



COALEX STATE INQUIRY REPORT - 233

November 1992

Olga Brunning, Esquire
Department of Natural Resources
Tawes Building - Room C-4
580 Taylor Avenue
Annapolis, Maryland 21401

TOPIC: SUSPENSION OR REVOCATION OF PERMIT FOR INSUFFICIENT INFORMATION; LIABILITY FOR ATTORNEY'S FEES

INQUIRY: Can a newly issued permit be suspended by the state in order to request additional information from the applicant? If, as result of the permit suspension, the operator sues and wins, will the state be liable for attorney's fees? Please locate relevant case law.

SEARCH RESULTS: Using the COALEX Library, LEXIS and existing COALEX Reports, relevant decisions and Federal Register notices were identified. The retrieved materials are discussed below, by topic. Copies are attached.

SUSPENSION OR REVOCATION OF PERMIT

LOWER PROVIDENCE TOWNSHIP v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND ALTERNATE ENERGY STORE, INC., PERMITTEE, 1988 EHB 275, 1988 Pa Envirn LEXIS 36, EHB Docket No. 81-078-M (1988).

"Synopsis: When it is discovered, subsequent to the issuance of the Mine Drainage Permit, that an unanticipated condition exists on the site with potential harm to the environment, the permit will be suspended and the matter will be remanded to DER for the purpose of reviewing the Mine Drainage Permit and issuing an amendment, if deemed necessary."

SAMUEL M. MULLINAX, 96 IBLA 52, IBLA 85-722 (1987).

"HEADNOTES: When [OSM] issues a 10-day notice to a state...based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, [OSM], that the response to that citizen's complaint was appropriate."



INNOVATIVE DEVELOPMENT OF ENERGY, INC. (IDE) v OSM, Docket No. NX 6-44-R (1987).

A description of the facts of the case included the following: The state revoked the original NPDES permit it had issued because IDE provided incorrect information in their initial application. IDE appealed this revocation. The Tennessee Water Quality Control Board upheld the permit revocation. IDE submitted revised mining plans and specifications and the NPDES permit was reissued.

The ALJ affirmed the validity of the NOV and CO, issued for violations of SMCRA.

COMMONWEALTH OF PA., PA. FISH COMMISSION AND LITTLE CLEARFIELD CREEK WATERSHED ASSOC. v DER AND AL HAMILTON CONTRACTING CO., PERMITTEE, 1991 Pa Envirn LEXIS 81, EHB Docket No. 86-338-W (1991).

"SYNOPSIS: A Department of Environmental Resources' (Department) approval of a request for a variance to surface mine coal within the 100-foot stream barrier was procedurally defective when there was no showing that the proposed variance was advertised as required [by Pa. SMCRA]. Further, the Department did not provide the Pennsylvania Fish Commission (FPC) a copy of the proposed variance to allow it to comment on the request, as required by the statute and regulation."

PEABODY COAL CO. v OSM, THE HOPI TRIBE, MAXINE KESCOLI, THE NAVAJO NATION, INTERVENORS, Docket No. TU 90-2-PR (1992).

One of the special conditions attached to the permit required Peabody to submit updated maps of archaeological sites. In approving the 1992 Settlement Agreement and the Special Conditions, the ALJ stated that "OSMRE can require [Peabody] not only to provide information but also to demonstrate on the basis of such information that its permit application is complete and accurate and that [Peabody] has complied with all statutory and regulatory requirements."

PAUL F. KUHN, 120 IBLA 1, IBLA 89-539 (1991).

"HEADNOTES: Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action."

COALEX STATE INQUIRY REPORT - 222, "Permit revisions and midterm permit review" (July, 1992).

This Report discusses the RA's ability to alter previously approved permit conditions or permit revisions and the purpose behind the need for the midterm permit review. Attached are OSM Directives, administrative case law and Federal Register preambles.



COALEX STATE INQUIRY REPORT - 159, "Review of permit applications; subsidence" (July, 1991).

The materials included in this Report discuss the regulatory authority's responsibility in processing permits and the responsibility of the applicant to provide sufficient information on the application for a mining permit. [Materials discussing subsidence are not included with this Report.]

COALEX STATE INQUIRY REPORT - 122, "Permitting -- (A) Permit application approval process; (B) Impacts on areas outside the permit boundary" (July, 1989).

The inquirer wanted to know if any state regulatory agencies engage in independent information gathering in the permitting process or only review, evaluate and criticize the information the operator puts in the permit application. No specific state regulations were identified; however, several relevant cases were retrieved.

