



COALEX STATE INQUIRY REPORT - 75
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Timothy W. Gresham
Assistant Attorney General
Commonwealth of Virginia
P.O. Drawer U
Big Stone Gap, Virginia 24219

TOPIC: NOTICES OF VIOLATION ISSUED BY OSM

INQUIRY: Sec. 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) deals with the methods by which the standards of the Act are to be enforced. Under Sec. 521(a)(1), when the Secretary receives information that gives him reason to believe that any person is in violation of the Act, he is to notify the applicable state regulatory authority (if one exists) of the possible violation. If the state regulatory authority fails to take "appropriate action" within ten days of notification by the Secretary, the Secretary is to order federal inspection of the mine allegedly in violation.

SEARCH RESULTS: Secs. 521(a)(2) and (a)(3) of SMCRA determine the actions that can be taken by the Secretary if he or his representative finds a violation of a requirement of the Act or of a permit condition. Section 521(a)(2) states:

"When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by the Act, which condition, practice, or violation also 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 to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation...."

Sec. 521(a)(3), which deals with less serious violations, reads, in part:

"When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by the Act; but such violation does not create an imminent danger...the Secretary or his authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing."

It is apparent that under Sec. 521(a)(2), Congress gave the Secretary the authority to issue a cessation order at any time ("on the basis of any Federal inspection") and in any place, including

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a state with primacy, if there is a threat of "imminent danger"; however, the Secretary's authority to issue a notice of violation for a violation occurring in a primacy state is less clear. The dispute centers on the language of 521(a)(3) quoted earlier. OSM maintains that it has the authority to issue a notice of violation in any situation, including one in a primacy state if that state is given ten days to take "appropriate action" and fails to do so. Others contend that OSM has this authority only in the situations specifically enumerated in Sec. 521(a)(3): (1) when the Federal inspection is carried out during the enforcement of a federal program, (2) a federal lands program, (3) under the initial regulatory program of Sec. 502, and (4) when a primacy state is determined to be inadequately enforcing all or part of its program under Sec. 521(b).

This Report traces the legislative history of Sec. 521 in an effort to determine the Congressional intent behind this language. In addition, the dispute within OSM over the meaning of Sec. 521(a)(3) will be discussed. Administrative and judicial decisions concerning the interpretation of Sec. 521(a)(3) area also discussed.

LEGISLATIVE HISTORY

The enforcement language found in one of the earliest versions of SMCRA, S. 630, was nearly identical to that contained in other environmental legislation, such as the Clean Air Act. S. 630 provided that if the Secretary found any person to be in violation of the Act, he was to notify the violator and the state in which the violation was found. If the violator failed to correct the problem within thirty days, the Secretary was to issue an order requiring the operator to comply with the permit requirements. (S. Rep. No. 1162, 92nd Cong., 2d Sess. 10 (1972)) This version of the bill made no distinction between violations requiring the issuance of a cessation order (CO) and a notice of violation (NOV); rather, the Secretary retained complete control over the citation of violations. Indeed, one paragraph of the 1972 enforcement provision reads: "Whenever the Secretary finds that any person= is in violation of this Act, he shall issue an order requiring such person to comply with such provision, or he shall bring a civil action...requiring such person to comply with such provisions." (Id.) S. 630 did provide for the federal takeover of an inadequately enforced state program; however, there was no specific requirement that the Secretary hold a public hearing in the state in question before implementing federal enforcement.

Like its predecessor, S. 425 made no specific provision for the issuance of notices of violations; however, this bill gave more enforcement authority to the state. The 1973 version of the enforcement section provided that "[w]henever, on the basis of any information available to him, the Secretary has reason to believe that any person may be in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the state regulatory authority...and the state shall proceed under the approved program." (S. Rep. No. 402, 93rd Cong., 1st Sess. 17 (1973)) If, on the basis of a federal inspection, the Secretary found a violation which created a danger to life, health, or property he could immediately issue a cessation order. Note that the CO provision of this bill was discretionary and not mandatory.



