COALEX STATE INQUIRY REPORT – 152
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TOPIC: CHALLENGES TO CUMULATIVE HYDROLOGIC IMPACT ASSESSMENTS (CHIAs)

INQUIRY: The Hopi Tribe is interested in obtaining all available information on challenges to CHIAs prepared by OSM. We are specifically interested in CHIAs that have been challenged for technical inadequacy, political bias, incompleteness, or other deficiencies.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. Copies of the Interior administrative decisions, state cases and federal opinions discussed below are attached.

INTERIOR'S OFFICE OF HEARINGS AND APPEALS DECISIONS

NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC), et al. v OSM, 4 IBSMA 4, IBSMA 81-83 (1982).

NRDC contested OSM's approval of ARCO's federal permit application. NRDC alleged that the application had been "improperly and illegally approved", in part, because the Director of OSM had not made independent findings that ARCO would meet all the requirements of SMCRA. The Board ruled as follows on the procedural questions:

1. OSM, not the states, has the responsibility to review and approve or disapprove a permit application regarding federal land. "[A]nyone seeking to mine coal of Federal lands shall first obtain a permit. Federal lands are defined as any land, including mineral interests, owned by the United States (except for Indian lands)." The mining permit obtained from the State of Colorado covered the non-federal portions of the minesite only.
2. NRDC has standing in this matter. The rules encourage public participation in the permitting process "so the regulatory authority might fully consider all of the circumstances surrounding a permit application in order that only permits with appropriate conditions might be issued." The burden of proving that the federal permit was improperly or illegally issued rests with the NRDC.

The Board referred the case to the Hearings Division to determine whether OSM had properly reviewed the application when it issued a mining permit to ARCO. [See immediately below.]

NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC), et al. v OSM, ATLANTIC RICHFIELD CO. AND STATE OF COLORADO, 89 IBLA 1, IBLA 83-757 (IBSMA 81-83) (September 27, 1985, as amended by November 18, 1986 decision).

As a result of the hearing held in response to the Board's order [See the case above.], the ALJ ruled that OSM "was sufficiently advised in all areas to support its approval" of ARCO's mining permit. NRDC appealed; they succeeded in proving some of the issues raised and failed on others:

1. The Board ruled that the party applying for a mining permit, not OSM, was responsible to provide certain information in the application:
    a. the description of the ground water basins or systems;
    b. the description of the baseline data;
    c. OSM was responsible for obtaining probable cumulative impact (PCI) data (later called CHIA) from appropriate governmental agencies; if the information is not available, the permit applicant must gather and submit.
2. OSM was not required to include certain areas in the PCI assessment as a control watershed "in the absence of a regulatory requirement for such information."
3. OSM "failed to take some pre-permit actions." Most relevant was OSM's failure to assess the probable cumulative impacts of "all anticipated mining in the area on the hydrologic balance". The Board stated that "no permit shall be approved unless there has been compliance with all the requirements of the Act and the State or Federal program." The imposition of stipulations to the permit as a means to satisfy unfilled requirements was a violation of the Act.

The decision by OSM to issue the permit was affirmed in part. Further briefing was ordered "concerning the appropriate relief".

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. v OSM AND WEST ELK COAL CO., 94 IBLA 269, IBLA 83-757 [IBSMA 81-83] (November 18, 1986, amends September 27, 1985 decision).

West Elk, substituting for Atlantic Richfield, sought two permit revisions. As part of its review process, the state undertook a new PCI assessment for each of the revisions. NRDC did not "challenge the sufficiency of the PCI assessments before the state because they were relying on their opportunity to contest that determination in OSM's mining plan review process, but OSM never provided that opportunity." The Board ruled that the state's public comment procedures on permit revisions and OSM's mining plan review operations were a coordinated process as "contemplated by the cooperative agreement to avoid duplication of effort". [The cooperative agreement which went into effect (1982) after the initial permit request (1981), "changed the responsibilities of the parties to that agreement."] The Board stated that further action "in the form of relief for the original PCI assessment deficiency is not warranted because the State has performed new PCI assessments with which NRDC et al. did not take issue."

THE HOPI TRIBE v OSM AND PEABODY COAL CO., Docket No. TU 6-3-PR (1986).

OSM approved two revisions to Peabody's permit which authorized construction of a dam, a sediment control structure to replace four existing smaller structures and relocation of an existing airport at the mining complex. An environmental impact statement (EIS) was prepared in 1972 following the passage of the National Environmental Policy Act (NEPA). The extensive technical and environmental assessment prepared in connection with the original permit approval resulted in a finding of no significant impact (FONSI). Peabody submitted a permanent application package and an EIS and a cumulative hydrologic impact assessment were being prepared. "Against this background" and on the basis of the testimony presented, the ALJ concluded that there would be no "measurable or significant impact on downstream users" and "OSM's approval of the two permit revisions was proper".

FRANK STEBLY v OSM, Docket No. DV 7-2-PR (1987).

OSM approved the permit for a preparation plant to wash coal on a permitted minesite. Stebly contended that OSM's EIS was inadequate and "its Finding of No Significant Impact (FONSI) was erroneous" in violation of NEPA.

