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Inside this issue...

D.C. CIRCUIT UPHOLDS MSHA JURISDICTION ON MINE ACCESS ROAD

by Dan Wolff and Tim Means

On July 21, the U.S. Court of Appeals for the District of Columbia Circuit handed down a decision that could potentially reverberate throughout the mining industry. In *Secretary of Labor v. National Cement Company of California*, the court held that a 4.3-mile stretch of road running through the Tejon Ranch in California from a state highway to a cement plant operated by National Cement on property leased from Tejon was, in its own right, a "mine" under the Federal Mine Safety and Health Act of 1977 ("Mine Act"). The ruling is significant because the access road is used by many persons and entities, not just National Cement, including ranchers, campers, California state authorities, and even Hollywood film crews – persons over whom National Cement has no control and who have no relation to mining. Moreover, the ruling upholds a radical new MSHA interpretation of its jurisdiction, but leaves many questions unresolved and subject to further speculation.

Background

For four decades, National Cement has operated a cement plant on the Tejon Ranch, a 270,000-acre ranch located in Los Angeles and Kern Counties, in California. The only paved access to the cement plant is a 4.3-mile stretch of road running to the cement plant gate from State Route 138. Beyond the plant, the road continues, unpaved, to other areas of the ranch. The Mine Act includes within its definition of "coal or other mine" locations that constitute "private ways and roads appurtenant" to areas of land from which minerals are extracted. In 1992, MSHA cited National Cement for failing to erect guardrails on the access road, but it subsequently vacated the citation, determining on review that the road was not a mine and that MSHA therefore lacked jurisdiction over it. In 2003, MSHA returned and cited National Cement under the same standard. MSHA vacated that citation, too, but on grounds that National Cement lacked sufficient notice that MSHA intended to assert jurisdiction anew over the road. In a follow-up letter to National Cement, MSHA made its intentions clear that it considered the road a mine and would henceforth assert jurisdiction over the road. When, in 2004, MSHA issued yet another citation for the same type of violation, that citation sparked this litigation.

continued on next page

Case History

National Cement challenged the citation on the ground that, among other things, if the access road were treated as a mine, it would find itself potentially liable for the conduct of many road users over whom it had no control. Tejon intervened, concerned primarily with the possibility that it could lose control over its road to MSHA regulators and be held liable as an "operator" in its own right if the road were deemed a mine given the Mine Act's definition of an "operator," which includes any entity that "controls" a mine.

A Commission administrative law judge ("ALJ") upheld the cited violation, agreeing with MSHA that the access road was "private" and "appurtenant to" the cement plant, and thus fell within the literal coverage of the statutory definition of a "mine." Noting that the situation was complicated by the fact that numerous persons and entities other than National Cement having no relationship to National Cement or mining also used the road, the Federal Mine Safety and Health Review Commission ("Commission") reversed on appeal, holding that MSHA's position would lead to absurd results, such as National Cement being held liable for actions on the road of other users over which it has no control. According to the Commission, an access road could only be treated as a mine in its own right if the operator of the mine facility to which the private road was appurtenant had exclusive control over the road. MSHA appealed to the D.C. Circuit, taking the position that the language of the Mine Act was clear, and that because the access road was both "private" and "appurtenant to" the cement plant, the road was a mine and everything on the road fell within its regulatory jurisdiction, end of story.

The court of appeals, in its first decision in this case, in 2007, disagreed with MSHA. Looking at the common definitions of "private" and "appurtenant," it concluded that the Mine Act was not clear, but was ambiguous. In other words, the court determined that both parties had put forward plausible interpretations. But, wary of deciding for itself how the statute *should be* interpreted given traditional notions of deference to agency policy choices, the court remanded the case to the Commission with instructions to obtain from MSHA an explanation for why the agency's position was entitled to deference in light of the noted ambiguity. In doing so, the court noted three concerns it had with MSHA's position, and expressed doubt as to MSHA's ability to address them adequately.

First, it questioned National Cement's control over the road. Second, aside from control over the road itself, the court questioned the appropriateness of subjecting National Cement to liability for the conduct of road users over whom National Cement did not exercise control. Third, the court questioned whether it was consistent with the enforcement scheme of the Mine Act for MSHA to treat Tejon as a mine operator, as it would have to if the road were deemed a mine, in light of the "control" test for operator status.

MSHA's Position on Remand

On remand, MSHA retreated from its position that everything on the road came within its jurisdiction. Instead, MSHA argued that it would treat the road as a mine, but – in light of the road's use by third parties – would refrain from asserting jurisdiction over vehicles on the road that bore no relation to the mining operation. Consistent with this approach, it said it would not hold National Cement responsible for the conduct of road users that National Cement did not control. It did contend, however, that National Cement would remain responsible for reporting all accidents on the road, and that this requirement was not "overly burdensome." As for Tejon, MSHA argued that to the extent Tejon controlled the road, it could be treated as an operator, and that was simply the consequence of entering into a business relationship with National Cement from which Tejon derived economic profit. Between the possibility of treating Tejon as an operator and not doing so, MSHA said it was consistent with the purpose of the Mine Act, i.e., the safety and health of miners who used the road, to do so.

The Commission rejected this position, primarily on the ground that it was inconsistent with longstanding Mine Act precedent treating mine operators as strictly liable for all conduct occurring on mine property. If the road were a mine, then the operator would be responsible for all vehicles and conduct on that mine property. MSHA again appealed to the D.C. Circuit.

D.C. Circuit Decision Following Remand

In its decision, the D.C. Circuit deferred to MSHA and accepted the agency's argument wholesale. The court found it reasonable for MSHA to treat the access road as a mine but not necessarily regard everything on the road as coming within the agency's jurisdiction. Adopting MSHA's reasoning, the court contrasted access roads

with extraction areas and agreed with MSHA that not everything on an access road necessarily relates to mining (as evidenced by the facts of this case) whereas, in the case of an extraction area, it usually does. Indeed, the court seemed unusually deferential, stating that it need not trouble itself with the possibility that MSHA might not actually limit its enforcement powers as it told the court it would. In the court's view, theoretical future abuses of discretion should not detract from the reasonableness of the position presented in this case and, in any event, any such future abuse could be challenged at that time. The court also agreed with MSHA that it would not be unreasonable for MSHA to treat Tejon as an operator, if necessary, given Tejon's economic benefit from National Cement's operations. The court did not actually decide whether Tejon was an "operator" for purposes of this case, however, finding that MSHA had to date only taken an enforcement action against National Cement.

Lessons Learned or Questions Left Unanswered?

Beyond the determination that the Tejon access road is a "mine," there are several key aspects to the *National Cement* decision and MSHA's new interpretation of what can be regulated as a "mine" that mine operators and those who have business or contractual relations with operators should be aware of. *First*, this decision could potentially affect not only roads, but also other facilities away from the extraction areas. The Mine Act's definition of "coal or other mine" also extends to "lands, ... structures, facilities, equipment, machines, ... or other property ... used in, or to be used in, ... the work of preparing coal or other minerals...." While that portion of the definition has received its own share of attention in the cases, the *National Cement* decision might embolden MSHA to push the envelope farther on facilities that it has traditionally not regulated. The fact that a facility is not used exclusively for mining-related purposes may become less of a factor militating against a determination that the facility is not a mine in light of *National Cement*.

Second, and of possible upside to the industry (if a silver lining is to be found anywhere in the decision), is how the "control" factor received heightened emphasis in this case. Notwithstanding the "strict liability" scheme of the Mine Act, operators who are cited for violations on access roads or facilities other than areas of extraction should pay careful attention to the actors who actually cause the violation. For example, the federal courts in recent years – including the D.C. Circuit – have held that production operators are *always* potentially on the hook for violations caused by their independent contractors, if MSHA chooses to cite them. While this will likely remain true at extraction areas – on the theory that production operators are *presumed* in control of all that goes on there – the *National Cement* decision opens the door to a contrary outcome on access roads or other facilities. While these other facilities may be "mines" within MSHA's jurisdiction, control by the production operator cannot be presumed – that is the argument that MSHA made and what the court accepted. That might prove advantageous in some future case.

