



COALEX STATE INQUIRY REPORT – 158
February 1990

Myra Spicker, Esquire
Division of Reclamation
Department of Natural Resources
309 West Washington Street
Suite 201
Indianapolis, Indiana 46204

TOPICS: CITIZENS' SUITS: THE 60-DAY LETTER

INQUIRY: Citizens are challenging the state's issuance of a mining permit. The citizens filed a 60-day letter, pursuant to sec. 520 of the Act (30 USC 1270), although the state regulatory authority (RA) is still actively investigating the issuance of the permit. Is there any caselaw which addresses the need to "exhaust administrative remedies" prior to filing a suit in a district court?

SEARCH RESULTS: Research was conducted using LEXIS. The cases identified address, primarily, the citizens' suit provisions of the Clean Water Act (Federal Water Pollution Control Act, 33 USC 1251 et seq.), the Clean Air Act (42 USC 7401 et seq.) and administrative actions by the Environmental Protection Agency (EPA). Legislative history materials are included which provide congressional intent for the citizens' suit provisions in SMCRA. Copies of materials discussed below are attached, as indicated.

LEGISLATIVE HISTORY

Excerpts from House and Senate Reports and congressional debate which discuss the inclusion of citizens' suit provisions in SMCRA follow. Copies of these excerpts are attached.

"Surface Mining Control and Reclamation Act of 1975", S REP No 28, 94th Cong, 1st Sess 217-218 (1975).

"The [Senate Committee on Interior and Insular Affairs] believes that citizen suits can play an important role in assuring that regulatory agencies and surface operators comply with the requirements of the Act and approved regulatory programs. The possibility of a citizen suit should help to keep program administrators 'on their toes.'"

"[N]o action for violation of the law may be started for 60 days after notice of the alleged violation to the alleged violator, the Secretary, and the State in which the violation occurs. If the regulatory authority begins a civil action against the violation, no court action could take place on the citizen's suit. The 60-day waiting period does not apply when the violation or failure to act



constitutes an imminent threat to the plaintiff's health or safety or would immediately affect a legal interest of the plaintiff."

"Surface Mining Control and Reclamation Act of 1974", H REP No 1072, 93rd Cong, 2nd Sess 288 (1974).

"A citizen suit may be brought against the Secretary for failure to perform any duty which is not discretionary with the regulatory authority. Before bringing citizen suits, 60 days notice must be provided to other parties and such suits may not be commenced against the regulatory authority if it is diligently prosecuting administrative or judicial action to require compliance."

"Surface Mining Control and Reclamation Act of 1976", H REP No 218, 95th Cong, 1st Sess 153 (1977).

"[The 60-day notice] will allow the Secretary opportunity to remedy any failure that may in fact exist without the necessity for suit."

The citizens' suit provision in SMCRA is patterned after the provisions in the Clean Water Act and the Clean Air Act.

FEDERAL CASE LAW

BAUGHMAN et al. v BRADFORD COAL CO., INC., 592 F 2d 215 (3rd Cir 1979), cert. denied 441 US 961 (1979).

The court upheld the District Court's Order that it had jurisdiction under the Clean Air Act to rule on Bradford's alleged violations of its Implementation Plan. The court ruled that the Pennsylvania Environmental Hearing Board (the Board) had jurisdiction to assess civil penalties as a result of a Department of Environmental Resources action but the Board was not a "court...of a State" as it lacked power to "enjoin violations of the Plan."

CHESAPEAKE BAY FOUNDATION (CBF), et al. v BETHLEHEM STEEL CORP., 608 F Supp 440 (D Md 1985).

The court granted CBF's motion for summary judgment, finding that Bethlehem had violated the Clean Water Act and the terms of its NPDES permit. In ruling that CBF had standing to bring the citizen's suit, the court cited to congressional intent and preceding cases:

"[T]he citizens' suit provision [of the Clean Water Act] [was] designed to supplement and expedite administrative action [by EPA] to abate violations [of the Act]; recourse to the courts is appropriate only when the administrative action taken is less than adequate."

Also see attached cases:

COMMONWEALTH OF MASSACHUSETTS v US VETERANS' ADMINISTRATION, 541 F 2d 119 (1st Cir 1976);



SAVE OUR SOUND FISHERIES ASSOCIATION v CALLAWAY, 429 F Supp 1136 (D RI 1977);

SUSQUEHANNA VALLEY ALLIANCE v THREE MILE ISLAND, 619 F 2d 231 (3rd Cir 1980), cert. denied 440 US 1096 (1981).

CHESAPEAKE BAY FOUNDATION (CBF), et al. v BETHLEHEM STEEL CORP., 652 F Supp 620 (D Md 1987).

This case addressed the issue of remedies from the case discussed above, liabilities for violations alleged in an amended complaint and Bethlehem's motion to dismiss the amended complaint asserting that the citizen suit provision of the Clean Water Act violated the constitutional principle of separation of powers.

Finding that the citizens' suit provision does not violate the principle of separation of powers, the court stated: "If a citizen brings suit and the Administrator chooses not to intervene, EPA does not simply 'cede [its] interest in enforcement' as defendant contends. Rather, EPA looks to citizen suits to supplement enforcement because the EPA and state agencies lack sufficient resources to bring all necessary actions."

Although CBF did not file a 60-day notice before amending their complaint, the claims were not dismissed since the defendant and the regulatory agencies had received 60-days' notice prior to the original complaint.

CBF's motion for summary judgment on the violations listed in the amended complaint was granted in part and denied in part.