"The requirements of NEPA are satisfied if all environmental considerations are explored. The burden of the party challenging the agency's decision is to show that it was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to address substantial environmental issue of material significance."

The ALJ determined that "the environmental assessment did identify and consider all the environmental issues" raised by Stebly, including ground water quality, surface water quality, surface water quantity, etc. Stebly did not "introduce any factual evidence that contradict's OSMRE's findings." Stebly's application for permit review was dismissed.

STATE CASE LAW

CITIZENS ORGANIZED AGAINST LONGWALLING v OHIO DEPT. OF NATURAL RESOURCES, 41 Ohio App 3d 290, 535 NE 2d 687 (Ohio Ct App 1987).

A group of landowners appealed the Ohio Reclamation Board of Review's decision approving Southern Ohio Coal Company's permit to mine using the longwall coal mining method, alleging that the permit application failed to "include measures required by law to protect the hydrological balance of the region" and specifically, it failed to "protect individual water users' rights." The court agreed with the Board that (1) omission of borehole data "did not flaw the permit application"; (2) although flawed, Southern Ohio Coal's hydrologic determination and the Chief of the Division of Reclamation's CHIA were adequate; (3) a longwall coal mining applicant may "provide alternative sources of water" rather than protect the "quantity of water". However, due to a number of problems found with Southern Coal's water replacement plan, the court remanded the case to the Board with directions to require Southern Coal to draft a new water replacement plan.

VILLAGE OF PLEASANT CITY v DIV. OF RECLAMATION, No. CA-835, slip op (Ohio Ct App 1987).

The village appealed the issuance of a mining permit to R.V.G., Inc. arguing that the CHIA and hydrologic determinations were inadequate; in particular, that the strip mining would interfere with the quantity and quality of the water available through the village's water well supply. The court affirmed the Reclamation Board of Review's decision to grant the permit, ruling that the decision was not "arbitrary, capricious, or otherwise inconsistent with law". A copy of the Board's decision was incorporated into the court's opinion.

OOTEN, et al. v FAERBER, AS COMMISSIONER, WEST VIRGINIA DEPT. OF ENERGY, AND MAGNET COAL, INC. 383 SE 2d 774 (W Va 1989).

The court reversed lower court and state administrative decisions which would have reinstated an area previously deleted from a surface mining permit because Magnet Coal had not met both of the required conditions: (1) mining and reclamation, including revegetation, had to be completed on a "significant portion" of the approved area; and (2) further determination of the possible effect of mining on the deleted area had to be made ("the proposed operation may cause stream pollution, landslides, flooding....").

FEDERAL DECISIONS

NATIONAL WILDLIFE FEDERATION (NWF), et al. v HODEL, 839 F 2d 694 (DC Cir 1988).

NWF challenged parts (c) and (d) of the definition of "anticipated mining" under 30 CFR 701.5, arguing that they restricted "the inquiry to those mines for which data was available" and contradicted [SMCRA] sec. 507(b)(11) which states that no permits shall be approved until hydrologic information on the "general area" is "available and incorporated into the application".

The court upheld the Secretary's regulations, describing the regulations as: "a basic policy trade-off between holding up or denying current mining permit applications until additional data about possible future mining in the area is generated, and risking the possibility that future mining in that same area may be delayed or precluded because the full extent of mining activity was not fully anticipated and proper hydrologic safeguards were not required....If any material damage would result to the hydrologic balance from the cumulative impacts of a newly proposed operation and any previously permitted operation, the new operation could not be permitted."

THE FOLLOWING FEDERAL DECISIONS RULE, IN PART, ON THE ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENTS AND COMPLIANCE WITH NEPA REQUIREMENTS. THESE ARE NON-COAL CASES.

LOUISIANA ENVIRONMENTAL SOCIETY (LES) v BRINEGAR, SECRETARY, DEPT. OF TRANSPORTATION, 407 F Supp 1309 (WD La 1976).

LES argued that new hearings were necessary because a new drainage system incorporated into an approved design for a bridge across Cross Lake was a "major design change". LES also alleged that the final EIS was illegally delegated to the Louisiana Highway Department. The court agreed with the Secretary that the drainage design change was one "which is routinely incorporated into segments of interstate highways". Regarding the EIS, the court found that it "was prepared in consultation with state and federal agencies. Furthermore, the record is clear that the federal defendants did not merely rubber stamp the State's work...it was the federal defendants critical analysis which prompted the preparation of the Supplement."

MINNESOTA PUBLIC INTEREST RESEARCH GROUP v BUTZ, 541 F 2d 1292 (8th Cir 1976).

The appeals court reversed the district court's ruling permanently enjoining commercial timber cutting in the Boundary Waters Canoe Area "as it relates to existing sales. With respect to future sales, the permanent injunction will remain in force until the Forest Service files its new Timber Management Plan and related EIS". The EIS prepared by the Forest Service for existing sales "complied with both the procedural and substantive requirements of NEPA."

Regarding the review of a federal agency's efforts to comply with NEPA, the court held that "the test of compliance with the procedural provisions of Sec. 102(2)(C) is one of good faith objectivity. The touchstone of our inquiry is reason.... [T]he EIS need contain only sufficient information to permit a reasoned choice of alternatives."