The exact meaning of this language is unclear. When Senator Jackson first introduced S. 425, he explained this section as follows:

"The first two subsections provide for administrative steps for violations of the Act's requirements. When a violation by any person is discovered by Federal inspection, the Secretary or his inspectors may issue an immediate cease and desist order and hold a hearing within three days of the issuance of the order if the person requests it. If a violation is suggested by information other than by inspections, the Secretary notifies the State regulatory authority and allows the State ten days to take appropriate action. If the State fails to take such action, the Secretary is to issue an order requiring the person to correct the violation." (119 Cong. Rec. 1357 (1973) (statement of Senator Jackson))

The text of S. 425, as originally introduced, included a provision for a ten day notice to be given to the state in which the violation occurred. (Regulation of Surface Mining Operation: Hearings Before the Senate Committee on Interior and Insular Affairs on S. 425, 93rd Cong., 1st Sess. 35 (1973)) This provision was nearly identical to that found in the 1977 version of SMCRA. However, in the final version of S. 425, the provision giving the Secretary the authority to issue an order after giving notice to the state was deleted, leaving the correction of less serious violations to the states:

"Subsection (a) provides that if the Secretary has reason to believe that a violation exists in a State with an approved State program, he notifies the State regulatory authority. The regulatory authority is directed to take corrective action pursuant to the State program. This carries out the Act's basic concept that the States should be responsible for regulation.

"Subsection (b) provides that when a violation which creates a danger to life, health or property or would cause significant harm to the environment is discovered by Federal inspection, the Secretary or his inspectors may issue an immediate cease and desist order...." (S. Rep. No. 402, 93rd Cong., 1st Sess. 66 (1973))

Thus, it appears from the 1973 Senate debates and reports that the Secretary was initially given the authority to issue "orders" for less serious violations of the Act, but that this authority was deleted in later versions. From the language of the report accompanying S. 425, it appears that the Senate only intended to have the Secretary use his enforcement authority for violations which could result in "significant harm" and to enforce a state program when the state was not doing so:

"In order to provide assurances that the minimum Federal requirements will be satisfied in all cases, the Committee has provided the Secretary of the Interior with the authority to monitor State enforcement by inspection, and to administer the requirements of the Act in the event of failure of a State to administer or enforce an approved State program, or any part thereof. Should Federal enforcement of a State program occur, the bill prevents any confusion arising from overlapping or dual Federal-State jurisdictions, by carefully defining the extent of the regulatory power of both the Federal and State authorities." (S. Rep. No. 402, 93rd Cong., 1st Sess. 41 (1973))



This version of S. 425 was passed by the Senate in October of 1973.

No less than fifteen bills were introduced in the House during the first session of the 93rd Congress. Nearly all of these bills contained enforcement sections. The language used in the House bills fell into two categories. The first set used language that was nearly identical to that found in the Senate bill. (See, e.g., H.R. 5988, 93rd Cong., 1st Sess. Sec. 221 (1973).) The other set placed the enforcement provisions in two different sections. One section, entitled "Reclamation Inspections", required the Secretary or his agent to inspect all surface mining operations at least twice a month. If the inspections revealed any violations of the Act, the inspector was to notify the Secretary of the violation and was to suspend any part of the operation which posed a serious danger to health or safety. Under the other section, entitled "State Enforcement", the Secretary was to "conduct a continuing review and evaluation of the effectiveness of the program and the administration and enforcement thereof" and make spot inspections of surface mining operations within the state to determine the effectiveness of the state program. (See, e.g., H.R. 1411, 93rd Cong., 1st Sess. Sections 25, 34 (1973).) While the House held hearings on these bills during 1973, no final action was taken.

After studying all the bills proposed in 1973, the House Committee reported a new bill, H.R. 11500, which combined provisions of the various bills which had been introduced in 1973. It was in this version of the surface mining legislation that the section giving federal inspectors the authority to issue notices of violation first appeared. This language appeared rather mysteriously: there is nothing in the Congressional Record or in any of the hearings to indicate where the language originated. Indeed, the enforcement section of H.R. 11500 was nearly identical to that found in the 1977 version of SMCRA. The only major difference was that H.R. 11500 did not provide for a public hearing to be held prior to federal enforcement of all or part of a state program.

