



COALEX STATE INQUIRY REPORT – 159
February 1990 [Updated July, 1991]

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TOPICS: REVIEW OF PERMIT APPLICATIONS; SUBSIDENCE [Includes Reports 101, 122, 135 & 151]

INQUIRY: Is there any material which discusses the regulatory authority (RA)'s responsibility in reviewing permit applications? In particular, how does the RA verify subsidence information?

SEARCH RESULTS: Research consisted of using the COALEX Library and the other materials available in LEXIS as well as prior COALEX State Inquiry Reports. No materials were identified which specifically addressed the question of the RA's responsibility to review subsidence information in the permit application. The materials found address the following major points:

- a. The RA's general responsibility in processing permits;
- b. Responsibility of the applicant to provide sufficient information on the application for a mining permit;
- c. RA's responsibility to obtain information from other agencies; and
- d. General information on subsidence control and a survey of related state regulations.

FEDERAL REGISTER NOTICES

1. 47 FR 27694 (JUNE 25, 1982). Proposed rule. Permitting. [Excerpts.]

The additions, revisions and deletions were proposed "to clarify permit requirements and procedures for the applicant."

Two new definitions were proposed in place of the definition of "complete application":
"administratively complete permit application " and "complete and accurate permit application."

"An administratively complete permit application would contain all information necessary to begin the processing of a permit application and to provide for public review. This review would not be cursory, but would be a review to determine if additional material would be needed prior to public review and technical analysis."

"A 'complete and accurate permit application' would contain all the information needed to issue a permit. Thus, a review to determine that the application is 'complete and accurate' would require



a detailed examination and evaluation of all data and material in the application to determine whether all the regulatory requirements are satisfied and that all the program requirements are met. A 'complete and accurate permit application' would include information resulting from an informal conference or hearing or other information determined as result of the public participation process which would become part of the record concerning the permit application."

2. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting. [Excerpts.]

These final rules revised the permanent program rules pertaining to: (1) the processing of permits for surface coal mining operations; (2) the general contents of permit applications; and (3) the legal, financial, compliance, and related information requirements of applications.

In the final rule, the word "permit" was dropped from the terms being defined; the terms used are "'administratively complete application' and 'complete and accurate application'....The terms will then be general enough to apply to permits, revisions, renewals, and transfers, sales, and assignments of permit rights if specified in the individual rules relating to those subjects."

In addition, OSM accepted the suggestion of one commenter and amended the term "complete and accurate application" to specify that it includes all information that is necessary "to make a decision on permit issuance." The change recognizes that "although a permit must be complete and accurate prior to approval, a complete and accurate application would not necessarily guarantee issuance of a permit if the regulatory authority makes findings which would be the basis for the denial of a permit. The final rule also clarifies that the regulatory authority is the entity to determine when an application is 'administratively complete' and 'complete and accurate'."

PRIOR COALEX REPORTS

3. COALEX STATE INQUIRY REPORT - 101, "Permit information re. the right to subside" (December 20, 1988).

This survey indicates which of the eight states queried require specific information concerning the right to subside property as part of the permit application and which states obtain this information from the right to mine documentation as part of the "right of entry" section of the permit application.

4. COALEX STATE INQUIRY REPORT - 122, "Permitting -- (A) Permit application approval process; (B) Impacts on areas outside the permit boundary" (July 28, 1989).

The main part of this report responds to the question of whether the RA must engage in independent information gathering or simply review and evaluate the information provided by the applicant. Included are (a) a sampling of federal and corresponding state regulations which indicate when other state and federal agencies need to be contacted and when independent entities may be utilized; and (b) several relevant cases.



5. COALEX STATE INQUIRY REPORT - 135, "Definition of mine stability" (January 8, 1990).

This report includes legislative and regulatory history materials which discuss subsidence control. No specific discussion of the phrase "maximum mine stability" was identified.