Third, entities that are not operators in the traditional sense but that do business or have contractual relationships with a mine operator must be aware of their potential "operator" status and resulting Mine Act liability. Indeed, MSHA's broad assertion of authority over unwitting entities appears to be its new modus operandi, as demonstrated also by its enforcement actions against the engineering consulting firms that did mine mapping for the operator of Quecreek and designed the Crandall Canyon Mine roof control plan. The lesson here is that if you do business in the mining world, you need to be aware of the potential for MSHA to treat you as a mine operator, no matter how remote your role appears or how utterly absurd the notion appears at first blush. The line that MSHA will draw in the future is by no means clear – in fact, it is less clear than ever. What is clear, though, is that MSHA is not afraid to cast a wide net, and the courts are too often willing to allow it to keep its catch.

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MSHA'S BROKEN PLAN APPROVAL PROCESS: A CALL FOR ACTION

by Ed Green and Tim Means

For almost 40 years, each operator of an underground coal mine has been required, pursuant to the Federal Mine Safety and Health Act (Mine Act), to adopt: (1) a ventilation system and methane and dust control plan suitable to the conditions and the mining system of the coal mine; and (2) a roof control plan suitable to the roof conditions and mining system of each coal mine. The plans, including any revisions, must be approved by MSHA and must be reviewed by the operator and MSHA at least every six months. According to the legislative history of the Mine Act, these plans, whose provisions are "enforceable as if they were mandatory standards," serve a critical purpose:

> Such individually tailored plans, with a nucleus of commonly accepted practices, are the method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

The need to adopt and periodically revise ventilation and roof control plans and obtain MSHA approval of them has resulted in what may be the most extended and contentious area of controversy between coal mine operators and MSHA. There has always been an inherent tension between the requirement that the operator prepare and adopt ventilation and roof control plans and the requirement for MSHA to approve the plans. These obligations, under ideal circumstances, should result in a constructive and complementary dialogue between the operator and MSHA, as well as safe and effective mine plans. In reality, however, there is often vigorous and acrimonious disagreement between the mine operator and MSHA about the specific contents of the plans.

Longstanding procedures allow resolution of these disagreements before the Federal Mine Safety and Health Review Commission (the "Commission"). For decades, this process for resolving disputes, albeit time-consuming and cumbersome, generally worked. For several reasons, however, this system has broken down, even grinding to a virtual halt in too many situations. The article discusses why the mine plan approval system is near collapse and sounds a call for action for the system's reform.

The Basic Law: Three Key Cases

Over the years, many mine plan approval cases have been heard by Commission Administrative Law Judges ("ALJs") and a number of these have been appealed to the Commission itself. Beyond that, a few cases dealing with mine plan approval issues have been heard by the federal courts of appeals under the Mine Act's provisions for judicial review of Commission orders. We briefly describe the three leading cases below and then discuss the confusion these rulings and other events have spawned.

In *Zeigler Coal Company v. Kleppe*, a case decided 1976 under the Mine Act's predecessor (the Federal Coal Mine Health and Safety Act of 1969), the U.S. Court of Appeals for the District of Columbia Circuit noted that the agency cannot impose plan conditions on an operator:

> The statute makes clear that the ventilation plan is not formulated by [MSHA], but is "adopted by the operator." While the plan must also be approved by [MSHA's] representative, who may on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose terms. For even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required.

The court held that requirements of duly adopted ventilation plans are generally enforceable as mine-specific mandatory standards, but added:

> In so ruling, we hasten to repeat . . . that mine operators cannot be compelled to adopt the plan . . . We note . . . there may possibly be cases of substantial imposition of outrageously ultra vires plan provisions, where a court should refuse enforcement of a plan which the operator has nominally adopted. However, we are of the view that an operator should be held to the terms of any plan, once he has freely put his name to it and thereby acknowledged that the provisions there set forth are reasonable ones.

Zeigler thus teaches that the plan is that of the operator; and that while MSHA has some significant leverage in determining the plan's contents, that power is by no means unrestrained.

In a 1985 case, *Secretary of Labor v. Carbon County Coal Company*, a unanimous Commission followed and applied the analysis propounded by the *Zeigler* court:

> The requirement that [MSHA] approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to [MSHA's] desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, [MSHA] and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision.

Following the *Zeigler* and *Carbon County Coal Company* decisions, therefore, a relatively clear legal interpretation of the roles and responsibilities of operators and MSHA existed in connection with the adoption and approval of ventilation and roof control plans. Then, a 1989 decision of the D.C. Circuit, *United Mine Workers of America v. Dole*, muddied that relative clarity. The *Dole* case did not even deal with a mine plan dispute. Rather, it involved a challenge by the UMWA to the validity of new mandatory safety standards on roof bolts and roof support removal requirements. In its analysis of that issue, the court stated:

> [T]he vast bulk of requirements for achieving a roof control plan "suitable to the roof conditions and mining system of each coal mine" were left to be developed by the mine operator and MSHA. In particular, Congress left essentially all the standards for roof bolts and roof support removal to be developed exclusively through a roof plan approval process.

But in a confusing footnote, the court added that:

> We note that while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners [sic] to further consultation with [MSHA] over revisions, [MSHA] must independently exercise [its] judgment with respect to the content of such plans in connection with [the agency's] final approval of the plan." S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977).

The discussion of mine plans in *Dole*, therefore, tilted the bilateral adoption-approval process to MSHA's favor, but because it was in a mere footnote (and *dicta* at that), *Dole* did not overrule *Zeigler*.

Following *Dole*, the law regarding the operator adoption and MSHA approval process remained essentially unchanged for the next 17 years. MSHA's Program Policy Manual ("PPM") provided a well understood process for the contest of mine plan approval actions before the Commission:

> In those situations when MSHA can no longer accept a provision of an approved plan, cannot approve a provision in a new plan, or cannot approve a proposed change to an approved plan, operators should be afforded the opportunity to contest MSHA's denial of approval. Where the operator disagrees with MSHA and indicates the desire to seek a citation to contest before the . . . Commission, a citation should be issued. Normally this should be a 104(a) citation and not involve unwarrantable failure findings, unless the circumstances justify it.

Mine plan disputes continued frequently during this time, but at least the rules of the road were generally understood by both mine operators and MSHA.

Accidents, Public Pressure Lead to More Aggressive Plan Scrutiny

Although the statutory provisions for adopting and approving plans remain unaltered, with the multi-fatality accidents at the Sago, Aracoma, and Darby underground coal mines in 2006, and then especially the multi-fatality accidents at the Crandall Canyon underground coal mine in August 2007, a dramatic change took place in MSHA's administration of the mine plan approval system. Extensive media coverage of these accidents and the intense political scrutiny of a Republican Administration's MSHA by a Democratically-controlled Congress resulted in MSHA inflexibility in plan approvals and unprecedented MSHA enforcement activities which, as of this date, remain accelerated and with no limits in sight. Although this intensified enforcement has occurred in all sectors of the mining industry, the underground coal mining industry has been hardest hit.

