



COALEX STATE INQUIRY REPORT - 284

May 1994

Sylvia Wilcox, Esquire
Department of Natural Resources
Division of Reclamation
402 W. Washington Street
Indianapolis, Indiana 46204

TOPIC: CHANGES IN APPROVED DRAINAGE DESIGN

INQUIRY: An operator received an NOV for failure to construct diversions and basins as designed in the approved revised plan, resulting in uncontrolled discharges. Please locate administrative decisions that discuss modifications to drainage control or sedimentation control designs or the implementation of the modifications. Also identify decisions where permittees were cited for failure to pass water through a sedimentation control structures and related drainage violation cases.

SEARCH RESULTS: Using the COALEX Library and other material available in LEXIS as well as an existing COALEX Reports, relevant Interior administrative decisions, Federal Register preambles plus an OSM Directive were identified. The attached materials are discussed below.

INTERIOR MATERIAL

OSM DIRECTIVE, Subject No. TSR-9, Transmittal No. 441, "Construction Certificate of Siltation Structures" (Issued April 27, 1988).

The directive provides guidance to OSM employees who review or approve construction certifications of or inspect siltation structures and identifies procedures for processing construction certifications when the structure differs from the approved design.

Procedures.

(1) Inspection certification approval.

...

"(b) An inspection report that certifies that it accurately describes the constructed structure, identifies any deviation from the approved design, and is accompanied by a request for approval of those deviations constitutes an acceptable application for a permit revision in accordance with current requirements and procedures. An inspection report that notes minor changes that do not affect the safety, stability, operation and



reliability of the structure from the approved design is acceptable, if it is readily apparent that the parameters upon which the initial approval was based have not changed. Otherwise, the report must be accompanied by supporting calculations, designs, demonstrations required by the regulations and 'as-built' drawings to establish that the constructed pond meets applicable performance standards."

(2) State Program Oversight.

...

"(c) If the inspection certification (1) does not exist, (2) does not match the constructed pond, or (3) the revised design has not been accepted by the regulatory authority as a revision, then a violation would appear to exist and a 10-day notice should be written...."

GATLIFF COAL CO. v OSM, Docket No. NX 92-6-R (1993).

In sustaining the issuance of the NOV for failure to construct and maintain a basin and a diversion ditch in accordance with approved plans, the ALJ stated:

"Applicant could have requested a modification of the permit in order to make the changes it desired, but chose not to. Applicant did not present any evidence rebutting Respondent's prima facie case, and attempted to show only that the structures it had in place were just as effective as those which should have been constructed."

ARCH MINERAL CORP. v OSM, Docket Nos. DV 91-6-R, DV 91-8-R (1992).

The NOV cited Arch for failing to construct a sedimentation control pond which constituted a failure to comply with its "approved permit/plan". Arch did not request an exemption to the use of sedimentation ponds from Wyoming DEQ which was required before using containment ditches/berms as the means to control surface drainage:

"[U]se of containment ditches/berms in lieu of a sedimentation pond must be explicitly described in the permit application so that the areal extent and technical merits of such an exemption can be assessed during the permit approval process."

RITH ENERGY, INC. v OSM, Docket No. 91-9-R (1992).

Rith was cited for failing to construct a road in conformity with the design specifications in the approved permit plan and for failing to submit a construction inspection certificate. The remedial action required Rith to construct the road in accordance with its approved plan and have the road certified. Rather than re-work the road, Rith applied for a permit revision to change the approved design specifications. OSM approved the revised plan which matched the existing configuration of the road.

THE PITTSBURGH & MIDWAY COAL MINING CO. (P&M) v OSM, Docket Nos. TU 4-8-P et al. (1985).



As part of this settlement agreement, OSM extended the time for abatement of an NOV in order to provide P&M with 30 days to submit a revised design for its proposed containment berm that would meet the standards for a siltation structure. Upon approval of the revised design, prompt construction and certification of the structure was required. Failure to abide by this plan would result in OSM's issuance of a CO.

COAL ENERGY v OSM, Docket No. NX 92-19-R (1992).

The permittee was issued an NOV and a CO for failure "to construct and/or maintain the basin 002 according to requirements and the approved permit."

COAL ENERGY, INC. v OSM, Docket Nos. NX 89-34-R, NX 89-36-R (1991).

The ALJ sustained the NOVs issued for failure to construct and maintain properly designed sedimentation ponds.

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

Syllabus: "A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed."

CORLEY-COLE, INC. v OSM, Docket No. NX 9-59-P (1981).

The permittee was issued an NOV and a CO for failure to have a sedimentation pond certified by a qualified registered engineer as having been constructed as designed and as approved in the reclamation plan. The CO was terminated following receipt of the required certification.

PINEVILLE PROPERTIES CORP. v OSM, 104 IBLA 258, IBLA 85-735 (1988).

Pineville received two NOVs. The first violation, which was uncontested, cited Pineville for "failure to construct diversion ditches which will accommodate the design precipitation event (100 yr.) as approved by the regulatory authority per detail and plan drawing within the subject's method of operation." The second violation, the focus of the appeal, concerned the operator's failure to certify that the French drain had been constructed as "designed in the approved method of operation." A modification of the second NOV ordered Pineville to submit a permit revision showing how the actual design of how the drain was constructed. The NOV and the CO, which was issued later, were upheld.

