



COALEX STATE INQUIRY REPORT - 165

March 1991

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TOPIC: PERMIT REVISIONS; INCIDENTAL BOUNDARY REVISIONS

INQUIRY: 30 CFR 774.13(d) ["Requests to change permit boundary" under "Permit revisions"] states that "Any extensions to the area covered by the permit, except incidental boundary revisions, shall be made by application for a new permit." Please locate any material which defines "extensions". Does this mean acreage added to the permit area? If the same number of acres are added as are deleted from a permit, is a new permit required? How do the other IMCC states interpret this section?

SEARCH RESULTS: COALEX Reports providing Legislative History, Regulatory History and state regulations for incidental boundary revisions (IBRs) were identified. Using the COALEX Library and other materials available in LEXIS, relevant OSM Directives and Federal Register preambles, discussing OSM rationale for approving or disapproving state IBR requirements, were retrieved. A survey of eleven IMCC member states provides information on current state regulations and their implementation. In addition, administrative and state decisions are included to indicate situations where IBRs or revised permits were required. Copies of the materials listed below are attached.

OSM DIRECTIVES

Subject No REG-19, Transmittal No 387, "Incidental Boundary Revisions" (October 19, 1987).

The purpose of the Directive is to establish policy for determining when an extension of the area covered by a federal permit constitutes an incidental boundary revision.

Nine criteria are listed for when a proposed boundary revision would be considered incidental. Some of the criteria are:

1. When the proposed change would not increase the area of land available for coal removal unless the increase would be a secondary impact of and incidental to the primary purpose of the revision;



2. When the proposed change would only involve lands for which the analysis of probable hydrologic consequences is applicable;
3. When the proposed change would not constitute a change in the method of mining;
4. When the proposed change would be contiguous with the permit area of a surface mine, but need not be contiguous with the permit area of an underground mine.

Some of the examples provided include:

1. The addition of areas to expand support facilities;
2. The addition of areas to improve the alignment of a road or diversion ditch or the placement of a soil stock pile area of a sedimentation control structure;
3. The addition of areas to make minor adjustments in the area permitted for coal extraction so long as the total area permitted for extraction is not increased.

Subject No REG-21, Transmittal No 398, "Findings and Determinations for Revisions and Renewals of Federal Permits" (November 10, 1987).

PREVIOUS COALEX REPORTS

COALEX STATE INQUIRY REPORT - 34, "Incidental boundary revision" (1985).

This Report provides Legislative History on the phrase "incidental boundary revisions"; a copy of the 1983 federal regulatory revision which added a new section establishing minimum criteria for approval of permit revisions; and copies of state regulations.

COALEX STATE INQUIRY REPORT - 118, "Major/minor permit revisions" (1989).

Included in this Report is a survey of regulations that define "major" or "significant" permit revision for five states: Indiana, Tennessee, West Virginia, Montana and Wyoming.

FEDERAL REGISTER NOTICE ON FEDERAL REGULATIONS

48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Requirements of applications.

See COALEX Report - 34.

FEDERAL REGISTER NOTICES ON STATE REGULATIONS

In the following Federal Register preambles, OSM discusses approval or disapproval of state program requirements for incidental boundary revisions or permit revisions:

ILLINOIS

53 FR 43112 (OCTOBER 25, 1988) [Excerpts]



INDIANA

51 FR 17478 (MAY 13, 1986) [Excerpts]

IOWA

51 FR 17176 (MAY 9, 1986) [Excerpts]

KENTUCKY

55 FR 46054 (NOVEMBER 1, 1990)

55 FR 24113 (JUNE 14, 1990) [Excerpts]

48 FR 21574 (MAY 13, 1983) [Excerpts]

48 FR 22711 (MAY 20, 1983) [Excerpts]

OHIO

52 FR 26959 (JULY 17, 1987) [Excerpts]

TENNESSEE

53 FR 49104 (DECEMBER 5, 1988)

WEST VIRGINIA

55 FR 23703 (JUNE 12, 1990) [Excerpts]

55 FR 21304 (MAY 23, 1990) [Excerpts]

54 FR 16136 (APRIL 21, 1989) [Excerpts]

INTERIOR ADMINISTRATIVE DECISIONS

TURNER BROTHERS, INC. (TBI) v OSM, Docket No. TU 6-51-R (1987).