Underground coal mine operators were also particularly affected by the sweeping provisions of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") enacted in June 2006; and the 2007 Crandall Canyon Mine collapse led to intense and unprecedented criticism of MSHA's allegedly negligent approval of the Crandall Canyon Mine's roof control plan. As recently as June 28, 2009, press reports quote MSHA's administrator for coal mine safety and health, Kevin Stricklin, as saying, "In the past, anything an operator submitted – if it was a reputable operator – we took their word for it." Of course, rote, rubber-stamp approval of ventilation and roof control plans has never been the case. At the heart of Mr. Stricklin's statement, however, is the hard truth that since Sago and compounded by the Crandall Canyon accidents, the well-understood, if imperfect, mine plan adoption and approval process has broken down altogether. The notion in *Dole* that MSHA retains final responsibility for deciding what had to be included in a mine plan has now been taken to unprecedented heights, with MSHA demanding an ever-changing and expanding multiplicity of pet provisions in such plans as part of the initial plan adoption and approval process, and then again during the mandated six-month reviews. Indeed, for many operators, unilateral demands by MSHA to revise mine plans seem to occur on almost a weekly basis, as MSHA's growing intrusiveness and inflexibility about the contents of ventilation and roof control plans has been now compounded by moving target obligations that must be included in the new Emergency Response Plans ("ERPs") born of the MINER Act. Today, the adoption and approval of mine plans is rarely a constructive, bilateral dialogue between MSHA and operators; instead, MSHA micro-manages every mine and holds the approval of mine plans hostage to its increasing demands for changes. Under MSHA's new approach, the plans have not so much been adopted by operators the way Congress intended, as forced on them by MSHA fiat under a continual threat: accede to our demands or we will shut you down.

Simply put, the principle articulated in *Zeigler* that operators cannot be compelled to adopt mine plans is little more than a fading memory. Further, as if substituting its often cookie-cutter judgment for the mine-specific engineering expertise of operators is not bad enough, MSHA has also frustrated the longstanding ability of operators to seek a plan dispute citation and resolve plan-related issues in contest proceedings before the Commission. MSHA accomplishes this very simply by either delaying or refusing to issue the citation that its own procedures require it to do. Even when a contest before the Commission can be finally initiated, an understaffed and underfunded Commission, with a current backlog of over 13,000 cases and barely a handful of ALJs to adjudicate them, has become a *de facto* stone wall for the only administrative remedy authorized by the Mine Act. The Commission is simply overwhelmed, and even expedited reviews of contests have become harder to obtain.

Process Paralysis

The result of all this on the mine plan adoption and approval process is that MSHA has become excruciatingly more slow and demanding in approving plans and revisions – *to the point of paralysis*. Even worse, however, has been what appears to be a conscious strategy by MSHA to hold operators hostage through unilateral demands for plan revisions and delays in plan approvals. MSHA, fearing criticism, wants to control every aspect of underground coal mining operations and is making up the applicable rules by dictating mine plan provisions every day that passes, if you can even get agency action on your plan.

Indeed, the situation has become so intolerable in the past year or so that one operator even complained about untimely plan approvals to the Department of Labor's Inspector General ("IG") about the problem. The IG investigated, found the complaint to be valid, and "recommend[ed] that MSHA establish a written plan for eliminating the current backlog of overdue mine plan reviews and maintaining timely reviews in the future." In a March 17, 2009 response to the IG Report, Acting MSHA Chief Michael Davis promised that MSHA:

> will issue a memo to address and improve the planning and reporting procedures for district mine plan approvals and to establish a more vigorous system for oversight from the districts and headquarters to maintain timely reviews. In the interim, MSHA will develop a staffing plan to address the current shortage of specialists in the districts and continue the Agency's efforts in increasing district staffing necessary for timely plan reviews and approvals.

While there may be something to MSHA's explanation of the need to improve planning and reporting procedures and deal with assorted specialists involved in plan reviews and approvals, we must conclude that this "corrective"

action will likely not address the real concerns and, in any respect, offers no realistic prospects for dealing with the enormity of the problem. Indeed, in a July 1, 2009 letter to Mr. Davis, Bruce Watzman, the National Mining Association's Senior Vice President for Regulatory Affairs, told MSHA that:

> The plan approval process has become increasingly complex and, unfortunately, confrontational. Critical decisions, essential to the safe and efficient operation of mines have, in some instances, been deferred until the eleventh hour resulting in operators accepting, as a prerequisite for operating, provisions that would otherwise be outside the scope of the plan review process. Unfortunately this issue is not new and despite the diligent efforts of many within MSHA to remedy this, the situation remains problematic.
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> Unfortunately, continued delays indicate that the corrective actions taken are either not being implemented or are insufficient. Either way the timeliness of the plan review and approval process remains unacceptably slow.

At bottom, the mine plan approval system is near collapse. Not only does MSHA all too often insist upon substituting, in the most excruciating detail, its own engineering and safety and health judgments *du jour* for those of the operator, even though the operator's proposals may be equally safe if not more so; but also the foot-dragging delays and bureaucratic obfuscation in the plan approval process have led to the unacceptable result exemplified in the old aphorism that "justice delayed is justice denied."

A Proposal to Fix the Broken System

The problem is bigger than any one coal mine safety and health district or district manager. It is national in scope and demands a national strategy for fixing the broken mine plan approval system. That strategy would involve an industry summit meeting or meetings with the leadership of MSHA, the Commission, Office of the Solicitor, other key Department of Labor officials, and representatives of the Office of Management and Budget. Meeting with congressional representatives interested in mine safety and health is also in order. This effort would be designed to focus attention on the emergency the underground coal mining industry is experiencing due to the paralysis of the plan approval process at MSHA, compounded by the unprecedented backlog of more than 13,000 unadjudicated cases pending before the Commission. The objective would be to obtain Obama Administration commitments, or congressional directives, or both, to end the backlogs and ensure timely and fair mine plan decisions, as well as prompt Commission adjudication of mine plan disputes when impasses exist between MSHA and operators. One aspect of this strategy could be to lobby both the Executive Branch and the Congress for more Commission ALJs to address arbitrary MSHA plan decisions and other enforcement actions that are paralyzing the underground coal industry.

In connection with this effort, the industry could also prepare and file petitions for rulemaking with MSHA and the Commission urging both agencies to extend the expedited dispute resolution provision of the ERP requirements of Section 2 of the MINER Act to MSHA roof control and ventilation plans. The MINER Act provision (codified as Mine Act § 316(b)(2)(G)), establishes an impasse procedure aimed at getting any ERP dispute between MSHA and an operator about an ERP's contents, or any refusal by MSHA to approve an ERP, before a Commission ALJ on an expedited basis. Thus, when an impasse occurs *in the judgment of the mine operator*, this provision makes it mandatory for MSHA to issue a technical citation that triggers a process for expedited Commission review. Under that process: (1) the citation must be immediately referred to an ALJ; (2) the operator and MSHA must provide all relevant material about the dispute to the ALJ within 15 days of the referral; and (3) the ALJ must issue a written decision within 15 days of the receipt of this material. Because this provision of the MINER Act is itself an "interim mandatory safety standard" under Mine Act § 301(a), a rulemaking petition seeking "an improved mandatory standard" under Mine Act § 101(a) is appropriate. We think that a rulemaking petition would also have to be filed at the Commission because, by itself, MSHA cannot issue a rule that requires Commission ALJs to do anything. Although neither MSHA nor the Commission is required to grant rulemaking petitions, the point of doing this would be at least to establish the foundation for industry discussions with the Executive Branch and congressional representatives, with the prospect of seeking judicial review if the agencies fail to provide relief.

The fact is, with its unprecedented 13,000-plus backlog of unheard cases (with predictions of further increases to come), the understaffed and underfunded Commission

is hopelessly mired in an impenetrable morass. As industry could explain in the rulemaking petitions and in its discussions with Executive Branch and congressional decisionmakers, the current situation leaves operators helpless when MSHA overreaches its authority or demands unreasonable changes in how an operator conducts its mining operation because, in a classic Catch-22: (1) you cannot go to court without getting a Commission decision first; and (2) because of the huge backlog, you cannot get a prompt decision from the Commission. Not only is justice delayed, justice denied; but also the near-total failure of the mine plan approval system has the real potential to allow unsafe conditions to persist in the dynamic and ever changing conditions of underground coal mining. Thus, quite legitimately, adoption of industry's rulemaking petitions, coupled with an enhanced complement of Commission ALJs, can be a "win-win-win-win" situation for miners, MSHA , and the Commission, as well as for underground coal mine operators.

