



COALEX STATE INQUIRY REPORT - 286

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TOPIC: BOND RELEASE ON INTERIM PERMIT SITES; CONTROLLING PERFORMANCE STANDARDS (Includes COALEX REPORT - 181)

INQUIRY: Please locate federal, state and administrative decisions discussing bond release on sites permitted under the interim regulatory program. In particular, locate decisions that address which performance standards (with special focus on revegetation requirements) are controlling for operations with state permits which were active during the time the interim program rules were in force.

SEARCH RESULTS: Using the administrative materials available in the COALEX Library, a number of Interior administrative decisions addressing various aspects of inquiry were identified. Also identified were an existing COALEX Report, two OSM Directives and a 9th Circuit case. Relevant Federal Register preambles to final federal program rules are attached to provide background information.

Copies of the materials listed below are attached.

A. FEDERAL CIRCUIT COURT CASE

AMERICAN MINING CONGRESS, ET AL. v US EPA, 965 F 2d 759 (9th Cir 1992).

This case rules on the EPA's decision to exempt from NPDES permit requirements only those coal mines that have completed reclamation under the final SMCRA program:

"In light of the differences between the interim and final SMCRA programs, EPA acted reasonably in exempting only mines reclaimed under the final program. EPA's decision was neither arbitrary nor capricious."

B. PERTINENT REGULATORY HISTORY



1. TERMINATION OF JURISDICTION
 - a. 57 FR 12461 (APRIL 10, 1992). Notice of reinstatement of suspended rule.
 - b. 56 FR 25036 (JUNE 3, 1991). Notice of suspension.
 - c. 53 FR 44356 (NOVEMBER 2, 1988). Final rule. Termination of jurisdiction.
2. REVEGETATION: 53 FR 34636 (SEPTEMBER 7, 1988). Final rule. Revegetation.
3. RECLAMATION REQUIREMENTS: 54 FR 13814 (APRIL 5, 1989). Final rule.
4. BOND AND INSURANCE REQUIREMENTS: 56 FR 59992 (NOVEMBER 26, 1991). Final rule.
5. INTERIM PROGRAM, GENERALLY: 56 FR 6224 (FEBRUARY 14, 1991). Final rule.

C. OSM DIRECTIVES

1. DIRECTIVE, Subject No. INE-28, Transmittal No. 343, "State Bond Release Oversight Inspections" (Issued June 6, 1987).
2. DIRECTIVE, Subject No. REG-14, Transmittal No. 362, "Interpretation of Initial Program and Indian Lands Regulations Concerning Rills and Gullies" (Issued July 9, 1987).

D. INTERIOR ADMINISTRATIVE DECISIONS

THE ISSUES RULED ON INCLUDE:

1. Whether interim vs permanent program regulations apply.
2. Proving compliance/noncompliance with appropriate performance standards.
3. Whether a state's release of bond on interim permit sites equals compliance with appropriate performance standards.
4. Compliance with state permit conditions does not excuse compliance with interim program requirements.

1. APPLICATION OF INTERIM VS PERMANENT PROGRAM REGULATIONS

- a. APPOLO FUELS, INC. v OSM, 125 IBLA 369, IBLA 89-503, 90-480 (1993). Provides an in-depth description of when jurisdiction on interim permit sites terminates.
2. INTERIOR CASES WHERE TDNS WERE ISSUED AFTER THE STATE RELEASED BOND ON INTERIM PERMIT SITES: The following decisions address OSM's issuance of a ten-day notice because OSM claimed the operator failed to meet various performance standards. The TDN followed the state's release of bonds for the sites originally permitted under the interim regulatory program.
 - a. ALTERNATE FUELS, INC. v OSM, Docket No. TU 5-23-R (1985).
 - b. THE CLEMENS COAL CO. v OSM, Docket Nos. TU 5-24-R, TU 5-5-P (1985).



