



## COALEX STATE INQUIRY REPORT - 317

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**TOPIC:** STATE REGULATIONS WHICH ARE INCONSISTENT WITH FEDERAL SMCRA

**INQUIRY:** A citizens' suit alleges that the Director of an OSM-approved state program is in violation of federal SMCRA - the citizens group claims that the state regulation is inconsistent with the federal regulation. Wyoming claims that the Director can only be held in violation of state law and that the section in question was approved by OSM as part of its regulatory program. Please identify cases, preambles, etc. that address these issues.

**SEARCH RESULTS:** Using LEXIS to search federal and state case law, as well as COALEX and other administrative materials yielded a number of decisions and federal register preambles that address various aspects of the issues in question. Materials retrieved as a result of the research are discussed below. Copies are attached.

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### FEDERAL AND STATE CASE LAW

#### **HAYDO v AMERIKOHL MINING, INC., 830 F 2d 494 (3rd Cir 1987).**

Plaintiffs alleged defendant's operations contravened both the state regulations and SMCRA. Since state regulatory plan was approved by Secretary, jurisdiction over violations lies in courts of state.

There is no concurrent jurisdiction in states and federal government:

"When a state fails to submit, implement, enforce or maintain an acceptable state regulatory program, the Secretary is required to prepare, promulgate and implement a federal program the for state.

"30 USC sec. 1254(a). Promulgation and implementation of a federal for a state preempts and supersedes any inconsistent state law and 'vests the Secretary with



exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations' taking place within the state."

**TRUSTEES FOR ALASKA v GORSUCH, 835 P 2d 1239 (Alaska 1992).**

Footnote 1: "[W]hile federal regulations promulgated under SMCRA may provide helpful guidance, they do not set a standard against which state law must be measured. In this context, Alaska law is superseded only where it is inconsistent with the federal statute."

**RUSSELL v ISLAND CREEK COAL CO., 389 SE 2d 194 (West Virginia 1989).**

SYLLABUS: 1. "When a provision of the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code, 22A-3-1 et seq., is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. Sec. 1201 et seq., the state act must be read in a way consistent with the federal act." Syl. pt. 1, *Canestraro v Faerber*, 179 W Va 793, 374 SE 2d 319 (1988).

**CANESTRARO v FAERBER, 374 SE 2d 319 (West Virginia 1988).**

See above.

**NATIONAL WILDLIFE FED'N. v LUJAN, 928 F 2d 453 (DC Cir March 22, 1991).**

Judge Wald, in the concurring opinion, provides a brief explanation of the structure of SMCRA:

"[A]n operator's obligations, in a state that has assumed exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, are determined by state law, state regulations, and a state-issued permit. In addition, the state is responsible for enforcing these obligations. But the SMCRA ensures that both the substantive state regulations and the sanctions for violations are consistent with those of the SMCRA."

**LAUREL PIPE LINE CO. v BETHLEHEM MINES CORP., 624 F Supp 538 (WD Pa 1986).**

"In participating states [those with Secretary-approved state regulations], enforcement rests with the state and not with the federal government."

**COMMONWEALTH v CRONER, INC., 618 A 2d 1135 (Pa Commw Ct 1992).**

The court affirmed the EHB's finding that the state's blasting regulations conflicted with the state statute and were invalid.

**NATIONAL COAL ASSN. v URAM, 1994 U.S. Dist LEXIS 16404, 39 ERC (BNA) 1624 (DC DC).**



The court, in ruling on the validity of federal NOV and ten-day notice rules in primacy states, discusses deficiencies in state programs (Section VI.C.1.b):

"If the state's program does not comply with federal standards, there is a remedial process. The 30 CFR Sec. 732.17(e) process is designed to authorize the Secretary to require amendments of approved state programs if circumstances warrant as a result of oversight inspections. Federal defendants note that because the Secretary has approved the state program as meeting the federal standards, it can be anticipated that the instances where a deficiency exists in a state program will be minimal and resolved through the public review process rather than through an OSMRE inspection or NOV against the operator. Accordingly, under this process Secretary should be able to cure a state deficiency. The process to cure a state program deficiency, located at 30 CFR Part 732 (1980) requires state program amendments as soon as possible after the Secretary becomes aware of a needed state program amendment. See 30 CFR Sec. 732.15 (1980)."

