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Corporate Officer Liability Under SMCRA: A Statutory Exception to Limited Liability

INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA)[1] is the final product of numerous legislative attempts[2] to promulgate federal guidelines and regulations for surface mining.[3] Although the congressional debates ceased when SMCRA was enacted, the battle among coal operators, environmentalists, and regulatory agencies has escalated.[4] While the courts have tentatively addressed some challenges to SMCRA,[5] there are many areas awaiting resolution—including implementation of the individual liability provision.[6]

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[1] Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1982)) [hereinafter cited as SMCRA].

[2] *See generally* S. REP. No. 128, 95th Cong., 1st Sess. 59-60, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593; McGraw, *Surface Mining Primacy for Kentucky: The Legal Implications*, 71 KY. L.J. 37, 38 n.3 (1982-83); Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775, 775-83 (1979); Comment, *Statutory Comments*, 25 N.Y.L. SCH. L. REV. 953, 953 n.1 (1979-80). While there is no longer a struggle in Congress to pass a federal surface mining law, legislative action to modify SMCRA continues. *See, e.g.*, Bratt, *Surface Mining in Kentucky*, 71 KY. L.J. 7, 9 nn.15-16 (1982-83).

[3] According to SMCRA, surface mining includes:

> contour, strip, auger, mountain removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in site distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site. . . .

30 U.S.C. § 1291(28)(A) (1982). This comprehensive definition underscores the legislative intent to stringently regulate surface mining.

[4] For an illustrative list, *see* Bratt, *supra* note 2, at 9 n.14, and Comment, *supra* note 2, at 953 n.2.

[5] Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981) (both opinions were limited in scope because the cases presented facial challenges to the statute's validity). *See generally* Bratt, *supra* note 2, at 11-18. The Supreme Court will review the civil penalty prepayment provision in the near future since Moore v. United States, 53 *U.S.L.W.* 3021 (U.S. July 3, 1984) (No. 84-41), is on the Supreme Court docket. (The lower court ruling found the civil penalty prepayment provision of SMCRA meets constitutional due process requirements. United States v. Moore, No. 82-5478 (6th Cir. Apr. 4, 1984)).

[6] SMCRA § 518(f), 30 U.S.C. § 1268(f) (1982).

Under both SMCRA[7] and the Kentucky surface mining act[8] (Kentucky Act), when a corporate permittee[9] violates performance standards, the corporate officers can be held individually liable.[10] However, the individual liability provision has not been used effectively in Kentucky.[11] The Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) has implemented the civil penalty provisions[12] against *corporate permittees* but has made no measurable effort to assess penalties against *individual corporate officers.*[13] As a result, millions of dollars of outstanding penalties assessed against the corporate entity lie dormant in accounts receivable records.[14] More importantly, the

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[7] While primary responsibility for enforcing surface mining laws belongs to the state, see *infra* note 8, the Office of Surface Mining (OSM) of the Department of the Interior (Department), established pursuant to 30 U.S.C. § 1211 (1982), administers the Federal program and oversees State Programs. *See generally* McGraw, *supra* note 2, at 43.

[8] The Kentucky surface mining act [hereinafter cited as the Kentucky Act] is codified at KY. REV. STAT. §§ 350.010 -.990 (1984) [hereinafter cited as KRS]. For an excellent discussion of the Kentucky Permanent Program, see McGraw, *supra* note 2.

[9] The enforcement provisions of SMCRA and the regulations thereunder "are not avoided by the failure of a person to obtain a state permit. . . . The definition of 'permittee' adopted by the Secretary for the initial regulatory program . . . includes those persons who fail to obtain a State permit before conducting surface coal mining and reclamation operations regulated by a state." Claypool Construction Co., 1 IBSMA 259, 260 (86 ID 486) (Sept. 26, 1979).

[10] For a discussion of limited liability of corporate shareholders, see *infra* notes 16-28 and accompanying text.

[11] 1984 OSM SECOND ANN. EVALUATION OF KY. SURFACE MINING AND RECLAMATION PROGRAM 65 [hereinafter cited as 2D ANNUAL EVALUATION]. *See infra* text accompanying notes 54-58 and notes 98-99. For notice of availability, see 48 Fed. Reg. 3837 (Aug. 23, 1983). The Annual Evaluation Report on the Administration of State Regulatory & Abandoned Mine Land Programs Under SMCRA can be obtained from the following: Division of State Program Assistance, OSM, 1951 Constitution Ave., N.W., Washington, D.C. 20240, or Lexington Field Office, OSM, 340 Legion Drive, Suite 28, Lexington, KY 40504.

[12] Civil penalties for the federal program are set out in 30 U.S.C. § 1268(i) (1982) which states: "As a condition of approval of any State program . . . the civil and criminal provisions thereof shall at a minimum, incorporate penalties no less stringent than those set forth in this section. . . ." KRS § 350.990 contains the civil penalties under the state program.

[13] Corporate officers and shareholders were named as respondents in Leslie Coal & Energy Engineering, No. 1766-III-15 (Ky. DNREP Jan. 15, 1981). See *infra* notes 59-62 and accompanying text. *See also*, Bratt, *supra* note 2, at 31-34.

[14] The Cabinet is unable to collect these penalties because the corporate entity is only a shell which exists for the sole purpose of insulating corporate individuals. Generally, the Cabinet is able to collect only those fines which are voluntarily paid. It is estimated that less than ten percent of the assessed penalties are ever collected.

