Journal of Natural Resources & Environmental Law

Volume 6
Issue 2 *Journal of Mineral Law & Policy, volume 6, issue 2*

Article 2

January 1991

The Applicant Violator System Under SMCRA: Ownership and Control Regulations

Chauncey S. R. Curtz
Wyatt, Tarrant & Combs, LLP

Karen J. Greenwell
Wyatt, Tarrant & Combs, LLP

The Applicant Violator System Under SMCRA: Ownership and Control Regulations

CHAUNCEY S. R. CURTZ*
KAREN J. GREENWELL**

INTRODUCTION

Thirteen years ago, Congress enacted the Surface Mining Control and Reclamation Act of 1977[1] (SMCRA). Among its purposes was to protect the environment from adverse effects of surface coal mining operations.[2] SMCRA contains comprehensive regulations governing the permitting[3] and environmental performance standards[4] for surface mining operations as well as extensive enforcement provisions. These enforcement measures include notices of violation,[5] cessation orders,[6] civil penalties[7] and the withholding of permits.[8]

The focus of this Article is 30 U.S.C. § 1260(c), § 522 of SMCRA, which prohibits the issuance of a permit in two broad categories of circumstances. First, permit issuance is forbidden

---

* Partner, Wyatt, Tarrant & Combs, Lexington, Kentucky. B.S., 1976, McGill University, Canada; J.D., 1981, University of Wisconsin.

** Senior Associate, Wyatt, Tarrant & Combs, Lexington, Kentucky. B.A., 1976, J.D., 1985, University of Kentucky. The authors gratefully acknowledge the assistance of Lori C. Hudson, Associate, Wyatt, Tarrant & Combs. The opinions expressed in this article are those of the authors.

[1] Surface Mining Control and Reclamation Act of 1977 [hereinafter cited as SMCRA], Pub. L. No. 95-87, § 522, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328) (Supp. III 1979).

[2] SMCRA § 102 (a) and (d), 30 U.S.C. § 1202(a) and (d).

[3] SMCRA §§ 506-514, 30 U.S.C. §§ 1256-1264.

[4] SMCRA §§ 515-516, 30 U.S.C. §§ 1265-1266.

[5] SMCRA § 521, 30 U.S.C. § 1271.

[6] *Id.*

[7] SMCRA § 518, 30 U.S.C. §d 1268.

[8] SMCRA § 522, 30 U.S.C. §§ 1211(c) and 1260(c) authorize the regulatory authority to withhold a surface coal mining and reclamation permit; 30 U.S.C. § 1253(a)(7) requires each state regulatory program to be consistent with the federal regulations found in 30 C.F.R. §§ 773.5 and 773.15.

where any surface coal mining operation "owned" or "controlled" by the applicant is currently in violation of the Act.[9] The Act also prohibits the issuance of a permit upon a determination that the applicant controls or has controlled mining operations with a demonstrated pattern of willful violations of the Act resulting in irreparable damage to the environment.[10] The prohibition against the issuance of permits under these conditions is mandatory.

Pursuant to 30 U.S.C. §1211(c)(2), the Secretary of the Interior promulgated regulations to implement these permit-blocking enforcement provisions.[11] Nevertheless, some violators managed to escape detection and obtain new permits.

I. THE APPLICANT VIOLATOR SYSTEM

In *Save Our Cumberland Mountains, Inc. v. Watt*[12] two environmental groups[13] filed suit to compel the Office of Surface Mining (OSM) to use its enforcement powers as required by SMCRA to prevent violators from obtaining permits. Despite OSM's use of cessation orders and civil penalties, violations of SMCRA had continued to go unabated.[14] One frequently used method for avoiding SMCRA's permit-blocking provisions was the formation of new corporations, partnerships or other business entities by individuals with unabated violations. Through

---

[9] SMCRA § 522, 30 U.S.C. § 1260(c) reads, in pertinent part, as follows: Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter.

[10] *Id.*

[11] 30 C.F.R. 773.

[12] 550 F. Supp. 979 (D.D.C. 1982).

[13] Save Our Cumberland Mountains, Inc. and the Council of Southern Mountains, Inc.

[14] *See* 53 Fed. Reg. 38,868 (1988).

these new entities, violators were obtaining permits as new operators. Without an adequate system to track the identities of these violators, it was difficult for OSM to determine who should be permit-blocked as required by the Act.[15]

In *Save Our Cumberland Mountains*, the court ordered OSM to comply with its regulations requiring denial of a permit where a violation and failure to abate existed.[16] With an appeal of the court's order pending, the respective parties negotiated a settlement which led to the entry of a consent decree known as the "Amended Parker Order."[17] The Applicant Violator System (AVS) was established as a requirement of the Amended Parker Order.

Under the Order, OSM agreed to establish and maintain a computerized system containing the identity of:

(a) all permanent program permit applicants and permittees;
(b) all persons who own or control such applicants or permittees;
(c) all entities including corporations, partnerships and individuals which are responsible for unabated cessation orders issued by OSM during the interim or permanent programs;
(d) all persons who own or control such entities;
(e) all entities which have failed to pay any penalty imposed by OSM in either the interim or permanent programs; and
(f) all persons who own or control such entities.[18]

The computerized AVS was established to enable OSM to effectively identify and track violators to enforce the permit-blocking provisions of the Act.[19]

The Order further required OSM to use the AVS to determine at least quarterly if any person in control of a permit applicant is or was in control of an entity with an unabated cessation order or unpaid penalty subject to the Order.[20] If OSM

---

[15] *Id.*

[16] *Save Our Cumberland Mountains*, 550 F. Supp. at 979.

[17] Save Our Cumberland Mountains v. Clark, 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. 1985). This Amended Order replaced an earlier, less detailed order from Judge Parker. *See* Save Our Cumberland Mountains v. Watt, 550 F. Supp. 979 (D.D.C. 1982).

[18] Amended Parker Order, 22 Env't Rep. Cas. (BNA) 1217, 1217 (D.D.C. 1985).

[19] *Id.*

[20] *Id.* at 1218. The various violations relevant to the AVS include: (1) Federal and State failure-to-abate cessation orders; (2) unabated Federal and State imminent harm

identifies such persons, or if the AVS indicates that persons with outstanding violations or unpaid civil penalties have applied for or received permits, the Amended Parker Order requires OSM to deny that applicant a permit and to promptly inform the state regulatory authority, if any.[21] OSM must also request the state agency to refuse to issue the permit or to revoke the permit, as the case may be.[22]

The adoption of the AVS has proved to be a history-making event in the regulation of surface coal mining in the United States. OSM has spent in excess of $15 million for in-house and contractual support in designing and implementing the system thus far.[23] Its regulations to implement the AVS, and its recent interpretations of those regulations, have sent shock waves throughout the mining industry. Both environmental and mining industry groups have filed lawsuits[24] out of dissatisfaction with the system and OSM's regulations for implementing it.[25]

II. THE REGULATIONS

The inability of a violator to get a permit is no doubt an effective inducement to comply with the requirements of SMCRA.

