COALEX STATE INQUIRY REPORT - 258

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TOPIC: CITIZEN SUIT PROVISIONS: STANDING TO SUE

INQUIRY: Does a coal company have standing to sue a state regulatory authority (RA) under the citizen suit provisions of SMCRA? A coal company is claiming injury, having to keep its mine open, because the RA is not releasing the coal company's bond. Please locate relevant materials.

SEARCH RESULTS: Research was conducted using the COALEX Library (in particular, the legislative history documents) and the other materials available in LEXIS.

One case was identified which states that the phrase "any person" does not include members of the regulated industry and, therefore, the regulated industry may not use the citizen suit provision of SMCRA. (See U.S. v GORMAN FUEL, below.) In another case, "any person" is defined as an entity "standing in the shoes of the public and representing the public interest...." (See MULLINAX v HODEL, below.)

Additional materials attached discuss the legislative history of the citizen suit provisions in SMCRA, the Clean Water Act and Clean Air Act, as well as cases that address relevant aspects of "standing".

LEGISLATIVE HISTORY

A 1973 Senate Report provided the following analysis of the Citizen Suits provision:

"[Citizen Suit section] provides for citizen participation in the enforcement of the Act by civil law suits (1) against any person who is alleged to be in violation of the Act or an order of the regulatory authority or (2) against the regulatory authority for alleged failure to perform a nondiscretionary act or duty.

"Suits may be brought by 'any person having an interest which is or may be adversely affected.' The Committee intends that this includes persons who meet the requirements for standing to sue set out by the Supreme Court in Sierra Club v. Morton (405 U.S. 727 (1972))."

S. REP. No. 402, 93rd Cong., 1st Sess. 70 (September 21, 1973) [S. 425; "Section-by-Section Analysis Title II"].

This analysis of the citizen suit provision was repeated in various forms of the bill through its passage. Additional Legislative History material is attached for background.

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 700 - General.

The definition of "person" is enclosed for background.

45 FR 69940 (OCTOBER 22, 1980). Proposed rule. Partial approval and partial disapproval of the Kentucky permanent regulatory program.

"1.2 The Secretary is unable to find KRS 350.250, Citizen Suit, to be consistent with the requirements of SMCRA for the following reasons:

"(a) Section 529(a) of SMCRA creates a right of action in 'any person having an interest which is or may be adversely affected.' The Kentucky language creates a right of action in 'any citizen of the Commonwealth.' The Kentucky language is too restrictive in scope since it denies the right of action to entities which are not citizens, such as corporations or associations, as well as to non-citizen residents of Kentucky and citizens of other States."

STATE CASE LAW

FRANKLIN TOWNSHIP AND COUNTY OF FAYETTE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND ELWIN FARMS, 452 A 2d 718 (Pa 1982).

The Commonwealth Court reversed the Environmental Hearing Board's ruling that the township and county lacked standing to challenge Elwin Farms' permit for a toxic waste landfill.

"The question of standing is rooted in the notion that for a party to maintain a challenge to an official order or action, he must be aggrieved in that his rights have been invaded or infringed."

"On the federal level, where review of federal agency action is sought, the standing requirement has been broadened to include persons who can show that the challenged action had caused them 'injury in fact' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agency was claimed to have violated."

The township and the county had "a substantial, direct and immediate interest in the establishment and operation of a toxic waste landfill within its boundaries so as to give each standing to challenge the issuance of a permit."

SMCRA-RELATED FEDERAL CASE LAW

U.S. v GORMAN FUEL, INC., 716 F Supp 991 (ED Ky 1989).

The court granted the government's motion to dismiss defendant's claims based on the SMCRA's citizen suit provision. The court cited to cases discussing the citizen suit provisions in the Clean Water Act (FWPCA) and Clean Air Act (CAA), see below, in interpreting the phrase "any person":

"Thus the legislative history of the citizen suit provision of the CAA and the FWPCA, after which the SMCRA citizen suit was patterned, supports the interpretation that members of the regulated industry may not avail themselves of the provisions of the citizen suit Cases which have analyzed the citizen suit provisions of the CAA and the FWPCA also support this Court's interpretation that members of the regulated industry are not 'any person' for purposes of the citizen suit provision."

MULLINAX v HODEL, 1988 U.S. Dist. LEXIS 520, Civil Action No. 87-G-0687-S (ND Ala 1988).