"envisioned"[15] deterrence factor is largely negated by the Cabinet's inaction.

This comment will analyze corporate officer liability under SMCRA and the Kentucky Act and the problems related to enforcing this liability by first addressing the limited liability of corporate officers and then examining the statutory provisions authorizing enforcement of penalties against corporate officers. Finally, the federal and state enforcement systems will be discussed.

I. LIMITED LIABILITY

> "It is well established that a corporate structure is a separate legal entity which has the legitimate purpose of insulating individuals from personal liability for acts done on behalf of the corporation."[16]

Interview with Charles Kurtz, Office of General Counsel, Ky. Nat. Res. & Env. Protection Cabinet (September 12, 1984) [hereinafter cited as Kurtz Interview]. In support of this, a Cabinet intra-office memorandum (Fines Receivable Report) regarding "extraordinary assessments due and owing to the Cabinet" lists assessments from $100,000 to $34,352,000. One notation states "the Cabinet's Accounts Receivable through February 29, 1984: $56,727,424.43." *Id.* Fiscal years 1982, 1983, and through March 19, 1984 were included in the Fines Receivable Report, (March 19, 1984).

[15] Even before SMCRA was enacted, there was doubt cast upon the future effectiveness of individual civil penalties as drafted. These reservations were expressed in a subcommittee hearing by counsel for environmentalists. The testimony in pertinent part follows:

> [Section] 518 as presently drafted will not achieve its purpose of deterrence. . . . The purpose of the civil penalty provision under H.R. 2 . . . is to induce those officials responsible for the operation of a mine to comply with the substantive standards established by the statutory scheme. As the Senate Labor and Public Welfare Committee has stated: To be successful in this objective a penalty should be of an amount which is sufficient to make it more economical for an operator to comply . . . than it is to pay the penalty assessed and continue to operate while not in compliance.

Surface Mining and Reclamation Act of 1977: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 87 (1977) (testimony of counselors J. Davitt McAteer and L. Thomas Galloway) [hereinafter cited as *Hearings*]. Because the civil penalties of SMCRA were modeled after civil penalties of the Mine Safety Act, the counselors utilized the major problem areas of the Mine Safety Program to forecast a repeated fiasco: "[A] glimpse into the dismal history of the civil penalty program of the Mine Safety Act . . . should be enough to show that transplanting the system unchanged into H.R. 2 will almost surely result in a dismal 'mess'. . . ." *Id.*

[16] Malisewski v. Singer, 598 P.2d 1014, 1015 (Ariz. Ct. App. 1979).

One of the major advantages for transacting business as a corporation is the limited liability of the shareholder.[17] Many jurisdictions[18] recognize "[g]enerally, the shareholder's liability for corporate obligations is limited to what he has invested in the corporation."[19] The general rule of limited liability states: "A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such share other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued."[20] This principle is often incorporated in a typical stockholder's provision.[21]

Kentucky has long recognized this century old principle of limited liability.[22] While the Kentucky courts have demonstrated "a general aversion for any disregard of the corporate entity,"[23] limited liability is not an absolute rule. Under appropriate circumstances, the court will utilize common law methods to "pierce the corporate veil."[24] Moreover, state and federal statutes have been enacted to impose civil and criminal liability on corporate

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[17] H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 73 (2d ed. 1970).

[18] "In a few jurisdictions, unlimited liability corporations are still possible." *Id.*

[19] *Id.*

[20] MODEL BUSINESS CORPORATION ACT § 25 (rev. ed. 1979).

[21] The provision may take one of many forms:

> The private property of the stockholders of this corporation shall not be liable for [or "shall be forever exempt from"] the debts, obligations or liabilities of this corporation [or "no stockholder shall be liable for the debts of the corporation in any amount greater that his unpaid subscription" or to extent stated].
>
> [Another form.] The private property of the stockholders of this corporation shall not be liable for corporate debts, and this article shall not be amended or changed except by unanimous consent of all the stockholders of the corporation in writing.
>
> [Another form.] The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

1A FLETCHER CORPORATION FORMS ANNOTATED § 1127 (4th ed. 1982).

[22] KRS § 271A.125(5) (1981) establishes: "A shareholder of a corporation shall not be personally liable for any debt or liability of the corporation, except as he may be liable by reason of his own conduct or acts." *See generally* HENN *supra* note 17, at § 73; Campbell, *Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact*, 63 KY. L.J. 23 (1974-75). The concept of limited liability was not an inherent characteristic of English corporate law.

[23] Thermothrift Ind. v. Mono-Therm Insul. Systems, 450 F. Supp. 398, 405 (W.D.Ky. 1978); *see also* Campbell, *supra* note 22, at 48.

[24] *See generally* 1 FLETCHER CYCLOPEDIA CORPORATIONS § 41.30 (1983); Campbell, *supra* note 22, at 33-35.

officers or directors for acts, omissions, or violations of the corporation.[25] These judicial and legislative actions have established exceptions to the limited liability concept.[26] Since judicial "piercing of the corporate veil" is applied on a case by case basis, it is difficult to predict when a court will disregard the corporate entity and impose corporate officer liability.[27] Although the parameters of statutory liability should be more readily ascertainable than those of judicially imposed liability, this is not necessarily the case since the scope and implementation of a statutory exception may be as dubious as the methods and application of "piercing the corporate veil." Corporate officer liability under SMCRA is illustrative.

