



## COALEX STATE INQUIRY REPORT - 312

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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.

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### FEDERAL REGISTER PREAMBLES

**54 FR 18438, 18442 & 18446 (APRIL 28, 1989). Final rule. Improvidently issued permits. 773.20(a)(4)(ii)(A) Ownership and Control Criteria at Time of Permit Issuance and 773.20(b)(3) Severing Ownership or Control Link.**

"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 or 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."

**53 FR 38868, 38884 (OCTOBER 3, 1988). Final rule. Ownership and control. 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."

4. Policy-Procedures. d. Procedures. (3) Effect of Bankruptcy on Suspension and Rescission. See this section of the enclosed OSM Directive for details.

**Three additional OSM Directives are enclosed for background:**

1. Subject No. INE-33, Transmittal No. 636, "510(c) Permit Review Procedures for Federal Permit Applications" (1990).
2. Subject No. REG-34, Transmittal No. 591, "Processing Applications for Federal Permits" (1990).
3. Subject No. INE-42, Transmittal No. 665, "Verification of Federal Permittee Ownership and Control Information After Site Disturbance" (1991).

**INTERIOR ADMINISTRATIVE CASES**

**CITIZEN'S FIDELITY BANK AND TRUST CO. v OSM, Docket No. NX 90-18-R, et al. (1992).**

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."

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

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**

### **PENNBANK, ET AL. v DER, EHB Docket No. 88-281-M, 1989 Pa Envirn LEXIS 39 (1989).**

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 NOV's and CO's 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.

### **COALEX STATE INQUIRY REPORT - 232, "Definition of 'operator' (Continuation of Report 224)" (1992).**

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

1. 54 FR 18438, 18442 & 18446 (APRIL 28, 1989). Final rule. Improvidently issued permits. 773.20(a)(4)(ii)(A) Ownership and Control Criteria at Time of Permit Issuance and 773.20(b)(3) Severing Ownership or Control Link.
2. 53 FR 38868, 38884 (OCTOBER 3, 1988). Final rule. Ownership and control. 773.15(b)(1).
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).
6. OSM DIRECTIVE, Subject No. INE-42, Transmittal No. 665, "Verification of Federal Permittee Ownership and Control Information After Site Disturbance" (1991).
7. CITIZEN'S FIDELITY BAND AND TRUST CO. v OSM, Docket No. NX 90-18-R, et al. (1992).
8. ROBERT L. CLEWELL ET AL., 123 IBLA 253, IBLA 91-321 (1992).
9. PENNBANK, ET AL. v DER, EHB Docket No. 88-281-M, 1989 Pa Envirn LEXIS 39 (1989).
10. COALEX STATE INQUIRY REPORT - 269, "Surety as 'permittee' or 'operator'" (1993).
  - A. IN THE MATTER OF WILLIAM H. PULLEN, 1992 IBLA LEXIS 124, IBLA 88-452 (1992).
  - 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).
  - E. PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, No. 412, slip op. (Ohio Ct. App 1985).
  - F. RIGHT OF WAY PAVING COMPANY, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, PENN.



- Environmental Hearing Board Docket No. 86-079-G, 1986 Pa. Envirn. LEXIS 105 (1986).
- 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).
- H. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 806.12 Terms and conditions of the bond.
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).
- C. DELIGHT COAL CORP., Docket No. CH 9-4-P (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).
- F. CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (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).
- I. S & M COAL CO. AND JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620 & 82-20 (1984).
- J. CLARK COAL, CO. v OSM, 102 IBLA 93, IBLA 86-627 & 87-348 (1988).
- K. CLARK COAL CO., INC. v OSM, Docket No. NX 6-60-R (1987).
- L. CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (1981).
- M. KENT COAL CO. v OSM, Docket No. NX 4-21-P (1986).
- N. M & J COAL CO. v OSM, Docket Nos. CH 6-15-R, CH 7-1-P (1988).
- O. M & J COAL Co. v OSM, 115 IBLA 8, IBLA 88-564 & 88-568 (1990).
- P. COALEX STATE INQUIRY REPORT - 181, "Current liability for acid mine drainage under a pre-SMCRA permit" (1991). [WITHOUT ATTACHMENTS]
- A. BOLOGNA MINING CO. v COMMONWEALTH OF PENNSYLVANIA, DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envirn LEXIS 60, EHB Docket No. 86-555-M (March 3, 1989).
- B. DARMAC COAL CO., 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983).
- C. DARMAC COAL CO. v OSM, Docket No. CH 1-107-R (May 1, 1981).
- D. CEDAR COAL CO., 1 IBSMA 145, IBSMA 79-5 (April 20, 1979).
- 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).



