



## COALEX STATE INQUIRY REPORT - 252

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### **TOPIC:** NOTICES OF VIOLATION (NOVs)

**INQUIRY:** Please locate any available material on the following aspects of NOVs:

- I. Can an NOV be written for a violation that occurred in the past, was corrected prior to writing of the NOV, leaving no remedial action to be taken? Fact situation: A permittee sent in surface water monitor reports late but before an NOV was written. Can this situation still be considered a violation under the "could reasonably be expected to cause environmental harm" theory? Can remedial steps be nothing?
- II. Do you have to prove environmental harm or wrongful intent to establish a violation? Fact situation: Permittee failed to post accurate or adequate information on signs.
- III. Does OSM's requirement to monitor surface water conflict with EPA's NPDES requirements? What is OSM's jurisdiction regarding the interpretation of Clean Water Act regulations? Fact situation: An operator's suit alleges that the Department of Environmental Management acted improperly in requiring permittee to monitor surface water.

**SEARCH RESULTS:** Using the COALEX Library and other LEXIS materials, items relevant to each of the three inquiries were identified. These are listed below. Copies are attached.

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### **I. NOV WRITTEN FOR AN ABATED VIOLATION.**

Research based on the specific fact situation retrieved Interior administrative decisions that rule on failure to submit reports, not specifically reports that are late. However, one ALJ case was identified where an NOV was issued but no remedial action was required. Other materials retrieved discuss the legislative history of enforcement mechanisms and the definition of "appropriate enforcement action". Federal cases included here address the issue of citizen suits for "wholly past violations" under non-SMCRA statutes.



**LEGISLATIVE HISTORY, H.R. Rep. 218, 95th Cong., 1st Sess. 130 (April 22, 1977, H.R. 2). Elements of a mine regulation program. Sections 521(a) (2), (3) & (4).**

"The bill establishes three strong but flexible enforcement mechanisms which provide inspectors with the tools necessary to respond to the most minor and the most serious violations.

...

"II. Notice of violation (section 521(a)(3). - Where the Secretary is the regulatory authority or Federal inspection is being conducted...and a Federal inspector determines that a permittee is violating the act or his permit but that the violation is not causing imminent danger to the health or safety of the public or significant, imminent environmental harm, then the inspector must issue a notice to the permittee setting a time within which to correct the violation....

"The enforcement mechanism of section 521(a)(3) will be utilized by the inspector in the great majority of compliance problems. It not only enables the inspector to gain immediate control of the problem, but also provides him with essential flexibility to appropriately deal with minor as well as major violations."

**44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 843.12 Notices of violation.**

Enclosed for background.

**53 FR 26728, 26733-26735 (JULY 14, 1988). Final rule. Evaluation of state responses to ten day notices.**

In discussing the definition of "appropriate action" and the rationale for its inclusion in the rules, OSM stated that "the rule focuses on the goal of the Act itself - to see that violations are corrected. In doing so, the rule allows state discretion in how best to accomplish that goal - but only if those means are authorized under the state program."

**OSM DIRECTIVE, Subject No. INE-13, Transmittal No. 166, "Revision of Inspection and Enforcement Policy" (Issued April 11, 1983).**

The Directive defines "appropriate enforcement action" as "any action required by the Act and regulations which will result in the timely abatement of all violations" and provides the following policy revision regarding "any violation which does not constitute a significant, imminent environmental harm or public danger:

"If a violation is completely abated during an inspection, an NOV should not be issued unless failure to issue an NOV would render the applicable regulation unenforceable. For example, turning off a pump to cease a discharge which obviously exceeds the effluent limits immediately abates the violation, but often there is no practical and/or effective remedial action which may be ordered to remedy the effects of the discharge.



Similarly, there is often no effective remedial action for improper blasting or topsoil contamination although an operator may cease the practice during the inspection. There would be no incentive for an operator to comply with regulations if he knew that he could avoid receiving an NOV simply by ceasing the violation during the time the inspector was on the site.

"Where, however, there is remedial action that can be taken and the operator takes it during the inspection, issuing an NOV serves no useful purpose. For example, there is no point in issuing an NOV where the operator has one or two perimeter markers missing when the inspector arrived but posted them before the inspector left."

**DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979).**

The second condition for which a violation was issued involved the failure "to remove the topsoil as a separate operation from areas to be disturbed before conducting any drilling for blasting, mining, or other surface disturbance, in violation of 30 CFR 715.16(a). Said notice of violation provided that the abatement of [the first condition] was to be completed by 8:00 a.m. on May 15, 1979, and no abatement of the conditions that allegedly constituted a violation of 30 CFR 715.16(a) was ordered since no remedial action was required. No cessation order has been entered but a civil penalty of \$1,700 was assessed on May 4, 1979, for the alleged [first violation] and no civil penalty was assessed for the alleged violation of 30 CFR 715.16(a)." The ALJ found the NOV to be "in order".

**GWALTNEY OF SMITHFIELD, LTD. v CHESAPEAKE BAY FOUNDATION, INC., 484 US 49 (1987).**

The Supreme Court held that section 505(a) of the Clean Water Act did not "confer federal jurisdiction over citizens suits for wholly past violations." The Chesapeake Bay Foundation had given notice of its intent to sue Gwaltney after the company had installed new equipment to correct effluent limits violations of its NPDES permit.

**ATLANTIC STATE LEGAL FOUNDATION, INC. v WHITING ROLL-UP DOOR MANUFACTURING CORP., 772 F Supp 745 (W.D. NY 1991).**

Here, the defendant came "into compliance" with EPCRA reporting provisions before the plaintiff began suit. In distinguishing this case from GWALTNEY, above, the court held "that the plaintiff may bring a citizen enforcement action pursuant to Sec. 326(a) to seek civil penalties for failure to comply with EPCRA's reporting provisions even though the plaintiff alleges no continuing violations at the time it commenced suit." What distinguishes the two cases is the language of the relevant statute sections.

Also see: WILLIAMS v LEYBOLD TECHNOLOGIES, INC., 784 F Supp 765 (N.D. Cal 1992) and ATLANTIC STATES LEGAL FOUNDATION, INC. v BUFFALO ENVELOPE CO., 1991 U.S. Dist. LEXIS 12834 (W.D. NY 1991).



## **II. NEED TO PROVE ENVIRONMENTAL HARM OR WRONGFUL INTENT; FAILURE TO POST SIGNS.**

A number of Interior decisions relating to these issues were identified. These appear below, organized by issue addressed.

### **SIGNS AND BOUNDARY MARKERS:**

#### **FELL ENERGY COAL CORP., 2 IBSMA 34, IBSMA 80-11 (1980).**

##### **SYLLABUS:**

"The requirement of 30 CFR 715.12(b) that mine and permit identification signs be maintained until the release of all bonds is violated if such signs are not present during an inspection and the permittee has not exercised reasonable diligence to maintain them."

Also see: SRP COAL CO. v OSM, Docket No. CH 2-17-P (1984) and SWEETWATER COAL CO. v OSM, Docket No. TU 5-3-P (1985).

### **PROOF OF OCCURRENCE OF HARM NOT NECESSARY TO ESTABLISH VIOLATION:**

#### **AMAX COAL CO., 74 IBLA 48, IBLA 83-614 (1983).**

The Board upheld the NOV issued for failure to control discharges from a sedimentation pond: "30 CFR 715.17(f) is a preventative measure, and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of its requirement."

Also see: KAISER STEEL CORP., 2 IBSMA 158, IBSMA 80-26 (1980), ALPINE CONSTRUCTION CORP. v OSM, 101 IBLA 128, IBLA 85-847 (1988) and excerpts from several other related decisions.

#### **HAYDEN & HAYDEN COAL CO. v OSM, 2 IBSMA 238, IBSMA 80-53 (1980). HAYDEN & HAYDEN COAL CO. v OSM, Docket No. NX 0-2-R (1980).**

##### **HEADNOTES:**

"When a cessation order indicates that it is being issued both because the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm and because there has been a failure to abate a violation listed in a notice of violation, a finding of either of those grounds is sufficient to sustain the cessation order."



### **III. OSM v EPA JURISDICTION.**

Cases and regulatory material identified address OSM/EPA jurisdiction issues and emphasize that the requirements of both agencies work together.

#### **57 FR 41236 (SEPTEMBER 9, 1992). EPA Final Rule. Notice of final NPDES general permits.**

"The Agency notes that the imposition of SMCRA requirements does not preclude CWA requirements, and that generally such requirements are intended to work together."