II. STATUTORY PROVISIONS

Both SMCRA and the Kentucky Act contain an exception to the general rule of limited liability. The exception provision in SMCRA [28] allows both civil penalties and criminal sanctions for violations, with statutory liability being imposed on the corporate officers, directors, or agents individually as well as the corporate entity. The SMCRA provision states:

> Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program, or Federal enforcement pursuant to Section 1252 of this title, or Federal Enforcement of a State program pursuant to Section 1271 of this title, or fails or refuses to comply with any order issued under Section 1271 of this title, or any order incorporated in a final decision issued by the Secretary under this chapter except in an order incorporated in a decision issued under Subsection (b) of this Section or Section 1293 of this title, *any director, officer, or agent of such corporation who*

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[25] Among Kentucky statutes which erode the concept of limited liability are KRS § 141.430(2) (1982) (imposing individual liability for nonpayment of withholding tax); KRS § 502.060 (1985) (imposing criminal liability to prevent any "person" from hiding behind a corporation to avoid criminal liability for his conduct). *See also* Butts v. Commonwealth, 581 S.W.2d 565 (Ky. 1979).

[26] Although courts generally recognize exceptions, the concept of limited liability has not been completely destroyed. "[T]he limited liability rule appears to be as firmly embedded as ever as a landmark institution." Meiners, *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 357 (1979).

[27] *See, e.g.*, Campbell, *supra* note 22, at 55; Meiners, *supra* note 26, at 354-57.

[28] SMCRA § 518 (codified at 30 U.S.C. § 1268 (1982)).

> *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 subsection (a) and (e) of this Section.*[29]

The Kentucky Act incorporated the substantive parts of this provision in Kentucky Revised Statutes (KRS) section 350.990(9).[30] Although these provisions seem clear at first glance, a closer examination reveals scope and enforceability issues.

A. *Definitions*

Although the provisions expressly name officers, directors, and agents as parties subject to penalties, fines, and imprisonment, there remains the problem of identifying the individuals to whom the provisions are applicable.[31] Since there are no definitions in either SMCRA or the Kentucky Act which are helpful, other sources must be examined.[32] Legislative history of SMCRA indicates that Congress intended for the provision to apply to corporate officers and other officials responsible for the mining operation and for compliance with the regulatory standards. One such document submitted by the Committee on Energy and Natural Resources states: "[s]ubsection (g) provides that the same penalties apply to the officers of a corporation which violates the provisions of this Act, as to an individual."[33] However, no evidence has been found to indicate whether the Senate intended to include any corporate agent without giving consideration to the amount of control the individual possessed.

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[29] SMCRA § 518(f) (codified at 30 U.S.C. § 1268(f) (1982)). (Emphasis added.)

[30] KRS § 350.990(9) (1983) states:

> Whenever a corporate permittee violates any provision of this chapter or regulation pursuant thereto or fails or refuses to comply with any final order issued by the Secretary, *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 as may be imposed upon a person pursuant to this section* (emphasis added).

[31] *See* Bratt, *supra* note 2, at 31. Bratt's discussion focuses on the party responsible for payment of a "properly assessed" civil penalty.

[32] Directive, Individual Civil Penalty Assessment, INE-4, Transmittal Number 193, (issued Oct. 19, 1983) [hereinafter cited as *Directive*].

[33] S. REP. No. 128, *supra* note 2, at 86. The individual penalty provision was included in § 418(g) of S. 7. The substance of the provision was the same as Section 518(f) in H.R. 2. SMCRA is an enactment of H.R. 2.

A more enlightening analysis of the provision comes from comparing and contrasting it to section 109 of the Federal Coal Mine Health and Safety Act of 1969 (MSHA).[34] One noted similarity of the two sections is that "[t]he purpose of a civil penalty . . . is to induce *those officials responsible for the operation of a mine* to comply with the substantive standards established by the statutory scheme."[35] Although this language came from legal counsel for the environmentalist group rather than the legislature, the counselors' interpretation of the statutory language[36] is persuasive.

Furthermore, in *United States v. Dix Fork Coal Co.*,[37] the Sixth Circuit similarly defined agent. There, the Office of Surface Mining (OSM) had issued a Cessation Order (CO) and Notice of Violation (NOV) requiring Dix Fork to take affirmative action to alleviate the danger created by aggravated land slides "located above a public road and residential area,"[38] which resulted in "an immediate and hazardous danger to the health or safety of the public."[39] When Dix Fork failed to take corrective action, the Secretary of the Interior initiated an enforcement action. When the district court ordered Dix Fork and its corporate agent, Wilford Niece, to comply by performing the necessary remedial actions, Dix Fork appealed the order. After responding to the questions of federal jurisdiction[40] and abstention,[41] the appellate court interpreted the enforcement provision at issue, which in pertinent part provides: "The Secretary may request the Attorney General to institute a civil action for relief . . . whenever such permittee or *his agent* (A) violates or fails

[34] Federal Coal Mine Health and Safety Act of 1969 (codified at 30 U.S.C. §§ 801-960 (1976)), *amended by* 30 U.S.C. §§ 822-962 (Supp. IV 1980) (now known as the Federal Mine Health and Safety Act of 1977) [hereinafter cited as MSHA]. For a legislative statement of the similarities of the two programs, see S. REP. No. 128, *supra* note 2, at 58.

[35] *Hearings*, *supra* note 15, at 454 (emphasis added).

[36] The words in question are "director, officer or agent".

[37] 692 F.2d 436 (6th Cir. 1982).

[38] *Id.* at 438.

