



COALEX STATE INQUIRY REPORT - 161

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TOPIC: LANDS UNSUITABLE FOR MINING: DEFINITION OF "NATURAL HAZARD LANDS" [Incorporates part of COALEX REPORT - 156 and includes all of REPORT 85]

INQUIRY: Please locate any material which discusses the definition and use of the phrase "natural hazard lands" under SMCRA sec. 522(a)(3)(D).

SEARCH RESULTS: This Report incorporates part of COALEX STATE INQUIRY REPORT - 156 which discusses the definition of "fragile or historic lands". An additional federal case and the history of an unsuitability petition (from Federal Register notices) are also included. Copies of all materials are attached, unless otherwise indicated.

SMCRA

Designating Areas Unsuitable for Surface Coal Mining. SMCRA sec. 522. 30 USC 1272. [Copies of the corresponding CFR sections are attached.]

("a)(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will -

...

"(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems; or (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of feed or fiber products, and such lands to include aquifers and aquifer recharge areas;...."

LEGISLATIVE HISTORY

COALEX STATE INQUIRY REPORT - 85, "Legislative History of SMCRA sec. 522(a)(3)(A) and (B)" (1987).

This Report provides the legislative history of the phrases "fragile or historic lands" and "significant damage" to "important resources" and includes some legislative history on "natural hazard lands".



CASE LAW

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (DC DC July 15, 1985).

The court upheld the Secretary's definitions of "historic lands", "fragile lands" and "natural hazard lands" as promulgated in the 1983 regulations. ("Natural hazard lands" definition was unchanged from the 1979 definition. See the Federal Register section, below.)

HISTORIC LANDS: Industry objected to the inclusion, in the regulation, of sites eligible for listing or whose listing is pending. The court found it not unreasonable to protect lands "in the process of possibly being declared historic."

FRAGILE LANDS: Industry argued that several of the terms were not clearly defined or were terms not used in the statute. The court stated that the Secretary was not restricted to words used in the Act or found in the legislative history. The Secretary's language did not "stray so far from [the Act's] language" that it was inconsistent with the statute or in any way "beyond his authority." The Secretary's rule was not arbitrary or capricious.

NATURAL HAZARD LANDS: Industry claimed that the Secretary's definition was too broad; the definition in the Act is limited to operations which could endanger life or property. The court determined that the word "could" in the Act referred to situations which "could" endanger; there was no requirement for the "regulatory authority to make a finding of actual danger. Viewed this way, the statutory language was broad enough to encompass threats to life and property....The court does not think it is unreasonable to promulgate a rule based on the assumption that surface mining on land that already, without the operation poses a threat to life and property, may continue to pose such a threat when mining takes place there."

PENN. COAL MINING ASSOC. et al. v WATT & COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, 562 F Supp 741 (MD Pa 1983).

The plaintiffs challenged the Secretary of Interior's approval of several proposed state regulations, including provisions for the judicial review of decisions which designate areas of the state as unsuitable for surface mining. Plaintiffs contend that they should have the right to a judicial review at the time a determination of unsuitability is made by the Pennsylvania Environmental Quality Board (EQB) is made; applying for a permit to mine land previously designated as 'unsuitable' and then appealing an adverse decision by the EQB to the Commonwealth Court of Pennsylvania "is expensive, and not a practical way to test the determination of unsuitability." The court ruled that "regardless of the wisdom involved in this procedure we find no conflict with federal law and regulation...."

REGULATION HISTORY

44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. [Excerpts.]



"The regulatory authority must consider petitions which are received after a permit application has been filed. Once a permit has been issued, however, the regulatory authority cannot revoke a permit if a petitioner seeks to designate a permitted area."

"Unlike the permit application process, the designation process is to be applied on a natural area basis, rather than a specific mine or site-by-site basis."

44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. 30 CFR Part 762 - Criteria for Designating Areas as Unsuitable for Surface Coal Mining. Section 762.5 Definitions.[Excerpts.]

FRAGILE LANDS: "[T]his definition does not attempt to imply any degree of significance for those lands defined as 'fragile'. The determination of significance is left to the decision on the petition itself. Also, the listing of examples of lands that may fall within the definition of fragile lands is not meant to be all inclusive....The definition is meant to provide guidance on what general types of resources can be considered fragile lands, not a list of areas which can or should automatically be designated suitable."

HISTORIC LANDS: "The significance test is properly left to the actual decision on the petition using the criteria in the Act which are repeated verbatim in Section 762.11."

