



COALEX STATE INQUIRY REPORT – 156
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TOPICS: LANDS UNSUITABLE FOR MINING: DEFINITION OF "RENEWABLE RESOURCE" AND "FRAGILE OR HISTORIC LANDS" [Includes COALEX Reports - 85, 35, 39 & 93]

INQUIRY: Is there any legislative history which discusses the use of the word "could" in reference to SMCRA subsections 522(a)(3)(B) and (C)? What information is available on water quality and supply? Is there any caselaw involving EPA-designated sole-source aquifers?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS as well as existing COALEX Reports. The only identification of an explanation for the use of "could" was found in IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (DC DC July 15, 1985) under the discussion of the phrase "natural hazard lands". As a result, information on this phrase has been included in the report, where appropriate. Existing COALEX Reports were identified which provide the legislative history of SMCRA 522(a)(3)(A) and (B), and legislative history and administrative decisions regarding water supply and replacement. A regulation history of the definitions of "fragile lands", etc. and an additional case on water supply are also discussed below. Several Federal Register notices and cases on sole-source aquifers appear at the end of the Report. Copies of all materials are attached.

FRAGILE OR HISTORIC LANDS

Designating Areas Unsuitable for Surface Coal Mining. SMCRA Sec. 522 (30 USC 1272).

"(a)(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will -

...

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems; or (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of feed or fiber products, and such lands to include aquifers and aquifer recharge areas;...."

[Copies of the corresponding CFR sections are attached.]



LEGISLATIVE HISTORY

COALEX STATE INQUIRY REPORT - 85, "Legislative History of SMCRA sec. 522(a)(3)(A) and (B)" (1987).

This Report provides the legislative history of the phrases "fragile or historic lands" and "significant damage" to "important resources".

CASE LAW

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

The court upheld the Secretary's definitions of "historic lands", "fragile lands" and "natural hazard lands" as promulgated in the 1983 regulations. ("Natural hazard lands" remained unchanged from the 1979 definition. See the Federal Register section, below.)

HISTORIC LANDS: Industry objected to the inclusion, in the regulation, of sites eligible for listing or whose listing is pending. The court found it not unreasonable to protect lands "in the process of possibly being declared historic."

FRAGILE LANDS: Industry argued that several of the terms were not clearly defined or were terms not used in the statute. The court stated that the Secretary was not restricted to words used in the Act or found in the legislative history. The Secretary's language did not "stray so far from [the Act's] language" that it was inconsistent with the statute or in any way "beyond his authority." The Secretary's rule was not arbitrary or capricious.

NATURAL HAZARD LANDS: Industry claimed that the Secretary's definition was too broad; the definition in the Act is limited to operations which could endanger life or property. The court determined that the word "could" in the Act referred to situations which "could" endanger; there was no requirement for the "regulatory authority to make a finding of actual danger.

"Viewed this way, the statutory language was broad enough to encompass threats to life and property....The court does not think it is unreasonable to promulgate a rule based on the assumption that surface mining on land that already, without the operation poses a threat to life and property, may continue to pose such a threat when mining takes place there."

REGULATION HISTORY

1. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. [Excerpts.]

"The regulatory authority must consider petitions which are received after a permit application has been filed. Once a permit has been issued, however, the regulatory authority cannot revoke a permit if a petitioner seeks to designate a permitted area."



"Unlike the permit application process, the designation process is to be applied on a natural area basis, rather than a specific mine or site-by-site basis."

2. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. 30 CFR Part 762 - Criteria for Designating Areas as Unsuitable for Surface Coal Mining. Section 762.5 Definitions. [Excerpts.]

FRAGILE LANDS: "[T]his definition does not attempt to imply any degree of significance for those lands defined as 'fragile'. The determination of significance is left to the decision on the petition itself. Also, the listing of examples of lands that may fall within the definition of fragile lands is not meant to be all inclusive....The definition is meant to provide guidance on what general types of resources can be considered fragile lands, not a list of areas which can or should automatically be designated suitable."

HISTORIC LANDS: "The significance test is properly left to the actual decision on the petition using the criteria in the Act which are repeated verbatim in Section 762.11."

"[T]he National Register of Historic Preservation Act of 1966, as amended, provides the same protection for places eligible for listing as for those places already on the National Register of Historic Places....OSM has decided that, for the purposes of Subchapter F, place is 'eligible' at the time the notice of eligibility is published in the Federal Register."

NATURAL HAZARD LANDS: "As written, the definition does not necessarily mean that an area falling within the definition would be automatically considered unsuitable for surface coal mining operations. It is left to the discretion of the State regulatory authority to determine whether an area is unsuitable for surface mining because of natural hazards."