1. NOV was issued for failing to remove highwalls to a point below the normal water table. The ALJ found the Clemens' reclamation work did not meet the requirements of the applicable regulations.
 - c. **EXCELLO COAL CORP./BERNOS COAL CO. v OSM**, Docket No. Nx 5-55-R (1985).
 1. NOVs were issued for failure to stabilize rills and gullies and failure to provide proper vegetative cover (pine trees). The ALJ ruled that the alleged violations were of the interim program standards, not the permanent program standards and that Excello's revegetation met the interim standards: proper vegetation was established; rills and gullies developed later. The ALJ did not accept Excello's reliance on the state's oral tree waiver and required the permittee to formally amend its permit.
 - d. **JERICOL MINING, INC. v OSM**, Docket Nos. NX 90-29-R, NX 90-36-R (1990).
 1. NOVs were issued for failure to eliminate all highwalls and failure to construct the diversion ditch as proposed. The ALJ vacated to NOVs and CO, finding that Jericol met the design specifications under the interim regulations. "The fact that DSMRE gave Applicant a grading bond release is a further indication that under Kentucky regulations the appropriate grading reclamation had been accomplished."
 - e. **SHAMROCK COAL CO. v OSM**, Docket No. NX 4-24-R (1986).
 1. The OSM inspector determined that the site was not in compliance with the reclamation performance standards of the Act and issued NOVs for failing to establish proper vegetative cover and failing to restore the disturbed area in a timely manner. The ALJ found that at the time the state released the bond, the site was in compliance with the state's applicable permanent program reclamation standards.
 - f. **DORA MINING CO., INC. v OSM**, 100 IBLA 300, IBLA 85-723 (1987).
 - g. **D & J MINERAL AND MINING, INC. v OSM**, Docket No. NX 4-11-R (1985).
3. **RELEASE OF BOND DID NOT TERMINATE JURISDICTION**
- a. **OSM v CALVERT & MARSH COAL CO., INC. AND BATTLE CREEK MINING CO., INC.**, 95 IBLA 182 (1987). Includes ALJ decisions for Calvert & Marsh plus Battle Creek.
 - b. **GRAFTON COAL CO.**, 3 IBSMA 175 (1981).
 - c. **FALCON COAL CO. v OSM**, Docket No. NX 0-97-R (1980).



4. CONTROLLING REGULATIONS

- a. **COALEX State Inquiry Report - 181**, "CURRENT LIABILITY FOR ACID MINE DRAINAGE UNDER A PRE-SMCRA PERMIT" (1990).
 1. The IBLA and ALJ decisions listed below address the question of which set of rules are controlling: the state (pre-primacy) regulations, initial federal regulations, or state or federal permanent regulations. No relevant state or federal decisions were identified. Copies of the decisions are attached.
 2. The cases found indicate: (1) that a permanent program permit (either state or federal) is not required if active mining has ceased and only reclamation remains; (2) if an operator does not obtain a permanent program permit, it continues to be subject to the initial federal regulations; and (3) an operator with a state (pre-primacy) permit must still comply with the initial federal regulations.
- b. **DARMAC COAL CO.**, 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983). **DARMAC COAL CO. v OSM**, Docket No. CH 1-107-R (May 1, 1981).
 1. An operator, mining under a Pennsylvania state permit, was issued an NOV for discharge which exceeded the maximum allowable numerical effluent limitations for pH and manganese in violation of interim regulation 30 CFR 715.17(a). The ALJ affirmed the issuance of the NOV, finding that all of the water analyses revealed that the pH level was "outside the parameters established in the interim regulations." [No mention was made of any difference between state regulations and initial program regulations.]
 2. While the Board agreed that there was "sufficient evidence to establish the essential facts of the violation", it reversed the ALJ's decision, finding that Darmac did not "disturb" the area around the pre-existing seep; therefore, there was "no showing of adverse physical impact".
- c. **CEDAR COAL CO.**, 1 IBSMA 145, IBSMA 79-5 (April 20, 1979).
 1. The Board determined that Cedar Coal was subject to the performance requirements of the initial program despite the fact that it operated under state mine permit issued before the federal initial program became effective. The state regulations at the time did not contain provisions for the complete elimination of any portion of an orphaned highwall. While Cedar was found to be subject to the performance standards of the interim program, the Board ruled that Cedar had not violated the standards in that it had not "disturbed" the orphaned highwall.
- d. **ALABAMA BY-PRODUCTS CORP. v OSM**, 1 IBSMA 239, IBSMA 79-16 (September 14, 1979).
 1. "Regardless of whether a permittee has a mining and reclamation plan approved by the state regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations."