---

cessation orders; (3) delinquent civil penalties; (4) bond forfeitures; (5) delinquent abandoned mine reclamation fees; and (6) unabated violations of Federal and State air or water environmental protection laws, rules or regulations. 30 C.F.R. § 773.15(b)(1).

[21] SMCRA § 503, 30 U.S.C. § 1253 allows states with approved surface coal mining regulatory programs to obtain "primacy." Once a state obtains primacy, the state agency becomes the regulatory authority and assumes "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations . . . ." *Id.* at § 1253(a). The state authorities must enforce state surface coal mining statutes and regulations that are no less effective than the federal regulations. Theoretically, once a state obtains primacy, OSM's role is reduced to one of oversight to ensure the state programs are consistent with the federal program. As discussed below, and particularly in Section IV of this Article, OSM's role in the states' use of the AVS and enforcement of the permit-blocking regulations has been significantly more active than is consistent with the notion of state primacy.

[22] Amended Parker Order, 22 Env't Rep. Cas. (BNA) 1217, 1218 (D.D.C. 1985).

[23] Means, "*The Applicant Violator System: A Critical Evaluation*", 10 EASTERN MIN. L. INST. 6-1 (1989).

[24] National Wildlife Federation v. Manuel Lujan, Jr., Nos. 88-3117-BDP, 88-3464-BDP, 88-3470-BDP, 89-1130-BDP, 89-1167-BDP, 89-1751-BDP, 89-1181-BDP (D.D.C. Consolidated). Among the parties to this consolidated action are the National Wildlife Federation, the Kentucky Resources Council, the National Coal Association and the American Mining Congress.

[25] At the time of this writing cross-motions for summary judgment are pending in this consolidated action. Not surprisingly, the environmental groups have argued that OSM's regulations implementing the AVS are not stringent enough, while the industry groups argue they are overbroad and deprive applicants and permittees of due process of law.

If violators are unable to obtain permits to engage in further mining, they will either be put out of business or they will become motivated to correct their violations, reclaim their mine sites and pay their delinquent civil penalties or abandoned mine land fees.

In attempting to implement the AVS's goal of identifying and blocking violators and those who control them from obtaining permits, OSM has promulgated three sets of regulations. The first set of regulations defines "ownership" and "control" for the purposes of the AVS.[26] These ownership and control regulations have been the biggest source of controversy involved with the AVS.[27] OSM's second set of regulations revises its existing regulations to require more detailed information from permit applicants.[28] The third set of regulations establishes the general procedures for determining whether a permit was improvidently issued and for applying what OSM considers the appropriate remedial measures for suspension and rescission of such permits.[29]

The AVS focuses primarily on identifying permit applicants who either own or control a violator or who are owned or controlled by anyone who owns or controls a violator. The "ownership" and "control" regulations are, thus, at the heart of the AVS and the controversy surrounding it. For that reason, this Article will focus on the ownership and control regulations. It will attempt to explicate the often convoluted regulations and examine some of the ramifications of OSM's regulatory definitions of "ownership" and "control".

On October 3, 1988, OSM promulgated the first of the three sets of regulations to implement the Amended Parker Order.[30] These regulations provide that before a permit can be issued, the regulatory authority must determine whether a violator is owned or controlled by either the applicant or those who own or control the applicant.[31] Thus, for each permit application, OSM uses the AVS to look at three separate groups of entities

---

[26] 30 C.F.R. § 773.5; 53 Fed. Reg. 38,868 (1988).

[27] Means, *supra* note 23, at 6-1.

[28] 54 Fed. Reg. 8,982 (1989).

[29] 54 Fed. Reg. 18,438 (1988).

[30] 30 C.F.R. § 773.5 and 30 C.F.R. § 773.15(b); 53 Fed. Reg. 38,868 (1988).

[31] 30 C.F.R. § 773.15(b). "[T]he regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph." *Id.*

for connections to a violation: 1) the applicant itself; 2) those entities owned or controlled by the applicant; and 3) any other entity owned or controlled by those who own or control the applicant.[32] If any entity in any of those three groups shows a link to a violator, then the permit will be denied.[33]

The key to determining when an applicant will be permit-blocked is the regulatory definition of "owned" and "controlled", as contained in 30 C.F.R. §773.5. Using those definitions the regulatory agency (OSM or a state agency) undertakes a three part analysis:

(1) Is the applicant a violator?
(2) Does the applicant own or control a violator?
(3) Who owns or controls the applicant, and do any of those persons or entities own or control a violator?

The terms "owned" or "controlled" and "owns" or "controls" are broadly defined to mean any one or a combination of specified relationships under two categories.[34]

30 C.F.R. §773.5(a) lists those persons or entities deemed to have "per se" control or ownership of an operation. Persons or

---

[32] 30 C.F.R. § 773.15(b).

[33] *Id.*

[34] 30 C.F.R. § 773.5 articulates these ownership and control relationships thus:
For purposes of this subchapter:
Owned or controlled and *owns or controls* mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition—
(a)(1) Being a permittee of a surface coal mining operation; (2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of any entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.
(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:
(1) Being an officer or director of an entity;
(2) Being the operator of a surface coal mining operation;
(3) Having the ability to commit the financial or real property assets or working resources of an entity;
(4) Being a general partner in a partnership;
(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or
(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

entities with these characteristics are irrefutably presumed to own or control the violator. Even if they do not have such ownership or control, entities with these relationships are not permitted to disprove the existence of control. The "per se" categories are:

(1) Being a permittee of a surface coal mining operation,[35] or

(2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity[36]; or

(3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.[37]

The second category consists of relationships which are "presumed" to establish ownership or control.[38] The applicant has the burden of rebutting the presumption by demonstrating he or she does not have the authority directly or indirectly to determine the manner in which the operation is conducted.[39] The regulation contemplates that the person with "presumptive" ownership or control can rebut the presumption. However, the regulations do not specifically provide for a hearing on that issue before the permit is denied.[40] The presumptive relationships include:

(1) Being an officer or director of an entity;[41]

(2) Being the operator of a surface coal mining operation;[42]

(3) Having the ability to commit the financial or real property assets or working resources of an entity;[43]

(4) Being a general partner in a partnership;[44]

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 to 50 percent of the entity;[45] or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having

---

[35] 30 C.F.R. § 773.5(a)(1).
[36] *Id.* at § 773.5(a)(2).
[37] *Id.* at § 773.5(a)(3).
[38] *Id.* at § 773.5(b).
[39] *Id.*; 53 Fed. Reg. 38,868 at 38,871.
[40] 30 C.F.R. § 773.5(b).
[41] *Id.* at § 773.5(b)(1).
[42] *Id.* at § 773.5(b)(2).
[43] *Id.* at 773.5(b)(3).
[44] *Id.* at § 773.5(b)(4).
[45] *Id.* at § 773.5(b)(5).

