for the assessment of Individual Civil Penalties (ICP's). The primary purpose of assessing an ICP is to motivate the responsible person(s) to abate the outstanding violation(s) or to lessen substantially any continuing environmental harm or threat to the public health or safety, or to enable the Office of Surface Mining Reclamation and Enforcement (OSM) to take remedial action (to the extent authorized by Congress) using the monies collected from the ICP.

2. Summary of Changes. This Directive explains agency policy and prescribes procedures to implement the ICP provisions of section 518(f) of the Surface Mining Control and Reclamation Act (the Act) and the Federal rules at 30 CFR Parts 724 and 846. This Directive has been modified and reorganized to clarify changes in policy and procedures concerning the assessment of ICP's to reflect provisions of the Settlement Agreement between Save Our Cumberland Mountains, Inc., et al., and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, et al., dated January 24, 1990. (See section 7 below, "Effect on Other Documents.")

3. Definitions.

a. Agent means a person who exercises authority and control over a surface mining operation on behalf of a corporate permittee. See 53 FR 3664, February 8, 1988. Under United States v. Dix Fork Coal Co., 692 F.2d 336 (6th Cir. 1982), an "agent includes that person charged with the responsibility for protecting society and the environment from adverse effects of the surface coal mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation."

b. Corporate Official(s) means the president and the directors of a corporation and any other officer or agent who has line responsibility with respect to a mine site.

c. Knowingly means that an individual knew, or had reason to know, in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal. See 30 CFR 724.5 and 846.5.

d. Line responsibility with respect to a mine site means authority or demonstrated control over the conduct of surface coal mining operations, including the ability to directly cause the abatement of violations, and any level of supervisory responsibility over a person having such ability. (For example, the mine superintendent and each official in the superintendent's "chain of command," up to and including the chief executive officer, would have line responsibility with respect to the mine site.)

e. Violation, failure, or refusal means (1) a violation of a condition of a permit issued pursuant to a Federal program, a Federal lands program, Federal enforcement pursuant to section 502 of the Act, or Federal enforcement of a State program pursuant to section 521 of the Act; or (2) a failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act. A failure or refusal to comply with any order issued under section 521 of the Act would include a failure or refusal to comply with an Imminent Harm Cessation Order (521(a)(2)) or a Failure To Abate Cessation Order (521(a)(3)). See 30 CFR 724.5 and 846.5.

f. Willfully means that an individual acted (1) either intentionally, voluntarily, or consciously, and (2) with intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal. See 30 CFR 724.5 and 846.5.

4. Policy/Procedures.

a. Background. Section 518(f) of the Act provides that a corporate official who willfully and knowingly authorizes, orders, or carries out a violation, failure, or refusal (as described above) may be assessed a civil penalty for violations committed by the corporation and shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under sections 518(a) and 518(e) of the Act. Further, OSM is required under 30 CFR 723.15(b)(2) and 845.15(b)(2) to take appropriate action pursuant to sections 518(e), 518(f), 521(a)(4), or 521(c) of the Act within 60 days after a violation has remained unabated beyond the abatement period set in the notice or order to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

OSM published a final rule on February 8, 1988 (53 FR 3664), which established a regulatory scheme for imposing individual civil penalties. Also, OSM has issued a Directive entitled, "Notice of Potential Liability for an Individual Civil Penalty" (INE-4), which provides guidance for informing a corporate official that he may be liable under certain circumstances for an ICP.

b. Policy. OSM will implement section 518(f) of the Act as part of its overall alternative enforcement program. It is agency policy to ensure that:

(1) For any Failure to Abate Cessation Order (FTACO) or Imminent Harm Cessation Order (IHCO) issued after the date of this Directive with respect to a site on which coal extraction had not been completed as of the time of issuance of the FTACO or IHCO:

(a) All corporate officials are informed when the corporation with which they are affiliated is issued an FTACO or IHCO by OSM; and

(b) An ICP is proposed against each corporate official who has been given a Notice of Potential Liability for an Individual Civil Penalty, unless (i) abatement occurs within 30 days after issuance of an FTACO or within 30 days after the abatement date set for an IHCO, whichever is applicable, or (ii) within 45 days after issuance of an FTACO or within 45 days after the abatement date set for an IHCO, whichever is applicable, the corporate official provides documentation that he or she has taken all reasonable steps within his or her authority to bring about abatement of the violation.

