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TOPIC: IS A BANKRUPTCY TRUSTEE CONSIDERED AN "OWNER OR OPERATOR"?

INQUIRY: In West Virginia, several surface mining permittees are in bankruptcy and operating under a court-appointed trustee. Is the bankruptcy trustee an "owner or operator"? Can owners, officers and directors rebut their presumed control if their company is operating in bankruptcy with a court-appointed trustee? Does it matter if the bankruptcy trustee is operating pursuant to Chapter 7 or Chapter 11?

SEARCH RESULTS: The COALEX Library, other LEXIS materials and existing COALEX Reports were used to research this inquiry. Only an Interior administrative consent decision was identified that mentions a bankruptcy trustee: the consent decision stated that the trustee and law firm employees were to be release from liability with respect to the bankrupt mining company upon compliance with the settlement agreement. An existing COALEX Report, which includes material on sureties that opt to reclaim rather than forfeit bonds and are subsequently found in violation of SMCRA regulations, provides additional information. Also identified are portions of preambles to federal regulations and OSM directives that discuss bankruptcy/bond forfeiture aspects of ownership/control and improvidently issued permits regulations.

Copies of the items listed below are attached.

FEDERAL REGISTER PREAMBLES


"The dissolution of a partnership will not relieve the partners of any previously-held responsibility for an unabated violation, or for a delinquent penalty or fee as owners or
controllers of the partnership.... The dissolution of liquidation of a corporation in
bankruptcy will not relieve any officer, director or other owner or controller of the
corporation of his or her previous responsibility for operations conducted by, or under
the ownership or control of, the corporation."

773.15(b)(1).

Effect of Bond Forfeiture. "If a bond forfeiture has occurred but the permit site has been
reclaimed and no violations remain, the person responsible for the bond forfeiture is not
precluded from receiving another permit. The guiding principle is whether any unabated
violation remains."

Effect of Bankruptcy. "The effect that a petition for liquidation or reorganization will have
on a particular permit application will depend on the facts surrounding the violation and
the application. Because of the complexity of the bankruptcy laws and the multitude of
factual situations that are possible, regulatory authorities will deal with such applications
on a case-by-case basis as they arise. In situations where a petition for liquidation or
reorganization has been filed and the automatic stay does not apply, as in the case of
post-petition indebtedness, the regulatory authority will perform the compliance review
required by Sec. 773.15(b)(1) and deny the permit. However, in situations where the
automatic stay does apply, so that the issuance of a permit cannot be blocked on
account of pre-petition indebtedness, the permit will be issued, conditioned on the
payment, once the stay has expired, of any amount not discharged in bankruptcy."

OSM DIRECTIVES BASED ON THE FEDERAL RULES

Subject No. INE-34, Transmittal No. 659, "Improvidently Issued Permits" (1991).

3. Definitions. "b. Person Responsible -- a person who is directly or indirectly
responsible for an unabated violation or a delinquent penalty or fee. A person is directly
responsible for an unabated violation or a delinquent penalty or fee where such person
has been cited for the violation or has been assessed the penalty or fee. A person is
indirectly responsible where such person owned or controlled the person cited for the
violation or assessed the penalty fee.) A person who is merely owned or controlled by
the person responsible for the unabated violation, penalty or fee would not be directly or
indirectly responsible, even though such person is linked to the unabated violation or
delinquent penalty or fee through ownership or control.)

"By the way of illustration, if A controls B and C, and B is a violator but A and C are not,
then B is directly responsible for a violation, A is indirectly responsible for a violation,
and C is merely linked to a violation through ownership and control. A, B and C are all
ineligible to receive permits. If the links between A and B and A and C are later severed,
A and B would still be ineligible to receive permits because they remain responsible
(indirectly or directly) for a violation; C, on the other hand, would become eligible to
receive a permit because it never was responsible (indirectly or directly) for a violation, and its ownership and control link to a violator has been severed. See 54 FR 18445."


Three additional OSM Directives are enclosed for background:


INTERIOR ADMINISTRATIVE CASES


According to the terms of this consent decision, OSM will

"(1) prevent any future AVS listing or other permit blocking measure against Citizen's Fidelity Bank, its officers, directors, employees, and persons under common control or ownership with the Bank;

"(2) relieve the Bank, "its officers, directors, employees, parent corporation, affiliates, subsidiaries, successors and assigns of liability with regard to the activities of Scarab Energy corporation and properties on which Scarab Energy Corporation or related entities conducted surface coal mining operations; and

"(3) upon compliance with the Settlement Agreement, release the court-appointed trustee for Scarab in the bankruptcy proceeding and all partners, associates and employees of the trustee's law firm "from liability with respect to properties on which Scarab Energy Corporation or related entities conducted surface coal mining."


In addressing bond forfeiture, one of several issues on appeal, the IBLA discussed a state's denying surface coal mining permits to applicants who owned or controlled operations in violation of the Act:

"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 [the AVS 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 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.”

PENNSYLVANIA ADMINISTRATIVE CASE


While this case involves the Oil and Gas Act, discussion of the issues include references to SMCRA and bankruptcy which are relevant to this inquiry.

COALEX REPORTS

COALEX STATE INQUIRY REPORT - 269, "Surety as 'permittee' or 'operator'" (1993).

A surety that opted to perform reclamation rather than forfeit performance bonds after an operator's permit was revoked was issued an NOV and CO for failing to meet SMCRA performance standards. Materials were retrieved which found that the surety is under the same obligations to properly fulfill the performance standards as the permittee.

NOTE: Attachments are included with this Report.

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

This Report addresses the question of whether a coal company which holds a valid permit on an inactive mine is considered an "operator"? Research was conducted to locate materials that defined "operator" and "permittee" or discussed related issues, i.e., inactive mining operations, liability for NOVs and COs where there is no permit, mitigating factors in assessing civil penalties and termination of jurisdiction.