[39] *Id.*

[40] *Id.* Dix Fork argued the operation was exempt from SMCRA because it affected less than two acres. The court construed "affect" to include acreage actually affected rather than acreage authorized to be affected by the operation.

[41] *Id.* Because the issue of abstention was not presented to the district court, the court did not address it on appeal.

to comply with any order or decision issued by the Secretary under this chapter. . . ."[42]

On appeal, Niece argued he was not an "agent" of Dix Fork in the sense of subjecting himself to personal liability under SMCRA. The court rejected the "common-law definitions of the term agent"[43] offered by both Niece and the Attorney General. After stating that "neither the Act nor regulations promulgated thereunder [define] the term 'agent',"[44] the court turned to MSHA for a definition of agent.[45] The court concluded "[t]he agent subjected to liability under the Coal Mine Health and Safety Act is the person 'charged with responsibility' for the operation which potentially may violate the purposes and policy of the legislative framework."[46] By analogy, the court defined an agent under SMCRA as "that *person charged with the responsibility* for protecting society and the environment from the adverse effects of the surface mining operation and *particularly charged with effectuating compliance with environmental performance standards during the course of a permittee's mining operation.*"[47]

Applying this definition to Niece, the court found Niece to be an agent under SMCRA. In reaching this conclusion, the court strongly emphasized Niece's role, "as Dix Fork's spokesman to OSM and as advisor to Dix Fork in all matters concerning compliance with the Act."[48] Furthermore, the "[r]efusal . . . to implement affirmative obligations on Niece as an agent would permit circumvention of the Act through the establishment of a sham corporation."[49] Although *Dix Fork* has been criticized for finding Niece subject to liability when Niece was not individually named on the NOV or the CO,[50] the case provides judicial

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[42] 30 U.S.C § 1371(c) (1982); *Dix Fork*, 692 F.2d at 439.

[43] *Dix Fork*, 692 F.2d at 439 n.1.

[44] *Id.* at 441.

[45] MSHA, *supra* note 34.

[46] *Dix Fork*, 692 F.2d at 440.

[47] *Id.* (Emphasis added.) The approach used and the definition derived are remarkably consistent with the hearing testimony. *See Hearings*, *supra* note 15, at 454.

[48] *Dix Fork*, 692 F.2d at 439.

[49] *Id.* at 441.

[50] *Id.* The court rejected Niece's due process argument on two grounds. First, the court found Niece had received constructive notice. In so concluding, the court stated OSM had been led to believe Niece was the actual owner of the company. Second, the court stated that 30 U.S.C. § 1271(c) permits "issuing orders and then seeking judicial enforcement." *See, e.g.*, Comment, *Sixth Circuit Interprets Agent Under Surface Mining Act*, 24 NAT. RES. J. 801, 801-04 (1984).

guidance for corporations and their agents in ascertaining potential liability under SMCRA.

Although Kentucky courts have not been faced with the task of defining the term agent as used in the Kentucky Act,[51] Kentucky statutory law defines agent in the Kentucky Penal Code provision for corporate liability as "any officer, director, servant or employe of the corporation or any other person authorized to act in behalf of the corporation."[52] Furthermore, a person is "criminally liable for conduct constituting an offense which he performs or causes to be performed, in the name of or in behalf of a corporation to the same extent as if the conduct were performed in his own name or behalf."[53]

A broad reading of *Dix Fork* may suggest the term should be construed to include any employee authorized to act according to company policy in "effectuating compliance with environmental performance standards during the course of a permittee's mining operations."[54] However, a more reasonable reading of *Dix Fork* suggests the more appropriate definition is that found in the Kentucky statute: a " '*high managerial agent*' . . . an officer of a corporation or any other agent of a corporation who has duties of such *responsibility* that his conduct reasonably may be assumed to represent the policy of the corporation."[55] This definition of agent is supported by the express purpose of SMCRA to "assure that surface coal mining operations are so conducted as to protect the environment."[56] Furthermore, mining operations are generally conducted in the manner established by the policy-making individuals and implemented by individuals in positions of major responsibility. Regardless of the approach taken, the conclusion is the same: both SMCRA and the Kentucky Act impose personal liability on corporate individuals who are responsible for policy-making and operation of the mine.[57]

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[51] Kentucky incorporated section 518(f), without modification, into the Kentucky Act. For this reason it is appropriate to look to state law for a definition of agent. *See supra* text accompanying note 30.

[52] KRS § 502.060 (1985).

[53] KRS § 502.050(2)(a) (1985).

[54] *Dix Fork*, 692 F.2d at 440.

[55] KRS § 502.050(2)(b) (1985). (Emphasis added.)

[56] 30 U.S.C. § 1202(d) (1982).

[57] For a discussion of the meaning of "operator," *see* Wombles v. Commonwealth, 328 S.W.2d 146 (Ky. 1959). *See also* Bratt, *supra* note 2, at 19 n.78.

B. *Enforcement*

Once an applicable class of individuals has been identified, enforcement of the provision must be addressed. One of the express purposes of SMCRA was to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[58] Recognizing the potential ineffectiveness of obligatory mining reclamation standards, the legislature drafted a comprehensive enforcement scheme.[59] Clearly, the legislature intended penalties to be utilized as an effective enforcement tool.[60] However, contrary to legislative intent, there has been little implementation of the penalty provision at either the federal or state level.

1. *On the Federal Level*

Although OSM has shown little effort in the area of enforcing the penalty provisions,[61] two ongoing legal battles initiated by environmentralists have drawn judicial and public attention to the federal enforcement program.[62] First, in *Save Our Cum-*

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[58] 30 U.S.C. § 202(a) (1982).

