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TOPIC: MODIFICATION OF A TERMINATED NOV

INQUIRY: What restrictions at law have been found to apply to an agency's power to terminate, modify or vacate a terminated NOV? May an agency unilaterally modify an NOV which has been terminated or vacated without having to go through a formal or informal hearing? Please locate any relevant materials.

SEARCH RESULTS: In researching this issue using the COALEX Library and other LEXIS libraries, a number of Interior administrative decisions were identified that contain relevant findings. These decisions are listed below in chronological order. Copies are attached.


Headnotes: "The remedial action required in a notice of violation may be modified in the document terminating the notice if the termination clearly shows in writing the remedial action accepted by OSM as an alternative abatement."


In holding that a fourth modification of an NOV was not effective, the Board stated:

"Since abatement previously ordered had been completed in this case, OSM might have issued a new notice of violation requiring the same abatement as modification 4. OSM did not have authority, however, to extend the abatement period in this notice of violation beyond 90 days."

T & T DARBY COAL CO. v OSM, Docket No. NX 2-8-R (1982).

Darby contested NOVs issued for failing to perform work required as a result of an earlier Consent Decision. In the Consent Decision, the earlier NOVs were "affirmed as validly issued", no civil penalties were assessed "provided that within a specified period
of time...the applicant would perform certain remedial operations and provided further
that in the event said remedial operations were not performed within that period of time,
the OSM could issue new notices of violation which would not constitute res judicata...."

HARRY SMITH CONSTRUCTION CO. v OSM, 78 IBLA 27, 1983 IBLA LEXIS 6, IBLA
83-621 & 82-23 (1983).

The portion of the ALJ's decision changing a cessation order, issued for mining without
a permit, into a notice of violation was reversed and the cessation order vacated. The
Board found that while 30 U.S.C. sec. 1275(b)(Supp. IV 1980) "authorizes the Secretary
to modify a notice of violation or cessation order", the exercise "of this authority is
predicated on findings of fact after a hearing. In this case the motion to modify the
cessation order was made in OSM's post-hearing brief, could not be responded to by
Smith because post-hearing briefs were ordered simultaneously, and was granted
without any rationale by the Administrative Law Judge's decision. We cannot condone
the granting of such relief without notice to the parties at the hearing and without the
appropriate findings of fact and conclusions of law."


OSM attempted to modify its original NOV while P&K's application for review was
pending before the Hearing Division. The Board did "not deny that OSMRE has the
authority to modify an NOV pursuant to section 521(a)(5) of SMCRA, 30 U.S.C. sec.
1271(a)(5)(1982)." However, "any OSMRE modification of an NOV when an application
for review of the original NOV is filed timely would have 'no force or effect' until
approved by the Administrative Law Judge, or until jurisdiction over the subject matter is
returned to OSMRE."

Subsequent to the modification of the original NOV, the ALJ dismissed P&K's challenge
to that NOV. OSM's modification of the NOV became effective 30 days after the receipt
of the ALJ's order. "When the modified NOV became effective P&K had the right to file
an application for review [of] OSMRE's modified NOV.... In a sense, OSMRE's
modification of its original NOV created a new cause of action under SMCRA which had
not been finally adjudicated in any prior administrative proceeding. P&K's right to apply
for review of the modified NOV gave P&K an opportunity to reopen the question of
OSMRE's authority to issue the underlying NOV."

PINEVILLE PROPERTIES CORP. v OSM, 104 IBLA 258, 1988 IBLA LEXIS 36, IBLA

At the end of a 90-day period, an OSM inspector modified an existing NOV and ordered
corrective action. A month later, the inspector issued a CO. Pineville argued that the
inspector should have vacated the original NOV and issued a new one setting forth
proper abatement and timetable. OSM replied that the inspector had "issued a
modification after the end of the 90 day abatement period that clarified the options
available to the Appellant to abate the violation and avoid the issuance of a cessation order."

The Board cite to UNIVERSAL COAL, above, stating that even "if we were to rule that [the inspector's] modification was of no effect under Universal, on the basis that it imposed new and different corrective measures after the 90-day period for abatement had expired, we would nevertheless have to uphold the CO, since Pineville had taken no action to abate the violation cited in the [original] NOV." Since Pineville had taken no action to abate the violation at the end of the 90-day period, the inspector should have issued the CO rather than modifying the original NOV.


This decision is included because of its discussion of termination versus vacation of an NOV:

"[T]here is a difference between termination of an NOV, which would occur when the conditions cited have been mitigated..., and vacating an NOV, which would amount to an admission that it was not properly issued."

ATTACHMENTS

C. T & T DARBY COAL CO. v OSM, Docket No. NX 2-8-R (1982).
F. PINEVILLE PROPERTIES CORP. v OSM, 104 IBLA 258, 1988 IBLA LEXIS 36, IBLA 85-735.
G. PINEVILLE PROPERTIES CORP. v OSM, Docket No. NX 2-6-R (1985).