NOTE: Report is enclosed without attachments; however, materials attached to the Report are listed in the ATTACHMENTS section.


The issue in question here was whether a permit holder who minimally disturbed the permitted area and did not remove minerals was considered an "operator", as defined in SMCRA, who is responsible for reclamation? Although no materials were identified with
the specific fact situation in question, the relevant materials retrieved yielded the following:

"Reclamation responsibilities are an incident of being granted a proper coal mining permit."

NOTE: Report is enclosed without attachments; however, materials attached to the Report are listed in the ATTACHMENTS section.

ATTACHMENTS

3. OSM DIRECTIVE, Subject No. INE-34, Transmittal No. 659, "Improvidently Issued Permits" (1991).
4. OSM DIRECTIVE, Subject No. INE-33, Transmittal No. 636, "510(c) Permit Review Procedures for Federal Permit Applications" (1990).
5. OSM DIRECTIVE, Subject No. REG-34, Transmittal No. 591, "Processing Applications for Federal Permits" (1990).
10. COALEX STATE INQUIRY REPORT - 269, "Surety as 'permittee' or 'operator’" (1993).
   B. JEWELL SMOKELESS COAL CO., 4 IBSMA 211, 218 (1982).
   C. ALLIED FIDELITY INSURANCE CO. v ENVIRONMENTAL QUALITY COUNCIL, 753 P 2d 1038 (Wyo 1988).
   D. PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, 489 NE 2d 785 (Ohio 1986).
   F. RIGHT OF WAY PAVING COMPANY, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, PENN.

G. COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND YODER, ET AL. v PBS COALS, INC. AND FETTEROLF MINING, INC., 534 A 2d 1130 (Pa Commonw Ct 1987).


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

A. Wyoming Statute Secs. 35-11-103 and 35-11-901.<

B. DELIGHT COAL CORP., 1 IBSMA 186, IBSMA 79-12 (1979).


D. JAMES MOORE v OSM, 1 IBSMA 216, IBSMA 79-10 (1979).

E. CLAYPOOL CONSTRUCTION CO., INC. v OSM, 1 IBSMA 259, IBSMA 79-17 (1979).


G. MARCO, INC. v OSM, 3 IBSMA 128, IBSMA 81-7 (1981).

H. JEWELL SMOKELESS COAL CO., 4 IBSMA 211, IBSMA 82-7 (1982).


M. KENT COAL CO. v OSM, Docket No. NX 4-21-P (1986).


P. COALEX STATE INQUIRY REPORT - 181, "Current liability for acid mine drainage under a pre-SMCRA permit" (1991). [WITHOUT ATTACHMENTS]


B. DARMAC COAL CO., 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983).


E. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (September 14, 1979).

F. TOLLAGE CREEK ELKHORN MINING CO., 2 IBSMA 341, IBSMA 80-32 (November 24, 1980).

G. CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (July 31, 1981).
I. GREATER PARDEE, INC. v OSM, Docket No. NX 0-219-R (September 18, 1980).
K. PEABODY COAL CO. v OSM, 101 IBLA 167 (February 17, 1988).
L. JOSEPHINE COAL CO. v OSM, 111 IBLA 316, IBLA 87-208 (October 30, 1989).

Q. COALEX STATE INQUIRY REPORT - 183, "Unwarranted failure to comply: definition of 'indifference', 'lack of diligence' and 'lack of reasonable care" (1991). [WITHOUT ATTACHMENTS]
A. COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (March, 1991).
   D. 47 FR 35620 (AUGUST 16, 1982). Final rules. Inspection and Enforcement; Civil Penalty Assessments. [Excerpts.]
   E. SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978).
T. COAL ENERGY, INC. v OSM, 105 IBLA 385, IBLA 87-190 (1988).
U. MARTIN v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 120 Pa Commw 269, 549 A 2d 675 (Pa Commw Ct 1988).
Y. TURNER BORS., INC. (TBI) v OSM, Docket Nos. TU 4-7-R, TU 4-11-R (1985).

B. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty" (May, 1990).
A. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v WATT, 550 F Supp 979 (DDC 1982).
B. SAVE OUR CUMBERLAND MOUNTAINS, INC. v CLARK, 725 F2d 1434 (DC Cir 1984).
C. Subsequent history: Auto-Cite and Shepard's Citations.
D. PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (1986).
C. OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., CH 0-2-A (March 17, 1981).

D. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (June 8, 1987).

E. LONE STAR STEEL CO. v OSM, 107 IBLA 134, IBLA 87-284 (February 6, 1989).

F. COLLINS MINING CO. v OSM, 103 IBLA 25, IBLA 87-327 (June 23, 1988).

G. NATIONAL MINES CORP. v OSM, 104 IBLA 331, IBLA 87-57 (September 23, 1988).


I. CF&I STEEL CORP. v OSM, DV 3-1-P (December 8, 1983).

R. COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (1991).

[WITHOUT ATTACHMENTS]

S. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty". [WITHOUT ATTACHMENTS]

T. GRAFTON COAL CO., INC., 3 IBSMA 175, IBSMA 80-84 (1981).


AA. NATIONAL WILDLIFE FEDERATION v LUJAN, 950 F 2d 765 (DC Cir December 10, 1991).


D. SQUIRE BAKER, 1 IBSMA 279, IBSMA 79-26 (1979).


H. MCWANE COAL CO., INC., 95 IBLA 1, IBLA 85-621 (1986).


K. CALL v G M SADER EXCAVATING & PAVING, INC., 68 Ohio App 2d 41, 426 NE 2d 798 (Ohio Ct App 1980).
