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§ 8.01. Introduction.

The mining industry is one of the most highly regulated industries in the United States, particularly with respect to employee safety and health and environmental protection. This extensive regulation essentially began with the novel provisions of the Federal Coal Mine Health and Safety Act of 1969, and was significantly expanded with the enactment of the Federal Mine Safety and Health Act of 1977 and the Surface Mining Control and Reclamation Act of 1977.

In recent years, the federal regulatory agencies which administer these statutory programs have attempted to expand the scope of their statutory enforcement authority to include additional persons for purposes of regulation and imposition of sanctions. Increasingly, those federal agencies are seeking to hold owners of mine properties and lessees of mineral rights vicariously liable for regulatory violations charged against independent contractors who have contracted to operate the mines. As a result, owners of mineral rights are finding themselves subject to the threat of substantial governmental fines, denials of mining permits and other limitations and liabilities as a result of citations by the government against contract mine operators. This is occurring even though the targeted property owners did not cause the violations and did not know they existed.

This enforcement trend may have had its genesis in part in what has become known as the Applicant Violator System, which was created in 1985 as the result of an agreement to settle litigation between the Office of Surface Mining Reclamation and Enforcement and environmental groups.

More recently, the Mine Safety and Health Administration has undertaken to charge mine property owners for violations of independent operators who mine the reserves of the property owners.

This Chapter will look at the historical background of MSHA enforcement against mine operators and will examine the recent shift in MSHA's enforcement policy toward imposing vicarious liability on an increasingly broad range of persons who are not the designated operator of the mine. Separately, the Chapter will consider the continuing expansion of enforcement by OSM under SMCRA to encompass persons beyond the permittee of the mine — persons such as "owners and controllers" and "contract miners."

§ 8.02. Historical Background of MSHA Enforcement Actions Related to Independent Contractors.

[1] Traditional Concept of "Operator."

Both the 1969 Coal Act and the 1977 Mine Act placed responsibility for compliance with the Act and related mandatory health and safety standards on the mine operator. The term "operator" was defined in the 1969 Coal Act as "any owner, lessee, or other person who operates, controls, or supervises a coal mine."

With regard to general responsibility for the mine, the term "operator" traditionally has been applied to the actual mine operator — in other words, to the individual, partnership, corporation or other entity in direct and immediate control of the mine on a day-to-day basis.

Indeed, for the entire history of the 1969 Coal Act (and until recently the 1977 Mine Act) there was no question that the actual mine operator was responsible for the mine as a whole and for compliance with all of the daily requirements of the Act.
While traditionally there was no dispute as to who was the "operator" of the mine as a whole, there did develop early in the 1969 Coal Act's enforcement a substantial question regarding the status of independent contractors who, by reason of their work in performing construction or other services on mine property, effectively controlled the part of the mine where the work was taking place. (10)

In these situations, the independent contractor was typically both the employer of the employees involved and the supervisor of the work being done. This raised the question whether the independent contractor, rather than the coal mine operator, was the "operator" i.e., the party that is responsible and should bear liability with respect to the specific work over which the contractor had control. (11)

With respect to independent service and construction contractors, some balance developed in MSHA's enforcement process with the passage of time and experience gained in enforcement and ensuing litigation. For over a decade now, MSHA's independent contractor enforcement policy has been directed at the party who causes a violation at the mine and/or whose employees are exposed to any risk created by the violation. (12)

This policy is based on a determination of who is in actual, direct and immediate control of the workers and the working conditions, and contrasts markedly with MSHA's recent policy related to mine property owners, where the emphasis is not on control but rather on imposition of vicarious liability.

As indicated above, MSHA is currently seeking to expand liability beyond the operator of the mine to include property owners and lessees. In pursuing this policy, MSHA relies not on changes in the law or regulations, but rather on what is essentially a more expansive view of permissible enforcement under the Act. In this connection, MSHA is apparently disregarding past interpretations of the Act, including those resulting from litigation related to independent service and construction contractors, as summarized below. (13)


One of the first cases to address the issue of independent contractor responsibility was Affinity Mining Company. (14)

In that case, the mine operator, Affinity Mining Company, hired an independent contractor, Cowin Construction Company, to extend an existing slope into a new coal seam so that a closed mine could be reopened. This slope work was done by employees of Cowin, solely under the direction and supervision of Cowin's superintendent. The only Affinity employee at the mine at that time was an engineer who was overseeing the entire project of reopening the mine, including approval of design changes for and completion of the slope project. (15)

During the course of Cowin's work, violations of the Act were alleged by the government. As a result of these allegations, the Bureau of Mines issued a withdrawal order, naming Affinity as the operator of the mine and assessing civil penalties against it. (16)

Affinity contested the government's assertion that Affinity was responsible for the violations committed by Cowin, asserting that Cowin was neither an agent of Affinity nor under its direction, supervision or control. (17)
In deciding the case, the administrative law judge implied that under the statutory definition of "operator," Affinity could be held to be the operator of the entire mine, including the slope project, and therefore liable for the violations committed by Cowin. However, the judge declined to do so, finding instead that as an independent contractor, Cowin was the operator of the mine with respect to the slope project. Accordingly, the judge determined that Cowin could and should be held liable for its own violations. \( (19) \)

The judge stated:

Because Cowin was directly and primarily, if not exclusively, responsible for the violations that assertedly occurred, I believe that it should have been the target for an assessment of civil penalties instead of Affinity. Assuming that either could be held liable as an operator of the mine, I do not think that sanctions should be sought against the less offending party. \( (20) \)