> the right to receive such coal after mining or having authority to determine the manner in which the person or another person conducts a surface coal mining operation.[46]

In promulgating these regulations and considering the responses of commentators, OSM states it "has concluded that the definition should not cover all degrees of ownership, but only those where control exists."[47] It views the purpose of withholding permits under the AVS as encouraging the correction of violations and the payment of monies owed.[48] OSM insists that the liability for civil penalties and reclamation work remains "with the persons who originally incurred the obligation" rather than the applicant.[49]

OSM's goal in designing these regulations may have been to reach only those who had actual ownership or control of violators and those who were directly responsible for the violation, but that has not been the practical effect. OSM chose to use extremely broad language in defining ownership and control. These broad definitions ensnare many persons and entities who in fact do not have ownership and control. At the same time, the regulations impose a heavy burden on an applicant to overcome the presumption of ownership or control (not to mention the hardship of being placed in a "per se" category). Because of the inability to disprove the presumptions prior to the denial of a permit, the regulations effectively exert enormous leverage on the applicant to pay civil penalties or undertake reclamation work that may legally be the obligation of another.

While the regulations do not *require* the applicant to pay the violator's fees or fulfill the violator's reclamation obligations, the applicant will have to do so in order to obtain the mining permit essential to conducting its business. OSM recognizes the practical coercive effect of the AVS and its regulations while at

---

[46] 30 C.F.R. § 773.5(b)(6).

[47] 53 Fed. Reg. 38,868 at 38,870.

[48] At 53 Fed. Reg. 38,868, OSM states:

> This rule is intended to secure greater compliance with the Act by preventing mining permits from being issued to persons who, either by themselves or through related persons, own or control violators of the Act. By defining the terms "owns or controls" and "owned or controlled" and by revising the scope of the compliance review, OSMRE will gain an effective tool to encourage persons who own or control a violator to ensure that all violations are abated or are in the process of being abated.

[49] 53 Fed. Reg. 38,868 at 38875; *see also* 53 Fed. Reg. 38,868 at 38,885.

the same time denying that it intends any shifting to the applicant of the liability to reclaim or pay fines. In its comments accompanying the ownership and control regulations, OSM states:

> The rule does not transfer liability for civil penalties and reclamation work to the permit applicant. Those responsibilities remain with the persons who originally incurred the obligation. If the commenter intended the term "liability" to mean that an applicant would be unable to receive a permit until reclamation is performed and penalties and fees paid, the commenter is correct. *The rule is justified because it is a powerful means of inducing remedial action in situations where such action is possible.*[50]

In this passage, OSM candidly admits that the purpose of the broad "ownership" and "control" definitions is to "induce" remedial action. What OSM leaves unsaid is that the regulations will effectively "induce" the *applicant*, as opposed to the violator, to take the remedial action so it can get a permit and resume its business.

In some circumstances, the AVS permit block can even extend to past ownership and control relationships that no longer exist. Even though the applicant (or its owners and controllers) may have cut all ties to the violator long before the time of the permit application, the applicant can remain inextricably linked to the violator in the AVS until all land is reclaimed or fines are paid. According to OSM's comments accompanying its regulations requiring the revocation of improvidently granted permits:

> 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. Nor will the expiration or termination of a mining contract necessarily relieve the parties to the contract of any previously held responsibility. 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.[51]

---

[50] 53 Fed. Reg. 38,868 at 38,875 (emphasis added); *see also supra* note 48.

[51] 54 Fed. Reg. 18,438 at 18,446.

This virtually unending ownership and control liability is particularly unfair and burdensome when the alleged owner or controller no longer has any contact with the person or entity directly responsible for the violation and may have no power or ability to correct it.

Following is a closer examination of the relationships OSM has regulated through its ownership and control regulations implementing the AVS, and some of the potential ramifications of the designation of those relationships as ones of ownership and control.

A. The "Per Se" Category Ramifications

Applicants (or their owners or controllers) who are linked to a violator by a relationship described in the "per se" category[52] are conclusively presumed to own or control the violator. The applicant will not be issued a permit to mine anywhere in the nation until all of the violator's outstanding civil penalties are paid and/or all property left unreclaimed by the actual violator is reclaimed.[53]

One of the more troubling of the "per se" ownership relationships is the "50 percent ownership" category.[54] Under this provision, an applicant owning 50 percent or more of a business is considered to be a "per se" owner or controller of the business. OSM's rationale for creating this category is that a "majority interest will always be a controlling interest."[55] However, in a practical sense, shareholders (particularly shareholders which are themselves corporations) may have limited managerial functions. The regulations do not clearly distinguish between owners of voting and non-voting stock. An owner of non-voting stock (even one who owns 50 percent or more of the equity of a corporation) has no actual, direct control of the corporation.

Similarly, the regulations do not distinguish between ownership by general and limited partners. Although a limited partner may own 50 percent or more of the partnership, by definition a limited partner has no management control. Because of the irrefutable "per se" nature of this category, these "majority"

---

[52] *See supra* text accompanying notes 35-37.

[53] *See generally*, 53 Fed. Reg. 38,868 at 38869-71.

[54] 30 C.F.R. § 773.5(a)(2).

[55] 53 Fed. Reg. 38,868 at 38,869.

shareholders or limited partners have no right or opportunity to rebut the ownership presumption by showing a lack of actual control.[56]

The "per se" category that best illustrates the vagueness and overbreadth of the ownership and control regulations is the final "catch all" discretionary classification. The regulations call for a conclusive finding of ownership or control for those "having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or any other entity conducts surface coal mining operations."[57] The regulations provide no guidance to the regulatory authorities or to the industry how this category is to operate.

The regulatory authority is given apparent *carte blanche* to determine what relationships come within this category and whether ownership or control exists. The only criteria or guidance OSM provides in promulgating the rule is that the agency's determination must be made on a case-by-case basis after examination of the facts.[58] Among the relationships and facts OSM suggests may be considered are "informal agreements, personal relationships, and the mining history of the parties," as well as the circumstances surrounding a coal mining operation or the fact that a person has financed the operation, owned the equipment or the rights to the coal, or directed the operation.[59]

This "guidance" is more than a little ironic. Since this is a *per se* ownership category, the applicant is afforded no opportunity for a hearing. The only facts OSM will ever consider are the ones that led it to its initial conclusion. Interestingly, OSM acknowledges (in another context) that this kind of information is not readily available to it. In justifying the shifting of the burden of proof to the alleged owner or controller who falls into a presumptive (not "per se") category, OSM states:

> The burden of proof properly should rest with those who have access to the information on which a control determination can be accurately made—the officers, directors, general partners, operators, those with the ability to commit the financial

---

[56] *Id.* at 38,870.

[57] 30 C.F.R. § 773.5(a)(3); *see also* 53 Fed. Reg. 38,868 at 38,870.

[58] "Whether a particular relationship provides authority to determine the manner in which a surface coal mining operation is conducted will be determined on a case-by-case basis after careful examination of the facts." 53 Fed. Reg. 38,868 at 38,870.

[59] 53 Fed. Reg. 38,868 at 38,870.

> or real property or working resources of an entity, owners of a ten through fifty percent interest, and owners and lessors of coal. Neither OSMRE nor regulatory authorities have easy access to the information which is needed to make an accurate determination of control in such circumstances, whereas persons subject to the presumptions would have better access to the information needed to show control does not exist.[60]

OSM's logic in finding it does not have access to the necessary information to prove ownership and control in these situations, but it *can* make a determination based on less apparent relationships, such as the mining history of the parties, is questionable at best.