- e. **TOLLAGE CREEK ELKHORN MINING CO.**, 2 IBSMA 341, IBSMA 80-32 (November 24, 1980).
 - 1. Although Tollage Creek's state permit contained language allowing part of the highwall to remain in the area in question, initial federal performance standards required the elimination of all highwalls and did not contain any provision for a variance from that requirement.
 - 2. Tollage Creek contended that OSM was estopped from asserting the alleged violation because of the "failure of the Secretary to designate an inconsistent state law as required by section 505(b) of the Act." The Board ruled that the Act requires the Secretary to designate inconsistent "laws which are on their face inconsistent." The Kentucky law was not "on its face inconsistent" but was interpreted by the state hearing officer in a way which was inconsistent with federal law. "Since the state is responsible for issuing permits which are consistent with Federal requirements, the state must assume the burden of conforming its permit to Federal standards during the initial program."
- f. **CONSOLIDATION COAL CO.**, 3 IBSMA 228, IBSMA 81-26 (July 31, 1981).
 - 1. The Board stated that an operator must comply with the obligations of the initial regulatory program [here, the surface impacts of underground coal mining] "until he has received a permit to operate under a permanent State or Federal regulatory program.' Alternately, if mining and reclamation operations have been terminated, the obligation to comply with the initial performance standards ends when an operation is no longer subject to regulation by a state with respect to any requirements of the initial program."
 - 2. Consolidation Coal's NOV was vacated as its failure to monitor water it pumped out of its inactive underground mine did not fall within the scope of "underground operation" as defined in the interim regulations.
- g. **GREATER PARDEE, INC.**, 3 IBSMA 313, IBSMA 81-1 (September 24, 1981). **GREATER PARDEE, INC. v OSM**, Docket No. NX 0-219-R (September 18, 1980).
 - 1. Greater Pardee contended that it was exempted by Kentucky from the requirement that all surface drainage pass through a sedimentation pond. The ALJ ruled, and the Board affirmed, that the Kentucky regulations exempted underground mines which existed "before May 3, 1978 from having to submit certain information to obtain a permit but this did not exempt an underground mine from any performance standards."
- h. **CITIZENS FOR THE PRESERVATION OF KNOX COUNTY**, 81 IBLA 209, IBLA 86-631, 83-2 (June 5, 1984).



1. The Board ruled that an operator, with an interim program permit, who had ceased all coal mining operations prior to the approval of a state's permanent program was not required to obtain a permanent program permit to conduct only reclamation activities, and that such reclamation activities were subject to the Department's initial program regulations.
 2. "The language of the statute specifies that 'operators' of surface coal mines who expect to be mining after the expiration of 8 months from the approval of a state program must file for a permanent program permit to cover those lands to be mined." Midland ceased mining operations prior to the approval of the Illinois permanent program. "Thus, at the time the permanent program was approved, Midland was not an operator of a surface coal mine at Mecco with any expectation of operating such mine."
- i. **PEABODY COAL CO. v OSM**, 101 IBLA 167 (February 17, 1988).
1. Peabody held an interim program permit and had applied for, but not yet received, a state permanent program permit when the NOV was issued. The Board held that:
 2. "Under the Act, surface mining operations were required to comply with the Federal interim regulatory program until a permanent State or Federal program was in place. 30 U.S.C. sec. 1252(e) (1982); 30 CFR 710.11(a)(3)...[U]ntil an operator received a permit to operate under a permanent state or Federal regulatory program, it was required to comply with the terms of the interim program permit. 30 CFR 710.11(a)(3)(iii)."
 3. The Board also rejected the operator's argument that OSM could not enforce the interim program after the effective date of Indiana's permanent program because the statutory authority to enforce the interim program had expired.
- j. **JOSEPHINE COAL CO. V OSM**, 111 IBLA 316, IBLA 87-208 (October 30, 1989).
1. "[C]ompliance with state mining permit conditions less stringent standards does not excuse applicant from complying with the interim program standards."
 2. Josephine Coal, operating under an initial program permit, was cited for failing to totally eliminate a pre-existing highwall. The appellant argued that since the Virginia authorities revised its permit to allow for leaving an unreclaimed highwall and the Virginia "permanent program regs now allow it, that this action on the NOV and CO by federal authorities should be dismissed." The Board confirmed the ALJ's rejection of this argument "on the ground that appellant's actions occurred under the interim program and, in fact, appellant never received a permanent program permit."
- k. **HARMAN MINING CORP. v OSM**, 114 IBLA 291, IBLA 87-525 (May 10, 1990)



