



COALEX STATE INQUIRY REPORT - 222

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TOPIC: PERMIT REVISIONS AND MIDTERM PERMIT REVIEWS

INQUIRY: An operator's recent request for a permit revision, for use of a topsoil substitute, was denied. The operator (Peabody) claimed that a similar provision in the original permit and subsequent permit revision requests have been approved; no NOV's have been issued for failure to meet the applicable performance standards. Please locate any material which discusses the RA's ability to alter previously approved permit conditions or permit revisions and the purpose behind the need for the midterm permit review.

SEARCH RESULTS: Research was conducted using the COALEX Library and the other materials available in LEXIS. No information was identified in the legislative history, Federal Register preambles or Interior administrative decisions that specifically addresses the RA's ability to alter previously approved permit conditions or permit revisions when there has been no failure to meet performance standards. However, one relevant OSM Directive on "Midterm Review of Federal Permits" and a Pennsylvania administrative decision which ruled on the Department of Natural Resources' change of an existing practice were retrieved. Also included here, for background, are a second OSM Directive on revisions and renewals of federal permits and portions of two 1983 Federal Register preambles to final rules on topsoil and permit processing.

OSM DIRECTIVE, Subject No REG-17, Transmittal No 382, "Midterm Review of Federal Permits" (Issued October 6, 1987).

The Directive established the policies and procedures that federal permitting entities (FPE) are required to follow when conducting midterm reviews of federal permits. Pertinent sections are reproduced below. The full text of the Directive is attached.

3. Policy/Procedures.



a. Background. Section 511 requires the RA to review outstanding permits and may "require reasonable revision or modification of the permit during the permit term."

c. Policy. "The FPE shall conduct the midterm permit review as an evaluation of the adequacy of the permit, not as an evaluation of the permittee's compliance with permit provisions.

...

"When, pursuant to any review, the FPE determines that permit revisions are necessary or appropriate to maintain or achieve compliance with the applicable State or Federal program, the FPE shall order the permittee to revise the permit accordingly, and, in accordance with the applicable program counterpart to 30 CFR 774.11(c), shall prepare and document written findings explaining the need for the revisions. If the review finds no need for permit revisions, the FPE shall prepare and document a determination of adequacy.

"The FPE may also identify permit provisions that are no longer relevant or which have been rendered obsolete or inefficient by technological advances. The FPE shall notify the permittee in writing that the irrelevant, obsolete, or inefficient provisions are being considered for deletion from the permit. If the permittee concurs, these provisions may be deleted."

d. Review elements and procedures. "The FPE shall: (1) Review all permit documents, including the permit application package, permit revisions, bond releases or bond release applications, monitoring data, and any annual or other reports, to identify all potential problem areas and determine whether revisions are needed.

...

"(3) Evaluate whether the assumptions underlying the finding made prior to the approval of the permit and any variances or special mining practices remain valid and whether, under current permit provisions, the site can be successfully reclaimed to achieve the approved postmining land use.

"(4) Review the site's inspection and enforcement history, including all enforcement actions and citizen complaint records, to identify any permit-related problems that may not have been identified during review of the permit file.

"(5) Review all changes in the pertinent State or Federal regulatory program made since permit issuance and determine whether any permit provisions need to be revised for the operation to remain in compliance with the current approved program."

**IN THE MATTER OF: CONSOLIDATION COAL CO. v COMMONWEAL. OF PENN.,
DEPT. OF ENVIRON. RESOURCES (PADER), 1976 EHB 44, EHB Docket No 72-297-D
(1976).**

Five coal companies appealed PADER's "present policy of issuing one consolidated mine drainage permit for an entire mine operation instead of continuing the prior practice of issuing a mine drainage permit for each discharge at a given mine." This policy, never promulgated in a



regulation, was instituted in 1970 but was not immediately applied to consolidate all existing mine drainage permits because of "manpower limitations". The practice had been "to implement the policy by issuing one consolidated permit, usually by amending an existing permit, whenever an applicant applied for a new borehole or shaft at an existing mine."

The Environmental Hearing Board (EHB) ruled that the consolidation of the mine drainage permits was invalid. The EHB stated that while section 315 of Pennsylvania's Clean Streams Law did not specify whether preventing discharges to the waters of the commonwealth should be accomplished by one permit for a particular mine that includes operations and discharges or by separate permits for the operation and the discharges. "Whatever system the Department adopted, however, should have some rational basis in administrative practice, should be accessible to the parties affected and should be consistently and fairly applied."

"In the best of all possible administrative worlds, all general pronouncements of policy and certainly all changes in general policy would be duly proclaimed by regulation after an appropriate deliberative rule-making process....However, in our view the law does not require a rule-making or other formal procedure unless the pronouncement of policy or change in policy will affect substantive rights....Appellants believe that their substantive rights are potentially affected because the Department will use the consolidated permit as an enforcement tool to close down an entire operation when one discharge, even an unrelated discharge, is in violation."

"In sum, we believe that a one-permit system for mine operations may be a permissible and even logical procedure under The Clean Streams Law, but that it was a significant interpretative change of general and possible substantive effect and should therefore have been accomplished by Regulation. The articulation and publication of the rules under which the Department is operating is necessary as a guarantee of due process and protection against the arbitrary exercise or abuse of administrative power."

"We do not agree...with the Department's witness who thought that the opportunity to review a permit on a proposed amendment would enable the Department to alter the conditions of a permit. It is fundamentally offensive to our sense of justice in a democratic society for the state to be able to alter the conditions of a previously granted permit because an applicant is seeking some new permission."

ATTACHMENTS

- A. OSM DIRECTIVE, Subject No REG-17, Transmittal No 382, "Midterm Review of Federal Permits" (Issued October 6, 1987).
- B. IN THE MATTER OF: CONSOLIDATION COAL CO. v COMMONWEAL. OF PENN., DEPT. OF ENVIRON. RESOURCES (PADER), 1976 EHB 44, EHB Docket No 72-297-D (1976).
- C. OSM DIRECTIVE, Subject No REG-21, Transmittal No 398, "Findings and Determinations for Revisions and Renewals of Federal Permits" (Issued November 10, 1987).
- D. 48 FR 22092 (MAY 16, 1983). Final Rule. Topsoil.



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

E. 48 FR 44344 (SEPTEMBER 28, 1983). Final Rule. Permitting.