



COALEX STATE INQUIRY REPORT - 74
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TOPIC: CIVIL PENALTY/RECLAMATION REQUIREMENTS

INQUIRY: May a state regulatory agency impose both civil penalty and reclamation requirements upon an operator mining without a valid permit.?

SEARCH RESULTS: A search of COALEX was conducted focusing on decisions of the Interior Board of Surface Mining Appeals (the Board) interpreting the Act's application to operators conducting surface mining operations without a permit. Also included is a discussion of OSM's changes in the regulatory definition of "Permittee" (30 CFR 700.5, 30 CFR 701.5) in attempting to clarify the Secretary's interpretation of Congressional intent.

INTERIOR BOARD DECISIONS

The first Board decision dealing with the issue of whether the Secretary could issue notices of violation and cessation orders or impose civil penalties upon a surface coal mine operator operating without a permit was DELIGHT COAL CORP., 1 IBSMA 186, 86 I.D. 321 (1979).

Delight operated an underground mining operation in Wise County, Virginia. OSM issued Delight a notice of violation and three orders of cessation. One of the cessation orders alleged a violation of 6502(d) of the Act in Delight's failure to obtain a surface mine permit. Delight filed a petition for review, contesting certain elements of the notice of violation and the amounts of the proposed civil penalties. The ALJ issued a ruling from the bench concerning Delight's petition for review and assessed a penalty. However, before the ALJ issued a written order he vacated the order from the bench "in order to prevent a possible= miscarriage of justice by a misinterpretation of the law and regulations." The ALJ requested briefings from the parties on whether a person who does not have a permit to mine coal was subject to (a) 30 U.S.C. 61201 et seq. (1977) and (b) the penalty provisions of 30 CFR 700 et seq. (Id. at 192) Both parties having failed to submit briefs in accordance with the ALJ's request, the ALJ issued a written opinion in which he held that "because Delight was not a permittee' within the meaning of the Act, the civil penalty provisions of section 518 of the Act did not apply...." (Id. at 193)

The Interior Board reversed, stating that:

"Acting on Congress' stated intention that certain operational and reclamation standards apply during the initial regulatory program, the Secretary defined permittee' in 30 CFR 700.5 in such a

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way as to insure that all persons conducting surface coal mining and reclamation operations would be covered during the initial program, despite possible differences in the operation of existing state regulatory schemes...." (Id. at 198)

In conclusion, the Board stated that "the definition of permittee' adopted by the Secretary for the initial regulatory program includes those persons who, through ignorance or dishonesty, fail to get a permit from the proper regulatory authority before engaging in activities regulated by a state." (Id. at 199)

The issue was again presented to the Board in CLAYPOOL CONSTRUCTION CO., 1 IBSMA 259, 86 I.D. 486 (1979). As in DELIGHT, the ALJ in CLAYPOOL held that the Act did not apply to Claypool which was engaged in mining activities without a permit. In reversing, the Board cited its decision in DELIGHT and reiterated its conclusion that 30 CFR 700.5 was written so as to include a mining operator operating without a permit as a "permittee" and therefore subject to the performance and enforcement provisions of the Act.

FEDERAL REGULATIONS

30 CFR 700.5 defines permittee as follows:

"[A]ny individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization holding a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program or a Federal lands programs. During the initial regulatory program, the term includes persons conducting surface coal mining and reclamation operations regulated by a State under State law or conducting such operations under a mining plan approved pursuant to Part 211 of this title."

This definition was promulgated as part of the initial regulatory program December 13, 1977 (42 FR 62639) without comment as to its application to operators without permits.

OSM reworded the definition of "permittee" when it issued the permanent program regulation, on March 13, 1979 (44 FR 15320), in an effort to clarify the applicability of the Act to operators of surface coal mining operations operating without a permit.

The old definition was deleted from the initial program. The new definition was promulgated as 30 CFR 701.5. which reads as follows:

"Permittee means a person holding or required to hold a permit to conduct surface coal mining and reclamation operation issued by a State program, by the Director pursuant to a Federal program, by the Director pursuant to a Federal lands program, or, where a cooperative agreement pursuant to Section 523 of the Act has been executed, by the Director and the State regulatory authority."

In explaining the rationale of the Secretary in making the change in the definition, OSM stated:

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"Several general comments were received which expressed concern over the problem of wildcat operators, i.e., persons operating without a permit. The definition of permittee was revised to include persons required to hold a permit to make it clear that a person cannot exempt himself from the requirements of the Act by failing to obtain a permit. This continues the interpretation made and implemented by the Office during the initial program." (44 FR 14935 (MARCH 13, 1979))

In addition, OSM stated that the change was made "... to further clarify that its interpretation of the Act is that any person who mines without a permit is in violation of the Act and regulations and is subject to enforcement action under the Act." (Id. at 14935)

Therefore, this change in OSM's definition of "permittee" in the permanent program, merely represented a clarification of the Secretary's interpretation under the initial program and did not constitute a change in policy or application of the Act towards operations being conducted without permits.

Challenges to the Secretary's authority to regulate operators operating without permits subsequent to the promulgation of the new definition of "permittee" have been just as unsuccessful.

In *WEST VIRGINIA ENERGY INC.*, 3 IBSMA 301 (1981), the Board, citing *DELIGHT* and *CLAYPOOL*, concluded that "... one who should have a permit is chargeable with substantive violations even in the absence of the required permit." (Id. at 307)

Likewise in *MOUNTAIN ENTERPRISES COAL CO. v OSM*, Docket Nos. CH 1-88-R, CH 1-1-09-P (November 2, 1981), the ALJ cited *DELIGHT* in stating, "[m]ining without a licence [sic] does not produce an impediment to enforcement nor to the assessment of a civil penalty." (Id. at 12)

ATTACHMENTS

- A. 42 FR 62640 (DECEMBER 13, 1977).
- B. 44 FR 15320 (MARCH 13, 1979).
- C. 44 FR 14935 (MARCH 13, 1979).