COALEX STATE INQUIRY REPORT - 160

March 1990

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

TOPICS: REMINING ABOVE AN ABANDONED MINE SITE

INQUIRY: A landowner is suing the state regulatory authority for granting an operator a permit to mine above an abandoned underground mine. The landowner fears the work will cause considerable subsidence. Are there any cases which address this issue?

SEARCH RESULTS: Using the COALEX Library and the publicly available materials in LEXIS, a number of relevant opinions were identified. These are discussed below. Copies are attached.

INTERIOR ADMINISTRATIVE DECISIONS

OLD BEN COAL CO. v OSM, Docket No. CH 6-1-PR (1987).

Certain deed and lease agreements granted Old Ben the right to mine coal without liability for subsidence damage; Old Ben and OSM agreed that "the language does not constitute a waiver of OSMRE's enforcement authority under applicable law." Old Ben was granted a mining permit but contested some of the conditions imposed on the permit.

Part of the ALJ's ruling is as following: (1) Old Ben was required to comply with the provisions of "the Illinois regulations concerning repair and/or compensation of landowners for subsidence damage to structures." (2) "OSMRE may require Old Ben to submit plans for mitigation of potential damage to historic and archeological sites listed on or eligible for listing on the National Register in areas adjacent to the permit site". (3) "[U]nder Illinois law, Old Ben is not required to reclaim the shadow area, but must merely restore the area to its pre-mining capability."

FRANK STEBLY v OSM, Docket No. DV 7-2-PR (1987).

OSM approved the permit for a preparation plant to wash coal on a permitted minesite. Stebly contended that OSM's EIS was inadequate and "its Finding of No Significant Impact (FONSI) was erroneous" in violation of NEPA.

"The requirements of NEPA are satisfied if all environmental considerations are explored. The burden of the party challenging the agency's decision is to show that it was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to address substantial environmental issue of material significance."

STATE ADMINISTRATIVE AND COURT DECISIONS

BELLE FOURCHE PIPELINE CO. AND EIGHTY-EIGHT OIL CO. v STATE OF WYOMING AND THUNDER BASIN OIL CO., 766 P2d 537 (Wyo 1988).

The court affirmed the decision of the Wyoming Environmental Quality Council, finding that Belle Fourche and Eighty-Eight "holders of easements and lessees", not "surface land owners". Belle Fourche operated oil and gas pipelines on the property; Eight-Eight operated a truck receiving station for oil on the property. Thunder Basin' mining operation would necessitate relocation of the two companies' facilities. The court stated "it was not necessary for Thunder Basin to obtain the consent of the appellants to its proposed mining and reclamation plan nor to post a bond to insure compensation for damages resulting in any injury to their interests. Thunder Basin complied with all the requirements of the [Environmental Quality Act] in its mining application."

CITIZENS ORGANIZED AGAINST LONGWALLING v OHIO DEPT. OF NATURAL RESOURCES, 41 Ohio App 3d 290, 535 NE 2d 687 (Ohio Ct App 1987).

A group of landowners appealed the Ohio Reclamation Board of Review's decision approving Southern Ohio Coal Company's permit to mine using the longwall coal mining method, alleging that the permit application failed to "include measures required by law to protect the hydrological balance of the region" and specifically, it failed to "protect individual water users' rights." The court agreed with the Board that (1) omission of borehole data "did not flaw the permit application"; (2) although flawed, Southern Ohio Coal's hydrologic determination and the Chief of the Division of Reclamation's CHIA were adequate; (3) a longwall coal mining applicant may "provide alternative sources of water" rather than protect the "quantity of water". However, due to a number of problems found with Southern Coal's water replacement plan, the court remanded the case to the Board with directions to require Southern Coal to draft a new water replacement plan.

GEORGE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, 102 Pa Commw 87, 517 A2d 578 (Pa Commw Ct 1986). GEORGE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND CONSOLIDATION COAL CO., 1984 EHB 921, Docket No. 84-223-G (1984).

Consolidated Coal Company was issued a permit to conduct underground longwall mining. A portion of the seam being mined lay under George's property. George's property included a surface stream and waterfall and the coal overlying the seam Consolidated mined. The court agreed with the Environmental Hearing Board [EHB] that it had no duty to consider the possible effects of subsidence upon George's underlying coal seam: SMCRA "defines underground

mining activities regulated thereunder to include only the surface impacts incident to an underground coal mine." The court remanded the question of the effects of subsidence on the stream and waterfall back to the Board. [The EHB decision is attached.]

CULP v CONSOL PENNSYLVANIA COAL CO., 96 Pa Commw 94, 506 A2d 985 (Pa Commw Ct 1986).