3. 44 FR 14902 (MARCH 13, 1979). Subchapter A - General. 30 CFR Part 701 - Permanent Regulatory Program. Section 701.5 Definitions. [Excerpts.]

RENEWABLE RESOURCE LANDS: This definition is used with respect to subsidence and Subchapter F, designation of lands as unsuitable for mining.

4. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas Unsuitable for Surface Mining. [Excerpts.]

"The proposed rules would modify existing requirements to provide States with new flexibility in carrying out the requirements of the Act. In some cases, the proposed rules would allow regulatory authorities to modify procedural requirements for determining areas unsuitable for surface coal mining operations."

5. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas Unsuitable for Surface Coal Mining. [Excerpts.]

All of Subchapter F was repromulgated.



FRAGILE LANDS: The phrase "beyond an operator's ability to repair or restore" was added to the 1979 definition. OSM reasoned that "mining is an appropriate temporary use of the land in most situations. An interruption of certain activities or a diminution of particular values during mining is not sufficient to classify the land as fragile if the activities or values can be restored."

HISTORIC LANDS: This definition parallels the definition of "fragile lands".

RENEWABLE RESOURCE LANDS: OSM added the definition of the phrase to this section in order "to clarify its use as a discretionary basis for designation of unsuitability under the Act".

NATURAL HAZARD LANDS: The 1979 definition of this phrase was retained.

6. 50 FR 257 (JANUARY 3, 1985). Notice of suspension.

As a result of an agreement by the parties, approved in a December 3, 1982 District Court Order, certain issues were withdrawn from consideration in Round III of the permanent program regulation litigation. Included in the settlement agreement was the suspension of the phrase "beyond an operator's ability to repair or restore" from the definitions of "fragile lands" and "historic lands". Instead of "requiring a showing of irreparable or permanent damage to the lands to allow for designation of an area as unsuitable for mining, a showing of significant damage will be sufficient."

7. 50 FR 30408 (JULY 25, 1985). Proposed rule. Definitions of Fragile Lands and Historic Lands.

Under to the proposed definitions "proponents of an unsuitability petition will no longer be required to show that surface coal mining will cause irreparable or permanent damage to the lands. Only a showing of significant damage will be required to classify lands as fragile or historic".

8. 51 FR 44484 (DECEMBER 10, 1986). Proposed rule. Reopening of comment period. Definitions of Fragile Lands and Historic Lands.

Additional comments were solicited on the need to revise the definition of "fragile lands" by removing references to "buffer zones".

9. 52 FR 18792 (MAY 19, 1987). Final rule. Definitions of Fragile Lands and Historic Lands.

Both definitions were changed to eliminate the requirement of a finding of irreparable damage. Language concerning significant damage was retained in the definition of fragile lands. However, since "the status of historic lands does not depend on their potential for incurring significant damage...the final rule does not include the criterion of significant damage in the definition of historic lands." In addition, the definition of fragile lands was changed "to remove buffer zones adjacent to areas where mining is prohibited, as an example of fragile lands".



WATER SUPPLY AND REPLACEMENT

EXISTING COALEX REPORTS

1. COALEX STATE INQUIRY REPORT - 35, "Water Rights and Replacement" (1985).

This Report provides the legislative history of SMCRA sec. 717, regulatory history of 30 CFR 779.17 and 816.54 [corresponding to SMCRA sec. 717(b) and 508(a)(13)], and available case law.

2. COALEX STATE INQUIRY REPORT - 39, "Water Replacement, Bond Release" (1985).

This Report focuses on the operator's responsibilities and liabilities after bond release, providing some legislative history and related administrative opinions.

3. COALEX STATE INQUIRY REPORT - 93, "Water Rights and Replacement" (1988).

This Report stated that there were no Interior decisions available which specifically address the question: Is there an acceptable level of water quality for water replacement and how long is the operator liable for maintenance of the replacement source? Two decisions from the Pennsylvania Environmental Hearing Board are discussed and an Interior Directive is attached.

ADDITIONAL CASE LAW

VILLAGE OF PLEASANT CITY v DIV. OF RECLAMATION, No. CA-835, slip op (Ohio Ct App 1987).

The village appealed the issuance of a mining permit to R.V.G., Inc. arguing that the CHIA and hydrologic determinations were inadequate; in particular, that the strip mining would interfere with the quantity and quality of the water available through the village's water well supply. The court affirmed the Reclamation Board of Review's decision to grant the permit, ruling that the decision was not "arbitrary, capricious, or otherwise inconsistent with law". A copy of the Board's decision was incorporated into the court's opinion.