The notice of violation language was most likely added to the bill during Committee consideration and markup; thus, there is no legislative history which explains exactly what was the original intent of this language. The House Committee prefaced the enforcement language by saying:

"While it is confident that the delegation of primary regulatory authority to the States will result in fully adequate State enforcement, the Committee is also of the belief that a limited Federal oversight role...[is] necessary to assure that the old patterns of minimal enforcement are not repeated.

"The mechanism fashioned by the Committee to meet the dual need of limited Federal enforcement oversight and citizen access is operative in both the interim period and after a State program has been approved. When the Secretary receives information from any source that would give rise to a reasonable belief that the standards of the Act are being violated, the Secretary must respond by either ordering an inspection by Federal inspectors during the interim period or, after the interim, notice to the States in the follow-up inspection that the State's response is inadequate." (H.R. Rep. No. 1072, 93rd Cong., 2d Sess. 111 (1974))



The section-by-section analysis explained the enforcement provisions as follows:

"The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

"The provisions for Federal enforcement have a number of specific characteristics:

- (1) The Secretary may receive information with respect to violations of provisions of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens.
- (2) Upon receiving such information, the Secretary must notify the State of [sic] such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary shall order Federal inspection of the operation....
- (3)...In the case of a violation which does not cause such imminent danger, the Secretary must issue a notice setting a period of no more than 90 days for abatement of the violation...." (Id. at 142)

Thus, it appears that the 1974 House version of the bill gave very strong enforcement powers to the Secretary, and even required him to issue notices of violations in states with approved programs. Note, however, that the House Committee language specifically gave the Secretary this power without the necessity of superseding all or part of the State program.

The 1974 Conference Committee adopted the language used in the House version of the bill, thus incorporating the provision giving the Secretary the power to issue notices of violation in primacy states. However, the House's explanatory language was not adopted, and the Committee decision was explained as follows:

"The Senate bill and House amendment contained similar enforcement provisions which made available to the Secretary and State regulatory authorities an array of sanctions and procedures for violations of the Act and of permits.... The House amendment, contrary to the Senate bill, made available to the Secretary the full range of enforcement sanctions and provisions against coal operators pending the development of approved State programs pursuant to the Act. The conferees elected to adopt the approach of the House amendment and to combine all enforcement provisions in one section." (H.R. Rep. No. 1522, 93rd Cong., 2d Sess. 78 (1974))

The Conference Committee's explanation of the enforcement provisions is confusing. The House and Senate bills were indeed "similar" on most points, but the Senate bill did not contain the notice of violation language found in the House version. Furthermore, the report states that the House bill made "the full range of sanctions" available to the Secretary, but then goes on to say that these enforcement powers are available "pending the development of approved State programs". Thus, the Conference Committee seems to have adopted the statutory language used by the House, but given it a somewhat more restricted meaning.



After President Ford vetoed S. 425 in 1974, the 94th Congress began work on a new surface mining bill. The enforcement provisions found in S. 7 and H.R. 25 were identical to those found in the vetoed bill, but the legislative explanation of Sec. 521(a)(3) were changed. Again, the House and the Senate adopted different phrasing to describe the enforcement sections of the Act.

To fully understand the language used by the House, it is necessary to compare the way the House described both the CO and the NOV provisions:

"I. Cessation order (Section 521(a)(2)). During any Federal inspection, if the inspector determines that any violation of the Act or permit condition or any other condition or practice exists which creates an imminent danger...the inspector must order a cessation of the mining operation causing or contributing to the danger or harm...

.....

"II. Notice of violation (Section 521(a)(3)). Where the Secretary is the regulatory authority or Federal inspection is being conducted pursuant to sections 502, 504(b) or subsection (b) of section 521, and a Federal inspector determines that a permittee is violating the Act or his permit but that the violation is not causing imminent danger,...then the inspector must issue a notice to the permittee setting a time within which to correct the violation...." (H.R. Rep. No. 45, 94th Cong., 1st Sess. 119-120 (1975))

The House Committee did not totally explain the legislative intent of this provision, since the language of the statutory provision itself was basically quoted verbatim. However, it is important to note that the Committee specified that a cessation order could be issued on the basis of any Federal inspection while a notice of violation was, apparently, only to be issued in the situations specified.