Finally, this national strategy presents other opportunities. Even should the rulemaking petitions not be adopted, there is much to be said for a campaign to shed light on a problem that is virtually unknown outside of the underground coal mining community. A summit meeting or series of meetings could galvanize industry and its supporters to press for reform. This is important: if the current plan approval process cannot be fixed, then it should be junked; and new laws should be enacted to establish explicit mandatory health and safety standards to replace MSHA's total dominion through its reign of unchecked, effectively unreviewable, discretionary dictates that are constantly shifting. Instead, the industry would know what standards must be met and could plan accordingly.

In conclusion, the underground coal mining industry has two choices – it can continue to struggle with the current broken mine plan approval system, or it can work to seize the initiative, in the fashion we have described, thereby working to manage its own destiny. The status quo is categorically unacceptable. *Carpe diem!* The time has come to fix the broken plan approval process.

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AS IF THINGS WEREN'T ALREADY BAD ENOUGH: FLAGRANT VIOLATIONS UNDER THE MINER ACT

by Tim Means and Willa Perlmutter

Much has been written, and no doubt more will be written still, about the profound changes to the mining industry brought about when the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act") took effect on June 15, 2006. The MINER Act set out new and detailed operational requirements, particularly in the areas of emergency preparedness and rescue training for underground coal mines, but it was the Act's changes to the Mine Safety and Health Administration's ("MSHA") civil penalty system that will have the biggest impact on industry – surface and underground, coal as well as metal/non-metal, across the board. One year ago in these pages we took a look at the way the civil penalty provisions of the MINER Act would affect operators (Mining Law Monitor, Vol. 24, No. 1) and noted MSHA's apparent belief that assessing operators ever-higher civil penalties would have a direct impact on miner safety. We predicted that the new penalty provisions of the MINER Act and MSHA's aggressive approach to enforcement since 2006 together would create a perfect storm that spelled big trouble for operators. Sad to say, we were right. We have seen a clear trend toward inspectors issuing more serious paper and with it, an enormous increase in the size of penalties being proposed for any given citation or order.

MSHA has been using the increased penalties as a public relations tool, a way to show the general public and, not insignificantly, Congress that it is getting really tough with the industry. The agency has not been shy about telling the world that between 2000 and 2008, total penalties assessed rose 674 percent, from $25.1 million to $194.3 million, while the fatality rate declined by 43 percent. MSHA, of course, sees this as cause and effect: that the fatality rate declined because of the higher penalties. In reality, however, the connection between penalties and safety – if, in fact, there is such a connection – is not nearly so clear. Fatality and other injury rates have declined steadily in recent years, even before the MINER Act passed, and MSHA's most recent statistics show that between 2006 and 2008, the downward trend continued at roughly the same rate it has experienced since 2000. In fact, while coal mine

fatalities decreased in each of the two years following the tragic record of 2006 (which saw disasters at Sago and Crandall Canyon, among others), the industry has yet to return to the low rate it achieved in 2005, before the MINER Act. It seems likely to us that the gains stem as much, or more, from industry's improvements in internal safety policies and miner training as they do from MSHA's aggressive enforcement and higher penalties.

Meanwhile, largely as a result of the steady increase in penalties, contest proceedings and penalty contests have multiplied, creating such a great backlog at the Mine Safety and Health Review Commission ("the Commission"), the administrative law court with jurisdiction over MSHA cases, that cases can take a year or more to come to resolution. In a related development, MSHA has scaled back opportunities for informal conferences, which means that more penalties are being contested. And that, of course, only exacerbates the Commission's backlog and the injustice to the industry.

One area where the trends are most starkly manifest is in the issuance of "flagrant violation" penalties by MSHA.

The Flagrant Violation Provision

Certainly, the provision of the MINER Act that has given MSHA the greatest opportunity to beat its own drum has been § 8(a)(2), which ratchets up penalties for regulatory violations deemed "flagrant." The provision states: "[v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term 'flagrant' with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

Since the MINER Act was passed, MSHA has assessed approximately 100 violations as flagrant. About half of those were for violations of only two underground coal regulations, the combustible accumulations standard and the roof control standard. As of this writing there have not been any published decisions of the Commission that interpret the flagrant violation provision. There have, however, been a number of cases in which an administrative law judge of the Commission has approved a settlement between a mine operator and MSHA, in which MSHA agreed to drop the flagrant allegations and/or reduce the operator's penalty by a substantial amount. Frustratingly, although MSHA often issues a press release when it decides to cite a mine operator for flagrant violations, the agency never publicizes the decision when it agrees to remove the flagrant label or scales back its penalty.

Because there is, as of yet, no Commission precedent interpreting the provision, it is difficult for operators to know exactly what violative behavior is eligible for assessment as flagrant. The legislative history of the MINER Act in general, and of the flagrant violation provision in particular, is virtually non-existent. There is some evidence that MSHA sought the flagrant violation provision of the MINER Act as an analogue to the "violation-by-violation" scheme (also known as the "egregious penalty policy") adopted by the Occupational Safety and Health Administration. David G. Dye, then Acting Assistant Secretary of Labor (MSHA), told a Senate subcommittee in January 2006 that "[t]he Administration believes that the [then existing] statutory cap is too low to deter repeat and egregious violations of the Mine Safety and Health Act, and has urged the Congress to increase the statutory cap from $60,000 to $220,000. This would bring the Mine Act's civil monetary penalties in line with those authorized by the Occupational Safety and Health Act."

It is important to recognize that designating a violation "flagrant" only raises the potential penalty for a particular violation. Unlike, for example, a finding that a violation was the result of high negligence, or that it was significant and substantial ("S&S"), the fact that a violation is identified as flagrant does not appear to carry any further legal consequences for a mine operator. The adverse public relations impact, however, is bad enough. Additionally, while the factors that support MSHA's decision to propose a penalty under the flagrancy provision also inform the decision to put an operator on notice of a potential pattern of violations, as of yet the agency has not established any formal operational relationship between the two enforcement tools.

MSHA's Interpretation of the Flagrant Violation Provision

The Part 100 regulation that implements the flagrant violation provision simply repeats the language of the MINER Act: "[v]iolations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed

a civil penalty of not more than $220,000. For purposes of this section, a flagrant violation means 'a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.'" Because the regulation adds nothing that is not already set forth in the statute, it does not help an operator understand how MSHA arrives at the decision to call a violation "flagrant." Instead, the most comprehensive – indeed, the only – description of the reasoning behind MSHA's interpretation of the flagrant violation provision is found in the preamble to the final rule. Yet, even the preamble sheds no real light on the way in which MSHA intends to assess allegedly flagrant violations.

Because the provision does not create new violations but only enhances penalties for violations cited under existing statutory provisions, industry concern during the rulemaking process over what the flagrant provision meant, and how it would be administered, centered on trying to identify which violations would be eligible for the higher penalties. Consequently, much of the relevant portion of the preamble responded to comments that because the statute refers to "reckless or repeated failure to make reasonable efforts to eliminate a known violation," penalties for a flagrant violation should not be assessed for the same type of violation that could be assessed under § 110(a), the regular penalty provision of the Mine Act. MSHA disagreed with those who commented that penalties for flagrant behavior should only apply after an operator recklessly or repeatedly fails to abate a cited violation, particularly since, as commenters pointed out, Congress put the flagrant violation provision in the same subsection of the Act as the provision imposing daily penalties for failure to abate a cited violation. To MSHA, by contrast, the fact that Congress divided § 110(b) into two separate provisions suggested that each should be read independently of the other.