See STUDENT PUBLIC INTEREST RESEARCH GROUP v GEORGIA-PACIFIC CORP., 615 F Supp 1419 (D NJ 1985).

NATURAL RESOURCES DEFENSE COUNCIL (NRDC), INC. v OUTBOARD MARINE CORP. (OMC), 692 F Supp 801 (ND Ill 1988).

The court found that OMC had violated some of the restrictions of its NPDES permit originally alleged by NRDC. OMC's request for dismissal of the action under the doctrines of primary jurisdiction or abstention were denied. The court stated that the concept of primary jurisdiction was "inapplicable here. To determine whether OMC has violated its NPDES permit, this Court will have no need to resolve issues 'within the special competence' of IEPA [Illinois EPA] or Board [Illinois Pollution Control Board].... Instead, this Court is asked to enforce the standards IEPA has already determined are appropriate....That involves no encroachment on IEPA's or Board's areas of expertise. They have already exercised their regulatory role by determining OMC's effluent restrictions...."

Abstention was rejected; the court was "obliged to enforce all permit restrictions" in effect without regard to the possibility that as a result of OMC's pending appeal, the Board might retroactively modify OMC's permit.



See *STUDENT PUBLIC INTEREST RESEARCH GROUP v MONSANTO CO.*, 600 F Supp 1479 (D NJ 1985).

STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY v FRITZSCHE, DODGE & OLCOTT, 579 F Supp 1528 (D NJ 1984), *aff'd* 759 F 2d 1131 (3rd Cir 1985).

The court cited to *BAUGHMAN*, above, in determining that "where EPA fails to allow participation by citizen groups in its enforcement proceedings it will not be accorded 'court status'". The plaintiff's request for a partial summary judgment was granted as the court found "that the EPA's actions with respect to defendant have not been diligent." The court also noted that "the doctrine of primary jurisdiction should be invoked sparingly where it would serve to preempt a citizen's suit".

O'LEARY v MOYER'S LANDFILL, INC., 677 F Supp 807 (ED Pa 1988). [Excerpts]

In defining the relevance of the doctrine of primary jurisdiction in this case, the court stated:

"EPA does not have exclusive authority over the cleanup at Moyer's Landfill; but since EPA does have responsibility for the site to the extent that this court does not, its authority is concurrent with that of this court."

After analyzing the issues involved, the court ruled on the issued of "existing financial obligations" and deferred to EPA "to plan, implement and fund the cleanup" at the Landfill.

STATE CASE LAW

MORDHORSE v EGERT et al., 88 SD 527, 223 NW 2d 510 (S D 1975).

This case involves enjoining optometrists, the South Dakota Board of Examiners in Optometry and two corporations from unprofessional conduct and unlawful practices. The court ruled that the administrative remedies did not have to be exhausted, in this case, before the court assumed jurisdiction:

"The presence of constitutional questions coupled with a sufficient showing of the inadequacy of administrative relief and impending irreparable harm flowing from delay incident to following the prescribed administrative procedures is sufficient to overcome the claim that administrative proceedings must first be exhausted."

ATTACHMENTS

- A. "Surface Mining Control and Reclamation Act of 1974", H REP No 1072, 93rd Cong, 2nd Sess 288 (1974).
- B. "Surface Mining Control and Reclamation Act of 1975", S REP No 28, 94th Cong, 1st Sess 217-218 (1975).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- C. "Surface Mining Control and Reclamation Act of 1976", H REP No 1445, 94th Cong, 2nd Sess 122 (1976).
- D. "Surface Mining Control and Reclamation Act of 1976", H REP No 218, 95th Cong, 1st Sess 153 (1977).
- E. 120 CONG REC 38606 (December 9, 1974).
- F. BAUGHMAN et al. v BRADFORD COAL CO., INC., 592 F 2d 215 (3rd Cir 1979), cert. denied 441 US 961 (1979).
- G. CHESAPEAKE BAY FOUNDATION (CBF), et al. v BETHLEHEM STEEL CORP., 608 F Supp 440 (D Md 1985).
- H. COMMONWEALTH OF MASSACHUSETTS v US VETERANS' ADMINISTRATION, 541 F 2d 119 (1st Cir 1976).
- I. SAVE OUR SOUND FISHERIES ASSOCIATION v CALLAWAY, 429 F Supp 1136 (D RI 1977).
- J. SUSQUEHANNA VALLEY ALLIANCE v THREE MILE ISLAND, 619 F 2d 231 (3rd Cir 1980), cert. denied 440 US 1096 (1981).
- K. CHESAPEAKE BAY FOUNDATION (CBF), et al. v BETHLEHEM STEEL CORP., 652 F Supp 620 (D Md 1987).
- L. STUDENT PUBLIC INTEREST RESEARCH GROUP V GEORGIA-PACIFIC CORP., 615 F Supp 1419 (D NJ 1985).
- M. NATURAL RESOURCES DEFENSE COUNCIL (NRDC), INC. v OUTBOARD MARINE CORP. (OMC), 692 F Supp 801 (ND Ill 1988).
- N. STUDENT PUBLIC INTEREST RESEARCH GROUP v MONSANTO CO., 600 F Supp 1479 (D NJ 1985).
- O. STUDENT PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY v FRITZSCHE, DODGE & OLCOTT, 579 F Supp 1528 (D NJ 1984), aff'd 759 F 2d 1131 (3rd Cir 1985).
- P. O'LEARY v MOYER'S LANDFILL, INC., 677 F Supp 807 (ED Pa 1988). [Excerpts]
- Q. MORDHORST v EGERT et al., 88 SD 527, 223 NW 2d 510 (S D 1975).