ENVIRONMENTAL DEFENSE FUND, INC. v COSTLE, 439 F Supp 980 (ED NY 1977).

In construction of a Long Island sewage treatment plant, the court held that the U.S. Environmental Protection Agency and the New York State Department of Environmental Conservation had "not acted arbitrarily or in violation of the law in adopting outfall sewering for the present time...rather than the recharge method of disposing of treated wastewater...the final solution remains for future advances in technology permitting the application of recharge." The court found the EIS somewhat, though not fatally, flawed due to the absence of even "'rough' estimates of the hydrologic impacts." The federal defendants were directed to prepare a supplement to the EIS addressing the effect of the outfall sewering on the local shellfish industry and "a comprehensive program for preventing, reducing, or eliminating the pollution of navigable waters and ground waters and improving the sanitary condition of surface and underground waters".

STATE OF MISSOURI, ex rel. v DEPT. OF THE ARMY, CORPS OF ENGINEERS, 526 F Supp 660 (WD Mo 1980).

In this challenge to the Army Corps of Engineers' operation of a hydroelectric generator in a dam of the Sac River near Stockton, Missouri, the court found that the project EIS and supplemental EIS had met all of the procedural requirements of NEPA: although adverse effects have been and will continue to be felt downstream, these were properly documented and discussed and fell

within state regulatory requirements (e.g., the increase of the level of suspended solids due to erosion remained within state water quality limits).

CITIZENS COUNCIL OF DELAWARE COUNTY v BRINEGAR, 619 F Supp 52 (ED Pa 1985).

The Citizens Council challenged the approval of construction of a highway which had been conditioned on the completion of a supplemental EIS. The court ruled that the Federal Highway Administration (FHWA) "took a good, hard look at all the environmental consequences of building the highway" and, as NEPA requires, "set out information sufficient to reach a well-reasoned decision" to proceed with the project. In the supplemental EIS, the FHWA concluded "that there was no feasible and prudent alternative to building the highway in the Blue Route corridor."

OREGON NATURAL RESOURCES COUNCIL (ONRC) v LYNG, 1988 U.S. Dist LEXIS 17264, 18 ELR 21503 (D Or 1988).

The ONRC contended that the Forest Service violated NEPA by failing to prepare a supplemental EIS and address the cumulative impacts of the sale of timber from the Duck Creek area of the Hells Canyon Natural Recreation Area. Although a federal agency is required to "continue to gather and evaluate new information about the impact of its actions on the environment" after an EIS is released, the court, citing from the regulations, concluded that the agency need prepare a supplemental EIS only when there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action of its impacts." The court found that cumulative impacts of the proposed sale were adequately studied.

ATTACHMENTS

A. NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC), et al. v OSM, 4 IBSMA 4, IBSMA 81-83 (1982).
B. NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC), et al. v OSM, ATLANTIC RICHFIELD CO. AND STATE OF COLORADO, 89 IBLA 1, IBLA 83-757 (IBSMA 81-83) (September 27, 1985, as amended by November 18, 1986 decision).
C. NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. v OSM AND WEST ELK COAL CO., 94 IBLA 269, IBLA 83-757 [IBSMA 81-83] (November 18, 1986, amends September 27, 1985 decision).
D. THE HOPI TRIBE v OSM AND PEABODY COAL CO., Docket No. TU 6-3-PR (1986).
E. FRANK STEBLY v OSM, Docket No. DV 7-2-PR (1987).
F. CITIZENS ORGANIZED AGAINST LONGWALLING v OHIO DEPT. OF NATURAL RESOURCES, 41 Ohio App 3d 290, 535 NE 2d 687 (Ohio Ct App 1987).
G. VILLAGE OF PLEASANT CITY v DIV. OF RECLAMATION, No. CA-835, slip op (Ohio Ct App 1987).
H. OOTEN, ET AL. v FAERBER, AS COMMISSIONER, WEST VIRGINIA DEPT. OF ENERGY, AND MAGNET COAL, INC., 383 SE 2d 774 (W Va 1989).

I. Excerpts from NATIONAL WILDLIFE FEDERATION (NWF), et al. v HODEL, 839 F 2d 694 (DC Cir 1988).
J. LOUISIANA ENVIRONMENTAL SOCIETY (LES) v BRINEGAR, SECRETARY, DEPT. OF TRANSPORTATION, 407 F Supp 1309 (WD La 1976).
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L. ENVIRONMENTAL DEFENSE FUND, INC. V COSTLE, 439 F Supp 980 (ED NY 1977).
M. STATE OF MISSOURI, ex rel. v DEPT. OF THE ARMY, CORPS OF ENGINEERS, 526 F Supp 660 (WD Mo 1980).
N. CITIZENS COUNCIL OF DELAWARE COUNTY v BRINEGAR, 619 F Supp 52 (ED Pa 1985).
O. OREGON NATURAL RESOURCES COUNCIL (ONRC) v LYNG, 1988 U.S. Dist LEXIS 17264, 18 ELR 21503 (D Or 1988).