(2) For any FTACO or IHCO issued after the date of this Directive with respect to a site on which coal extraction had been completed as of the time of issuance of the FTACO or IHCO, and for any FTACO or IHCO issued prior to the date of this Directive with respect to any site:

(a) The president or chief executive officer of a corporation is informed when the corporation with which he or she is affiliated is issued an FTACO or IHCO by OSM. Service of the FTACO or IHCO on other directors, officers, or agents of the corporation is discretionary and should be decided on a case-by-case basis depending on the evidence of the particular person's responsibility for the violation, failure, or refusal at issue; and

(b) OSM considers proposing an ICP against each individual who has been given a Notice of Potential Liability for an Individual Civil Penalty, unless (i) abatement occurs within 30 days after issuance of an FTACO or within 30 days after the abatement date set for an IHCO, whichever is applicable, or (ii) within 45 days after issuance of an FTACO or within 45 days after the abatement date set for an IHCO, whichever is applicable, the corporate official provides documentation that he or she has taken all reasonable steps within his or her authority to bring about abatement of the violation.

(3) ICP assessment amounts sufficiently reflect the costs of abatement in order to serve as an incentive to the individual to correct the violation, provided that the maximum ICP amount will not

exceed the estimated cost of abatement plus a 10 percent incentive amount;

(4) Each corporate official assessed an ICP is afforded the rights of appeal described in paragraph 4.d.(5)(a) of this Directive; and

(5) In cases where more than one individual may be liable for an ICP, each person meeting the criteria set forth in section 4.d.(1) and section 4.d.(2) shall be assessed an ICP and held individually liable for payment of the penalty and jointly and severally liable for fulfilling the requirements set forth in an approved abatement plan as provided for in paragraph 4.d.(6)(c).

c. Responsibilities.

(1) Field Office Directors are responsible for investigating the circumstances surrounding any Cessation Order issued to a corporate permittee (as explained under sections 4.d.(1) and 4.d.(2) below) in order to determine which, if any, individuals associated with the corporation knowingly and willfully authorized, ordered, or carried out the violation, failure, or refusal at issue. The Field Office Director shall provide his or her determination to the Field Assessment Unit within 60 days after the issuance of an FTACO or within 60 days after the abatement date set for an IHCO, whichever is applicable. Field Office Directors, with the assistance of the Field Solicitor, are also responsible for entering into written abatement plans with individuals wishing to abate their violations.

(2) Assistant Director for Field Operations is responsible for ensuring that ICP assessments made by Field Assessment Units adequately reflect the criteria set forth in section 4.b.(3) of this Directive.

(3) Field Assessment Units are responsible for:

(a) Deciding whether to propose one or more ICP's for an FTACO or IHCO within 30 days of receipt of any ICP referral from a Field Office Director;

(b) Assigning each ICP a unique identification number consistent with the applicable identification numbering scheme established by the Division of Debt Management's Collection Management Information System (CMIS) guide;

(c) Issuing Notices of Proposed Individual Civil Penalty Assessment, Final Orders, and Demand Letters;

(d) Inputting and tracking ICP data in CMIS; and

(e) Meeting the reporting requirements described in section 5 below.

d. Procedures.

(1) For any FTACO or IHCO issued after the date of this Directive with respect to a site on which coal extraction had not been completed as of the time of issuance of the FTACO or IHCO, the Field Assessment Unit shall propose an ICP when the following criteria are met:

(a) A violation remains unabated after 30 days following issuance of an FTACO or 30 days following the abatement date set for an IHCO, whichever is applicable;

(b) The violator entity with which the individual is associated was incorporated under applicable State law at the time the violation, failure, or refusal occurred;

(c) The individual was a corporate official (as defined in paragraph 3.b. above) at the time the violation occurred or during the time a failure or refusal to comply continued;

(d) The corporate official knows of the cessation order and has been served a "Notice of Potential Liability for an Individual Civil Penalty" or equivalent document; and

(e) The corporate official has failed within 45 days after the issuance of an FTACO or within 45 days of the abatement date set for an IHCO, whichever is applicable, to provide documentation that he or she has taken all reasonable steps within his or her authority to bring about abatement of the violation.

