



COALEX STATE COMPARISON REPORT - 334

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Jennifer McCumber, Esquire
New Mexico Minerals & Natural Resources Department
2040 South Pacheco Street
Santa Fe, New Mexico 87505

TOPIC: PUBLIC NOTICE REQUIREMENTS FOR PERMIT MODIFICATION

INQUIRY: A permit issued in 1996 was contested by two citizens. The case is still under administrative appeal. In early 1997, the permittee requested a modification of the permit to change the water monitoring plan. This revision to the permit was considered minor or insignificant and, according to state regulations, did not require advertising or public participation. These same citizens contested the permit modification on the grounds that there was no public notification of the modification. Do other states require public notification for permit modifications? Can permit modifications be appealed?

SURVEY & SEARCH RESULTS: A telephone survey of five IMCC member states and COALEX/LEXIS research were conducted. Results of the survey appear below. A search of Interior and Pennsylvania administrative decisions did not yield any substantive materials on point. Several preambles to federal rules were identified which contain some relevant information. Copies of the items listed below are attached.

FEDERAL REGULATIONS

According to 30 CFR 773.13 "Public participation in permit processing", the public notification and participation processes are required for applications for a permit, a "significant revision of a permit" or renewal of a permit. In 30 CFR 774.13 "Permit revisions", the state regulatory authority is responsible for establishing guidelines indicating for which revisions all the permit application information requirements including notice and public participation apply.

SUMMARY OF SURVEY RESPONSES

1. The state contacts surveyed reported that public notice and participation are required for major or significant revisions to permits. These processes are not required for minor or insignificant permit revisions. For all surveyed, modifications to the water monitoring plan constituted a minor or insignificant revision.



2. Virginia indicated that advertising might be required for an insignificant permit revision, such as a modification to the water monitoring plan, if this had been an issue at the time the original permit was approved. The Pennsylvania contact indicated that a revision to a permit being contested would not be approved if the revision involved the issue being contested in the original permit; in such a situation, the decision on the revision would be held pending the outcome of the litigation on the original permit.
3. All decisions of the regulatory authority are appealable.
4. None of the state contacts recalled any case similar to the facts of this inquiry.

FEDERAL REGISTER NOTICES

Excerpts from preambles to three proposed and final rules follow. These items from the Regulatory History of the permit revision rules were selected as being the most relevant to this inquiry.

44 FR 14902 (MARCH 13, 1979). PERMANENT PROGRAM FINAL PREAMBLE - FINAL RULE. PART 788 PERMIT REVIEWS, REVISIONS AND RENEWALS. (Became Part 774 in 1983)

In the discussion of 788.11 "Regulatory authority (RA) review of outstanding permits", a "commenter requested that public notice and opportunity to submit comments be added to this section." OSM rejected this suggestion, stating that other regulations provide citizens the opportunity to file complaints with the RA or OSM if they believe an operation violates the rules or is creating a danger to the public or the environment.

In 788.13 "Permit revisions", OSM added language to ensure that RAs "provide parameters in their regulations to determine what changes in the methods of operations or reclamation constitute a significant departure from those approved in the original permit and, therefore, necessitate a revision."

48 FR 44344 (SEPTEMBER 28, 1983). FINAL RULE. PARTS 773, 774, 788, etc. REQUIREMENTS OF APPLICATIONS.

According to these rules, all changes to the original permit require an RA-approved revision to the permit. The RA is responsible for establishing guidelines which "set the scale or extent of significant revisions'. Significant revisions are required to meet all the permit application requirements for those parts of the permit which would be revised and all processing provisions including notice, public participation...." Nonsignificant revisions are subject to the review procedures "established under the State or Federal program."

59 FR 53884 (OCTOBER 26, 1994). PROPOSED RULE. NOTIFICATION AND PERMIT PROCESSING.



OSM proposed to revise sec. 773.15(a) to require the RA to "provide parties to an informal conference the same notification of decisions modifying the permit application as for decisions approving or denying the application."

PAEHB DECISION

HAROLD WEISS v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL PROTECTION AND MARTIN STONE QUARRIES, INC., PERMITTEE, Pa EHB Docket No. 94-283-MG, 1996 Pa. Envirn. LEXIS 86 (1996).

This state administrative case mentions the Department's failure "to notify the public concerning modifications which were made to the permit application"; however, this issue was precluded from the appeal.

ATTACHMENTS

- A. Survey Responses
- B. 30 CFR 773.13 Public participation in permit processing & 30 CFR 774.13 Permit revisions.
- C. 44 FR 14902 (March 13, 1979). Permanent Program Final Preamble - Final Rule. Part 788 Permit reviews, revisions and renewals. (Became Part 774 in 1983)
- D. 48 FR 44344 (September 28, 1983). Final Rule. Parts 773, 774, 788, etc. Requirements of applications. [Excerpts]
- E. 48 FR 44344 (September 28, 1983). Final Rule. Parts 773, 774, 788, etc. Requirements of applications. [Excerpts]
- F. Harold Weiss v Commonwealth of Penn., Dept. Of Environmental Protection and Martin Stone Quarries, Inc., Permittee, Pa EHB Docket No. 94-283-MG, 1996 Pa. Envirn. LEXIS 86 (1996).

Survey and research conducted by: Joyce Zweben Scall

SURVEY RESPONSES

ILLINOIS

Minor or insignificant permit revisions do not require public notice and comment. Changes to water monitoring plans are not considered significant or major permit revisions. All agency decisions are appealable.

It would not make any difference if the original permit was under appeal in considering a permit modification. The permit revision would be considered a separate action.

INDIANA



Non-significant permit revisions do not require public input. Changes to water monitoring plans fall under the non-significant category.

There have been cases where issued permits were challenged, operations began and modifications to the original permit were made while the permits were under review. While all state permitting decisions are appealable, the contact could not recall any situations where an insignificant permit revision, by itself, was contested.

PENNSYLVANIA

State regulations specify what requires public notice. Minor/insignificant revisions do not require the public notice procedure. Modifications to a water monitoring plan that do not involve discharges generally would fall into the minor/insignificant category.

If an issued permit is being challenged, the RA likely to issue a permit modification if the revision is unrelated to the aspect of the permit being contested. A minor/insignificant permit revision request would be put on hold if it involved the issue being litigated.

VIRGINIA

Virginia has state guidelines that specify which types of permit modifications are considered minor/insignificant not requiring public notice and participation versus major/significant ones that do require public notice and participation. Changes to a water monitoring plan would typically be considered a minor permit modification not requiring public notice. However, if the water monitoring plan was a significant issue when the original permit was issued, then any modification to the plan would be subject to the public notification requirements. All state permitting decisions are appealable.

The state contact did not recall any situation where a permit being appealed was modified and the modification was also appealed. However, there was a Right-of-Entry case where a minor modification was appealed. In this case, the appellant was found to have no legal standing.

WEST VIRGINIA

State regulations specify which permit modifications require advertising and which modifications don't require advertising. The type of permit modification issued here would qualify as a minor modification not requiring advertising. If a permit is viable, the state would issue modifications even if the original permit was challenged and under appeal. All state permitting decisions are appealable.

The West Virginia contact did not recall any situations similar to this inquiry nor any permits where a minor modification was appealed.