Although it has not yet been tested by the Commission or the courts, MSHA's position may be vulnerable to challenge. Section 110(b) of the Mine Act previously only imposed a daily penalty on an operator who failed to abate a cited violation. One could argue that it makes sense for § 110(b) to group together penalties for the same type of behavior – i.e., operators who do not abate cited violations within the time set by MSHA. Congress must have decided to group the two provisions together for a reason, and may have chosen to separate § 110(b) into two provisions to give MSHA two different enforcement mechanisms for the same situation. However, if the two provisions are read independently of each other, as MSHA thinks they should be, the agency could propose a flagrant penalty for a violation that had been cited for the first time, even if the violation was abated within the deadline established by the inspector. We believe that result would be contrary to Congress's intent that violations be cited as flagrant only if they exhibit "a reckless or repeated failure to make reasonable efforts to *eliminate a known* violation." (Emphasis added.)

Procedure Instruction Letter No. I08-III-2

Regrettably, the guidance MSHA has given its personnel for assessing flagrant penalties does not come from the language of the statute, nor has it been established by regulation. Rather, it is a creature purely of MSHA's invention, spelled out in Procedure Instruction Letter ("PIL") No. I08-III-2. The instructions took effect on May 29, 2008 and will expire on March 31, 2010. (The May 29, 2008 PIL is identical to, and supersedes, Procedure Instruction Letter No. I06-III-4, which was effective from October 26, 2006 to March 31, 2008.) PIL No. I08-III-2 was issued jointly by Jay Mattos (Director of the Office of Assessments), Kevin G. Stricklin (Administrator for Coal Mine Safety and Health), and Felix A. Quintana (Administrator for Metal and Nonmetal Safety and Health). It establishes two separate categories, reckless violations and repeat violations, that can incur flagrant violation penalties. According to the PIL:

> For violations that are the result of reckless failure to make reasonable efforts to eliminate a known violation:
>
> 1. Citation or order is evaluated as significant and substantial,
>
> 2. Injury or illness is evaluated as at least permanently disabling,
>
> 3. Citation or order is evaluated as an unwarrantable failure, and
>
> 4. Negligence is evaluated as reckless disregard.
>
> For violations that are the result of repeated failure to make reasonable efforts to eliminate a known violation:
>
> 1. Citation or order is evaluated as significant and substantial,
>
> 2. Injury or illness is evaluated as at least permanently disabling,

3. Type of action is evaluated as an unwarrantable failure, and

4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.

In addition, if the violation meets the above criteria it must also be evaluated to determine if it proximately caused, or could have reasonably been expected to cause death or serious bodily injury. A proximate cause is one which directly produces the injury or death and without which the injury or death would not have occurred.

As defined in the PIL, the two categories of flagrant violations thus share certain requirements: the violation must be S&S; the injury or illness that would likely result is predicted to be at least permanently disabling; and the violation must be the result of the operator's unwarrantable failure. The two categories are different from each other only in that to be "reckless," the violation must be the result of the operator's reckless disregard; and to be a "repeat" violation, there must have been at least two prior unwarrantable failures of the same standard in the previous 15 months.

At least in theory, the PIL also offers some small measure of comfort for mine operators. The PIL tells MSHA inspectors that they are supposed to document any mitigating circumstances that might affect the decision to assess a violation as flagrant but, to date, we have not seen that instruction honored. Finally, the PIL says that "[w]hen possible and appropriate, MSHA District Managers should notify mine operators and miners' representatives if a mine's enforcement history makes it eligible for issuance of flagrant violations," although it then goes on to state that the notification is not absolutely necessary before a violation can be deemed flagrant.

MSHA's PIL is Flagrantly Flawed

MSHA's enforcement of the flagrant violation provision is problematic. For one thing, the Commission has clearly defined what constitutes "unwarrantable failure" under the Mine Act, and under that definition, "unwarrantable failure" and "reckless disregard" are synonymous, or nearly so. Thus, for allegedly "reckless failures" under the PIL, MSHA would impose flagrant penalties for violations that are virtually indistinguishable from those that result from an operator's unwarrantable failure under § 104(d). However, to impose a penalty under the circumstances described by MSHA in the PIL, without distinguishing flagrant violations from any other unwarrantable failure, could be seen as arbitrary and capricious. The MINER Act already told MSHA the way Congress intended that unwarrantable failures be treated, mandating (for the first time) specific minimum penalties for operators who receive § (d)(1) and (d)(2) paper ($2000 and $4000, respectively). 30 U.S.C. § 820(a)(3). By comparison, it should be reasonable to conclude that a "flagrant" violation must be one where the operator's conduct is even more blameworthy, and thus deserving of a high penalty, than an ordinary unwarrantable failure, which is certainly very serious but by no means uncommon.

Although MSHA's instructions for each identifying category of flagrant violations require a preliminary finding that the operator unwarrantably failed to comply with a mandatory standard, neither the MINER Act nor its scant legislative history suggests that Congress intended flagrant violations and unwarrantable failures to mean the same thing. Venerable principles of statutory construction presume that Congress must have meant that flagrant violations should be something different from unwarrantable failures; otherwise it would have used the same language for both. Because it did not, operators should be able to assume that flagrant violations are ones that involve even more serious misconduct.

Congress also intended to designate as "flagrant" those violations that constitute, among other things, a "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard." The PIL seems to be at odds with the language of the MINER Act, however. While the language of the statute suggests that Congress wanted to punish an operator who allows a particular violation to continue unabated, despite repeated direction or opportunities to correct it, the PIL focuses instead on the operator who is cited for having already unwarrantably violated the same standard more than twice in 15 months. The Secretary's interpretation is not consistent with the language of the statute. When Congress talked about a "repeated failure to make reasonable efforts to eliminate a known violation," it seemed to be referring to only one violation, but one that an operator repeatedly failed to remedy. MSHA, on the other hand, would find a flagrant violation if the operator unwarrantably violates the same standard three times or more in a 15-month period, without ever looking at whether the first two violations arose from different facts altogether.

MSHA assuaged industry's concern that violations of different subsections of a particular standard might be cited as "repeat violations" for regular assessment purposes by stating in the preamble that "repeat violations" would have to be of the same "citeable" provision, but MSHA evidently was not troubled that, under MSHA's scheme, multiple violations of a broad standard could also be repeat violations, and even flagrant ones, even though the prior violations really had nothing to do with each other or with the last one being assessed. For example, for underground coal mines, MSHA would consider violations of § 75.380(f) (primary escapeway) and § 75.380(h) (secondary escapeway) separately, but three violations of the combustible accumulations standard, § 75.400, could be grouped together. MSHA could use that very broad regulation as the basis for calling the third one flagrant, even though one involved coal dust on a beltline, one was for trash in the kitchen, and the last was an order for loose coal on a piece of equipment in another part of the mine.

MSHA has not yet said for sure that it will only count prior violations as repeat-type flagrant violations once they have become final orders. We have already seen some cases in which MSHA – unlawfully, we believe – cited an operator for three or more unwarrantable failures of the same standard all at the exact same time, then used two of the orders as a basis for arguing that the third should be assessed as a flagrant violation. When considering repeat violations, themselves another new penalty enhancer under the MINER Act, MSHA has been clear that it will only count violations that have become final and beyond challenge by the operator. Surely, the same principle should apply to flagrant violation assessments under the PIL. At most, MSHA should only be able to base the penalty for a flagrant violation on previous unwarrantable failures which have been paid or become final orders. Fairness requires the agency to limit flagrant to "repeat violations" where the predicate orders are no longer subject to challenge.

Proximate Cause?