(2) For any FTACO or IHCO issued after the date of this Directive with respect to a site on which coal extraction had been completed as of the time of issuance of the FTACO or IHCO, and for any FTACO or IHCO issued prior to the date of this Directive with respect to any site, the Field Assessment Unit shall consider the following criteria when deciding whether to assess an ICP:

(a) A violation remains unabated after 30 days following issuance of an FTACO or 30 days following the abatement date set for an IHCO, whichever is applicable;

(b) The Field Office Director has referred the Cessation Order to the Field Solicitor for injunctive relief or criminal penalties in accordance with the applicable Alternative Enforcement Directive, and the Field Solicitor has declined to initiate an action for injunctive relief; or the Field Solicitor has requested that OSM assess an ICP in combination with ongoing litigation in situations where the Field Solicitor believes that such an approach will assist in bringing about abatement of the violation(s);

(c) The violator entity with which the individual is associated was incorporated under applicable State law at the time the violation, failure, or refusal occurred;

(d) The individual was a director, officer, or agent of the corporation to which the Cessation Order was issued at the time the violation occurred or during the time a failure or refusal to comply continued;

(e) The individual knows of the Cessation Order and has been served a "Notice of Potential Liability for an Individual Civil Penalty" or equivalent document;

(f) The individual has failed within 45 days after the issuance of an FTACO or within 45 days of the abatement date set for an IHCO, whichever is applicable, to provide documentation that he or she has taken all reasonable steps within his or her authority to bring about abatement of the violation, or other evidence exists which establishes that the individual willfully and knowingly authorized, ordered, or carried out the violation, failure, or refusal; and

(g) The individual has sufficient assets to warrant issuance of an ICP.

(i) If the Field Assessment Unit has reason to believe that an individual may have insufficient assets to warrant issuance of an ICP, the Field Assessment Unit may order a net worth determination (NWD) through the Division of Debt Management.

(ii) In cases where more than one person may be liable for an ICP, additional consideration will be given to the cumulative net worth of the individuals to determine whether sufficient assets exist for the individuals acting either alone or together to abate the Cessation Order or to lessen substantially any continuing environmental harm or threat to the public health or safety.

(iii) If the individual's net worth as determined under paragraphs (g)(i) and (g)(ii) above is inadequate for the individual(s) to abate the Cessation Order or to lessen substantially any continuing environmental harm or threat to the public health or safety, then the individual(s) will be considered ineligible for an ICP, no ICP will be assessed, and the decision not to assess an ICP will be documented.

(3) The Field Assessment Unit shall consider the following criteria when determining the amount of an ICP:

(a) The individual's history of authorizing, ordering, or carrying out previous violations, failures, or refusals at the particular surface coal mining operation where the unabated Cessation Order has been issued. For every Cessation Order previously issued on

that particular surface coal mining operation, the Field Assessment Unit will assess the individual \$500 if the individual was, at the time of issuance of such order, in a position of authorizing, ordering, or carrying out such violation. Conversely, if no prior Cessation Orders were identified that met this criterion, there would be no penalty amount assessment for history.

The maximum amount the Field Assessment Unit may assess an individual per day based on history is \$2,000 (the equivalent of four prior Cessation Orders).

(b) The seriousness of the violation, failure, or refusal, as indicated by the extent of damage and/or the cost of reclamation, including any irreparable harm to the environment and any hazard to the health or safety of the public. The Field Assessment Unit shall determine from information supplied in the Field Office documentation (i) the degree of environmental harm, public health hazard, or safety hazard caused by the violation and (ii) whether the damage caused by the violation was confined to or extended beyond the permit area. Based upon this information the Field Assessment Unit will assess the individual the following amounts:

<u>Environmental Harm</u>	<u>Assessment Range (Dollars)</u>
None	0
Insignificant	0 - 500
Moderate	501 - 1,000
Significant	1,001 - 1,500

<u>Extent of Damage</u>	<u>Assessment Range (Dollars)</u>
Confined within Permit Area	0 - 700
Extending Outside Permit Area	701 - 1,500

The maximum the Field Assessment Unit may assess an individual per day based on seriousness of the violation is \$3,000.