TBI had obtained an incidental boundary revision requiring them to follow a specific cut sequence, progressing south; TBI had made cuts progressing west. The ALJ affirmed the issuance of the NOV because TBI had not followed their mine plan.

ROCKY COAL CO., INC. v OSM, Docket No. NX 7-90-R (1987).

Rocky Coal was cited for having failed to permit all areas which had been disturbed, by the placement of overburden and spoil. The corrective action required a permit revision. The CO was affirmed because Rocky Coal failed to correct the inadequacies in its permit revision application that had been resubmitted to the state regulatory authority.

MULLINS COAL CO., INC. v OSM, Docket Nos. NX 5-29-R, NX 5-41-R (August 23, 1985).

The ALJ found that Mullins had failed to apply for an amendment to its permit to incorporate all areas that had been affected by its operations: a landslide occurred on a portion of Mullins' haul road.



ISLAND CREEK COAL CO. v OSM, Docket Nos. NX 9-106-R, NX 0-35-P (1981).

Island Creek was found to have disturbed an area off the permitted area. They did receive permission from the regulatory authority to add the disturbed area to their permitted acreage.

PENNSYLVANIA ADMINISTRATIVE CASES

KOCHER COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), EHB Docket No. 82-073-W (1986).

Kocher was directed to discontinue mining activities being conducted outside the boundary of Kocher's approved mining permits. Kocher had submitted an amended permit application to DER for additional acreage for its mining activities and although DER had not approved the amended permit, Kocher believed that DER had approved it. During the appeal process, DER did grant the permit for the additional acreage. The board dismissed the appeal as moot.

ROCKWOOD INSURANCE CO. (BLUE COAL CO.) AND ROCKWOOD INSURANCE CO. (NORTHWEST MINING CO.) v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1981 EHB 424, Docket Nos. 78-168-S, 78-166-S (1981).

The two coal companies bonded by Rockwood increased their permitted acreage by applying for and receiving amended permits. Both companies later failed to comply with the state performance standards and their bonds were forfeited. DER proved that the bonds were properly forfeited in their full face amounts.

STATE DECISION

OOTEN v FAERBER, COMMISSIONER, W. VA. DEPT. OF ENERGY, AND MAGNET COAL, INC., 383 SE 2d 774 (W Va 1989).

"SYLLABUS: 2. Where consideration of the reinstatement of an area deleted from a surface-mining permit is conditioned upon (1) completion of mining and reclamation on a significant portion of the approved area and upon (2) a further determination of the possible effect of mining on the deleted area, there must be compliance with both of these conditions, including revegetation, prior to reinstatement, unless the permit conditions are modified in accordance with the statute."



SURVEY

SURVEY QUESTIONS

- A. Do you literally apply the provisions of 511(a)(3), to your program, thereby mandating acquisition of a new permit if a permit boundary is to be extended other than through an IBR?
- B. Do you interpret the term "extension" as it is used in 511(a)(3) to mean an increase in size of the permit, or to encompass any boundary change in the permitted area?
- C. Are incidental boundary revisions allowed within your program as a means of changing permit boundaries or increasing permitted acreage? If so, are there any restrictions on the scope or use of IBRs?
- D. Is there any other mechanism within your program whereby a permit may be revised or amended to change permit boundaries or to increase permitted acreage? If so, what is the mechanism, and what are the limitations, if any, which apply to its use?
- E. Do you allow permit revisions or amendments which exchange previously permitted and bonded acreage, which has not been and will not be disturbed due to a change in plans, for new acreage of equivalent or lesser acreage? Such as "add/delete" revision would result in either no net change in permitted area, or a decrease in total permitted area.
- F. Whatever permit boundary or size revision procedures exist within your program, are they approved by OSM?