Finally, to qualify as flagrant under the MSHA PIL, the violation "must also be evaluated to determine if it proximately caused, or could have reasonably been expected to cause death or serious bodily injury." "Proximate cause" is a complex legal term of art that is generally used in negligence cases, in determining whether someone's careless actions and the result of those actions were sufficiently and causally related to justify awarding damages to the injured party. The PIL defines a "proximate cause" as "one which directly produces the injury or death and without which the injury or death would not have occurred." Our research discloses very few Mine Act cases in which proximate cause was considered at all, and there appear to be no cases that shed light on the manner in which the Commission is likely to interpret that phrase in the future, presumably because the Mine Act is a strict liability law and therefore the question of causation rarely surfaces. Nonetheless, a mine operator facing an allegation that a violation was flagrant, with the high penalty to match, would do well to look carefully at whether proximate cause could be proven by MSHA. If MSHA alleges that the violation caused an accident, the operator should ask whether the accident could have happened even if there had been no violation. If no accident occurred and the agency alleges only that the violation could reasonably be expected to cause one, the operator should be even more skeptical. Is MSHA's assumption fair? If not, the flagrant designation could be vulnerable to challenge.

* * *

Under the MINER Act, operators have faced extraordinary challenges in trying to co-exist with MSHA. MSHA's inspectors have gotten more aggressive, penalties have skyrocketed, and the opportunities to engage the agency in any reasoned discussion of alleged violations have been drastically reduced. On top of that, MSHA is now making liberal use of the flagrant violation of the MINER Act to raise penalties to unprecedented heights. In this enforcement environment (to say nothing of the economic one), it is crucial that an operator faced with a penalty for an allegedly flagrant violation scrutinize the enforcement action from every angle, with attention to every detail, to identify potential opportunities for a legal challenge. It is frustrating that MSHA personnel feel a need to use the flagrant violation provision against operators as a weapon in the agency's own struggle for the approval of Congress and the public. The one bright spot is that to date, MSHA's flagrant violation penalties have often been driven more by MSHA's quest for "good press" than by any basis in fact and law. Therefore, if you get one of these flagrant violations, prospects for successful litigation are favorable.

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MAJOR SUPREME COURT VICTORY FOR MINING INDUSTRY UNDER CLEAN WATER ACT

by Luke van Houwelingen

On June 22, the U.S. Supreme Court issued its much awaited opinion on the division of permitting authority under the Clean Water Act ("CWA") over "fill material" between the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"). In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* ("SEACC"), the Court held that because the discharge at issue was defined by the agencies' regulations as "fill material," an Alaska gold mining operation properly obtained its permit from the Corps under § 404 of the statute, rather than from EPA under the § 402 National Pollutant Discharge Elimination System ("NPDES") permit program. The Court also held that the agencies had properly concluded that EPA's new source performance standards for effluents do not apply to the discharge of fill material.

History of the Case

Petitioner Coeur Alaska planned to reopen the Kensington Gold Mine in southeast Alaska, employing the froth-flotation process, under which a significant amount of mine tailings and process wastewater remains as waste product once gold deposits are removed. The company sought a permit from the Corps to discharge slurry containing tailings from its operation into Lower Slate Lake, 45 miles north of Juneau, Alaska. The company intended to build a dam to contain the discharge, creating an impoundment in the lake. Under its disposal plan, Coeur Alaska would pump approximately 4.5 million tons of tailings into the lake over a 10 to 15 year period, raising its elevation by 50 feet and tripling its surface area from 23 to about 60 acres.

The Corps and EPA concurred that the slurry met the definition of "fill material" under the agencies' regulations because it would have the effect of raising the bottom elevation of the lake. The Corps granted the permit under § 404, which governs the discharge of "dredged or fill material" under the CWA. Although the discharge would initially kill all of the fish in the lake, the Corps concluded that the plan to use the lake as a tailings pond was the least environmentally damaging way to dispose of the mine tailings. An alternative "dry tailings" disposal method would have resulted in the permanent loss of dozens of acres of wetlands. As part of the permit, the Corps required the company to institute a reclamation plan at the close of operations, under which it would cap the tailings at the bottom of the lake with a layer of native material, reintroduce native fish, and monitor the health of the lake. The company also obtained an NPDES permit from EPA for the discharge from the dam at the lake's outfall point.

SEACC challenged the permit, arguing that the discharge was subject to new source performance standards set by EPA under § 306 of the CWA for the froth-flotation mining operations. The plaintiff also argued that any permit allowing discharge into the lake would have to be issued by EPA under § 402, and not by the Corps under § 404. The district court upheld the permit, holding that if a permit is issued for the disposal of "fill material," then the new source performance standards are inapplicable.

The Ninth Circuit reversed. The court believed that both the regulatory definition of "fill material" and the performance standards for froth-flotation mines promulgated by EPA facially appeared to cover Coeur Alaska's proposed plan of operations. It concluded, however, that the plain language of the CWA resolved the apparent conflict between those provisions and required that the EPA performance standard control. The Ninth Circuit described the § 404 permit program for "dredged or fill material" as a "secondary permit program." If EPA has adopted an effluent standard or performance standard applicable to a relevant source of pollutant, including the froth-flotation operation at issue, the court held that §§ 301 and 306 of the CWA preclude the use of a § 404 permit scheme for that discharge.

Coeur Alaska, joined by the State of Alaska, sought certiorari in the U.S. Supreme Court. Numerous *amici* filed briefs in support of both sides. The National Mining Association, for example, argued that the Ninth Circuit's decision ignored the practical realities of mining in the United States: fill material produced by mines will often contain some substance regulated by an EPA effluent limitation, but the quantities of materials produced could never qualify for permits under § 402. In many areas of the country storage within some jurisdictional water of the United States is the only feasible method of disposal, and with no legal method of disposal available, many mines would be forced to close. Although the federal government originally opposed the granting of certiorari, it supported petitioners during the briefing and at oral

argument in January. Despite the intervening change in Administration, the federal respondents did not retreat from the agencies' position that performance standards did not apply to the proposed discharge of tailings slurry at issue after the Court ordered supplemental briefing in May. In its supplemental briefing, the government even argued that, should the Court determine that the performance standards did apply, the Corps would still be the appropriate agency to permit the discharge.

The Supreme Court's Opinion

The Supreme Court reversed the Ninth Circuit. Turning first to the question of which agency was given the authority by the CWA to issue permits for the discharge of mining waste, the Court held, in a 6-3 decision authored by Justice Kennedy, that the Ninth Circuit had wrongly reallocated the division of responsibility over permits for the discharge of fill material from the Corps to EPA. The Court determined that the statute is best understood to provide that if the Corps has the authority to issue a permit under § 404, then EPA lacks the authority to do so under the NPDES program. According to the Court, any ambiguity on this issue was resolved by EPA's own regulations, which provide that discharges of dredged or fill material regulated under § 404 do not require NPDES permits from EPA. The Court accorded deference to EPA's interpretation of these regulations. The Court noted that § 404 refers to all "fill material," without qualification, and held that there is no exception to the Corps' authority over discharges of fill material even when such a discharge would otherwise be governed by EPA new source performance standards.

In so ruling, the Court acknowledged the significant burden the regulated industry would face if it had to determine not only whether a proposed discharge constitutes "fill material" under the regulations, but also whether it was subject to one of hundreds of EPA effluent standards: "The [CWA] gives no indication that Congress intended to burden industry with that confusing division of permit authority." EPA's role is instead maintained in other ways: the Court recognized that the Corps must consider the environmental consequences of every permit it issues under guidelines written by EPA, and that EPA retains the statutory authority to veto any Corps-issued permit when it determines the effects are unacceptable. In addition, EPA had issued a permit for the discharge *from* the lake into a downstream creek, subject to the strict performance standard under § 306 for new froth-flotation mining operations, under which "no discharge of process wastewater" is allowed.

