



COALEX STATE INQUIRY REPORT - 272

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TOPIC: ALLUVIAL VALLEY FLOORS (AVF): DEFINITION OF "NOT SIGNIFICANT TO FARMING" OR "NEGLIGIBLE IMPACT ON FARM'S AGRICULTURAL PRODUCTION"

INQUIRY: Has OSM defined the above terms that appear in SMCRA sec. 510(b)(5)(A)? Has OSM defined the size of "small acreage" or applied a percentage to either of the above terms? Has OSM made any AVF determinations? If so, based on what criteria? Wyoming's guidelines define significant as anything over 10% and anything less than 5% as negligible. Please locate any relevant information that discusses these questions. [30 CFR Sections 701.5 and 785.19, and Part 822]

SEARCH RESULTS: The COALEX Library and other materials available in LEXIS were used to conduct this research. Discussions of the terms in question appear in the preambles to proposed and final federal regulations and in decisions ruling on challenges to those regulations. The regulatory history of the relevant sections is provided below. Copies of these materials are attached. Also included are federal cases ruling on SMCRA's AVF prohibition as a taking; Interior administrative decisions ruling on the importance of making an AVF determination prior to permit issuance; and several other background documents.

BACKGROUND INFORMATION ON SMCRA 510(b)(5) & 701

45 FR 78637 (NOVEMBER 26, 1980). Conditional approval of the permanent program submission from the State of Wyoming.

The excerpt included discusses the state's Alluvial Valley Floor Guidelines.

43 FR 38035 (AUGUST 25, 1978). Alluvial Valley Floors Technical Guidelines.

OSM "is today publishing proposed guidance to assist both State regulatory authorities and OSM in the interpretation and application of section 515(b)(10) and 510(b)(5) of the act and 30 CFR 715.17(j) (42 FR 62687, December 13, 1977) to pending permit



applications and mining and reclamation plans for surface coal mining operations which may be subject to those sections of the act and regulations. This guidance is proposed in order to promote uniformity of interpretation and application of the act and regulations relating to alluvial valley floors among regulatory authorities who share responsibility under the act, and to give fair notice to operators of the information which may be requested by regulatory authorities when a surface coal mining operation will or may affect the essential hydrologic functions, uses, or productivity or alluvial valley floors."

DECISIONS - FEDERAL

WHITNEY BENEFITS, INC. AND PETER KIEWIT SONS' CO. v U.S., 926 F 2d 1169 (Fed Cir 1991). WHITNEY BENEFITS, INC. AND PETER KIEWIT SONS' CO. v U.S., 18 CI Ct 394 (CI Ct 1989). WHITNEY BENEFITS, INC. AND PETER KIEWIT SONS' CO. v U.S., 752 F 2d 1554 (Fed Cir 1985).

SMCRA's AVF prohibition effected a taking of the Whitney coal property, the "evidence having shown the total destruction of all economically viable use".

DECISIONS - INTERIOR ADMINISTRATIVE

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al. v OSM; ATLANTIC RICHFIELD CO., & STATE OF COLORADO, INTERVENORS, 89 IBLA 1, IBLA 83-757 (September 27, 1985) [Amended by November 18, 1986 Decision]. NATURAL RESOURCES DEFENSE COUNCIL, INC. et al. v OSM; ATLANTIC RICHFIELD CO., & STATE OF COLORADO, INTERVENORS, 94 IBLA 269, IBLA 83-757 (November 18, 1986).

In the first decision the Board ruled "OSM failed to make its alluvial valley floor determination prior to permit issuance and stipulations #3 and #5 were added to the permit to elicit information required before permit approval".

"In our earlier decision we stated that OSM's failure to require the applicant to satisfy 30 CFR 785.19(d) (1981) before issuing the permit, by allowing the applicant to submit the necessary information or establish that it was not required to do so was error. NRDC v. OSM, 89 IBLA at 57, 91 I.D. at 416. The Board found that issuance of the permit had deprived the applicant of the opportunity to comply with the regulation and that OSM's stipulation Nos. 3 and 5 were apparently included to satisfy the regulation."

REGULATORY HISTORY

42 FR 62639 (DECEMBER 13, 1977). Initial program regulations. 715.17 Protection of the hydrologic system. 715.17(j) Alluvial valley floors west of the 100th meridian west longitude.



"The potentially adverse effects of mining in or adjacent to alluvial valley floors may all too readily affect offsite areas as well as the degree to which mining is or is not allowed in the vicinity of alluvial valley floors and as to the environmental protection standards that must apply."

"[W]hile the Department feels it has adequately provided the necessary regulatory basis for national determinations of alluvial valley floors, States and regulatory authorities are encouraged to refine the performance standards to meet regional and local situations. If, for example, it is necessary to more accurately identify the role of alluvial valley floors in the agricultural economy of a region, the appropriate regulatory agency may develop such a requirement, perhaps through amendment of existing statutes or regulations or exercise of existing authorities."