1. "A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii)."
- I. **Also see:**
 1. **DONALDSON CREEK MINING CO. v OSM**, 111 IBLA 289, IBLA 87-439 (1989).
 2. **RAYLE COAL CO. v OSM**, 3 IBSMA 111, IBSMA 80-88 (1981).
5. **"ESTABLISHMENT OF VEGETATION" VS "SUCCESSFUL VEGETATION"**
 - a. **PITTSBURGH & MIDWAY COAL MINING CO., v OSM**, 107 IBLA 246, IBLA 87-378 (1989).
6. **ADDITIONAL DECISIONS**
 - a. **MCNABB COAL CO., INC. v OSM**, Docket Nos. TU 4-24-P, et al. (1986). **MCNABB COAL CO., INC. v OSM**, 105 IBLA 29, IBLA 86-1454 (1988).
 1. McNabb was required to comply with surface and ground water monitoring requirements "even where current mining operations might be considered exempt from regulation" under the Act. The ALJ stated:
 2. "Regardless of whether initial program or permanent program standards apply, the areas mined by McNabb prior to June 7, 1983, are subject to the Act until all performance standards are met. See Citizens for the Preservation of Knox County, 81 IBLA 209 (1984). Regardless of whether a mining permit is canceled, revoked, expired, or whether a company simply stops mining, there is no authority in the law to support the proposition that the standards applicable at the time of mining no longer apply."
 - b. **H.C. BOSTIC COAL CO., INC. v OSM**, Docket Nos. NX 88-8-R, et al. (1991).

ATTACHMENTS

- A. APPLICATION OF INTERIM VS PERMANENT PROGRAM REGULATIONS
 1. **AMERICAN MINING CONGRESS, ET AL. v US EPA**, 965 F 2d 759 (9th Cir 1992).



B. FEDERAL REGISTER NOTICES

1. 57 FR 12461 (APRIL 10, 1992). Notice of reinstatement of suspended rule.
2. 56 FR 25036 (JUNE 3, 1991). Notice of suspension.
3. 53 FR 44356 (NOVEMBER 2, 1988). Final rule. Termination of jurisdiction.
4. 53 FR 34636 (SEPTEMBER 7, 1988). Final rule. Revegetation.
5. 54 FR 13814 (APRIL 5, 1989). Final rule.
6. 56 FR 59992 (NOVEMBER 26, 1991). Final rule.
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 - a. ALTERNATE FUELS, INC. v OSM, Docket No. TU 5-23-R (1985).
 - b. THE CLEMENS COAL CO. v OSM, Docket Nos. TU 5-24-R, TU 5-5-P (1985).
 - c. EXCELLO COAL CORP./BERNOS COAL CO. v OSM, Docket No. Nx 5-55-R (1985).
 - d. JERICOL MINING, INC. v OSM, Docket Nos. NX 90-29-R, NX 90-36-R (1990).
 - e. SHAMROCK COAL CO. v OSM, Docket No. NX 4-24-R (1986).
 - f. DORA MINING CO., INC. v OSM, 100 IBLA 300, IBLA 85-723 (1987).
 - g. D & J MINERAL AND MINING, INC. v OSM, Docket No. NX 4-11-R (1985).
3. BOND RELEASE/TERMINATION OF JURISDICTION
 - a. OSM v CALVERT & MARSH COAL CO., INC. AND BATTLE CREEK MINING CO., INC., 95 IBLA 182 (1987).
 - b. BATTLE CREEK MINING CO., INC. v OSM, Docket No. NX 3-22-R (1985).



- c. CALVERT & MARSH COAL CO., INC. v OSM, Docket No. NX 3-21-R (1985).
- d. GRAFTON COAL CO., 3 IBSMA 175 (1981).
- e. FALCON COAL CO. v OSM, Docket No. NX 0-97-R (1980).

4. AMD

- a. COALEX STATE INQUIRY REPORT - 181, "CURRENT LIABILITY FOR ACID MINE DRAINAGE UNDER A PRE-SMCRA PERMIT" (1990).
 - 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).
- b. DONALDSON CREEK MINING CO. v OSM, 111 IBLA 289, IBLA 87-439 (1989).
- c. RAYLE COAL CO. v OSM, 3 IBSMA 111, IBSMA 80-88 (1981).



5. ESTABLISHING VEGETATION

- a. PITTSBURGH & MIDWAY COAL MINING CO., v OSM, 107 IBLA 246, IBLA 87-378 (1989).

6. ADDITIONAL DECISIONS

- a. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-24-P, et al. (1986). MCNABB COAL CO., INC. v OSM, 105 IBLA 29, IBLA 86-1454 (1988).
- b. H.C. BOSTIC COAL CO., INC. v OSM, Docket Nos. NX 88-8-R, et al. (1991).