



COALEX STATE INQUIRY REPORT - 34

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Sue A. Shadley, Legal Analyst
Division of Reclamation
309 W. Washington Street
Indianapolis, Indiana 46204

TOPIC: INCIDENTAL BOUNDARY REVISION

INQUIRY: SMCRA, Sec. 511(a)(3) states: "Any extensions to the area covered by the permit except incidental boundary revisions must be made by application for another permit."

1. Has any state defined the phrase "incidental boundary revisions" in its regulations under SMCRA?
2. Once an extension to a permitted area is said to be incidental, what type of information is the permittee required to submit?

SEARCH RESULTS:

Legislative History

A COALEX search was conducted to examine the legislative history of the phrase "incidental boundary revisions". Since the 93rd Congress, Congressional bills have included language identical to that referenced in the inquiry at SMCRA, Sec. 511(a)(3). S. Rep. No. 402, accompanying the 93rd Congressional bill 425, did however contain slightly different interpretive language from that in subsequent House and Senate reports.

Referencing Sec. 212, Revision and Revocation of Permits, S. Rep. No. 402 states:

"Subsection (b) provides that the permittee can request a revision of the permit. The regulatory authority is to establish guidelines for the scale or extent of a revision request for which all permit application information and procedural requirements, including notice and hearing, will apply. However, (1) any revisions which propose a substantial change in the intended future use of the land (such as from a residential development to a shopping complex) or significant alterations in the Reclamation Plan (e.g., changes in treatment of surface and ground water) must, at a minimum, be subject to the permit application notice and, hearing requirements, and (2) any extensions to the area covered by the permit, other than incidental boundary revisions (such as additional footage to permit the better siting of an access road), may be accomplished only through application for new permits, not through revision applications." (S. Rep. No. 402, 93rd Cong., 1st Sess. 57 (1973))

All subsequent Congressional reports that were examined from COALEX, including the 93rd Congressional H. Rep. 11500, contained identical language to that used by the 95th Congress with the enactment of SMCRA. The applicable section of the 95th Congressional S. Rep. No. 128 states:

"Section 411. Revision of Permits



"This section establishes a process for the revision of a permit during its term as well as review by either a State regulatory authority or the Secretary of existing permits issued prior to the assumption of regulatory jurisdiction by the current regulatory authority.

"An operator may submit an application for a permit revision to the regulatory authority and within a period of time established by that agency, the application shall be approved or disapproved. The regulatory authority is to establish guidelines for procedures which may vary depending upon the scale and extent of the proposed revision. In all events, however, the process will be subject to the Act's notice and hearing requirements and a proposed revision which would extend the area covered by existing permit (other than incidental boundary revisions) is to be made through the normal permit application process.

"The regulatory authority may require revision of a permit during its term provided that it is based on a written finding and that it follows the State or Federal program's notice and hearing requirements." (S. Rep. No. 128, 95th Cong., 1st Sess. 79-80 (1977))

Federal Regulations

The permanent program regulations pertaining to permit revisions were reorganized by OSM and promulgated in final form on September 28, 1983 at 48 FR 44395 (1983). The section from SMCRA concerning incidental boundary revisions was codified at 30 CFR Sec. 774.13(d). No definition for the phrase "incidental boundary revision" was identified under the federal program.

Under the 1983 regulatory revision, a new section was promulgated, establishing minimum criteria for approval of permit revisions. OSM states, in the preamble to the 1983 ruling:

"Section 511(a)(2) of the Act does not require all the findings for issuance of a new permit to be made for each permit revision, unless the revision would include an extension to the permit area other than an incidental boundary revision. Rather, the required findings and criteria for approval may be tailored to the scope of the proposed revision, provided that all requirements of the Act and the regulatory program are met. The final rule reflects this and provides the regulatory authority the flexibility to make only those findings necessitated by the application for a revision." (48 FR 44377 (1983))

State Regulations

A COALEX search was conducted which examined state regulatory programs for provisions concerning incidental boundary revisions. Most programs cited SMCRA Sec. 511(a)(3), but went no further in terms of definition or types of information required for that particular revision. Kentucky was the only state identified by the search which listed incidental boundary revision under its section of definitions.