On appeal, the Interior Board of Mine Operations Appeals \( (21) \) affirmed the outcome reached by the judge, but disagreed with the judge's suggestion that Affinity might have some secondary liability for the civil penalties. \( (22) \)

As the Board stated:

To give true meaning to the expressions of the Congress we consider that the term "operator" must be read together with responsibility for health and safety of employees (miners, workers). Therefore, while more than one person may fall technically within the definition of "operator," only the one responsible for the violations and the safety of employees can be the person served with notices and orders and against whom civil penalties may be assessed. \( (23) \)

Consequently, in Affinity, enforcement was appropriately directed towards the entity which controlled the mine, or area of the mine, where the violation took place. \( (24) \)

The decision in Affinity led to further litigation by both the Mining Enforcement and Safety Administration and the mining industry. For example, the Association of Bituminous Contractors \( (25) \) brought a declaratory judgment action in the U.S. District Court for the District of Columbia. \( (26) \)

In that suit, the ABC sought a judgment that independent contractors hired by coal mining companies solely to perform construction work at the mines did not fall within the definition of "operator" as set forth in the 1969 Coal Act and could not be held responsible for violations of the Act. The ABC further requested an injunction to prevent the Secretary of the Interior from enforcing and applying the Act and its implementing regulations against such construction contractors. \( (27) \)

The District Court granted the relief request by the ABC, and the Secretary of the Interior appealed. \( (28) \)

The D.C. Circuit reversed the district court's decision in ABC v. Andrus \( (29) \)

In so doing, the appeals court considered not only the definition of "operator" but also the definition of "coal mine" to conclude that independent contractors were also considered operators under the 1969 Coal Act. As stated by the court, the term "operator" included persons who operate, control, or supervise a coal mine in addition to owners or lessees, and a "coal mine" included all shafts, slopes, tunnels, excavation and
other property to be used in the work of extracting bituminous coal.

Based on these definitions, the court found that in order to be an "operator" under the Act, a company does not have to exercise control or supervision over an entire mine. Rather, an independent contractor hired to do construction work at a mine is an operator with respect to the work it performs and may be held responsible for violations of the Act it commits.

In its decision, the D.C. Circuit adopted the reasoning of the Board in Affinity, recognizing the importance of placing responsibility on the party in the best position to take precautionary measures. In this regard, the court stated:

[i]t is not a stretching of the statute to hold that companies who profess to be as independent of the coal mine owners as these construction companies purport to be, do control and supervise the construction work they have contracted to perform over the area where they are working.

The court further stated:

If a coal mine owner or lessee contracts with an independent contracting company for a certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of ensuring compliance with mandatory safety regulations.

Following the D.C. Circuit's decision in Andrus, the Federal Mine Safety and Health Review Commission was required to address the contractor liability issue in Secretary of Labor v. Republic Steel Corp.

One question considered by the Commission, in the context of an owner who operated the overall mine, was whether such a production operator could be held liable for violations committed by its independent contractors even though none of the production operator's employees were exposed to the violative conditions and the production operator could not have prevented the violations.

In Republic Steel, the Commission agreed with the Fourth Circuit's conclusion in BCOA that, as a matter of law under the 1969 Coal Act, a production operator of a coal mine could be held liable for violations committed by its independent contractors, regardless of whether the production operator's own employees were exposed to the hazardous conditions created by the violations or whether the production operator could have prevented the violations.

In deciding that a production operator may be held liable for the violations of its contractors, the Commission did not find that a production operator must always be held liable. Rather, the Commission clearly recognized that an independent contractor has its own responsibility for complying with the Act and that, even when enforcement action is taken against a production operator, the Secretary may also proceed against the independent contractor.

The foregoing cases demonstrate that while an independent service or construction contractor may be held responsible for its own violations, under certain circumstances the mine operator also may be held liable for the contractor's violations. The cases do not, however, provide definitive guidance regarding when a mine operator or an independent contractor or both should be held liable.

In the 1977 amendments to the 1969 Coal Act, the definition of the term "operator" was expanded to expressly include "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." (38)

This inclusion of independent contractors in the definition of "operator" reflected Congress' recognition of the case law under the prior Act which concluded that independent contractors were responsible for compliance with the Act and could be held liable for their own violations. Despite this expanded definition of "operator," however, there still remained the question of who should be held liable for violations committed by independent contractors.

**[4]** NMSHA Regulations and Guidelines on Independent Contractor Liability.

Subsequent to the enactment of the 1977 Mine Act, MSHA promulgated regulations concerning the procedures and requirements for identification of independent contractors. (39)

The purpose of the 1980 regulations was to identify independent contractors who perform services or construction at mines in order to facilitate "MSHA's enforcement policy of holding independent contractors responsible for violations committed by them or their employees." (40)

The preamble to the final rule reflects MSHA's belief that the best way to ensure the safety and health of miners is to place responsibility for compliance with the Act directly on the contractors, since "independent contractors are generally in the best position to prevent safety and health violations in the course of their own work, and to abate those violations that may occur...." (41)

Thus, since 1980, MSHA's general policy has been to enforce the Act directly against independent contractors for violations committed by them or their employees. MSHA further indicated, however, that ultimate responsibility for the safety and health of persons working at a mine falls on the production operator, and that under appropriate circumstances, MSHA may take enforcement action against production operators for violations involving independent contractors. (42)

In conjunction with the independent contractor regulations, MSHA issued and published enforcement guidelines addressing the circumstances under which a production operator may be held responsible for violations of its independent contractors. (43)

These circumstances include:

(1) when the production-operator has contributed by either an act or an omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement. (44)

These guidelines remain the most current published expression of MSHA's enforcement policy related to independent contractors and production operators. (45)


