



## **COALEX STATE INQUIRY REPORT - 169**

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### **TOPIC: OWNERSHIP AND CONTROL; APPLICANT VIOLATOR SYSTEM**

**INQUIRY:** A company wished to transfer ownership of a permit. The transfer was blocked because of problems the new owner had in another state. The new owner failed to pay AML severance tax payments in the other state. The new owner claims that it did not own or control the company in the other state. What cases and general information are available on these issues?

**SEARCH RESULTS:** An existing COALEX Report provides cases through August, 1990. Additional research was conducted using the COALEX Library and other materials available in LEXIS to update that Report. Some of the items retrieved are included for general background information. Unless otherwise indicated, copies of the materials listed below are attached.

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### **EXISTING COALEX REPORT**

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

Included in this report are administrative decisions and federal and state case law which discuss "own and control" issues, as well as related issues, e.g., which party controls an operation, owns a company or is responsible for violations and civil penalties. A list of the items included as part of this Report appears under ATTACHMENTS, below.

### **ADDITIONAL FEDERAL CASE LAW**

**SAVE OUR CUMBERLAND MOUNTAINS v LUJAN, 21 Env'tl L Rep 20121 (D DC Sept. 5, 1990).**

The court approved the settlement agreement which "implements currently valid rules governing the issuance and rescission of mining permits. It also requires the Secretary to enter into Memoranda of Understanding with mining states regarding the use of the Applicant/Violator System ('AVS')."



## **ADDITIONAL ADMINISTRATIVE CASE LAW**

### **NORTHERN PLAINS RESOURCE COUNCIL (NPRC) et al. v OSM, MONTCO, INTERVENOR, 112 IBLA 266, IBLA 88-270 (1990).**

The Board affirmed the ALJ's finding that OSM properly approved Montco's permit: Montana's state program, then in effect, was the controlling law. "That program required the regulatory authority to make a finding that any surface coal mining and reclamation operation 'owned or controlled' by the applicant was not in violation of applicable law....At that time, there was no requirement...that Montco disclose those entities owned or controlled by anyone owning or controlling Montco or to disclose the compliance history of such entities. NPRC has not shown that the coal mining entities it identified were either owned or controlled by Montco. NPRC has failed to demonstrate error in OSMRE's review and approval of Montco's permit."

### **FRANK STEBLY v OSM, 109 IBLA 242, IBLA 87-782 (June, 1989).**

"Under 30 CFR 773.15(b) (1987), the regulatory authority shall, prior to approval of a permit for a surface mining and reclamation operation, make a finding that any operation owned or controlled by the applicant is not currently in violation of SMCRA or in violation of any Federal law, rule, or regulation, or any state law, rule, or regulation enacted pursuant to Federal law, rule, or regulation pertaining to air or water environmental protection."

## **REGULATORY HISTORY**

### **54 FR 18438 (APRIL 28, 1989). Final rule. Parts 773 and 843 Requirements for permit processing; improvidently issued permits.**

This rule included general procedures for determining whether a permit was improvidently issued and for applying appropriate remedial measures.

Section 773.20(b) Review Criteria. The Violations Review Criteria covered "the types of unabated violations and delinquent penalties and fees for which a regulatory authority should have withheld a permit, as well as the applicable ownership and control relationships."

### **54 FR 8982 (MARCH 2, 1989). Final rule. Parts 773, 778 and 843 Requirements for permit approval; ownership and control information; reporting of violations.**

The revised rules required the permit applicant to submit more detailed information on persons who own or control it and changed the requirements for reporting violations. Permit application requirements were conformed with changes in the permitting process to insure that permits were issued based on current compliance review information.

### **53 FR 38868 (OCTOBER 3, 1988). Final rule. Part 773 Requirements for permit approval; ownership and control.**



This rule added the definitions of the terms "owns or controls" and "owned or controlled" to 30 CFR 773.5 and revised the scope of review of a permit applicant's compliance record prior to the issuance of a new permit. These revisions were aimed at providing OSM with effective tools to ensure that all violations are abated.

In the past, some operators evaded the requirements of the Act and obtained a new permit while past violations remained unabated or money remained unpaid. In some instances, they formed new corporations, partnerships or other business entities, and through them applied for permits for new operations without correcting the violations or paying the fees and penalties resulting from old operations. If allowed to persist, these practices could seriously weaken enforcement of the Act and impede mine site reclamation. This could result in an unfair competitive advantage to operators who fail to comply with the requirements of the law and thereby lower their coal production costs.

### **PRIOR REGULATORY HISTORY (NOT ATTACHED)**

53 FR 44694 (NOVEMBER 4, 1988). Part 773 Ownership and control.

53 FR 29343 (AUGUST 4, 1988). Parts 773 and 843 Remedial actions regarding improvidently issued permits.

52 FR 37164 (OCTOBER 5, 1987). Notice of reopening of public comment period. Part 773 Requirements for permit approval; ownership and control information.

