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# *Basics of SMCRA*

## *Alternative Enforcement*

August 21, 2013

IMCC Workshop: The Status of State Reclamation Bonding Programs:  
Lessons Learned and Current Challenges

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# *Introduction to Alternative Enforcement*

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- Two types of SMCRA enforcement:
  - **Primary**
    - Notice of violation, cessation order, civil penalty, and the means by which permits are approved or amended, and bonds are released
  - **Alternative**
    - Other Administrative or Legal Actions

# *SMCRA Alternative Enforcement Actions*

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- Civil Actions for Relief
- Individual Civil Penalty (ICP)
- Permit Suspension or Revocation for a Pattern of Violation
- Permanent Permit Ineligibility
- Criminal Penalties
- Enforcement on a Continuing Violation
- Enforcement on Abandoned Sites
- Recovering Civil Penalties

# *Permits, Penalties and Enforcement through the Courts*

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- Permit eligibility
- Individual Civil Penalties associated with violations
- Orders for reclamation, criminal penalties, payment of penalties, civil actions for relief and contempt

## *Why Alternative Enforcement?*

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- Less reliance on bonds
- Reduce financial pressure on states’ special reclamation funds
- Encourages abatement of violations
- Strong deterrent that makes violators think twice before abandoning sites
- Promotes the “Polluter Pays” principle

# ***Permit Eligibility – SMCRA 510(c)***

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- **Permit Ineligibility**

*...no permit shall be issued if any surface coal mining operation owned or controlled by the applicant is currently in violation....until the violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority with jurisdiction over the violation...*

- **Permanent Permit Ineligibility**

*...no permit shall be issued to an applicant after a finding by the RA, after opportunity for hearing, that the applicant, or the operator specified in an application controls or has controlled mining operations with a demonstrated pattern of willful violations of this act....resulting in irreparable damage to the environment...*

# *Permit Eligibility*

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Understanding who is ineligible...

Current Federal rule definitions:

**Ownership:** sole proprietor or  
owning of record in excess of 50% of the voting  
securities or other instruments of ownership of an  
entity.

**Control or controller:** Permittee, or  
Operator, or  
Anyone who has the ability to determine  
the manner in which an operation is  
conducted.

## *Permit Eligibility*

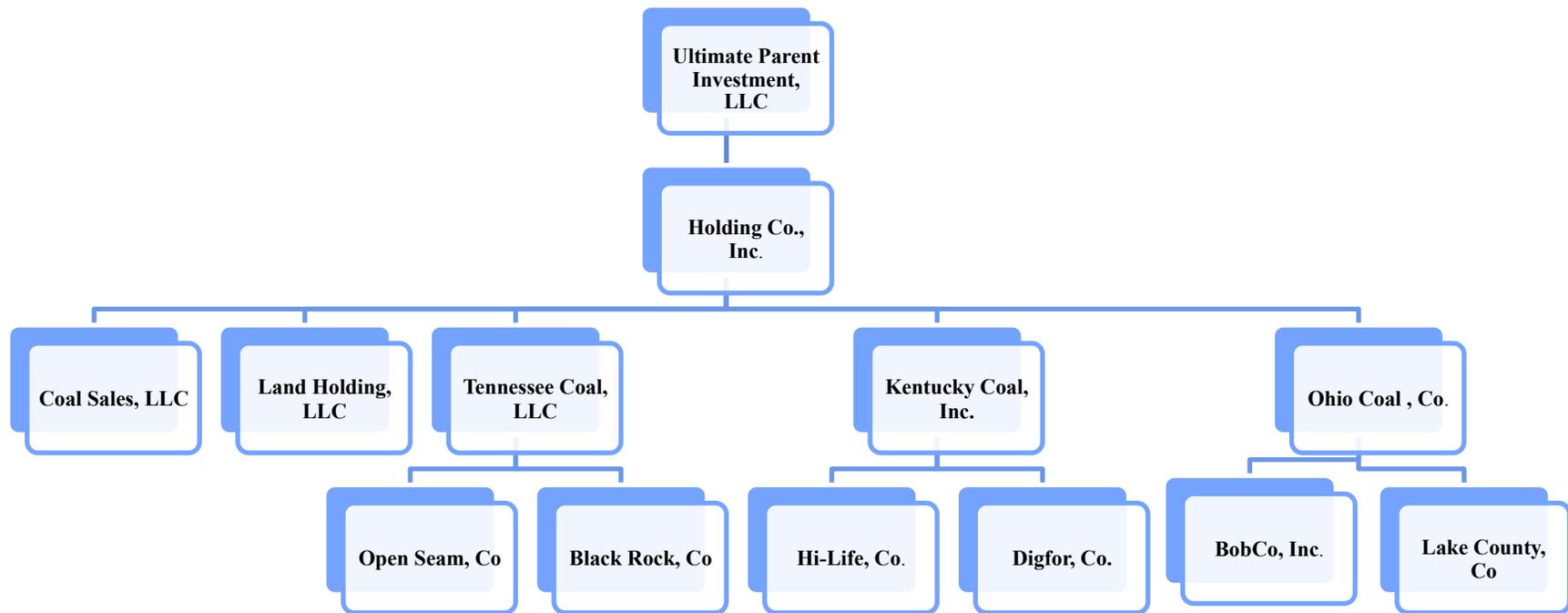
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### **WHAT IS THE APPLICANT/VIOLATOR SYSTEM?**

