



COALEX STATE INQUIRY REPORT - 198

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TOPIC: DEFINITION OF "PUBLIC FACILITIES"; STATUS OF UNDERGROUND PIPELINES WITHIN SMCRA

INQUIRY: Are there any cases, legislative history or other material which address the meaning of "public facilities" as set out in 30 CFR sec. 817.121(d)(1)? Specifically, do underground pipelines or gas utility lines fall within sec. 817.121(d)(1) as "public facilities"? How does SMCRA treat the undermining of underground pipelines or gas utility lines?

SEARCH RESULTS: The COALEX Library, other materials in LEXIS and existing COALEX State Reports were used to research this Inquiry. Definitions for "public building" or "public facility" were identified under regulations for areas designed as unsuitable, subsidence control and AML.

Areas designed as unsuitable rules defines "public building" consistently as "any structure". Under the 1978 draft of the final rules, "public building" in the subsidence control rules includes "public utilities"; the preamble to the 1979 permanent program final subsidence control rules talk about "structures". Beginning in June, 1983, the phrase "public building and facility" is used in subsidence control rules; these are described as "structures and features" that need protection because of their "public character". The AML reclamation program provisions include "public utilities" as part of the definition of "public facility". None of these materials specifically discuss utility, gas or pipelines.

Utility lines are discussed along with support facilities under 816.181/817.181 and under the protection of fish and wildlife, 816.97/817.97. See description of COALEX Report 194. Copies of the materials discussed below are attached.

COALEX STATE INQUIRY REPORT - 194, "Permitting of utility lines" (1991).

An operator who had the right to mine under a coal severance deed was installing utility lines to supply power to the mine. The landowner inquired if the construction of utility lines over his land required permitting under SMCRA.



COALEX research failed to identify materials that specifically stated that utility lines require permitting under SMCRA. Case law included with the Report discusses the operator's right, as owner of the mineral estate, to utilize the surface by constructing transmission or utility lines. The regulatory history provided addressed the need to include information on utility lines and other "support facilities" as part of the permit application, in protection of fish and wildlife, and under the performance standards.

43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules.

Sec. 761.5 Definitions.

In the proposed permanent program rules, in Part 761 Areas Designated by Act of Congress, "public building" was defined as "any structure that is owned by a public agency or used for public business, meetings or other group gatherings."

Sec. 817.123 Subsidence control: Pre-mining survey.

"A pre-mining survey shall be conducted of all public buildings including but not limited to churches, schools, hospitals, and public utilities or municipal public service operations including highways, dams, and cemeteries."

43 FR 49932 (OCTOBER 25, 1978). Final rules. AML reclamation program provisions, procedures and requirements. Sec. 874.13 Reclamation objectives and priorities.

"Reclamation projects shall meet one or more of the objectives stated in this section.... (e) Protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by past coal mining practices."

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final rules.

Sec. 761.5 Areas designated by act of Congress - Definitions.

"Public building: Some commenters believed that the proposed definition was too broad, contrary to normal usage and included private dwellings. They suggested deleting 'meetings of other group gathering' to narrow the scope of the definition, so that it would include buildings used for public business. OSM has decided to insert the word 'principally' to avoid prohibiting mining near buildings with only occasional use."

Sec. 817.126 Subsidence control: Buffer zones.

The preamble to this section discusses the need to protect public buildings from subsidence.

47 FR 16604 (APRIL 16, 1982). Proposed rules. Subsidence control.



"Section 817.126 would be incorporated in proposed Sec. 817.121(d)-(f) and rearranged and shortened.

...

"The rewording reflects Section 516(c) of the Act and elaborates further on the prevention of imminent danger to the inhabitants of urbanized areas, cities, towns, or communities by providing protection for facilities generally used by the public. The present rule in Sec. 817.126(c) protects public buildings against underground mining either beneath or in close proximity to them. The proposed revision in Sec. 817.121(d) would also indicate that the regulatory authority may prohibit underground mining under or adjacent to, or may limit the percentage of coal extraction in the vicinity of such features or facilities if necessary to minimize the potential for material damage to such features or facilities or to protect the public health and safety."

48 FR 24638 (JUNE 1, 1983). Final rule. Subsidence control, concurrent surface and underground mining operations and contemporaneous reclamation. Sec. 817.121(d).

"Section 817.121(d) establishes a class of structures and features to which greater protection is owed because of their public character or important nature. For these features, it is particularly important that damage be prevented before it occurs and not that damage can be corrected afterwards. Specifically, Sec. 817.121(d) provides for the protection of public buildings and facilities; churches, schools, and hospitals;

...

"Section 817.121(d)(1), which provides protection for public buildings and facilities, tracks previous Sec. 817.126(c). Paragraph (d)(2) as proposed would have provided special protection for private facilities generally used by the public, such as churches, schools, and hospitals. To reduce uncertainty in application of this requirement which could have been interpreted more broadly than was intended, the final rule simply provides special protection for all churches, schools, and hospitals. This portion of the rule is broader than its predecessor, Sec. 817.126(c), which applied only to public buildings."

48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Designating lands as unsuitable. Sec. 761.5 Definitions: Public building.

