



COALEX STATE INQUIRY REPORT – 153
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TOPIC: 90-DAY ABATEMENT PERIOD - SETTING A "REASONABLE TIME" FOR ABATEMENT

INQUIRY: According to 30 CFR 843.12(b)(3) [COMAR 08.13.09.40(F)(2)(c)] the Notice of Violation (NOV) must set "a reasonable time for abatement". Please locate Interior Board of Land Appeals (IBLA) and Administrative Law Judge (ALJ) decisions which discuss the following questions: How much discretion is acceptable in setting the abatement period? How specific does the start date/end date information have to be?

SEARCH RESULTS: Using the COALEX Library in LEXIS, a number of Office of Hearings and Appeals (OHA) decisions were identified which discuss the adequacy of abatement information provided to operators in NOV's and the amount of time set for abating the violations. The identified opinions are discussed below. Copies of the opinions are attached.

Included, also, is a copy of an earlier report which discusses the extension of the 90-day abatement period for "good cause shown".

FADCO, INC. v OSM, Docket No. CH 9-29-R (1979).

In confirming the issuance of the cessation order (CO), the ALJ placed the onus for the CO on the operator stating that the "inspector set what would be a reasonable time at least initially to see what the company could do, and the inspector was never asked to extend the [abatement] time until after the time had run out."

OLD BEN COAL CO., 2 IBSMA 38, IBSMA 80-6 (1980).

In the NOV, the inspector failed to cite the proper CFR section "either by explicit reference or by description of the alleged violation." The Board reversed the ALJ decision, ruling that "The failure of an OSM inspector to set forth with reasonable specificity in a notice of violation the nature of the alleged violation and the required remedial action will result in a vacation of the notice."

MAUERSBERG COAL CO., 2 IBSMA 63, IBSMA 80-20 (1980). MAUERSBERG COAL CO. v OSM, Docket No. CH 0-51-R (1979).



An NOV was issued to the operator for mining off the permitted area. The abatement period was first set for 90 days and then changed 20 days. The ALJ ordered the abatement period extended "inasmuch as the abatement period granted was not reasonable to perform the remedial action." The Board reversed the ALJ's ruling finding that the application for temporary relief had failed to provide the required information and the applicant (Mauersberg) had failed to provide sufficient evidence.

ISLAND CREEK COAL CO., 2 IBSMA 125, IBSMA 80-23 (1980).

In this case, like in OLD BEN, above, the inspector cited the incorrect regulation in the NOV; however, here the description of the violation clearly referred to the proper section. The Board found that "A notice of violation containing an improper citation to the regulations is reasonably specific where the narrative description of the alleged violation accurately notifies the permittee of the nature of the alleged violation."

GRAFTON COAL CO., INC., 2 IBSMA 316, IBSMA 80-61 (1980).

"[I]t was [an] error for the Administrative Law Judge to vacate a notice of violation on his own motion on the grounds that it lacked reasonable specificity...when the parties expressed no confusion about the nature of the alleged violation." The ALJ's decision to vacate the NOV and CO were affirmed on other grounds.

RENFRO CONSTRUCTION CO., INC., 2 IBSMA 372, IBSMA 80-52 (1980).

"The basic purposes of an NOV are to inform the recipient of the nature and extent of circumstances at a surface coal mining and reclamation operation found to be in violation of OSM's regulatory standards, and to require certain action to eliminate those circumstances. The first purpose is served when the terms of the notice are sufficiently particular to guide the review process.... When a course of abatement action is prescribed in terms clearly related to an alleged violation, the second purpose is served. The greater OSM's precision in its composition of an NOV, the more likely it is that these criteria will be met; however, arguable ambiguities in the contents of an otherwise proper NOV do not invalidate OSM's enforcement action in the absence of a showing of actual prejudice to the recipient as a result of such ambiguities."

PHILLIPS COAL, INC. v OSM, Docket No. CH 9-213-R (1981).

