COALEX STATE INQUIRY REPORT - 255

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TOPIC: DEFINITION OF "ADVERSELY AFFECT ANY PUBLICLY OWNED PARK"; PROHIBITION AGAINST MINING WITHIN 300 FEET OF A PUBLIC PARK

INQUIRY: 30 CFR 761.11 [Areas where mining is prohibited or limited] (c) states that subject to valid existing rights (VER), no surface coal mining operations shall be conducted "On any lands where mining will adversely affect any PUBLICLY OWNED PARK...unless jointly approved by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place". 761.11(f) states that no surface coal mining operations shall be conducted "within 300 feet measured horizontally of any...PUBLIC PARK". Please locate materials that define and compare the use of the underlined terms or the term "adversely affect".

SEARCH RESULTS: The COALEX Library and other materials on LEXIS were used to research this request. Only one Pennsylvania Environmental Hearing Board (EHB) case was identified that discusses the state equivalents of 761.11(c) together with 761.11(f); however, the Pennsylvania case differs from Indiana's: the Pennsylvania statute section states that variances from the 300 foot restriction are possible under special circumstances. [See GARDNER, et al.[LANDOWNERS] v COMMONWEALTH OF PENN., below.]

The legislative history and regulatory history materials retrieved discuss 761.11(c) in terms of the definition of "publicly owned" park vs "public" park or the need for approval of the agencies that have jurisdiction over the park. "Adversely affect" is not defined, per se; the retrieved materials state that the regulatory authorities must consider the impacts that mining outside the boundaries of the parks could have on the parks. Little was found that discussed 761.11(f).

In the cases retrieved, mining in or adjacent to a public park is one of the issues. This issue is not ruled on in any of the included decisions because either the issue wasn't "ripe" for consideration or the mining company did not pass the initial question of VER.

The relevant parts of the materials retrieved are summarized or excerpted below. Copies of these items plus sections from three states that allow variances to the 300 foot prohibition are attached.

LEGISLATIVE HISTORY

S. REP. 402, 93rd Cong., 1st Session, S. 425, pp 67-69 (September 21, 1973). Section-by-Section Analysis Title II. Section 216 Designation of land areas unsuitable for surface mining.

"This section recognizes that surface mining is a very significant use of land which even with stringent reclamation requirements has a severe impact on the resources involved."

"Subsection(c) sets out two categories of surface mining operations which will not be permitted unless they were in existence on the date of enactment of the Act. The first category includes all operations on lands within the boundaries of units of national systems established to preserve special values of the lands involved such as the National Park, Wildlife Refuge, and Wilderness Preservation Systems.

"The second category includes operations which will adversely affect any publicly owned parks unless approved jointly by the regulatory authority and the agency with jurisdiction over the park. This includes operations involving coal underlying park lands and operations outside the park boundaries which would adversely affect the park. The Committee expects the regulatory authority and the park agency to maintain close coordination to assure proper protection of all parks."

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule.

1. Sections 780.31 and 784.17 Protection of public parks and historic places. These sections require that "the reclamation plan include a description of measures to be used to minimize or prevent harm to public parks and historic places."

2. Section 786.15 (now 773.13). Commenters suggested "that proposed Section 786.15(e) be amended to explicitly specify that a permit could be issued, notwithstanding adverse effects on a public park or historical place, if its approval was granted by the regulatory authority and agency with jurisdiction over the park or place. These comments were not accepted because additional language was unnecessary. Section 786.19(e) [now 773.15 and 773.19] of the final rules cross-references to Section 761.11(c) of the final rules. The latter Section contains the exception language suggested by the commenters."

3. Section 761.11(c) Areas where mining is prohibited or limited.

"[I]n cases where the regulatory authority determines that a proposed mining operation would adversely affect a publicly owned park or historic place, the agency with jurisdiction over that park or place would have to approve a permit for that operation."

45 FR 70481 (OCTOBER 24, 1980). Proposed rule: approval in part/disapproval in part of the Utah Permanent Regulatory Program.

"30 CFR 761.11(c) prohibits or limits surface coal mining operations on any lands where such mining will 'adversely affect' any publicly owned park of places included in the National Register of Historic Places. The Utah regulations...restrict that provision to lands 'contained in' the noted parks and places. The state's promulgated regulations are not consistent with the protection of public parks and places provided in 30 CFR 761.11(c) because mining outside the boundaries of these places could affect them but would not be covered by the states's rules."

48 FR 41312 (SEPTEMBER 14, 1984). Final rules. Part 761. Areas designated as unsuitable. [Excerpts of the proposed rule are attached as background: 47 FR 25278 (June 10, 1982).]

