United States Department of the Interior

ACT/007/020
#2

OFFICE OF SURFACE MINING
Reclamation and Enforcement
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Denver, Colorado 80202-5733

IN REPLY REFER TO:

To: JOE HELFRICH / BILL MALENCIK
FR: HENRY AUSTIN
RE: Mining WITHOUT A PERMIT

JOE:
This DIRECTIVE is still in effect for OSM, and would apply directly to the HORIZON MINE.

Also - OSM DIRECTIVES ARE AVAILABLE ON OSM's HOME PAGE. (WWW.)

I WILL SEARCH FOR CASE LAW.

TALK TO YA' SOON!

— HENRY —

— 3 pages to follow —

	U· S· DEPARTMENT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT DIRECTIVES SYSTEM	Subject Number: INE-5 Transmittal Number: 340 Date: 5/27/87

Subject: Mining Without a Permit

Approval: Jed D. Christensen | Title: Director

1. PURPOSE. The purpose of this directive is to establish policy and procedural guidance concerning appropriate enforcement and abatement measures for mining without a permit or mining off a valid permit.

2. DEFINITIONS. None.

3. POLICY/PROCEDURES.

a. Background. In Claypool Construction Company v. OSM, 2 IBSMA 81 (1980), the Interior Board of Surface Mining and Reclamation Appeals interpreted the language of section 521(a)(2) of the Act to mean that a surface mine operator's failure to have a permit does not in itself constitute a condition, practice or violation which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. This ruling prohibited OSMRE from issuing a cessation order (CO) under the existing regulations on the sole basis that an operator is found mining without a permit. The Board held further in West Virginia Energy, Inc., v. OSM, 3 IBSMA 301 (1981), that where OSMRE issues a notice of violation (NOV) to an operator for mining without a permit in violation of section 502(a) of the Act, the only remedial action appropriate to such a violation is to cease mining until a permit is obtained. Accordingly, the Board vacated that portion of the citation at issue which required reclamation of the disturbed area. As a result, OSMRE fell back to section 521(a)(5) of the Act for the authority to issue a NOV to cease unpermitted mining operations until a permit was obtained.

In response to these decisions, OSMRE amended its regulations (47 FR 18555, April 29, 1982) to authorize the issuance of CO's for mining without a permit and to impose reclamation requirements as a remedial action to abate the violation. With respect to these issues, the amended regulations supersede the Board's holdings in Claypool and West Virginia Energy, Inc.

b. Policy. In accordance with 30 CFR 843.11(a)(2) surface coal mining operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources; except where such operations are an integral, uninterrupted

extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations. Consequently, where such illegal operations are encountered, an authorized representative of the Secretary shall immediately issue a CO, or in the case of the exception, an NOV.

When a CO is issued, the mere cessation of mining activity itself should not be viewed as adequate to abate the imminent danger or harm. Additional affirmative obligations should be imposed in accordance with 30 CFR 843.11(a)(3) to require full reclamation of the site, or in limited cases, obtain a surface coal mining operations permit. The cessation order shall remain in effect until abatement is completed with progress towards abatement routinely monitored.

c. Procedures.

(1) A CO issued pursuant to the above policy shall order the immediate cessation of mining, citing section 506(a), or under primacy the State program equivalent. As additional corrective action, the CO shall direct the person to backfill, grade, and revegetate in accordance with applicable Federal or State regulations within a specific abatement date(s), employing interim abatement measures as necessary. Other imminent harm/danger conditions which exist shall be cited as separate violations within the CO for mining without a permit. Violations not causing an imminent harm/danger shall be cited separately in an NOV.

(2) The procedures above shall also apply where a permittee conducts surface coal mining operations on an uninterrupted extension of the permitted area but has not filed an application with the regulatory authority to conduct such operations. However as an exception, the corrective action in the CO shall in addition to ordering the immediate cessation of mining, include the option of submitting a complete application for a permit revision to the regulatory authority within a reasonable time. Where the permittee submits and the regulatory authority accepts such application for a revision, the abatement period may be extended as necessary for application processing purposes. If, thereafter, the permittee fails to diligently pursue approval of the permit revision, or the application is withdrawn, or approval denied, the CO shall be modified to set a reasonable time for complete reclamation of the extension area.

(3) In the case of the exception (30 CFR 843.11(a)(2)(i)) where the permittee conducts surface coal mining operations on an uninterrupted extension of a valid permitted area but has previously filed a complete application with the regulatory authority to conduct such operations, the NOV issued for mining without a permit shall order the cessation of mining within a reasonable time based on the circumstances. As

additional corrective action, the NOV shall direct the permittee to diligently pursue approval of the application submitted to permit such operations. The initial abatement date may be up to 90 days and extended as necessary in accordance with 30 CFR 843.12(f). If, thereafter, the permittee fails to diligently pursue approval of the revision, or the application is withdrawn, or approval denied, the corrective action and abatement date shall be modified to require complete reclamation as described in 3.b.(1) above. Other violations caused during the illegal mining on the extension area shall be addressed as separate violations within the NOV for mining without a permit.

(4) Because notices and orders requiring cessation of mining will usually require more than 30 days to completely abate, informal public hearings must be conducted in accordance with 30 CFR 843.15 to prevent expiration of the notice or order.

(5) In States with approved programs and where Federal lands cooperative agreements exist with the State regulatory authority, issuance of a required CO may be deferred to the State inspector during joint inspections. During non-joint inspections, OSMRE shall issue any required CO, or in the case of the exception in 3.c.(3) above, a ten-day notice.

(6) The policy and procedures contained in 3.c.(1) above may be modified where necessary to conform with enforcement procedures previously established to implement the "Two Acre Settlement Agreement".

4. REPORTING REQUIREMENTS. None.

5. REFERENCES.

a. Section 506(a), 521(a)(2), 521(a)(3), and 521(a)(5) of the Act.

b. 30 CFR 843.11(a)(2) (45 FR 18555) April 29, 1982.

c. Claypool Construction Company v. OSM, 2 IBSMA 81, May 16, 1980.

d. West Virginia Energy Inc., v. OSM, 3 IBSMA 301, September 17, 1981.

6. EFFECT ON OTHER DOCUMENTS. Revises Directive INE-5, Transmittal Number 203, dated February 13, 1984.

7. EFFECTIVE DATE. Upon issuance.

8. CONTACT. Chief, Branch of Inspection, (202) 343-5384.