The issue becomes even more muddled when the language used by the Senate committee is considered. While the statutory provisions and the explanatory phrasing used by the Senate are similar to those used by the House, the Senate added this key paragraph:

"In order to prevent federal-state overlap, the federal inspector is only to use his authority under section 521(a)(3) where the Secretary is the regulatory authority. However, in other circumstances, the Secretary must insure, in accordance with the provisions of section 521(a)(1), that the State is notified of the compliance problem so that it may act under the terms of the approved state program." (S. Rep. No. 28, 94th Cong., 1st Sess. 182 (1975))

This explanation clearly states that the Secretary is not to issue notices of violation in states with approved programs. However, the House bill, and not the Senate bill, was the one that was passed by both houses. It is not clear which explanation of the enforcement provision was adopted by the Conference Committee; in fact, the enforcement provision of Sec. 521 was not even discussed in the Committee report's explanation of "important changes" made during conference negotiations. Thus, it is impossible to tell which explanation of section 521(a)(3) was adopted in the bill that was sent to President Ford.



The surface mining bill was again vetoed by President Ford, and in 1976, Congress began yet another series of hearings and debates on new bills. The two bills considered by the House during the second session of the 94th Congress contained enforcement language identical to that found in the 1975 version. Similarly, the House's explanation of these provisions did not change. The committee continued to make the distinction between when a Federal inspector could issue a cessation order ("during any Federal inspection") and when he could issue a notice of violation ("where the Secretary is the regulatory authority"), but did not adopt the language used by the Senate. No new bills were reported out of the Senate committee during 1976.

In 1977, the House passed H.R. 2, which again contained language identical to that found in earlier versions of the surface mining legislation. Similar language was used to describe the enforcement provisions of Sec. 521, except that the House committee deleted the emphasis on "any" in the cessation order explanation. (See H.R. Rep. No. 218, 95th Cong., 1st Sess. 129-120 (1977).)

A new provision was added by the Senate in 1977. While the notice of violation language of Sec. 521(a)(3) remained unchanged, the Senate added the provision to Sec. 521(b) which requires that a public hearing be held in a state before the Secretary can begin federal enforcement of a state program. It is unclear when or why this language was added, but it probably became part of the bill during committee markups. The committee explained this provision as follows:

"Under subsection (b), if violations occurring under an approved State program appear to result from the failure of the State to enforce the program effectively, the Secretary shall so inform the State. The Secretary shall give public notice of his finding with respect to the State program and= 30 days after giving public notice shall hold a hearing in the State. If, as a result of the hearing, the Secretary finds the State is failing to enforce its program effectively, he shall give public notice of his finding." (S. Rep. No. 218, 95th Cong., 1st Sess. 89 (1977))

The Senate continued to use the same explanation of the enforcement provisions that it had used in earlier versions of the bill, including the paragraph which stated that the Secretary was only to use his power under Sec. 521(a)(3) when he was the regulatory authority. No further explanation of this section was given.

The Conference Committee passed a modified version of H.R. 2, which included the public hearing provision added by the Senate. Again, however, the Committee made no attempt to clarify what version of the explanatory language was to accompany Sec. 521(a)(3). After discussing a change made in Sec. 521(a)(4) of the bill, the Committee noted:

"Another issue presented in the Enforcement section of the legislation is the differing procedures by which the Secretary can enforce part of a State program. The House receded from its position that the Secretary could exercise this authority upon the finding of a State's effective failure to enforce, and the conference adopted the Senate amendment's requirement for a public hearing prior to such action by the Secretary." (S. Rep. No. 337, 95th Cong., 1st Sess. 110 (1977))



H.R. 2, as modified, was passed by both houses and was signed into law by President Carter in 1977. Thus, from the legislative history, it is difficult to determine exactly what role Congress intended to have the Secretary play in the issuance of notices of violation in states with approved programs. While the Senate clearly intended that the Secretary's role should be more limited, the House never expressly adopted the Senate's explanation of the enforcement section.