43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules.

a. 785.19 Alluvial valley floors.

"The applicant would be required to conduct a pre-application reconnaissance inspection [and provide detailed technical information] in these areas holding a stream or within two miles of a stream, to determine the absence or likely presence of an alluvial valley floor in the vicinity of a proposed mine plan area."

"[T]he regulatory authority would be required to make specific findings before determining that any portion of an alluvial valley floor or stream subject to the pre-application requirements may be excluded from further consideration in the full permit application process.... It is expected that the regulatory authority would make these findings prior to receipt of a complete application for a permit for the area involved."

b. 786.17 Criteria for permit approval or denial: Alluvial valley floors.

"Subsection 786.17(c) is being proposed to provide specific guidelines for the use of the regulatory authority in determining the extent of acceptable impact of proposed surface coal mining and reclamation operations on farming in alluvial valley floor situations. As proposed, OSM would establish as a measure of significant impact on farming, a value of 10 percent of decrease in a farm's production capacity for harvestable crops, a 10 percent decrease of the farm's water supply or a combination of these factors which would result in a 10 percent decrease in typical annual productivity."

c. Part 822 Special permanent program performance standards - operations in alluvial valley floors.

See attached material.

44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -Final rule.



a. 701.5 Definitions. Alluvial valley floors.

See attached material.

b. 785.19 Alluvial valley floors.

(A)...Proposed sections 785.19 and 786.17 "have been combined in order to clearly indicate to an applicant, at the time the preapplication investigations are conducted, the criteria for permit approval or denial."

(B)(7)..."[T]he designation of an area as an alluvial valley floor does not preclude mining as a matter of law. Mining will only be prohibited where there is an alluvial valley floor and (1) where mining will interfere with or preclude farming; (2) where mining will materially damage the water supply to an alluvial valley floor; or (3) where the essential hydrologic functions cannot be restored after mining."

(A) Subsection 785.19(e) Criteria...."(2) Some commenters have made recommendations relating to the proposed language of Section 786.17(c) (now 785.19(c)(2)) as that subparagraph described the phrase 'significance...on farming.' The Office has determined that the test of significance would be applied to all alluvial valley floors, regardless of whether they are currently undeveloped rangelands or not. ...

"An option of reiterating the two potential exclusions of Section 510(b)(5)(A) (e.g. (1) undeveloped rangelands which are not significant to farming on said alluvial valley floors and (2) areas of such small acreage as to be of negligible impact on the farm's agricultural production), was felt to be unduly complex particularly if a viable alternative could be identified. The alternative was to use the term 'significance to (or on farming)' to represent both exclusions, that is, the undeveloped rangeland and the small acreage exclusions. The Office, therefore, interprets the small acreage determination to be a determination of significance to a farm's agricultural production.

"(3) Commenters asked that significance be related, variously, to one farm to a particular crop, to the nation, or to another base. The comparison to determine significance must be site-specific as is evidence by legislative history...and as discussed in the preamble to Section 785.19(c). The Office modified the measure of significance, so that it can be judged on whether removal of the area from production would decrease expected annual income from agricultural activities normally conducted at the farm. Many comments related to the proposal to use a value of 10 percent, or more stringent criteria established by the regulatory authority, to define the area of a farm that would, if affected, be 'significant' in terms of being included under Section 510(b)(5)(A) of the Act....

...

"The Office has determined that a value of 10 percent is inadequately established to be used at this time; and, therefore, has deleted the proposed language in the final regulation, as far as it specified a value of 10 percent. In accord with many comments



received, the measure of significance has been changed to that of total value derived from agricultural activities rather than acreage. The comparison of vegetation yield of the alluvial valley floor would be made to total yield of the affected farm. It is felt that the exemption of Section 510(b)(5)(A) is more equitably handled with an assessment of yield rather than area, because the area does not necessarily reflect the value of the area to the farm, while the yield should be a direct measure of this value. The Office will apply this indicator on a quantitative basis in each case.

"The Office has substituted, in place of the 10 percent criterion, a criterion that related significantly to a decrease in the expected annual income.

"This concept should satisfy the concern of commenters who expressed a desire to have the alluvial valley floor regulations incorporate additional economic indicators. It relates the significance to 'expected' income, which is in part a measure of historical production. In that manner, it also relates significance to agricultural activities conducted on the farm as a whole, and, thus, satisfies the desire to make the evaluation relate to the value of various crops. The Office believes this approach to closely reflect the intent of Congress that mining will not be allowed if it interferes with a farming operation."

c. Part 822 Operations in Alluvial Valley Floors

See attached material.

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 14 ERC(BNA) 1083 (D DC February 26, 1980).

