



COALEX STATE INQUIRY REPORT - 309

December 1994

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TOPIC: IMPOSITION OF INDIVIDUAL CIVIL PENALTIES FOR CORPORATE VIOLATIONS (Update of COALEX Report No. 131)

INQUIRY: We are requesting a search for authority issued under 30 U.S.C. Sec. 1268(d), (e), & (f) and/or 30 C.F.R. Sec. 846 et seq., regarding civil penalties assessed against individual corporate officers for corporate permittee violations.

SEARCH RESULTS: The COALEX Library and other LEXIS materials were used to update Report - 131. The additional OSM Directives, Federal Register preambles, as well as administrative and other decisions are listed below. Copies are attached.

EXISTING COALEX REPORT

COALEX STATE INQUIRY REPORT - 131, "Individual liability of corporate officer, director or agent" (1989).

Contains Interior administrative decisions as well as state and federal cases that discuss the "participation theory" and "piercing the corporate veil" when a regulatory agency attempts to hold a corporate officer, director or agent individually liable for corporate violations.

FEDERAL REGISTER NOTICES

53 FR 3664 (FEBRUARY 8, 1988). Final rule. Individual Civil Penalties.

"[DOI] is amending its Initial and Permanent Regulatory Program procedures to provide for the assessment of individual civil penalties against officers, directors and agents of corporate permittees in accordance with section 518(f) of [SMCRA]."

See the implementation of these rules in the OSM Directives, below.



53 FR 8752 (MARCH 17, 1988). Final rule. Special Rules Applicable to Surface Coal Mining Hearings and Appeals.

"The intended effect of these regulations is to provide the mechanisms for administrative review of proposed individual civil penalties." [Enclosed for background.]

53 FR 38868 (OCTOBER 3, 1988). Final rule. Ownership and control.

"This rule adds definitions of the terms 'owns or controls' and 'owned or controlled' as these concepts are used in section 510(c) of [SMCRA]." [Enclosed for background.]

56 FR 48924 (SEPTEMBER 26, 1991). Proposed rule. Individual civil penalties.

"The proposed rule would provide that an individual civil penalty will be assessed against each officer, director, or agent of a permittee who has been served with a copy of the cessation order issued to the permittee and who has willfully and knowingly failed or refused to take all reasonable steps within his or her legal authority to bring about abatement of the violation."

57 FR 47431 (OCTOBER 16, 1992). Withdrawal of proposed rule.

"The proposed rules are being withdrawn as a result of comments received during the public comment periods".

OSM MATERIALS: DIRECTIVES

OSM DIRECTIVE, Subject No. INE-4, Transmittal No. 601, "Notice of Potential Liability for an Individual Civil Penalty" (Issued March 3, 1990).

Purpose of the Directive is to establish "procedures for informing corporate officials (as defined below) that they will or may be liable, under certain circumstances, for an Individual Civil Penalty (ICP)."

"3. Definitions.

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

"b. Individual Civil Penalty means a penalty as provided under section 518(f) of SMCRA, which states that '[whenever] a corporate permittee violates a condition of a permit...or fails or refuses to comply with any order incorporated in a final decision issued by the Secretary under this Act...any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) or this section.'"



"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....

"e. 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"

OSM DIRECTIVE, Subject No. INE-40, Transmittal No. 600, "Individual Civil Penalty Assessment" (Issued March 1, 1990).

"This Directive establishes policy and procedures for the assessment of Individual Civil Penalties (ICP's). The primary purpose of assessing the 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 [OSM] to take remedial action (to the extent authorized by Congress) using the monies collected from the ICP."

OSM DIRECTIVE, Subject No. INE-30, Transmittal No. 599, "Alternative Enforcement Referrals for Criminal Penalties, Individual Civil Penalties, and Injunctive Relief" (Issued March 1, 1990).

"This Directive establishes procedures for Field Offices to refer enforcement cases to the Solicitor for criminal penalties or injunctive relief, and to provide the Field Assessment Unit with the requisite information for assessment of an individual civil penalty (ICP) where warranted."