**MOLINARY v POWELL MT. COAL, 832 F Supp 169 (WD Va 1993). MOLINARY v POWELL MT. COAL, 779 F Supp 839 (WD Va 1991).**

The court, cited to the earlier decision:

"it follows that once a state program is approved by the Secretary, the rules, regulations, orders, and permits issued under that program are issued, in the language of 30 USC Sec. 1270(f), 'pursuant to' the SMCRA."

And continued:

"Therefore, a person who is damaged by a violation of a rule, regulation, order or permit issued pursuant to an approved state program has a federal right of action under Sec. 1270(f). But see *Haydo v Amerikohl Mining Co.*, 830 F 2d 494 (3rd Cir 1987); *National Wildlife Fed'n v Lujan*, 289 US App DC 41, 928 F 2d 453, 464 n.1 (DC Cir 1991) (concurring opinion).

...

"The fact that Sec. 1270(f) provides a federal right of action does not mean that state law should not be consulted in fashioning an appropriate remedy. To the contrary, in determining an appropriate remedy it is entirely permissible to "borrow" or select state law....In the present context -- an alleged violation of a rule, regulation, order or permit issued by Virginia -- state law is the only logical starting point, and should be applied unless it conflicts with the purposes or policies of the SMCRA."

**HODEL v VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, 452 US 264 (1981).**

The permanent program is not self-implementing, but becomes effective through the approved state or federal program under Sections 503 or 504.



Also see: IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 14 ERC ( BNA) 1083, 10 ELR 20208 (DC DC February 26, 1980).

## **INTERIOR ADMINISTRATIVE DECISIONS**

### **NORTHERN PLAINS RESOURCE COUNCIL, INC. v OSM, 112 IBLA 266, IBLA 88-270 (1990).**

HEADNOTES: "OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and OSMRE makes the necessary findings based thereon, an application for a permit is properly approved."

## **REGULATORY INFORMATION**

### **45 FR 78637 (NOVEMBER 26, 1980). Conditional approval of Wyoming program.**

The state regulation in question was approved as part of this program package. This information is enclosed for background.

### **58 FR 43594 (AUGUST 17, 1993). Notice of petition to initiate rulemaking. [Withdrawn 2/10/94.]**

Petition discusses federal enforcement in primacy states.

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

Excerpts from the following Parts are enclosed for background:

1. 730 - General requirements for regulatory programs in states
2. 731 - Submission of state programs
3. 732 - Approval or disapproval of state program submissions
4. 733 - Maintenance of state programs/withdrawing approval

## **ATTACHMENTS**

- A. HAYDO v AMERIKOHL MINING, INC., 830 F 2d 494 (3rd Cir 1987).
- B. TRUSTEES FOR ALASKA v GORSUCH, 835 P 2d 1239 (Alaska 1992).
- C. RUSSELL v ISLAND CREEK COAL CO., 389 SE 2d 194 (West Virginia 1989).
- D. CANESTRARO v FAERBER, 374 SE 2d 319 (West Virginia 1988).
- E. NATIONAL WILDLIFE FED'N. v LUJAN, 928 F 2d 453 (DC Cir March 22, 1991).
- F. LAUREL PIPE LINE CO. v BETHLEHEM MINES CORP., 624 F Supp 538 (WD Pa 1986).



- G. COMMOWNEALTH v CRONER, INC., 618 A 2d 1135 (Pa Commw Ct 1992).
- H. NATIONAL COAL ASSN. v URAM, 1994 U.S. Dist LEXIS 16404, 39 ERC (BNA) 1624 (DC DC).
- I. MOLINARY v POWELL MT. COAL, 832 F Supp 169 (WD Va 1993).
- J. MOLINARY v POWELL MT. COAL, 779 F Supp 839 (WD Va 1991).
- K. HODEL v VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, 452 US 264 (1981).
- L. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 14 ERC (BNA) 1083,10 ELR 20208 (DC DC February 26, 1980).
- M. NORTHERN PLAINS RESOURCE COUNCIL, INC. v OSM, 112 IBLA 266, IBLA 88-270 (1990).
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