A number of cases have been decided by the Commission and federal courts involving the question of liability for violations committed by independent contractors. Early cases under the 1977 Mine Act provided that the expansion of the term "operator" to include independent contractors simply clarified what was
previously unclear under the 1969 Coal Act that independent contractors may be held liable as operators for their own violations. It was concluded, however, that this expanded definition did not change MSHA's authority to proceed against the independent contractor, the production operator, or both in appropriate circumstances.\(^{(46)}\)

In none of these early cases was MSHA trying to take enforcement action against the owner or lessee of mineral rights as a result of violations committed by independent production contractors which were contracted to operate and control entire mines. Rather, as with cases decided under the 1969 Coal Act, these 1977 Mine Act cases involved the question whether production operators could be held responsible for violations committed by independent service or construction contractors. As explained below, it has only been recently that MSHA has tried to hold mineral rights owners or lessees who are not production operators liable for violations of contractors that are wholly responsible for the operation of the entire mine.

§ 8.03. Shift in MSHA's Enforcement Policy.

[1]\(^{\text{Utah Power & Light v. Secretary of Labor.}}\)

MSHA's attempt to shift enforcement policy began with \textit{Utah Power & Light v. Secretary of Labor}.\(^{(47)}\)

There, MSHA unsuccessfully introduced the concept of holding an owner of a mine liable for violations committed by the owner's contract mine operator which was mining on the owner's property. One of MSHA's theories in \textit{Utah Power & Light} was that the owner was a "co-operator" of the mine with the contract mine operator, Emery Mining Corporation, and therefore liable for the violations.\(^{(48)}\)

MSHA based its co-operator theory on the following assertions: 1) both Emery and UP&L were involved with coal production monitoring, planning and development of the mine from the beginning of their contract relationship; 2) UP&L was the lessee of the mine; 3) at the time of the violations, UP&L owned the equipment being used by Emery in its contract mine operations; 4) UP&L and Emery mutually agreed on production goals for the mine; 5) UP&L had a resident engineer at the mine on a daily basis to make sure UP&L's mining plan was followed; and 6) UP&L reviewed mining plans before they were submitted to MSHA for approval.\(^{(49)}\)

In light of these facts, MSHA argued that the relationship between UP&L and Emery was analogous to the relationship between a production operator and its independent service contractors and that, under such circumstances, MSHA has discretion to hold either the production operator, the independent contractor, or both liable for violations of the contractor.\(^{(50)}\)

[2]\(^{\text{Secretary of Labor v. Top KAT Mining, Inc.}}\)

MSHA again recently advanced the "co-operator" theory of liability in \textit{Secretary of Labor v. Top KAT Mining, Inc.}.\(^{(51)}\)

In that case, MSHA sought to hold W-P Coal Company liable for violations committed by Top KAT, a contract mining company operating on W-P's property. This effort apparently was initiated because the contract mine operator had gone out of business prior to paying the civil penalties assessed by MSHA.\(^{(52)}\)

As with the \textit{Utah Power & Light} case, this attempt to hold W-P responsible represents a significant departure from MSHA's traditional enforcement policy involving production operators and independent service and construction contractors.
At trial in the *W-P* case, the basis of the Secretary's co-operator theory was that *W-P* exercised sufficient control and supervision over the contract mining company's operation to constitute an operator under the Act. (53)

On appeal, the Secretary sought to expand the co-operator theory to include any owner or lessee of a mine, regardless of whether the owner or lessee had any control or involvement in the operation of the mine or knowledge of the alleged violations. The Secretary's brief on appeal asserts:

> [E]ven if a party who is an owner-operator under the Mine Act chooses not to exercise significant control over the operation of its mine, it should still remain a legitimate subject for enforcement action and liability under the Mine Act. The reason for this principle is obvious – *parties who have the legal power to exercise control over a mine should be encouraged to actually exercise that power in order to promote safety and health at the mine.* (54)

Thus, according to the theory advanced in *W-P*, the Secretary apparently claims the right to cite anyone who arguably falls within the technical definition of "operator" for violations committed by independent contract mine operators. (55)

Since on appeal the Commission held that the Secretary may proceed against *W-P* as an operator involved in the mine, it remanded the case to the judge to consider issues that he did not reach initially. These issues include whether the enforcement action against *W-P* represented an unfair departure from the Secretary's past practice, whether *W-P* was accorded procedural due process attendant to MSHA inspections since *W-P* did not have an opportunity to participate in the inspection in the customary manner of an operator, and whether the Secretary's after-the-fact enforcement actions against *W-P* were implemented within the structures of the law, including the requirement that citations be issued with reasonable promptness.

**[3]** *AA&W Coals, Inc.*

MSHA's attempts to expand the number of parties which may be held liable for violations committed by independent production operators is further evident in enforcement actions taken by MSHA in response to an explosion at a mine operated by *AA&W Coals, Inc*. The explosion occurred at *AA&W*’s *Elmo No. 5* underground mine on November 30, 1993. (56)

*AA&W* operated the *Elmo No. 5* Mine under a contract with *Kyber Coal Company*, which is a subsidiary of *Berwind Natural Resources Corporation*. As a result of the accident investigation, MSHA charged *AA&W* with nine violations which MSHA contends contributed to the explosion, and approximately 200 other non-contributing violations. In addition, MSHA issued all of these citations to *Kyber* together with three other corporate affiliates of *Kyber* – *Berwind Natural Resources, Jesse Branch Coal Company and Berwind Land Company* – stating:

> As a result of its investigation, MSHA believes that all five corporations exercised sufficient control over the *Elmo No. 5* mine to meet the definition of a mine operator under the Federal Mine Safety and Health Act of 1977.