The propriety of *any per se* categories of ownership or control relationships may be questionable in light of the AVS' high error rate. According to the United States General Accounting Office (GAO) the probability of an incorrect ownership and control determination being made by the AVS is very high. As recently as January, 1989, 5 out of the 13 applications reviewed by the GAO were later reversed upon subsequent manual verification.[61] "Overall, about 46 percent of the system recommendations were reversed."[62] With nearly a 50 percent chance that an applicant will be incorrectly linked to a violator simply because of a system error, it seems unjust to deprive an applicant of *all* opportunity for a prior hearing.

The catchall "per se" category of the ownership and control regulations has been widely criticized as overly broad and as too inclusive.[63] It would only take a little imagination to encompass just about anyone under this category. Furthermore, an applicant is left to wonder whether its particular relationship with an operation will place it in this category. Once the application is filed, if the applicant falls within this category, that permit and all future permits are blocked by OSM, and there is no recourse.

---

[60]s9 53 Fed. Reg. 38,868 at 38,871.

[61] It is small comfort that OSM has implemented a program of manual checking of the computer's links between violators and applicants. This simply leaves applicants at the mercy of the compounded computer and human error.

[62] Report of the United States General Accounting Office to the Chairman, Committee on Interior and Insular Affairs, House of Representatives, GAO/AFMD Report—89-31, *Surface Mining - Operation of the Applicant Violator System Can Be Improved.* 10 (January 1989), pp. 13-15.

[63] 53 Fed. Reg. 38,868 at 38870.

Assuming the constitutionality of the system is upheld,[64] the applicant has no process by which to appeal OSM's discretionary conclusion of ownership and control.[65]

B. The Presumptive Category Ramifications

The "presumptive" ownership or control relationships are based on OSM's assumption that applicants in those categories "ordinarily" would be in a position to assert such control over an operation.[66] Critics of the rebuttable presumptions contend they are contrary to both established principles of corporate law and the business realities of control of surface mining operations.[67]

Under the first presumptive category, an officer or director of a violator or of an entity linked to a violator through any ownership or control relationship would be unable to obtain a permit.[68] Critics argue an individual officer or director may be incapable of asserting authority because of the collective nature of the group in question.[69] OSM has taken the position that the mere fact that control was exercised through group decisions with no single officer or director able to make decisions does not rebut the presumption of ownership or control.[70] Without this most logical proof of lack of control, OSM does not explain how an officer or director can rebut the presumption.

OSM assumes an officer or director will have ready access to the materials necessary to rebut such a presumption (whatever they might be).[71] OSM does not, however, consider the situation where such information is *not* available to the officer or director—as when the individual is *no longer* an officer or director and has *no* current connection at all with the violator. OSM's position also ignores the fact that the opportunity to present those materials comes *after* the requested permit is denied. No

---

[64] The litigation referred to in note 24, *supra*, and the pending cross-motions for summary judgment, involve several constitutional challenges to the AVS and its implementing regulations.

[65] *See generally*, 53 Fed. Reg. 38,868 at 38,869-71.

[66] 53 Fed. Reg. 38,868 at 38,871.

[67] *Id.*

[68] 30 C.F.R. § 773.5(b)(1).

[69] 53 Fed. Reg. 38,868 at 38,871—38,872.

[70] "A person, such as a director, cannot escape responsibility merely by asserting that he or she is a member of a group, and the group, collectively, can exercise authority, but not any one individual." 53 Fed. Reg. 38,868 at 38,872.

[71] 53 Fed. Reg. 38,868 at 38,872.

consideration is given to the hardship the applicant incurs in the interim, not to mention its burden and expense of disproving the presumption.

The "operator" of a surface coal mine on which there is a violation is presumed to own or control the entity which caused the violation.[72] Unlike a permittee which is conclusively liable for all violations which occur on the permit,[73] an operator is only presumptively liable. According to OSM, an operator of a surface mine is liable only for its own conduct and can rebut the presumption by showing the violation was caused by someone else.[74] This focus on causation and whether the operator's conduct caused the violation is inconsistent with OSM's comments relating to officers and directors. Officers and directors *cannot* rebut their presumptive control by showing they did not cause the violation. OSM fails to explain why it should be otherwise for operators. Such internal inconsistencies raise serious questions about the basic fairness of the ownership and control regulations.

Without much discussion, OSM indicates in its comments that it considers the category "operator" to include more than just entities that remove the coal.[75] The authority OSM cites for this broadened scope of the meaning of "operator" is *United States v. Rapoca Energy Co. (Rapoca)*.[76] Thus, there is considerable uncertainty as to precisely who can be tapped as an operator under this regulation.

Anyone "having the ability to commit the financial or real property assets or working resources of an entity is presumed to own or control the entity" under these regulations.[77] Like the catch-all "per se" category, this category gives the regulatory

---

[72] 30 C.F.R. § 773.5(b)(2); *see also* 53 Fed. Reg. 38,868 at 38,873.

[73] 30 C.F.R. § 773.5(a)(1).

[74] "Although permittees are responsible for everything that happens on the site, non-permittee operators are responsible only for their own conduct. Thus an operator may be able to show that a violation was caused by the permittee or someone else other than itself." 53 Fed. Reg. 38,868 at 38,873.

[75] "Further, courts have construed operators to include entities which do not physically engage in coal removal . . . .Thus, although OSMRE agrees that entities physically engaged in surface coal mining operations will almost universally control such operations, the term operator includes more than such entities." 53 Fed. Reg. 38,868 at 38,873 (citation omitted).

[76] 613 F. Supp. 1161 (D.C. Va. 1985). For an extensive discussion of this case, see *infra* text accompanying notes 93-96.

[77] 30 C.F.R. §773.5(b)(3); *see also* 53 Fed. Reg. 38,868 at 38,873.

agency extremely wide discretion in determining what relationships can be included.

This category is so broad that control could even be imputed to financial lending institutions under certain circumstances.[78] A lending agreement which requires approval of the financial institution to use borrowed funds for certain purposes or to move or commit equipment or other resources held as collateral could cause a financial institution to run afoul of the AVS. While being unable to get a mining permit might not adversely affect a lending institution itself, it could have an impact on the institution's officers, directors, and others who "own" or "control" the institution. It could also affect other mining industry customers of the institution who may find that they are owned or controlled by the tainted financial institution through similar financing arrangements.

Being a general partner in a partnership is another presumptive category.[79] Like the presumption regarding officers and directors, this category ignores the fact that a single partner often cannot make operational decisions. As one of several partners all of whom have equal votes, an individual partner usually has no control of the partnership within the ordinary meaning of the word. Once again OSM asserts the ability of a partner to avail itself of all the potential means of rebuttal as a remedy for the overinclusiveness of the category.[80] However, OSM has said proof that one is part of a group that can act only by majority vote is insufficient. Nor can one rebut the presumption by showing he or she attempted to correct the violation but could not get the violator to cooperate or agree to an abatement plan.[81] OSM has thus left a partner with few, if any, apparent ways to rebut the presumption of ownership and control. At best, it is exceedingly unclear how a partner can make a successful rebuttal.