INTERIOR OHA DECISIONS

LUNCO MINING CO. v OSM, Docket No. NX 90-72-R (1992).

The ALJ found that Jesse Mining Co. was an operator on Lynco's permit. It was also determined that OSM failed to establish a legal relationship between Jesse Evans and Jesse Mining or Lynco "upon which liability might be imposed against him as an individual." OSM did not prove "that Mr. Evans exercised control over the corporation's activities or enjoyed an equity position".



SHELBIANA CONSTRUCTION CO. v OSM, 102 IBLA 19, IBLA 85-88 & 87-307 (1988).

HEADNOTES: 3. "Where the evidence in a case shows the complete merger of the ownership and control of a corporation, such that the corporation is merely acting as the individual's alter ego, the individual cannot be allowed to escape responsibility for the statutory requirement to eliminate highwalls by hiding behind the corporate entity."

PENNSYLVANIA ADMINISTRATIVE DECISIONS

LEASURE v DER, EHB Docket No. 82-007-G, 1987 Pa Environ LEXIS 1 (1987).

"[T]he underlying issue in this appeal can be stated very simply: Recognizing that [Old Home Manor] may not have the resources to perform those reclamation activities which were specified in the Order upheld in OHM v DER, should Leasure be required to perform them with his personal funds?"

The Environmental Hearing Board concluded the following:

"Corporate officers and directors are not excluded from the definition -- in 35 P.S. Sec. 691.1 -- of persons to whom DER may issue Orders under the [Clean Streams Law] or the SMCRA.

"DER had the authority to issue the Order to Leasure on a theory of liability stemming from Leasure's status as an OHM officer, but our approving this authority does not necessarily imply that, on the merits, the Order was within DER's discretion.

"DER has not met its burden of showing that the corporate veil justifiably can be pierced to impose personal liability on Leasure for OHM's failure to properly reclaim.

"DER has not met its burden of showing that Leasure can be said to have participated in OHM's mining activities before 1979, under the common law theory of 'participation' by establishing misconduct or intentional neglect by Leasure.

"Although Leasure did participate in OHM's reclamation activities after 1979, the circumstances -- especially the facts that OHM was heavily in debt and that Leasure nevertheless has managed to get much reclamation performed -- do not warrant requiring Leasure to expend his own funds for reclamation OHM has not performed."

WOOD PROCESSORS, INC. & JOYNER v DER, EHB Docket No. 91-219-E, 1994 Pa. Environ. LEXIS 12 (1994).

SYNOPSIS: "Where the corporate president of such a waste processor is shown to have participated in and directed the waste processing operations at two of the three



locations where the processing occurred, he may be held personally liable therefore on a corporate-officer-participation theory."

BLUMENTHAL v DER, EHB Docket No. 91-161-E, 1993 Pa Environ LEXIS 123 (1993).

SYNOPSIS: "Where DER argues for individual liability through a piercing of the corporate veil, it must not only advance this theory before the merits hearing but must also supply proof sufficient to establish that such a piercing is factually justified."

LOUIS J. NOVAK, SR. ET AL. v DER, EHB Docket No. 84-425-M, 1987 Pa Environ LEXIS 57 (1987).

"Corporate officers may be held personally liable for violations of the Solid Waste Management Act and the Clean Streams Law either through piercing the corporate veil or establishing their participation in the violations." However, in this case, DER "failed to present any evidence regarding piercing the corporate veil of [Novak Sanitary Landfill]. Therefore, it failed to satisfy its burden of proof and the Novaks, therefore, cannot be held personally liable for violations of the Clean Streams Law and the Solid Waste Management Act under this theory."

SOUTHWEST EQUIPMENT RENTAL, INC. v DER, EHB Docket No. 83-175-M, 1986 Pa Environ LEXIS 113, 1986 EHB 465 (1986).