The Court then turned to the question whether the Corps had violated a statutory mandate by issuing a permit not in compliance with EPA's performance standards. The Court upheld the agencies' position that those standards do not apply to discharges of fill material regulated by the Corps. Although each side in the litigation claimed that the statute unambiguously favored its interpretation, the Court concluded that both the statute and the regulations were ambiguous on this point. The Court instead deferred to the government's interpretation, as set forth in an EPA memorandum, that the standards do not apply to fill material. The Court also recognized that the agencies' past practice weighed against requiring EPA to apply its performance standards to such discharges. The Court concluded that the CWA and regulations did not contemplate that an entity would be required to obtain a permit from both EPA and the Corps, which would create confusion, delay, expense, and uncertainty in the permitting process. It determined that the Corps lawfully issued the specific permit in this case, observing that the alternative disposal method would result in a pile of tailings "twice as high as the Pentagon and cover three times as many acres," and involve the permanent destruction of dozens of acres of wetlands.

Future Implications of the Decision on § 404 Permitting

For an industry under attack from many directions in recent months, the Coeur Alaska decision offers a welcome respite. Some words of caution are appropriate, however. Although the Court found § 404's silence about § 306 to be suggestive of Congress' intent, it ultimately decided that the statute was ambiguous on the question whether new source performance standards promulgated under § 306 are applicable to discharges of fill material permitted by the Corps under § 404. The Court also observed that the regulations, too, were ambiguous. According to the Court, the agencies' formal regulations implementing §§ 306 and 404 do so without addressing the tension between them, and the provisions were not clearly reconciled by additional regulations the parties had cited. The Court instead relied in large part on an internal EPA memorandum from the director of an EPA office with responsibility for wetlands and watersheds, to the director of the regional program office with responsibility over the mine. The Court held that this memo, which it concluded had addressed and resolved in a reasonable way the agencies' practice and policy, was entitled to a measure of deference because it interpreted the agencies' own regulatory scheme.

Because that portion of the Court's opinion does not rest on a definitive interpretation of the CWA, or even the relevant regulations, the decision does not foreclose the agencies from changing their approach in the future to require discharges of tailings, slurry, and other "fill material" to comply with EPA new source performance standards. The Court endorsed a regulatory scheme that revolves around the agencies' definition of "fill material." Under the Court's decision, the agencies could move to revise the current, effects-based definition, jointly adopted by the agencies in 2002. Previously, the Corps employed a purpose-based definition that excluded pollutants discharged into water primarily to dispose of waste, and presumably the agencies retain the authority to adopt that approach again. EPA might also revoke the memorandum that the Court relied on, and attempt to replace its interpretation of the regulatory scheme with another, less favorable to mining operations. Indeed, almost immediately after the decision was issued, environmental groups began urging the Obama Administration to take both of these steps.

Then, on July 14, 2009, an EPA Region 10 official sent a letter to the Corps requesting that the Corps delay renewal of Coeur Alaska's permit for the operation at issue in the case, to allow for public notice on Coeur's extension request, and consideration of what the letter called "new information" related to the mine. EPA's attempt to intervene (after declining to veto the § 404 permit earlier) may reflect more aggressive involvement by the agency in § 404 permitting process going forward. The new EPA Administrator, Lisa Jackson, has indicated that the EPA may now be less hesitant to use its veto power, which it has only used thirteen times in the past. It remains to be seen how amenable the Corps will be to the increased EPA involvement in the permitting process: on August 17, 2009, Coeur announced that the Corps had reactivated the § 404 permit for the Kensington Mine and that it will immediately move to finalize construction of the mine. In this new and ever-changing environment, the regulated community will need to remain vigilant for agency shifts in the policies and practices on which key portions of the Supreme Court's *Couer Alaska* decision relied.

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THE ADVANTAGES TO A STRATEGIC PURCHASER TO ACQUIRE DISTRESSED ASSETS IN BANKRUPTCY

by Steve Eichel

[*Editors' Note:* From time to time, the Mining Law Monitor features articles by Crowell & Moring attorneys outside our Environment and Natural Resources Group, to acquaint you with C&M's other expertise and capabilities. The article below, by Steve Eichel of our Financial Services Group, discusses the advantages of one particular vehicle for selling a company's assets in bankruptcy – a timely topic as the mining industry, like so many others, works its way through the current economic downturn.]

During the past year, companies of all sizes, including some in the mining industry, have had to file for bankruptcy protection because they either had to restructure their indebtedness and/or did not have the liquidity to continue to operate their businesses. Under the Bankruptcy Code, a company may file for liquidation under Chapter 7 or for reorganization under Chapter 11. Under Chapter 7, the company no longer operates its business and a trustee is appointed to liquidate the debtor's assets. Under Chapter 11, the company continues to operate its business and manage its affairs. Upon the filing of a bankruptcy case, the company is referred to as a "debtor."

Due to the current economic climate, many distressed companies could not obtain financing in bankruptcy to continue their operations and have been forced to sell all or part of their business, creating an opportunity for strategic acquirers to purchase assets through the Chapter 11 process quickly and free and clear of most liens, claims and encumbrances, without assuming burdensome contracts.

A debtor may sell its assets in bankruptcy (i) in the ordinary course of business under Bankruptcy Code § 363(c) without notice or a hearing, (ii) outside the ordinary course of business, under Bankruptcy Code § 363(b), after notice and a hearing, or (iii) as part of a plan of reorganization. If a debtor seeks to sell all or part of its business (rather than just its inventory), the sale is outside the debtor's ordinary course of business. This article focuses on the advantages of purchasing assets outside the ordinary course of business under Bankruptcy Code § 363(b).

Advantages of Purchaser Acting as the Stalking Horse

Under § 363(b), a debtor may seek to sell some or all of its assets, including both tangible assets and intangible assets, such as trademarks, patents and copyrights. Once a debtor determines the assets to sell, it will usually "shop" the assets in an effort to find a "stalking horse" bidder in order to maximize the value to the debtor's estate.

A stalking horse is the bidder who executes an asset purchase agreement with the debtor, subject to an auction process and court approval. It is advantageous for a buyer to be the stalking horse bidder for several reasons. First, the stalking horse has greater access to due diligence and a longer period of time to investigate the proposed transaction. Second, the stalking horse will dictate (or at least negotiate) the terms of the deal, such as price, bidder qualifications, minimum bidding increments at an auction (if there is more than one bidder), and other conditions and terms of the asset purchase agreement, which may be to the detriment of other bidders. Third, the stalking horse may have a head start to obtain necessary financing (when and if it is available). Finally, the stalking horse will negotiate a break-up fee in the event another bidder is the successful bidder at the auction. The size of the break-up fee will vary depending on, among other things, the jurisdiction, the size and complexity of the transaction, and the interest of other buyers in the purchasing the debtor's assets. The break-up fee is paid from the proceeds of a higher or better bid for the debtor's assets and is subject to court approval. On the whole, the advantage of being the stalking horse outweighs the potential expense and the potential risk that the stalking horse will not be the ultimate purchaser of the debtor's assets.

Assets Can Be Purchased Quickly Without Shareholder Approval

Once the stalking horse is in place, the asset sale can occur relatively quickly under § 363(b). Although the debtor is only required to provide a 20-day notice of the proposed sale, the sale will likely take longer because the process is usually divided into two separate motions: (i) a motion to establish bidding and sale procedures, including protections for the stalking horse; and (ii) a motion to approve the sale. Each of these motions must be on notice to the debtor's creditors and other parties in interest. Even with the filing of two motions, the sale process under § 363(b) will likely be significantly quicker than either purchasing the debtor's business under a plan of reorganization or purchasing the business outside of bankruptcy.