The AVS is an automated information system owned and operated by OSM. Information on applicants, permittees, operators, applications, permits, as well as unabated and uncorrected environmental violations are maintained in this nationwide database for all Federal and State programs.

# *Example of typical Organizational Structure*

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## *Individual Civil Penalties*

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### WHO?

Any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out a violation, failure or refusal

### WHEN?

After cessation order issued to the corporate permittee has remained unabated for 30 days

Note: Each day of the continuing violation may be deemed a separate violation and a separate ICP may be assessed until abatement or compliance is achieved

## *Individual Civil Penalties*

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Not subject to the business' Automatic Stay  
during bankruptcy

Not dischargeable within business' bankruptcy

Unpaid civil penalties may be recovered in a civil action  
in the appropriate United States District Court

## *Enforcement through courts*

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Civil action for relief (temporary, preliminary or permanent injunctions, restraining orders, or other actions), when the permittee or its agent fails to correct violations

# *Enforcement through courts*

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## **Dix Fork**

First in a line of court decisions where OSM successfully argued the responsible corporate officer doctrine. Court looked at corporate agents as responsible for failure to reclaim - reasoning that agents are liable.

Court looks back at who was there when it happened in contrast to administrative remedies which may be limited by individual's lack of ownership and control in the present tense

Failure to reclaim can lead to contempt actions

**Case site: United States v. Dix Fork Coal Co. , 692 F2d 436 (6<sup>th</sup> Cir. 1982)**

# *Assistance available from the AVS Office*

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Investigative assistance available to States from the AVS Office:

- Asset investigations
- Field investigations
- Assistance in findings of control
- Financial analyses of companies
- Bankruptcy assistance
- Assistance with representation in cases where states do not have jurisdiction.

## *SMCRA Sections referenced*

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- Permit eligibility - 510(c)
- Individual Civil Penalties associated with violations - 518(f)
- Orders for reclamation, civil actions for relief - 521 (c)
- Criminal penalties - 518(e) and (g)
- Payment of penalties - 518 (d)

## *Regulation Sections Referenced*

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- Alternative Enforcement - 30 CFR 845.15(b)(2)
- Permit eligibility - 30 CFR 774.11 (c) - (e)
- Individual Civil Penalties - 30 CFR 846
- Orders for reclamation & civil actions for relief - 30 CFR 847.16
- Criminal penalties - 30 CFR 847.11
- Payment of penalties, 30 CFR 846.18 & 870.23 (a) - (f)

## *OSM Agency Directives*

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OSM has developed agency directives that may provide guidance for certain AE actions:

- INE-4: Notice of Potential Liability for an Individual Civil Penalty
- INE-30: Alternative Enforcement Referrals for Criminal Penalties and Civil Action for Injunctive Relief
- INE-40: Individual Civil Penalty Assessment
- INE-41: Civil Penalty Assessment for Unabated Imminent Harm Cessation Orders

You may view (and print) the directives from OSM's Web site at

<http://www.osmre.gov/directives.htm>.