Under the regulations, ownership or voting rights of 10 to 50 percent of the securities of record of a corporate entity creates

---

[78] For example, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601-9657, lender liability for cleanup costs of hazardous waste has been found to stem from liability attached to the "current owner and operator" of the facility or the "owner or operator at the time of disposal." *See* U.S. v. Fleet Factors Corp., 901 F.2d 1550, 1554 (1990).

[79] 30 C.F.R. § 773.5(b)(4); *see also* 53 Fed. Reg. 38,868 at 38,873.

[80] 53 Fed. Reg. 38,868 at 38,873-38,874.

[81] 54 Fed. Reg. 18,438 at 18,450.

a presumption of ownership or control.[82] OSM asserts this provision is in line with decisions which have found that actual control of a corporation is possible even when the shareholder owns less than the majority of the voting stock.[83] The cases OSM cites[84] provide little support for the rule it adopts.

In *Gottesman v. General Motors Corp.*,[85] relied on by OSM, the court concluded that, under the circumstance of that case, an owner of 23 percent of General Motors' stock had "control" within the meaning of the Sherman Anti-Trust Act. However, the court based that decision on the fact that the remaining 77 percent of the stock was widely dispersed among many owners.[86] It appears such considerations of the ownership of the remaining shares also played a role in the court's decision in *Securities and Exchange Commission v. R.A. Holman & Co.*.[87]

A presumption of ownership or control based on as little as 10 percent ownership, without any consideration of the ownership of the remaining shares, is not supported by these cases. Moreover, ownership of 10 percent of a corporation is by definition not majority ownership, and under normal circumstances would not give the shareholder actual control. This presumption has attracted much criticism. In large part it is criticized because it makes a presumptive rule out of a very exceptional corporate circumstance, and it requires the applicant to prove otherwise.[88]

This provision raises another problem which is related more to OSM's interpretation and implementation of the regulation than to its actual wording. OSM has indicated it will apply the 10 to 50 percent ownership and control presumption "in determining whether control exists between indirectly related corporate entities" and "at each level of a corporate structure."[89]

OSM gives this illustration of the effect of application at each level of a chain:

---

[82] 30 C.F.R. § 773.5(b)(5); *see also* 53 Fed. Reg. 38,868 at 38,873-38,874.

[83] 53 Fed. Reg. 38,868 at 38,873.

[84] Securities and Exchange Commission v. R.A. Holman & Co., 377 F.2d 665, 667 (2d. Cir. 1967); Gottesman v. General Motors Corp., 279 F. Supp. 361, 368 (S.D.N.Y. 1967).

[85] 279 F. Supp. 361, 368-369 (S.D.N.Y. 1967).

[86] "I have come to the conclusion that duPont, by reason of its 23% stock interest in General Motors, had the power to control that corporation because of the unrelated ownership of the balance of the shares." *Id.* at 368.

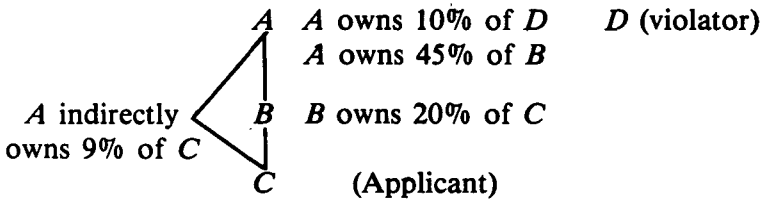
[87] 377 F.2d 665, 666-667 (2d. Cir. 1967).

[88] 53 Fed. Reg. 38,868 at 38,874.

[89] *Id.*

> For example, if Company "A" owns a forty-five percent interest in Company "B" and Company "B" owns a twenty percent interest in Company "C" (the applicant), then Company "A" will be presumed to own or control the applicant, even though Company "A" has an indirect interest in the applicant of only 9 percent. The determining factor is not the percentage owned, but whether control exists. In such an example, if Company "A" owned or controlled Company "D" which had a violation, the applicant will not be issued a permit unless it submits evidence proving that it is not controlled by Company "B", Company "B" is not controlled by Company "A", Company "A" does not own or control Company "D", or Company "D" is not a violator.[90]

The diagram below illustrates just how tenuous a connection this presumption would call ownership or control.



Although Applicant *C* may have neither direct contact nor any ownership or control relationship with Violator *D*, Applicant *C* is still permit blocked because of its remote, indirect nine percent ownership by *A* which owns or controls the violator. While adopting ten percent ownership as a bright line indicator of ownership or control, OSM reserves the ability to find such a relationship for an entity owning even less than ten percent through the "per se" category of "other relationships" discussed earlier.[91]

The last presumptive classification is based upon the "ownership" or "control" of coal to be mined by another person under a lease, sublease or other contract. This liability is also based on having the right to receive such coal after mining or having the authority to determine the manner in which the surface coal mining operation is conducted.[92] OSM bases this

---

[90] *Id.*

[91] *Id.*

[92] 30 C.F.R. § 773.5(b)(6) establishes a presumption of ownership and control from:

provision on its conclusion that "in contract mining operations, the owner or lessor of the coal more often than not is controlling the mining operation even though the owner or lessor of the coal purportedly employs 'independent contractors'."[93]

OSM's sole support for this presumption which violates the most basic precepts and definitions of contract and employment law is the decision in *Rapoca*.[94] A review of the *Rapoca* opinion shows it provides little support for OSM's disregard of long-established principles of employment and contract law.

First, the *Rapoca* decision is a district court decision which, at this writing, has not been adopted by any state or federal appellate court. Moreover, the *Rapoca* court did not purport to establish a general rule or presumption relating to the relationship between a lessor and lessee or between the parties to a contract mining agreement. Rather, the *Rapoca* decision is based solely on, and limited to, its circumstances.

Rapoca did not even directly involve issues of ownership or control or an attempt to define those relationships. Rather, it dealt only with liability for payment of reclamation fees. The issue was whether Rapoca Energy Company (Rapoca Energy) or the contract miners which actually severed the coal in question were responsible for payment of reclamation fees. Section 402 of the Surface Mining Control Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982) requires that "operators" of coal mining operations pay a reclamation fee based on the number of tons mined.

The Act defines "operator" at 30 U.S.C. § 1291(13) as "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location."[95] The issue, then, was whether Rapoca Energy was an operator within the meaining of the Act so as to incur liability for the reclamation fee. Based on the singular circumstances of Rapoca Energy's relationship with its contract miners, the Court determined it was so liable.

Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having the authority to determine the manner in which that person or another person conducts a surface coal mining operation.

[93] 53 Fed. Reg. 38,868 at 38,877.

[94] *Rapoca*, 613 F. Supp. 1161 (D.C. Va. 1985).

[95] 30 U.S.C. § 1291(13) (1982).