"Section 522(e)(5) of the Act forbids mining within 300 feet of public buildings. 'Public building' was previously defined as 'any structure that is owned by a public agency or used principally for public business, meetings, or other group gatherings.' OSM proposed two options to amend the definition of public building. Option 1 would have defined public building to mean 'any structure that is owned, leased, or principally used by a governmental agency for public business, meetings, or other group gatherings.' This revision would have modified the previous definition by including structures not only owned or used but also those leased by government agencies for public purposes. Modifying the term 'public' to 'governmental' would eliminate certain community buildings from consideration in this context. However, community and institutional buildings are covered in a separate definition."



OSM adopted Option 1 with two modifications: "Public building means any structure that is owned or leased, and principally used by a governmental agency for public business or meetings."

52 FR 4860 (FEBRUARY 17, 1987). Final rule. Subsidence control.

"While private parties may not be motivated to protect the environment, they have a great incentive to protect structures that they own. State law has traditionally provided remedies in contract and tort for those parties who own subsidence-damaged structures. Accordingly, it is inappropriate for OSMRE to step in and protect owners of these structures thereby creating an additional private property right which clearly was not intended by Congress.

"In those instances where public interest does exist in the protection of certain structures, the rules continue to provide such protection without regard to State law. For instance, 30 CFR 817.121(d) prohibits underground mining activities beneath or adjacent to public buildings and facilities, churches, schools and hospitals, and large bodies of water unless an operator can demonstrate before a permit is issued that subsidence will not cause material damage..... Taken together with the land restoration requirement of Sec. 817.121(c)(1), OSMRE's rules will amply protect the public interests endangered by subsidence."

Definitions of "public building/facility" from the US Code.

Included as an attachment are nine sections containing definitions of "public facility" from the United States Code Service which appear under such titles as:

1. Conservation: Coastal Zone Management
2. Public Health and Welfare
3. Emergency Management and Assistance
4. Energy
5. Business Credit and Assistance
6. Aeronautics and Space

Definitions of "public building/facility" from state codes.

Included as an attachment are code sections from eight states containing definitions of "public facility". Sections are included from the following states:

1. Alabama
2. Arkansas
3. Colorado
4. Illinois
5. Kentucky
6. Ohio
7. Pennsylvania
8. Tennessee



ATTACHMENTS

1. COALEX STATE INQUIRY REPORT - 194, "Permitting of utility lines" (1991).
 - A. BUFFALO MINING COMPANY v MARTIN, 267 SE d 721 (W Va 1980).
 - B. CABOT OIL & GAS CORP. OF W. VA. AND CRANBERRY PIPELINE CORP. v POCAHONTAS LAND CORP., 376 SE 2d 94 (W Va 1988).
 - C. ELK HORN COAL CORP. v KENTUCKY-WEST VIRGINIA GAS CO., 317 SW 2d 472 (Ky Ct App 1957).
 - D. TRIVETTE v CONSOLIDATION COAL CO., 177 SW 2d 868 (Ky Ct App 1944).
 - E. COLUMBIA GAS TRANSMISSION CORP. v LIMITED CORP., 759 F Supp 343 (E.D. Ky 1990).
 - F. AKERS v BALDWIN, 736 SW 2d 294 (Ky 1987).
 - G. SKIVOLOCKI v EAST OHIO GAS CO., 313 NE 2d 374 (Ohio 1974).
 - H. PHIPPS v LEFTWICH, 222 Se 2d 536 (Va 1976).
 - I. ANNOTATION, "Right of owner of title to or interest in minerals under one tract to use surface, or underground passages, in connection with mining other tract", 83 A.L.R. 2d 665. [Excerpts]
 - J. 44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.97 Protection of fish and wildlife.
 - K. 44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.181 Support facilities and utility installations.
 - L. 48 FR 20392 (MAY 5, 1983). Final rule. Support facilities.
 - M. 48 FR 22110 (MAY 16, 1983). Final rules. Roads.
 - N. 48 FR 30312 (JUNE 30, 1983). Final rule. Fish, wildlife, and related environmental values. Sec. 816.97(e)(1) [previous Sec. 816.97(c).]
 - O. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 21 ERC (BNA) 1193, 14 ELR 20617 (D.C. D.C. July 6, 1984). [Excerpts]
 - P. 50 FR 28186 (JULY 10, 1985). Interim final regulation. Suspension of the definition of "support facilities".
 - Q. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (D.C. Cir January 29, 1988). [Excerpts]
 - R. 53 FR 45190 (NOVEMBER 8, 1988). Final rule. Roads. Secs. 780.38 and 784.30 Support facilities.
 - S. 53 FR 47378 (NOVEMBER 22, 1988). Final rule. Definitions: Support facilities.
2. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Sec. 761.5 Definitions and Sec. 817.123 Subsidence control: Pre-mining survey.
3. 43 FR 49932 (OCTOBER 25, 1978). Final rules. AML reclamation program provisions, procedures and requirements. Sec. 874.13 Reclamation objectives and priorities.
4. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final rules. Sec. 761.5 Areas designated by act of congress - Definitions and Sec. 817.126 Subsidence control: Buffer zones.
5. 47 FR 16604 (APRIL 16, 1982). Proposed rules. Subsidence control.
6. 48 FR 24638 (JUNE 1, 1983). Final rule. Subsidence control, concurrent surface and underground mining operations and contemporaneous reclamation. Sec. 817.121(d).



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7. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Designating lands as unsuitable. Sec. 761.5 Definitions: Public building.
8. 52 FR 4860 (FEBRUARY 17, 1987). Final rule. Subsidence control.
9. Definitions of "public building/facility" from the US Code.
10. Definitions of "public building/facility" from state codes.