In protecting the safety and health of mine employees, control and responsibility go hand in hand . . . . That holds true for all levels of ownership and management who are in control at the mine site. (57)

Although litigation of this matter has not yet progressed beyond preliminary stages, (58) it is evident that MSHA is committed to expanding liability for violations to virtually every entity who might be even
remotely connected with contracts for mine production by independent contractors.


As the foregoing cases demonstrate, MSHA seems committed to expanding the reach of its enforcement authority beyond the limits traditionally recognized by both MSHA and the mining industry. Prime targets are those mineral rights owners or lessees who have what MSHA considers to be the "ability to control" the independent production contractor, even if such control is not exercised. Moreover, in the relatively few enforcement cases to date, MSHA has not indicated that it perceives any need to give advance notice of any intention to hold a property owner responsible for a contract mine operator's violations or to abide by the procedural requirements contained in the 1977 Mine Act. Rather, in most cases, the first notice to the property owner has occurred long after the violations have been cited and all elements of the inspection have been completed, including abatement of the alleged violations and determination of the criteria to be used for assessing civil penalties.\(^{(59)}\)

MSHA's shift in enforcement policy has wide-ranging implications for the traditional independent contract mine operator relationship. This is because MSHA's present enforcement efforts have focused on the close relationships between companies that share contractual or business relations related to mining. Therefore, while it would initially seem to behoove property owners to increase separation from contract mining companies to better ensure against being held responsible for violations committed by the operating company,\(^{(60)}\)

MSHA's intention appears to be to encourage involvement by the property owner in a manner completely inconsistent with common law principles of independent contractor relationships.\(^{(61)}\)

Recent statements by MSHA officials support this conclusion. In a statement before the House Appropriations Committee, Assistant Secretary of Labor J. Davitt McAteer stated:

MSHA's mission is to protect the safety and health of the Nation's miners. Accomplishing that mission calls for an aggressive, broad-based, enforcement policy; an enforcement policy which holds all of those who have authority over a mining operation responsible for compliance with the laws designed to protect miners' safety and health....

Safety problems at small coal mines are notorious. Workers at mines with less than 10 workers have five times the risk of fatal injuries as those at mines with over 50 workers....

A contributing factor to the problem at many small mines is: the collapse of effective oversight and regulation of the persons who most directly influence safety conditions, supervisors and foremen. Prior initiatives have failed to address this root cause, but MSHA's new efforts in this area will be devoted to restoring accountability for mine safety. Enforcement must discourage mine owners and operators from delegating safety responsibility to persons unfit or unwilling to exercise it. In order to address this issue, MSHA intends to cite owners as well as operators and others who have actual authority for the operation of the mine and the safety and health of the miners. . . .\(^{(62)}\)

Likewise, in another recent statement, MSHA Accident Investigation Program Manager Jack Tisdale stated:

MSHA recognizes that all small mine operators are not "contract" mine operators producing coal for delivery to a lessor's coal handling or preparation facilities, and that all small mine operators are not inattentive to mine safety and health. In those instances where "contract" mining operators are employed...
MSHA believes that more involvement by the leasing entities in the safety and health performance of this small underground mine segment of the industry will cause improvement in safety and health performance. (63)

In essence, with its new enforcement policy, MSHA is telling certain companies that if they have the power, by reason of ownership, close relationship, economic leverage, or otherwise, to cause the operating company to operate differently, MSHA will hold the owner responsible for violations committed by the actual mine operator. Such a policy seems to have virtually no limits. It calls for increased, rather than decreased, involvement by owners in the operations of their independent contract mine operators and thus, as indicated, contravenes traditional rules for independent contractor relationships and corporate separateness.

§ 8.05. Enforcement Policies of the Office of Surface Mining Reclamation and Enforcement.

[1] Historical Background.

Under the Surface Mining Control Reclamation Act of 1977, OSM also has been aggressively expanding the reach of its enforcement mechanisms for ensuring compliance with the provisions of the Act. Drawing upon a seemingly straightforward provision of SMCRA prohibiting the issuance of new permits to those applicants who own or control mines with unabated violations, OSM has extended this authority through administrative rulemaking and related judicial oversight.

One of Congress' stated purposes in enacting SMCRA was to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." (64)

To guarantee that this goal was met, the Act established enforcement procedures for ensuring responsible actions by the surface mining industry both during and after mining. (65)

Some provisions of SMCRA were directed at mine operators. (66)

However, most of the enforcement provisions contained in the Act were directed against the permittee of a surface mining operation. (67)

For example, the Act provides that when a permittee is determined to be in violation of any requirement of the Act, the permittee or its agent will be issued a notice of violation and given a reasonable time for abatement of the violation. (68)

The enforcement provisions further state that any permittee who violates any permit condition or any provisions of the Act may be assessed a civil penalty for such violation. (69)

The Secretary also is given authority to request that a civil action for relief, including permanent or temporary injunctive relief, be instituted whenever any permittee or its agent violates or refuses to comply with any order or decision issued by the Secretary. (70)


Despite the extensive enforcement mechanisms in SMCRA, initial enforcement efforts by OSM were considered by some to be ineffective. (71)

As a result, a number of environmental groups brought suit in the U.S. District Court for the District of Columbia to force OSM to more actively enforce the Act. (72)
The final outcome of that case was the entry of a consent order(73) which required, among other things, that OSM create a computerized "applicant/violator" monitoring system (AVS) containing a list of all permit applicants and permittees that had failed to satisfy penalties issued by OSM or state regulatory agencies, together with all persons who "owned or controlled" these applicants or permittees.(74)