Instead of focusing on whether Rapoca Energy was involved in the removal of coal so as to come within the Act's definition of "operator", the *Rapoca* court turned to state law principles of agency under the laws of Virginia and West Virginia. Based on the extensive participation and control of Rapoca Energy over the activities of its contract miners, the Court determined Rapoca Energy's contract miners were not independent contractors, but were merely agents of Rapoca Energy.[96]

The *Rapoca* court also inexplicably focused on the fact that Rapoca Energy's contract miners were not permitted to sell the coal on their own behalf. Rather, they were required to deliver the coal to Rapoca Energy at a specified location and received a flat per-ton fee for mining the coal. Without explanation, the court determined that Rapoca's continued ownership of the coal and the contract miners' inability to sell it as they chose negated the existence of an independent contractor relationship.

> Where [sic] the relationship that of owner and independent contractor, the mining companies would undoubtedly be free to sell to whomever would pay the highest price, with only a royalty per ton of coal mined or percentage of the sale price being remitted to Rapoca.[97]

The status of an independent contractor is not predicated upon the ability to dispose of or sell the final product. Rather, it is based primarily upon the relationship between the parties and the extent to which the independent contractor conducts its affairs without the day-to-day oversight or guidance of the person or entity for whom it performs services.[98]

---

[96] The court based its decision upon the specific facts of Rapoca Energy's relationship with its contract miners. It recounted those facts thus:

> Rapoca surveys its mineral holdings to determine what locations are suitable for coal mining operations. It then performs all preliminary engineering work for the site, including the engineering work required for a surface mining permit. In addition, Rapoca begins the actual site development work, which includes building or improving access roads, constructing sedimentation ponds, and facing up the coal seam.
>
> During the course of the mining operations, Rapoca provides all engineering and mapping services for the contractors. The contractors follow Rapoca's engineers' directions relative to the placement and method of driving entries, the pulling of mine pillars, the location and use of haulings inside the mines, and any other matter pertaining to the protection of the mine and the securing of the greatest amount of coal possible.

Rapoca, 613 F. Supp. at 1164.

[97] *Id.*

[98] Glenn v. Beard, 141 F.2d 376, (6th Cir. 1944), *cert. denied* 323 U.S. 724, *reh'g denied*, 324 U.S. 889 (1944); Sturgill v. Barnes, 300 S.W.2d 574 (Ky. 1957).

OSM's presumptive category of ownership and control relationships founded on lease or contract mining relationships is directly modeled on the *Rapoca* decision. Its response to that criticism is that "those who have reputations for operating in compliance with the laws shall have few problems."[99] Thus, OSM generalizes what is essentially a singular situation into a presumption which must be rebutted by each and every person or entity coming within its broad scope. Because one company's relationship with its contract miners led one court to find a relationship of control, OSM extends a presumption of control to *all* mining agreements. The *Rapoca* decision itself provides no basis for such a generalization.

OSM concedes this category (which would include all operations conducted by contract miners) may negatively affect those operations. Neither the regulations nor OSM elaborate how having a "good reputation" will prevent an applicant from being permit-blocked and having its business disrupted if the AVS links the applicant to a violator.

Nor can the parties to a contract mining agreement rely on its terms to define their relationship. OSM has taken the position that although the agreement may establish the rights of the parties among themselves, it does not define their relationship for purposes of the AVS.[100]

The effects of this classification can be devastating to a lessor or one who has contracted with a contract miner which is somehow tied to a violation.[101] As a practical matter, the lessor must become the guarantor of the contract miner's compliance with all state and federal mining laws and regulations. Although the regulations do not require a lessor to abate a contract miner's violations, the lessor will have to pay to remedy the errors of the lessee or contract miner in order to obtain any permit on that or any other tract of land. Similarly, all other lessees of that tainted lessor with similar relationships will be blocked. This cost could be financially disastrous to a lessor who finds itself the victim of a lessee's operations.

Equally as problematic as OSM's definitions of ownership and control are its stated intentions regarding its interpretation

---

[99] 53 Fed. Reg. 38,868 at 38,878.

[100] "The terms of a contract may establish the rights of the parties among themselves, but are not a conclusive determination of the responsibility of the parties under the Act." 53 Fed. Reg. 38,868 at 38,877.

[101] A case in point is the experience of Island Creek Coal Company which is discussed below in Section IV of this Article.

and application of the definitions. Both the regulation itself[102] and OSM's comments[103] indicate OSM intends to make ownership and control determinations based on one or a *combination* of the relationships set out in the regulations.

This piggy-backing of ownership and control relationships can result in a permit block based on a very tenuous string of relationships which leave the applicant very far removed from, and often in practical terms a stranger to, the violator. For example, if the applicant, Company *A*, has a contract mining agreement with *B* who owns 10 percent of Company *C* which has one director who is also a partner in a partnership that owns minerals that are leased to a lessee who has an unabated violation, Company *A* would be permit-blocked under OSM's regulations. Schematically, this chain of relationships would look like this:

Company *A* (Applicant)

(contract mining agreement)

Contract Miner *B*

(*B* owns 10% of Company *C*)

Company *C*

Director

(Director is a partner in Partnership)

Partnership

(Partnership leases mineral to Lessee)

Lessee (Violator)

While it is not certain that OSM would attempt to enforce the regulations in this manner, there is nothing in the regulations or OSM's comments to prevent it from doing so.

OSM has also declared its intention to track ownership and control relationships up and down the corporate chain.[104] This means that a violation tied to one subsidiary or even to an

---

[102] 30 C.F.R. § 773.5.

[103] Where two entities are indirectly related, control is established using any appropriate combination of the relationships specified in the definition, including the presumptions in paragraph (b). For instance, a director of a parent company is presumed to control wholly owned subsidiaries of the parent company using the combination of the relationships specified in paragraphs (b)(1) and (a)(2).

53 Fed. Reg. 38,868 at 38,869.

[104] OSM "will track ownership up and down a corporate chain so long as control is present." 53 Fed. Reg. 38,868 at 38,875.

officer or director of that subsidiary can cause the parent and all other subsidiaries to be permit-blocked. In the context of directors, this could lead to the following results. If *A* is a director of both corporation *X* and corporation *Y*, and corporation *Y* shows up in the AVS as a violator, corporation *X* will be permit blocked because of its ownership and control link to the violator through director *A*. Moreover, if *A* was director of the violator at the time of the violation, corporation *X* will be permit blocked even if *A* is not a director of the violator at the time of the application.[105]

Successor liability can also become an issue under the AVS. OSM has taken the position that a parent corporation which acquires a subsidiary with violations becomes the owner and controller of a violator and is thus permit-blocked.[106] A further ramification of this rule is that all of the parent corporation's *other* subsidiaries would also be permit-blocked. Under the regulations, the other subsidiaries would be presumed to be owned or controlled by the parent which owns or controls a violator.

