



COALEX STATE INQUIRY REPORT - 268

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Division of Reclamation
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TOPIC: IMPROVIDENTLY ISSUED PERMIT

INQUIRY: Indiana is promulgating regulations that mirror the federal rules on improvidently issued permits. Industry is claiming that the state has the authority to revoke permits only after showing cause, not through rescission. Are there any cases addressing this issue?

SEARCH RESULTS: Research was conducted using the COALEX Library and the other materials available in LEXIS. No cases on this issue were identified. A preamble to 1989 final rules and an OSM directive were retrieved that discuss the revocation/rescission issue and detail the procedures to be followed for determining whether a permit was improvidently issued and the suspension/ rescission of these permits. Several additional items are included for background. Copies of the items listed below are attached.

54 FR 18438 (APRIL 28, 1989). Final rule. Improvidently issued permits.

1. Definitions of terms (18438).

"Rescission -- equivalent to revocation, but used to differentiate between the rescission of an improvidently issued permit under Sec. 773.21 of this rule and the revocation of a permit for a pattern of violations under existing 30 CFR 843.21.

...

Revocation -- see rescission."

2. Permit Rescission vs. Revocation (18460).

"Several commenters said that the Act did not authorize rescission of a permit, only revocation.

...

"OSMRE disagrees. Although section 201(c)(1) of the Act used the term revocation and



not rescission, these two terms are equivalent.

. . .

"To differentiate between the revocation of a permit for reasons that existed at the time of permit issuance, and revocation for reasons that subsequently arose, OSMRE applies the term rescind to the former and revoke to the latter. In either case the ultimate effect of rescission or revocation is identical -- the loss of the permit -- and the choice of different terms for each is simple a matter of administrative convenience."

OSM DIRECTIVE, Subject No. INE-34, Transmittal No. 659, "Improvidently Issued Permits" (Issued 2/22/91).

This directive established procedures for determining whether a permit was improvidently issued and details the rescission process if the permit is determined to be improvidently issued where OSM is the regulatory authority. Particularly relevant sections are reproduced below. The entire document is attached.

"4. Policy/Procedures.

"a. Background. Sections 201(c) and 510(c) of the Act require a regulatory authority to withhold a surface coal mining and reclamation permit from any applicant who is either directly or indirectly responsible for an outstanding violation of the Act or certain other environmental laws and regulations or is linked to such a violation through a relationship of ownership or control. OSM has implemented these provisions by regulations at 30 CFR 773.5 and 773.15. Each State regulatory program is required to contain counterparts consistent with those regulations.

. . .

"b. Policy. Whenever OSM has reason to believe that a Federal permit has been improvidently issued, it shall be agency policy to immediately conduct a review to determine whether the permit was, in fact, improvidently issued and to take steps to bring the permit into compliance in accordance with the procedures specified in section 4.d.(1) below. Where OSM has reason to believe that a permit approved pursuant to a State program has been improvidently issued, it shall be agency policy to immediately notify the State regulatory authority of the matter, and to follow-up with the State to ensure that the permit is brought into compliance by implementing the procedures specified in section 4.d.(2) below."

"d. Procedures. These include:

"1. Notifying the permittee promptly by certified letter, indicating the basis for the determination that the permit was improvidently issued. There is a 15 day response period.

"2. If the permittee does not contact the Field Permitting Unit or cooperate to develop an abatement plan or payment schedule, the Field Permitting Unit prepares a transmittal, accompanied by a Notice of Proposed Suspension and Rescission, for approval of the Assistant Director for Field Operations. The transmittal explains actions already taken and the reasons why they were unsuccessful. The Notice specifies a time, not to



exceed 90 days, for the permittee to submit certain information or the permit will automatically be rescinded. It also includes information on how to file an appeal for administrative review.

"3. Where the permittee fails to satisfy the requirements necessary to avoid automatic suspension or rescission, the Field Permitting Unit prepares a Notice of Permit Suspension or a Notice of Permit Rescission for the approval of the Assistant Director for Field Operations. These Notices also carry the right of appeal."

See the DIRECTIVE for procedures for State Program Permits and cases where the permittee has filed a petition for protection under bankruptcy laws.

HEARINGS on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 71 (February 24, 1977). Panel discussion.

"The Supreme Court has held that notice and an opportunity to be heard prior to suspension or termination of an important benefit is a constitutional imperative.

...

"The right to prerovocation hearing is also denied by sections 504(d) and (f). These sections allow either the Secretary or the State regulatory authority to determine that a permit has been improvidently granted and, in effect, to revoke it in part or in toto. While there may be no right to hearing where only questions of law are involved, the determinations under 504(d) and (f) must necessarily involve mixed questions of law and fact and the due process clause of the Constitution mandates that these questions be resolved only after procedurally proper notice and an opportunity to be heard."

Also included with this Report are:

Excerpts from 56 FR 45780 (SEPTEMBER 6, 1991). Proposed rule. Ownership and control information.

HEARINGS on H.R. 2 Before Subcomm. the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 344 (February 28, 1977).

ATTACHMENTS

- A. 54 FR 18438 (APRIL 28, 1989). Final rule. Improvidently issued permits.
- B. OSM DIRECTIVE, Subject No. INE-34, Transmittal No. 659, "Improvidently Issued Permits" (Issued 2/22/91).
- C. HEARINGS on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 71 (February 24, 1977). Panel discussion.



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- D. Excerpts from 56 FR 45780 (SEPTEMBER 6, 1991). Proposed rule. Ownership and control information.
- E. HEARINGS on H.R. 2 Before Subcomm. the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 344 (February 28, 1977).