[59] H.R. REP. No. 218, 95th Cong., 1st Sess. 129, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 660 reads:

> H.R. 2 contains comprehensive provisions for inspections, enforcement notices and orders, administrative and judicial review, and *penalties*. These requirements are of equal importance to the provisions of the bill regarding mining and reclamation performance standards since experience with State surface mining reclamation laws has amply demonstrated that the most effective reclamation occurs when sound performance standards go hand in hand with strong, equitable enforcement mechanisms.

Id. (Emphasis added.)

[60] Before contesting a penalty, the person charged must prepay the proposed penalty into an escrow account. SMCRA § 518(c) (codified at 30 U.S.C. § 1268(c) (1982)). The legislative intent behind the provision was clear:

> A major issue was presented by the House bill's inclusion of language in Section 518(e) that would allow the Secretary to take civil penalties owed by the operator from the performance bond posted to assure reclamation of the area upon default. The Senate amendment had no similar provision. The House receded to the Senate on this issue.

H.R. REP. No. 493, 95th Cong., 1st Sess. 109, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 728.

[61] 5 SURFACE MINING REP. No. 3, 96 (March 1984) [hereinafter cited as SMR No. 3].

[62] 30 U.S.C. § 1270 (1982) authorizes citizen participation to compel compliance.

berland Mountains, Inc. v. Watt,[63] two environmentalist organizations alleged that the Department of Interior (Department) had not enforced mandatory civil penalties against SMCRA violators who had been issued a CO.[64] United States District Judge Barrington D. Parker rejected the Department's argument that the Secretary's duty under the provision was discretionary.[65] Judge Parker also rejected the Secretary's argument of impracticality of enforcement.[66]

On appeal, the court merely found that venue in Washington, D.C. was improper and did not even address the penalty enforcement issue.[67] An out-of-court settlement has been reached in that case but has not been formally accepted by the federal court. If the court of appeals remands the case back to Judge Parker, "[t]here's no guarantee Parker will agree to the order"[68] in light of Parker's past tough stand on enforcement. While the order provides for enforcement against individuals as well as corporate violators, the potential effectiveness of the plan is questionable. However, the court order is a positive step for environmentalists in their ongoing battle to enforce the statutory scheme.

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[63] 550 F. Supp. 979 (D.D.C. 1982).

[64] *Id.* at 980. "In review this year . . . congressional auditors estimated that the uncollected penalties against strip mine violators might total $150 million. The magnitude of the never paid fines . . . has given [*Save Our Cumberland Mountains v. Watt*] the working name of 'the megabucks case.' " *Officials blocking mining suit's settlement* (sic), Lexington Herald-Leader, Oct. 7, 1984, at A12, col. 2 [hereinafter cited as Lexington Herald].

[65] *Save Our Cumberland Mountains, Inc.*, 550 F. Supp. at 981-83.

[66] The Secretary grounded his impracticality argument on the 30 day notice requirement of § 1268(c) and the cost of enforcement.

[67] Save Our Cumberland Mountains, Inc. v. Clark, 725 F.2d 1434, 1437 (D.C.Cir. 1984); Save Our Cumberland Mountains, Inc. v. Clark, 725 F.2d 1422, 1426-31 (D.C. Cir. 1984).

[68] 5 SURFACE MINING REP. No. 11, 178 (Nov. 1984) [hereinafter cited as SMR No. 11 (Nov. 1984)]. The order provides for a computer system "to track non-paying violators," enforcement assistance from state agencies, and collection efforts by OSM. The computer system is to contain the identity of owners and officers of entities owing penalties. Armed with this information, OSM is "to request the state agency involved with the applicant to refuse the permit or revoke a permit already issued." *Id.* at 178. If the state agency does not act within OSM's specified time period, OSM can take further steps by issuing an NOV "ceasing all operations under that permit until all cessation orders are abated, all civil penalties are paid or an appropriate abatement plan or payment schedule is approved by OSM." *Id.* Individuals with assets less than $50,000 will not be subjected to OSM's collection efforts. *Id.*

Second, in *Council of Southern Mountains v. Watt*,[69] U.S. District Judge Oliver Gasch instructed OSM "to act against coal operators who knowingly violate federal surface mining laws."[70] Gasch's order was prompted by the agency's failure to comply with the terms of a 1980 settlement of the original suit.[71] A 1979 action[72] charged that "OSM had failed to carry out its mandatory duties under Section 518(f) of the federal surface mining act."[73] In 1984 the environmentalists returned to court to follow up their "push to get OSM to use all the enforcement tools available in the law to ensure violation-free mining—including action against individuals and not just corporations."[74]

In response to Gasch's order, OSM "[scrambled] to review the mining abuse cases in a short time after several years of moribund activity."[75] The agency's review resulted in a recommendation of "criminal prosecution of 108 cases out of 1,287 CO's issued to corporate permittees since March 30, 1980."[76] OSM has recommended civil penalties in 216 additional cases.[77] As the next step "[t]he solicitor's office will decide which of the recommended cases will be referred to the Justice Department for action."[78] Whatever the outcome, the environmentalists will undoubtedly continue to scrutinize the citizen participation provision.[79]

2. *On the State Level*

Until recently, the Kentucky Cabinet had failed to establish a set policy for enforcing penalties against corporate officers

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[69] Council of Southern Mountains, Inc., v. Watt, No. 81-CA-530-MR (D.D.C. Jan. 20, 1984), *reported in* 5 SURFACE MINING REP. No. 4, 106 (April 1984) [hereinafter cited as SMR No. 5 (April 1984)]. This case involves action on infractions from March 30, 1980 until the present, whereas the "megabucks case," *supra* note 64, involves infractions since passage of SMCRA.

