



COALEX STATE INQUIRY REPORT - 336

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TOPIC: MODIFICATION OF A TERMINATED NOV

INQUIRY: What restrictions at law have been found to apply to an agency's power to terminate, modify or vacate a terminated NOV? May an agency unilaterally modify an NOV which has been terminated or vacated without having to go through a formal or informal hearing? Please locate any relevant materials.

SEARCH RESULTS: In researching this issue using the COALEX Library and other LEXIS libraries, a number of Interior administrative decisions were identified that contain relevant findings. These decisions are listed below in chronological order. Copies are attached.

DRUMMOND COAL CO., 3 IBSMA 100, 1981 IBLA LEXIS 916, IBSMA 81-14 (1981).

Headnotes: "The remedial action required in a notice of violation may be modified in the document terminating the notice if the termination clearly shows in writing the remedial action accepted by OSM as an alternative abatement."

UNIVERSAL COAL CO., 3 IBSMA 218, 88 I.D. 672, 1981 I.D. LEXIS 88 (1981).

In holding that a fourth modification of an NOV was not effective, the Board stated:

"Since abatement previously ordered had been completed in this case, OSM might have issued a new notice of violation requiring the same abatement as modification 4. OSM did not have authority, however, to extend the abatement period in this notice of violation beyond 90 days."

T & T DARBY COAL CO. v OSM, Docket No. NX 2-8-R (1982).

Darby contested NOV's issued for failing to perform work required as a result of an earlier Consent Decision. In the Consent Decision, the earlier NOV's were "affirmed as validly issued", no civil penalties were assessed "provided that within a specified period



of time...the applicant would perform certain remedial operations and provided further that in the event said remedial operations were not performed within that period of time, the OSM could issue new notices of violation which would not constitute res judicata...."

HARRY SMITH CONSTRUCTION CO. v OSM, 78 IBLA 27, 1983 IBLA LEXIS 6, IBLA 83-621 & 82-23 (1983).

The portion of the ALJ's decision changing a cessation order, issued for mining without a permit, into a notice of violation was reversed and the cessation order vacated. The Board found that while 30 U.S.C. sec. 1275(b)(Supp. IV 1980) "authorizes the Secretary to modify a notice of violation or cessation order", the exercise "of this authority is predicated on findings of fact after a hearing. In this case the motion to modify the cessation order was made in OSM's posthearing brief, could not be responded to by Smith because posthearing briefs were ordered simultaneously, and was granted without any rationale by the Administrative Law Judge's decision. We cannot condone the granting of such relief without notice to the parties at the hearing and without the appropriate findings of fact and conclusions of law."

P&K COAL CO., LTD. v OSM, 98 IBLA 26, 1987 IBLA LEXIS 5, IBLA 85-940 (1987).

OSM attempted to modify its original NOV while P&K's application for review was pending before the Hearing Division. The Board did "not deny that OSMRE has the authority to modify an NOV pursuant to section 521(a)(5) of SMCRA, 30 U.S.C. sec. 1271(a)(5)(1982)." However, "any OSMRE modification of an NOV when an application for review of the original NOV is filed timely would have 'no force or effect' until approved by the Administrative Law Judge, or until jurisdiction over the subject matter is returned to OSMRE."

Subsequent to the modification of the original NOV, the ALJ dismissed P&K's challenge to that NOV. OSM's modification of the NOV became effective 30 days after the receipt of the ALJ's order. "When the modified NOV became effective P&K had the right to file an application for review [of] OSMRE's modified NOV.... In a sense, OSMRE's modification of its original NOV created a new cause of action under SMCRA which had not been finally adjudicated in any prior administrative proceeding. P&K's right to apply for review of the modified NOV gave P&K an opportunity to reopen the question of OSMRE's authority to issue the underlying NOV."

PINEVILLE PROPERTIES CORP. v OSM, 104 IBLA 258, 1988 IBLA LEXIS 36, IBLA 85-735. PINEVILLE PROPERTIES CORP. v OSM, Docket No. NX 2-6-R (1985).

At the end of a 90-day period, an OSM inspector modified an existing NOV and ordered corrective action. A month later, the inspector issued a CO. Pineville argued that the inspector should have vacated the original NOV and issued a new one setting forth proper abatement and timetable. OSM replied that the inspector had "issued a modification after the end of the 90 day abatement period that clarified the options



available to the Appellant to abate the violation and avoid the issuance of a cessation order."

The Board cite to UNIVERSAL COAL, above, stating that even "if we were to rule that [the inspector's] modification was of no effect under Universal, on the basis that it imposed new and different corrective measures after the 90-day period for abatement had expired, we would nevertheless have to uphold the CO, since Pineville had taken no action to abate the violation cited in the [original] NOV." Since Pineville had taken no action to abate the violation at the end of the 90-day period, the inspector should have issued the CO rather than modifying the original NOV.

J & M COAL CO. v OSM, 122 IBLA 90, IBLA 89-504 (1992).

This decision is included because of its discussion of termination versus vacation of an NOV:

"[T]here is a difference between termination of an NOV, which would occur when the conditions cited have been mitigated..., and vacating an NOV, which would amount to an admission that it was not properly issued."

ATTACHMENTS

- A. DRUMMOND COAL CO., 3 IBSMA 100, 1981 IBLA LEXIS 916, IBSMA 81-14 (1981).
- B. UNIVERSAL COAL CO., 3 IBSMA 218, 88 I.D. 672, 1981 I.D. LEXIS 88 (1981).
- C. T & T DARBY COAL CO. v OSM, Docket No. NX 2-8-R (1982).
- D. HARRY SMITH CONSTRUCTION CO. v OSM, 78 IBLA 27, 1983 IBLA LEXIS 6, IBLA 83-621 & 82-23 (1983).
- E. P&K COAL CO., LTD. v OSM, 98 IBLA 26, 1987 IBLA LEXIS 5, IBLA 85-940 (1987).
- F. PINEVILLE PROPERTIES CORP. v OSM, 104 IBLA 258, 1988 IBLA LEXIS 36, IBLA 85-735.
- G. PINEVILLE PROPERTIES CORP. v OSM, Docket No. NX 2-6-R (1985).
- H. J & M COAL CO. v OSM, 122 IBLA 90, IBLA 89-504 (1992).