REGULATORY HISTORY

The federal regulations pertaining to the issuance of notices of violation in primacy states are located at 30 CFR Sec. 843.12. The language of Sec. 843.12(a)(1) reflects that which is found in Sec. 521(a)(3) of SMCRA. The regulation of OSM's authority to issue NOVs in primacy states is found in Sec. 843.12, and reads in pertinent part:

"When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued...the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action can be taken by the State. Where the State fails within ten days to cause the violation to be corrected or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate...." (30 CFR Sec. 843.12(a)(2) (1986))

Thus, OSM's regulations, while first repeating the language found in the Act, go on to expressly give the Secretary the power to issue a notice of violation in a state with an approved program. However, this provision was included only after the Secretary changed his own interpretation of the Act's requirements.

Under OSM's proposed regulations, the Secretary or his representative would not have been allowed to issue a notice of violation in a primacy state. "It is noteworthy", wrote the drafters, "that the proposed regulation only allows a Federal inspector to issue a notice of violation as part of the enforcement of a State program pursuant to Sections 504(b) or 521(b) of the Act." (43 FR 41663, 41795 (1978)) Subsection (d) of the proposed regulation gave the federal inspector the power to notify the state of the violation, but not to issue a notice. OSM invited comments on this provision in order to determine whether the proposed regulation was a proper interpretation of the Act and its legislative history.

OSM changed its position when the final regulations were issued in 1979. While noting that "[t]he legislative history of the Act does give conflicting statements on this issue", OSM decided that the history, when read in conjunction with the Act, gave them the authority to issue the disputed notices of violation. OSM justified this position by saying:

"...If OSM cannot issue a notice of violation following the State regulatory authority's refusal or failure to take action in the first instance, then the Federal inspection may be pointless. One



answer to this statement is that the point of the federal inspection in such a situation is to gather information for a Section 521(b) proceeding (OSM taking over all or a portion of a State program). The difficulty with this argument is that, as a practical matter, it would leave a large gap in the enforcement scheme of the Act.

"The Office's ability to take over a part of a State program as a result of the State's refusal or inability to take action in isolated cases may be limited and may take a great deal of time. If this is true, then during the interim, violations which are not imminent hazards could go unpunished and unabated. It should be pointed out that some of these notice-of-violation situations could be potentially serious or widespread, even though a hazard to life or significant environmental harm was not imminent' at the time of the Federal inspection. There is no reason to believe that Congress intended that such a gap exist in the permanent program or that Congress intended OSM to sit idly by while these violations ripen into imminent hazards to that OSM can act under the provisions of Section 521(a)(2) of the Act." (44 FR 14901, 15302 (1979))

OSM thus concluded that there was a "gap" in the federal enforcement scheme in the Act, and that it was within the Secretary's authority to fill in the missing link.

In 1981, OSM proposed to delete the provision giving the Secretary the authority to issue notices of violation in primacy states. The proposed rule would have deleted the sentence in Sec. 843.12(a)(2) which gave the Secretary this authority. The other alternative OSM considered was that of retaining the existing language. The preamble to the proposed rules explained:

"The proposed change is intended to raise the question whether, in a case where a State has failed to take appropriate action to ensure abatement of any violation, OSM's recourse may be with the State rather than the permittee. The Office believes that, where an approved State program is in force, OSM may lack authority to issue citations directly to permittees except in those limited circumstances where public health and safety, or significant, imminent environmental harm would justify issuance of a cessation order under Section 521(a)(2) of the Act." (46 FR 58467 (1981))

In April of 1982, OSM reported that it had decided to delay a decision on the amendment to Sec. 843.12(a)(2) until a Supplemental Environmental Impact Statement could be prepared. The comment period was reopened on the proposed change. (47 FR 17269 (1982); 47 FR 35630 (1982)) It was not until 1983 that OSM issued their decision. In a "policy statement", the Office concluded that "the regulation contained at 30 CFR Sec. 843.12(a)(2) was properly and lawfully promulgated; therefore, there [was] no need to reconsider the issue." (48 FR 9199 (1983))

JUDICIAL DECISIONS

Two federal courts have adjudicated the validity of the Secretary's regulations dealing with the federal issuance of notices of violation in primacy states. In *CLINCHFIELD COAL CO. v HODEL*, the Federal District Court for the Western District of Virginia granted Clinchfield Coal's request for temporary relief and enjoined OSM from issuing a cessation order to



Clinchfield for failure to obey the notice of violation issued by OSM. In doing so, the court found that there was a substantial likelihood that OSM would be prevented from enforcing the NOV.

