

27—40.73(207) Enforcement.

40.73(1) Definitions. As used in this Part 7, the following terms have the specified meanings:

“Unwarranted failure to comply” means the failure of a permittee to prevent the occurrence of any violation of the permit or any requirement of Iowa Code chapter 207 due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit of Iowa Code chapter 207 due to indifference, lack of diligence, or lack of reasonable care.

“Willful violation” means an act or omission which violates Iowa Code chapter 207, these rules or any permit condition required by Iowa Code chapter 207 or these rules, committed by a person who intends the result which actually occurs.

40.73(2) Cessation orders.

a. Cessation orders following State inspections:

(1) An authorized representative of the administrator shall immediately order a cessation of surface coal mining and reclamation operations or of the relevant portion thereof, if the representative finds, on the basis of any State inspection, any condition or practice, or any violation of Iowa Code chapter 207, these rules or any condition of an exploration approval or permit imposed under any such program, Iowa Code chapter 207 or these rules which:

- Creates an imminent danger to the health or safety of the public; or
- Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(2) Surface coal mining and reclamation 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, unless 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; or
- Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the division.

(3) If the cessation ordered under paragraph *“a,”* subparagraph (1), of this subrule will not completely abate the imminent danger or harm in the most expeditious manner physically possible, the authorized representative of the administrator shall impose affirmative obligations on the permittee to abate the imminent danger or significant environmental harm. The order shall specify the time by which abatement shall be accomplished.

b. Cessation orders following expiration of abatement period:

(1) When a notice of violation has been issued under 40.73(3) *“a”* and the permittee fails to abate the violation within the abatement period fixed or subsequently extended by the authorized representative, the authorized representative of the administrator shall immediately order a cessation of coal exploration or surface coal mining and reclamation operations, or of the portion relevant to the violation.

(2) A cessation order issued under this paragraph *“b”* shall require the permittee to take all steps the authorized representative of the administrator deems necessary to abate the violations covered by the order in the most expeditious manner physically possible.

c. A cessation order issued under paragraphs *“a”* or *“b”* of this subrule shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

- (1) The nature of the condition, practice or violation;
- (2) The remedial action or affirmative obligation required, if any, including interim steps, if appropriate;
- (3) The time established for abatement if appropriate; and
- (4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

The order shall remain in effect until the condition, practice or violation resulting in the issuance of the cessation order has been abated or until vacated, modified or terminated in writing by an authorized

representative of the administrator, or until the order expires pursuant to Iowa Code section 207.14(6) and subrule 40.73(6).

d. Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any order unless otherwise provided in the order.

e. An authorized representative of the administrator may modify, terminate or vacate a cessation order for good cause and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the permittee.

f. An authorized representative of the administrator shall terminate a cessation order by written notice to the permittee when the representative determines that all conditions, practices or violations listed in the order have been abated. Termination shall not affect the right of the division to assess civil penalties for those violations under rule 27—40.74(207).

g. Within 60 days after the issuance of a cessation order, the division shall notify in writing any person who has been identified under 27—40.32(207), 30 CFR 774.12, and 27—40.34(207), 30 CFR 778.11(c) and (d), as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

40.73(3) Notices of violation.

a. An authorized representative of the administrator shall issue a notice of violation if, on the basis of a State inspection carried out during the enforcement of a State program, the representative finds a violation of Iowa Code chapter 207, these rules, or any condition of a permit or an exploration approval imposed under such program, Iowa Code chapter 207, or these rules, which does not create an imminent danger or harm for which a cessation order must be issued under subrule 40.73(2).

b. A notice of violation 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 administrator 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 permittee. 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 permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in paragraph “*f*” of this subrule. An extended abatement date pursuant to this subrule shall not be granted when the permittee’s failure to abate within 90 days has been caused by lack of diligence or intentional delay by the permittee in completing the remedial action required.

d. If the permittee fails to meet the time set for abatement the authorized representative shall issue a cessation order under 40.73(2)“*b.*”

If the permittee fails to meet the time set for accomplishment of any interim step, the authorized representative may issue a cessation order under 40.73(2)“*b.*”

e. An authorized representative of the administrator shall terminate a notice of violation by written notice to the permittee when it is determined that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the division to assess civil penalties for those violations under rule 27—40.74 (207).

