



## COALEX STATE INQUIRY REPORT - 265

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### TOPIC: 733 PROCEDURES

**INQUIRY:** What are the procedures for discovery, subpoenas, deposition taking and the appeal process when a state is the recipient of a 733 action?

**SEARCH RESULTS:** Research was conducted using the COALEX Library and the other materials available in LEXIS. The material retrieved includes Senate reports that discuss congressional intent in establishing 733 procedures and OSM preambles discussing its procedures for substituting federal enforcement of a state program or withdrawing approval of a state program. The most complete descriptions of these procedures occur in the preambles to the 1978 proposed rules and the 1979 final rules. The 1979 final rules state, in the discussion of final 733.12(d), that there would be no questioning of interested persons allowed, only rebuttal testimony and then refers the reader to a related discussion included under the preamble to Part 732. The preamble also states that while Section 733.12 contains no provision for judicial review of the Director's decision to withdraw approval of a state's program or substitute federal enforcement, the Act does provide that final decisions of the Department are subject to judicial review. No other materials were identified that address the issue of what procedures the states should follow in responding to a 733 action.

Copies of the materials listed below are attached.

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### LEGISLATIVE HISTORY

#### **S. REP. 402, 93rd Cong., 1st Sess. 51 (September 21, 1973) (S. 425). Section-by-Section Analysis. Section 205 Federal Programs.**

"This section provides for Federal regulation of surface mining and reclamation operations in any State which proves unwilling or unable to do the job itself. In accord with the purposes and findings in Title I, Federal regulation is to occur only if a particular State wishes to forego or fails to assume primary responsibility for regulating surface mining operations within its boundaries.

...

"The assumption of regulatory authority over surface mining operations in any State by



the Secretary through promulgation of a Federal program for that State is regarded as a 'last resort' measure. It is certainly preferable that the State regulate such operations through State programs which meet the requirements of the Act. The Committee hopes and expects that the States, in good faith, will develop and implement strong State programs. However, if they fail to do so the purpose of the Act and this section in particular is to insure that the full reach of the Federal constitutional powers will be exercised to achieve the purposes of the Act."

See also: S. Rep. 128, 95th Cong., 1st Sess. 72 (May 10, 1977) (S. 7). Section-by-Section Analysis. Section 404 Federal Programs.

## REGULATORY HISTORY

### **43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 733; Criteria and procedures for substituting federal enforcement of state programs and withdrawing approval of state programs.**

The preamble set out the procedures for substituting federal enforcement of state programs or withdrawing approval of state programs:

1. The Director evaluates the effectiveness of the administration of a state program at least annually or in response to a citizen report that a state is not maintaining its approved program.
2. The Director provides prompt written notice to the state if the evaluation shows ineffective administration of its program.
3. If requested, the Director holds an informal conference with the state. This allows the state to explain its position regarding allegations of ineffective administration. Although not specifically stated in the regulations, this and other informal conferences will be open to the public.
4. If, following the informal conference the Director still believes that the program is not being effectively administered, he must hold a public hearing in order to make a determination whether the state is effectively administering and enforcing its program.
5. Upon completion of the public hearing, the Regional Director submits the available information and a recommendation to the Director. If, on the basis of this information, the Director finds that there are violations resulting from failure of the state to administer part of all of its program effectively, the Director has two options:
  - a. Substitute direct federal enforcement of the state program; or
  - b. Withdraw approval of the state program in whole or in part.

"Withdrawing approval is designed to be the remedial action available to the Director for extreme cases of ineffective program administration by a State. Enforcement of all or part of a State program by the Director under the first option will be the preferred



remedial measure and will be adequate to deal with less extreme cases of ineffective program administration.

"In evaluating the administration of State programs...the Director shall base his decision to substitute Federal enforcement or withdraw approval on the adequacy of program resources and processes.... The decision will also be based on the adequacy of the program permitting process, program inspection process, adequacy, and enforcement and the overall adequacy of the entire program. These criteria have been established to provide a rational basis for proper evaluation of a State program. In evaluating the program the Regional Director and Director shall, to the extent possible, attempt to quantify program effectiveness or failures."

**44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final Rule. Part 733; Procedures for substituting federal enforcement of state programs and withdrawing approval of state programs.**

"6. Section 733.12(a)(2) has added the requirement that all persons requesting evaluations [of a state program] set forth a concise statement of the facts in their request. To avoid frivolous complaints, the Director must verify these facts prior to making an evaluation decision. This change has been made in response to comments which criticized the proposed evaluation provisions as being cumbersome and obstructive since under the proposed regulations any request could trigger an evaluation... If the Director is unable to verify the allegations or upon verification has no reason to believe that a program evaluation is necessary, his decision in writing to the requestor will be the final decision by the Department."

11. Section 733.12(d). "The policy of the Office for the public hearing...is that no questioning of those testifying will be allowed but that rebuttal by interested persons will be permitted."

17. While "there is no provision in Section 733.12 for judicial review of the Director's or the Secretary's decision to withdraw approval of a state's program or substitute federal enforcement... Section 521(a)(1) of the Act clearly provides that final decisions of the Department are subject to judicial review."

