



## COALEX STATE INQUIRY REPORT - 224

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### TOPIC: DEFINITION OF "OPERATOR" AND "PERMITTEE"

**INQUIRY:** A coal company holds a valid permit on an inactive mine. The company claims it is not liable for the NOV and CO the state issued because it is not an "operator" as that term is defined in the Wyoming statute. Please locate materials discussing the definition of "operator", "permittee" and related topics, e.g., termination of jurisdiction.

**SEARCH RESULTS:** The COALEX Library, other LEXIS materials and existing COALEX State Inquiry Reports were used to research the following topics:

1. Definition of "permittee" and "operator"
2. Inactive mining operations
3. Liability for NOV's and CO's if:
  - a. There was no permit, particularly under the interim program; or
  - b. There was an interim permit but no permanent program permit
4. Civil penalties - (1) mandatory penalties; or (2) mitigating civil penalties
5. Termination of jurisdiction

The relevant materials retrieved are listed below by topic. Copies are attached unless otherwise indicated.

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### DEFINITION OF "PERMITTEE"

**DELIGHT COAL CORP., 1 IBSMA 186, IBSMA 79-12 (1979). DELIGHT COAL CORP., Docket No. CH 9-4-P (1979).**

In reversing and remanding the ALJ's decision, the Board ruled that the "definition of 'permittee' adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who, through ignorance or dishonesty, fail to obtain a permit before engaging in activities regulated by a state."



"During the initial regulatory program, a person may be assessed a civil penalty under 30 CFR 723.1 for violations of a permit condition, a regulation, or a provision of Title V of the Act even though he does not hold a permit from the state regulatory authority."

**JAMES MOORE v OSM, 1 IBSMA 216, IBSMA 79-10 (1979).**

"To be subject to regulation under Kentucky law, Moore must be, inter alia, an 'operator' as that term is used in state law. Under Kentucky law, an 'operator' is defined as one 'who removes or intends to remove more than [250] tons of coal within [12] successive calendar months....' KRS 350.010(6); 405 KAR 1:010E Sec. 1(34). If Moore did not remove or intend to remove more than 250 tons of coal in a 12-month period, then, under Kentucky law, he would not be subject to State regulation within the scope of the initial Federal performance standards and, thus, not subject to OSM's jurisdiction." The Board found that Moore failed to prove the amount of coal removed or intended to be removed.

**CLAYPOOL CONSTRUCTION CO., INC. v OSM, 1 IBSMA 259, IBSMA 79-17 (1979).  
CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979).**

"'Permittee'. The definition of 'permittee' adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state."

**MARCO, INC. v OSM, 3 IBSMA 128, IBSMA 81-7 (1981).**

"Competent evidence that the person listed in state records as permittee over an area had no legal right under state law to mine or reclaim that area and that the person was not conducting mining or reclamation in 30 CFR 700.5 (1978) is sufficient to rebut a prima facie showing that the person is the permittee."

**JEWELL SMOKELESS COAL CO., 4 IBSMA 211, IBSMA 82-7 (1982).**

"'Permittee.' For purposes of the initial regulatory program, one who conducts a surface coal mining operation is a 'permittee,' whether or not required to hold a permit under state law, and is responsible for compliance with performance standards applicable to the operation."

**S & M COAL CO. AND JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620 & 82-20 (1984).**

"Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a permittee whether or not required to hold a permit under state law. The permittee is responsible for compliance with the performance standards applicable to the operation. If there is question as to who is responsible for compliance with those standards, it is proper for the inspector issuing the notice of violation to cite all of the parties who may be



responsible. If a cited party can submit sufficient proof that it is not responsible for compliance, the violation will not be considered a violation by that party."

**CLARK COAL, CO. v OSM, 102 IBLA 93, IBLA 86-627 & 87-348 (1988). CLARK COAL CO., INC. v OSM, Docket No. NX 6-60-R (1987).**

"Under sec. 521(a) of [SMCRA], a permittee of a mine site is a proper party to be cited for a violation of the Act notwithstanding the fact the coal was removed by a third party."

