



COALEX STATE INQUIRY REPORT - 19

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Sue A. Shadley, Legal Analyst
Division of Reclamation
309 W. Washington Street
Indianapolis, Indiana 46204

TOPIC: INTERPRETATION OF "IN ACCORDANCE WITH" AND "CONSISTENT WITH"

INQUIRY: Under SMCRA Sec. 503(a), in order for a state to obtain primacy under the Act, it must enact state law which provides regulation of surface coal mining and reclamation operations "in accordance with the requirements of [the] Act". Moreover, the state regulatory program must be "consistent with" the federal regulations promulgated under SMCRA. Has there been any interpretation of what constitutes "in accordance with" and "consistent with"?

SEARCH RESULTS:

A COALEX search was conducted of the legislative history of the Act to identify Congressional interpretation of these phrases prior to the Act's passage. No specific definition of the phrases was identified. In July, 1977, the House and Senate Conference Report stated that "an approved state program requires (1) a State law consistent with the Federal law and (2) State rules and regulations consistent with the Secretary's regulations. The Conference Report retains the basic principle that the Federal law and regulations are minimum standards which may be exceeded by the States." (H. Rep. No. 95-493, 95th Cong., 1st Sess. 102 (1977))

The May, 1977 Senate Report No. 95-128 stated that because of the variety of regional conditions, the administration of surface coal mining regulation and reclamation "is more properly done by the States". Concurrently, "uniform minimum Federal standards [were] needed to establish minimum criteria for regulating surface mining and reclamation activities throughout the country." The design and enforcement of the state programs were to be "in conformance with Federal criteria". (S. Rep. 95-128, 95th Cong., 1st Sess. 51-52 (1977))

A COALEX search was also conducted of Office of Surface Mining (OSM) Federal Register notices to identify any further interpretation of the phrases. Under the 1979 federal regulations promulgated by the Secretary, "in accordance with" and "consistent with" were defined in 30 CFR Sec. 730.5 as meaning:

"(a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act. (b) With regard to the Secretary's regulations, the State laws and regulations are no less stringent than and meet the applicable provisions of the regulations of this chapter." (44 FR 15324 (1979))

In 1981, 30 CFR Sec. 730.5(b) was amended as follows:

"With regard to the Secretary's regulations, [consistent with and in accordance with mean that] the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of the Act." (46 FR 53376 (1981))



The 1981 revision of the definition of these terms was intended, according to the Federal Register preamble, "to give States more flexibility in the development of regulations for surface coal mining and reclamation operations within their borders." (46 FR 53376 (1981))

At the same time, 30 CFR Sec. 731.13, which delineated the conditions under which a state could request an alternative to the federal regulation, was deleted from the regulations. Generally known as the "State window", Sec. 731.13 required that the state demonstrate that a proposed alternative was "necessary because of local requirements or local environmental or agricultural conditions."

OSM stated in the preamble to the 1981 amendments that the regulatory change was intended to address the state criticism that the "State window" unnecessarily restricted state alternatives to the federal regulation. Further, that the amendments made it clear that:

"States are not required to adopt the Secretary's regulations; that within limits described herein, they are free to develop and adopt regulations which meet their special needs. States are no longer required to demonstrate that each alternative is necessary because of local requirements of local environmental or agricultural conditions. In addition, States are not required to mirror all applicable provisions of the Secretary's regulations. A State program, including its laws and regulations will, however, have to be as effective as the Secretary's regulations in meeting the requirements of the Act in order to be approved. This implements Congress' intent that the Secretary's regulations serve as the benchmark for evaluating State proposals." (46 FR 53377 (1981))

The meaning of the phrase "no less effective than" was further elaborated in the preamble as follows:

"To be no less effective in meeting the requirements of the Act' the State program must provide assurance that the State provisions will be as effective in meeting the requirements of the Act as the Federal regulations. The standards for judging the effectiveness of the State proposals are the appropriate Federal regulations, however, the State approach no longer need duplicate the approach in the Federal regulations.