SURVEY RESULTS

ALABAMA

A. Does state require new permit if boundary extended other than through IBR?

No. To do so would result in an unmanageable permit load and an unreasonable and unnecessary cost in time and money.

B. Interpretation of "extension".

Any change in boundary.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Yes. The acreage must be minimal in comparison to the original permit size. Baseline information in the original permit must cover the extension area. The operation and reclamation plans in the original permit must be applicable to the extension areas.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?



No.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Yes, if conditions stated above, in C., apply.

F. Are state's permit boundary or size revision procedures approved by OSM?

All are policy or procedural interpretations of state regulations which mirror federal regulations.

ARKANSAS

A. Does state require new permit if boundary extended other than through IBR?

No. New permits are not required; however, all provisions of permitting process are required, as if a new permit would be issued. This would be called a "significant departure" and the permit revised.

B. Interpretation of "extension".

Use the term as it is used in 511(A)(3).

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Yes, depending on site specific conditions and circumstances. State generally does not allow more than a 5 - 10 % increase in acreage.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

Unaffected acreage may be reduced from permit; otherwise, any changes are according to 511(a)(3).

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Swapping or adding acreage would either be treated as a "significant departure" or IBR.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

ILLINOIS

A. Does state require new permit if boundary extended other than through IBR?

Research conducted by: Joyce Zweben Scall

Survey conducted by: IMCC



Yes, for surface mines and surface facilities of underground mines. For underground works of underground mines (shadow areas), areas may be added as a significant revision to an existing permit.

B. Interpretation of "extension".

An extension would be an area subject to permitting which was not previously permitted. This would involve both a change in size as well as a change in boundary.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

IBRs allow both. It does not seem possible to add acres without adding permit boundaries. IBRs are granted in accordance with 62 Ill. Adm. Code 1774.13(d). No other restrictions apply.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

Other than IBRs and the methods described in A., above, or as part of a provision in the Illinois program allowing for the separate permitting of minor underground facilities (MUF), no other methods for adding acres exist. MUFs are limited to small areas not adjacent to the major permitted facilities. MUFs include air shafts, fan and ventilation buildings, small support buildings, access power holes, etc.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

No. Such additions and deletions may only be accomplished through two distinct and separate actions.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

INDIANA

A. Does state require new permit if boundary extended other than through IBR?

No.

B. Interpretation of "extension".

Increase in acreage of permit area.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?



IBRs are used to increase acreage, with a maximum of 20 acres per IBR. The aggregate of all IBRs cannot be more than 15 % of original permit. The maximum increase for coal removal acreage is 10 %.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

No.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

No.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

KENTUCKY

A. Does state require new permit if boundary extended other than through IBR?

No. State regulations allow for an amendment. Amendments must meet the same criteria as a new permit.

B. Interpretation of "extension".

Any boundary change.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Yes. Only restriction is 10 % or 20 acres in size, whichever is less.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

See answers to A., B. and C., above.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Yes. State will allow deletion for undisturbed acres. The acreage limitations in C., above, do not count in the deletion of acreage.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.



MARYLAND

A. Does state require new permit if boundary extended other than through IBR?

Maryland requires a permittee to apply for and obtain an amended permit for any change in the boundaries of a permitted area. A "new" permit application and bond is required prior to issuing a new permit or amendment that allows the change to occur on the ground. However, such procedures as advertisement (public notice and opportunity for a hearing) are not required when the area change is less than 10 acres and the Bureau determines the change is insignificant. Maryland will allow a permit to be increased in area, using this procedure, a total of 10 acres over the permit's entire life.