Thus, with the establishment of the AVS, OSM's enforcement procedures were revised to target not only the permittees but also the "owners and controllers" of permit applicants, permittees and any other entities which had outstanding violations.(75)

After the AVS was established, OSM promulgated regulations which sweepingly define the phrases "owned or controlled" and "owns or controls," and set forth the conditions under which permit applications would be granted or denied.(76)

Two types of "ownership and control" were established under the regulations. The first classification consists of individuals or companies who are automatically deemed to be owned or controlled or owners and controllers. This group includes 1) the actual permittees of surface coal mining operations; 2) owners of more than 50 percent of an entity; and 3) individuals or entities having any other relationship which gives them the authority directly or indirectly to determine the manner in which an applicant, an operator or other entity conducts surface mining operations.(77)

The second classification covers relationships which 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."(78)

This group includes 1) officers or directors of an entity; 2) operators of surface coal mine operations; 3) persons with the ability to commit the financial or real property assets or working assets of an entity; 4) general partners in a partnership; (5) persons having between 10 and 50 percent ownership interest in an entity; or 6) persons owning or controlling the coal to be mined by another person under a lease, sublease or other contract and having the right to receive the coal after mining or the authority to determine the manner in which the person conducts surface mining operations.(79)

One of the primary purposes of the ownership and control regulations was to link the performance of contract mine operators with the mineral owning corporations that contract with them to conduct surface mining operations.(80)

The same approach was taken with respect to subsidiary companies who perform mining or reclamation and are owned or controlled by parent corporations. In essence, the ownership and control rules obliterated all principles of corporate separateness and made permit applicants and permittees responsible for the violations of anyone linked to them by any type of ownership or control relationship.(81)

Although this did not necessarily broaden the universe of entities against which OSM could take direct enforcement actions for violations of the Act and regulations, it nonetheless provided a powerful mechanism for compelling compliance with the Act and regulations.

In addition to defining "owned or controlled," the regulations also set forth the conditions under which permits would be granted, denied, renewed or revised. In essence, the regulations provide that a permit shall not be issued "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 . . . ."

Individuals and entities which have outstanding violations are listed on the AVS and thereby become permit blocked Ñ in other words, prohibited from obtaining any permits until the identified problems are fully resolved. Moreover, any entity they own or control and any entity that owns or controls them also will be permit blocked.\(^{(83)}\)

Thus, the use of the ownership and control rules in conjunction with the AVS results in permit blocks for all related entities until compliance is achieved.


In 1993, OSM issued a proposed rule to clarify and amend its original regulations concerning the AVS and the ownership and control provisions.\(^{(84)}\)

One of OSM's proposals is to specify that operators are deemed to own or control the surface mining operations which they actually conduct. Under the current regulations, operators are subject to a rebuttable presumption regarding ownership and control of their operations.\(^{(85)}\)

In addition, the proposed rule purports to clarify OSM's understanding that the term "operator" as used in SMCRA has always included permittees, mineral owners who conduct surface mining operations through the use of contract miners, and entities that mine coal under a contract, sublease, or assignment from a permittee.\(^{(86)}\)

Thus, under the proposed rule, the operator of a surface mining operation, including any contract mine operator, would now be deemed to be an owner and controller of the surface operation, or at least that part of a surface operation on which the contract operator works.\(^{(87)}\)


Prior to this proposed amendment to the ownership and control rules, permittees and owners of the surface mine property arguably were the only entities deemed responsible for compliance with the Act, regardless of whether a contract miner had been engaged to mine the coal. Under the proposed regulations, the contract mine operators would be deemed equally liable. Such liability, however, would extend only to the specific area that the contract mine operator actually controls. By the same token, if there are several contract mine operators at one site, each contract mine operator will be responsible only for that portion of the operation that it actually controls. Any contract mine operator who receives a notice of violation may have an opportunity to challenge the assertion that it controls the area involved in the notice of violation.\(^{(88)}\)

When the recent proposal for changes to OSM's rules is compared with the general trend toward increasing the scope of persons looked to for regulatory compliance, it is clear that OSM continues to be an aggressive innovator. However, OSM's innovations have typically been incorporated into administrative rulemaking with advance notice and opportunity to comment being afforded to interested persons. This approach is significantly different from MSHA's attempts to change its enforcement policies through internal determinations, ad hoc implementation, and arguments in litigation initiated by regulated parties in response to MSHA's efforts to extend liability.

§ 8.06. Conclusion.

For many years, owners of mine properties could freely contract to have mineral reserves mined by others
without being subject to governmental attempts to impose residual or vicarious liability. The contract mine operator would be completely responsible for conducting safe and environmentally lawful operations. Today, however, property owners stand to be held vicariously liable for virtually any shortfalls of the contract mine operator. Government agencies, particularly OSM through regulations, and now MSHA through enforcement policy changes, are striving to make vicarious liability the rule rather than the exception in the mining industry. Owners and operators need to carefully evaluate the structure of their legal relationships to make sure they take into consideration the realities of today’s federal enforcement on mining properties. They also need to pay close attention to present and future litigation and regulations that may affect their rights, obligations and potential liabilities.


4. Hereinafter referred to as "OSM."

5. Hereinafter referred to as "MSHA."

6. 1969 Coal Act, § 3(d).

U.S.C. § 814; civil penalties are issued against "the operator," 1969 Coal Act, § 109(a)(1); 1977 Mine Act, § 110(a) 30 U.S.C. § 820(a), and "the operator" is required to provide compensation to miners who are idled by withdrawal orders, 1969 Coal Act, § 110(a); 1977 Mine Act, § 111, 30 U.S.C. § 821.


