# COALEX STATE INQUIRY REPORT - 66
## April 14, 1986

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**TOPIC:** JUDICIAL REVIEW

**INQUIRY:** Investigate the legislative history of judicial review under Sec. 526(a)(1) and Sec. 526(e) of SMCRA.

**SEARCH RESULTS:** Sec. 526(a)(1) of SMCRA provides for judicial review of certain actions taken by the Secretary, while Sec. 526(e) provides for judicial review of actions taken by a state regulatory authority. In Sec. 526(a)(1), actions of the Secretary to approve or disapprove a state program, to promulgate national rules, and to perform other rulemaking functions are made subject to judicial review. Actions relating to state program approval/disapproval are reviewable by the United States District Court for the district including the capital of the state whose program is at issue. Actions relating to promulgation of national rules are reviewable by the District Court for the District of Columbia circuit. Finally, actions relating to other rulemaking are reviewable by the District Court for the district in which the surface coal mining operation is located. Petitions for review must be filed within sixty days of the Secretary's action, but may be filed later if the petition is based solely on grounds arising after the sixtieth day. In addition, petitions may only be filed by persons who participated in the administrative proceedings and are aggrieved by the action.

In contrast, Sec. 526(e) makes actions of state regulatory authorities pursuant to an approved state program subject to judicial review. Review of the regulatory authority's action may be held in a "court of competent jurisdiction". While "court of competent jurisdiction" is not defined, there is some indication in the legislative history that the phrase is meant to refer to state courts (See 120 Cong. Rec. 25227 (1974), discussed infra.) This section does not specify requirements that the petitioner file within any set time period, nor does it impose a requirement that the petitioner must have participated in the administrative proceeding and be aggrieved. Instead, the section simply requires that the review shall be "in accordance with State law". Further, the section explicitly states that review under Sec. 526(e) shall not be construed to limit the rights established under Sec. 520 (citizen suits), indicating that Secs. 526(e) and 520 are co-extensive and not mutually exclusive.

Sec. 526(a)(1) has evolved through several minor legislative revisions. Those revisions focused primarily on the appropriate courts for review and appropriate time limitations on filing petitions. Beyond a rejected amendment proposed 1974 to delete Sec. 526(e), that section has remained virtually untouched throughout the legislative history of the Act.

Search conducted by: Mary Perdue

**HISTORY**

The first version of the Surface Mining Control and Reclamation Act appeared in 1974 in H.R. 11500. The House bill provided for judicial review in section 221 as follows:

"Section 221. Judicial Review
"Any decision of the Secretary approving or disapproving a State program under section 203 or preparing and promulgating a Federal program under section 204 may be reviewed in an appropriate United States Court of Appeals by a petition filed within 60 days of such decision by a person who participated in the administrative proceedings and who was aggrieved by such decision according to this section.

"All other decisions or orders of the Secretary shall be reviewable in the appropriate United States District Court for the locality in which the surface coal mining operation is located. Commencement of a proceeding under this section shall not operate as a stay of action by the Secretary unless so ordered by the court." (H.R. Rep. 1072, 93rd Cong., 2d Sess. at 143 (1974))

The early focus on judicial review arose during debates on the proposed House bill H.R. 11500. In May of 1974, a letter to Congressman Haley concerning various provisions of H.R. 11500 made the following suggestions:

"Judicial review; procedure. Actions implementing H.R. 11500 should be subject to review only by United States Courts of Appeals rather than by U.S. District Courts and Federal regulations of program-wide import (those issued pursuant to sections 202. 211 and 212) should be reviewed only in the United States Court of Appeals for the District of Columbia on a petition to review filed within 90 days of the issuance of the regulations. In addition, we believe the language of section 222 permitting judicial review of Secretarial disapproval of State plans should be eliminated. This would be consistent with other environmental laws which preclude review of such decisions." (120 Cong. Rec. 17086 (1974))

Later debate the same year yielded a specific proposal to amend the judicial review provisions of H.R. 11500, found at Sec. 221. This proposal incorporated review by the Court of Appeals for state program approval/disapproval and for promulgated regulations, while vesting the District Court with jurisdiction to review other orders and decisions by the Secretary. The filing period for petitions objecting to actions approving or disapproving state programs was set at thirty days. The specific filing periods days were proposed as follows:

"Section 211. (a)(1) Any action of the Secretary to approve or disapprove a state program pursuant to section 203 of this Act or to prepare and promulgate a Federal program pursuant to section 204 of this Act shall be subject to judicial review only by the appropriate United States Court of Appeals upon the filing in such court within thirty days from the date of such action of a petition by any person who participated in the administrative proceedings related thereto and who is aggrieved by the action praying that the action be modified or set aside in whole or in part...