"Section 510(b)(5) of the Act, 30 U.S.C. sec. 1260(b)(5), enumerates two exclusions from the criteria for approval of mining operations on alluvial valley floors. The first allows mining when the regulatory authority finds that mining activities will interrupt 'such small acreage as to be of negligible impact on the farm's agricultural production.' The Secretary's test for the small acreage exemption is elucidated at 30 C.F.R. sec. 785.19(e)(2), 44 FR 153 76 (1979):

The effect of the proposed operations on farming will be concluded to be significant if they would remove from production, over the life of the mine, a proportion of the farm's production that would decrease the expected annual income from agricultural activities normally conducted at the farm.

The NCA alleges the regulatory provision emasculates the statutory exception; it effectively converts a small acreage exemption into a total ban of mining activities.

"The court agrees with the NCA, and will order the remand of 30 C.F.R. sec. 785.19(e)(2). The clear language of the Act directs permit approval if the mining will interrupt only a small number of acres. Such mining activity would create a negligible impact on a farm's productive capacity. But the Secretary's definition would prohibit



mining in this situation. Interference with a small number of acres may nonetheless result in a decrease of the farm's income. The Act intended the regulatory authority to grant a permit in this situation. Recognizing that the Act affords the Secretary discretion to define the exemption, but mindful that the Secretary cannot stray from the intent of the Act, we remand 30 C.F.R. sec. 785.19(3). The court directs the Secretary to revise the regulation to allow mining on an AVF that results in a negligible impact on the farm's production."

45 FR 51547 (AUGUST 4, 1980). Notice of suspension and statement of policy regarding effect on State programs.

"30 CFR 785.19(e)(1)(ii). The regulation was remanded by the court to allow the Secretary to add exclusions for undeveloped rangelands and negligible farmland interruption. Pending further rulemaking, the Secretary will interpret this regulation in accordance with the court decision."

"30 CFR 785.19(e)(2). The small acreage exemption test for mining on alluvial valley floors is suspended. The regulation was remanded to allow the Secretary to revise it to allow mining on an alluvial valley floor that results in a negligible impact on a farm's production."

47 FR 25486 (JUNE 11, 1982). Proposed rule.

See attached rule.

48 FR 29802 (JUNE 28, 1983). Final rule.

a. 701.5 Definitions. Alluvial valley floors.

The definition which mirrors the statute was retained. "The key to the definition is the relationship between the hydrology of the area and agricultural activities."

b. 785.19(a) Alluvial valley floor determinations.

Permit applicants may request the regulatory authority "make a determination whether, in an arid and semiarid area, valley floors in the proposed permit area or adjacent are alluvial valley floors. It also requires sufficient data be submitted by the applicant to make this determination and allows the regulatory authority to request additional information from the applicant."

"Unnecessary detailed technical information and study requirements" are deleted, allowing the regulatory authority "to adjust the type of information and level of analysis to better reflect site-specific conditions."

c. 785.19(b) Application of statutory exclusions.



"Under the final rule, negligible impact of the proposed surface coal mining and reclamation operation on farming will be based on the relative importance of the affected vegetation and water of the developed grazed or hayed AVG to the farm's production. "

...

"Under these final rules, it is necessary to determine the 'significance to farming' only with regard to the statutory exclusions for undeveloped rangeland. The applicability in section 785.19(b)(2)(ii) of the second statutory exclusion is dependent upon the finding that small acreage affected will cause negligible impact on a farm's agricultural production. Also, the finding in final section 785.19(e)(2)(i) relates to whether the proposed surface coal mining operation will interrupt, discontinue or preclude farming."

50 FR 7274 (FEBRUARY 21, 1985). Notice of suspension.

"This notice of suspension addresses those regulations remanded by the October 1, 1984 Memorandum Opinion in Round II of In Re: Permanent (II)."

701.5 Definition of "agricultural activities or farming" as related to alluvial valley floors

"The Court remanded the definition in section 701.5 which treats the terms 'agricultural activities' and 'farming' as synonymous because it believed the use of different terms might indicate a congressional intent to prescribe different meanings to those terms."

NATIONAL WILDLIFE FEDERATION V HODEL, 839 F 2d 694 (DC Cir January 29, 1988).

III.C.1. Alluvial Valley Floors. The Court of Appeals upheld the district court's ruling that "the Secretary had abandoned the detailed specification of standards approach "without adequate explanation," and therefore 'remand[ed] this issue to the Secretary for further consideration.'"

"Prior to 1983, sec. 785.19(d) of the regulations contained detailed specifications of the information needed in a permit application when the proposed operation might affect an alluvial valley floor or waters supplied to an alluvial valley floor. In 1983, the Secretary withdrew the enumeration of 'technical data, information, and analysis' that formerly had to be presented and evaluated in a permit application, and instead' require[d] generally that sufficient information be submitted to enable the regulatory authority to make the necessary determinations."