[70] SMR No. 3, at 96.

[71] *Id.*

[72] *Id.* The 1979 suit resulted in a settlement which environmentalists charge OSM of violating.

[73] *Id.*

[74] SMR No. 4 (April 1984).

[75] *Id.*

[76] *Id.* The same two individuals are involved in 67 of the 108 cases recommended for criminal action.

[77] *Id.* There are more individuals involved in the civil penalty cases "because more than one person can be responsible for violations in a single closure order."

[78] *Id. See generally* Lexington Herald, *supra* note 64 (Justice Department blocked settlement in the "megabucks" case).

[79] 30 U.S.C. § 1270, *supra* note 62, at 10.

and agents individually.[80] OSM addresses this problem in its 1984 Annual Evaluation of the Kentucky Permanent Program.[81] OSM found "[t]he use of individual civil penalties, as outlined in 405 KAR Section 11(4), is left up to the discretion of each attorney. No office-wide policy nor Department involvement has been initiated to implement this provision."[82] The agency has identified historical and current problems which block enforcement.[83]

Leslie Coal & Energy Engineering[84] is demonstrative of the problem. Corporate individuals were named as respondents along with the corporate permittee for a variety of violations. Leslie Coal did not contest the violations, but argued that it was not an operator[85] within the meaning of the Kentucky Act since "another company did the actual mining under a contract arrangement."[86] Rejecting this argument, the hearing officer concluded Leslie Coal was an operator under the statutory regulations and remained responsible to the Cabinet for the permit. Although the Cabinet sought to bar Leslie Coal and the *individual parties* from mining, the hearing officer found the Cabinet "could revoke *Leslie Coal's permit* and forfeit *its* bond."[87] Further, the

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[80] Kurtz Interview, *supra* note 14.

[81] 2D ANNUAL EVALUATION, *supra* note 11, at 65.

[82] *Id.*

[83] In the past, Kentucky's corporation law effectively prevented any attempt to hold corporate officers individually responsible for acts done while a corporation was in existence. Now KRS 350.990(9) abrogates the old law in the area of surface mining regulation and will allow individual civil penalties to be collected. Problems preventing the effective use of individual civil penalties are: each attorney is on his or her own in deciding when to go after an individual civil penalty; no major cases have yet to be decided by State circuit or appellate courts; and Department personnel do not get involved, each attorney does all of the investigation himself or herself.

2D ANNUAL EVALUATION, *supra* note 11, at 65. *See also* text accompanying notes 16-27 *supra* for a discussion of limited liability.

[84] Leslie Coal & Energy Engineering, No. 1766-III-15 (Ky. DNREP Jan 15., 1981) 1 REP. No. 9, 121 (Feb. 1981) (now known as SURFACE MINING REPORTER). *See also* Bratt, *supra* note 2, at 31.

[85] KRS § 350.010(6) (1983) defines operations as "surface coal mining operations, all of the premises, facilities, roads and equipment used in the process of producing coal from a designated area or removing overburden for the purpose of determining the location, quality or quantity of a natural coal deposit or the activity to facilitate or accomplish the extraction or the removal of coal." Leslie Coal argued that it was not an operator under a similar definition. *Leslie Coal*, 1 REP. No. 9, 121 (Feb. 1981).

[86] *Leslie Coal*, 1 REP. No. 9, 121 (Feb. 1981).

[87] *Id.*

hearing officer concluded an administrative hearing "is not the proper forum in which to pierce the corporate veil and thus [find] the Respondents individually liable for the civil penalties."[88]

The Secretary adopted the hearing officer's conclusion regarding civil penalties, but found the Cabinet had statutory authority for barring permittees and *individuals* from receiving " 'directly or indirectly' permits issued by DNREP."[89] Neither the hearing officer nor the Secretary addressed the fact that the Kentucky Act authorizes subjecting the individuals to civil and criminal liability.[90] This provision in effect erodes the concept of limited liability for corporate officers and eliminates the need to resort to common law methods of imposing individual liability. This provision was not implemented in *Leslie Coal.*

In addition to the problems identified by OSM,[91] the Cabinet has delayed implementation of the corporate liability provision because of due process concerns which have been expressed by practitioners and commentators.[92] Both state and federal regulatory agencies need to develop specific penalty assessment procedures which satisfy due process requirements.

III. PENALTY ASSESSMENT PROCEDURES

A. *Federal Penalty Assessment*

OSM has revamped the Federal procedures for assessing a penalty against corporate officers.[93] On October 11, 1983, the agency issued a directive which sets forth the policy and procedures for implementing the provision.[94] OSM's policy is ex-

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[88] *Id.*

[89] *Id.* (Emphasis added.)

[90] KRS § 350.990(9) (1984).

[91] 2D ANNUAL EVALUATION, *supra* note 11, at 65.

[92] *See, e.g.*, 24 NAT. RES. J. 801, 804 (1984). *See also supra* note 50. While KRS § 350.990(9) (1983) was not the provision at issue in *Dix Fork*, the plaintiff's due process arguments are analogous.