Kentucky, Illinois and Maryland describe incidental boundary revisions in terms of a specific number of acres relative to the size of the permitted area.



Kentucky goes further to differentiate between areas where coal is or is not to be removed; and between types of incidental boundary revisions that would be considered major or minor revisions.

Under the Illinois program, in general, the Department may determine that certain changes are minor if there is no alteration to the final reclamation or mining plan. In such case, a permit revision would not be required.

In West Virginia, under the provisions for underground mining operations, incidental boundary revisions are described in terms of operation rather than acreage. Included would be, for example, additional drift openings, shafts, boreholes and the uphill expansion of existing refuse areas.

Colorado includes incidental boundary revisions under its definition of technical revision and lists separately under its permit revisions the requirements to be met for technical revisions.

Notice and hearing requirements for permit revisions vary from state to state. Revisions in Maryland, Wyoming and North Dakota do not require hearing procedures.

Synopses Of The Above Cited State Regulatory Programs Follow:

KENTUCKY

The Kentucky regulations define "incidental boundary revisions" as follows:

"Incidental boundary revision" means an extension to a permit area that is necessary for reasons unforeseen at the time the original permit application was prepared and that is small in relation to the permit area (surface operations area for underground mining activities).

"(a) Where an extension includes new areas from which coal will be removed, it will be considered as an incidental boundary revision only if the extension is no more than ten (10) percent of the permit area acreage or five (5) acres, whichever is less.

"(b) Where an extension is for new areas not involving extraction of coal, it will be considered an incidental boundary revision only if the extension is no more than ten (10) percent of the permit area acreage (surface operations area acreage for underground mining activities) or two (2) acres,= whichever is greater.

"(c) Cumulative acreage added by successive revisions may not exceed the above limitations." (405 Kentucky Admin. Regs. 7:020E Section 1(57) (1984))

Revisions are classified as either major or minor. A revision is considered major if "the proposed change is of such scope and nature that the cabinet [Natural Resources and Environmental Protection Cabinet] determines that public notice is necessary to allow participation in the Cabinet's decision by persons who have an interest which way be



adversely affected by the proposed change." (405 Ky. Admin. Regs. 8:010 S 20(2)(a)) A revision which is not determined to be major is a minor revision.

Major revisions include, but are not limited to, incidental boundary revisions that: (1) affect new watersheds; (2) include diversions of perennial streams; and (3) include new areas from which coal will be removed, provided that such revisions will be limited to ten percent of the permit area acreage or five acres, whichever is less.

Incidental boundary revisions other than those listed above are considered to be minor revisions. Minor revisions are subject to fewer permit regulations than are major revisions. Except for incidental boundary revisions, any extensions to an area covered by a permit must be made by application for a new or amended permit.

Applications for major or minor revisions submitted after July 15, 1982 must include a basic fee of \$375. A revision which proposes an incidental boundary revision which increases the acreage in the permit, must include an additional acreage fee of \$75 per acre, or fraction thereof, with the application. No acreage fee is required for surface areas overlying underground workings which are not affected by surface operations and facilities.

Section 20 of 405 Ky. Admin. Regs. 8:010 addresses permit revisions.

ILLINOIS

Under the Illinois regulations:

"Extensions of area covered by a permit, except for incidental boundary revisions, shall be made by application of a new permit, and shall not be approved under this Part.

"Incidental boundary revisions are those which: (i) Constitute a relatively small percentage of the initial permit acreage, (ii) Are contiguous with the permit acreage, (iii) Are required for the orderly and continuous mining operation, (iv) Would be reclaimed in conformity with the initial plan= . (v) For the purpose of this section, incidental boundary changes are described as follows: (Reformatted from original)

Original Permit Acres: Maximum Size of Boundary Changes-Acres

Up to 10: 1
Up to 25: 2.5
Up to 50: 5
Up to 75: 7.5
Up to 100: 10
Over 100: 20"

(Illinois Coal Mining Regs., Sec. 1788-12(b)(5) (Amended Dec. 12,1982))

A revision to a permit must be obtained for changes in the surface coal mining or reclamation operations described in the original application and approved under the original permit, when such changes constitute a significant departure from the method of conduct of mining or reclamation operations contemplated by the original permit. Significant departures from the methods or conduct of mining or reclamation operations



include any change in the operations if such change was not contemplated or provided for in the original permit. (Id., at Sec. 1788.12(a)(1))