52 FR 20032 (MAY 28, 1987). Proposed rule. Part 773 Requirements for permit approval; ownership and control information.

52 FR 17366 (MAY 7, 1987). Reopening of public comment period. Part 773 Requirements for permit approval; ownership and control.

52 FR 16275 (MAY 4, 1987). Reopening of public comment period. Part 773 Requirements for permit approval; ownership and control.

51 FR 33905 (SEPTEMBER 24, 1986). Extension of comment period for permit condition and rescission rule. Parts 773 and 843.

51 FR 25900 (JULY 17, 1986). Notice of public hearing. Part 773 Requirements for permit approval; ownership and control.

51 FR 25822 (JULY 16, 1986). Parts 773 and 843 The permitting process.

51 FR 23085 (JUNE 25, 1986). Reopening of public comment period and public hearing. Parts 773 and 778 Requirements for permit approval; ownership and control.



51 FR 12879 (APRIL 16, 1986 [Part 1 of 2]). Reopening of comment period. Ownership and control.

50 FR 24122 (JUNE 7, 1985). Notice of public hearings and extension of public comment period. Part 773 Requirements for permit approval; ownership and control.

50 FR 13724 (APRIL 5, 1985). Proposed rule. Part 773 Requirements for permit approval; ownership and control.

## **OSM DIRECTIVES**

### **DRAFT DIRECTIVE, Subject No. INE- , "Verification of Permittee Ownership & Control Information After Site Disturbance" (1990).**

The purpose of this Directive is to implement the verification procedures required by provisions of the SOCM v Lujan Settlement Agreement.

The verification of ownership and control is two part:

1. Pre-inspection verification check of the Applicant/Violator System and Mine Safety and Health Administration (MSHA), Abandoned Mine Land and Energy Information Agency data; and
2. On-site inquiry during a regular inspection where the inspector will make inquiries as to the identities of the permittee, the operator for the site, and the MSHA number; discuss any discrepancies and document the review and inquiry.

A variety of actions can be taken if there is a change in the ownership and control information, e.g.:

1. An NOV may be issued.
2. The permittee may be contacted for an explanation or a request to amend the application.
3. If the omission or inaccuracy is determined to be intentional, the matter may be referred for prosecution.

### **TEMPORARY DIRECTIVE, Subject No. 89-19, "Implementation of Ownership and Control Information Rule for Federal Permit Applicants" (April, 19, 1989).**

This Directive implemented the ownership and control information update rule published on March 2, 1989 (54 FR 8985).

### **TEMPORARY DIRECTIVE, Subject No. 89-20, "Notifying Recipients of Cessation Orders of the Requirement to Update Ownership and Control Information" (April 19, 1989).**

This Directive also implements the rule published on March 2, 1989. Its purpose is the updating of permit information.



**TEMPORARY DIRECTIVE, Subject No. 89-1, "Conditionally Issued State Permits" (October 21, 1988).**

"The purpose of this temporary directive is to provide guidance for situations where the Applicant Violator System (AVS) recommends permit denial due to an outstanding violation or debt".

**DIRECTIVE, Subject No. REG-21, "Findings and Determinations for Revisions and Renewals of Federal Permits" (October 10, 1987).**

"This Directive establishes policy and procedures concerning (1) the findings required for approval of applications for revisions of Federal permits, (2) the determinations required for approval of applications for renewal of Federal permits, and (3) the findings required for denial of applications for renewal of Federal permits."

**DIRECTIVE, Subject No. INE-32, "Oversight Procedures for States' Use of the Applicant Violator System" (October 1, 1987).**

"This directive provides oversight for evaluating the use of the Applicant Violator System by States with approved regulatory programs." Some of the procedures in this directive "are related to the review of the States' overall permitting program which are described in the Directive entitled "Oversight of State Programs -- Annual Evaluations." (REG-8)

**DIRECTIVE, Subject No. INE-34, "Guideline for Responding to Improvidently Issued Permits" (October 1, 1987).**

"This directive establishes policy and procedures for suspending or revoking improvidently issued Federal surface coal mining permits and requesting the suspension or revocation of State issued permits."

**ATTACHMENTS**

- A. COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control of operations" (August, 1990).
1. WILLIAM J. MCINTIRE COAL CO. v COMMONWEALTH OF PA., DEPT. OF NATURAL RESOURCES (DER), Docket No. 83-180-M, slip op (July 7, 1986).
  2. CONCERNED CITIZENS OF JEFFERSON TOWNSHIP v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES AND GRINDSTONE COAL CO., Docket No 83-269-G, slip op (March 5, 1986).
  3. KEYSTONE MINING COMPANY, INC. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 542, Docket No. 83-241-G (June 19, 1985).



