



## COALEX STATE INQUIRY REPORT - 42

May 31, 1985

Bob Hykan  
Office of Attorney General  
1525 Sherman Street, 3rd Floor  
Denver, Colorado 80203

### TOPIC: PATTERN OF VIOLATIONS

**INQUIRY:** Under SMCRA Sec. 521(a)(4), a "pattern of violations" may lead to a permit suspension or revocation. What type of connection must exist between the violations to constitute a "pattern of violations"? In this specific case, several notices of violations have been issued citing different regulations. The essential set of facts, however, are the same with similar underlying conditions. Could that be considered a "pattern of violations", even though different regulations have been involved?

### SEARCH RESULTS:

#### Legislative History

Suspension or revocation resulting from a "pattern of violations" has been included in surface mining legislation since the 93rd Congress. The current version adopted in SMCRA Sec. 521(a)(4) is similar to that of the 93rd Congressional bill. (See H. Rep. 93-1072, 93rd Cong., 2d Sess., 142 (1974))

The proposed section concerning the suspension and revocation of permits as submitted to the 95th Congressional Conference Committee by the House and Senate, however, differed significantly. The final version adopted was that contained in Senate Bill S. 7. In lieu of the phrase "pattern of violations" the House bill had proposed that "where a Federal inspector finds three serious violations within 90 days of each other, he is to issue a cessation order. Upon the issuance of three cessation orders an order to show cause why the permit shall not be suspended or revoked shall issue [sic]." (H. Rep. 95-28, 95th Cong., 1st Sess. 130 (1977); S. Rep. 95-337, 95th Cong., 1st Sess. 110 (1977))

Criteria for what would constitute a pattern of violations was not identified in the legislative history. Of apparent significance, however, were the phrases "unwarranted failure to comply" and "willfully caused by the permittee." S. Rep. 95-128, discussing the section that was adopted by the Conference Committee, states that:

"Where the Secretary is the regulatory authority and a federal inspector determines that a pattern of violations of the Act or permit exists or has existed and that such violations are caused by the unwarranted failure of the permittee to comply or are willfully caused by the permittee, the inspector must issue an order to the permittee to show cause as to why his permit should not be suspended or revoked. If the permittee fails to show cause as to why the permit should not be suspended or revoked, the inspector must immediately suspend or revoke the permit.



"This provision requires that suspension or revocation of a mining permit be preconditioned upon conduct which demonstrably fails to meet the standards of care and diligence which are to be expected of permittees who seek to comply with the law." (S. Rep. 95-128, 95th Cong., 1st Sess. 92 (1977))

#### Federal Regulations/Interim Program - 30 CFR Sec. 722.16

During the development of the interim program regulations, the question arose as to whether it would be practical to develop either a national or regional norm that would automatically trigger a show cause order under this section. The concept was not adopted, although OSM proposed examining it further during the interim period as a statistical basis and analytical capability were developed. (42 FR 62639 (DECEMBER 13, 1977)) No further reference to the concept of the norm approach to a pattern of violations was identified.

The preamble to the interim regulations contains a discussion of how a permittee can demonstrate that he is not in a pattern of violations, once the show cause order is issued. Emphasizing the importance of the unwarranted or willful nature of the violations, the preamble states that: "This can be done in several ways including a showing that the violations alleged to constitute the pattern are neither willful nor unwarranted or a showing that they are not violations." (42 FR 62669 (DECEMBER 13, 1977))

#### Federal Regulations/Permanent Program - 30 CFR Sec. 843.13

30 CFR Sec. 843.13 concerning suspension or revocation of permits under the permanent program was promulgated March 13, 1979 and later revised August 16, 1982. (44 FR 15300 (MARCH 13, 1979); 47 FR 3562 (DECEMBER 16, 1982)) Under the revised section, if the Director "determines that a pattern of violations of any requirements of the Act, this chapter, the applicable program, or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions," the Director is required to issue a show cause order. The key change from the 1979 regulations is that "the Director is given discretion in determining the existence of a pattern of violations." Once such a determination has been made, however, the regulations continued to provide that the show cause order to issued." (30 CFR Sec. 843.12(a)(1); 47 FR 35629 (AUGUST 16, 1982))

Under the federal regulations, the determination of a pattern of violations is based upon two or more federal inspections of the permit area within any 12-month period. To be considered are the number of violations cited on more than one occasion of the same or related requirements or of different requirements; and the extent to which the violations were isolated departures from lawful conduct. (30 CFR 843.13(a)(2)) Sec. 843.13(4) limits the NOV's to be those issued by federal inspectors under federal enforcement programs. Other violations "may be considered only as evidence of whether the pattern of violations was caused by a permittee willfully or through his unwarranted failure to comply, and may not be considered in determining the existence of the pattern itself." (47 FR 35631 (AUGUST 16, 1982))

During the revision process, two commenters proposed precluding a finding of a pattern of violations based on violations of different requirements. OSM disagreed stating that "under



appropriate circumstances, a number of violations of different requirements can support a finding of a pattern of violations." (Id. at 35631)

### Interior Board And Federal Court Decisions

A search of COALEX did not identify any relevant Interior Board\* or federal court decisions.

\*OSM is presently updating the COALEX files containing ALJ and Board decisions, and they may not be complete.

### ALJ Decisions

OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., CH 0-2-A (March 17, 1981).

July, 1980 OSM filed an order to show cause directed to RWR Development Co. and Debcon Coal Co. why their permit should not be revoked or suspended for an alleged pattern of violations. Administrative Law Judge Tom M. Allen found that OSM failed to present a prima facie case, as required under 43 CFR Sec. 4.1193, for suspension or revocation. Although the record supported that several violations occurred during the year, the credibility of the federal inspector who wrote the violations was in question and OSM failed to show "the type of negligence or want of such care necessary to overcome the testimony of its own witnesses and of Permittee and Operator." (Id. at 21; see also Id. at 17)

The basis used in the determination was "(1) if the violations issued were of such a nature to be classed as willful, (2) if the violation, not willful, were an unwarranted failure to comply, and (3) if the results of such determinations yield a finding of a pattern of violations meriting suspension or revocation of the permit." (Id. at 8)

### **ATTACHMENTS:**

- A. Excerpt, H. Rep. 93-1072, 93rd Cong., 2d Sess. 142 (1974).
- B. Excerpt, S. Rep. 95-337, 95th Cong., 1st Sess. 110 (1977).
- C. Excerpt, H. Rep. 95-218, 95th Cong., 1st Sess. 130 (1977).
- D. Excerpt, S. Rep. 95-128, 95th Cong., 1st Sess. 92 (1977).
- E. Excerpt, 42 FR 62639 (DECEMBER 13, 1979), concerning 30 CFR Sec. 722.16.
- F. 47 FR 35629 (AUGUST 16, 1982), preamble discussion of Part 843, Federal Enforcement.
- G. OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., CH 0-2-A (March 17, 1981).