



COALEX STATE INQUIRY REPORT - 55
September 5, 1985

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TOPIC: PERMIT DENIAL FOR OUTSTANDING FINES AND BOND FORFEITURES

INQUIRY: What authority does the state have to deny a permit for an operation where the "Operations Director", but not the owners, has outstanding fines and has had past permit revocation and bond forfeiture?

SEARCH RESULTS: The criteria for permit approval or denial under the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) is contained in Sec. 510. In pertinent part, this section includes the following requirement:

"Where... any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act."

The requirements of Sec. 510(c) of SMCRA are included in 30 CFR Sec. 773.15 of the OSM regulations, which essentially repeats the statutory language. Similar provisions are also included in Arkansas Regulations Secs. 786.17 and 786.19. (See attachments.)

Simply put, this review of the violations history consists of two parts: (1) A determination of whether the applicant has any outstanding violations, and (2) A determination of whether the applicant, or the operator, controls or has controlled operations with a pattern of violations indicating an intent not to comply with the Act.

In the example posed, it is assumed that the person or entity named as the applicant for the permit has no previous record of violations or any outstanding violations. However, the "Operations Director" does have outstanding violations, as well as past permit revocations and bond forfeitures. In such a case, the possibility exists that the applicant is, in fact, owned or controlled by the "Operations Director".



On April 5, 1985, the OSM acknowledged the possibility that such practices have been used in efforts to circumvent the requirements of the Act and proposed a revision to the federal regulations to define "ownership or control" in a manner to help minimize such abuse. The term "ownership or control" is not defined in SMCRA and neither the federal nor the Arkansas regulations currently contain a definition for "ownership or control".

Whether in the example, the "Operations Director" can be found to "own or control" the applicant for purposes of the applicability of the first test is unclear under both the existing regulations, and under OSM's proposed regulation. OSM in the preamble discussion to the proposed rule does, however, request public comment on whether the definitions should contain an "express presumption that agents, subcontractors, general managers, foremen, or others who exercise independent discretion for directing the day-to-day operations at a mine, have control within the meaning of Sec. 510(c)." (50 FR 13726, April 5, 1985)

A prior COALEX search was conducted of the legislative history of the language "operation owned or controlled by the applicant", found in this section. A copy of the results of that search are attached for your reference.

A COALEX search was also conducted of any U.S. Department of the Interior, ALJ and Board of Land Appeals Decisions, to determine whether any prior cases have been decided on the issue raised. No cases directly addressing the issue were identified in this search.

The second test contained in Sec. 510(c) extends not only to the applicant, but also to the operator, and any operations controlled or which have been controlled by the operator. Briefly, under this section, the following requirements must be met:

"(1) The applicant, or operator, controls or has controlled mining operations with,
(2) A demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act."

Similar provisions are included in both the federal and the Arkansas program.

An "operator" is defined as "any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location". Presumably, an "Operations Director" could be classified as an "operator" within this definition.

The second question that must be addressed is whether the "Operations Director" has "controlled mining operations with a demonstrated pattern of willful violations of such nature, duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the applicable provisions. (See 30 CFR Sec. 773.15(b); and Arkansas Regulations Sec. 786.19(I).)

In the example, the "Operations Director" had controlled prior mines with bond forfeitures and permit revocations. Such a history would likely be considered sufficient to support the finding



required under Sec. 510(c) and the applicable regulations. Permit revocations, for example, require that a finding be made that a "pattern of violations...exists or has existed and that the violations were caused by the permittee willfully or through unwarranted failure to comply". (See 30 CFR Sec. 843.13 and Arkansas Regulations Sec. 843.13) The existence of outstanding fines and forfeited bonds at the prior mines would also support the required finding.

While no case law was identified in this search on the specific issue raised, it does appear that under the example, a permit should be denied to the applicant who has an "Operations Director" with a pattern of violations, based upon the second test in Sec. (510(c) of SMCRA.

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 4.
- B. 50 FR 13726 (April 5, 1985). 30 CFR Sec. 773.15.
- C. Arkansas Surface Coal Mining and Reclamation Code., Reg. Secs. 786.17, 786.19 and 843.13.