"There is no indication that any of Southwest's officers participated in the conduct that gave rise to the violations at issue here, that they made any decisions resulting in those violations or that they had knowledge of the activities leading to the violations. In the absence of such a showing we must conclude that the officers cannot be held liable under the participation theory of corporate officer liability."

FEDERAL COURT DECISIONS

NATIONAL COAL ASSOCIATION & AMERICAN MINING CONGRESS v LUJAN, 979 F 2d 1548 (DC Cir 1992).

The court affirmed Secretary's individual civil penalty regulations, finding that they are not "arbitrary, capricious, or otherwise inconsistent with law".

U.S. v RINGLEY, 985 F 2d 185 (4th Cir 1993).

"This case raises the issue of whether the general partners of a coal mining partnership may be held liable under [SMCRA] for the partnership's unpaid reclamation fees after the individual partners' debts have been discharged in bankruptcy. The United States brought this action against the individual partners,, after efforts to collect the unpaid fees from the partnership failed. Because we conclude that the partners may not escape



payment of the reclamation fee, we affirm the district court's grant of summary judgment for the United States."

U.S. v DAUGHERTY ET AL., 599 F Supp 671 (E.D. Tenn 1984).

After analyzing the "identity theory", the "alter ego theory" and the "instrumentality rule" for piercing the corporate veil, the court found the Daugherty was not liable as an individual for the corporate debt.

SEE ALSO THESE STATE COURT DECISIONS

PEOPLE ES REL. MORSE, 634 NE 2d 436 (Ill App Ct 1994).

NATURAL RESOURCES & ENVTL PROTECTION CABINET v COLEMAN, 876 SW 2d 614 (Ky Ct App 1993).

NATURAL RESOURCES & ENVTL PROTECTION CABINET v WILLIAMS, 768 SW 2d 47 (Ky 1989).

THE VILLAGE AT CAMELBACK PROPERTY OWNERS ASSN. INC. v CARR, 538 A 2d 528 (Pa Super Ct 1988).

ATTACHMENTS

1. COALEX STATE INQUIRY REPORT - 131, "Individual liability of corporate officer, director or agent" (1989).
 - A. Ky. Rev. Stat. Ann. Sec. 350.990(9) (Michie/Bobbs-Merrill 1988).
 - B. 25 Pa. Code Sec. 86.1 (1982). Protection of Natural Resources. Definitions.
 - C. Policy Statement of the Dept. of Environmental Resources: Civil Penalty Program (1985). Introduction.
 - D. RUDALPH WILLIAMS (LAKE COAL CO., INC.) v. OSM, Docket No. NX 5-12-P (Sept. 23, 1986).
 - E. BERT BANKS (LAKE COAL CO.) v. OSM, Docket No. NX 5-14-P (Oct. 31, 1986).
 - F. GRUNDY MINING CO. AND TENNESSES CONSOLIDATED COAL CO. v. OSM, Docket No. NX 1-146-P (June 14, 1985).
 - G. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v. OSM, Docket Nos. NX 1-118-R and NX 3-10-P (July 26, 1985).
 - H. U.S. v. DIX FORK COAL CO., 692 F.2d 436 (6th Cir., 1982).
 - I. WILFORD NIECE v. OSM, Docket No. NX 5-2-P (Oct. 27, 1986).
 - J. COLLEGE WATERCOLOR GROUP, INC. v. WILLIAM H. NEWBAUER, INC. AND WILLIAM H. NEWBAUER, 468 Pa. 103, 360 A.2d 200 (Pa., 1976).