11. The term "independent contractor" traditionally has been applied only to service and construction contractors engaged by mine operators to perform specific tasks or projects at mines. The term has not been deemed to include contract mine operators who contract with the owner or lessee of the mineral rights to operate the mine. Contract mine operators have always been treated as the "operator" of the mine and have always been responsible for regulatory compliance, as well as for all penalties associated with regulatory violations. Compare, e.g., 30 C.F.R. § 41.1(a) with 30 C.F.R. § 45.2(c).


13. For additional perspectives on the history of MSHA enforcement policy with respect to independent service and construction contractors, see Chernoff, supra; Vish, McGinley & Biddle, 1 Coal Law and Regulation § 3.13 [3] (1989).


15. 2 I.B.M.A. at 64-65.

16. Until the creation of the Mining Enforcement and Safety Administration (MESA) in 1974, the Bureau of Mines was the agency designated to carry out enforcement on behalf of the Secretary of the Interior under the 1969 Coal Act.

17. 2 I.B.M.A. at 63, 65.

18. Id. at 64.

19.
19 *Id.* at 67.

20

21 Hereinafter referred to as "the Board." The Board was the predecessor of the current Federal Mine Safety and Health Review Commission (hereinafter referred to as the "Commission").

22 On appeal, the Bureau of Mines argued that 1) Affinity was the proper party to the proceedings since it was the one and only operator of the mine; 2) even if both Affinity and Cowin were "operators" of the mine, the Bureau should have sole discretion to choose whether to proceed against one or the other, or both; and 3) an independent contractor performing work in a mine is an agent, not an "operator." 2 I.B.M.A. at 58.

23 2 I.B.M.A. at 60 (emphasis added). The Board further found, however, that an operator such as Affinity would not be immune from liability if it materially abetted the violations of its independent contractor, or actually committed the violations through a principal-agent relationship. In addition, the Board rejected the Bureau of Mines' argument that it had unlimited discretion to choose which operator to proceed against since the standard for determining liability involved a factual determination to be made on a case-by-case basis. 2 I.B.M.A. at 61. The Board's decision in *Affinity* was consistent with an earlier decision involving a Section 110(b) discrimination complaint, in which the Board also found that an independent construction contractor was an "operator" under the 1969 Coal Act and, therefore, was responsible for its own violations. *Wilson v. Laurel Shaft Construction Co.*, 1 I.B.M.A. 217, 225 (1972).

24 The standard set forth in *Affinity* for determining whether a mine owner could be held liable for violations committed by its independent contractors was refined by the Board in subsequent cases. For example, in *Peggs Run Coal Co.*, 5 I.B.M.A. 175, 182-83 (1975), the Board expanded the bases for holding a mine operator liable for a contractor's violations to include situations where employees of the mine operator were endangered by the violation and the operator could have prevented the violation with a minimum degree of diligence.

25 Hereinafter referred to as "the ABC."


27
Subsequent to the district court's decision, the Secretary of the Interior issued Order No. 2977, which instructed MESA to issue citations for violations committed by an independent construction contractor only to the operator who hired the contractor. In response to this Order, the Bituminous Coal Operators' Association (hereinafter "BCOA") filed suit in federal district court in Virginia, seeking an injunction to prevent the Secretary from enforcing the policy announced in Order No. 2977. In the BCOA case, the district court found that construction contractors were not "operators" under the 1969 Coal Act and that the Secretary did have authority to cite coal mining companies, as operators, for violations committed by their independent construction contractors. The U. S. Court of Appeals for the Fourth Circuit affirmed the district court's result, but ruled that independent construction contractors were subject to the provisions of the 1969 Coal Act and could be held liable as operators under the Act for violations committed by them. The court further found that a mine owner or lessee also could be held responsible for violations of its contractors. Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977).

Although this case involved the 1969 Coal Act, the Commission had already been established under the 1977 Mine Act to replace the Interior Board of Mine Operations Appeals.

The term "production operator" was first coined in regulations under the 1977 Mine Act to distinguish owner-operators from independent service and construction contractors performing specific tasks at the owner-operator's mine.
36 1 F.M.S.H.R.C. at 9-11.

37.

37 *Id.* at 11.

38.

38 30 U.S.C. § 802(d) (*emphasis added*).

39.


40.


41.

41 *Id.* at 44,494-495.

42.

42 *Id.*

43.

43 *Id.*

44.

44 *Id.* at 44,497.

45.

45 *See MSHA Program Policy Manual*, Vol. III, Part 45 at 6-7. MSHA recently reiterated its intention to hold production operators responsible for the overall safety and health of persons working at a mine. *See MSHA Program Information Bulletin No. P94-14* (May 20, 1994). In this bulletin, MSHA specifically recognizes that production operators are those who exercise daily control over the mine. As MSHA stated:

> Because production operators have the overall knowledge and daily control of mine operation, they are in the best position to coordinate the contractor's activities and to monitor the contractor's safety performance.

*Id.* Thus, MSHA has once again reinforced the fact that traditional regulatory and enforcement focus is on the operator in direct and immediate control of daily mine operations.

46.
1. *E.g.*, Secretary of Labor v. Old Ben Coal Co., 1 F.M.S.H.R.C. 1480, 1482 (1979), aff’d, No. 79-2367 (D.C. Cir. Jan. 6, 1981); Cyprus Indus. Minerals Co. v. F.M.S.H.R.C., 664 F.2d 1116, 1119 (9th Cir. 1981). In *Old Ben*, the Commission further determined that it had jurisdiction to review the Secretary's exercise of discretion in proceeding against a production operator for violations committed by its independent contractor, and that the standard to be applied in reviewing such decisions was whether the Secretary's decision "was made for reasons consistent with the purpose and policies of the 1977 Act." 1 F.M.S.H.R.C. at 1485.