"With respect to judging the effectiveness of State provisions which are alternatives to the Secretary's regulations, the type or purpose of the provision will affect the Secretary's review. In judging the effectiveness of an alternative to the Secretary's regulations dealing with mining and reclamation operations performance standards, OSM will analyze whether the Secretary's regulatory objective is as likely to be achieved by the State alternative as by the comparable Federal regulations. Alternatives to procedural provisions in the Secretary's regulations will be evaluated from the point of view of their similarity to the Secretary's rules in affording rights and remedies to persons. Where Sections 518(i) and 521(d) do not apply, the effectiveness of alternatives to the enforcement and penalty provisions will be evaluated from the standpoint of whether operators will be as likely to maintain compliance under the State program as under a program containing the Federal rules. Monetary and other penal provisions of a State program must be similar in severity to those in the Act and as effective as the Federal regulations in meeting the requirements of the Act." (46 FR 53377 (1981))

A further search of LEXIS was conducted to identify legal cases involving the interpretation of the phrases "in accordance with" and "consistent with". In the cases identified, the courts have



applied the regulatory definition of 30 CFR Sec. 730.5 in conjunction with SMCRA Sec. 526(a) which specifies standards for the judicial review of the Secretary's approval or disapproval of state regulatory programs. The Statute requires that the Secretary's action "be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law".

In *VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC. v JAMES G. WATT*, No. 83-1828 (4th Cir 1984), the court based its decision on the following:

"A court reviewing the Secretary's approval of a state program must decide whether the Secretary acted arbitrarily, capriciously, or otherwise inconsistently with law in concluding (a) that the proposed program comprises state regulations no less effective than the Secretary's, and (b) that state laws are not less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act.

"As a general rule of law, agency action is arbitrary, capricious, or otherwise inconsistent with law unless the record demonstrates that it is rational, based on relevant consideration, and within the scope of the agency's delegated authority. *MOTOR VEHICLE MFR. ASSN. v STATE FARM MUTUAL*, ___ US ___ (1983); *CITIZENS TO PRESERVE OVERTON PARK, INC. v VOLPE*, 401 US 402 (1971). Furthermore, insofar as an agency decision marks a dramatic change in agency policy, it must be supported by a reasoned analysis explaining the change. *MOTOR VEHICLE MFR. ASSN.*, ___ US ___."

In a disagreement centered on a question of statutory construction, the Court held that the Secretary's interpretation was "entitled to deference" (*Id.* at pt. 2)

In *PENNSYLVANIA COAL MINING ASSOC. v JAMES G. WATT*, 562 F Supp 741 (D Pa 1983), the court bases its review on the definition promulgated under Sec.730.5, and SMCRA Sec. 526(a)(1), making the observation that "[t]his standard for judicial review, obviously, places the burden of proof on one attacking the action of the Secretary in approving a state program or requiring amendment thereto."

The standard of review applied in *CITIZENS FOR RESPONSIBLE RESOURCE DEVELOPMENT v JAMES G. WATT*, 579 F Supp 431 (D Ala 1983) was based on a Supreme Court decision addressing similar statutory language used in the Administrative Procedure Act, 5 USC Sec. 706(2)(A):

"Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....' To make this finding, the court must consider whether the decision was based on the relevant factors and whether there has been a clear error of judgment.... Although this inquiry into the facts is to be searching and careful, the ultimate standards of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." (*CITIZENS TO PRESERVE OVERTON PARK, INC. v VOLPE*, 401 US 402, 416, 91 S Ct 814, 28 L Ed 2d 136 (1971))

The District Court rejected the plaintiff's argument that a section of the state regulatory program "was less effective' than the applicable provision in the SMCRA because it does not exactly mirror' all provisions of the SMCRA and the corresponding regulations" and at another point,



reminded the plaintiff "that Congress did not intended that the state laws and regulations exactly mirror their federal counterparts; rather, the state laws and regulations must be in accordance with the federal law."

ATTACHMENTS:

- A. Excerpt from H. Rep. No. 95-493, 95th Cong., 1st Sess. 102 (1977).
- B. Excerpt from S. Rep. 95-128, 95th Cong., 1st Sess. 51-52 (1977).
- C. 46 FR 53376 (1981).
- D. Excerpt from PENNSYLVANIA COAL MINING ASSOC. v JAMES G. WATT, 562 F Supp 741(D Pa 1983).
- E. Excerpt from VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC. v JAMES G. WATT, No. 83-1828 (4th Cir 1984).
- F. Excerpt from CITIZENS FOR RESPONSIBLE RESOURCE DEVELOPMENT v JAMES G. WATT, 579 F Supp 431 (D Ala 1983).