



COALEX STATE INQUIRY REPORT – 122
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TOPIC: PERMITTING

- A. PERMIT APPLICATION APPROVAL PROCESS**
- B. IMPACTS ON AREAS OUTSIDE THE PERMIT BOUNDARY**

INQUIRIES:

- A. Do the regulatory agencies in other states engage in independent information gathering in the permitting process or only review, evaluate and criticize the information the operator puts in the permit application as being accurate, workable and consistent with the Surface Mining Control and Reclamation Act of 1977 (SMCRA)?
- B. Is there any case law that has interpreted the necessity of including within the permit boundaries areas that suffer impacts incidental to underground mining, such as planned subsidence in longwall operations?

SEARCH RESULTS: Research was conducted using the COALEX Library and the federal and state case law files on LEXIS. Information retrieved as a result of the research is discussed below. Copies of the selected state regulations and the federal and state court decisions are attached.

PERMIT APPLICATION APPROVAL PROCESS

No state regulations were identified which require a regulatory authority to utilize independent sources to verify information provided as part of the mining permit application process. There are, however, federal and corresponding state regulations which request or require information from government agencies or independent entities outside of the regulative authority. For example:

30 CFR 773.13 Public participation in permit processing.

Subsection 773.13(a)(3) requires that written notification of an "applicant's intention to mine" be sent to federal, state or local agencies "with an interest in the proposed operation". Subsection 773.13(b) provides procedures for handling comments and objections to the permit application from federal, state or local agencies. (Also see the attached Pennsylvania and Kentucky regulations which correspond to this subsection and the one following.)



30 CFR 773.15 Review of permit applications.

Subsection 773.15(b) requires the regulatory authority to "make a finding" that the applicant is not in violation of any federal or state law or rule "pertaining to air or water environmental protection".

ILLINOIS ADMIN. CODE Title 62, Sec. 1784.14 (1988) Hydrologic Information [corresponding to 30 CFR 784.14].

Subsection 1784.14(c)(1) states that information on the cumulative hydrologic impact of a proposed operation on surface and ground water "shall be provided...if available" from appropriate federal or state agencies.

INDIANA ADMIN. CODE Title 13, r. 13-4.1-3-3 (1987) Application for permit; contents; public inspection of certain information; tests [corresponds to 30 CFR 780.22(b) and 784.22(b)].

At the request of an operator who has a projected annual production of under 100,000 tons, the regulatory authority may utilize and pay for a "qualified public or private laboratory" to determine the probable hydrologic consequences of the mining operation. Subsection 13-4.1-3-3(c).

COLORADO CODE Regs. Section 2.09.1 Small operator assistance program; Assistance provided [corresponding to 30 CFR 795.12].

Under the small operator assistance program, the regulatory authority may "select and pay a qualified laboratory to determine for the operator the probable hydrologic consequences" of the mining operation. Subsection 2.09.1(1)(a).

CASE LAW

No decisions were identified which rule on the necessity to gather independent information on permit applications. Several state and federal cases were identified which touch some aspect of the topic.

VILLAGE OF PLEASANT CITY, OHIO v DIVISION OF RECLAMATION, No. CA-835, slip opinion (Ohio Ct. App. 1987).

The court upheld and incorporated the Ohio Reclamation Board of Review's decision to grant a mining permit over the objections of the Village of Pleasant City. As part of the evidence supporting its decision to issue the permit, the Division of Reclamation included a report it had commissioned by an outside consulting firm which evaluated the "potential impacts of mining upon the hydrology" of the area to be mined.

UTAH INTERNATIONAL, INC. v DEPARTMENT OF THE INTERIOR, 643 F. Supp 810 (D. Utah 1986).

The primary issue in this case concerns the payment of attorney and witness fees to environmental groups who prevailed on issues while aligned with the government in surface mining-related litigation. However, in footnote 33, the court quoted from the stipulation which resulted from the Environmental Defense Fund's hydrology claim. One point is quoted here:



"The Secretary, in the consideration of a permit application for lands located in the Petition area, shall not approve a permit unless the applicant can demonstrate that the proposed surface coal mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area...."

GRAHAM v COMMONWEALTH OF PENNSYLVANIA, 79 Pa. Commw. 403, 469 A.2d 709 (Pa Commw. Ct. 1984).

Citing to the Right-to-Know Law, the Grahams requested that the court "compel DER [the Pennsylvania Department of Environmental Resources] to assist them in the preparation of their application for a permit to mine...", including supplying hydrological and geological information on the Grahams' land and conducting an inspection of the land to "recommend methods of abating potential acid mine drainage and erosion of sediment". The court held that the Right-to-Know Law "gives no one the right to demand that information be assembled and transmitted, as distinguished from the right to inspect....The petitioners have not pointed us to any authority for the proposition that DER is obliged to provide these kinds of services to persons, as the petitioners, who have not applied for a permit to mine their lands."

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F. Supp. 1519 (D.D.C. 1985).

The court quoted from its prior opinion which struck down "[the] definition of 'mine plan area' which effectively required coal companies to supply information for areas outside the permit boundary...[and] information covering the entire life of the mining operation." IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION I, No. 79-1144, slip op. at 35 (D.D.C. Feb. 26, 1980).

"The court [drew] the conclusion that Congress articulated, with specificity, those instances in which information outside the permit area was necessary." Feb. 1980 Opinion at 35.

In the present decision, the court ruled on citizen and environmental groups' contention that the regulations require operators to submit information only on activities "conducted during the life of the permit rather than activities to be conducted during the life of the mine". The court determined that the regulatory authority required certain information in order to prepare a cumulative hydrologic impact analysis (CHIA), a substantial element in the permit approval process. Information to be considered in the preparation of the CHIA includes "life-of-the-mine" information, hydrologic data for both on- and off-site areas and "the probable cumulative impact of all anticipated mining in the area".

ATTACHMENTS

- A. KENTUCKY. REV. STAT. Sec. 350.055 (1980) Publication of notice of intention to mine by permit applicant -- Notification of various local government bodies by department [Subject to federal approval].
- B. PENNSYLVANIA CODE Title 25, Sec. 86.31 (1982) Public notices of filing of permit applications.
- C. PENNSYLVANIA CODE Title 25, Sec. 86.33 Right to file written objections.



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- D. ILLINOIS ADMIN. CODE Title 62, Sec. 1784.14 (1988) Hydrologic Information [corresponding to 30 CFR 784.14].
- E. INDIANA ADMIN. CODE Title 13, r. 13-4.1-3-3 (1987) Application for permit; contents; public inspection of certain information; tests [corresponds to 30 CFR 780.22(b) and 784.22(b)].
- F. COLORADO CODE Regs. Section 2.09.1 Small operator assistance program; Assistance provided.
- G. VILLAGE OF PLEASANT CITY, OHIO v DIVISION OF RECLAMATION, No. CA-835, slip opinion (Ohio Ct. App. 1987).
- H. UTAH INTERNATIONAL, INC. v DEPARTMENT OF THE INTERIOR, 643 F. Supp 810 (D. Utah 1986).
- I. GRAHAM v COMMONWEALTH OF PENNSYLVANIA, 79 Pa. Commw. 403, 469 A.2d 709 (Pa Commw. Ct. 1984).
- J. Excerpt from IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F. Supp. 1519 (D.D.C. 1985).