Whether OSM will impose successor liability upon one who acquires only the assets of a violator is less clear. OSM seems to take the position that the purchase of assets directly related to the violation would cause successor liability. In other situations, apparently OSM would allow the parties to allocate liability for the violation by contract.[107]

> When a company acquires only assets of an entity, its responsibilities will depend upon a number of factors. For instance, if the assets purchased include the mine site and equipment where outstanding violations exist, the acquiring company would be responsible for the violations under the theory that the acquiring company has purchased the liabilities in connection with the transferred assets of the other entity and that the purchase price for the entity would reflect any liabilities trans-

---

[105] "The determining factors under final § 773.15(b)(1) are: (1) Whether the common officer was in control of the violator at the time the violation occurred and is therefore responsible for the violation; or (2) whether the common officer presently controls the violator and, therefore, can order abatement." 53 Fed. Reg. 38,868 at 38,876.

[106] "OSMRE concludes that it is reasonable and proper to hold an acquiring company liable for the violations for which a subsidiary was responsible prior to its acquisition in a number of circumstances." 53 Fed. Reg. 38,868 at 38,876.

[107] *Id.*

ferred. In other instances, assets may be transferred without transferring responsibility for violations.[108]

If the liability is to remain with the seller, OSM requires the document of transfer to clearly so state.[109] Even if the parties do clearly evidence an intention to leave liability with the seller of the assets, OSM's comments indicate it will review the transaction and make its *own* determination where the liability rests.[110] Thus, one acquiring the assets of an entity with an ownership or control link to a violator is left in a quandary as to who will ultimately bear the liability under the AVS. Since the result could be a permit-block of the purchaser or new parent company (and all of the parent's other subsidiaries), the penalty for an incorrect guess where OSM will place the liability is extremely severe.

III. CHALLENGING AN OWNERSHIP DETERMINATION

No formal procedures have yet been established for challenging OSM's permit-blocking decision prior to the denial of the permit application. OSM relies on informal procedures, including verification of permit blocking recommendations by a central Applicant Violator System Clearing House.[111] Should a link be disclosed by a check, OSM is to send a notice to the permit applicant with a warning that the relationship in question would cause a permit to be withheld unless the violation is abated, is in the process of being abated, or unless the permit applicant can demonstrate that the "requisite ownership and control relationships between the owners and controllers of the applicant and the violator [did] not exist."[112] Although the regulations imply the applicant may then submit evidence to make the required showings, they do not actually provide for such a procedure.[113] The regulations only specifically require a hearing when the regulatory agency denies a permit because of a pattern of violations.[114]

If the informal administrative review process is unsuccessful, the applicant may seek review of the agency's denial. If the

---

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] 53 Fed. Reg. 38,868 at 38,878-79.
[112] 53 Fed. Reg. 38,868 at 38,879.
[113] 30 C.F.R. § 773.15(b)(1)(ii).
[114] *Id.* at § 773.15(b)(3).

permit is a federal permit, the applicant may file a request for review of OSM's decision at the Interior Department office of Hearings and Appeals.[115] Temporary relief is effectively unavailable since OSM's regulations prohibit temporary relief from a decision not to issue a permit.[116]

Where the state regulatory authority makes the decision to deny the permit application, OSM has indicated that the permit applicant may petition the state regulatory authority for review of the permit denial.[117] However, OSM will review the state's decision, and if not satisfied, it will challenge it. OSM has virtually admitted that primacy is of little or no concern in the realm of the AVS. Indeed, a resolution of the AVS permit block with the state may be only a prelude to further protracted review and negotiations with OSM on the same matter.[118] Moreover, OSM prohibits a state from deciding an applicant's challenge to determinations that federal violations exist or that monies are owed to the federal government and further requires such challenges to be resolved in a federal forum.[119] Thus, if the violator has both state and federal violations on record, even at the initial stages an applicant may be facing battle on two fronts simultaneously.

As noted above, neither the regulations nor OSM's comments provide much enlightenment as to what evidence will rebut the various presumptions of ownership or control.[120] OSM does say that the standard of proof is a preponderance of the evidence.[121] However, this seemingly concrete standard is undercut by other statements by OSM. In its discussion of its reasons for not adopting standards or guidelines for rebutting the presumptions,

---

[115] *See* 43 C.F.R. § 4.1360.

[116] *Id.* at §§ 4.1367, 4.1377(a). However, in a recent case, The Pittston Company and Clinchfield Coal Company obtained an injunction when OSM attempted to permit-block them because of unpaid fines of a contract miner. The Pittston Co. and Clinchfield Coal Co. v. Lujan, CA 91-0006-A (D.W. Va. 1991). The plaintiffs argued that due process prevented them from being bound by DSM's action against the contract miner since the plaintiffs were not parties to that action.

[117] 53 Fed. Reg. 38,868 at 38,879.

[118] *See* Section IV of this Article (OSM refused to remove Island Creek Coal Company from the AVS after requested to do so by the state).

[119] 53 Fed. Reg. 38,868 at 38,879.

[120] *See generally*, 53 Fed. Reg. 38,868 at 38,879-38,880 (standards for rebutting presumptions).

[121] "The measure of proof needed to rebut a presumption under this rule is a preponderance of the evidence, the standard ordinarily required in civil matters." 53 Fed. Reg. 38,868 at 38,879.

OSM states, "the proof needed to rebut the presumptions will be determined case-by-case."[122]

OSM then goes on to totally repudiate the preponderance standard and to articulate a kind of "sliding scale" standard of proof.

> The factual requirements for rebutting a presumption will change depending on the particular situation. For instance, the amount of proof required to rebut a presumption of control for a chief executive officer will likely be greater than that for a junior vice-president of a corporation. Likewise, *the amount and kind of proof would vary where different presumptions apply*.[123]

Permit applicants are left with no intelligible standard of proof for rebutting the presumptions of ownership and control. It is not hard to see why the coal industry has become so frustrated with the system. While time passes and costs escalate, a permit applicant must speculate what type of information would suffice to rebut a presumption of ownership or control to the satisfaction of the regulatory agency—if the opportunity for rebuttal is available at all.

IV. AN OWNERSHIP AND CONTROL CASE IN POINT—ISLAND CREEK COAL COMPANY

Because OSM's ownership and control regulations are of fairly recent vintage, there are few examples of OSM's interpretation and implementation of them to assist the industry in anticipating their effect. One available example, however, is the experience of Island Creek Coal Company which has been widely reported in various industry publications.[124]

Some months prior to July, 1990, Island Creek Coal Company (Island Creek) requested a modification to its refuse area Permit Number 713-5002 as part of an ongoing operation. By July, 1990, Island Creek anticipated that it would be granted

---

[122] 53 Fed. Reg. 38,868 at 38,880.