The issue in the reargued case was "whether the Department [of Environmental Resources] abused its discretion in granting Consol the subsidence permit without considering Culp's interest in his superincumbent coal seams." After analyzing the purposes Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (1966), the court ruled that it did not "provide protection for subsurface interests such as Culp's," but that fact "can in no way be seen as detrimental to the protection of the public interest."

PORTER v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES [DER] AND CONSOLIDATION COAL CO., 1985 EHB 741, Docket No. 84-240-G (1985).

The Porters appealed DER's issuance of subsidence control and coal mining permits to Consolidated Coal. The Porters, owners of "real property in the permit area", were granted standing as "they clearly have a substantial, immediate and direct interest in the issuance of those permits." Evidence presented could only relate to the issues or "injuries which they have alleged in order to establish standing", i.e., "(i) that the permit applications do not provide for adequate surface and groundwater monitoring...and (ii) that they anticipate pollution of ground and surface water on this property."

ISLAND CREEK COAL CO. v RODGERS, CIMARRON COAL CORP. v RODGERS, 644 SW 2d 339 (Ky Ct App 1982).

Island Creek, the underground mine operator, was found "liable for damages to structures on the surface [the Rodgers and other subdivision residences] which were built after the underground operations had been abandoned". Cimarron's blasting for strip mining "contributed to or accelerated the subsidence in conjunction with Island Creek's failure to provide sufficient support for the surface". Island Creek was held liable for compensatory damage for "failure to support the surface"; Cimarron was held liable for compensatory damages "to the extent that its blasting contributed to the subsidence" and for punitive damages because the "blasting was done in reckless or wanton disregard for the rights of others". The court ordered a retrial on the "damages aspect of this case".

THE VILLAGE OF WILSONVILLE et al. v SCA SERVICES, INC., 77 Ill App 3d 618, 396 NE 2d 552 (Ill App Ct 1979).

The court affirmed the trial court ruling enjoining SCA from continuing to operate a chemical hazardous waste landfill and ordered the removal of the hazardous materials buried there. The landfill, the village and the surrounding area were located over an abandoned mine site. The

village alleged that as a result of subsidence, hazardous substances would escape from the landfill and migrate out of the site. Although the court found that evidence of the migration "uncertain, contingent upon the existence of conditions in the subsurface which were not known", it concluded "that there was a reasonable likelihood that escape would take place sometime in the future." There was no "feasible method to protect to public if the hazardous substance did start to migrate out of the site" and the "actual infliction of injury" was "of a nature that would likely be catastrophic if it did occur...."

FEDERAL DECISIONS

INSURANCE CO. OF NORTH AMERICA v U.S. GYPSUM [USG] CO., 678 F Supp 138 (WD Va 1988).

Subsidence occurred beneath USG's gypsum processing plant. The court ruled that for "the purposes of an 'all risk' insurance policy," the loss suffered by USG was "fortuitous" - it was neither intended nor expected - and denied "the insurance company's motion for judgment".

"Certainly, a subsidence event was a risk at any USG location where mining had been ongoing. Indeed, subsidence is likely to occur on the earth above a mine but any resulting damage is at best a risk, not a certainty, especially where precautions are taken....There was no certainty that any subsidence was destined to occur or, in particular, that it was destined to occur within the time limits of the policy in issue."

ATTACHMENTS

A. OLD BEN COAL CO. v OSM, Docket No. CH 6-1-PR (1987).
B. FRANK STEBLY v OSM, Docket No. DV 7-2-PR (1987).
C. BELLE FOURCHE PIPELINE CO. AND EIGHTY-EIGHT OIL CO. v STATE OF WYOMING AND THUNDER BASIN OIL CO., 766 P2d 537 (Wyo 1988).
D. CITIZENS ORGANIZED AGAINST LONGWALLING v OHIO DEPT. OF NATURAL RESOURCES, 41 Ohio App 3d 290, 535 NE 2d 687 (Ohio Ct App 1987).
E. GEORGE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, 102 Pa Commw 87, 517 A2d 578 (Pa Commw Ct 1986).
F. GEORGE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND CONSOLIDATION COAL CO., 1984 EHB 921, Docket No. 84-223-G (1984).
G. CULP v CONSOL PENNSYLVANIA COAL CO., 96 Pa Commw 94, 506 A2d 985 (Pa Commw Ct 1986).
H. PORTER v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES [DER] AND CONSOLIDATION COAL CO., 1985 EHB 741, Docket No. 84-240-G (1985).
I. ISLAND CREEK COAL CO. v RODGERS, CIMARRON COAL CORP. v RODGERS, 644 SW 2d 339 (Ky Ct App 1982).
J. THE VILLAGE OF WILSONVILLE et al. v SCA SERVICES, INC., 77 Ill App 3d 618, 396 NE 2d 552 (Ill App Ct 1979).

K. INSURANCE CO. OF NORTH AMERICA v U.S. GYPSUM [USG] CO., 678 F Supp 138 (WD Va 1988).