



COALEX STATE INQUIRY REPORT - 304

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TOPIC: FEDERAL INSPECTIONS - DEFINITION OF "ARBITRARY, CAPRICIOUS OR AN ABUSE OF DISCRETION" UNDER 30 CFR 842.11(b)(1)(ii)(B)(2).

INQUIRY: Please locate any material that defines or discusses the standards OSM uses when reviewing state actions. In particular, is there any description of the standards used by OSM to determine when a state regulatory authority's action regarding a possible violation is "arbitrary, capricious or an abuse of discretion"?

SEARCH RESULTS: Using the COALEX Library and other materials available in LEXIS a number of relevant items were identified. These include preambles to final rules published in the Federal Register, a DC Circuit Court Memorandum and Interior administrative cases discussing the issue.

Copies of the materials listed below are attached.

FEDERAL REGISTER NOTICES

53 FR 26728 (JULY 14, 1988). Final rule. Parts 842 & 843; Evaluations of state notices to ten-day notices.

B. Part 842 - Federal Inspections and Monitoring. 2. Arbitrary or Capricious Standard of review.

"Under the final rule, the state program is the standard for judging the appropriateness of a state response because once such a program is approved, a state is expected to act in accordance with that program. It is therefore the approved state program, rather than the Act, that will be used to determine whether a state action, taken in response to a federal ten day notice, is appropriate or constitutes good cause."

The preamble to the final rule continues with a discussion of "appropriate action" and "good cause".



44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 842 Federal Inspections & Part 843 Federal Enforcement.

The preamble to 842.11(b)(1)(ii) does not include any discussion of the phrase in question. This material is included for background.

FEDERAL COURT CASE

**NCA v URAM, Civ. Action No. 87-2076; NCA v BABBITT, Civ Action No. 88-2273; NWF v BABBITT, Civ. Action No. 88-2416 (DC DC September 16, 1994).
[Memorandum on motions for a summary judgment]**

One of the regulations being challenged here is the ten-day notice rules at 30 CFR 842.11(b)(1) [1988].

II. Relevant Statutory Background. A. Arbitrary & Capricious Standard/State Response.

"The Court finds that the Secretary's decision to promulgate the rule to review a state's response to a TDN under the arbitrary and capricious, abuse of discretion standard is a permissible interpretation of SMCRA and is not arbitrary, capricious or otherwise inconsistent with law. The operators must comply with approved state law and with state regulations not inconsistent with SMCRA. Under this new standard, primacy states will continue to enforce their programs and the federal government is still the final arbiter as to whether the operator is in compliance. However, the state must in the first instance make such a determination. Thus, if the state interpretation of its own program is arbitrary, capricious or constitutes an abuse of discretion, the Secretary will show no deference to the state regulatory authority. Accordingly, in view of the above, the Court concludes that the rule should be upheld."

The Court also ruled on the definitions of "appropriate action" and "good cause".

COALEX REPORT

COALEX SIGNIFICANT ISSUE REPORT - 242, "Ten day notices: Definition of 'abuse of discretion'" (1993).

This Report identifies federal decisions that define "abuse of discretion" in the contest of administrative proceedings or agency interpretations of (state) regulations. It is attached for background.

INTERIOR ADMINISTRATIVE CASES

CONSOLIDATED COAL CO. v OSM, Docket No. CH 94-6-R (1994).



OSM issued a TDN to Illinois for failing to take "further action" on property owner's complaint that the site had not been reclaimed to AOC. The state, following its regulations which uses a "permit wide method of judging AOC", found that Consolidated had achieved AOC on the property in question. OSM disagreed with the state's decision. "However, no testimony was offered which tended to show that the State came to this decision in an arbitrary or capricious manner or abused its discretion.... OSM is dissatisfied with the permit-wide standard utilized by the State, but that issue is not under consideration in this case. Illinois has followed its approved regulations. It decided that a violation did not exist under the State program and that decision was made in good faith and after careful consideration."

ARMSTRONG, HILLMAN, 130 IBLA 228, IBLA 92-342 (1994).

HEADNOTES: 3. VER. "Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. Sec. 1271(a)(1) (1988) concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S.C. Sec. 1272(e) (1988) and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and capricious when at least one essential factor for a valid existing rights determination is unaddressed."

DELAMR ADKINS v OSM, 128 IBLA 1, IBLA 90-392 (1993).

The Board concluded that "OSM's oversight inspection was proper in this case" and reversed the ALJ's "contrary conclusion and his order vacating the NOV":

"Although the regulations were amended effective August 15, 1988, after OSM issued both the TDN to the State and the NOV to Adkins, and the rules now characterize 'appropriate action' as a 'response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion' (30 CFR 841.11(b)(1)(B)(2)), we find that OSM properly evaluated DMLR's response to the TDN based on the regulatory interpretation then in effect. (Nor would our decision be different if we were to apply the current regulatory definition of 'appropriate action.')

PAUL F. KUHN, 120 IBLA 1, IBLA 89-539 (1991).

The Board ruled that Ohio Division of Reclamation's failure to suspend mining in a disputed area within the permit boundaries until resolution of the contested boundary was arbitrary, and 'fell short of 'appropriate action.'"

GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, 118 IBLA 129, IBLA 89-158 (1991).

Gateway maintained that according to 30 CFR 842.11(b)(1)(B), OSM must give a primacy state "a TDN of an alleged violation" and is "precluded from taking direct



enforcement action absent a TDN". The Board ruled that those rules applied from the date a permanent program permit is issued but they "do not operate to deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program."

Excerpts from 14 Interior relevant but not persuasive administrative cases are also attached.

ATTACHMENTS

- A. 53 FR 26728 (JULY 14, 1988). Final rule. Parts 842 & 843; Evaluations of state notices to ten-day notices.
- B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 842 Federal Inspections & Part 843 Federal Enforcement.
- C. NCA v URAM, Civ. Action No. 87-2076; NCA v BABBITT, Civ Action No. 88-2273; NWF v BABBITT, Civ. Action No. 88-2416 (DC DC September 16, 1994). [Memorandum on motions for a summary judgment]
- D. COALEX SIGNIFICANT ISSUE REPORT - 242, "Ten day notices: Definition of 'abuse of discretion'" (1993).
- E. CONSOLIDATED COAL CO. v OSM, Docket No. CH 94-6-R (1994).
- F. ARMSTRONG, HILLMAN, 130 IBLA 228, IBLA 92-342 (1994).
- G. DELMAR ADKINS v OSM, 128 IBLA 1, IBLA 90-392 (1993).
- H. PAUL F. KUHN, 120 IBLA 1, IBLA 89-539 (1991).
- I. GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, 118 IBLA 129, IBLA 89-158 (1991).
- J. Excerpts from 14 Interior relevant but not persuasive administrative cases.