### **INACTIVE MINING OPERATION**

**CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (1981).**

In reversing the ALJ's decision, the Board stated:

"[T]he monitoring requirements of 30 CFR 717.17(h)(2) are made applicable to underground operations, as defined in 717.11(a)(1), by 717.17(h)(1). In this context the issue becomes whether pumping water out of an otherwise inactive underground mine is an 'underground operation.' We believe it is not. That activity is not sufficiently related to those included in 717.11(a)(1) to fall within the scope of that definition."

**KENT COAL CO. v OSM, Docket No. NX 4-21-P (1986).**

The ALJ found that the violations were properly issued to Kent Coal, holder of a Kentucky permit, as a result of "a 2-hour routine inspection of the surface effects of applicant's inactive and unoccupied underground coal mining operation...."

**M & J COAL CO. v OSM, Docket Nos. CH 6-15-R, CH 7-1-P (1988), aff'd M & J COAL CO. v OSM, 115 IBLA 8, IBLA 88-564 & 88-568 (1990).**

In response to a citizen's complaint, inspectors inspected "M & J's then inactive operation" and charged M & J's underground coal mining operation with causing subsidence damage to the citizen's residence and property. The ALJ upheld the issuance of the CO.

### **CIVIL PENALTIES**

**COALEX STATE INQUIRY REPORT - 181, "Current liability for acid mine drainage under a pre-SMCRA permit" (1991).**

Some of the Interior administrative decisions included as part of this Report discuss operators' obligation to comply with initial federal regulations, or state or federal permanent regulations regardless of whether the operator applied for a permit under the permanent program.

**COALEX STATE INQUIRY REPORT - 183, "Unwarranted failure to comply: definition of 'indifference', 'lack of diligence' and 'lack of reasonable care' (1991).**



The Interior administrative decisions included with this Report attempt to define the phrases above in determining the validity of an NOV or CO, or when addressing the appropriateness of the points assigned for negligence.

**COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (1991).**

Materials identified and included with this Report indicate that no matter how legitimate the cause, NOVs and COs cannot be vacated because of an operator's inability to comply. The reason for the inability to comply may be taken into consideration as a mitigating factor in computing civil penalties.

**COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty".**

This Report includes materials which state that the assessment of \$750 for each day that failure to abate continues is mandatory and cannot be reduced.

**TERMINATION OF JURISDICTION**

**GRAFTON COAL CO., INC., 3 IBSMA 175, IBSMA 80-84 (1981). GRAFTON COAL CO., INC. v OSM, Docket No. CH 0-175-R (1980).**

"Release of a portion of a permittee's performance bond by a state does not reduce OSM's authority to regulate that permittee."

Also see NEW BIG CREEK MINING, Docket No. NX 1-49-P (1985).

**APPOLO FUELS, INC. v OSM, Docket Nos. NX 89-39-R, NX 89-46-R (1990).**

"The undersigned finds that all the evidence presented shows that Applicant's 37 acres was fully reclaimed as of 1985, and that Respondent's jurisdiction terminated at that time. Applicant had accomplished the two events required by 30 C.F.R. Sec. 700.11(d): It has successfully completed all reclamation for the 37 acres as shown by the bond release, the bond release report, and the 16 inspection reports from '82 to '85; the period of extended liability for vegetation ended in October of 1985."

Enclosed for background are the following regulatory history materials:

**53 FR 44356 (NOVEMBER 2, 1988).** Final rule. Termination of jurisdiction.

**NATIONAL WILDLIFE FEDERATION v LUJAN**, 31 ERC (BNA) 2034, 21 ELR 20135 (D.C. DC August 30, 1990). [Excerpts]

**56 FR 25036 (JUNE 3, 1991).** Notice of suspension. Compliance with court order.



**NATIONAL WILDLIFE FEDERATION v LUJAN**, 950 F 2d 765 (DC Cir December 10, 1991).

**57 FR 12461 (APRIL 10, 1992)**. Notice of reinstatement of suspended rule. Termination of jurisdiction.

## ATTACHMENTS

- A. Wyoming Statute Secs. 35-11-103 and 35-11-901.
- B. DELIGHT COAL CORP., 1 IBSMA 186, IBSMA 79-12 (1979).
- C. DELIGHT COAL CORP., Docket No. CH 9-4-P (1979).
- D. JAMES MOORE v OSM, 1 IBSMA 216, IBSMA 79-10 (1979).
- E. CLAYPOOL CONSTRUCTION CO., INC. v OSM, 1 IBSMA 259, IBSMA 79-17 (1979).
- F. CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979).
- G. MARCO, INC. v OSM, 3 IBSMA 128, IBSMA 81-7 (1981).
- H. JEWELL SMOKELESS COAL CO., 4 IBSMA 211, IBSMA 82-7 (1982).
- I. S & M COAL CO. AND JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620 & 82-20 (1984).
- J. CLARK COAL, CO. v OSM, 102 IBLA 93, IBLA 86-627 & 87-348 (1988).
- K. CLARK COAL CO., INC. v OSM, Docket No. NX 6-60-R (1987).
- L. CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (1981).
- M. KENT COAL CO. v OSM, Docket No. NX 4-21-P (1986).
- N. M & J COAL CO. v OSM, Docket Nos. CH 6-15-R, CH 7-1-P (1988).
- O. M & J COAL CO. v OSM, 115 IBLA 8, IBLA 88-564 & 88-568 (1990).
- P. COALEX STATE INQUIRY REPORT - 181, "Current liability for acid mine drainage under a pre-SMCRA permit" (1991). [WITHOUT ATTACHMENTS]
  - A. BOLOGNA MINING CO. v COMMONWEALTH OF PENNSYLVANIA, DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envirn LEXIS 60, EHB Docket No. 86-555-M (March 3, 1989).
  - B. DARMAC COAL CO., 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983).
  - C. DARMAC COAL CO. v OSM, Docket No. CH 1-107-R (May 1, 1981).
  - D. CEDAR COAL CO., 1 IBSMA 145, IBSMA 79-5 (April 20, 1979).
  - E. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (September 14, 1979).
  - F. TOLLAGE CREEK ELKHORN MINING CO., 2 IBSMA 341, IBSMA 80-32 (November 24, 1980).
  - G. CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (July 31, 1981).
  - H. GREATER PARDEE, INC., 3 IBSMA 313, IBSMA 81-1 (September 24, 1981).
  - I. GREATER PARDEE, INC. v OSM, Docket No. NX 0-219-R (September 18, 1980).
  - J. CITIZENS FOR THE PRESERVATION OF KNOX COUNTY, 81 IBLA 209, IBLA 86-631, 83-2 (June 5, 1984).
  - K. PEABODY COAL CO. v OSM, 101 IBLA 167 (February 17, 1988).



- L. JOSEPHINE COAL CO. v OSM, 111 IBLA 316, IBLA 87-208 (October 30, 1989).
- M. HARMAN MINING CORP. v OSM, 114 IBLA 291, IBLA 87-525 (May 10, 1990).
- Q. COALEX STATE INQUIRY REPORT - 183, "Unwarranted failure to comply: definition of 'indifference', 'lack of diligence' and 'lack of reasonable care'" (1991). [WITHOUT 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 COMPANY, 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 BROS., 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).
- R. COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (1991). [WITHOUT ATTACHMENTS]
- S. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty". [WITHOUT ATTACHMENTS]
- T. GRAFTON COAL CO., INC., 3 IBSMA 175, IBSMA 80-84 (1981).
- U. GRAFTON COAL CO., INC. v OSM, Docket No. CH 0-175-R (1980).
- V. NEW BIG CREEK MINING, Docket No. NX 1-49-P (1985).
- W. APPOLO FUELS, INC. v OSM, Docket Nos. NX 89-39-R, NX 89-46-R (1990).



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

- X. 53 FR 44356 (November 2, 1988). Final rule. Termination of jurisdiction.
- Y. NATIONAL WILDLIFE FEDERATION v LUJAN, 31 ERC (BNA) 2034, 21 ELR 20135 (D.C. DC August 30, 1990). [Excerpts]
- Z. 56 FR 25036 (JUNE 3, 1991). Notice of suspension. Compliance with court order.
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