The definition of "publicly owned park" and a new definition of "public park" were added to 30 CFR 761.5.

A "public park" is any area or portions of areas dedicated or designated by any Federal, State or local agency primarily for public recreational use; the land on which the "public park" is situated may be owned by a private landowner or group, the National Park Service, the State or locality. This definition was chosen because it provides the regulatory authority with flexibility to determine on a case-by-case basis whether a particular area should be defined as a "public park".

A "publicly owned park" is defined as a public park that is owned by a Federal, State or local government entity.

The use of the two terms parallels their use in SMCRA sections 522(e)(3) for "publicly owned park" and 522(e)(5) for "public park". The use of "adversely affect" also parallels its use in SMCRA section 522(e)(3).

51 FR 8466 (March 11, 1986). Proposed rulemaking. Protecting Historic Properties from Surface Coal Mining Operations.

"Section 522(e) of the Act lists several property types on which mining is prohibited. Specifically, this section states that no surface coal mining operations will be permitted 'within one hundred feet of a cemetery' or 'which will adversely affect any publicly owned park or places included in the National Register of Historic Sites (sic) unless approved

jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site.' Exceptions exist for valid existing rights and operations existing on August 3, 1977."

52 FR 4244 (FEBRUARY 10, 1987). Final rule. Protecting Historic Properties from Surface Coal Mining Operations.

Sections 780.31/784.17 Protection of public parks and historic places.

"[E]ach permit application would need to include a description of the measures to be used either (1) to prevent impacts to publicly owned parks or any places listed on the National Register of Historic Places, or (2) if valid existing rights exists or joint agency approval is to be obtained under Section 761.12(f), to minimize impacts. This revised language clarified that unless valid existing rights exists or joint approval is obtained, the statutory intent is avoidance, not minimization, of adverse impacts."

"Numerous commenters noted that the statute intended that only adverse impacts, not any impacts, to publicly owned parks...were to be avoided. OSMRE agrees, and has added the term 'adverse' to clarify this."

FEDERAL, STATE AND ADMINISTRATIVE CASES

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

Section III. Lands Unsuitable Regulations. I. Procedures for Joint Approval of Mining that Affects Parks and Historic Places.

"Section 522(e)(3) of SMCRA permits mining on areas that affect parks or places on the National Register if there is joint approval by both the regulatory agency and the agency with jurisdiction over the park or site."

The court ruled that the Secretary has the flexibility to determine the time period for notifying the federal, state or local agency with jurisdiction over that park or site.

KERRY COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 56 Pa Commw 364 (Pa Commw Ct 1981). IN THE MATTER OF KERRY COAL CO. v COMMONWEALTH OF PENN., DER AND PENN. COUNCIL OF TROUT UNLIMITED, INC., INTERVENOR, Docket Nos. 77-083C, 77-084-C, 1979 Pa Envirn LEXIS 29, 1979 EHB 77 (1979).

DER attached a special condition to Kerry's mine drainage permit requiring Kerry to obtain a variance if its mining operations were to affect an area within 300 feet of a state park. The Pennsylvania state court reversed the Environmental Hearing Board (Board)'s

ruling and interpreted the wording of the state regulation such that the 300 foot restriction applied to PARK BUILDINGS, not park boundaries.

DASET MINING CORP. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), Docket Nos. 78-102-B, 78-103-B, 79-112-B, 79-113-B, 1981 Pa Envirn LEXIS 35, 1981 EHB 109 (1981).

DER refused to issue Daset a surface mining permit for an operation located within 300 feet of a public park. After ruling that the property being mined adjoined state park lands, the Board renewed its interpretation that SMCRA "prohibits mining within 300 feet of any public park rather than park building subject to 'valid existing rights [VER].'" The issue became whether Daset's application was subject to VER. The Board found that Daset did possess VER to mine the entire property in question.

GARDNER, et al. [LANDOWNERS] v COMMONWEALTH OF PENN., DER, 145 Pa Commw 345, 603 A 2d 279 (Pa Commw Ct 1992).

In 1967, the Landowners' property was condemned to provide land for a state park; the Landowners retained rights to the coal under the condemned property. Sec. 4.2(c) of the initial PaSMCRA allowed mining within 300 feet of a public park if a variance was obtained. When Sec. 4.5 was added, prohibiting all surface mining in public parks except those subject to VER, the Landowners claimed a de facto taking. The court ruled that the Landowners' petition was not ripe due to their failure to exhaust administrative remedies: they had made no attempt to apply for a variance. The court reasoned that the Pa. General Assembly had not repealed the 4.2(c) variance, "thus expressing an intention to preserve the Secretary's authority to grant variances allowing mining in state parks in 'special circumstances.'" DER has the authority to issue permits "if the proposed surface mining is remining of previously mined lands, and land and water conservation benefits will result from that operation."