The notice of violation in question in the CLINCHFIELD case was issued by OSM after what it deemed to be an "inappropriate response" to a ten-day notice issued to Virginia. The problem was that OSM and the state regulatory authority had differing interpretations of a regulation dealing with durable rock fills. During a routine inspection, the OSM inspector informed a representative of the state regulatory authority that the diversion ditches were being improperly constructed, according to OSM's interpretation of the applicable regulations. OSM then issued a ten-day notice to the State of Virginia.

The state regulatory authority refused to take any action on the ten-day notice, stating that the diversion ditches were being constructed in accordance with Virginia's interpretation of the applicable regulations. Thus, the dispute centered upon differing interpretations of the same regulations. OSM then issued a notice of violation to Clinchfield for failure to comply with Virginia regulations. After an Administrative Law Judge (ALJ) denied temporary relief to Clinchfield, it appealed to district court.

After reviewing the Act and its legislative history, the court concluded that OSM probably did not have the authority to issue the NOV in question:

"If the term primacy' is to have any meaning, then the state regulatory authority must have principal responsibility for interpreting and enforcing its own regulations and the Surface Mining Act. If the state fails to enforce the Act, then OSM may take action to withdraw approval of the state program under 30 CFR Sec. 1271(b). I do not believe that Congress intended the OSM to serve as a duplicative regulatory body, conducting inspections and directly issuing notices of violation, especially where the state authority has made a determination that no violation exists." (CLINCHFIELD COAL CO. v HODEL, No. 85-0113-A at 20 (WD Va June 20, 1985))

The District Court's decision was reversed by the Fourth Circuit Court of Appeals on different grounds. The Fourth Circuit held that the District Court lacked subject-matter jurisdiction over the case, since the action was tantamount to an attack on a federal regulation. Citing COMMONWEALTH OF VIRGINIA v WATT, 741 F2d 37 (4th Cir 1984), the Court held that "an attack on administration action taken in accordance with Secretary of the Interior's regulations under SMCRA was an attack on the regulations themselves and may be heard only in the U.S. District Court for the District of Columbia." (CLINCHFIELD COAL CO. v DOI, No. 85-2206 (unpublished) at 2 (4th Cir August 27, 1986)) Thus, the case was remanded to the District Court with instructions to dissolve the preliminary injunction issued against OSM.

The District Court for the Northern District of Alabama has also dealt with this question. In U.S. v CAMP COAL CO., the court questioned OSM's authority to issue a notice of violation against a company operating under a valid Alabama permit. OSM had inspected Camp Coal's site and issued a ten-day notice to Alabama Surface Mining Commission (ASMC), asserting that the



OSM inspector had found two violations at the site. The first was corrected immediately by the operator. The second violation, which alleged that rills and gullies had been found in backfilled and reclaimed areas, was the subject of this litigation. After receiving the ten-day notice, ASMC conducted its own inspection of the site and notified OSM that the filling of the rills and gullies was not yet due to be completed. OSM then sent Camp Coal a notice of violation, and notified the ASMC that its response had been inappropriate. Camp Coal continued to follow the ASMC guidelines, but was later issued a cessation order by OSM. After the issuance of the cessation order, OSM reinspected the area (with a different inspector) and found that the rills and gullies still existed. In fact, Camp Coal had, indeed, refilled the rills and gullies, but intervening rains had created new rills and gullies. The OSM inspector notified Camp Coal that since the company had failed to notify OSM of the abatement, and since the violation had reappeared prior to the follow-up inspection, the violation would be considered to be continuing.