SOLE-SOURCE AQUIFER

FEDERAL REGISTER NOTICES

1. 52 FR 6836 (FEBRUARY 14, 1989). Criteria for Identifying Critical Aquifer Protection Areas.

This final rule revised EPA's regulations for identifying areas which are "particularly vulnerable to contamination", where contamination would cause significant economic, environmental or social costs".



2. 52 FR 32342 (AUGUST 27, 1987). EPA designation of a sole-source aquifer.

This is an example of an EPA notice of a determination of a sole or principal source of drinking water that "if contaminated, would create a significant hazard to public health....[A]ll Federal financially assisted projects constructed in [the area]...will be subject to EPA's review". The notice includes the text of section 1424(e) or the Safe Drinking Water Act (42 USC 300f, 300h-3(e)).

A list of additional Federal Register notices of sole-source aquifer determinations is attached to this item.

CASE LAW

1. US v MATTIACE INDUSTRIES, INC., CARGO TRUCKING, INC., AND INTERSTATE CIGAR CO., INC., 73 Bankr. 816; 17 ELR 21004 (ED NY 1987).

US, on behalf of the EPA, won the exemption to the automatic stay provision of the Bankruptcy Code. The US sought to hold the defendants liable for the cleanup of a chemical spill which had seeped into the soil underneath an EPA designated sole-source drinking water aquifer.

2. NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC) et al. v US EPA, 824 F 2d 1258 (1st Cir 1987).

NRDC challenged EPA's rules for the long-term disposal of high level radioactive waste under the Nuclear Waste Policy Act of 1982, alleging that the regulations violated the Safe Drinking Water Act. The rules for individual and ground water protection requirements were remanded to EPA.

3. FLORIDA WILDLIFE FEDERATION et al. v GOLDSCHMIDT, 506 F Supp 350 (SD Fla 1981).

The court denied plaintiff's motion for preliminary injunction to halt construction of a segment of Interstate 75. The Florida Wildlife Federation failed to prove that construction of the highway and the attendant secondary development would cause irreparable harm to the Biscayne Aquifer.

ATTACHMENTS

- A. CFR sections
 - 1. 30 CFR 762.5 Definitions.
 - 2. 30 CFR 762.11 Criteria for designating lands as unsuitable.
- B. COALEX STATE INQUIRY REPORT - 85, "Legislative History of SMCRA sec. 522(a)(3)(A) and (B)" (1987).
- C. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (DC DC July 15, 1985).



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- D. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. [Excerpts.]
- E. 44 FR 14902 (MARCH 13, 1979). Subchapter F - Areas Unsuitable for Mining. 30 CFR Part 762 - Criteria for Designating Areas as Unsuitable for Surface Coal Mining. Section 762.5 Definitions. [Excerpts.]
- F. 44 FR 14902 (MARCH 13, 1979). Subchapter A - General. 30 CFR Part 701 - Permanent Regulatory Program. Section 701.5 Definitions. [Excerpts.]
- G. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas Unsuitable for Surface Mining. [Excerpts.]
- H. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas Unsuitable for Surface Coal Mining. [Excerpts.]
- I. 50 FR 257 (JANUARY 3, 1985). Notice of suspension.
- J. 50 FR 30408 (JULY 25, 1985). Proposed rule. Definitions of Fragile Lands and Historic Lands.
- K. 51 FR 44484 (DECEMBER 10, 1986). Proposed rule. Reopening of comment period. Definitions of Fragile Lands and Historic Lands.
- L. 52 FR 18792 (MAY 19, 1987). Final rule. Definitions of Fragile Lands and Historic Lands.
- M. COALEX STATE INQUIRY REPORT - 35, "Water Rights and Replacement" (1985).
- N. COALEX STATE INQUIRY REPORT - 39, "Water Replacement, Bond Release" (1985).
- O. COALEX STATE INQUIRY REPORT - 93, "Water Rights and Replacement" (1988).
- P. VILLAGE OF PLEASANT CITY v DIV. OF RECLAMATION, No. CA-835, slip op (Ohio Ct App 1987).
- Q. 52 FR 6836 (FEBRUARY 14, 1989). Criteria for Identifying Critical Aquifer Protection Areas.
- R. 52 FR 32342 (AUGUST 27, 1987). EPA designation of a sole-source aquifer.
- S. US v MATTIACE INDUSTRIES, INC., CARGO TRUCKING, INC., AND INTERSTATE CIGAR CO., INC., 73 Bankr. 816; 17 ELR 21004 (ED NY 1987).
- T. NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC) et al. v US EPA, 824 F 2d 1258 (1st Cir 1987).
- U. FLORIDA WILDLIFE FEDERATION et al. v GOLDSCHMIDT, 506 F Supp 350 (SD Fla 1981).