



U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
DIRECTIVES SYSTEM

Subject Number:

INE-4

Transmittal Number:

601

Date:

March 1, 1990

Subject: Notice of Potential Liability for an Individual Civil Penalty

Approval:

Director

1. Purpose. This Directive establishes the Office of Surface Mining Reclamation and Enforcement's (OSM's) procedures for informing corporate officials (as defined below) that they will or may be liable, under certain circumstances, for an Individual Civil Penalty (ICP). The purpose of this Directive is to establish agency enforcement procedures and not to change any substantive standards or individual rights.

2. Summary of Changes. This Directive explains agency policy and prescribes procedures for Field Offices to implement provisions of section 518(f) of the Surface Mining Control and Reclamation Act (SMCRA). This Directive has been modified and reorganized to clarify changes in policy and procedures concerning the issuance of Notices of Potential Liability for an Individual Civil Penalty, to reflect provisions of the Settlement Agreement between Save Our Cumberland Mountains, Inc., et al., and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, et al., dated January 24, 1990. (See section 7 below, "Effect on Other Documents.")

3. Definitions.

a. Corporate Official(s) means the president and the directors of a corporation and any other officer or agent who has line responsibility with respect to a mine site.

b. Individual Civil Penalty means a penalty as provided under section 518(f) of SMCRA, which states that "[w]henver a corporate permittee violates a condition of a permit . . . or fails or refuses to comply with any order incorporated in a final decision issued by the Secretary under this Act . . . any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section."

c. Knowingly means that an individual knew, or had reason to know, in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal. See 30 CFR 724.5 and 846.5.

d. Line responsibility with respect to a mine site means authority or demonstrated control over the conduct of surface coal mining operations, including the ability to directly cause the abatement of violations, and any level of supervisory responsibility over a person having such ability. (For example, the mine superintendent and each official in the superintendent's "chain of command," up to and including the chief executive officer, would have line responsibility with respect to the mine site.)

e. Willfully means that an individual acted (1) either intentionally, voluntarily, or consciously, and (2) with intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal. See 30 CFR 724.5 and 846.5.

4. Policy/Procedures.

a. Policy. It is agency policy to ensure that:

(1) For any Failure to Abate Cessation Order (FTACO) or Imminent Harm Cessation Order (IHCO) issued after the date of this Directive with respect to a site on which coal extraction had not been completed as of the time of issuance of the FTACO or IHCO, OSM uses reasonable efforts to serve on every corporate official a copy of the FTACO or IHCO and a "Notice of Potential Liability for an Individual Civil Penalty." The Notice shall inform the corporate official that an ICP will be proposed against the corporate official unless:

(a) Abatement occurs within 30 days after the issuance of the FTACO or within 30 days after the abatement date set for the IHCO, whichever is applicable; or

(b) Within 45 days after the issuance of the FTACO or within 45 days after the abatement date set for the IHCO, whichever is applicable, the corporate official provides documentation that he or she has taken all reasonable steps within his or her authority to bring about abatement of the violation.

(2) For any FTACO or IHCO issued after the date of this Directive with respect to a site on which coal extraction had been completed as of the time of issuance of the FTACO or IHCO, OSM uses reasonable efforts to serve a copy of the FTACO or IHCO and a "Notice of Potential Liability for an Individual Civil Penalty" (as described in paragraph 4.a.(1)) on the president or chief executive officer of the corporate permittee issued the FTACO or IHCO. Service of the copy of the FTACO or IHCO and the Notice on other directors, officers, or agents of the corporation is discretionary and should be decided on a case-by-case basis

depending on the evidence of the particular person's responsibility for the violation, failure, or refusal to comply at issue.

b. Procedures.

(1) Whenever an inspector issues an FTACO or IHCO to a corporate permittee after the date of this Directive with respect to a site on which coal extraction had not been completed as of the time of issuance of the FTACO or IHCO, the Field Office shall promptly conduct appropriate research to identify and locate all corporate officials for service. Such research shall include (a) a review of the permit application, the inspection and enforcement files, and the Applicant/Violator System (AVS) to identify the president of the corporate permittee, all directors, and all officers and agents who have line responsibility with respect to the mine site, and (b) such additional research (e.g., by checking with the U.S. Postal Service) as is appropriate to determine the current address for each such corporate official.

Following such research, a copy of the FTACO or IHCO, together with a completed "Notice of Potential Liability for an Individual Civil Penalty" (see Appendix 1), shall be served upon each corporate official. Service shall be by hand delivery or certified mail (restricted delivery), in accordance with the procedures set forth in Directive INE-8 for the service of Notices of Violation and Cessation Orders, or in accordance with the terms of any service contract OSM may have in place at the time.