2. Utah Power & Light v. Secretary of Labor, 9 F.M.S.H.R.C. 2028 (1987). This case involved a petition by Utah Power and Light (UP&L) for interlocutory review of an order issued by the administrative law judge denying UP&L's motion for summary judgment. The petition was denied by the Commission, but the Commission criticized MSHA for failure to articulate clearly its theory of liability and ordered clarification on remand. After the Secretary clarified his position on remand, the A.L.J. granted partial summary decision to UP&L, vacating 11 citations.

3. The Secretary's initial theory of liability was that UP&L was liable as Emery's "successor-in-interest." Thus, when the citations and orders were issued against UP&L, they indicated on their face that UP&L was being cited only as a successor-in-interest. At the time the violations were committed, the mine was owned by UP&L, but was being operated by Emery pursuant to a contract with UP&L. Subsequent to the occurrence of the violations, but prior to the issuance of the citations and orders, UP&L purchased Emery's assets and assumed direct operation of the mine. 9 F.M.S.H.R.C. at 2028.


5. *Id.* at 349. Because the Secretary had failed to initially cite and assess civil penalties against UP&L as an operator, the judge refused to rule on the Secretary's alternative co-operator theory. The judge reasoned that under the 1977 Mine Act, an enforcement action cannot be maintained absent the issuance of a citation or order to an "operator." *Id.* The judge also stressed the importance of the Secretary's duty to comply with all of the procedural requirements of the Act, such as citing the party as an operator, assessing penalties against such party, and providing an opportunity for the cited party to either contest the violation or pay the proposed penalty. *Id.* at 350-51. However, the judge in *dicta* stated that, if true, the facts relied on by the Secretary in support of its co-operator theory would generally establish that UP&L was an operator of the mine. *Id.* at 352. As it was, all 41 citations and orders were vacated as to the mine owner. *Id.*; Emery Mining Corp., 10 F.M.S.H.R.C. 1337 (A.L.J. Morris 1988).

6. 15 F.M.S.H.R.C.J. 682 (A.L.J. Melick, 1993). The full caption of this case before the administrative law judge was *Secretary of Labor v. Top KAT Mining, Inc., W-P Coal Co. and Bear Run Coal, Inc.* However, Top KAT and Bear Run were subsequently dismissed as parties and thus, on appeal, the caption became *Secretary of Labor v. W-P Coal Co.* For simplicity, the case will hereinafter be referred to as the *W-P* case.
The judge viewed W-P as an operator under the statutory definition, but rejected the notion that W-P was a "co-operator." The judge further rejected the government's effort to proceed against W-P simply for "administrative convenience" in collecting the penalty initially assessed against Top KAT. On review, the Commission agreed that W-P was not a "co-operator," but nevertheless reversed the judge, holding that "substantial evidence does not support the judge's conclusion that W-P was only superficially involved in Top KAT's operations." Secretary of Labor v. W-P Coal Co., 16 F.M.S.H.R.C. 1407, 1411 (July 1994).

15 F.M.S.H.R.C.J. at 687. The judge rejected the Secretary's co-operator theory, stating "[t]he term 'co-operator' is not defined in the Act . . . and any liability on the part of W-P in this case must rest upon a finding that it was an "operator" under Section 3(d) of the Act." Id.

Secretary of Labor v. W-P Coal Company, Docket No. WEVA 92-746, Brief for the Secretary of Labor at 33-34 (emphasis added).

The Commission did not address the Secretary's expansive argument with respect to being able to cite any owner-operator or any contractor-operator without regard to involvement in mine operations. Rather, the Commission found that "the record reveals that W-P was sufficiently involved in the mine to support the Secretary's decision to proceed against W-P." Secretary of Labor v. W-P Coal Co., 16 F.M.S.H.R.C. 1407, 1411 (July 1994). The Commission also reemphasized its prior recognition that its "review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion."


Id. (quoting Assistant Secretary of Labor J. Davitt McAteer).

Kyber Coal Company, Jesse Branch Coal Company, Berwind Natural Resources Corporation, and Berwind Land Company have all separately contested all of the violations charged against them, asserting among other things that they are not operators of AA&W's Elmo No. 5 mine.

In the case of AA&W, however, notice of charges against other entities was given at the same time as charges were made against AA&W. In addition, perhaps as a hedge on rulings by the Commission and courts that procedural shortcuts are unlawful under the Act and will not be tolerated, see Emery Mining Corp. v. Secretary of Labor, 10 F.M.S.H.R.C.J. 339 (A.L.J. Morris, 1988) and cases cited therein. MSHA
recently has given advance notice in a couple of instances of an intent to hold certain companies responsible for the actions of independent contract mine operators with whom they contract.

60. See Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir.), cert. denied, 444 U.S. 836 (1979) (civil liability may be imposed on third party where one company involves itself in the operations of another).

61. Under traditional common law principles, one who engages an independent contractor is generally insulated from liability for the acts or omissions of its independent contractor. The reason for this is that the independent contractor's work "is to be regarded as the contractor's own enterprise, and he . . . is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." Restatement (Second) of Torts § 409 (1965).


64. 30 U.S.C. § 1202(a).

