



COALEX STATE INQUIRY REPORT - 183

June 1991

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TOPIC: UNWARRANTED FAILURE TO COMPLY: DEFINITION OF "INDIFFERENCE", "LACK OF DILIGENCE" AND "LACK OF REASONABLE CARE" [Includes COALEX Reports Nos. 141 & 172]

INQUIRY: Are there any administrative decisions which define the terms above as used in the definition of "unwarranted failure to comply", 30 CFR 843.5 [initial regulations 30 CFR 722.16(b)(3)]? The same phrases are found as part of the definition of "negligence", 30 CFR 845.13(b)(3)(ii)(B) [initial regulations 30 CFR 723.12(d)].

SEARCH RESULTS: The COALEX Library and existing COALEX Reports were used to conduct this research. The relevant OHA decisions identified attempt to define terms at issue in determining the validity of an NOV or CO, or when addressing the appropriateness of the points assigned for negligence. Copies of the decisions listed below are attached. Also included are COALEX Report - 172, "Inability to comply" (March, 1991) and COALEX Report - 141, "Reduction of mandatory civil penalty" (May, 1990) [See, in particular, PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (January 28, 1986)].

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

In finding that there was "no pattern of violation to warrant either suspension or revocation" of the mining permit, the ALJ used BLACK'S LAW DICTIONARY to define the phrases at issue:

"There is a wide chasm between an act of indifference and lack of reasonable care. There is a difference between the lack of diligence in 'allowing a violation to occur' and a failure to abate a violation due to indifference or lack of reasonable care."

"Indifference denotes disinterest or unconcern which, under some circumstances, may amount to willful conduct although passive as opposed to active willful disregard."

"Reasonable care is such a degree of care, precaution or diligence as may fairly and properly be expected or required, having regard to the nature of the action, or of the subject matter, and the circumstances surrounding the transaction."



"Lack of reasonable care usually equates with ordinary negligence and in this case it should be defined according to the nature of the industry of surface mining and those who work therein."

LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (June 8, 1987).

"OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing" on the permit area without permission of the regulatory authority. "The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed", they are not relevant to whether or not there was a violation of the regulations. "Inability to comply may only be considered in mitigation of the amount of the civil penalty."

LONE STAR STEEL CO. v OSM, 107 IBLA 134, IBLA 87-284 (February 6, 1989).

As part of the discussion of the civil penalty assessment, the Board reduced the number of points for negligence, finding that "the regulation is designed to recognize degrees of fault in causation, since it provides that causes for violations ranging from inadvertence, through negligence, to intentional conduct are possible. Because each category of fault allows for assessment of a varying number of points, each category is designed to allow the exercise of discretion by the Department. Thus, if no negligence can be said to exist, but a violation nevertheless has occurred, no points at all are assessed."

The Board's calculation of points indicated that less than 30 points should be assessed "under the agreed circumstances" (see LONE STAR, above) and the penalty was waived.

COLLINS MINING CO. v OSM, 103 IBLA 25, IBLA 87-327 (June 23, 1988).

The Board found that Collins "was less than diligent in attempting to address the State NOV" and "negligent in failing to abate the violation cited by OSMRE. The record clearly shows an operator who desired to deal with the violation at its own pace and not according to the schedule dictated by either the State or OSMRE."

NATIONAL MINES CORP. v OSM, 104 IBLA 331, IBLA 87-57 (September 23, 1988).

In determining civil penalty amounts, the Board concluded "that petitioner's failure to prevent the contribution of additional suspended solids to the river was 'due to indifference, lack of diligence, or lack of reasonable care.' There is no evidence of a greater degree of fault than negligence. Here, petitioner was attempting to address one problem and through inattention it created another."

FARRELL-COOPER MINING CO. v OSM, 111 IBLA 115, IBLA 87-417 (September 28, 1989).



The Board affirmed the ALJ's finding that Farrell-Cooper had disturbed 35 acres of land prior to establishing sedimentation controls and that this action was taken prior to the approval of its permit revision and the ALJ's assessment of 12 points. The Board disagreed with the ALJ's ruling that Farrell-Cooper's negligence was "insignificant":

"If the negligence were, in fact, 'insignificant', less than 12 points would be appropriate. In this case, Farrell-Cooper was negligent. It should not have cleared the area in question until approval of its mine plan revision. Failure to do so exhibited a lack of reasonable care for which 12 points are properly assigned."