Whether a proposed change constitutes a "significant departure" is analyzed on a case-by-case basis. Under the Illinois program:

"A determination as to what constitutes a significant departure shall be made by the Department in consultation with the permittee. Changes which do not so alter the final reclamation or mining plan are considered minor and do not require permit revision. However, any request for such changes must be included in a written request to the Department." (Id., at Sec. 1788.12(b)(6))

The regulations list several changes which are not significant departures, such as changes of direction of mining or location of mining equipment within the permit area, and substitution of mining equipment designed for the same purpose, the use of which is not detrimental to achievement of final reclamation. (Id., at Sec. 1788.12(a)(1)(l)(vi))

An application for revision must be filed in a timely manner and may be made on the standard permit form. Only those sections of the form which pertain to the revision in question must be completed. Any application for a revision which proposes significant alterations must, at a minimum, be subject to the review, public participation, and approval or disapproval criteria, as well as the requirements concerning administrative and judicial review. (Id., at Sec. 1788.12(b)(1)(3))

MARYLAND

Permit revisions are addressed at Title 8 of the Code of Maryland Regs. at Sec. 8.13.09.08.

Incidental boundary revisions are not considered significant alternations in the original permit. However, an incidental boundary revision may not include new area that is more than 25 percent of the original permit acreage, or 5 acres,, whichever is less; or more than 250 feet from the original permit area. (Title 8, COMAR Sec. 8.13.09.08(b)(4)(a))

An application for an incidental boundary provision must be:

"(a) Submitted to the Bureau at least 5 days before the permittee desires to revise the permitted operation; (b) Accompanied by such narratives, maps, cross sections, and documentation as would be required if the revision were part of a new permit application; and (c) Approved or disapproved by the Bureau if it would have been approved or disapproved as part of a new permit application." (Id., Sec. 8.13.09.08(b)(3))

A hearing is not required for approval of incidental boundary revisions. (MD. [NAT. RES.] Code Ann., Sec. 7-505(a) (1979))

WEST VIRGINIA/UNDERGROUND MINING OPERATIONS



Any extension to an area already covered by a permit, except incidental boundary revisions, must be made by application for another permit. Incidental boundary revisions include, but are not limited to, additional areas of disturbance ancillary to permitted surface effects of underground mining operations, provided that the operator has submitted (A) adequate bond, (B) a map showing the disturbed area and facilities, and a reclamation plan. (Art. 6, WV Surface Coal Mining and Reclamation Act, Sec. 20-6-19(a)(2))

Incidental boundary revisions are limited to additional areas of disturbance directly related to underground development such as additional drift openings, shafts, boreholes and related structures and the uphill expansion of existing refuse areas. Incidental boundary revisions will not be granted for areas not uniquely related to underground mines such as coal storage, refuse disposal (except the uphill expansion of existing refuse areas) and coal haulage. (WV Surface Mining Reclamation Regs., Sec. 7D (1983))

During the term of the permit, the permittee may submit to the director an application for permit revision together with a revised reclamation plan. An application for a significant revision will be subject to all requirements of Article 6 of the West Virginia Surface Coal Mining and Reclamation Act and all regulations promulgated pursuant there= to. (Art. 6, WV Surface Coal Mining and Reclamation Act, Sec. 20-6-19(b))

COLORADO

"Technical revision" is defined as a minor change which will not cause a significant alternation in an operator's reclamation plan. The definition, found at Sec. 34-33-103(27) of the Colorado Surface Coal Mining Reclamation Act, includes "incidental permit boundary revisions". The definition is also found in the regulations at Sec. 1.04(136). A separate definition for "minor revision" is promulgated at Sec. 1.04(73) of the regulations and does not include incidental permit boundary revisions.

A revision to a permit must be required for technical revisions. An applicant for a technical revision must: (I) Place an advertisement in a local newspaper; and (ii) Make a copy of the complete application available for public inspection and copying by filing a copy of the application with the recorder at the courthouse of the county closest to the operations.