"[T]he National Register of Historic Preservation Act of 1966, as amended, provides the same protection for places eligible for listing as for those places already on the National Register of Historic Places....OSM has decided that, for the purposes of Subchapter F, place is 'eligible' at the time the notice of eligibility is published in the Federal Register."

NATURAL HAZARD LANDS: "As written, the definition does not necessarily mean that an area falling within the definition would be automatically considered unsuitable for surface coal mining operations. It is left to the discretion of the State regulatory authority to determine whether an area is unsuitable for surface mining because of natural hazards."

44 FR 14902 (MARCH 13, 1979). Subchapter A - General. 30 CFR Part 701 - Permanent Regulatory Program. Section 701.5 Definitions. [Excerpts.]

RENEWABLE RESOURCE LANDS: This definition is used with respect to subsidence and Subchapter F, designation of lands as unsuitable for mining.

47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas Unsuitable for Surface Mining. [Excerpts.]

"The proposed rules would modify existing requirements to provide States with new flexibility in carrying out the requirements of the Act. In some cases, the proposed rules would allow regulatory authorities to modify procedural requirements for determining areas unsuitable for surface coal mining operations."



48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas Unsuitable for Surface Coal Mining. [Excerpts.]

All of Subchapter F was repromulgated.

FRAGILE LANDS: The phrase "beyond an operator's ability to repair or restore" was added to the 1979 definition. OSM reasoned that "mining is an appropriate temporary use of the land in most situations. An interruption of certain activities or a diminution of particular values during mining is not sufficient to classify the land as fragile if the activities or values can be restored."

HISTORIC LANDS: This definition parallels the definition of "fragile lands".

RENEWABLE RESOURCE LANDS: OSM added the definition of the phrase to this section in order "to clarify its use as a discretionary basis for designation of unsuitability under the Act".

NATURAL HAZARD LANDS: The 1979 definition of this phrase was retained.

50 FR 257 (JANUARY 3, 1985). Notice of suspension.

As a result of an agreement by the parties, approved in a December 3, 1982 District Court Order, certain issues were withdrawn from consideration in Round III of the permanent program regulation litigation. Included in the settlement agreement was the suspension of the phrase "beyond an operator's ability to repair or restore" from the definitions of "fragile lands" and "historic lands". Instead of "requiring a showing of irreparable or permanent damage to the lands to allow for designation of an area as unsuitable for mining, a showing of significant damage will be sufficient."

50 FR 30408 (JULY 25, 1985). Proposed rule. Definitions of Fragile Lands and Historic Lands.

Under to the proposed definitions "proponents of an unsuitability petition will no longer be required to show that surface coal mining will cause irreparable or permanent damage to the lands. Only a showing of significant damage will be required to classify lands as fragile or historic".

51 FR 44484 (DECEMBER 10, 1986). Proposed rule. Reopening of comment period. Definitions of Fragile Lands and Historic Lands.

Additional comments were solicited on the need to revise the definition of "fragile lands" by removing references to "buffer zones".

52 FR 18792 (MAY 19, 1987). Final rule. Definitions of Fragile Lands and Historic Lands.

Both definitions were changed to eliminate the requirement of a finding of irreparable damage. Language concerning significant damage was retained in the definition of fragile lands.



However, since "the status of historic lands does not depend on their potential for incurring significant damage...the final rule does not include the criterion of significant damage in the definition of historic lands." In addition, the definition of fragile lands was changed "to remove buffer zones adjacent to areas where mining is prohibited, as an example of fragile lands".

"OSM believes that natural subsidence is a natural hazard which can be considered a 'cave-in', as mentioned in the specific examples. Moreover, because subsidence which is attendant to underground mining is indeed provided for in the Act, OSM has deleted this term from the definition of natural hazard lands."

HISTORY OF AN UNSUITABILITY PETITION

Black Diamond, Washington.

Rezoning for mining John Henry No. 1. permit application submitted by the Pacific Coast Coal Company. Mining next to City of Black Diamond, Washington. Alternatives: disapproval or approval with or without conditions.

1. 48 FR 30775 (JULY 5, 1983).

Notice of public meeting on the need for an EIS.

2. 48 FR 39306 (AUGUST 30, 1983).

Notice of intent to prepare a site-specific EIS.

3. 49 FR 11260 (MARCH 26, 1984).

Notice of availability of draft EIS.

4. 49 FR 25052 (JUNE 19, 1984).

