



COALEX STATE INQUIRY REPORT - 60
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TOPIC: CESSATION ORDER (CO)

INQUIRY: 30 CFR 843.11(a)(2) contains a provision designating unpermitted surface coal mining and reclamation operations as constituting a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. An exemption is included for those operations that are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

Are there any instances where this exemption can inhibit proper regulation of sites where permit renewal is pending? Search other approved state programs to ascertain whether they have adopted this rule. Also, conduct a search of ALJ rulings and court cases which cite 30 CFR 722.11(c) or 843.11(a)(2).

SEARCH RESULTS: Sec. 521(a)(2) of the Surface Mining and Reclamation Act (SMCRA) requires the issuance of a cessation order of surface coal mining and reclamation operations that "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm". If cessation does not completely abate the imminent danger to health or safety of the public or significant imminent environmental harm, in addition to the cessation order, affirmative obligations on the operator are to be imposed to abate the condition.

As promulgated March 13, 1979, 30 CFR Sec. 843.11(a) mirrored the statutory language of the Act with respect to the cessation order requirements under SMCRA Sec. 521(a)(2). (44 FR 15458 (1979)) 30 CFR Sec. 843.11(a) was later revised to bring under the umbrella of the cessation orders, wildcat mining operations operating without a permit. (47 FR 18552 (1982))

OSM revised the regulations "for clarity" in response to two IBSMA decisions: CLAYPOOL CONSTRUCTION COMPANY v OSM, 2 IBSMA 81 (May 16, 1980) and WEST VIRGINIA ENERGY, INC. v OSM, 3 IBSMA 301 (September 17, 1981).

In CLAYPOOL, the Interior Board had interpreted SMCRA Sec. 521(a)(2) to mean that a surface mine operator's failure to have a permit did not in itself require the issuance of a cessation order. In WEST VIRGINIA ENERGY, the Board held that where OSM issues a notice



of violation to an operator for mining without a permit, the only remedial action appropriate to such a violation is to cease mining until a permit was obtained. The Board vacated that portion of the citation at issue which required reclamation of the disturbed area.

In the December 1, 1981 proposal to revise Sec. 843.11, OSM observed that:

"The permitting process is central to the health, safety and environmental protection provisions of the Act. Where the permitting process is circumvented or disregarded, that fact alone should compel issuance of a cessation order and the imposition of reclamation requirements. To the extent that the Board's decisions in CLAYPOOL and WEST VIRGINIA ENERGY are inconsistent with the Office's determination of this issue, the Secretary proposes to alter the Department's interpretation of the relevant provisions of the Act and regulations.

"Proposed new Section 843.11(a)(2) implements this proposal by providing for the issuance of cessation orders where surface coal mining operations are conducted by anyone without a valid permit or pending permit application." (46 FR 58467 (DECEMBER 1, 1981))

In the preamble discussion of the final regulations, OSM stated that it "provided an exception for uninterrupted extensions of previously permitted operations for which timely and complete permit applications are pending because it recognizes that in such instances the earlier permit and the operator's efforts to obtain a further permit reduce the risk of environmental harm from the unpermitted operation." (47 FR 18557 (APRIL 29, 1982))

The primary purpose of revised Sec. 843.11(a)(2) was to allow the regulatory agency to issue cessation orders to unpermitted mining operations and to require appropriate reclamation work. The exemption included for previously permitted, ongoing operations only precludes the issuance of a cessation order on the sole basis that the permit was no longer in effect. Such operations are subject to regulation and under 30 CFR Sec. 773.11(b)(2) required to "be conducted in compliance with the requirements of the Act. Subchapter B of this chapter, applicable State Statutes and regulations, and all terms and conditions of the initial program authorization or permit". There have been no instances identified where Sec. 843.11(a)(2) has inhibited proper regulation of sites where permit renewal was pending.

A search of ALJ and Interior Board decisions did not identify any decisions citing either Sec. 722.11(c) or Sec. 843.11(a)(2).*

*The Office of Surface Mining is currently updating the COALEX ALJ and IBSMA files; therefore, cases may have been decided on this subject which are not yet available through COALEX.

A search of state regulatory programs identified parallel requirements under the State programs of Oklahoma, Indiana and Alaska to 30 CFR Sec. 843.11(a)(2).



ATTACHMENTS

- A. 47 FR 18552-18558 (1982).
- B. 46 FR 58464-58470 (1981).
- C. Oklahoma Permanent Regulatory Program Regs., Sec. 843.11 (1984).
- D. Indiana Reg. Sec. 310 IAC 12-6-5 (1983).
- E. Alaska Reg. Sec. 11 AAC 90.613 (1983).
- F. CLAYPOOL CONSTRUCTION CO. v OSM, 2 IBSMA 81 (1980).
- G. WEST VIRGINIA ENERGY, INC. v OSM, 3 IBSMA 301 (1981).