"(2) Any promulgation of regulations by the Secretary to sections 211, 212, and 255 of this Act shall be subject to judicial review only by the appropriate United States Court of Appeals in accordance with the procedures set forth in subsection (1) of this section.

"(3) All other orders or decisions issued by the Secretary pursuant to this Act shall be subject to judicial review only in the United States District Court for the locality in which the surface coal mining operation is located." (120 Cong. Rec. 23263 (1974))

These amendments were offered in substantially the same form and were coupled with a proposal to delete subsection (e) review of state programs. (For text of the proposed amendments see 120 Cong. Rec. 25224-25225 (1974).) The following explanation of the amendments were offered:

"Mr. Chairman, my amendment to section 221 substitutes the language of section 215 of H.R. 12898. Under the provisions of the existing 221, judicial review of the approval of a State program shall be in the court of appeals. A petition for review must be filed within 60 days. My amendment would shorten that period to 30 days, but its authorization would not disturb the principal provisions in this regard. Promulgation of regulations by the Secretary are made subject to review in the court of appeals by my amendment. No mention of judicial review of the Federal regulations is now contained in section 221. Certainly the promulgation of regulations is a matter of such great importance in the administration of this act that judicial review must be clearly and specifically authorized . . . Finally, subsection (e) which relates to the review of State programs is eliminated as unnecessary. The existing subsection (e) places jurisdiction for review of action by the State regulatory authority in State courts. It is clear that such law would govern anyway. and, therefore, this subsection is surplusage." (120 Cong. Rec. 25227 (1974))

The amendments to S. 425 proposed by the House of Representatives contained Court of Appeals review of approval/disapproval for state programs, and a sixty day petition filing cutoff. Other orders and decisions by the Secretary were made reviewable by the District Court for the locality in which the surface coal mining operation is located. Subsection (e), providing for review by a court of competent jurisdiction with regard to actions by the State regulatory authority, was retained. (See 120 Cong. Rec. 25843 - 25844 (1974).)

The language of those amendments appears in the text of S. 7 which appears in the report by the Committee on Interior and Insular Affairs. (See S. Rep. No. 28, 94th Cong., 1st Sess. at 131-133 (1975) (setting forth the text of S. 7).) The report refers only briefly to judicial review under Sec. 526, and stating that the section provides specific provisions for judicial review of Secretarial actions. (Id. at 183) No mention is made of subsection (e) and review of state regulatory actions, however, that subsection does appear in the text of S.7. (Id. at 133)

In the committee's report on H.R. 25, the same synopsis of judicial review provisions appears. (See H.R. Rep. No. 45, 94th Cong., 1st Sess. at 121 (1975).) Again, no reference is made to any specific provisions for review of actions by state regulatory authorities. Review of actions by the Secretary is vested in the appropriate Court of Appeals for actions with regard to State programs, and in the District Court for the locality of the mining operation for actions with regard to other

decisions and orders. Petitions objecting to actions on state programs are required to be filed within sixty days. (See H. Rep. No. 45, 94th Cong., 1st Sess. at 207 (1975).)

The judicial review provisions appear with no major changes in March, 1975 debate. The Court of Appeals - District Court distinction is retained for the different types of actions by the Secretary. The sixty day petition cutoff is also retained, along with subsection (e). (See 120 Cong. Rec. 6830 (1975).)