- H. GREATER PARDEE, INC., 3 IBSMA 313, IBSMA 81-1 (September 24, 1981).
- I. GREATER PARDEE, INC. v OSM, Docket No. NX 0-219-R (September 18, 1980).
- J. CITIZENS FOR THE PRESERVATION OF KNOX COUNTY, 81 IBLA 209, IBLA 86-631, 83-2 (June 5, 1984).
- 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).
- M. HARMAN MINING CORP. v OSM, 114 IBLA 291, IBLA 87-525 (May 10, 1990).
- 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).
    - A. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 843 Federal Enforcement. [Excerpts.]
    - B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 843 Federal Enforcement. Section 843.18 Inability to comply. [Excerpts.]
    - C. 46 FR 58464 (DECEMBER 1, 1981). Proposed rules. Inspection, Enforcement and Civil Penalty Assessments. [Excerpts.]
    - 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).
    - F. VERNON R. PAUL v COMMONWEALTH OF PENN., DEPT. OF ENVIRON. RESOURCES (DER), Docket No. 84-290-G, 1985 EHB 791 (1985).
    - G. DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 2-12-P, IN 1-13-P (1983).
    - H. MARTIN MINING CORP. v OSM, Docket No. IN 1-9-R (1983).
    - I. GLENN COAL CO. v OSM, Docket No. CH 0-279-R (1984).
    - J. GARLAND COAL AND MINING CO. v OSM, Docket Nos. TU 4-43-R, IBLA 85-106 (1986).
    - K. CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988).
    - L. CLEAR CREEK COAL CO. v OSM, Docket Nos. NX 1-49-R, NX 1-59-R (1985).
    - M. CARBON FUEL CO., INC. v OSM, Docket No. NX 9-116-R (1980).



- N. W.E. AND JONAH WARREN COAL CO., INC. v OSM, Docket No. NX 0-246-R (1984).
- O. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).
- P. THE OHIO VALLEY COMPANY CONSTRUCTION DIV., INC. v OSM, Docket No. IN 9-13-R (1979).
- Q. DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979).
- R. GREATER PARDEE, INC. v OSM, Docket No. CH 0-284-R (1981).
- S. SHAWNEE COAL CO. v OSM, Docket No. IN 2-2-R (1981).
- 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).
- V. ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (April 27, 1990).
- W. ALPINE CONSTRUCTION CO. v OSM, Docket No. TU 7-55-R (1988).
- X. TURNER BROS., INC. v OSM, Docket Nos. TU 6-20-R, TU 6-52-R, TU 6-81-R (1987).
- Y. TURNER BORS., INC. (TBI) v OSM, Docket Nos. TU 4-7-R, TU 4-11-R (1985).
- Z. TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).
- 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).
  - E. GRAYS KNOB COAL CO. v OSM, 98 IBLA 171, IBLA 85-364 (1987).
  - F. L.W. OVERLY COAL CO. v OSM, 103 IBLA 356, IBLA 88-39 (1988).
  - G. APEX CO., INC., 4 IBSMA 19, IBSMA 81-53 (1982).
  - H. GRAHAM BROTHERS COAL CO. v OSM, Docket No. CH 3-14-R (1984).
  - I. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (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).
- H. FARRELL-COOPER MINING CO. v OSM, 111 IBLA 115, IBLA 87-417 (September 28, 1989).
- 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).
- U. GRAFTON COAL CO., INC. v OSM, Docket No. CH 0-175-R (1980).
- V. NEW BIG CREEK MINING, Docket No. NX 1-49-P (1985).
- W. APPOLO FUELS, INC. v OSM, Docket Nos. NX 89-39-R, NX 89-46-R (1990).
- X. 53 FR 44356 (NOVEMBER 2, 1988). Final rule. Termination of jurisdiction.
- Y. NATIONAL WILDLIFE FEDERATION v LUJAN, 31 ERC (BNA) 2034, 21 ELR 20135 (D.C. DC August 30, 1990). [Excerpts]
- Z. 56 FR 25036 (JUNE 3, 1991). Notice of suspension. Compliance with court order.
- AA. NATIONAL WILDLIFE FEDERATION v LUJAN, 950 F 2d 765 (DC Cir December 10, 1991).
- BB. 57 FR 12461 (APRIL 10, 1992). Notice of reinstatement of suspended rule. Termination of jurisdiction.
- 12. COALEX STATE INQUIRY REPORT - 232, "Definition of 'operator' (Continuation of Report 224)" (1992).
  - A. RUSSELL PRATER LAND CO. v OSM, 3 IBSMA 124, IBSMA 80-94 (1981).
  - B. C & N COAL CO., INC. v OSM, 103 IBLA 48, IBLA 86-166 (1988).
  - C. AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1983).
  - D. SQUIRE BAKER, 1 IBSMA 279, IBSMA 79-26 (1979).
  - E. B & H COAL CO., INC. v OSM, Docket No. NX 89-48-P (1991).
  - F. COOK AND SON, INC. AND STONE v OSM, Docket Nos. NX 90-35-R, NX 90-37-R, NX 90-42 R, NX 90-44-R (1992).
  - G. HERALD v OSM, 123 IBLA 334, IBLA 90-153 (1992).
  - H. MCWANE COAL CO., INC., 95 IBLA 1, IBLA 85-621 (1986).
  - I. CONSOLIDATED COAL CO. v OSM, Docket Nos. CH 89-1-P, CH 89-2-P (1990).



- J. CITIZENS FOR THE PRESERVATION OF KNOX COUNTY, 81 IBLA 209, IBLA 83-631, IBLA 83-2 (1984).
- K. CALL v G M SADER EXCAVATING & PAVING, INC., 68 Ohio App 2d 41, 426 NE 2d 798 (Ohio Ct App 1980).
- L. INGRAM COAL CO. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1990 Pa Envirn LEXIS 49 (1990).
- M. 42 FR 62639 (DECEMBER 13, 1977). Final rules. [Excerpt]