The dispute in this case arose over the civil penalty imposed on Camp Coal by OSM. A penalty of \$22,500 was set by OSM, the maximum amount which could be assessed. Apparently, an OSM inspector told Camp Coal that since they did not have the money, they should try to appeal the assessment without prepaying the civil penalty. However, when Camp Coal attempted to take this route, OSM moved to dismiss the appeal because the company did not prepay the penalty. After the ALJ granted OSM's motion, the U.S. filed this enforcement action in District Court.

The District Court first found that OSM had waived the prepayment requirement through the words and actions of its inspector. Even if OSM had not waived the prepayment of the penalty, the court reasoned, Camp Coal did not owe the penalty because OSM did not have the authority to issue the underlying notice of violation. The court first cited the *CLINCHFIELD* decision with approval, then went on to say:

"The predominant issue in *CLINCHFIELD*...is the extent to which OSM has the right to force its view of reclamation requirements over a conflicting view by the state regulatory agency, particularly where the state agency's view makes good sense.

"In the instant case, the United States wants to hide the clear fact that= the underlying issue is one of a direct conflict and confrontation between OSM and ASMC. The truth is that Camp Coal is no more than a pawn or victim of this confrontation.

"If the notice of violation issued in this case overstepped OSM's authority and was void, did it suddenly become valid and enforceable as a basis for an assessment just because the operator lacked the wherewithal to meet a monetary administrative appeal prerequisite? The court thinks not, even without a waiver of the prerequisite by OSM." (*U.S. v CAMP COAL*, No. 85-AR-2117-S (ND Ala February 20, 1986))

The court also cited to the *DRUMMOND v HODEL* case, which it had handed down fifteen days before the *CLINCHFIELD* case was decided, for the same proposition. This case was not available on the LEXIS case file.



What the judicial resolution of this issue will be is unclear. Two different judicial districts seem to agree that OSM does not have the power to issue these notices of violation; however, note that the CLINCHFIELD case was reversed on appeal, albeit on different grounds, and that the CAMP COAL opinion was handed down before the Fourth Circuit reversed CLINCHFIELD. On the other hand, the DRUMMOND case cited by the Alabama District Court was decided before the CLINCHFIELD case, and was not appealed by OSM. Thus, the courts have yet to reach a definitive position on this issue.

The question of OSM's authority to issue notices of violation has arisen in a number of cases heard by the Interior Board of Land Appeals. In a majority of those cases, the ALJ or Board upheld OSM's authority to issue these NOVs without specifically addressing the validity of the pertinent regulations. Other judges have pointed out that they are bound by the Secretary's regulations and therefore have no authority to declare them invalid for an alleged lack of statutory basis. (See BASIN COAL CO. v OSM, No. NX 5-123-R (February 10, 1986))

ATTACHMENTS

- A. S. Rep. No. 1162, 92nd Cong., 2d Sess. (1972).
- B. S. Rep. No. 402, 93rd Cong., 1st Sess. (1973).
- C. 119 Cong. Rec. 22399 (1973).
- D. Regulation of Surface Mining Operations: Hearings Before the Committee on Interior and Insular Affairs of the U.S. Senate, 93rd Cong., 1st Sess. (1973).
- E. Regulation of surface Mining: Hearings Before the Subcommittee on the Environment and Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs of the House of Representatives, 93rd Cong., 1st Sess. (1973).
- F. H.R. Rep. No. 1072, 93rd Cong., 2d Sess. (1974).
- G. H.R. Rep. No. 1522, 93rd Cong., 2d Sess. (1974).
- H. H.R. Rep. No. 45, 94th Cong., 1st Sess. (1975).
- I. H.R. Rep. No. 28, 94th Cong., 1st Sess. (1975).
- J. H.R. 25, 94th Cong., 1st Sess. (1975).
- K. H.R. Rep. No. 896, 94th Cong., 2d Sess. (1976).
- L. H.R. Rep. No. 1445, 94th Cong., 2d Sess. (1976).
- M. H.R. Rep. No. 218, 95th Cong., 1st Sess. (1977).
- N. S. Rep. No. 128, 95th Cong., 1st Sess. (1977).
- O. S. Rep. No. 337, 95th Cong., 1st Sess. (1977).
- P. 43 FR 41663 (1978).
- Q. 44 FR 14901 (1979).
- R. 46 FR 58467 (1981).
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