



## COALEX STATE INQUIRY REPORT - 236

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### TOPIC: PATTERN OF VIOLATIONS

**INQUIRY:** The operator who is the subject of a pattern of violations (POV) hearing wishes to introduce evidence concerning the underlying factual circumstances surrounding the finalized NOV and assessment. The state regulatory authority (RA) wishes to exclude all evidence concerning the NOV and the assessment, other than that which is contained within the finalized records of the RA. The state takes the position that the finalized NOV and assessment are res judicata and cannot be collaterally attacked. Please locate material on the admissibility of evidence to explain, contradict, or collaterally attack the finalized NOV and assessment.

**SEARCH RESULTS:** Two particularly relevant Interior ALJ decisions were identified using the COALEX Library and LEXIS (see OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO. and CHESTNUT COAL, below). Other relevant materials identified during the research are discussed below. Copies are attached.

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### DOI ADMINISTRATIVE PROCEEDINGS FOR SUSPENSION/REVOCATION OF PERMITS: INITIAL REGULATORY PROGRAM

#### OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., Docket No. CH 0-2-A (1981).

The ALJ analyzed each violation issued within the 12 month period and reviewed the testimony of the inspectors who wrote the violations before ruling that there was no pattern of violations:

"This decision is not to determine validity, invalidity or justification for writing the violations, but, based on a complete review of the record, to determine if there has been such a pattern of violations as justifies sanction under section 521(a)(4) of the Act."

"What OSM has not shown is the type of negligence or want of such care as to overcome the testimony of its own witnesses and of Permittee and Operator."



## **DOI ADMINISTRATIVE PROCEEDINGS FOR SUSPENSION/REVOCATION OF PERMITS: PERMANENT REGULATORY PROGRAM**

### **CHESTNUT COAL CO. v OSM, Docket No. NX 89-5-PR (1989).**

The ALJ held that OSM failed to prove that Chestnut had demonstrated "a pattern of violations combined with an unwarranted failure to comply with the Act or regulations such that its permit should be revoked" or suspended. In reaching his decision that each of the three violations was an isolated, unique occurrence that was timely abated with little or no impact on the environment, the ALJ ruled "that the evidence of violations before the 12-month period [cited in the show cause order] could be introduced to show the Permittee's willful or unwarranted failure to comply". The ALJ quoted from two OSM internal policy memorandums on which the Knoxville Field Office based its procedures for implementing 30 CFR 843.13: Directive INE-36 (see below) and a Knoxville Field Office memo "Pattern of Violations, 30 CFR 843.13 and 521(a)(4) of PL 95-87". [NOTE: A copy of the field office memo is not available at this time.]

"That memorandum listed nine criteria that were to be used...in determining whether a pattern of violations existed... Those criteria included: how the violations were caused; the number and type of violations; whether the violations were isolated events; how the violations impacted the environment; how permit suspension would improve the environment; what affirmative obligations might be included in the suspension order to correct the violations; the remedial action specified in the NOV; and photo documentation."

### **GOLDEN CHIP COAL CO., INC., Docket No. NX 7-4-PR (1987).**

OSM's pleading listed 12 NOV's and COs. Golden Chip neither requested a hearing nor filed an answer to the show cause order. The ALJ revoked the permit.

## **POV MENTIONED IN SETTLEMENT AGREEMENTS AND CONSENT DECISIONS**

**GATLIFF COAL CO. v OSM, Docket No. NX 91-5-PR (1991).**

**VIRGINIA IRON, COAL & COKE CO. v OSM, Docket No. NX 7-46-P (1988).**

**FAULKNER CONSTRUCTION CO. v OSM, Docket Nos. NX 7-26-R, NX 7-27-R, NX 7-28-R (1987).**

**UNITED ENERGY CORP., FORMERLY KNOWN AS UNITED COAL CO. AND UNITED COAL CO. v OSM, Docket No. NX 6-27-P (1986).**

**BIG VALLEY COAL CO. AND CRAVAT COAL CO. v OSM, Docket No. NX 0-107-P (1980).**

As long as mining companies are in compliance with the Agreements/Consent Decisions, NOV's, COs, and penalty assessments will not be used by OSM "in any proceeding as evidence of prior violations, of a history of violations, or of a demonstrated pattern of willful violations."