LIABILITY FOR ATTORNEY'S FEES

SHEESLEY v DER, EHB Docket No. 85-064-G (1986).

In this unsuccessful third party appeal from a release of a mining bond by DER, the EHB held it has the discretion to award litigation expenses if the petitioner either succeeds on the merits of the case, or if exceptional circumstances exist. Examples of such exceptional circumstances are: where DER procedures, policies, rules, or regulations are modified or where the petitioner has made a substantial contribution to the litigation.

JAY TOWNSHIP, ET AL. v DER AND E.M. BROWN COAL CO., INC., PERMITTEE, 1987 Pa Envirn LEXIS 144, EHB Docket No. 82-300-W (1987).

Petitioners were awarded attorney's fees, having "substantially contributed" to the outcome of the litigation.

"Petitioners, in a third party posture, challenged the DER's issuance of a mining permit to Permittee. During the hearing on the merits, the Petitioners' efforts led to a supersedeas of the permit while Permittee gathered evidence in support of its permit. During the continuance, Permittee determined its permit was probably wrongfully issued because of the potential for pollution from the mine site existed, and, thereafter, requested cancellation of the permit."

BIG B MINING CO. v DER, 1990 Pa Envirn LEXIS 36, EHB Docket No. 83-215-G (1990).

"SYNOPSIS: A petition for attorneys fees and other costs cannot be granted under section 4(b) of Pa. SMCRA where the petitioner is the permittee and the underlying proceeding was an appeal from the denial of a permit application. Construing section 4(b) of Pa. SMCRA consistently with regulations adopted by the Department of the Interior to implement a similar



provision under Fed. SMCRA, the Board rules that a permittee is not eligible for cost recovery in permit application proceedings."

SMITH v DER AND FLK MINING CO., PERMITTEE, 1990 Pa Envirn LEXIS 151, EHB Docket No. 87-414-F (1990).

"SYNOPSIS: A petition for costs and attorney's fees filed by a Permittee under Section 4b of the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. section 1396.4b, is denied. The fact that the Appellant withdrew her appeal prior to a hearing does not provide a sufficient basis for concluding that the Permittee is a 'prevailing party.'"

COALEX STATE INQUIRY REPORT - 120, "Attorneys' fees" (July, 1989).

Included here are state and federal cases that rule on the award of attorneys' fees to surface mining operators as a result of challenges to permit decisions. [NOTE: The Report is included here without attachments.]

COALEX STATE INQUIRY REPORT - 180, "Attorneys' fees in non-enforcement, non-adversarial proceedings" (July, 1990).

This Report adds several decisions to Report No. 120. [NOTE: The Report is included here without attachments.]

COALEX STATE INQUIRY REPORT - 220, "Petitions for costs, expenses and attorney's fees" (June, 1992).

Listed in this Report are the Interior and Pennsylvania administrative decisions, several state and recent federal cases, and legislative history materials that rule on the award of costs, expenses and attorney's fees.

ATTACHMENTS

- A. LOWER PROVIDENCE TOWNSHIP v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND ALTERNATE ENERGY STORE, INC., PERMITTEE, 1988 EHB 275, 1988 Pa Envirn LEXIS 36, EHB Docket No. 81-078-M (1988).
- B. SAMUEL M. MULLINAX, 96 IBLA 52, IBLA 85-722 (1987).
- C. INNOVATIVE DEVELOPMENT OF ENERGY, INC. (IDE) v OSM, Docket No. NX 6-44-R (1987).
- D. COMMONWEALTH OF PA., PA. FISH COMMISSION AND LITTLE CLEARFIELD CREEK WATERSHED ASSOC. v DER AND AL HAMILTON CONTRACTING CO., PERMITTEE, 1991 Pa Envirn LEXIS 81, EHB Docket No. 86-338-W (1991).
- E. PEABODY COAL CO. v OSM, The Hopi Tribe, Maxine Kescoli, The Navajo Nation, Intervenor, Docket No. TU 90-2-PR (1992).
- F. PAUL F. KUHN, 120 IBLA 1, IBLA 89-539 (1991).