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 the control of the permittee;

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

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

(4) Where climatic conditions preclude abatement within 90 days, or where, due to climatic 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 the environment.

h. If any of the conditions in paragraph “f” of this subrule exist, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the administrator or designee and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that the permittee is entitled to an extension under the provisions of 40.73(3)“c” and “f.” In determining whether or not to grant an abatement period exceeding 90 days, the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file the reasons for granting or denying the request. The authorized representative’s immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for concurrence or disapproval in the file.

i. Any determination made under paragraph “h” of this subrule shall contain a right of appeal to the division in accordance with Iowa Code section 207.14.

j. No extension granted under paragraph “h” of this subrule may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of paragraph “h” of this subrule.

40.73(4) Suspension or revocation of permits.

a. Order for show cause:

(1) The administrator shall issue an order to a permittee requiring the permittee to show cause why the permit and right to mine under Iowa Code chapter 207 should not be suspended or revoked, if the administrator determines that a pattern of violations of any requirements of Iowa Code chapter 207, these rules, or any permit condition required by Iowa Code chapter 207 exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions. Violations by any person conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

(2) The administrator may determine that a pattern of violations exists or has existed, based upon two or more State inspections of the permit area within any 12-month period, after considering the circumstances, including:

- The number of violations, cited on more than one occasion, of the same or related requirements of Iowa Code chapter 207, these rules, or the permit;
- The number of violations, cited on more than one occasion, of different requirements of Iowa Code chapter 207, these rules, or the permit; and
- The extent to which the violations were isolated departures from lawful conduct.

(3) The administrator shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of Iowa Code chapter 207, these rules, or the permit during three or more State inspections of the permit area within any 12-month period. If, after such review, the administrator determines that a pattern of violations exists or has existed, the

administrator shall issue an order to show cause as provided in paragraph “a,” subparagraph (1), of this subrule.

b. If the permittee files an answer to the show cause order and requests a hearing under Iowa Code section 207.14, a public hearing shall be provided. The division shall give 30 days’ written notice of the date, time and place of the hearing to the permittee, and any intervenor. Upon receipt of the notice, the administrator shall publish it, if practicable, in a newspaper of general circulation in the area of the surface coal mining and reclamation operations and shall post it in the division.

c. Within 60 days after the hearing, and within the time limits set forth in Iowa Code section 207.14, the division shall issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. If the division revokes or suspends the permit and the permittee’s right to mine under Iowa Code chapter 207, the permittee shall immediately cease surface coal mining operations on the permit area and shall:

(1) If the permit and the right to mine under Iowa Code chapter 207 are revoked, complete reclamation within the time specified in the order; or

(2) If the permit and the right to mine under Iowa Code chapter 207 are suspended, complete all affirmative obligations to abate all conditions, practices, or violations as specified in the order.

d. Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the administrator shall review the permittee’s history of violations to determine whether a pattern of violations exists pursuant to this subrule, and shall issue an order to show cause as appropriate pursuant to subrule 40.73(4), paragraph “a,” subparagraph (1).

40.73(5) *Service of notices of violation, cessation orders, and show cause orders.*

a. A notice of violation, cessation order, or show cause order shall be served on the person to whom it is directed or the person’s designated agent promptly after issuance as follows:

(1) By tendering a copy at the coal exploration or surface coal mining and reclamation operation to the designated agent or to the individual who, based upon reasonable inquiry, appears to be in charge. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept.

(2) As an alternative to paragraph “a,” subparagraph (1), of this subrule, service may be made by sending a copy of the notice or order by certified mail or by hand to the permittee or designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

b. Designation by any person of an agent for service of notices and orders shall be made in writing to the division.

c. The division may furnish copies of notices and orders to any person having an interest in the coal exploration, surface coal mining and reclamation operation, or the permit area.