In hearings before a subcommittee of the Senate Committee on Energy and Natural Resources, an industry representative set forth the position that all judicial review should be brought in the Court of Appeals. (See Surface Mining Control and Reclamation Act of 1977: Hearings on S.7. Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. at 684 (1977) (statement of Edward Weinberg, Counsel, Western Fuels Ass'n. Inc.).) During these hearings, another industry representative favored vesting all judicial review in the Court of Appeals, and also pointed out that current bills did not specify the "appropriate" Court of Appeals. An amendment was proposed to specify that the "appropriate" Court of Appeals is the court for the circuit in which the state involved is located. (Id. at 917-918 (statement of G. Scott Cuming, Senior Vice President and General Counsel, El Paso Company)) In later hearings, Mr. Weinberg again asserted industry support for judicial review in the Court of Appeals for all Secretarial action. (See Surface Mining Control and Reclamation Act of 1977: H.R. 2 Before the Subcomm. on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. at 112-113 (1977) (statement of Edward Weinberg of Duncan, Brown, Weinberg & Palmer, P.C., Counsel to Western Fuels Ass'n. Inc.).)

The 1977 House Report on H.R. 2 insets a judicial review synopsis very similar to the 1975 report on H.R. 25. The "appropriate" Court of Appeals for review of Secretarial actions on state programs is specified as the Court of Appeals "for the circuit which contains this (sic) State whose program is at issue". Review for promulgation of regulations is vested in the Court of Appeals for the District of Columbia, while review of other orders and decisions is left with the District Courts. (See H.R. Rep. No. 218, 95th Cong., 1st Sess. at 177 (1977).) The views of the Justice Department, favoring the provisions on judicial review are also expressed in the report. (Id. at 163-166) (See also Id. at 70 for further explanation of the amendments.)

The Senate Report on S.7 does not discuss any judicial review changes significantly different from H. Rep. 95-218 on H.R. 2. (See S. Rep. No. 128, 95th Cong., 1st Sess. 41-42, 96. (1977).) S. Rep. 337 on H.R. 2 presents changes in the courts of review for Secretarial actions from the Court of Appeals to District Courts in all instances. No other significant charges were made. (See S. Rep. 95-337, 95th Cong., 1st Sess. at 75111 (1977)) Finally, H. Rep. 95-493 adopts the judicial review language presented in S. Rep. 95-337. (See H.R. Rep. 493, 95th Cong., 1st Sess. at 75111 (1977).)

**ATTACHMENTS**

A. Excerpt, H.R. Rep. No. 1072, 93rd Cong., 2d Sess., (1974).

B. Excerpt, 120 Cong. Rec. 17986 (daily ed. May 30, 1974) (letter to Congressman Haley concerning H.R. 11500).
C. Excerpt, 120 Cong. Rec. 23263 (daily ed. July 15, 1974).
D. Excerpt, 120 Cong. Rec. 25224 - 25227 (daily ed. July 24, 1974).
E. Excerpt, 120 Cong. Rec. 25843 - 25844 (daily ed. July 30, 1974)(message from the House of Representatives on S. 425).
F. Excerpt, S. Rep. No. 28. 94th Cong., 1st Sess. at 131-133, 183 (1975).
G. Excerpt, H.R. Rep. No. 45, 94th Cong., 1st Sess. at 121, 207 (1975).
H. Excerpt, 120 Cong. Rec. 6830 (daily ed. March 17, 1975).
I. Excerpt, Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. at 684, 917-918 (1977) (statements by Edward Weinberg Counsel, Western Fuels Ass'n Inc. and G. Scott Cuming, Senior Vice President and General Counsel, El Paso Company).
J. Excerpt, Surface Mining Control and Reclamation Act of 1977: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. at 112-113 (1977) (statement of Edward Weinberg of Duncan, Brown, Weinberg & Palmer, P.C., Counsel to Western Fuels Ass'n. Inc.).
K. Excerpt, H.R. Rep. No. 218, 95th Cong., 1st Sess. 70, 163-166, 177 (1977).
L. Excerpt, S. Rep. No. 128, 95th Cong., 1st Sess. at 41-42, 96 (1977).
M. Excerpt, S. Rep. No. 337, 95th Cong., 1st Sess. at 76111 (1977).
N. Excerpt, S. Rep. No. 493, 95th Cong., 1st Sess. at 75111 (1977).