



COALEX STATE INQUIRY REPORT - 298

October 1994

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Tawes Building
580 Taylor Avenue, Room C-4
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TOPIC: 775.11(B) HEARING WITHIN 30 DAYS OF PERMIT DENIAL & DECISION WITHIN 30 DAYS OF HEARING

INQUIRY: Is there any information on what the consequences are if a hearing on the denial of a permit application is not held within the 30 day time frame? The permit applicant claims that the permit is automatically approved.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials in LEXIS. Several items were identified that indicate that in some cases, the 30-day period may be too short a time frame. In these cases, the time frame may be extended with the concurrence of all parties. No materials were identified that specify consequences when the regulatory authority fails to meet the 30-day time frame. The preamble to the 1983 final rules on approval and disapproval of permit applications, made it clear that operating without an approved permit was not an option.

Listed below are legislative history, regulatory history and several other items that address relevant aspects of the permit application review and the hearing/appeal processes. Copies of listed items are attached.

H.R. REP. 1445 (H.R.13950), 94th Cong, 2nd Sess 117 (August 31, 1976). Section-by-Section Analysis.

"Section 514. Decisions of the Regulatory Authority and Appeals

"Under the administrative procedure established in this section, if hearings on the mining application have been held within 30 days after their completion, the regulatory authority shall provide to the applicant and all parties to the administrative proceeding its written findings granting or denying the permit in whole or in part and stating its reasons.



"In instances where no hearings have been held, the regulatory authority is to notify the applicant in writing of its decision. If the application has been denied in whole or in part, specific reasons for denial must be included. THIS RESPONSE MUST BE GIVEN WITHIN A REASONABLE TIME AFTER SUBMISSION OF THE PERMIT APPLICATION.

"APPROVAL OF THE APPLICATION RESULTS IN THE ISSUANCE OF THE MINING PERMIT...." [Emphasis added]

43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. 788.13 Permit approval or denial actions (several other sections are enclosed for background).

"In general, Section 514(b) of the Act requires that these actions [regulatory review of a permit application] be taken within a 'reasonable time'.... The Office is concerned that the phrase 'reasonable time' in this context be applied so as to insure that applications are given meaningful review and that adequate opportunity for full public participation is provided."

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 787.11 Administrative review.

"4. One commenter suggested that Section 787.11 be modified to state specifically which party has the burden of proof in the administrative hearing. The Office accepted this comment for nation-wide consistency, and Section 787.11(b)(5) was inserted to place the burden on the party seeking to reverse the decisions of the regulatory authority in accordance with general principles of administrative law."

48 FR 44344 (SEPTEMBER 28, 1983). Final rule. 775.11 Administrative review (derived from 787.11).

775.11(b)(2). In the situation where a permit for a new operation has been denied: "OSM has not modified the prohibition against granting temporary relief to such applicants...the status quo in such situations does not include authorization for mining operations to proceed. OSM continues to interpret Sections 102(b), (c), (d) and (e); 201(c); 507, 508, and 510 of the Act to require that coal mining be allowed only after the regulatory authority has carefully scrutinized the application and determined that the provisions of the Act will be met and that reclamation of the area to be disturbed is feasible."

51 FR 35248 (OCTOBER 2, 1986). Proposed rules. Special rules applicable to surface coal mining hearings and appeals. Review of Approval or Disapproval of Applications for New Permits.

"A comment suggested that the requirements of 30 USC 1264(c) that a hearing be held within thirty days of the filing of a request for review and that a written decision be



issued within thirty days after the hearing should be able to be waived because administrative review of many technical issues cannot realistically be conducted within these time limits and because the parties should be allowed time to resolve their differences by settlement. 43 CFR 4.1364(b) has been revised to authorize an administrative law judge to allow more time to convene a hearing and to authorize the administrative law judge or the Board to allow more than thirty days to issue a written decision upon motion signed by all parties. 43 CFR 4.1268 and 4.1369 have been revised accordingly."

52 FR 39521 (OCTOBER 22, 1987). Final rule. Special rules applicable to surface coal mining hearings and appeals.

The final rule implemented the proposed rule, as indicated above.

56 FR 2139 (JANUARY 22, 1991). Final rule. Special rules applicable to surface coal mining hearings and appeals.

"(7) 43 CFR 4.1364

"It was proposed to amend 43 CFR 4.1364 to provide that unless all parties agree to an extension or waiver, the Administrative Law Judge shall commence a hearing within 30 days of the filing of a request for review of an OSMRE decision and notify the applicant or permittee and all interested parties of the time and place of the hearing. There were no comments on this proposed change, so it is adopted.