(c) The demonstrated good faith of the individual in attempting to achieve rapid compliance after receiving notice of the Cessation Order. In applying good faith, the Field Assessment Unit will apply the criteria governing good faith found at 30 CFR 845.13(b)(4) and in the Civil Penalty Assessment Manual Directive (CAA-1).

(d) The amount of the penalty determined under section 4.d.(3)(a)-(c) above will be assessed for each day the violation, failure, or refusal continues from the date of service on the individual of the Cessation Order or other order incorporated in a final decision, until abatement or compliance is achieved.

(e) The total ICP penalty amount shall not exceed the estimated cost of abatement plus a 10 percent incentive amount.

(4) The Field Assessment Unit shall ensure that the Notice of Proposed Assessment (NOPA) is personally served on the individual, together with a narrative explaining the reasons for the penalty (see Appendix 1), the amount to be assessed, and a copy of the underlying Notice of Violation and Cessation Order which was issued to the corporate permittee. Service shall be by hand delivery or certified mail (restricted delivery), in accordance with the procedures set forth in Directive INE-8 for the service of Notices of Violation and Cessation Orders, or in accordance with the terms of any service contract OSM may have in place at the time.

(5) The NOPA shall become a final order 30 days after personal service upon the individual unless within that time:

(a) The individual files in accordance with 43 CFR 4.1300 et seq. a petition for review with the Hearings Division of the Office of Hearings and Appeals; or

(b) The Field Office Director and the individual(s) or responsible corporate permittee agree to a schedule or plan for the abatement or correction of the violation, failure, or refusal.

(6) Payment of ICP and penalty withdrawal.

(a) If a NOPA becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order as required by Directive CAA-1, "Civil Penalty Assessment Manual."

(b) If an individual named in a NOPA files a petition for review in accordance with 43 CFR 4.1300 et seq., the penalty shall be due upon issuance of a final administrative order by the Office of Hearings and Appeals.

(c) If the Field Office Director and the individual(s) have agreed in writing on a satisfactory plan for compliance with an unabated Cessation Order, the Field Assessment Unit may allow the individual(s) to delay payment of the NOPA until either the issuance of a final order stating that the penalty is due, or a written notice stating that abatement or compliance has been completed and the penalty has been withdrawn. A final order will be issued under this paragraph only in cases where an individual has defaulted on the abatement plan. In such circumstances, the Field Assessment Unit may issue a final order for the full penalty amount or for a modified amount reduced to reflect any partial abatement. In situations where more than one individual has been assessed an ICP and one of the individuals completes the abatement actions, the penalties assessed against that individual as well as the other remaining individuals will be withdrawn if they have not become final.

(d) In the event payment of the ICP will be delayed because an abatement plan has been agreed to, the Field Assessment Unit will provide written notice to the individual(s) that the deadline to file an appeal of the proposed ICP assessment cannot be extended under 43 CFR 4.1302.

5. Reporting Requirements. Field Assessment Units shall prepare and forward to the AVS Office a quarterly report specifying the name of every individual against whom OSM has assessed an ICP pursuant to section 518(f) of the Act, the amount of the penalty, the current status of the penalty, and the name of all individuals who OSM has determined are ineligible for assessment of an ICP pursuant to section 518(f) of the Act.

6. References.

- a. Section 518(f) of the Act.
- b. 30 CFR Part 724.
- c. 30 CFR Part 846.
- d. 30 CFR Section 701.5.
- e. 43 CFR Section 4.1300 et seq.
- f. Directive INE-4, "Notice of Potential Liability for an Individual Civil Penalty," dated March 1, 1990.
- g. Directive INE-8, "Service of Notices of Violation and Cessation Orders," dated May 19, 1983.
- h. Directive INE-30, "Alternative Enforcement Referrals for Criminal Penalties, Individual Civil Penalties and Injunctive Relief," dated March 1, 1990.
- i. Directive CAA-1, "Civil Penalty Assessment Manual," dated January 6, 1988.
- j. Settlement Agreement Between Save Our Cumberland Mountains, Inc., et al., and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, et al., dated January 24, 1990.
- k. Definition of "Agent," United States v. Dix Fork Coal Co., 692 F.2d 336 (6th Cir. 1982).
- l. Collection Management Information System Guide as issued by the Division of Debt Management in February 1988 and as modified thereafter.