- K. ZUBIK v. ZUBIK, 384 F.2d 267 (3rd Cir., 1967), cert. denied, 390 U.S. 988 (1968).
- L. CHESTER-CAMBRIDGE BANK AND TRUST CO. v RHODES, 346 Pa. 427, 31 A.2d 128 (Pa., 1943).
- M. DONSCO, INC. v CASPER CORP., 587 F.2d 602 (3rd Cir., 1978).
- N. WICKS v MILZOCO BUILDERS, INC., 503 Pa 614, 470 A.2d 86 (Pa., 1983).
- O. U.S. v. PARK, 421 U.S. 658 (1975).
- P. LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 119 Pa. Commw. 440, 547 A.2d 447 (Pa. Commw. Ct., 1988).
- Q. DER v. LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI, EHB Docket No. 80-211-CP-W, slip op. (Pa. EHB, 1987).
- R. JOHN E. KAITES AND JOHNSTOWN COAL AND COKE, INC. v. DER, 108 Pa. Commw. 269, 529 A.2d 1148 (Pa. Commw. Ct., 1987).
- S. JOHN E. KAITES, ET AL. v. DER, Docket No. 84-104-G, slip op. (Pa. EHB, 1986).
- T. JOHN E. KAITES, ET AL. v. DER, Docket No. 84-104-G, 1985 E.H.B. 625 (1985).
- U. DER v. BLACK CARBON FUEL, 86 C.D. 1987 (July 14, 1989).
- 2. 53 FR 3664 (FEBRUARY 8, 1988). Final rule. Individual Civil Penalties.
- 3. 53 FR 8752 (MARCH 17, 1988). Final rule. Special Rules Applicable to Surface Coal Mining Hearings and Appeals.
- 4. 53 FR 38868 (OCTOBER 3, 1988). Final rule. Ownership and control.
- 5. 56 FR 48924 (SEPTEMBER 26, 1991). Proposed rule. Individual civil penalties.
- 6. 57 FR 47431 (OCTOBER 16, 1992). Withdrawal of proposed rule.
- 7. OSM DIRECTIVE, Subject No. INE-4, Transmittal No. 601, "Notice of Potential Liability for an Individual Civil Penalty" (Issued March 3, 1990).
- 8. OSM DIRECTIVE, Subject No. INE-40, Transmittal No. 600, "Individual Civil Penalty Assessment" (Issued March 1, 1990).
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- 10. LYNCO MINING CO. v OSM, Docket No. NX 90-72-R (1992).
- 11. SHELBIANA CONSTRUCTION CO. v OSM, 102 IBLA 19, IBLA 85-88 & 87-307 (1988).
- 12. LEASRUE v DER, EHB Docket No. 82-007-G, 1987 Pa Environ LEXIS 1 (1987).
- 13. WOOD PROCESSORS, INC. & JOYNER v DER, EHB Docket No. 91-219-E, 1994 Pa. Environ. LEXIS 12 (1994).
- 14. BLUMENTHAL v DER, EHB Docket No. 91-161-E, 1993 Pa Environ LEXIS 123 (1993).
- 15. LOUIS J. NOVAK, SR. ET AL. v DER, EHB Docket No. 84-425-M, 1987 Pa Environ LEXIS 57 (1987).



16. SOUTHWEST EQUIPMENT RENTAL, INC. v DER, EHB Docket No. 83-175-M, 1986 Pa Envirn LEXIS 113, 1986 EHB 465 (1986).
17. NATIONAL COAL ASSOCIATION & AMERICAN MINING CONGRESS v LUJAN, 979 F 2d 1548 (DC Cir 1992).
18. U.S. v RINGLEY, 985 F 2d 185 (4th Cir 1993).
19. U.S. v DAUGHERTY ET AL., 599 F Supp 671 (E.D. Tenn 1984).
20. PEOPLE EX REL. MORSE, 634 NE 2d 436 (Ill App Ct 1994).
21. NATURAL RESOURCES & ENVTL PROTECTION CABINET v COLEMAN, 876 SW 2d 614 (Ky Ct App 1993).
22. NATURAL RESOURCES & ENVTL PROTECTION CABINET v WILLIAMS, 768 SW 2d 47 (Ky 1989).
23. THE VILLAGE AT CAMELBACK PROPERTY OWNERS ASSN. INC. v CARR, 538 A 2d 528 (Pa Super Ct 1988).