EASTERN MINERALS INTERNATIONAL, INC., IBLA 88-256, 117 IBLA 221 (1990).

OSM denied Eastern's permit application based on a finding that the mine would be on property unsuitable for mining and would cause an adverse impact on the state park adjacent to the mining site. The ALJ directed OSM to reconsider the application, with attention to two issues: 1) Eastern's VER and 2) whether the proposed operation would adversely affect the state park. OSM's determination, upheld by the IBLA, that Eastern did not have VER negated the necessity for a determination on the second issue.

L & E TRUCKING, INC. v OSM, Docket Nos. CH 1-160-R, CH 2-24-P, CH 2-25-R (1981).

L & E was cited for having conducted surface coal mining operations within 300 feet of a public park. The operator did not know that the adjoining land had been deeded to the US for public park land. The ALJ considered these "unusual circumstances" as

mitigating factors to reduce the points for negligence and assessed a small monetary fine.

CITY OF INDEPENDENCE v CALL, CHIEF OF DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES (DNR), No. 43249, slip op. (Ohio Ct App, June 4, 1981).

Boyas Excavating Co. received a permit from DNR to operate a surface mine in the City of Independence. Independence appealed the dismissal of its motion contesting the issuance of the permit using these arguments: the city was a "person" entitled to appeal such rulings and the granting of a permit to conduct a surface mining operation within the designated boundaries of a federal park was unlawful. The court determined that the city was a "person" entitled to appeal an order of DNR and that the second issue was not ripe for review.

ATTACHMENTS

A. S. REP. 402, 93rd Cong., 1st Session, S. 425, pp 67-69 (September 21, 1973). Section-by-Section Analysis Title II. Section 216 Designation of land areas unsuitable for surface mining. [Excerpts.]
B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. [Excerpts.]
C. 45 FR 70481 (OCTOBER 24, 1980). Proposed rule: approval in part/disapproval in part of the Utah Permanent Regulatory Program. [Excerpts.]
D. 48 FR 41312 (SEPTEMBER 14, 1984). Final rules. Part 761. Areas designated as unsuitable.
E. 47 FR 25278 (JUNE 10, 1982). Proposed rule. Part 761. Areas designated as unsuitable. [Excerpts.]
F. 51 FR 8466 (MARCH 11, 1986). Proposed rulemaking. Protecting Historic Properties from Surface Coal Mining Operations. [Excerpts.]
G. 52 FR 4244 (FEBRUARY 10, 1987). Final rule. Protecting Historic Properties from Surface Coal Mining Operations. Sections 780.31/784.17 Protection of public parks and historic places. [Excerpts.]
H. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (D DC July 15, 1985). [Excerpts.]
I. KERRY COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 56 Pa Commw 364 (Pa Commw Ct 1981).
J. IN THE MATTER OF KERRY COAL CO. v COMMONWEALTH OF PENN., DER AND PENN. COUNCIL OF TROUT UNLIMITED, INC., INTERVENOR, Docket Nos. 77-083C, 77-084-C, 1979 Pa Envirn LEXIS 29, 1979 EHB 77 (1979).
K. DASET MINING CORP. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), Docket Nos. 78-102-B, 78-103-B, 79-112-B, 79-113-B, 1981 Pa Envirn LEXIS 35, 1981 EHB 109 (1981).

L. GARDNER, et al. [LANDOWNERS] v COMMONWEALTH OF PENN., DER, 145 Pa Commw 345, 603 A 2d 279 (Pa Commw Ct 1992).
M. EASTERN MINERALS INTERNATIONAL, INC., IBLA 88-256, 117 IBLA 221 (1990).
N. L & E TRUCKING, INC. v OSM, Docket Nos. CH 1-160-R, CH 2-24-P, CH 2-25-R (1981).
O. CITY OF INDEPENDENCE v CALL, CHIEF OF DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES (DNR), No. 43249, slip op. (Ohio Ct App, June 4, 1981).
P. STATE SECTIONS re: variances from the 300 foot prohibition for:
    1. Pennsylvania: Statute sections 4.2 and 4.5.
    2. North Dakota: Regulation section 69-05.2-04-01
    3. Kentucky: Regulation section 405 KAR 24:040E Sec.2