7. Effect on Other Documents. Supersedes Temporary Directive No. 89-23, "Individual Civil Penalty Assessments," dated July 6, 1989.

8. Effective Date. Upon Issuance.

9. Contact. Chief, Branch of Inspection and Enforcement (202) 343-4550.

10. List of Appendices.

Appendix 1: Notice of Proposed Assessment of an Individual Civil Penalty Under section 518(f) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1268(f).

NOTICE OF PROPOSED ASSESSMENT OF AN INDIVIDUAL CIVIL PENALTY
UNDER SECTION 518(f) OF THE SURFACE MINING CONTROL AND
RECLAMATION ACT OF 1977, 30 U.S.C. 1268(f).

(Corporate Official)

Individual Civil
Penalty No. _____

(Title)

(Address)

(Corporate Permittee)

The Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to Section 518(f) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1268(f), may assess an individual civil penalty against a director, officer, or agent of a corporate permittee which has violated a condition of its permit or has failed or refused to comply with a cessation order. As (insert individual's title) of (insert corporate permittee's name), you were previously notified on (list date of service of the Notice of Potential Liability for an Individual Civil Penalty) that, unless the corporation complied with (list citation numbers and dates served), which are attached to this notice, you could be liable for an individual civil penalty assessment. The violations cited in such Notice of Violation and Cessation Order have not been abated; and OSM has determined that, as a director, officer, or agent of a corporation, you have willfully and knowingly authorized, ordered, or carried out a violation, failure, or refusal to comply. OSM therefore proposes the assessment of an individual civil penalty against you in the amount of \$_____. In assessing this penalty OSM has applied the criteria specified in the Federal rules at 30 CFR Part (insert either 724 or 846) which are:

(1) Your history (if any) of authorizing, ordering, or carrying out previous violations, failures, or refusals to comply at the particular surface coal mining operation;

(2) The seriousness of the violation, failure, or refusal to comply (as indicated by the extent of damage and/or the cost or reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and

(3) Your demonstrated good faith (if any) in attempting to achieve rapid compliance after notice of the violation, failure, or refusal to comply.

Under the Federal rules at 30 CFR 724.14(b) and 846.14(b), the amount of a proposed penalty shall not exceed \$5,000 for each violation. However, each day of a continuing violation may be deemed a separate violation, and OSM may assess a separate individual civil penalty for each day the violation, failure, or refusal continues, from the date of service of the underlying notice of violation, cessation order, or other order incorporated in a final decision issued by the Secretary, until abatement or compliance is achieved.

If you wish to abate the outstanding violation(s) listed in the enclosed notice of violation and cessation order or wish to execute in writing a plan for abatement of the outstanding violation(s), please contact me at (telephone number). Abatement of the outstanding violation(s) would enable OSM to withdraw the proposed individual civil penalty under the criteria listed in 30 CFR 724.18(c) and 846.18(c).

In accordance with 43 CFR, Part 4, Section 4.1300 you have the right to appeal this decision within 30 days from the date of receipt of this notice. You may appeal by filing a written notice of appeal with me and at the same time sending a copy of the notice to the Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203. The notice of appeal must indicate that an appeal is intended and must identify the individual civil penalty number listed above and the date on which you received this letter. The notice may include a statement of reasons for the appeal and any arguments that you choose to make. If the notice of appeal does not include a statement of reasons for appeal, a statement must be filed with the Office of Hearings and Appeals within 20 days after filing the notice of appeal.

This proposed penalty will become final and payable within 30 days from the date you receive this letter, unless within that time you file an appeal or enter into an abatement agreement as explained above. Payments should be made by check or money order payable to "Assessment Office--OSM" and sent to:

Office of Surface Mining
Reclamation and Enforcement
P.O. Box 360292 M
Pittsburgh, Pennsylvania 15251

To assure proper credit of your payment, you must note on the check or money order the individual civil penalty number for which payment is being made.

Please read this letter carefully. If you have any questions which are not answered by this letter, please contact me at the phone number listed above.

Sincerely,

Chief, Field
Assessment Unit

Enclosures