"(8) 43 CFR 4.1365

"I was proposed to amend 43 CFR 4.1365 to provide that the filing of a request for review would not stay the effectiveness of the OSMRE decision pending completion of administrative review. There were no comments on this proposed change, so it is adopted."

OSM DIRECTIVE, Subject No. INE-6, Transmittal No. 163, "Informal Public Hearing Under 30 CFR 843.15" (Issued 3/24/83).

Enclosed for background.

NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, WEST ELK COAL CO., INTERVENOR, 94 IBLA 269, IBLA 83-757 (November 18, 1986).

"Under the Act a person cannot undertake surface coal mining operations on lands on which such operations are regulated by a state without obtaining a permit issued by the appropriate regulatory authority. 30 USC Sec. 1252(a). 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. 30 USC Sec. 1260(b) (1982). Section 514 of the Act governs the permit application approval or disapproval process. 30 USC Sec.



1264 (1982). The application may be approved or disapproved in whole or in part. 30 USC Sec. 1264(b) (1982). If the application is approved, the permit shall issue. 30 USC Sec. 1264(c) (1982). If the application is disapproved, specific reasons for disapproval must be set forth. Id. Administrative challenges to approval or denial are regulated by 30 USC Sec. 1264(c) (1982), which establishes rigorous time limits for requesting a hearing..., for holding the hearing..., and for issuance of a decision...."

AMERICAN DRUGGISTS INSURANCE CO. v COMMONWEALTH DEPT., 670 SW 2d 485 (Ky Ct App 1984).

"The appellant's final argument is that the order of the Department was issued contrary to the law and is therefore invalid. The sole support of this contention is KRS 224.081 (now KRS 224.081(1)) which provides that a hearing officer shall have thirty days after the conclusion of a hearing to make a report and recommendation to the secretary of the Department. In this case the hearing was concluded on October 6, 1980, but the required report was not made until April 30, 1981. We agree with the appellant that the hearing officer did not strictly adhere to the statutory language but find this failure to be harmless error. The appellant did not request or demand the hearing officer to file his report and the parties' rights were not impaired by the delay. Accordingly, we admonish this tardy practice and encourage more prompt action by hearing officers, but in this particular case we find that any error was harmless and may be disregarded."

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET v ADAMS, 873 SW 2d 834 (Ky Ct App 1993).

The state circuit court vacated the Cabinet's finding of guilt of violations of KySMCRA. This decision was based on the fact that "in the administrative proceeding, an administrative summons notifying the appellee of a request for a formal administrative hearing had not been issued within thirty days of the filing and mailing of the preliminary hearing officer's report." This "constituted a 'jurisdictional defect,' depriving the appellant of the authority to hold a formal hearing."

The circuit court's ruling was reversed and the matter remanded to the Cabinet for "an order reinstating its original judgment." The ruling was based "on more than one reason": "the [circuit] court did not even make findings supporting the allegations contained in appellee's motion, relying instead on what it supports to be a jurisdictional defect in the formal administrative hearing." In addition, the appellate court found that the Cabinet had made its request for a formal hearing within the time set by the regulations.

ATTACHMENTS

- A. H.R. REP. 1445 (H.R.13950), 94th Cong, 2nd Sess 117 (August 31, 1976).
Section-by-Section Analysis.



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- B. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. 788.13 Permit approval or denial actions (several other sections are enclosed for background).
- C. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 787.11 Administrative review.
- D. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. 775.11 Administrative review (derived from 787.11).
- E. 51 FR 35248 (OCTOBER 2, 1986). Proposed rules. Special rules applicable to surface coal mining hearings and appeals. Review of Approval or Disapproval of Applications for New Permits.
- F. 52 FR 39521 (OCTOBER 22, 1987). Final rule. Special rules applicable to surface coal mining hearings and appeals.
- G. 56 FR 2139 (JANUARY 22, 1991). Final rule. Special rules applicable to surface coal mining hearings and appeals.
- H. OSM DIRECTIVE, Subject No. INE-6, Transmittal No. 163, "Informal Public Hearing Under 30 CFR 843.15" (Issued 3/24/83).
- I. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, WEST ELK COAL CO., INTERVENOR, 94 IBLA 269, IBLA 83-757 (November 18, 1986).
- J. AMERICAN DRUGGISTS INSURANCE CO. v COMMONWEALTH DEPT., 670 SW 2d 485 (Ky Ct App 1984).
- K. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET v ADAMS, 873 SW 2d 834 (Ky Ct App 1993).