## **PENNSYLVANIA ADMINISTRATIVE CASES**



**VERNON R. PAUL v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1985 Pa Envirn LEXIS 26, 1985 EHB 791, EHB Docket No. 84-290-G (1985).**

In this appeal of a denial by DER of Paul's application for a coal refuse disposal permit, the Board denied DER's Motion for summary judgment. Paul will be allowed a hearing to determine whether he can "meet his burden of showing that he now has the ability and intention to comply with the law, despite a history of violations", and should be granted a permit. [Pa. law, which is stricter than SMCRA, allows DER to deny a permit where the applicant lacks the ability or intention to comply with the regulations.]

**NON-MINING CASES**

**FORMOSA PLASTICS CORP. v JOHN E. WILSON III, SECRETARY, DELAWARE DEPT. OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL (DNR), slip op., CA No. 8216, (Del Ch 1985).**

The DNR revoked a series of permits issued to Formosa's manufacturing plant which produces polyvinyl chloride. The court refused to stay the summary administrative action pending final action by the Environmental Appeals Board due to the threat to the public health and safety. The Secretary concluded from the "pattern of repeated violations" that Formosa "demonstrated inability to operate the plant safely within the requirements of the law."

**MATERIAL INCLUDED FOR BACKGROUND**

**OSM DIRECTIVE, Subject No. INE-36, Transmittal No. 470, "Suspension and Revocation of Federal Permits Due to Patterns of Violations" (Issued September 26, 1988).**

This directive reviews the regulation, provides definitions, an outline of responsibilities and criteria used to determine that there has been a pattern of violations:

"The Assistant Director's decision on whether to suspend or revoke a permit and for how long is case-specific and will be based on the permittee's history of previous violations and the Field Office Director's recommendation on the type of violations (unwarranted failure to comply or willful violation), the permittee's compliance record (e.g., whether the permittee previously had a permit suspended or revoked), or if the permittee continued to mine on a suspended permit."

**44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Section 843.13 Suspension or revocation of permits.**

**45 FR 58780 (SEPTEMBER 4, 1980). Final rulemaking. Civil penalties.**

**54 FR 18438 (APRIL 28, 1989). Final rule. Requirements for permits and permit processing; Improvidently issued permits.**



## ATTACHMENTS

- A. OSM v RWR DEVELOPMENT CO. AND DEBCON COAL CO., Docket No. CH 0-2-A (1981).
- B. CHESTNUT COAL CO. v OSM, Docket No. NX 89-5-PR (1989).
- C. GOLDEN CHIP COAL CO., INC., Docket No. NX 7-4-PR (1987).
- D. GATLIFF COAL CO. v OSM, Docket No. NX 91-5-PR (1991).
- E. VIRGINIA IRON, COAL & COKE CO. v OSM, Docket No. NX 7-46-P (1988).
- F. FAULKNER CONSTRUCTION CO. v OSM, Docket Nos. NX 7-26-R, NX 7-27-R, NX 7-28-R (1987)
- G. UNITED ENERGY CORP., FORMERLY KNOWN AS UNITED COAL CO. AND UNITED COAL CO. v OSM, Docket No. NX 6-27-P (1986).
- H. BIG VALLEY COAL CO. AND CRAVAT COAL CO. v OSM, Docket No. NX 0-107-P (1980).
- I. VERNON R. PAUL v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1985 Pa Envirn LEXIS 26, 1985 EHB 791, EHB Docket No. 84-290-G (1985).
- J. FORMOSA PLASTICS CORP. v JOHN E. WILSON III, SECRETARY, DELAWARE DEPT. OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL (DNR), slip op., CA No. 8216, (Del Ch 1985).
- K. OSM DIRECTIVE, Subject No. INE-36, Transmittal No. 470, "Suspension and Revocation of Federal Permits Due to Patterns of Violations" (Issued September 26, 1988).
- L. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Section 843.13 Suspension or revocation of permits.
- M. 45 FR 58780 (SEPTEMBER 4, 1980). Final rulemaking. Civil penalties.
- N. 54 FR 18438 (APRIL 28, 1989). Final rule. Requirements for permits and permit processing; Improvidently issued permits.