HARDROCK MINING CO., INC. v OSM, Docket No. NX 90-16-R (1991).



NOVs were issued for "failure to pass all surface water through an approved sediment control structure" and "failure to construct ponds in accordance with the approved detailed plans".

L & D COAL AND LAND CORPORATION v OSM, Docket Nos. NX 90-22-R, NX 90-51-R (1990).

As part of this Consent Decision, OSM agreed to allow L & D to use an alternative sedimentation control in lieu of constructing a sedimentation pond.

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

Included in the NOVs were citations for failure to construct ponds on the site. The issuance of the NOVs was sustained even though OSM ultimately accepted the use of alternative means of abatement for sediment control violations.

LYNCO MINING CO. v OSM, Docket No. 90-39-R (1992).

As part of the settlement agreement, Lynco was required to revise its permit to include construction of a natural drainway.

COALEX STATE INQUIRY REPORT - 193, "Failure to maintain sedimentation ponds (siltation structures)" (September, 1991).

Included in this Report are Interior administrative decisions and the Federal Register preambles that constitute the "regulatory history" of the federal regulations.

ADDITIONAL FEDERAL REGISTER MATERIAL

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final rule.

816.46 (o) and (p). Fill material.

...

"Section 515(b)(10)(B)(ii) of the Act provides that sedimentation ponds must be constructed as designed and approved in the reclamation plan. This provision of the Act is intended to assure that the regulatory authority has the authority to require the design of sediment ponds to meet the requirements of the Act. Moreover, Section 510(a) authorizes the regulatory authority to grant, require modification of or deny plans to construct sediment ponds."

53 FR 44356 (NOVEMBER 2, 1988). Final rule. Termination of jurisdiction.

30 CFR 700.11(d)(1)(ii) Permanent Program Operations.

...

The overall regulatory program monitors each phase of each mining and reclamation



operation from beginning to end. "Approval of the reclamation and operation plan required for each permit is predicated on a demonstration by the permit applicant that the design and performance standards of the regulatory program will be met. Throughout the conduct of both mining and reclamation operations, the regulatory authority performs periodic inspections to ensure compliance with the approved reclamation and operation plan. Also, certifications are required both during and upon completion of construction for certain critical structures cited by the commenters. Where operations are inconsistent with the approved plan or certifications are not provided or are inaccurate, the regulatory authority will require corrective measures, either through enforcement actions or permit revisions."

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control of operations" (1990).
- B. COALEX STATE INQUIRY REPORT - 169, "Ownership and control; applicant violator system" (1991).
- C. COALEX STATE INQUIRY REPORT - 224, "Definition of 'operator' and 'permittee'" (1992).
- D. COALEX STATE INQUIRY REPORT - 231, "Ownership and control: 'related parties'" (1992).
- E. COALEX STATE INQUIRY REPORT - 232, "Definition of 'operator'" (1992).
- F. 58 FR 34652 (JUNE 28, 1993). Proposed rules. Definitions of ownership and control; applicant/violator system; civil penalties for owners and controllers of violators.
- G. List of Federal Register Notices relating to federal AVS and O&C rules.
- H. OSM DIRECTIVE, Subject No. INE-2, Transmittal No. 688, "Ownership and control information update after receipt of a cessation order" (Issued 9/3/91).
- I. OSM DIRECTIVE, Subject No. INE-32, Transmittal No. 679, "Oversight procedures for states' implementation of the applicant/violator system; Memorandum of understanding" (Issued 7/1/91).
- J. OSM DIRECTIVE, Subject No. INE-33, Transmittal No. 636, "510(c) Permit review procedures for federal permit applications" (Issued 9/18/90).
- K. OSM DIRECTIVE, Subject No. INE-34, Transmittal No. 659, "Improvidently issued permits" (Issued 2/22/91).
- L. OSM DIRECTIVE, Subject No. INE-42, Transmittal No. 665, "Verification of federal permittee ownership and control information after site disturbance" (Issued 3/26/91).
- M. BLACK HAWK COAL CO. v OSM, 112 IBLA 1989 IBLA LEXIS 37 (1989).
- N. SPURLOCK MINING CO. v OSM, Docket No. NX 92-13-R (1992).
- O. ROBERT L. CLEWELL ET AT., 123 IBLA 253, IBLA 91-321 (1992).
- P. L & D COAL AND LAND CORP. v OSM, Docket Nos. NX 90-22-R, NX 90-51-R (1990).
- Q. AARON W. BRASHEAR v OSM, Docket Nos. NX 1-95-R, NX 5-125-R (1990).
- R. ERNEST VAN HOOSE, (AVS) PA 92-03, IBLA 93-147 (1993).



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

- S. Excerpts from a number of OHA decisions.
- T. U.S. v FIRE RING FUELS, INC., 788 F Supp 330 (ED Ky 1992).
- U. UNITED STATES v. RAPOCA ENERGY CO., 613 F. Supp. 1161 (W.D. Va 1985).
- V. THE PITTSTON CO. AND CLINCHFIELD COAL CO. v LUJAN, 798 F Supp 344 (WD Va 1992).
- W. ANNOTATION, "Liability for Reclamation Fees under Sec. 402 of SMCRA", 117 ALR Fed 377 (1994).