B. Interpretation of "extension".

Maryland requires application for, approval of, and issuance of an amended permit for all changes to a mine permit that results in different area being affected than was previously approved.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

A permittee is allowed to move a permit boundary a maximum of 250 feet from its original position. The new area covered by this shift must be countered by a deletion of an equivalent acreage elsewhere in the permit. To obtain this type of boundary revision, there must be equivalent undisturbed area available to delete. An application must be filed for such a permit boundary revision and all applicable aspects of the permitting program addressed. An amended permit will be issued if the proposal is approved.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

Maryland allows area amendments to all mining permits. Amendments determined to be significant revisions require the same application forms, review procedures, public notice requirements, PHC, CHIA, written findings, and AVS compliance review as an original permit. Amendments that are listed in Maryland's regulations as insignificant include revisions that allow up to 10 acres to be added to a permit (over the life of the permit). Insignificant revisions require the Bureau's approval, but are not subject to public notice requirements. There are no mechanisms, other than described above, to change permit boundaries or increase acreage.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Yes, if the boundary of the "add" area is not more than 250 feet from the original permit boundary, or a boundary that was established through significant revision procedures. An amended permit is issued for "add/delete" changes.



F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

OHIO

A. Does state require new permit if boundary extended other than through IBR?

Yes.

B. Interpretation of "extension".

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Yes. See Division Advisory Memos #28 and #29 attached.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

No.

E. Does state allow acreage exchange, e.g., "add/delete" revision? No.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

OKLAHOMA

A. Does state require new permit if boundary extended other than through IBR?

Yes.

B. Interpretation of "extension".

Use the term as it is used in 511(a)(3).

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Yes. The operator can add 10 acres or 5 % of the permit whichever is less.



D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage? Boundaries can be decreased through the bond release procedure, if the land has not been disturbed.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

No.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes.

PENNSYLVANIA

A. Does state require new permit if boundary extended other than through IBR?

Yes. Additional acreage may not be added to a permit other than through and IBR.

B. Interpretation of "extension".

Pennsylvania's program does not use the term "extension" with respect to permit revisions and changes in permit boundaries. We would interpret the term "extension" as used in 511(a)(3) to mean an increase in the size of the permit.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

Insignificant boundary corrections are allowed under the following conditions: 1) may be considered only for areas where mining was intended at the time the permit was issued (i.e., irregular coal cropline); 2) correction must be small or inconsequential (in most cases, area substantially less than 5 acres and in no case would an area greater than 5 acres be considered insignificant); and 3) may not be used to correct violation where mined off permit area.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

None.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Areas under authorizations for bonding increments within a permit may be revised or amended but total permit acreage and permit boundaries remain unchanged.

F. Are state's permit boundary or size revision procedures approved by OSM?



Yes.

NEW MEXICO

A. Does state require new permit if boundary extended other than through IBR?

Other than IBRs, a permit revision (with notification to interested parties, opportunity for public hearing, etc.) is required if the new boundary is contiguous with existing boundary.

B. Interpretation of "extension".

Any boundary change.

C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

IBRs are allowed for both. No definite criteria for IBRs, they are subject to the director's discretion.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

Other than IBRs, a permit revision is required. A new permit would be required if new area is not contiguous.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Other than IBRs, a permit revision is required even if total acreage in permit remains the same.

F. Are state's permit boundary or size revision procedures approved by OSM?

Yes, part of regulations.

VIRGINIA

A. Does state require new permit if boundary extended other than through IBR?

Yes.

B. Interpretation of "extension".

Virginia interprets the incidental "extension" to mean any IBR that adds any previously unpermitted areas to the permit area.



C. Does state allow IBRs to change permit boundaries or increase permitted acreage: restrictions and scope?

The Virginia program allows IBR which may add incidental acreage or modify existing permit boundaries. However, Virginia restricts this revision to only incidental changes.

D. Are there other mechanisms for changing permit boundaries or increasing permitted acreage?

No. Any areas other than IBRs may be permitted only by applying for a separate permit or by applying for a new permit encompassing both areas. Either way, all new permit requirements are mandated.

