



## COALEX STATE INQUIRY REPORT - 283

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### **TOPIC:** TRANSFERABILITY OF VALID EXISTING RIGHTS (VER)

**INQUIRY:** An operator of a tippie (with VER) wanted to transfer the permit; however, he did not get all of the papers in before the permit expired. Is the VER transferable to the new operator, particularly in this situation where there was a break in the permit? Please locate any relevant information on these issues.

**SEARCH RESULTS:** Research was conducted using COALEX and LEXIS. A 1991 preamble to OSM's proposed rule on VER discussing the transferability of VER was identified; a copy is attached. No information was retrieved on the issue of the expiration of a permit before the completion of its proposed transfer and the resulting effect on VER. To provide general background information, materials on transfer of permit rights and continuing permittee obligations when permits expire are included as part of the Report.

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### **TRANSFERABILITY of VER**

#### **56 FR 33152 (JULY 18, 1991). Proposed rule. Areas designated by Act of Congress.**

"Transferability of VER. The legislative history of SMCRA suggests that Congress wanted to avoid any compensable takings.... Many, if not most, property rights in coal are transferable under State law. Any VER regulatory definition or policy adopted by OSM that would have the effect of limiting or abrogating the right to transfer property would risk effecting a compensable taking. In addition, a review of VER law under other Federal statutes indicates no clear or typical Congressional intent the VER be nontransferable. OSM believes that to interpret SMCRA to impose or authorize a limit on VER transferability would not comply with the intent of Congress in enacting SMCRA. Thus, the property rights requirement in this proposed section incorporates the concept that VER is transferable.



"...[I]f a person with a property interest in the coal on the applicable effective ate had VER, that person could, if permitted by applicable laws and regulations, transfer the VER to a successor after the effective date. The transferred right would suffice as the basis for a finding of VER for the successor in interest. The determination of VER takes into account the nature of the rights on the applicable effective date. Subsequent property transactions cannot be used to create VER if it did not exist on the effective date."

See excerpt on transferability of VER in 53 FR 52374 (December 27, 1988). Proposed rules. Applicability of the prohibitions of SMCRA to the surface impacts of underground coal mining.

### **TRANSFER OF PERMIT RIGHTS**

A list of Federal Register preambles on proposed and final rules for Parts 773 and 774 dating back to June, 1982 is attached.

### **PERMIT EXPIRATION**

#### **54 FR 13814 (APRIL 5, 1989). Final rule. Permit renewal.**

The rule removed the requirements to renew a permit for which the permit term expired when only reclamation activities remained to be performed. The preamble discusses the obligations that continue until final bond release.

#### **44 FR 14902 (MARCH 13, 1979). Permanent program preamble - Final rule. Section 788.14 Application for renewals.**

"3. Also suggested was an addition to this section allowing an operation to continue under the terms of the old permit, should the application for renewal be contested beyond the term of the old permit. This suggestion was rejected. Section 771.21(b)(2) [now 774.15] of the regulations requires that applications for renewal be submitted at least 120 days prior to expiration of the permit involved, which should be ample time in which to process renewal applications. Section 506(d) of the Act and 30 CFR 788.16 [now 774.14] state that an operation shall have the right of successive renewal, unless the regulatory authority makes certain findings. If these finding are not made, the permittee could continue mining past the term of the original permit, even if the decision of the regulatory authority was contested by opponents of renewal. However, if the regulatory authority found that the permit should not be renewed, and the original term of the permit expired during an appeal, the operator should not be able to continue to operate under the Act."

See the two Interior administrative decisions attached: WHITE WINTER COALS, INC., 1 IB SMA 305, IB SMA 79-29 (1979). STRAIGHT LINE COAL CORPORATION v OSM, Docket No. NX 0-104-R (1981).



## **ATTACHMENTS**

- A. 56 FR 33152 (JULY 18, 1991). Proposed rule. Areas designated by Act of Congress.
- B. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules. Applicability of the prohibitions of SMCRA to the surface impacts of underground coal mining.
- C. A list of Federal Register preambles on proposed and final rules for Parts 773 and 774 dating back to June, 1982.
- D. 54 FR 13814 (APRIL 5, 1989). Final rule. Permit renewal.
- E. 44 FR 14902 (MARCH 13, 1979). Permanent program preamble - Final rule. Section 788.14 Application for renewals.
- F. WHITE WINTER COALS, INC., 1 IBSMA 305, IBSMA 79-29 (1979).
- G. STRAIGHT LINE COAL CORPORATION v OSM, Docket No. NX 0-104-R (1981).