



COALEX STATE INQUIRY REPORT - 318

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TOPIC: GOVERNMENT IMMUNITY: STATE'S LIABILITY WHEN CLEANING UP WASTE AT AML SITES

INQUIRY: Please locate any cases that discuss whether a state can be held liable for violations of SMCRA while cleaning up refuse and waste found at abandoned mine sites. Does EPA have any agreements or understandings with the AML state regulators regarding such cleanup?

SEARCH RESULTS: Research was conducted using LEXIS. A Federal Register preamble to proposed rules was identified which discusses a new section to SMCRA AML regulations relating to state liability. The final rule is also included. No EPA/SMCRA agreements or SMCRA cases were identified on this issue. However, several related decisions were identified ruling on a state's liability under CERCLA [Comprehensive Environmental Response, Compensation and Liability Act of 1980].

Copies of the material discussed below are attached.

SMCRA Sec. 405(I) [30 USC 1235(I)], added November 5, 1990:

"No State shall be liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a State abandoned mine reclamation plan approved under this section. This subsection shall not preclude liability for cost or damages as a result of gross negligence or intentional misconduct by the State. For all purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence."

No legislative history discussing this section which was part of the "Abandoned Mine Reclamation Act of 1990" was identified.

56 FR 57376 (NOVEMBER 8, 1991). Proposed rule. Abandoned Mine Land Reclamation Fund Reauthorization Implementation.



"A new section 874.15 (Limited liability), reiterates the language of section 405(l) of SMCRA which mandates that no State of Indian tribe shall be liable under Federal law for any costs or damages as a result of any action or omitted action while carrying out an approved abandoned mine reclamation plan. This section, however, does not preclude liability for gross negligence or intentional misconduct by a State or Indian tribe. OSM intends to conduct discussions with the Environmental Protection Agency (EPA) regarding the funding of projects which may be eligible under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA). At minimum, OSM would not approve funding for any project which might affect EPA's responsibilities until EPA had been consulted."

59 FR 28136 (MAY 31, 1994). Final rule. Abandoned Mine Land Reclamation Fund Reauthorization Implementation.

Enclosed for background.

CERCLA CASES

These cases discuss situations where a state agency has become an owner or operator of a hazardous waste site because of its regulatory activities, making it a potentially responsible party under CERCLA. The issues addressed include: statutory exemption from liability and an agency's control over the polluting activity.

COMMITTEE TO SAVE THE MOKELUMNE RIVER v EAST BAY MUN. UTIL. DIST., 1993 US Dist. LEXIS 8364, 37 ERC (BNA) 1159 (ED Cal 1993), aff'd, COMMITTEE TO SAVE THE MOKELUMNE RIVER v EAST BAY MUN. UTIL. DIST., 13 F 3d 305 (9th Cir Cal 1993).

"Although it may be that the Board's initial involvement at Penn Mine was in a regulatory capacity, as noted above, the record conclusively demonstrates that it presently does more than regulate -- it controls the discharge of pollutants. It jointly constructed the facility, purchased the pump, finances pump operating costs, and controls discharges of pollutants. These factors demonstrate that the RWQCB [California Regional Water Quality Control Board] is presently a discharge in its own right rather than a passive agency bystander and is liable for the discharges."

UNITED STATES v STRINGFELLOW, 1990 US Dist. LEXIS 19001; 31 ERC (BNA) 1315 (CD Cal 1990).

The State of California was found to be a "person" under CERCLA. The state's liability was established because of its activities which included control of waste disposal and participation in opening and closing the site.



UNITED STATES v NEW CASTLE CTY., 727 F Supp 854 (D Del 1989), summ. judgment granted, in part, denied, in part, UNITED STATES v NEW CASTLE CTY., 769 F Supp 591 (D Del 1991).

The court's opinion discusses factors on which state liability might be premised.

PENNSYLVANIA v UNION GAS CO., 491 US 1 (1989).

The Court affirmed the Court of Appeals ruling that CERCLA's "amended language clearly rendered States liable for monetary damages and that Congress had the power to do so under the Commerce Clause."

ATTACHMENTS

- A. SMCRA Sec. 405(l) [30 USC 1235(l)], added November 5, 1990.
- B. 56 FR 57376 (NOVEMBER 8, 1991). Proposed rule. Abandoned Mine Land Reclamation Fund Reauthorization Implementation.
- C. 59 FR 28136 (MAY 31, 1994). Final rule. Abandoned Mine Land Reclamation Fund Reauthorization Implementation.
- D. COMMITTEE TO SAVE THE MOKELUMNE RIVER v EAST BAY MUN. UTIL. DIST., 1993 US Dist. LEXIS 8364, 37 ERC (BNA) 1159 (ED Cal 1993).
- E. COMMITTEE TO SAVE THE MOKELUMNE RIVER v EAST BAY MUN. UTIL. DIST., 13 F 3d 305 (9th Cir Cal 1993).
- F. UNITED STATES v STRINGFELLOW, 1990 US Dist. LEXIS 19001; 31 ERC (BNA) 1315 (CD Cal 1990).
- G. UNITED STATES v NEW CASTLE CTY., 727 F Supp 854 (D Del 1989).
- H. UNITED STATES v NEW CASTLE CTY., 769 F Supp 591 (D Del 1991).
- I. PENNSYLVANIA v UNION GAS CO., 491 US 1 (1989).