In all three situations, the debtor and its advisors will spend time "shopping" the business. However, a sale under § 363(b) (a "363 Sale") avoids the time and expense related to the entire plan of reorganization process, including negotiation and formulation of a reorganization plan, disclosure statement, disclosure hearing, balloting and confirmation hearing, and creditor approval of the sale. Furthermore, a 363 Sale can be consummated merely with court approval over the objections of any party in interest, including the debtor, corporate shareholders, and secured creditors. There is no requirement that the debtor's shareholders or creditors approve the transaction. Thus, without the requirement of shareholder approval, the debtor is not required to call a shareholder meeting to sell all or substantially all of the company, which it would likely be required to do outside of bankruptcy. As a result, a 363 Sale can be completed in a short period of time by just obtaining court approval of the sale. Moreover, once the sale is consummated to a good faith purchaser, any appeal of the sale order that results in reversal or modification of the sale order does not affect the validity of the sale, unless the sale was stayed pending appeal.

Buyer Can Purchase Assets "Free and Clear"

In addition to the speed of the transaction, there are several benefits to purchasing a business or individual assets under a 363 Sale that could not be achieved outside of bankruptcy. For instance, a debtor can sell its assets "free and clear" of most liens and claims. A typical example is that a debtor may seek to sell one or more of its divisions to raise capital in order to restructure its remaining business. Section 363 permits the lender's security interest to be separated from the debtor's assets that are being sold. The lender is not harmed because it does not lose its lien. Rather, the lien attaches to the sale proceeds, and the proceeds remain with the debtor's bankruptcy estate (which consists of the debtor's assets at the time of the filing of the bankruptcy petition). The purchaser buys the debtor's assets free and clear of the lender's lien on the debtor's assets.

Buyer Can Select Contracts to Assume and Corresponding Liabilities

Moreover, a 363 Sale allows a purchaser to determine which contracts should be assumed by the debtor and assigned to the purchaser. Thus, an asset purchaser can acquire a company in bankruptcy and retain the advantageous contracts but leave the others behind. Although there are exceptions, the non-debtor party to the executory contracts with the debtor generally cannot rely on an anti-assignment provision in the contract with the debtor to object or otherwise withhold consent to the assignment.

In order to assume a contract, § 365 requires that all prior defaults must be cured at the time of assumption or within a reasonable time thereafter. The non-debtor party to an assumed contract may seek to assert costs to "cure" defaults and require the buyer to demonstrate "adequate assurance" of its ability to cure defaults or to perform under the contract. Although the cure is usually paid from the proceeds of sale, allocation of these cure costs between the buyer and the debtor is often a negotiation between the parties.

A 363 Sale allows the buyer to analyze these cure costs as well as the future costs of the contracts to be assumed and assigned. Thus, by choosing only the contracts that it wants to acquire, the purchaser can select which liabilities of the debtor to assume, if any. A buyer may agree to assume certain liabilities to make sure that there is continuity of employees and customer or supplier relationships. The ability to allocate these costs to the bankruptcy estate (through a purchase price adjustment or otherwise) will be a matter of negotiation.

Of particular interest to companies engaged in mining and other natural resource development is that sometimes a purchaser may have liability notwithstanding the sale order, including successor liability for environmental matters and "future" claims (for example, where environmental impacts may have occurred but have not yet become evident). A debtor's ability to discharge various environmental liabilities in its Chapter 11 cases can be an especially complex issue. There are few bright-line rules and, in many instances, resolution of the question of whether a debtor's obligations under state, federal or other environmental statutes are claims under Bankruptcy Code, and thus dischargeable in bankruptcy, often will require inquiry into the specific facts and circumstances of each case. Sophisticated bankruptcy, environmental and insurance counsel are crucial in determining whether these are real risks in the proposed transaction.

Through a 363 Sale, a strategic purchaser can use the bankruptcy process to acquire assets quickly, free and clear of a lender's existing liens and many other claims and encumbrances, all without having to obtain shareholder approval. In addition, a purchaser's ability to pick and choose the contracts (and corresponding liabilities) that it wants to retain is a tremendous advantage over buying assets outside of bankruptcy because it allows a strategic buyer an opportunity to purchase assets that complement or expand an existing business without assuming burdensome contracts.

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SEVEN SENIOR LAWYERS JOIN C&M'S ENVIRONMENT AND NATURAL RESOURCES PRACTICE

We are pleased to report that we have expanded our Environment & Natural Resources Group with the addition of a team of five Patton Boggs LLP partners and two senior hires from the U.S. Environmental Protection Agency and U.S. Department of the Interior. They include a team of five lawyers led by John C. Martin, former co-chair of the Patton Boggs Environmental Group; Michael Bogert, a former senior DOI official and Regional Administrator of EPA Region 10 office that oversees much of the Pacific Northwest; and Robert Meyers, the former Acting Assistant Administrator of EPA's Office of Air and Radiation. To support the growth and serve the needs of various clients, the firm has opened an office in Anchorage, AK, which will be headed by former Alaska Assistant Attorney General and energy lawyer Kyle W. Parker.

The seven senior attorneys strengthen our experience in compliance and enforcement issues under the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the Clean Air Act, the Clean Water Act, Superfund, and other laws. And the launch of our Anchorage office expands Crowell & Moring's ability to serve clients in the American West, particularly in the arena of upstream oil and gas exploration and production, mineral development, state and federal permits, regulation of public lands, and enforcement matters.

The new additions are:

Senior Counsel Michael Bogert is the former, presidentially appointed Counselor to Interior Secretary Dirk Kempthorne. In that role, he addressed ESA reform, climate change, and water rights issues. He is also the former Regional Administrator of EPA's Region 10 that oversees Alaska and other northwest states. He is a former Counsel to the Office of then Governor-Elect Arnold Schwarzenegger and also served as Chief Deputy Legal Affairs Secretary to Governor Pete Wilson of California.

Partner Amy Chasanov is an environmental litigator who has extensive experience with NEPA, the Clean Water Act, and the Oil Pollution Act. She has participated in state and federal rulemaking and litigation, and advises a range of oil and gas and other clients on environmental compliance. She is the former Deputy Policy Director at the Economic Policy Institute.

Partner John C. Martin is the former co-chair of the Patton Boggs Environment Group. He represents clients in complex litigation involving natural resources and environmental issues with a particular focus on the application of environmental regulation to the energy industry. He was formerly an attorney at DOI and the Department of Justice, where he litigated environmental and natural resources issues. He regularly represents clients in litigation related to Clean Water Act, Clean Air Act, ESA, and NEPA issues.

Partner Susan M. Mathiascheck is a recent deputy chair of the Patton Boggs Litigation Department. She advises clients in complex judicial challenges to agency actions and provides counseling on issues concerning endangered species, emergency response, property use and development, air and water emissions, and hazardous waste.

Senior Counsel Robert Meyers is the former Acting Assistant Administrator of EPA's Office of Air and Radiation. In that capacity, he oversaw implementation of the Clean Air Act, including the agency's response to the landmark case of *Massachusetts v. EPA*, as well as implementing national air quality standards and developing new renewable fuel standards. Before joining EPA, he served as Deputy Chief Counsel for Energy and Environment and Environmental Counsel for the House Energy and Commerce Committee.

Partner Kyle W. Parker advises clients in the energy and natural resource industries. A former Assistant Attorney General in the oil, gas, and mining section of the Alaska Department of Law, he provides legal and government affairs services to oil and gas companies, natural gas pipelines, and electricity generators.

Partner Duane A. Siler has substantial litigation experience under CERCLA, RCRA, the Oil Pollution Act, and other federal and state environmental laws. He advises industrial sector and energy clients on a variety of hazardous and toxic chemical issues, and assists clients in obtaining and defending critical permits for energy and natural resources projects.

Parker will be based in the Anchorage, AK, office, and the other additions will be based in Washington, D.C.

C&M Environment & Natural Resources Group

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