CF&I STEEL CORP. v OSM, DV 3-1-P (December 8, 1983).

The ALJ assigned 15 points (out of a possible 25) for negligence finding that "the petitioner's 'negligence' was aggravated by the failure to begin corrective measure in a timely manner...."

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (March, 1991).
 - A. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 843 Federal Enforcement. [Excerpts.]
 - B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 843 Federal Enforcement. Section 843.18 Inability to comply. [Excerpts.]
 - C. 46 FR 58464 (DECEMBER 1, 1981). Proposed rules. Inspection, Enforcement and Civil Penalty Assessments. [Excerpts.]
 - D. 47 FR 35620 (AUGUST 16, 1982). Final rules. Inspection and Enforcement; Civil Penalty Assessments. [Excerpts.]
 - E. SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978).
 - F. VERNON R. PAUL v COMMONWEALTH OF PENN., DEPT. OF ENVIRON. RESOURCES (DER), Docket No. 84-290-G, 1985 EHB 791 (1985).
 - G. DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 2-12-P, IN 1-13-P (1983).
 - H. MARTIN MINING CORP. v OSM, Docket No. IN 1-9-R (1983).
 - I. GLENN COAL CO. v OSM, Docket No. CH 0-279-R (1984).
 - J. GARLAND COAL AND MINING CO. v OSM, Docket Nos. TU 4-43-R, IBLA 85-106 (1986).
 - K. CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988).
 - L. CLEAR CREEK COAL CO. v OSM, Docket Nos. NX 1-49-R, NX 1-59-R (1985).
 - M. CARBON FUEL CO., INC. v OSM, Docket No. NX 9-116-R (1980).
 - N. W.E. AND JONAH WARREN COAL CO., INC. v OSM, Docket No. NX 0-246-R (1984).
 - O. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).



- P. THE OHIO VALLEY COMPANY CONSTRUCTION DIV., INC. v OSM, Docket No. IN 9-13-R (1979).
- Q. DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979).
- R. GREATER PARDEE, INC. v OSM, Docket No. CH 0-284-R (1981).
- S. SHAWNEE COAL CO. v OSM, Docket No. IN 2-2-R (1981).
- T. COAL ENERGY, INC. v OSM, 105 IBLA 385, IBLA 87-190 (1988).
- U. MARTIN v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 120 Pa Commw 269, 549 A 2d 675 (Pa Commw Ct 1988).
- V. ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (April 27, 1990).
- W. ALPINE CONSTRUCTION CO. v OSM, Docket No. TU 7-55-R (1988).
- X. TURNER BORS., INC. v OSM, Docket Nos. TU 6-20-R, TU 6-52-R, TU 6-81-R (1987).
- Y. TURNER BROS., INC. (TBI) v OSM, Docket Nos. TU 4-7-R, TU 4-11-R (1985).
- Z. TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).
- B. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty" (May, 1990).
 - A. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v WATT, 550 F Supp 979 (DDC 1982).
 - B. SAVE OUR CUMBERLAND MOUNTAINS, INC. v CLARK, 725 F2d 1434 (DC Cir 1984).
 - C. Subsequent history: Auto-Cite and Shepard's Citations.
 - D. PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (1986).
 - E. GRAYS KNOB COAL CO. v OSM, 98 IBLA 171, IBLA 85-364 (1987).
 - F. L.W. OVERLY COAL CO. v OSM, 103 IBLA 356, IBLA 88-39 (1988).
 - G. APEX CO., INC., 4 IBSMA 19, IBSMA 81-53 (1982).
 - H. GRAHAM BROTHERS COAL CO. v OSM, Docket No. CH 3-14-R (1984).
 - I. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).
- C. OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., CH 0-2-A (March 17, 1981).
- D. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (June 8, 1987).
- E. LONE STAR STEEL CO. v OSM, 107 IBLA 134, IBLA 87-284 (February 6, 1989).
- F. COLLINS MINING CO. v OSM, 103 IBLA 25, IBLA 87-327 (June 23, 1988).
- G. NATIONAL MINES CORP. v OSM, 104 IBLA 331, IBLA 87-57 (September 23, 1988).
- H. FARRELL-COOPER MINING CO. v OSM, 111 IBLA 115, IBLA 87-417 (September 28, 1989).
- I. CF&I STEEL CORP. v OSM, DV 3-1-P (December 8, 1983).