Once the Division issues a proposed decision, the applicant may request a hearing within 10 days after publication of the decision. (CO Surface Coal Mining Reclamation Regs., Sec. 2.08.4(5)(b) (1982))

An application for a technical revision, as well as any revision, must contain:

"(a) An identification of the permit by permit number or other appropriate reference which is the subject of the revision; (b) A specific description of the requested change in the term of the permit; (c) A specific description of any changes in the mining and reclamation operation which may have an effect on performance bond requirements of Rule 3; and (d) Such other information as may be necessary for the Division to determine if the proposed revision will comply with the Colorado Surface Coal Mining Reclamation and its promulgated rules. The Board or Division may reasonably request additional information to evaluate the proposed revision." (Id., at Sec. 2.08.4(4) (1982))



Technical revisions of permits are addressed at Article 33 of the Colorado Surface Coal Mining Reclamation Act, Sec. 34-33-116, and in the regulations at Sec. 2.08.4.

NORTH DAKOTA

A revision to a permit must be obtained for any proposed acreage changes from an existing permit area when necessary to accommodate revisions in surface coal mining and reclamation operations. (N.D. Admin. Code, Sec. 69-05.2-11.02(I) (1980)) Also, a permittee may request additional acreage to be included in a permit as part of a permit revision application is in the judgment of the commission, such additional acreage is considered to be an incidental boundary change to the original permit area. Such permit revision acreage approved by the commission will have the same permit term as the original permit. (Id., at Sec. 69-05.2-11.02(2))

An application for permit revision must be filed with the commission and must include: (i) A narrative describing the proposed permit revision. (ii) Appropriate maps and legal descriptions, cross sections, graphs, construction details, procedures, revised reclamation plans, and other data which affirmatively demonstrate compliance with the applicable provisions of the North Dakota Century Code. (Id., at Sec. 69-05.2-11.02(3),(4))

The commission will review each application and determine whether a "significant alteration to an existing permit" will occur. If the commission finds the revision is not a significant alteration, the application is not subject to the notice, bearing and procedural requirements. (Id., at Sec. 69-05.2-11.02(5)(a), (b))

WYOMING

Extensions to permitted acreage must be made by application for another permit with public notice, except for incidental boundary revisions. A permit may be revised without public notice or hearing for incidental boundary revisions which do not propose significant alternations in the reclamation plan. (Wy. Environmental Quality Act, Sec. 35-11-402(a),(b),(x) (1980))

The operator must notify the administrator in advance where the extension is an incidental boundary revision. A copy of the notification must be kept at the site of the operation. (Land Quality Div. of the Dept. of Environmental Quality Regs., Sec. 6 (1980))

ATTACHMENTS:

- A. Excerpt from S. Rep. No. 402, 93rd Cong., 1st Sess. 57 (1973).
- B. Excerpt from S. Rep. No. 128, 95th Cong., 1st Sess. 79-80 (1977).
- C. Preamble discussion of 30 CFR Sec. 774.13 Permit Revisions, 48 FR 44376-78 (1983).
- D. Excerpts from Kentucky Administrative Regulations, Table of Contents; and 405 Ky. Admin. Regs. 8:010 5 20 Permit Revisions.
- E. Excerpts from Illinois Coal Mining Regulations: Table of Contents; and Parts 1771, 1786, 1787 and 1788. (See Sec. 1788.12 Permit Revisions).



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- F. Excerpt from West Virginia Surface Mining Reclamation Regs, Sec. 7D, Incidental Boundary Revisions. Excerpt from Article 6, West Virginia Surface Coal Mining and Reclamation Act, Sec. 20-6-19 Permit Revision (See Sec. 20-6-19(a)(2) and (b)).
- G. Excerpt from Annotated Code of Maryland, Sec. 7-505 (1979). Excerpt from Code of Maryland Regulations, Sec. 08.13.09.08.
- H. Excerpt from Wyoming Environmental Quality Act, Sec. 35-11-402. Excerpt from Land Quality Div. of the Dept. of Environmental Quality Regs., Sec. 6 (1980).
- I. Excerpt from North Dakota Admin. Code, Sec. 69-05.2-11-02 Permit Revisions.
- J. Excerpt from Colorado Surface Coal Mining Reclamation Act, Sec. 34-33-103, and Colorado Surface Coal Mining Reclamation Regs., Sec. 2.08.4 (1982).