**47 FR 26356 (JUNE 17, 1982). Final rules. Part 733; Amendment of procedures for substituting federal enforcement and establishing a federal program in a state.**

"The purpose of these rules is to provide greater editorial clarity and to remove or amend certain burdensome or counter-productive requirements to achieve a more streamlined set of regulations."

**52 FR 10898 (APRIL 6, 1987). Notice of decision on petition for rulemaking.**



The Director decided to deny the petition for rulemaking from 10 citizens' organizations who requested that OSM amend its 733 procedures. The petitioners proposed that OSM provide detailed procedures for its annual evaluation of state programs and recommended modifications to existing procedures regarding the withdrawal of approval of state programs.

**53 FR 26728 (JULY 14, 1988). Final rule. Parts 842 and 843; Evaluation of state responses to ten-day notices.**

These rules were promulgated to establish a uniform standard by which OSM can evaluate state responses to federal ten-day notices; they are an "attempt to reach a proper balance recognizing the lead role of the primary states, while at the same time providing the federal presence that Congress intended to assure the law, through the approved state programs, i[s] effectively enforced."

"With this final rule, OSMRE expects that use of 732 and 733 actions may increase, as the regulatory focus shifts from individual situations to a broader evaluation of a state's overall program. Such a shift in focus, and a willingness on the part of OSMRE to require program amendments and to process those amendments expeditiously, as well as ongoing program oversight, answers the concern that states will not effectively implement, enforce, or maintain their programs."

**FEDERAL REGISTER NOTICES RE: STATE PROGRAMS**

**49 FR 15496 (APRIL 18, 1984). Final Rule. Substituted federal enforcement of portions of the Tennessee Permanent Regulatory Program. [Excerpts]**

The preamble described the steps taken by OSM in instituting federal enforcement for portions of Tennessee's program that OSM found had not been adequately enforced. Only a portion of the item is attached.

**49 FR 14674 (APRIL 12, 1984). Final rule. Substituted federal enforcement of portions of Oklahoma's Permanent Regulatory Program. [Excerpts]**

The preamble described the steps taken to institute federal enforcement for portions of Oklahoma's program.

**55 FR 111679 (MARCH 27, 1990). Final rule; approval of amendment. Oklahoma Permanent Regulatory Program. [Excerpts]**

The Director did not approve part of Oklahoma's proposed amendments that failed to include or reference rules implementing the incidental mining exemption. In responding to the National Wildlife Federation's request that a federal program be implemented in Oklahoma the Director stated:



"NWF's request that a Federal program be implemented in Oklahoma is premature; fairness and the regulations dictate that prior to the Director exercising this option, Oklahoma first be given an opportunity to respond to the required amendment, and to promulgate rules that are not less effective than the revised Federal regulations."

**58 FR 33553 (JUNE 18, 1993). Notice of informal conference. Montana Permanent Regulatory Program.**

The informal conference was being held because "OSM had reason to believe that serious problems exist which are adversely affecting the effective implementation, administration, maintenance, and enforcement of Montana's approved regulatory program." The specific "inadequacies of MDSL's implementation of its approved program" were described in the Notice.

**MISC. ITEM**

**IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, PEABODY COAL CO., APPELLANT, 653 F 2d 514 (DC Cir April 1, 1981).**

In addressing the issue of the relative authority of the Secretary of the Interior and the states in the administration of SMCRA, the court spoke of the Secretary's oversight function and his "ultimate power over lax state enforcement" - direct enforcement of permit conditions and take over of the permit-issuing process:

"Direct intervention by the Secretary in the operation of state regulatory programs is clearly intended as an extraordinary remedy.... The Secretary's primary means of guaranteeing effective state programs lies in his approval function at the beginning of the process."

**ATTACHMENTS**

- A. S. REP. 402, 93rd Cong., 1st Sess. 51 (September 21, 1973) (S. 425). Section-by-Section Analysis. Section 205 Federal Programs.
- B. S. REP. 128, 95th Cong., 1st Sess. 72 (May 10, 1977) (S. 7). Section-by-Section Analysis. Section 404 Federal Programs.
- C. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 733; Criteria and procedures for substituting federal enforcement of state programs and withdrawing approval of state programs.
- D. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final Rule. Part 733; Procedures for substituting federal enforcement of state programs and withdrawing approval of state programs.
- E. 47 FR 26356 (JUNE 17, 1982). Final rules. Part 733; Amendment of procedures for substituting federal enforcement and establishing a federal program in a state.
- F. 52 FR 10898 (APRIL 6, 1987). Notice of decision on petition for rulemaking.



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- G. 53 FR 26728 (JULY 14, 1988). Final rule. Parts 842 and 843; Evaluation of state responses to ten-day notices.
- H. 49 FR 15496 (APRIL 18, 1984). Final Rule. Substituted federal enforcement of portions of the Tennessee Permanent Regulatory Program. [Excerpts]
- I. 49 FR 14674 (APRIL 12, 1984). Final rule. Substituted federal enforcement of portions of Oklahoma's Permanent Regulatory Program. [Excerpts]
- J. 55 FR 111679 (MARCH 27, 1990). Final rule; approval of amendment. Oklahoma Permanent Regulatory Program. [Excerpts]
- K. 58 FR 33553 (JUNE 18, 1993). Notice of informal conference. Montana Permanent Regulatory Program.
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