(2) Whenever an inspector issues an FTACO or an IHCO to a corporate permittee after the date of this Directive with respect to a site on which coal extraction had been completed as of the time of issuance of the FTACO or IHCO, the inspector shall make reasonable efforts to serve a copy of the FTACO or IHCO, together with a completed "Notice of Potential Liability for an Individual Civil Penalty" (see Appendix 1), on the president or chief executive officer of the corporation and on any other officer, director, or agent who has demonstrated control over the daily conduct of the mining operation. Service shall be by hand delivery or certified mail (restricted delivery), in accordance with the procedures set forth in Directive INE-8 for the service of Notices of Violation and Cessation Orders, or in accordance with the terms of any service contract OSM may have in place at the time.

(3) Whenever an FTACO or IHCO issued to a corporation is forwarded by a Field Office for assessment of a civil penalty or for alternative enforcement pursuant to 30 CFR 845.15(b)(2), copies of the documentation provided to the corporate official under paragraph 4.b.(1) or 4.b.(2) of this Directive and related service information shall be included.

5. Reporting Requirements. Copies of the "Notice of Potential Liability for an Individual Civil Penalty" shall be included with the FTACO or IHCO referral packages transmitted for assessment and alternative enforcement.

6. References.

- a. Section 518(f) of SMCRA.
- b. 30 CFR 845.15(b)(2) and 30 CFR Part 846.
- c. Directive INE-8, "Service of Notices of Violation and Cessation Orders," dated May 19, 1983.
- d. Directive INE-30, "Alternative Enforcement Referrals for Criminal Penalties, Individual Civil Penalties, and Injunctive Relief," dated March 1, 1990.
- e. Directive INE-40, "Individual Civil Penalty Assessments," dated March 1, 1990.
- f. Settlement Agreement Between Save Our Cumberland Mountains, Inc., et al., and Manuel Lujan, Jr., Secretary of the United States Department of the Interior, et al., dated January 24, 1990.

7. Effects on Other Directives. Supersedes Directive INE-4, "Notice of Potential Liability for an Individual Civil Penalty," dated February 16, 1988.

8. Effective Date. Upon issuance.

9. Contact. Chief, Branch of Inspection and Enforcement
(202) 343-4550.

10. List of Appendices.

Appendix 1: Notice of Potential Liability for an Individual Civil Penalty Assessment Under Section 518(f) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1268(f).

Appendix 1

NOTICE OF POTENTIAL LIABILITY FOR AN INDIVIDUAL CIVIL PENALTY
ASSESSMENT UNDER SECTION 518(f) OF THE SURFACE MINING CONTROL
AND RECLAMATION ACT OF 1977, 30 U.S.C. 1268(f)

Name of Corporate Official

Title of Corporate Official

Name of Corporate Permittee

Citation Number

Permit Number

The Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to Section 518(f) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1268(f), may assess an Individual Civil Penalty against a director, officer, or agent of a corporate permittee which has violated a condition of its permit or fails to refuses to comply with a cessation order. Section 518(f), in pertinent part, provides that:

[A]ny director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties that may be imposed upon a person under [Section 518(a)]

As (insert individual's title) of the above-referenced corporate permittee, you are hereby notified that the corporation has been issued a cessation order (insert number), a copy of which is attached. You will be subject to assessment of an Individual Civil Penalty if you willfully and knowingly fail or refuse to take all reasonable steps within your legal authority to bring about abatement of the violation(s) by the corporate permittee (insert one of the following:) [for FTACO's] within 30 days after the issuance of the cessation order (or) [for IHCO's] within 30 days after the abatement date set forth in the cessation order.

In the event that any violation cited in the cessation order is not abated, you may provide, for OSM's consideration, written documentation that demonstrates that you took all reasonable steps within your authority to bring about abatement. Such documentation shall be provided (insert one of the following:) [for FTACO's] within 45 days after issuance of the cessation order (or) [for IHCO's] within 45 days of the abatement date set forth in the cessation order. Assessment of an Individual Civil Penalty does not affect OSM's

authority to assess civil penalties or take other enforcement actions against the corporate permittee or other directors, officers, or agents as well.

This notice does not constitute an assessment, but rather advises you that you are potentially liable for an Individual Civil Penalty. Because a Notice of Potential Liability for an Individual Civil Penalty Assessment is neither a notice of violation nor a cessation order under section 521 of SMCRA, nor a modification, vacation, or termination of such notice or order, no administrative review by the Office of Hearings and Appeals is provided for under the provisions of 43 CFR 4.1160. However, in the event that a Notice of Proposed Assessment for an Individual Civil Penalty is issued, you may then appeal under the provisions 30 CFR 846.17, 30 CFR 846.18, and 43 CFR 4.1300 et seq.

If you have any questions concerning this matter, you may contact:

<u>OSM ID Number</u>	<u>Authorized Representative</u>	<u>Telephone Number</u>
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(Detach along perforated line and retain for OSM records.)

Signature of Individual Served

Date Served

I certify that a copy of this notice was served upon (insert individual's name) or his/her authorized agent.

Print name of server

Signature of server

Attachment(s)