## ***Dix Fork line of cases***

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-United States v. Dix Fork Coal Co., 692 F.2d 436 (6th Cir. 1982)

A few other noted cases include:

-United States v. Peery, 862 F.2d 567 (6th Cir. 1988)

-United States v. Aiken, 867 F.2d 965 (6th Cir. 1989)

-United States v. Hubler, 117 Bankr. 160 (W.D. Pa. 1990)

-Rice v. Alabama Surface Mining Commission, 555 So. 2d 1079  
(Ala. Civ. App. 1989)

## *Legal Assistance*

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For legal assistance, you may contact the Department of the Interior's Offices of the Regional Solicitor in Knoxville, Pittsburgh, and Denver:

- Knoxville Office of the Regional Solicitor 865.545.4315
- Pittsburgh Office of the Regional Solicitor 412.937.4000
- Denver Office of the Regional Solicitor 303.231.5350

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**Use of AE  
in  
Bankruptcy  
/Bond  
Forfeiture  
negotiations**

## *Early Indicators of Potential Failure*

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- Cash flow problems (failure to pay employees, vendors, labs)
- Increase in violation occurrences (failure to abate viols)
- Delayed reclamation or production orientation
- Termination of leases
- Departure of key people
- Sale of permit or other assets (equipment being removed)
- Bankruptcy

## *Reaction of Regulatory Authority*

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- Critical that you take action to minimize exposure and reduce risk when the warning signs appear.
- Communication is key - consult with company officials; your legal staff; other regulatory agencies; vendors; mineral owner; surety.
- Limit new or additional disturbance
- Focus on minimizing public danger and off-site impacts (usually water problems or stability issues)

# *Lodestar Energy Bankruptcy*

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- **Background:**

- Mining without contemporaneous reclamation
- Bonds held by surety (Frontier) who was under-collateralized
- Utah relied on bond forfeitures but surety didn't have enough money to pay the bonds.
- Utah settled for partial reclamation.
- OSM and Utah issued imminent harm violations (COs).

- **AE Action Taken:**

- OSM sent letters of potential individual liability to officers of Wexford Capital (wealthy out-of-state entity).

- **Result:**

- Individual owners and controllers created a reclamation fund that exceeded \$12M for reclamation operations in three states.

# *Horizon Natural Resources Bankruptcy*

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- **Background**

- Largest bankruptcy in the history of coal mining:
  - Over 400 SMCRA permits in 5 states
  - Approximately \$350 million in reclamation liability

- **AE Action taken:**

- Potential of individual liability and potential permit ineligibility due to information in the AVS were effective AE mechanisms:
  - Owners wanted to continue in the mining business and the buyer wanted the support of regulators and sureties in bankruptcy.
  - Specific assets & liabilities were distributed by the bankruptcy into Old Coal & New Coal
  - Despite multi-state issues with competing interests, regulators worked together to focus on overall goal—achieving reclamation on all permits.

# *Horizon Natural Resources Bankruptcy, continued*

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- **Result:**

- Lexington Coal Company, LLC (LCC) was formed in 2004:
  - Acquired substantially all Horizon assets not acquired by other entities.
  - Included approximately 305 permits.
- Reclamation Agreement provided for Releases for Individual Liability under SMCRA in exchange for specified reclamation.
- LCC activities closely monitored by States and OSM to ensure reclamation obligations are met.

- **Status:**

- All required permit increments with each State achieved Phase 1 bond release;
- LCC fully funded all known Water Treatment Trusts to treat long-term effects of pollutional discharge on 14 permitted sites (KY-6, TN-4, WV-4).

# *Unity Virginia Holdings Bankruptcy*

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- **Background**

- Mining operations and corresponding liabilities were in Virginia
- Owners, assets, and Chapter 7 bankruptcy case were in Texas.
- Problem: State programs have limited ability to engage in litigation outside their State boundaries.

- **AE Action taken:**

- OSM issued Imminent Harm Cessation Orders (IHCO) and participated in the bankruptcy.
- The U.S. Attorney from the U.S. Department of Justice in Dallas, Texas, represented SMCRA interests during the bankruptcy.

- **Result:**

- Negotiated agreement in 2007 worth \$2.5 million to complete reclamation.

## *Lessons Learned*

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- Cooperation – Focus on the greater good for the environment. A multi-state plan is much more difficult and complex.
- Communication - Routinely communicate with all parties involved (staff, operators, surety, creditors, vendors, other regulatory agencies).
- Creativity - Think outside the box to create new approaches and incentives to achieving reclamation.
- Never give up – Bankruptcy is NOT the end. Environmental violations that create public danger may put you in front of most creditors.