- G. COALEX STATE INQUIRY REPORT - 222, "Permit revisions and midterm permit review" (July, 1992).
 - A. OSM DIRECTIVE, Subject No REG-17, Transmittal No 382, "Midterm Review of Federal Permits" (Issued October 6, 1987).
 - B. IN THE MATTER OF: CONSOLIDATION COAL CO. v COMMONWEAL. OF PENN., DEPT. OF ENVIRON. RESOURCES, 1976 EHB 44, EHB Docket No 72-297-D (1976).
 - C. OSM DIRECTIVE, Subject No REG-21, Transmittal No 398, "Findings and Determinations for Revisions and Renewals of Federal Permits" (Issued November 10, 1987).
 - D. 48 FR 22092 (May 16, 1983). Final Rule. Topsoil.
 - E. 48 FR 44344 (September 28, 1983). Final Rule. Permitting.
- H. COALEX STATE INQUIRY REPORT - 159, "Review of permit applications; subsidence" (July, 1991).
 - A. 47 FR 27694 (JUNE 25, 1982). Proposed rule. Permitting. [Excerpts.]
 - B. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting. [Excerpts.]
 - C. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 89 IBLA 1, IBLA 83-757, 81-83 (September 27, 1985).
 - D. NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, 94 IBLA 269, IBLA 83-757, 81-83 (November 18, 1986 - amends September 27, 1985 decision).
 - E. MOOSE COAL CO. v CLARK, 687 F Supp 244 (WD Va 1988).
 - F. VIRGINIA CITIZENS FOR BETTER RECLAMATION [VCBR], 82 IBLA 37, IBLA 83-702 (July 10, 1984).
- I. COALEX STATE INQUIRY REPORT - 122, "Permitting -- (A) Permit application approval process; (B) Impacts on areas outside the permit boundary" (July, 1989).
 - A. KY. REV. STAT. Sec. 350.055 (1980) Publication of notice of intention to mine by permit applicant -- Notification of various local government bodies by department [Subject to federal approval].
 - B. PA. CODE TITLE 25, Sec. 86.31 (1982) Public notices of filing of permit applications.
 - C. PA. CODE TITLE 25, Sec. 86.33 Right to file written objections.
 - D. ILL. ADMIN. CODE TITLE 62, Sec. 1784.14 (1988) Hydrologic Information [corresponding to 30 CFR 784.14].
 - E. IND. ADMIN. CODE TITLE 13, r. 13-4.1-3-3 (1987) Application for permit; contents; public inspection of certain information; tests [corresponds to 30 CFR 780.22(b) and 784.22(b)].
 - F. COLO. CODE REGS. Section 2.09.1 Small operator assistance program; Assistance provided
 - G. VILLAGE OF PLEASANT CITY, OHIO v DIVISION OF RECLAMATION, No. CA-835, slip opinion (Ohio Ct. App. 1987).
 - H. UTAH INTERNATIONAL, INC. v DEPARTMENT OF THE INTERIOR, 643 F. Supp 810 (D. Utah 1986).
 - I. GRAHAM v COMMONWEALTH OF PENNSYLVANIA, 79 Pa. Commw. 403, 469 A.2d 709 (Pa Commw. Ct. 1984).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- J. Excerpt from IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F. Supp. 1519 (D.D.C. 1985).
- J. SHEESLEY v DER, EHB Docket No. 85-064-G (1986).
- K. JAY TOWNSHIP, ET AL. v DER AND E.M. BROWN COAL CO., INC., PERMITTEE, 1987 Pa Envirn LEXIS 144, EHB Docket No. 82-300-W (1987).
- L. BIG B MINING CO. v DER, 1990 Pa Envirn LEXIS 36, EHB Docket No. 83-215-G (1990).
- M. SMITH v DER AND FLK MINING CO., PERMITTEE, 1990 Pa Envirn LEXIS 151, EHB Docket No. 87-414-F (1990).
- N. COALEX STATE INQUIRY REPORT - 120, "Attorneys' fees" (July, 1989). [NOTE: The following list of cases are discussed in Report No. 120; however, copies of these decisions are not attached.]
- A. ANNOTATION, "Award of Attorneys' Fees Pursuant to Sec. 520(d), 520(f), 525(e), or 703(c) of Surface Mining Control and Reclamation Act of 1977 (30 USCS Sec. 1270(d), 1270(f), 1275(e), 1293(c)", 89 A.L.R. Fed. 170 (1988).
