

Significant 2006 Court Decisions

There were six significant court decisions that influenced the implementation of the Surface Mining Act during 2006. The cases involved issues on takings, valley fills, material damage, hydrology, acid mine drainage, and Environmental Impact Statements.

In Tennessee

Takings Claim Fails to Prevail

Cane Tennessee, Inc. v. United States and Colten, Inc. v. United States

Plaintiffs claimed a permanent and temporary taking of their coal interests based on OSM's permitting action and the Secretary of the Interior's designation of certain land's unsuitability for surface coal mining operations. Plaintiffs own the fee interest (surface and minerals) in certain lands and the mineral interests only in other lands located in close proximity to Fall Creek Falls State Park, Tennessee. Plaintiffs were seeking \$8,000,000 for the alleged permanent taking based on the land's unsuitability for mining designation made by the Secretary and \$7,500,000 for the alleged temporary taking.

The only remaining liability issue that required resolution by the trial court was Cane Tennessee Inc.'s (Cane) permanent takings claim based on the land's unsuitability for mining designation. The Court has previously decided all other claims in favor of the Government. On January 25, the Court granted in part and denied in part the Government's motion for summary judgment. The Court agreed with the Government that Cane lacked "reasonable investment-backed expectations" but concluded there were genuine issues of material fact on the issue of "economic impact" and ordered an evidentiary hearing on that issue. A trial was held on July 12-13, on the issue of whether the property held by Cane had any non-coal value after June 17, 2000, the date of the Government action.

On October 27, 2005 the United States Court of Federal Claims found that the Cane tracts had a significant market value after the Secretary's unsuitability decision on June 17, 2000, and that the "economic impact" of that regulatory act did not constitute a sufficiently serious financial loss to constitute a taking. Therefore, the Court concluded that the plaintiff failed to establish that its property was taken by the Government.

OSM Prevails in NEPA Lawsuit

On June 29, 2006, a three judge panel of the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision to issue an Opinion granting the Government's motion for summary judgment in the case of Save Our Cumberland Mountains, et al., v. Dirk Kempthorne, et al. In the District Court case, plaintiffs and four environmental organizations had challenged OSM's June 30, 2003, decision to issue a permit to conduct surface coal mining operations in Campbell and Scott Counties, Tennessee. Pursuant to the Administrative Procedures Act, plaintiffs contended that in complying with NEPA, OSM's decision not to prepare an Environmental Impact Statement was arbitrary and capricious. Upon review of the entire record, the District Court concluded that OSM's decision to prepare an environmental assessment and Finding of No Significant Impact (FONSI) for the permit was not arbitrary, capricious, or an abuse of discretion.

In the Court of Appeals decision, the Court affirmed, with one caveat, the District Court's decision. The Court of Appeals concluded that OSM's position to only consider three alternatives in the environmental assessment - grant the permit, deny the permit, or take no action - unduly circumscribed the scope of the alternatives that the statute and regulations require Federal agencies to consider. However, the Court nonetheless concluded that the administrative record showed the agency had in effect considered other options to the permit request (primarily modifications to the application that would diminish the environmental consequences of the mining). OSM's Knoxville Field Office had already implemented changes in preparing its environmental assessments by expanding the range of alternatives the agency considers under NEPA after reviewing the February 23, 2005, District Court decision.

Program Amendments Decision Appealed

On January 19th, 2006, the Department filed a protective Notice of Appeal of the November 22nd, 2005, Amended Judgment Order by the Federal District Court for the Southern District of West Virginia revising OSM's December 2003 approval of two West Virginia State program amendments related to hydrologic protection. The US Court of Appeals for the Fourth Circuit established a briefing schedule on January 27, 2006.

Decision prohibiting Nationwide Permits Overturned

On November 23, 2005, the 4th Circuit Court of Appeals overturned an earlier decision prohibiting the U.S. Army Corps of Engineers' approval for valley fills without conducting a site-specific environmental assessment. Last year, U.S. District Judge Joseph R. Goodwin ruled that the approval of general permits for valley fills violated the Clean Water Act and ordered that all valley fill permits be considered as Individual Permits. The Appeals Court determined that the use of general permits did not violate the Clean Water Act and vacated the District Court decision.

District Court Amends Judgment Order On "Cumulative Impact" Definition

On September 30th, 2005, U.S. District Court for the Southern District of West Virginia vacated the Secretary's approval of the State's deletion of its definition of "cumulative impact" and its addition of the definition of "material damage to the hydrologic balance outside the permit area". On November 1st, in response to the Court's decision, OSM sent the West Virginia Department of Environmental Protection (WVDEP) a 30 CFR Part 732 notification stating that the State cannot implement the new definition of "material damage to the hydrologic balance outside the permit area" and must re-insert into the West Virginia program the deleted definition of "cumulative impact."

On November 22, 2005, the Court issued an amended judgment order that directed OSM to instruct the State that it may not implement the deletion of the definition of "cumulative impact" nor the addition of the definition of "material damage to the hydrologic balance outside the permit area". The Court clarified that the State must enforce only the State program as approved by OSM prior to the amendments. In response to the Court's decision, on January 5, OSM sent WVDEP a letter rescinding the November 1, 2005, 30 CFR Part 732 notification and informing the State that the definition of "cumulative Impact" remains part of the approved West Virginia program and, as such, must be implemented by the State. OSM also stated that the definition of "material damage to the hydrologic balance outside the permit area" remains disapproved and cannot be implemented.

Court Upholds IBLA Decision Affirming OSM's Procedure

West Virginia Highlands Conservancy v. Norton, No. 2:05-CV-11 (N.D.W. Va.)

On March 7, 2006, the U.S. District Court for the Northern District of West Virginia denied the West Virginia Highlands Conservancy's (WVHC) motion for summary judgment and granted the Department's motion for summary judgment affirming the Interior Board of Land Appeals' (IBLA) decision in OSM's favor.

This matter involved a follow-up citizen complaint to an initial citizen complaint. The initial complaint led to citation of a permittee for discharging acid mine drainage from its mine site, but did not result in abatement. The follow-up complaint requested further enforcement action, part of which OSM pursued (referral for alternative enforcement action). The WVHC was not satisfied, since abatement still was not achieved, and sought review by IBLA. The WVHC contended mere referral for alternative enforcement action was insufficient, since abatement was not achieved.

The IBLA upheld OSM's action as reasonable at the time it was taken. The WVHC then requested judicial review, contending the citizen complaint regulations, principally 30 CFR 842.15, require abatement before OSM finally decides an informal review request of an enforcement action. The Court agreed with OSM that IBLA's interpretation of the regulation to require a final appealable decision on a specific citizen complaint within 30 days, as expressly provided by the regulation, was reasonable and due deference.

New Logo for Mid-Continent



Charles "Sandy" Sandberg, director of OSM's Mid-Continent Region, and Stefanie Self show off a t-shirt bearing Stefanie's winning design for the new MCR logo.



For more information about OSM and its programs

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