



COALEX STATE INQUIRY REPORT – 99
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TOPIC: BURDEN OF PROOF - SHOW CAUSE ORDERS

INQUIRY: Which party bears the burden of proof in a hearing on a show cause order?

SEARCH RESULTS: Section 521(a)(4) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) states that when, on the basis of a federal inspection, the Secretary or his representative determines that a pattern of violations exists, and that those violations have been caused by the permittee's unwarranted failure to comply with the Act's requirements or with the permit conditions, "the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should be suspended or revoked. . . ." (30 USC Sec. 1271(a)(4)). Given this statutory language, the question arises as to whether, in a hearing held pursuant to a show cause order, the permittee must bear the burden of proving that the permit should not be revoked, or whether the regulatory authority must prove that the permit should be revoked.

FEDERAL REGULATIONS

OSMRE's regulations pertaining to the suspension or revocation of permits are found at 30 CFR Sec. 843.13. This regulation covers the prerequisites for the issuance of a show cause order, as well as the procedures for requesting a hearing on the order. The language of Sec. 843.13(a)(1) is similar to that found in Sec. 521(a)(4) of SMCRA, in that it requires the Director to "issue an order to a permittee requiring him or her to show cause why his or her permit and right to mine under the Act should not be suspended or revoked. . . ." (30 CFR Sec. 843.13(a)(1) (1987)) If a permittee requests a hearing to contest the show cause order, that hearing is to be conducted by the Department of the Interior, Office of Hearings and Appeals (OHA). Thus, Sec. 843.13(b) notes that the procedures to be used in a hearing on a show cause order are governed by the OHA rules, found at 43 CFR Part 4.

The rule which sets forth the allocation of the burden of proof in suspension or revocation proceedings is found at 43 CFR Sec. 4.1193, which reads as follows:

"In proceedings to suspend or revoke a permit, OSM shall have the burden of going forward to establish a prima facie case for suspension or revocation of the permit. The ultimate burden of persuasion that the permit should not be suspended or revoked shall rest with the permittee." (43 CFR Sec. 4.1193 (1987))



Thus, under the federal rules, the regulatory authority bears the burden of establishing a prima facie case that the permit should be suspended or revoked, while the permittee bears the ultimate burden of proving that his or her permit should not be suspended or revoked. In other words, the regulatory authority must show that a pattern of violations exists, but the permittee must ultimately prove that circumstances exist which explain or mitigate the pattern of violations placed into evidence by the regulatory authority.

This allocation of the burden of proof in a show cause hearing was discussed in the preamble to final 43 CFR Part 4. The Office of Hearings and Appeals noted that it had received comments from numerous parties "that Sec. 4.1193 erroneously placed the ultimate burden of persuasion in a suspension or revocation proceeding on the permittee and that such placement was inconsistent with the Administrative Procedure Act." (43 FR 34,382 (August 3, 1978)) In response to these comments, OHA defended its position by noting that both the language of Sec. 521(a)(4) and the legislative history discussing that section supported its position. Indeed, the Senate report explained the provisions of Sec. 521(a)(4) as follows:

"This section also provides for the Secretary to hold a public hearing following the issuance of an order to show cause why a permit should not be revoked or suspended pursuant to section [521]. At the hearing the permittee shall have the burden of proof to show why his permit should not be suspended or revoked." (S. Rep. No. 128, 95th Cong., 1st Sess. 96 (1977))

Thus, Congress clearly intended that the permittee bear the burden of proof in a show cause hearing, and the OHA regulations reflect that intent.

STATE REGULATIONS

A search was conducted of the state regulatory files to determine which states had adopted rules placing the ultimate burden of proof in a show cause hearing on the permittee. A majority of the state regulations located did not specifically allocate the burden of proof, but were similar to the federal regulations found at 30 CFR Sec. 843.13(a)(1).^{*} Other states have adopted regulations which allocate the burden of proof in a manner similar to that found at 43 CFR Sec. 4.1193.

^{*}FOOTNOTE: It should be noted that the COALEX library of state regulations only contains state surface mining statutes and regulations. Thus, while a state's surface mining regulations may not specifically allocate the burden of proof, other state regulations (i.e. state administrative procedure acts) may contain this information, which is not available in COALEX.

The pertinent statutes and regulations in Alabama, Alaska, Illinois, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, North Dakota, New Mexico, Texas, Virginia, West Virginia and Wyoming closely resemble those found at Sec. 521(a)(4) and Sec. 843(a)(1), with a few variations. Of the states which have adopted regulations which specifically allocate the burden of proof, the language found in regulations adopted by Iowa, Ohio, Oklahoma, and Utah is essentially identical to that found in the federal regulations at 43 CFR Sec. 4.1193. Arkansas' statute, which covers all adjudicatory hearings under the surface mining law, states that "Except



as otherwise provided by law, the person contesting a notice, order or decision in an adjudicatory public hearing shall have the burden of proof." (Arkansas Surface Coal Mining and Reclamation Act of 1979, Section 29(j))

Kentucky's regulations state that, in the case of a hearing held pursuant to the applicable show cause regulations, "the cabinet shall have the burden of persuasion to establish a case for the requested relief." These rules go on to state that "the respondent in any action shall have the burden of persuasion to establish any affirmative defense." Thus, it appears that, while the language used differs, Kentucky's regulations are similar to the federal rules in that the permittee would bear the ultimate burden of persuasion.

ATTACHMENTS

- A. 43 CFR Sec. 4.1193 (1987).
- B. 43 FR 34,382 (August 3, 1978).
- C. S. Rep. No. 128, 95th Cong., 1st Sess. 96 (1977).
- D. Alabama Code Sec. 9-16-93 (1984).
- E. 11 Alaska Annot. Code 90.617 (1983).
- F. Illinois Surface Coal Mining Land Conservation and Reclamation Act Program Regulations Sec. 1843.13 (1982).
- G. Kansas Mined Land Conservation and Reclamation Act Sec. 49-405 (1980).
- H. Louisiana Surface Mining Regulations Sec. 243.13 (1980).
- I. Maryland Annot. Code Sec. 7-507 (1986).
- J. Mississippi Surface Coal Mining and Reclamation Regulations Sec. 243.13 (1980).
- K. 10 Missouri Code of Regulations 40-7.031 (1988).
- L. Montana Code Annot. Sec. 82-4-251 (1984).
- M. North Dakota Administrative Code Sec. 69-05.2-28-09 (1980).
- N. New Mexico Coal Surface Mining Regulations Sec. 30-13 (1980).
- O. Rules of Practice and Procedure Before the Railroad Commission of Texas Sec. 051.01.01.103 (1979).
- P. Virginia Coal Surface Mining Control and Reclamation Act Sec. 45.1-245 (1981).
- Q. West Virginia Code Sec. 22A-3-17 (1985).
- R. Wyoming Environmental Quality Act Sec. 35-11-409 (1978).
- S. Arkansas Surface Coal Mining and Reclamation Act Sec. Sec. 24, 29 (1980).
- T. 400 Kentucky Administrative Regulations Sec. 1:050 (1984).
- U. Iowa Administrative Rules for Surface Coal Mining and Reclamation Operations Sec. 4.365(6) (1981).
- V. Ohio Administrative Code Sec. 1501:13-14-02 (1987).
- W. Oklahoma Rules of Practice and Procedure for the Coal Reclamation Act of 1979 Sec. 4.1192 (1984).
- X. Utah Code Sec. 843.13 (1985).