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

[124] McPhee, *Coping with @*! OSM*, 16 KY. COAL J. 1 (Oct. 1990); McGraw, *Getting Caught in the AVS Net*, 16 KY. COAL J. 4 (Oct. 1990); *Kentucky Bars Island Creek*, 14 COAL OUTLOOK 1 (July 30, 1990); *Island Creek Alters Contractor "Control" Issue*, 14 COAL OUTLOOK 2 (Sept. 28,1990); *Island Creek Submits Control List to Agencies*, 14 COAL OUTLOOK 3 (Dec. 3, 1990).

very shortly.[125] By letter dated July 5, 1990 Island Creek was informed by the Kentucky National Resources and Environmental Protection Cabinet (the "Cabinet") that Island Creek was permit-blocked because of a bond forfeiture by a former contract miner.[126] The permit block applied not just to Island Creek but also to its directors and officers and any shareholders with an interest of 10 percent or more.[127]

This letter was the first official notice Island Creek had of any problems on the Price Coal operation. According to the Cabinet, Price Coal had failed to reclaim a site it was mining under a contract with Island Creek. Price Coal's reclamation bond was forfeited in late 1988, but Island Creek was not notified of it until the permit block notice on July 1990—at least a year and a half later. Island Creek notified the Cabinet that it wanted to appeal the violation and requested the Cabinet to grant it conditional permits pending the appeal. The Cabinet pointed out that the statute of limitation had run on Price Coal's forfeiture, so no appeal was possible. Because the violation could not be appealed (even though Island Creek had just learned of it), the Cabinet would not agree to grant conditional permits.[128] In the world of the AVS, it seems an "owner" and "controller" has fewer rights and gets less due process than the violator it supposedly owns or controls.

---

[125] Complaint, *Island Creek Coal Corp. v. Kentucky Natural Resources & Envtl. Protection Cabinet*, No. 90-CI-976 (Pike Cir. Ct. filed July 19, 1990).

[126] Letter from Lawrence E. Grash, Deputy Commissioner of the National Resources and Environmental Protection Cabinet to Mr. S.O. Ogden of Island Creek Coal Company (July 5, 1990) (text of letter discussing permit block against Island Creek Coal Company). The letter reads:

> This is to inform you that effective the date of this letter, Island Creek Coal Company, its directors and officers, plus any stockholders holding ten percent or more of voting stock are permit blocked under KRS 350.085. These blocks have been initiated through entry into the Federal Applicant Violator System and Kentucky Surface Mining Information System.
>
> The reason for this block is a bond forfeiture on Price Coal Company, Permit Number 498-5319. Our investigation of the outstanding cessation orders on Price Coal has found a contract that clearly defines a control relationship over Price Coal by Island Creek.
>
> We would be happy to discuss reclamation of this site as well as resolution of outstanding penalties at your convenience.

[127] *Id.*

[128] Conversations between Chauncey S.R. Curtz and E. Wayne Busconi, Corporate Counsel, and Gerald McPhee, Director of Government Relations for Island Creek Coal Company, and between Karen J. Greenwell and Mr. McPhee.

Island Creek requested a formal hearing with the Cabinet pursuant to 405 KAR 7:090(1) to contest the Cabinet's determination that Island Creek owned or controlled its contract miner, Price Coal. Island Creek again requested it be granted conditional permits pursuant to 405 KAR 8:010(13)(4)(b) pending the outcome of the hearing on the ownership and control determination. The Cabinet refused to conditionally issue any permits or revisions.[129]

In an attempt to obtain interim relief, Island Creek filed an action in Pike Circuit Court.[130] In that action, Island Creek requested a preliminary injunction requiring the removal of the permit-block and a preliminary injunction that the Cabinet conditionally issue its pending permit revision. A hearing was held on Island Creek's request for preliminary injunction.[131] Before the court ruled on the motion, Island Creek began negotiations with the Cabinet regarding an abatement plan for the Price Coal mine site.

After substantial negotiations, the Cabinet and Island Creek arrived at an abatement plan satisfactory to the state authority. Based on those negotiations and eventual agreement, Island Creek, in effect, withdrew its motion. The Cabinet agreed to remove Island Creek from the state's version of the AVS (the Surface Mining Information System or SMIS) and requested that OSM remove Island Creek from the AVS. However, OSM refused, and the Cabinet declined to grant Island Creek's pending permit revision under those circumstances.[132] Thus, Island Creek's settlement with the state authority was not the end of its ordeal, and Kentucky's primacy under the Act was of no practical effect.[133]

Since a settlement with the Kentucky regulatory authority did not resolve Island Creek's permit block, Island Creek began negations afresh with OSM. After extensive negotiations, Island Creek and OSM finally arrived at a settlement agreement. Pursuant to that agreement, Island Creek has identified all of its contract miners as well as all sites upon which they have

---

[129] Complaint, *supra* note 125, at 2-3.

[130] *See* Complaint, *supra* note 125.

[131] *See* Record, Island Creek Coal Corp. v. Kentucky Natural Resources & Envtl. Protection Cabinet, No. 90-CI-976 (Pike Cir. Ct. filed July 19, 1990).

[132] *See supra* note 128.

[133] *See, e.g.*, SMCRA § 503, 30 U.S.C. § 1253.

worked.[134] Island Creek and the Cabinet must now negotiate on a case-by-case basis as to any needed reclamation on any of the sites. If an agreement is not reached on any site (or, presumably, if OSM does not approve the agreement), Island Creek will face the possibility of being permit-blocked again. State Cabinet officials have indicated it will use the Island Creek settlement as the model for future negotiations and settlements with permit-blocked applicants.[135]

The ownership and control regulations and OSM's comments on them purport to allow primacy to remain with the states and to allow the states to run their own versions of the AVS. Nevertheless, OSM actually directs the states in the permit-blocking process through memoranda of understanding with the states and the use of the federal AVS. Even if a state removes the name of an alleged owner and controller from its own system, OSM can leave the alleged owner and controller on the federal system, effectively preventing the applicant from receiving a permit in any state. Obviously, the resolution of any permit block will involve OSM, and OSM must be satisfied before the matter can be resolved.

Island Creek's case illustrates the problem of obtaining a hearing to contest an ownership or control determination. The Kentucky regulations do not provide for a hearing prior to the denial of the permit.[136] Like Island Creek, a company with a pending permit may receive notice it is permit-blocked, but be unable to obtain a hearing to challenge the decision until the Cabinet actually denies the permit because of the link to a violator. The problem with waiting until the permit is denied and then challenging the control through the administrative process is the amount of time such a procedure can take. While the months go by, and the alleged owner and controller's operations are brought to a standstill, the pressure grows to negotiate with the state and OSM and to assume the liability, even though it may not be warranted.

CONCLUSION

In principle, an Applicant Violator System could be an effective tool for enforcing SMCRA. However, the implementation

---

[134] *See Island Creek Submits Control List to Agencies, supra* note 124.

[135] *See supra* note 128.

[136] 405 KY. ADMIN REGS. 7 (1990); 405 KY. ADMIN. REGS. 8 (1990).

and definitional make-up of the AVS has opened a Pandora's Box of problems for the mining industry as well as the regulatory agencies. Under OSM's definitions of "ownership" and "control", just about anyone can be deemed an "owner" or "controller" of a mining operation. Efforts within the definitional regulations themselves to distinguish non-owners/controllers are woefully inconsistent. The result of an incorrect determination of ownership or control could be financially disastrous for the innocent person who as a practical matter neither owned nor controlled a mining operation which has violated the Act.

This article is but an overview of one of three sets of regulations implementing the AVS. Additional regulations are now being prepared by OSM. It is clear that we are far from seeing the final chapter of the "ownership and control" regulatory battle.