Receipt and partial rejection of petition to designate lands as unsuitable for mining.

The petition claimed that coal mining operations would be conducted on natural hazard lands, on fragile lands and in close proximity to population.

OSM rejected the part of the petition which included Pacific Coast Coal's proposed mine permit area as the completed application for John Henry No 1. Mine had already been received by OSM and proper notice published.

5. 49 FR 32686 (AUGUST 15, 1984).

Receipt of complete petition for designation of lands as unsuitable for mining.



6. 50 FR 7005 (FEBRUARY 19, 1985).

Notice of availability of final EIS.

7. 50 FR 19495 (MAY 8, 1985).

Notice of intent to prepare a combined draft unsuitability petition evaluation document/EIS.

8. 51 FR 10679 (MARCH 18, 1986).

Notice of availability of draft of the Black Diamond Petition Evaluation Document/EIS. (Copy not attached.)

9. 51 FR 10640 (APRIL 4, 1986).

EPA published notice of availability of draft PED/EIS. (Copy not attached.)

10. 52 FR 44643 (NOVEMBER 20, 1987).

Combined petition evaluation document and EIS.

The evaluation document included the petition, analysis of alternatives, testimony from public hearing, etc.

11. 53 FR 35565 (SEPTEMBER 14, 1988).

Decision on Black Diamond Unsuitability Petition.

OSM found insufficient grounds to support the allegations that coal mining was unsuitable on natural hazard lands within the petition area, that underground mining would cause subsidence or that increased seismic activity would present a natural hazard to structures and hydrology, etc.

Certain parts of the curtailed petition area were designed as unsuitable for mining: Lake No. 12 area constituted fragile lands, another area was incompatible with existing State or local land-use plans. The portion of area that coincided with approved permit area was beyond scope of the decision.

ATTACHMENTS

- A. CFR sections
 - 1. 30 CFR 762.5 Definitions.
 - 2. 30 CFR 762.11 Criteria for designating lands as unsuitable.
- B. COALEX STATE INQUIRY REPORT - 85, "Legislative History of SMCRA sec. 522(a)(3)(A) and (B)" (1987).



- C. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (DC DC July 15, 1985).
- D. PENN. COAL MINING ASSOC. et al. v WATT & COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, 562 F Supp 741 (MD Pa 1983).
- E. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. [Excerpts.]
- F. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. 30 CFR Part 762 - Criteria for Designating Areas as Unsuitable for Surface Coal Mining. Section 762.5 Definitions. [Excerpts.]
- G. 44 FR 14902 (MARCH 13, 1979). Subchapter A - General. 30 CFR Part 701 - Permanent Regulatory Program. Section 701.5 Definitions. [Excerpts.]
- H. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas Unsuitable for Surface Mining. [Excerpts.]
- I. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas Unsuitable for Surface Coal Mining. [Excerpts.]
- J. 50 FR 257 (JANUARY 3, 1985). Notice of suspension.
- K. 50 FR 30408 (JULY 25, 1985). Proposed rule. Definitions of Fragile Lands and Historic Lands.
- L. 51 FR 44484 (DECEMBER 10, 1986). Proposed rule. Reopening of comment period. Definitions of Fragile Lands and Historic Lands.
- M. 52 FR 18792 (MAY 19, 1987). Final rule. Definitions of Fragile Lands and Historic Lands.
- N. Unsuitability Petition History (Federal Register Notices)
 - 1. 48 FR 30775 (JULY 5, 1983). Notice of public meeting on the need for an EIS.
 - 2. 48 FR 39306 (AUGUST 30, 1983). Notice of intent to prepare a site-specific EIS.
 - 3. 49 FR 11260 (MARCH 26, 1984). Notice of availability of draft EIS.
 - 4. 49 FR 25052 (JUNE 19, 1984). Receipt and partial rejection of petition to designate lands as unsuitable for mining.
 - 5. 49 FR 32686 (AUGUST 15, 1984). Receipt of complete petition for designation of lands as unsuitable for mining.
 - 6. 50 FR 7005 (FEBRUARY 19, 1985). Notice of availability of final EIS.
 - 7. 50 FR 19495 (MAY 8, 1985). Notice of intent to prepare a combined draft unsuitability petition evaluation document/EIS.
 - 8. 52 FR 44643 (NOVEMBER 20, 1987). Combined petition evaluation document and EIS.
 - 9. 53 FR 35565 (SEPTEMBER 14, 1988). Decision on Black Diamond Unsuitability Petition.