40.73(6) *Informal public hearing.*

a. Except as provided in paragraphs “b” and “c” of this subrule, a notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing has been held within that time. The purpose of the hearing is to provide the division with information needed to decide whether or not to extend the cessation of mining. The hearing shall be held at or reasonably close to the mine site so that it may be viewed during the hearing or at any other location acceptable to the division and the person to whom the notice or order was issued. The division office shall be deemed to be reasonably close to the mine site unless a closer location is requested and agreed to by the division. Expiration of a notice or order shall not affect the division’s right to assess civil penalties with respect to the period during which the notice or order was in effect. No hearing will be required where the condition, practice, or violation in question has been abated or the hearing has been waived. For purposes of this subrule only, “mining” includes (1) extracting coal from the earth or from coal waste piles and transporting it within or from the permit

area, and (2) the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a mine site.

b. A notice of violation or cessation order shall not expire as provided in paragraph “*a*” of this subrule if the informal public hearing has been waived, or if, with the consent of the person to whom the notice or order was issued, the informal public hearing is held later than 30 days after the notice or order was served. For purposes of this subrule:

(1) The informal public hearing will be deemed waived if the person to whom the notice or order was issued:

- Is informed, by written notice served in the manner provided in paragraph “*b*,” subparagraph (2), of this subrule, that the person will be deemed to have waived an informal public hearing unless one is requested within 30 days after service of the notice; and

- Fails to request an informal public hearing within that time.

(2) The written notice referred to in subrule 40.73(6) “*b*”(1) shall be delivered to such person by an authorized representative or sent by certified mail to such person no later than five days after the notice or order is served on such person.

(3) The person to whom the notice or order is issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if a request is received on or after the twenty-first day after service of the notice or order. The extension of time shall be equal to the number of days elapsed after the twenty-first day.

c. The division shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public hearing to:

(1) The person to whom the notice or order was issued; and

(2) Any person who filed a report which led to that notice or order.

d. The division shall also post notice of the hearing in the division and, where practicable, publish it in a newspaper of general circulation in the area of the mine.

e. Iowa Code chapter 17A regarding requirements for formal adjudicatory hearings shall not govern informal public hearings. An informal public hearing shall be conducted by a representative of the division, who may accept oral or written arguments and any other relevant information from any person attending.

f. Within five days after the close of the informal public hearing, the division shall affirm, modify, or vacate the notice or order in writing. The decision shall be sent to:

(1) The person to whom the notice or order was issued; and

(2) Any person who filed a report which led to the notice or order.

g. The granting or waiver of an informal public hearing shall not affect the right of any person to formal review under Iowa Code section 207.14 or 207.15.

h. The person conducting the hearing for the division shall determine whether or not the mine site should be viewed during the hearing. In making this determination the only consideration shall be whether a view of the mine site will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or of the required remedial action.

40.73(7) Formal review of citations.

a. A person issued a notice of violation or cessation order under subrule 40.73(2) or 40.73(3), or a person having an interest which is or may be adversely affected by the issuance, modification, vacation or termination of a notice or order, may request review of that action by filing an application for review and request for hearing under Iowa Code section 207.14 within 30 days after receiving notice of the action.

b. The filing of an application for review and request for a hearing under this subrule shall not operate as a stay of any notice or order, or of any modification, termination or vacation of either.

40.73(8) Inability to comply.

a. No cessation order or notice of violation issued under this Part 7 may be vacated because of inability to comply.

b. Inability to comply may not be considered in determining whether a pattern of violations exists.

c. Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty under rule 27—40.74(207) and of the duration of the suspension of a permit under 40.73(4)“*c.*”

40.73(9) Compliance conference.

a. A permittee may request an on-site compliance conference with an authorized representative to review the compliance status of any condition or practice proposed at any coal exploration or surface coal mining and reclamation operation. Any such conference shall not constitute an inspection within the meaning of Iowa Code section 207.13.

b. The division may accept or refuse any request to conduct a compliance conference under paragraph “*a*” of this subrule. Where the division accepts such a request, reasonable notice of the scheduled date and time of the compliance conference shall be given to the permittee.

c. The authorized representative at any compliance conference shall review such proposed conditions and practices as the permittee may request in order to determine whether any such condition or practice may become a violation of any requirement of Iowa Code chapter 207 or any applicable permit or exploration approval.

d. Neither the holding of a compliance conference under this subrule nor any opinion given by the authorized representative at such a conference shall affect:

(1) Any rights or obligations of the division or of the permittee with respect to any inspection, notice of violation or cessation order, whether prior or subsequent to such conference; or

(2) The validity of any notice of violation or cessation order issued with respect to any condition or practice reviewed at the compliance conference.