- B. RUCKELSHAUS v SIERRA CLUB, 463 U.S. 680 (1983).
- C. PENNSYLVANIA v DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, 478 U.S. 546 (1986).
- D. BLUM v STENSON, 104 S.Ct. 1541 (1984).
- E. COPELAND v MARSHALL, 641 F.2d 880 (D.C. Cir. 1980).
- F. UTAH INTERNATIONAL INC. v DEPARTMENT OF INTERIOR, 643 F.Supp. 810 (D. Utah 1986).
- G. HARDY v COMMONWEALTH OF PENNSYLVANIA, 101 Pa. Commw. 1 (1986).
- H. VIRGINIA CITIZENS FOR BETTER RECLAMATION, 88 IBLA 126, IBLA 84-838 (1985).
- I. DONALD ST. CLAIR, 84 IBLA 236 (1985).
- J. COUNCIL OF THE SOUTHERN MOUNTAINS, INC. v OSM, 3 IBSMA 44, IBSMA No. 80-34 (1981).
- K. DENNIS R. PATRICK v OSM, 1 IBSMA 248, Appeal No. IBSMA 79-21 (1979).
- L. TURNER BROS., INC. v OSMRE, Docket Nos. TU 6-24-R, TU 6-28-R, TU 6-36-R, TU 6-45-R, TU 6-51-R, TU 6-74-R, TU 6-106-R, TU 7-3-R, TU 7-17-R, TU 7-20-R, TU 7-24-R, TU 7-25-R, TU 7-27-R, TU 7-28-R (1987).
- M. ALTERNATE FUELS, INC. v OSM, Docket No. TU 5-23-R (1985).
- N. DELTA MINING CORP., 3 IBSMA 252, IBSMA 81-60 (1981).
- O. JAY TOWNSHIP v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 82-300-W (1987).
- P. KWALWASSER v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 84-108-M (1988).
- Q. SHEESLEY v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 81-061-H (1982).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- O. COALEX STATE INQUIRY REPORT - 180, "Attorneys' fees in non-enforcement, non-adversarial proceedings" (July, 1990). [NOTE: The following list of cases are discussed in Report No. 18; however, copies of these decisions are not attached.]
1. NORTH CAROLINA DEPT. OF TRANSPORTATION v CREST STREET COMMUNITY COUNCIL, 479 US 6 (1986).
 2. WEBB v BOARD OF EDUCATION OF DYER CITY, 471 US 234 (1985).
 3. US (EPA) v ENVIRONMENTAL WASTE CONTROL, INC., 737 F Supp 1485 (ND Ind 1990).
 4. HONDA v MITCHELL, 417 F 2d 324 (DC Cir 1969).
 5. DEMIER v GONDLES, 676 F 2d 92 (4th Cir 1982).
 6. Panitch v Wisconsin, 451 F Supp 132 (ED Wisc 1978).
 7. WINTON v AMOS, 255 US 373 (1921).
 8. COALEX STATE INQUIRY REPORT - 120, "Attorneys' Fees" (1989).
 9. NATURAL RESOURCES DEFENSE COUNCIL, ET AL. v OSM, WEST ELK COAL, INTERVENOR, STATE OF COLORADO, INTERVENOR, 107 IBLA 339, IBLA 87-200 (1989).
 10. SAVE OUR CUMBERLAND MOUNTAINS, INC., 111 IBLA 197, IBLA 89-410 (1989). Petition approved.
 11. MARTIN v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envir LEXIS 99, EBH Docket No. 85-064-W (1989).
 12. KAY v EHRLER & KENTUCKY BOARD OF ELECTIONS, 111 S Ct 1435, 113 L Ed 2d 486, (1991).
 13. AVOYELLES SPORTSMEN'S LEAGUE v MARSH, 786 F 2d 631 (5th Cir 1986).
 14. Alabama Power Co., et al. v Gorsuch and Sierra Club, et al., Intervenor, 672 F 2d 1 (DC Cir 1982).
- P. COALEX STATE INQUIRY REPORT - 220, "Petitions for costs, expenses and attorney's fees" (June, 1992).
- A. The list of Congressional Records entries available in Legislative History files in the COALEX Library.
 - B. Interior ALJ decisions listed above: First page in "KWIC".
 - C. The list of all ALJ cases retrieved in response to the search request (the request is also included).
 - D. IBLA and IBSMA decisions listed above: First page in "KWIC".
 - E. Pennsylvania Environmental Hearing Board decisions: First page in "KWIC".
 - F. FIDEL RAMOS, ET AL. v RICHARD D. LAMM, 539 F Supp 730 (D Col 1982). [Full text of case.]
 - G. State court decisions listed above: First page in "KWIC".
 - H. CITY OF BURLINGTON v ERNEST DAGUE, SR., et al., 1992 US LEXIS 4363, 60 USLW 4717 (US 1992). [Full text of case.]