4. PARKER SAND AND GRAVEL v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1893 EHB 557, Docket No. 83-134-G (September 9, 1983)./
5. JANE BURNS, et al. v GEORGE DIALS, COMMISSIONER, 378 SE 2d 665 (W Va 1989).
6. CLARK COAL CO. v OSM, 102 IBLA 93, IBLA 86-627, 87-348 (1988).
7.
  - a. SHELBIANA CONSTRUCTION CO. v OSM, SAMMY GOFF v OSM, 102 IBLA 19, IBLA 85-88, IBLA 87-307 (1988).
  - b. SAMMY GOFF v OSM, Docket Nos. NX 5-49-R, NX 5-102-R (1987).
8.
  - a. TENNESSEE CONSOLIDATE COAL CO. v OSM, 99 IBLA 274, IBLA 85-351 (1987).
  - b. TENNESSEE CONSOLIDATED COAL CO. AND WALNUT COAL COMPANY, INC. v OSM, Docket Nos. NX 1-87-R, NX 1-147-P (1985).
9. MCWANE COAL CO., INC., 95 IBLA 1, IBLA 85-621 (1986).
10. S & M COAL CO. & JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620, 82-20 (1984).
11. KIMBERLY SUE COAL CO., INC., 74 IBLA 170, IBLA 83-619, 82-19 (1983).
12.
  - a. VIRGINIA FUELS, INC., 4 IBSMA 185, IBSMA 82-18 (1982).
  - b. MOLE COAL CO., INC. AND VIRGINIA FUELS, INC. v OSM, Docket Nos. CH 2-21-R, CH 2-33-R (1982).
13. PIERCE COAL AND CONSTRUCTION, INC., 3 IBSMA 350, IBSMA 81-33 (1981).
14.
  - a. WILSON FARMS COAL CO., 2 IBSMA 118, IBSMA 80-33 (1980).
  - b. WILSON FARMS COAL CO. v OSM, Docket No. NX 9-88-R (1980).
15. H.C. BOSTIC COAL CO., INC. AND WAYNE BOSTIC v OSM, Docket Nos. NX 88-8-R, NX 88-33-R, NX 88-34-R, NX 88-38-R, NX 88-46-R (1988).
16. ROY E. MEHAFFEY v OSM, Docket No. NX 7-35-R (1987).
17. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v OSM, Docket Nos. NX 1-118-R, NX 3-10-P (1985).\*
18. GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v OSM, Docket No. NX 1-146-P (1985).
19. Q & G COAL CO., INC. v OSM, Docket No. CH 1-200-P (1982).
20. L & R MINING CO., INC. v OSM, Docket No. CH 1-222-P (1982).
21. BLACK FOX MINING AND DEVELOPMENT CORP. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 172, Docket No. 84-114-G April 29, 1985).
22. DRESSLER COAL CORP. v DIVISION OF RECLAMATION, slip op (Ohio Ct App 1984).
23. US v RAPOCA ENERGY CO., 613 F Supp 1161 (D C VA 1985).
24. US v DIX FORK COAL CO., 692 F2d 436, 13 ELR 20244 (6th Cir 1982).



25. INTERNATIONAL UNION v FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, 840 F2d 77 (D C Cir 1988).
26. ANNOTATION. "Who is 'operator' of coal mine within the meaning of the Federal Coal Mine Safety and Health Act (30 USCS Sec. 802(d))", 54 ALR Fed 792 (1989).

[\* Update to ALJ: BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v OSM, 97 IBLA 285, IBLA 85-845 (1987). BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v LUJAN, 739 F Supp 1133 (ED Tenn 1990).]

- B. SAVE OUR CUMBERLAND MOUNTAINS v LUJAN, 21 Env'tl L Rep 20121 (D DC Sept. 5, 1990).
- C. NORTHERN PLAINS RESOURCE COUNCIL et al. v OSM, MONTCO, INTERVENOR, 112 IBLA 266, IBLA 88-270 (1990).
- D. FRANK STEBLY v OSM, 109 IBLA 242, IBLA 87-782 (June, 1989).
- E. 54 FR 18438 (APRIL 28, 1989). Final rule. Improvidently issued permits.
- F. 54 FR 8985 (MARCH 2, 1989). Final rule. Ownership and control; report of violations.
- G. 53 FR 38868 (OCTOBER 3, 1988). Final rule. Ownership and control.
- H. DRAFT DIRECTIVE, Subject No. INE- , "Verification of Permittee Ownership & Control Information After Site Disturbance" (1990).
- I. TEMPORARY DIRECTIVE, Subject No. 89-19, "Implementation of Ownership and Control Information Rule for Federal Permit Applicants" (April, 19, 1989).
- J. TEMPORARY DIRECTIVE, Subject No. 89-20, "Notifying Recipients of Cessation Orders of the Requirement to Update Ownership and Control Information" (April 19, 1989).
- K. TEMPORARY DIRECTIVE, Subject No. 89-1, "Conditionally Issued State Permits" (October 21, 1988).
- L. DIRECTIVE, Subject No. REG-21, "Findings and Determinations for Revisions and Renewals of Federal Permits" (October 10, 1987).
- M. DIRECTIVE, Subject No. INE-32, "Oversight Procedures for States' Use of the Applicant Violator System" (October 1, 1987).
- N. DIRECTIVE, Subject No. INE-34, "Guideline for Responding to Improvidently Issued Permits" (October 1, 1987).