

Pursuant to Sections 27 and 28 of the Arkansas Surface Coal Mining and Reclamation Act of 1979, Act 134 of 1979, as amended by Act 647 of 1979, notice of public hearings was given. Said hearings were held on April 18, 1985, and August 6, 1985, respectively for receiving comments on revisions to two sections of the Surface Coal Mining and Reclamation Code. No substantive comments were received.

Therefore, it is ordered by the Commission that the revisions to Section 843 and 845 attached hereto, be, and is hereby adopted this date to be effective twenty (20) days hence.

COMMISSIONERS

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CHAIRMAN

SUBMITTED BY: Floyd G. Durham DATE PASSED: 09-27-85




STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
8001 NATIONAL DRIVE, P.O. BOX 9583
LITTLE ROCK, ARKANSAS 72209

SURFACE MINING AND RECLAMATION DIVISION

PHONE: (501) 562-7444

MEMORANDUM

TO: Commissioners

FROM: Floyd G. Durham, Chief 
Surface Mining and Reclamation Division

DATE: September 12, 1985

SUBJECT: Proposed minute order for revisions to Surface Coal
Mining and Reclamation Code (The Code).

In an effort to be no more restrictive than the federal regulations, two changes to the Code are presented for your consideration. The first, 843.12 will allow the Department to extend the time for abatement of a violation past ninety (90) days for just cause. Heretofore, we had no choice other than issue a Cessation Order. The second is a change to Section 845, which will make our regulations consistent with our federal counterpart, and should greatly expedite the penalty assessment process while relieving the legal staff from an enormous case load. The Secretary of the Interior approved these amendments on August 15, 1985.

843.12 Notices of Violation.

(a) An authorized representative of the Director shall issue a notice of violation if, on the basis of an inspection carried out during the enforcement of the State program, he finds a violation of the Act, this Chapter, the State program, or any condition of a permit or an exploration approval imposed under the State program, the Act, or this Chapter, which does not create an imminent danger or harm for which a cessation order must be issued under Section 843.11.

(b) A notice of violation issued under this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(1) The nature of the violation,

(2) The remedial action required, which may include interim steps;

(3) A reasonable time for abatement, which may include time for accomplishment of interim steps; and

(4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

(c) An authorized representative of the Director may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the person that it is not feasible to abate the violation within 90 days due to one or more of the circumstances in paragraph (f) of this section. An extended abatement date pursuant to this section shall not be granted when the person's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the person in completing the remedial action required.

(d) If the person to whom the notice was issued fails to meet any time set for abatement or the accomplishment of an interim step, the authorized representative shall issue a cessation order under Section 843.11(b).

(e) An authorized representative of the Director shall terminate a notice of violation by written notice to the person to whom it was issued, when he determines that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the Department to assess civil penalties for those violations under Part 845 (Civil Penalties).

(f) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) Where the permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within control of the person;

(2) Where there is a valid judicial order precluding abatement within 90 days as to which the person has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(3) Where the person cannot abate within 90 days due to a labor strike;

(4) Where climatic conditions preclude abatement within 90 days, or where due to climate conditions, abatement within 90 days clearly would cause more environmental harm than it would prevent; or

(5) Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act of 1977.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or environment.

(h) If any of the conditions in paragraph (f) of this Section exists, the person may request the authorized representative of the Director to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director or his or her designee, and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The person shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of Section 843.12(c) and (f). In determining whether or not to grant an abatement period exceeding 90 days, the authorized representative may consider any relevant oral or written information from the person or other source. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request. The authorized representative's immediate supervisor shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

(i) Any determination made under paragraph (h) of this section shall contain a right to an adjudicatory hearing pursuant to the Act and Code.

(j) No extension granted under paragraph (h) of this section may exceed 90 days. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension; the person may request a further extension pursuant to paragraph (h) of this section.

845.18 Procedures for assessment conference

- (a) The Arkansas Department of Pollution Control and Ecology (Department) shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom notice or order was issued, if the request is received within 15 days from the date the proposed assessment or reassessment is mailed.
- (b) (1) The Department shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by Section 29 of the Arkansas Surface Coal Mining and Reclamation act of 1979 or by Section 554 of Title 5 of the United States Code, regarding requirements for formal adjudicatory hearings. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later, provided: That a failure by the Department to hold such conference within 60 days shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty has been assessed proves actual prejudice as a result of the delay.
- (2) The Department shall post notice of the time and place of the conference at the field office closest to the mine at least 5 days before the conference. Any person shall have a right to attend and participate in the conference.
- (3) The conference officer shall consider all relevant information on the violation. Within 30 days after the conference is held, the conference officer shall either:
- (i) Settle the issues, in which case a settlement agreement shall be prepared and signed by the conference officer on the behalf of the Department and by the person assessed; or
 - (ii) Affirm, raise, lower, or vacate the penalty.
- (4) An increase or reduction of a proposed civil penalty assessment of more than 25 percent and more than \$500 shall not be final and binding on the Director, until approved by the Mining Division Chief of his or her designee.
- (c) The conference officer shall promptly serve the person assessed with a notice of his or her action in the manner provided in 845.17 (b) of the Arkansas Surface Mining Enforcement and Reclamation Final Regulations and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

- (d) (1) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect.
- (2) If full payment of the amount specified in the settlement agreement is not received by the Department within 30 days after the date of signing, the Department may enforce the agreement or rescind it and proceed according to paragraph (b)(3)(ii) within 30 days from the date of the rescission.
- (e) The conference officer may terminate the conference when he or she determines that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.
- (f) At formal review proceedings under Sections 18, 19, 20, 21, 24, and 30 of Arkansas Surface Coal Mining and Reclamation Act of 1979, no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

845.19 Request for hearing.

- (a) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if a conference has been held, the reassessed or affirmed penalty to the Director (to be held in escrow as provided in paragraph (b) of this section) within 30 days receipt of the proposed assessment or reassessment or 15 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested if it has been decided in a review proceeding commenced under Section 843.16 of the Code.
- (b) The Director shall hold all funds in escrow pending completion of the administrative and judicial review process, at which time the shall disburse them as provided in Section 845.20.

845.20 Final assessment and payment of penalty.

- (a) If the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in Section 845.19, the proposed assessment shall become a final order of the Director and the penalty assessed shall become due and payable upon expiration of the time allowed to request a hearing.
- (b) If any party requests judicial review of the final order of the Director, the proposed penalty shall continue to be held in escrow until completion of the review. Otherwise, subject to paragraph (c) of this section, the escrowed funds shall be transferred to the Department in payment of the penalty, and the escrow shall end.

- (c) If the final decision in the administrative and judicial review results in an order reducing or eliminating the proposed penalty assessment under this part, the Department shall within 30 days of receipt of the order refund to the person assessed all or part of the escrowed amount.
- (d) If the review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the Department within 15 days after the order is mailed to such person.