6. COALEX STATE SIGNIFICANT ISSUE REPORT - 151, "Subsidence: An Oversight of Significant Issues" (September, 1990).

The included in this report are discussions of state subsidence damage and right to mine regulations.

ADDITIONAL OPINIONS

7.a. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 89 IBLA 1, IBLA 83-757, 81-83 (September 27, 1985).

The Board ruled that the coal mining permit applicant is responsible for providing sufficient data on ground water basins or systems for the RA to make its probable cumulative impact assessment.

7.b. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 94 IBLA 269, IBLA 83-757, 81-83 (November 18, 1986 - amends September 27, 1985 decision).

In ruling on the briefs filed to address the issues of appropriate relief for the failures identified in the case above, the Board stated:

"Section 510(b) of the Act provides that no permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing that all necessary requirements of the Act have been met."

8.a. VIRGINIA CITIZENS FOR BETTER RECLAMATION [VCBR], 82 IBLA 37, IBLA 83-702 (July 10, 1984).

The Board upheld OSM's issuance of a cessation order, finding that: "OSM properly takes enforcement action against the owner of a surface coal mining operation [Moose Coal Co.] who fails to submit a timely and complete application for permanent program permit and who continues to operate under an interim permit after 8 months following approval of a state's permanent program."

8.b. MOOSE COAL CO. v CLARK, 687 F Supp 244 (WD Va 1988).

The district court voided the cessation order concluding that the Board's decision was based on an incomplete record: VCBR failed to notify Moose Coal of its appeal of the Virginia state hearing officer's decision. To ensure that Moose Coal complied with the permanent program



reclamation requirements, the company was required to post bond. The bond was to remain in effect until OSM authorized its release.

9. NATIONAL WILDLIFE FEDERATION v LUJAN, et al. AND NATIONAL COAL ASSOCIATION, et al., 733 F Supp 419 (D D C February 12, 1990).

The court ruled that OSM's regulation limiting the duty of an underground coal operator to correct material damage to structures caused by subsidence "to the extent required by state law" is invalid; the limitation lacked a proper basis in the Act. The rule was remanded to OSM for revision by striking the reference to state law. In addition, the court found that section 516(b)(1) requires the protection of structures just as it does the land.

The court upheld the Secretary's deletion of the requirement for a presubsidence survey, stating that the Secretary provided good reason for the deletion and the rule was in keeping with the language and intent of the Act.

[Includes a copy of a legal memorandum from Interior's Office of the Solicitor which discusses the decision.]

ATTACHMENTS

- A. 47 FR 27694 (JUNE 25, 1982). Proposed rule. Permitting. [Excerpts.]
- B. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting. [Excerpts.]
- C. COALEX STATE INQUIRY REPORT - 101, "Permit information re. the right to subside" (December 20, 1988).
- D. COALEX STATE INQUIRY REPORT - 122, "Permitting -- (A) Permit application approval process; (B) Impacts on areas outside the permit boundary" (July 28, 1989).
- E. COALEX STATE INQUIRY REPORT - 135, "Definition of mine stability" (January 8, 1990).
- F. COALEX STATE SIGNIFICANT ISSUE REPORT - 151, "Subsidence: An Oversight of Significant Issues" (September, 1990).
- G. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 89 IBLA 1, IBLA 83-757, 81-83 (September 27, 1985).
- H. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 94 IBLA 269, IBLA 83-757, 81-83 (November 18, 1986 - amends September 27, 1985 decision).
- I. MOOSE COAL CO. v CLARK, 687 F Supp 244 (WD Va 1988).
- J. VIRGINIA CITIZENS FOR BETTER RECLAMATION [VCBR], 82 IBLA 37, IBLA 83-702 (July 10, 1984).
- K. NATIONAL WILDLIFE FEDERATION v LUJAN, et al. AND NATIONAL COAL ASSOCIATION, et al., 733 F Supp 419 (D D C February 12, 1990).