53 FR 29310 (AUGUST 3, 1988). Proposed rule.

See attached material.

54 FR 9724 (MARCH 7, 1989). Final rule.



See attached material.

NATIONAL WILDLIFE FEDERATION v LUJAN, 31 ERC (BNA) 2069 (D DC September 5, 1990).

II. Definition of Farming on Alluvial Valley Floors.

Also enclosed to complete the regulatory history are these Notices:

45 FR 54752 (AUGUST 18, 1980). Final rule. Expiration dates incorporated by reference.

45 FR 8240 (FEBRUARY 6, 1980). Final rule. Expiration dates incorporated by reference.

47 FR 33683 (AUGUST 4, 1982). Final rule. Sections 785.10 Information collection and 822.10 Information collection were added.

ATTACHMENTS

1. CITIZENS ORGANIZED AGAINST LONGWALLING v DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES; SOUTHERN OHIO COAL, INTERVENOR, 535 NE 2d 687 (Ohio Ct App 1987).
2. CITIZENS ORGANIZED AGAINST LONGWALLING, et al. v SOUTHERN OHIO COAL (SOCCO), 1989 Ohio App LEXIS 2262 (Ohio Ct App 1989).
3. GIOIA COAL COMPANY v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 84-211-G, 1986 Pa Envirn LEXIS 157 (1986).
4. BUFFY AND LANDIS v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND PBS COALS, INC., EHB Docket No. 90-284-E, 1990 Pa Envirn LEXIS 185 (1990).
5. . CARLSON MINING v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-547-E, 1992 Pa Envirn LEXIS 161 (1992).
6. AMBROSIA COAL v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 85-078-W, 1986 Pa Envirn LEXIS 129 (1986).
7. OSM DIRECTIVE, Subject No. REG-27, Transmittal No. 474, "Water Replacement" (Issued: November 19, 1988).
8. 44 FR 14902 (3/13/79). Permanent Program Final Preamble -- Final Rule. 816.54 Hydrologic balance: Water rights and replacement.
9. 48 FR 43956 (9/26/83). Final rules. Geology permitting. 816.41(h) Water rights and replacement.



10. COALEX STATE INQUIRY REPORT - 203, "Water supply and replacement for underground mining (Includes Reports 35 & 93)" (1992). [ENCLOSED WITHOUT ATTACHMENTS.]
- A. 56 FR 33170 (JULY 18, 1991). Notice of inquiry. Underground mining performance standards -- Subsidence.]
 - B. 56 FR 37194 (AUGUST 5, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence. C. 56 FR 49286 (AUGUST 14, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence.
 - C. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir 1988).
 - D. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule.
 - a. Section 817.54. Hydrologic balance: Water rights and replacement.
 - b. Introduction to Part 783. Underground Mining Permit Application - Minimum Requirements for Information on Environmental Resources.
 - c. Section 783.17. Alternate water supply information.
 - E. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION [PSMRL I (ROUND II)], 19 ERC (BNA) 1477 (D DC May 16, 1980).
 - F. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology Permitting and Performance Standards.
 - G. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION [PSMRL II (ROUND III)], 620 F Supp 1519 (D DC July 15, 1985).
 - H. COALEX STATE INQUIRY REPORT - 35, "Water Rights and Replacement" (1985).
 - I. COALEX STATE INQUIRY REPORT - 93, "Water Rights and Replacement" (1988).
 - J. 120 CONG. REC. H23639 (daily ed. July 16, 1974) (statement of Rep. Evans). [Excerpt]
 - K. 123 CONG. REC. S8083 (daily ed. May 20, 1977) (statement of Sen. Danforth).
 - L. 1977 versions of SMCRA sections:
 - a. S. 7, 95th Cong, 1st Sess (January 10, 1977). Excerpt from Sec. 415 Environmental Protection Performance Standards.
 - b. HR 2, 95th Cong, 1st Sess (April 1, 1977). New sec. 717. Water Rights and Replacement of Supplies.
 - c. HR REP. No. 218, 95th Cong, 1st Sess 181 (April 22, 1977). Section-by-Section Analysis. Section 717 - Water Rights.
 - M. 52 FR 45920 (DECEMBER 2, 1987). Final rule. Underground coal mining activities; hydrologic balance; protection recharge capacity.
 - N. UTAH POWER & LIGHT CO. v OSM, Docket Nos. UT-001; TU 6-1-PR (1988).
 - O. OSM DIRECTIVE, Subject No. REG-27, Transmittal No. 474, "Water Replacement" (Issued October 19, 1988).



11. COALEX STATE COMPARISON REPORT - 210, "Subsidence: compensation for damaged structures and water supply" (1992). [ENCLOSED WITHOUT ATTACHMENTS.]