



## Chapter 5

### **The Applicant Violator System in 2002: An Update on Permit Blocking Under SMCRA**

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<sup>1</sup> Although the author represents the National Mining Association (NMA) in much of the litigation that is discussed in this chapter, the views expressed herein are the views of the author alone and not necessarily the views of the NMA.

**§ 5.01. Introduction.**

It appears that there has not been an EMLF Annual Institute presentation about the Applicant Violator System (AVS)<sup>2</sup> since the 13th Annual Institute in Williamsburg, Virginia.<sup>3</sup> Looking back at the chapter presented there 10 years ago,<sup>4</sup> the contrast between the AVS then and now is amazing.

The AVS has made substantial progress since then, most particularly, in the beneficial changes that have been made in how permit-blocking is conducted. This chapter will touch briefly on some of those significant improvements.

However, virtually all of those improvements in the AVS had to be achieved through hard fought litigation. Virtually, if not absolutely, every substantial change for the better in the AVS had to be won in court by the National Mining Association, over the vigorous and unwavering opposition of the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM) that administers the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA).<sup>5</sup> Every step of the way, OSM, along with environmentalist and anti-coal groups, has fought against the meaningful reforms the coal industry has sought in order to refocus the AVS on its avowed and original purpose of preventing scofflaws from obtaining permits for new mining operations without meeting their environmental compliance obligations at their existing operations. Instead, OSM has consistently attempted to use the AVS as a blunt force instrument of both environmental remediation and revenue collection, without regard to the locus of fault or legal liability, by blacklisting people and holding permits hostage until someone – anyone who could be coerced to do so – met the regulatory agencies' demands to abate outstanding violations.

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<sup>2</sup> The AVS is an automated information system designed to match the names of applicants for permits against a list of those who own or control mines with outstanding violations.

<sup>3</sup> (Editor's note: At the 22nd Annual Institute in Baltimore, "Tim" Means received the 2002 President's Award for his significant contribution to the Foundation's legal scholarship – including 10 published chapters for the Annual Institute proceedings.)

<sup>4</sup> Means and Klise, "The Applicant Violator System Revisited: A Regulatory and Litigation Update," 13 *E. Min. L. Inst.* Ch. 7 (1992).

<sup>5</sup> 30 U.S.C. § 1201-1328 (2000).

Not only has OSM consistently sought to spread the web of AVS liability as broadly as possible, but when the U.S. Court of Appeals has held its actions unlawful, OSM has then sought to evade or minimize the intended consequences of the court's decisions, either by inaction or counteraction. The most recent examples of this can be found in OSM's newly "redesigned" ownership and control rules that took effect in federal program states on January 18, 2001,<sup>6</sup> but which remain under challenge in federal district court, as discussed below.

### § 5.02. Victories, Progress, and Lost Opportunities.

#### [1] — The SOCM Saga.

At the 13th Annual Institute, we heralded the coal industry's then-recently successful victory over the Save Our Cumberland Mountains (SOCM) plaintiffs, after the industry had intervened in the longstanding litigation SOCM had brought against OSM in 1981 to compel more intensive regulatory enforcement against the coal industry. SOCM had won a sweetheart settlement in 1985, embodied in a consent decree from the federal district court which required the agency to create the AVS and begin permit blocking.<sup>7</sup> After OSM promulgated the 1988-89 ownership and control rule trilogy<sup>8</sup> to create the extremely onerous and overreaching rules governing the AVS scheme,<sup>9</sup> and after SOCM had persuaded OSM to enter into yet another settlement agreement to compel additional enforcement measures by OSM, giving SOCM a major role in overseeing OSM's administration of the AVS, *inter alia*, the National Coal Association and American Mining Congress intervened and persuaded the U.S. Court of Appeals for the D.C. Circuit to vacate the second settlement agreement and dismiss for lack of jurisdiction SOCM's 10-year long case against OSM.<sup>10</sup> As we noted at the

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<sup>6</sup> See 65 *Fed. Reg.* 7982 (Dec. 19, 2000).

<sup>7</sup> *Save Our Cumberland Mountains, Inc. v. Clark*, 22 E.R.C. (BNA) 1217 (D.D.C. 1985).

<sup>8</sup> See 53 *Fed. Reg.* 38868 (1988); 54 *Fed. Reg.* 8982 (1989); & 54 *Fed. Reg.* 18438 (1989).

<sup>9</sup> See Means, "The Applicant Violator System: A Critical Evaluation," 10 *E. Min. L. Inst.*, Ch. 6 (1989).

<sup>10</sup> *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 911 (1993).