E. Does state allow acreage exchange, e.g., "add/delete" revision?

Deletion of undisturbed permitted acreage is not restricted. However, additions of new areas must, independent of the deletion, meet the IBR test. Otherwise, the new area must be a new permit.

F. Are state's permit boundary or size revision procedures approved by OSM?

Virginia has not adopted specific criteria nor has OSM officially approved them. However, the Virginia IBR procedures have been used since December 16, 1981 without issue from OSM.

ATTACHMENTS

- A. OSM DIRECTIVE, Subject No REG-19, Transmittal No 387, "Incidental Boundary Revisions" (October 19, 1987).
- B. OSM DIRECTIVE, Subject No REG-21, Transmittal No 398, "Findings and Determinations for Revisions and Renewals of Federal Permits" (November 10, 1987).
- C. COALEX STATE INQUIRY REPORT - 34, "Incidental boundary revision" (1985)
 - A. S REP No 402, 93rd Cong, 1st Sess 57 (1973). [Excerpt]
 - B. S REP No 128, 95th Cong, 1st Sess 79-80 (1977). [Excerpt]
 - C. 48 FR 44376-78 (SEPTEMBER 28, 1983). Sec. 774.13 Permit revisions. [Excerpt]
 - D. KENTUCKY Administrative Regulations, 405 KAR 8:010 Sec. 20 Permit Revisions. [Excerpts]
 - E. ILLINOIS Coal Mining Regulations. Parts 1711, 1786, 1787 and 1788. [Excerpts]
 - F. WEST VIRGINIA Surface Mining Reclamation Regs. Sec. 7D, IBRs; West Virginia Surface Coal Mining and Reclamation Act, Article 6, Sec. 20-6-19 Permit Revision. [Excerpts]
 - G. Annotated Code of MARYLAND, Sec. 7-505 (1979). Code of Maryland Regulations Sec. 08.13.09.08.[Excerpts]
 - H. WYOMING Environmental Quality Act, Sec. 35-11-402. Land Quality Div. of the Dept. of Environmental Quality Regs., Sec. 6 (1980). [Excerpts]



- I. NORTH DAKOTA Admin. Code, Sec. 69-05.2-11-02 Permit Revisions.
[Excerpt]
- J. COLORADO Surface Coal Mining Reclamation Act, Sec. 34-33-103. Colorado Surface Coal Mining Reclamation Regs., Sec. 2.08.4 (1982).
- D. COALEX STATE INQUIRY REPORT - 118, "Major/minor permit revisions" (1989).
 - A. SMCRA Sec. 511.
 - B. 30 CFR 774.13 Permit Revisions.
 - C. INDIANA Regulations and Statutes
 - D. TENNESSEE Regulations and Statutes
 - E. WEST VIRGINIA Regulations and Statutes
 - F. MONTANA Regulations and Statutes
 - G. WYOMING Regulations and Statutes
- E. ILLINOIS: 53 FR 43112 (OCTOBER 25, 1988) [Excerpts]
- F. INDIANA: 51 FR 17478 (MAY 13, 1986) [Excerpts]
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- M. ROCKY COAL CO., INC. v OSM, Docket No. NX 7-90-R (1987).
- N. MULLINS COAL CO., INC. v OSM, Docket Nos. NX 5-29-R, NX 5-41-R (August 23, 1985).
- O. ISLAND CREEK COAL CO. v OSM), Docket Nos. NX 9-106-R, NX 0-35-P (1981).
- P. KOCHER COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), EHB Docket No. 82-073-W (1986).
- Q. ROCKWOOD INSURANCE CO. (BLUE COAL CO.) AND ROCKWOOD INSURANCE CO. (NORTHWEST MINING CO.) v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1981 EHB 424, Docket Nos. 78-168-S, 78-166-S (1981).
- R. OOTEN v FAERBER, COMMISSIONER, W. VA. DEPT. OF ENERGY, AND MAGNET COAL, INC., 383 SE 2d 774 (W Va 1989).