[93] 30 C.F.R. §§ 845.17-.20 contain the federal procedures for civil penalty assessment. OSM issues directives which provide guidelines for implementation.

[94] *Directive, supra* note 32, at 4. This document replaces Temporary Directive, Individual Civil Penalty Assessment, Chapter T52, § 02, Transmittal No. 44 (April 29, 1980) and Permanent Directive, Individual Civil Penalty Assessment INE-4 (June 9, 1983).

pressed in two provisions of the directive: (a) general, and (b) criteria. The procedures are outlined in four provisions.[95]

OSM's general policy is to "implement the provision as part of the overall inspection and enforcement program."[96] The criteria provisions limit this generally broad policy, by providing "only where [both site and individual criteria] apply can an assessment under Section 518(f) be issued."[97] For site criteria to apply "the permittee or operator must be a corporation, not an individual partnership or other entity,[98] and the violation must be "serious."[99]

If site criteria apply, then the individual criteria provisions identify the individuals against whom the provision can be asserted.[100] There are three conditions under which individual liability can be imposed.[101] The application can arise (l) where an individual "apparently in charge of the operation at the site states that he does not intend to comply"[102] with an NOV or CO being issued; (2) "where there has been personal service of an NOV or a CO"[103] *and* "personal service of a CO for non-abatement to the same individual"[104] who must be "authorized to act on behalf of the corporation;"[105] or (3) if the site is inactive, a written warning must be sent to the *president* of the corporation.[106] Where noncompliance occurs *and* "a CO for non-

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[95] *Id.* at 1, 3.

[96] *See Directive, supra* note 32, at 1, § 3(a) which provides:

> The Office of Surface Mining (OSM) will implement Section 518(f) of the Act as part of the overall inspection and enforcement program. In addition, OSM generally will issue individual civil penalties in the same amount as the penalties issued to the permittee except that the $750 per day minimum penalty for non-abatement under Section 518(h) does not apply to individuals.

Id.

[97] *Directive, supra* note 32, at 1.

[98] *Id.*

[99] *Id.* at 2. Serious violation is defined as a violation that "was assessed more than 12 points for negligence and more than 7 points for extent of damage according to the requirements of 30 CFR 723.12(c)(2) and (d)." *Id.*

[100] *Directive, supra* note 32, at 2. *See supra* notes 28-48 and accompanying text.

[101] *Id.*

[102] *Directive, supra* note 32, at 2.

[103] *Id.*

[104] *Id.*

[105] *See id.* The criteria provision further states the "agent may be a foreman or other person in a position of authority."

[106] *Id.*

abatement is issued, the president of the corporation will be considered for possible issuance of an individual civil penalty."[107]

Once all criteria are met, section 518(f) can be implemented.[108] Thus, the burden of implementing the provision is on field office inspectors.[109] Thereafter, the field office director and Branch of Inspection, Compliance Section are responsible for notifying the individual of a proposed assessment.[110]

Although the discretionary language of the directive may be an area open to environmentalists' criticism, the federal policy and procedures guidelines provide needed flexibility and address two areas of concern. First, the individual criteria identify the persons against whom an individual civil penalty can be issued. Second, due process considerations are built into the policy and procedures.

B. *State Penalty Assessment*

As a follow-up to its annual evaluation of Kentucky's Permanent Program,[111] OSM recommended and the Cabinet agreed

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[107] *See Directive*, *supra* note 32, at 3. Under the third condition, an inactive mine site, only the president of the corporation can be held individually liable.

[108] *Id.* at 3.

[109] *Id.* Section 3(c)(2) lists the responsibilities and duties of the inspectors:

> For all CO's for non-abatement there must be a written record stating which criteria might apply and which apparently do not apply. This written record must be initiated with the inspection report and immediately brought to the attention of the supervisor. Where there is an apparently inactive site, a letter must be written to the president of the corporation informing him or her of the possible eligibility for an individual civil penalty, in the event of non-compliance. Note that this written notice must be sent at the time the NOV or CO's for significant imminent harm or danger where the inspector believes none of the criteria above apply, there need be *no* written record explicitly stating that the criteria have been considered but do not apply. However, from reading an inspection report where an NOV or CO for significant imminent harm or danger was issued it should be evident to the reader that there were no grounds for considering a possible individual penalty. Because of the time constraints under Section 518(c) of the Act and the additional burden of implementing Section 518(f), inspectors must do all follow-up paperwork for CO's for non-abatement and for significant imminent harm or danger within three working days of issuance of the CO.

Id.

[110] *Id.* If an individual is notified of a proposed assessment, he will be afforded the same hearings and conference procedures as for regular penalties.

[111] *See* 2D ANNUAL EVALUATION, *supra* note 11; *see also supra* note 7.

"to draft and implement necessary policy and procedures . . . for the use of individual civil penalty sanctions."[112] In addition, OSM said "this policy should include substantial Department involvement from the early stages to increase the use and effectiveness of this procedure."[113] In drafting individual civil penalty assessment procedures, the Cabinet had to work within statutory impositions of minimum and maximum standards. SMCRA sets a threshhold standard as a condition of approval of a state program.[114] A maximum stringency for state regulations is established by the Kentucky Act.[115]

The Cabinet has completed its task of drafting the civil penalty assessment procedures.[116] Although the new system establishes Cabinet-wide policy and procedures, it fails to identify clearly the individuals potentially affected. However, the procedures expressly provide for issuance of an NOV to officers, directors, and agents who are listed on the permit application.[117] In addition, an NOV may also be issued to "any agent on site

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[112] *See* 2D ANNUAL EVALUATION, *supra* note 11.

