



COALEX STATE INQUIRY REPORT - 11

August 13, 1984

Donald A. Brown
Department of Environmental Resources
Bureau of Litigation
503 Executive House
P.O. Box 2357
Harrisburg, Pennsylvania 17120

TOPIC: P.L. 95-87, SEC. 521(a)(3) - 90-DAY ABATEMENT PERIOD

INQUIRY: Has there been any case law interpreting the 90-day provision cited in Sec. 521(a)(3)?

BACKGROUND: Entered consent decree beyond the 90-day period for a company which is not returning for an extension. Are opposing an additional extension on the basis that physical inability to comply is not an adequate defense.

SEARCH RESULTS:

Sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) states that when a violation occurs which "does not create an imminent danger to the health or safety of the public, or cannot be reasonable expected to cause significant, imminent environmental harm", the Secretary or an authorized representative shall issue a notice "fixing a reasonable time but not more than ninety days for the abatement of the violation".

In the Act's subsequent paragraph addressing the issuance of cessation orders by the Secretary or his authorized representative, SMCRA implies that the time for abatement may be extended "for good cause shown". (30 USC Sec. 1271(a)(3))

A search in COALEX of the legislative history of the Act failed to locate any reference suggesting the Congressional intent of the phrase "good cause shown". In a hearing before the Senate Subcommittee on Public Lands and Resources, Steven L. Friedman, Counsel, Pennsylvania Coal Mining Association, suggested the following amendment be made to Senate Bill S-7, Sec. 421(a)(3):

"...the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation conditions permitting.

"If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he may immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation subject to the procedures of this section. (Hearing, Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources (February 7, 1977; March 1, 2 and 3, 1977))



Senate Bill S-7 and P.L. 95-87 did not incorporate the suggested changes which would have made the issuance of a cessation order discretionary.

Addressing the abatement period issue, the federal interim and permanent regulatory programs were modified, August 17, 1981, by OSM to contain a list of conditions defining the criteria by which the 90-day abatement period could be extended. The Office of Surface Mining (OSM) found "that there are certain very limited cases where, because of the nature of the violation or circumstances beyond the permittee's control, abatement within 90 days is impossible or would cause greater environmental harm than would abatement at a later date." (46 FR 41702 (1981))

The federal regulations, as amended, include five criteria by which a mining operation may qualify for an extension to the 90-day abatement period:

"(1) Where the permittee of an ongoing permitted operation has failed to obtain permit renewal or other necessary approval of designs or plans for reasons outside of his control, e.g., because the regulatory authority is unable to process the application within 90 days after the permit expires.

"(2) When a valid judicial order precludes abatement within 90 days and the permittee is diligently pursuing all rights of appeal and knows no other effective legal remedy.

"(3) When the 90-day abatement is prevented because of a labor strike.

"(4) When climatic conditions either preclude abatement within the 90 days or because of climatic conditions abatement within 90 days would clearly cause more environmental harm than it would prevent.

"(5) Where abatement within 90 days requires action that would violate safety standards established under the Mine Safety and Health Act of 1977." (30 CFR 843.13(f))

The final OSM rules stipulate that the permittee has the "burden of establishing by clear and convincing proof that he or she is entitled to an extension". (30 CFR 843.13(h)) Determination made under this section of the regulations must be in writing and contain a right of appeal to the Office of Hearings and Appeals. (30 CFR 843.13(i))

Under the Act, state regulatory programs are required to include enforcement provisions "no less stringent" than those in Sec. 521. (SMCRA Sec. 521(d)) The regulations specifically require they be consistent with those in 30 CFR 843.12 Notices of Violation. (30 CFR 840.13)

On two occasions, state regulatory authorities were required by OSM to revise their submitted regulations concerning the accepted criteria for extending the 90 days abatement period. (Pennsylvania, 48 FR 40888 (1983); and Virginia, 47 FR 31549 (1982))

Concerning Pennsylvania, in 30 CFR 938.11(j), the Secretary required that the state regulations be amended to "limit the circumstances when abatement times in excess of ninety days will be permitted to be the same or similar to 30 CFR 843.12...." The Secretary's decision was upheld by the federal court. (PENNSYLVANIA COAL MINING ASSOC., et al. v JAMES G. WATT, AND COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Div. A. No. 82-1129, 562 F Supp 741 (MD Pa 1983))



Pennsylvania's regulation, as submitted in 25 Pa Code 86.211, provided for additional time to be allowed when "necessary to achieve the standards set forth in the Acts and regulations...such additional time may be granted for reason of financial hardship or impossibility, but only when additional time is essential for the achievement of the standards of environmental protection set forth in the Act and regulations promulgated thereunder...."

The court decisions stated that:

"The federal regulation is quite specific and it can be seen that there is little if any room for subjective determination. Five circumstances are outlined in which extensions may be considered and we have no difficulty in concluding that Pennsylvania's broad regulation exceeded the scope of the federal provision." (562 F Supp 741)

An "inability to comply" is not included among these five conditions. Under 30 CFR Sec. 722.17 and 843.18, the regulations state that inability to comply does not constitute an affirmative defense with response to the issuance of a violation or cessation order. Secs. 722.17(a) and (b) were upheld by a federal court (IN RE: SURFACE MINING REGULATION LITIGATION, 456 F Supp 1301 (DDC 1978))

OSM, in its preamble to the 1981 modification of the interim and permanent regulatory programs stated that the five conditions by which a mining operation could qualify for a 90-day extension did not affect the "inability to comply" provision under 30 CFR Secs. 722.17 and 843.18 (46 FR 41702 (1981))

In a search of LEXIS, no additional cases were identified applying these regulatory requirements to individual fact situations.

ATTACHMENTS:

- A. Excerpts from Hearing, Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources (February 7, 1977' March 1, 2 and 3, 1977).
- B. 46 FR 41702-41706 (AUGUST 17, 1981).
- C. Excerpts from IN RE: SURFACE MINING REGULATION LITIGATION, 456 F Supp 1301(DDC August 24, 1978).
- D. Excerpts from PENNSYLVANIA COAL MINING ASSOC., et al. v JAMES G. WATT, AND COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Div. A. No. 82-1129, 562 F Supp 741 (MD Pa 1983).