#### **AMERICAN MINING CONGRESS v EPA, 965 F 2d 759 (9th Cir 1992).**

"Finally, we find no evidence that EPA's storm water rule duplicates, varies or frustrates the goals or administration of SMCRA. The rule is fully consistent with EPA's obligation to cooperate with the Secretary of the Interior in carrying out the provisions of SMCRA. See 30 USC Sec. 1292(b). Hence, we conclude that EPA did not arbitrarily promulgate its storm water rule in conflict with SMCRA."

#### **IN RE: SURFACE MINING REGULATION LITIGATION, 627 F 2d 1346 (DC DC May 2, 1980).**

In discussing the interim effluent regulations, the court stated "The Act [SMCRA] gave the Secretary authority to regulate in these areas because the Federal Water Pollution Control Act was silent in regard to them, but where the Secretary's regulation of surface coal mining's hydrologic impact overlaps EPA's, the Act expressly directs that the Federal Water Pollution Control Act and its regulatory framework are to control so as to afford consistent effluent standards nationwide."

#### **48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology permitting and performance standards.**

The excerpts from the Federal Register preamble address OSM/EPA jurisdiction issues.

#### **53 FR 36394 (SEPTEMBER 19, 1988). Final rule. Probable hydrologic Consequences Determination.**

The excerpt discusses OSM regulations' references to EPA laws and programs.

### **ATTACHMENTS**

- A. LEGISLATIVE HISTORY, H.R. Rep. 218, 95th Cong., 1st Sess. 130 (April 22, 1977, H.R. 2). Elements of a mine regulation program. Sections 521(a) (2), (3) & (4).



- B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 843.12 Notices of violation.
- C. 53 FR 26728, 26733-26735 (JULY 14, 1988). Final rule. Evaluation of state responses to ten day notices.
- D. OSM DIRECTIVE, Subject No. INE-13, Transmittal No. 166, "Revision of Inspection and Enforcement Policy" (Issued April 11, 1983).
- E. DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979).
- F. GWALTNEY OF SMITHFIELD, LTD. v CHESAPEAKE BAY FOUNDATION, INC., 484 US 49 (1987).
- G. ATLANTIC STATE LEGAL FOUNDATION, INC. v WHITING ROLL-UP DOOR MANUFACTURING CORP., 772 F Supp 745 (W.D. NY 1991).
- H. WILLIAMS v LEYBOLD TECHNOLOGIES, INC., 784 F Supp 765 (N.D. Cal 1992).
- I. ATLANTIC STATES LEGAL FOUNDATION, INC. v BUFFALO ENVELOPE CO., 1991 U.S. Dist. LEXIS 12834 (W.D. NY 1991).
- J. FELL ENERGY COAL CORP., 2 IBSMA 34, IBSMA 80-11 (1980).
- K. SRP COAL CO. v OSM, Docket No. CH 2-17-P (1984).
- L. SWEETWATER COAL CO. v OSM, Docket No. TU 5-3-P (1985).
- M. AMAX COAL CO., 74 IBLA 48, IBLA 83-614 (1983).
- N. KAISER STEEL CORP., 2 IBSMA 158, IBSMA 80-26 (1980).
- O. ALPINE CONSTRUCTION CORP. v OSM, 101 IBLA 128, IBLA 85-847 (1988).
- P. Excerpts from several other related decisions.
- Q. HAYDEN & HAYDEN COAL CO. v OSM, 2 IBSMA 238, IBSMA 80-53 (1980).
- R. HAYDEN & HAYDEN COAL CO. v OSM, Docket No. NX 0-2-R (1980).
- S. 57 FR 41236 (SEPTEMBER 9, 1992). EPA Final Rule. Notice of final NPDES general permits.
- T. AMERICAN MINING CONGRESS v EPA, 965 F 2d 759 (9th Cir 1992).
- U. IN RE: SURFACE MINING REGULATION LITIGATION, 627 F 2d 1346 (DC DC May 2, 1980).
- V. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology permitting and performance standards.
- W. 53 FR 36394 (SEPTEMBER 19, 1988). Final rule. Probable hydrologic Consequences Determination.