[113] *Id.* This recommendation is inapposite to the hearing judge's finding in *Leslie Coal*, 1 REP. No. 9, 121. *See supra* notes 86-90 and accompanying text.

[114] SMCRA § 518(i) (codified at 30 U.S.C. § 1268(i) (1982)) requires:

> As a condition of approval of any State program submitted pursuant to Section 1253 of this title, the civil and criminal penalty provisions thereof shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement right or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

[115] KRS § 350.069 (Supp. 1984) establishes a maximum stringency of regulations:

> To make the state program no more stringent than the federal program, effective October 1, 1984, the cabinet shall, within thirty (30) days of publication of final rulemaking in the federal register, promulgate those regulations that are consistent with and no less effective than the federal regulations promulgated pursuant to Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977 and by having such regulations in full force and effect within sixty (60) days thereafter unless a public hearing is requested. In the event a public hearing is held, the regulations shall be implemented within thirty (30) days after the hearing. (Enact. Acts 1984, ch. 190, § 1, effective July 13, 1984).

[116] The new system for implementation of KRS § 350.990(9) became effective Jan. 1, 1985. Knarr, *New Procedures on Civil Penalties, Determination of "Pattern Violations,"* Ky. Coal J., March 1985, at 25.

[117] Ky. Dept. of Nat. Res. and Environmental Protection (DNREP), Memorandum to Commissioner, Dept. Surface Mining Reclamation and Enforcement, Dec. 7, 1984 [hereinafter cited as Memorandum].

actually performing the work."[118] This ambiguous and vague language complicates the already difficult task of identifying the individuals to whom the Kentucky provision is potentially applicable. Until this language is officially interpreted by the Cabinet, the commissioner's comments may provide insight.

According to the commissioner, under the old system, an officer of a corporate permittee charged with unabated violations often complained that he did not have personal knowledge of the violation.[119] Thus, the corporate officer contended that he was not afforded an opportunity to abate the violation because he had no knowledge of it. This most often occurred in two situations. First, the corporate permittee may have had a contractual arrangement with another operator to mine the coal. If the contract miner was guilty of a non-compliance violation, the corporate officer may have never been informed. Second, the corporate permittee's own foreman may have failed to inform the officer of an NOV.[120] From the commissioner's comments, one could infer "any agent on site actually performing the work"[121] includes both a contract miner and a corporate permittee's foreman. It is not clear whether the language also includes a mere employee working on the site.[122]

"Agent" appears again in the procedure for issuance of a CO. Here the procedures provide for issuance of a CO to agents "known to the Cabinet."[123] This use of agent may be a shorthand expression encompassing both agents listed on the permit application and agents "actually on site performing the work."[124] Another interpretation could be that of an agent neither listed on the permit application nor actually working on the site but who, nevertheless, is responsible for policy-making or operation of the mine.[125] In addition to placing an impossible burden on the Cabinet, this broad interpretation could result in an individ-

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[118] *Id.* at 1.

[119] Knarr, Ky. Coal J., March 1985, at 25.

[120] *Id.*

[121] Memorandum, *supra* note 116, at 1.

[122] *See supra* notes 37-57 and accompanying text for a discussion of the Sixth Circuit's interpretation of "agent" under SMCRA; *see also Dix Fork*, 692 F.2d 436; *see generally* 24 NAT. RES. J. 801 (1984).

[123] Memorandum, *supra* note 112, at 2.

[124] *Id.* at 1.

[125] *Dix Fork*, 692 F.2d at 440.

ual being issued a CO without first having been issued an NOV. Such an action is beyond the scope of the procedures. According to the procedures, a CO is to be issued only if an NOV is not timely abated.[126] Furthermore, issuing a CO to an individual who has not first been issued an NOV would defeat the Cabinet's efforts to eliminate the due process concerns associated with the enforcement of the provision.[127] Therefore, "agent known to the Cabinet" should be interpreted in a manner consistent with the interpretation given to *agent* in the procedure for issuing an NOV.

CONCLUSION

Both the general public and the surface mining industry have benefited from the surface mining laws and regulations. The federal/state regulatory programs have established more equally competitive surface mining practices and have fostered a safer and healthier environment. While environmentalists tend to judge the federal/state efforts on the number of violations cited or the penalties collected, the primary purpose of the program—protection of society and the environment from the adverse effects of surface coal mining operations—should not be forgotten. Regulations alone will not achieve this purpose. The primary goal of both programs should be the implementation of an enforcement scheme which will result in the deterrence of surface mining violations.

The federal and state acts provide the statutory authority necessary to prevent circumvention of surface mining and reclamation laws by individuals operating through sham corporations. If corporate individuals know that OSM and the Cabinet will exercise their authority to assess and collect individual civil penalties for violations, these individuals will be induced to comply with the Act. After all, it is not the Cabinet's intent to place another burden on those involved with mining; rather, the purpose is to personally inform potentially liable individuals and give them the opportunity to quickly perform remedial measures to minimize the penalties assessed against them. Implementation

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[126] *Id.* at 2. This problem does not arise under the federal system. *See supra* text accompanying note 104.

[127] Knarr, Ky. Coal J., March 1985, at 25.

of the new system should also encourage corporate officers and directors to establish corporate policies which emphasize compliance with the surface mining and reclamation laws and to police their own mining operations. With such corporate policies and procedures and with timely abatement, personal assessment should seldom occur.

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