65. The enforcement mechanisms given to OSM under SMCRA to ensure compliance with the Act were notices of violation; cessation orders; denials, revocations and suspensions of mining permits; civil penalties; injunctions; and criminal prosecution. 30 U.S.C. §§ 1271, 1268.

66. For example, Section 401(a) of SMCRA provides that "[a]ll operators of coal mining operations subject to the provisions of [the Act] shall pay . . . a reclamation fee . . . " into the Abandoned Mine Reclamation Fund. 30 U.S.C. § 1232(a). The term "operator" is defined in SMCRA 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." 30 U.S.C. 1291(13).

67. The term "permittee" is defined as "a person holding a permit." 30 U.S.C. § 1291(18).

69.


70.

70 30 U.S.C. § 1271(c).

71. Some of the early problems encountered by OSM included failures by permittees to abate notices of violation; failure to abate cessation orders; bond forfeitures; inability to assess and collect civil penalties as required by the Act; and issuance of new permits to entities with outstanding violations and fines. It is generally agreed that OSM failed to utilize its considerable enforcement authority to ensure that compliance occurred. See, e.g., Conrad, "The Applicant Violator System Under the Surface Mining Control and Reclamation Act of 1977: Constitutional Concerns," 8 Eastern Min. L. Inst. § 10.02 [3] (1989) (hereinafter cited as Conrad); and Means, 10 Eastern Min. L. Inst. § 6.01 (1989) (hereinafter cited as Means).

72.


73.

73 The consent order became known as the Amended Parker Order, 22 Env't Rep. Cas. (BNA) at 1217.

74.

74 More specifically, the Amended Parker Order provided for the establishment of:

[A] computerized system which contains (a) the identity of all permanent program permit applicants and permittees; (b) the identity of all persons who own or control such applicants or permittees as set forth in 30 U.S.C. § 1257; (c) the identity of all entities including all corporations, partnerships, and individuals, which are responsible for unabated cessation orders issued by OSM during the interim or permanent programs; (d) the identity of all persons who own or control such entities; (e) the identity of all entities which have failed to pay any penalty imposed by OSM under 30 U.S.C. § 1268(h) in either the interim or permanent programs; and (f) the identity of all persons who own or control such entities.

22 Env't Rep. Cas. (BNA) at 1217 (footnotes omitted). For a detailed discussion of the AVS and its genesis, see Conrad §§ 10.03-.05; Means §§ 6.01-.05.

75.

75 Under the AVS, before any permit may be issued, the issuing authority must submit the names listed on the permit application to the AVS. If any of the names listed in the application appear in the system as linked to unabated violations, the permit cannot be issued. In addition, the issuing authority is required to periodically check the system to ensure that a current permit was not improvidently issued. The permit applicant bears the burden of proving that neither the applicant nor anyone who owns or controls the
applicant is in violation of the Act or the regulations. 30 C.F.R. § 773.15(2).

76.

76 30 C.F.R. § 773.

77.

77 30 C.F.R. § 775.5(a).

78.

78 30 C.F.R. § 773.5(b).

79.

79 Id.

80.

80 For a more extensive analysis of the application of the ownership and control rules to contract miners and the impact of that rule on the owner-contract miner relationship, see Woodrum, "Liability of Mineral Owners for the Actions of Their Contractors Under the Surface Mining Control and Reclamation Act of 1977," 10 Eastern Min. L. Inst. ch. 8 (1989).

81.

81 For a further discussion of the ownership and control rules and the related regulations governing the AVS, see Means, supra note 71 at §§ 6.03-.05.

82.

82 30 C.F.R. § 773.15(b)(1). In determining whether to issue a permit, the regulatory authority will consider information concerning federal and state failure-to-abate cessation orders, unabated federal and state imminent harm cessation orders, delinquent civil penalties, bond forfeitures where the violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees and unabated violations of federal and state air and water environmental laws and regulations. Id. The regulations also contain a provision for conditional approval of a permit application if the applicant proves that the outstanding violation is in the process of being corrected. 30 C.F.R. § 773.15(b)(2).

83.

83 OSM's regulations were challenged in federal court in National Wildlife Fed'n v. Lujan, No. 88-3117 (D.D.C.)(consolidated). Parties on both sides of the environmental regulation issue objected to the regulations. The National Wildlife Federation challenged the rebuttable nature of the presumptions, arguing that those relationships should constitute per se control. The National Coal Association and American Mining Congress, on the other hand, challenged the ownership and control rules, asserting that they were inconsistent with SMCRA, ultra vires, arbitrary, capricious and in violation of due process requirements. The litigation is discussed in Means, §§ 6.06-.07, and in Means & Klise, 13 Eastern Min. L. Inst. ch. 7 (1992).

Id. at 34,653. According to OSM, this proposal was made because operators are invariably the controllers of the operations they conduct, and no entity had ever attempted to rebut the presumption that it controlled operations it conducted. OSM believes that the new proposal would clarify the intent of the current regulations that not only is a permittee deemed a controller of a surface mining operation, but so is a non-permittee entity who is removing the coal on behalf of the permittee. Such non-permittee operator, however, is deemed to control only that portion of the mine where it is actually conducting mining operations. OSM proposed to further clarify the existing regulations to specify that permittees are deemed controllers with respect to any and all operations or activities conducted on a site. Id. at 34,654.

Id. at 34,654.

Id.

It is not yet clear what affect the proposed rule would have on direct enforcement. Technically, the ownership and control rule does not affect direct liability for NOVs and cessation orders, but only liability for AVS sanctions such as permit blocks. It would seem logical, however, that a contractor who is deemed not to be responsible for violations at a site for purposes of ownership and control could not be directly liable for NOVs as an operator of the site.