The ALJ ruled that Phillips Coal was not prejudiced by the fact that the reclamation specialist had incorrectly cited "that section of the interim regulation [Phillips] had allegedly violated.

"The wording contained in the notice of violation served its notice-giving function to applicant concerning the offending diversion ditch, as well as informing applicant of precisely what had to be done to remedy its shortcoming."

ISLAND CREEK COAL CO. v OSM, Docket Nos. NX 9-106-R, NX 0-35-P (1981).



"Upon reviewing that wording employed in the pertinent notice of violation, and bearing in mind that at least one of applicant's employees accompanied the OSM reclamation specialist during all stages of this extended inspection, I find that the wording used to describe [the violations] did set forth with reasonable specificity the nature of the violations, the remedial action required, the periods of time established for abatement, and a reasonable description of those portions of that surface coal mining operation to which the notice applied."

MOUNTAIN ENTERPRISES COAL CO. v OSM, Docket Nos. CH 1-88-R, CH 1-109-R (1981).

In the initial NOV, the inspector gave the operator two months to abate the violation. Two days later, the inspector issued a modification providing six stages of reclamation; however, the inspector allowed only 10 days for each area. The ALJ vacated the CO based on these violations stating that "It appears that the inspector and the Office of Surface Mining have assumed the position that any length of time the inspector feels is reasonable to abate a violation, even if it is less than the 30 days given by the Act to appeal, is not only lawful and appropriate but justified under the Act. This concept appears to exist even if the inspector knows that the remedial action of the kind suggested is impossible during the time allotted.... I therefore find that the actions of the inspector...were premature, unreasonable, arbitrary, and capricious and outside the intention of the Act."

TURNER BROTHERS INC. v OSM, 102 IBLA 111, IBLA 86-378 (1988). TURNER BROTHERS INC. v OSM, Docket No. TU 5-31-R (1986).]

"A notice of violation must inform a party of the specific nature of the legal standard for which he is being cited, the specific conditions at the minesite which has been found to constitute a violation, and the specific manner by which the condition may be abated. Similarly a cessation order must inform a party of the particular legal standard at issue and the condition at the minesite which violates the standard. Arguable ambiguities in the contents of an otherwise proper NOV do not invalidate an enforcement action in the absence of a showing of actual prejudice to the recipient."

ATTACHMENTS

- A. FADCO, INC. v OSM, Docket No. CH 9-29-R (1979).
- B. OLD BEN COAL CO., 2 IBSMA 38, IBSMA 80-6 (1980).
- C. MAUERSBERG COAL CO., 2 IBSMA 63, IBSMA 80-20 (1980).
- D. MAUERSBERG COAL CO. v OSM, Docket No. CH 0-51-R (1979).
- E. ISLAND CREEK COAL CO., 2 IBSMA 125, IBSMA 80-23 (1980).
- F. GRAFTON COAL CO., INC., 2 IBSMA 316, IBSMA 80-61 (1980).
- G. RENFRO CONSTRUCTION CO., INC., 2 IBSMA 372, IBSMA 80-52 (1980).
- H. PHILLIPS COAL, INC. v OSM, Docket No. CH 9-213-R (1981).
- I. ISLAND CREEK COAL CO. v OSM, Docket Nos. NX 9-106-R, NX 0-35-P (1981).
- J. MOUNTAIN ENTERPRISES COAL CO. v OSM, Docket Nos. CH 1-88-R, CH 1-109-R (1981).



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- K. TURNER BROTHERS INC. v OSM, 102 IBLA 111, IBLA 86-378 (1988).
- L. TURNER BROTHERS INC. v OSM, Docket No. TU 5-31-R (1986).
- M. COALEX STATE INQUIRY REPORT - 110, "Extension of the 90-day abatement period for 'good cause shown'" (1989) which includes COALEX State Inquiry Report 11, "PL 95-87 Section 521(a)(3) - 90-day abatement period" (1984).