



COALEX STATE COMPARISON REPORT - 316

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TOPIC: COAL REFUSE DISPOSAL IN VALLEYS WITH STREAMS

INQUIRY: A recent Pennsylvania statute allows the disposal of coal refuse waste in valleys with streams under certain conditions. Do other states allow this? If so, how do they relate this disposal to the requirements of the Clean Water Act - must they comply with Section 402 or 404 of the CWA?

SEARCH RESULTS: Due to the short lead time on this request, only a very limited survey was conducted: West Virginia was contacted by phone and some COALEX/LEXIS research was conducted. A federal court case was identified that discusses compliance with Section 402 versus Section 404 when disposing of surface coal mining waste in small streams.

Results of the survey and research are discussed below. Copies of the materials listed below are attached.

WEST VIRGINIA

How the requirements of the CWA are applied depends on certain factors, e.g., is the stream perennial or intermittent and is the coal refuse acid producing? Mitigation is required if disposal is in-stream. The mitigation policy requires the state to be paid for rendering the stream unusable.

West Virginia Reg. Sec. 38-2-22 (1991). Coal Refuse; 22.3 Permit Requirements - General.

"(s) Underground Disposal. Plans for underground refuse disposal shall be submitted to and approved by the Commissioner and the Mine Safety and Health Administration. All plans must include:

...

(10) The method of treatment of water if released to surface streams".



Sections 22.4 Permit Requirements - Impounding Structures and 22.5 Performance Standards are enclosed for background.

WEST VIRGINIA COAL ASSN. v REILLY, 1991 U.S. App LEXIS 9401; 33 ERC (BNA) 1353; 22 ELR 20092 (4th Cir 1991). WEST VIRGINIA COAL ASSN. v REILLY, 728 F Supp 1276 (SD WV 1989).

The court considered "the question of who has authority over the placement of fill material or water treatment ponds in small streams in West Virginia for the disposal of waste associated with surface coal mining operations": the EPA or the state given NPDES permitting authority under Section 402 of the CWA versus the Army Corps of Engineers under Section 404 of the CWA.

Citing to the memorandum of agreement (MOA) which the EPA and Army Corps of Engineers entered into in 1986 to resolve confusion over which agency had jurisdiction over fill material in-stream treatment procedures, the court stated:

"Paragraph B.4.a. provides that a fill material will be subject to Sec. 404 if its 'discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.' By contrast, paragraph B.5 provides that fill will be subject to Sec. 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.

"It is apparent from the MOA that the types of fills and discharges at issue in this case fall under the B.5 definition and are subject to the EPA's permitting authority under Sec. 402. The discharge of fill material at issue here is expressly for the purpose of disposing of waste or spoil from the mining operations. The EPA concedes that the Secretary of the Army may have some jurisdiction over the use of fills in the construction of the embankment for the ponds since such embankment may be said to be constructed for the 'primary purpose' of 'changing the bottom elevation' or the stream in which it is constructed in order to create the pond."

The circuit court affirmed "the district court's conclusion that the in-stream treatment ponds and the waters above such ponds fall within the definition of 'waters of the United States,' see 40 C.F.R. Sec. 122.2(d), and the EPA did not act beyond its statutory authority in regulating these waters."

ATTACHMENTS



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- A. Excerpts from 1994 Pa. ALS 114; 1994 Pa Laws 114; 1994 Pa HB 1075 amending the Coal Refuse Disposal Control Act.
- B. WEST VIRGINIA Reg. Sec. 38-2-22 (1991). Coal Refuse
 - 1. 22.3 Permit Requirements - General.
 - 2. 22.4 Permit Requirements - Impounding Structures
 - 3. 22.5 Performance Standards
- C. WEST VIRGINIA COAL ASSN. v REILLY, 1991 U.S. App LEXIS 9401; 33 ERC (BNA) 1353; 22 ELR 20092 (4th Cir 1991).
- D. WEST VIRGINIA COAL ASSN. v REILLY, 728 F Supp 1276 (SD WV a 1989).