The plaintiff filed a citizen's complaint claiming that certain surface mining permits were improperly issued. Mullinax claimed mineral ownership of the lands within the permitted area. This case was an appeal of an Interior administrative decision. In dismissing the action, the court discussed why it lacked jurisdiction to hear the appeal.

"The Citizen Suit provision [of SMCRA] authorizes 'any person' to commence a civil action 'to compel compliance with this Act', 30 U.S.C. 1270. It is clear from the legislative history of the Act that Congress included sec. 520 as a means of securing citizen participation in the enforcement process."

"The federal courts have repeatedly held that Citizen Suits provisions are for the purpose of forcing enforcement action only and cannot be used by plaintiffs to bring their own private causes of action... This is an entirely private dispute and plaintiff cannot be characterized as standing in the shoes of the public and representing the public interest in protecting the environment from the adverse effects of surface mining operations."

NATIONAL COAL ASSOCIATION (NCA) AND AMERICAN MINING CONGRESS (AMC) v LUJAN, 979 F 2d 1548 (DC Cir December 1, 1992).

The court ruled that NCA and AMC, two associations of coal producers, had standing to challenge the individual penalty regulations.

"According to the Secretary, NCA/AMC have not demonstrated that regulations on penalties for individuals threaten the trade associations or their corporate members with any injury. We find utterly unpersuasive the Secretary's endeavor in this context to divorce the corporation from those who act in its name."

"[W]e are satisfied that the companies' own economic interests are vitally affected by the subsection (f) [individual penalty] regulations."

JO D. MOLINARY v POWELL MOUNTAIN COAL CO., INC. D/B/A/ WAX COAL CO., 779 F Supp 839 (WD Va 1991).

The court denied Wax Coal's motion to dismiss this class action finding "nothing in the clear language of the SMCRA or its legislative history to support Wax Coal's view that federal courts are divested of jurisdiction over citizen suits in states with approved surface mining and reclamation programs". In discussing federal oversight and legislative background on citizen suits, the court noted that Congress gave little substantive attention to state citizen suits and did not include them in the list or requisites for an approved state program.

"The closest Congress came was to require states seeking program approval to provide criminal or civil actions for 'sanctions for violations of State laws, regulations or conditions or permits.'"

NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir January 29, 1988).

"The Supreme Court has construed the constitutional elements of the standing requirement as embracing three separate, yet necessarily intertwined components: The party invoking the court's authority must demonstrate (1) 'some actual or threatened injury' that (2) 'fairly can be traced to the challenged action' and (3) 'is likely to be redressed by a favorable decision.'"

NON-SMCRA FEDERAL CASE LAW

SIERRA CLUB v MORTON, 405 U.S. 727 (1972).

Held: "A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action."

The Court also stated: "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.... But a mere 'interest in a problem," no matter how long-standing the interest and no matter how qualified the

organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."

DATA PROCESSING v CAMP, 397 U.S. 150 (1970).

From SIERRA CLUB, above: "[W]e held more broadly that persons had standing to obtain judicial review of federal agency action under sec. 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated."

Also see:

U.S. v STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES, 412 U.S. 669 (1973), which discusses both cases above.

NATURAL RESOURCES DEFENSE COUNCIL, INC. v TRAIN, 510 F 2d 692 (DC Cir 1974), which discusses the citizen suit provisions of the Clean Water and Clean Air Acts.

FRIENDS OF THE EARTH et al. v CAREY et al., 535 F 2d 165 (2nd Cir 1976), which discusses the citizen suit provision of the Clean Air Act.

ATTACHMENTS

A. S. REP. No. 402, 93rd Cong., 1st Sess. 70 (September 21, 1973) [S. 425; "Section-by-Section Analysis Title II"].
B. LEGISLATIVE HISTORY material from February, 1972 through July, 1977 including excerpts from Hearings, Congressional Records and Committee Reports.
C. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 700 - General.
D. 45 FR 69940 (OCTOBER 22, 1980). Proposed rule. Partial approval and partial disapproval of the Kentucky permanent regulatory program.
E. FRANKLIN TOWNSHIP AND COUNTY OF FAYETTE v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND ELWIN FARMS, 452 A 2d 718 (Pa 1982).
F. U.S. v GORMAN FUEL, INC., 716 F Supp 991 (ED Ky 1989).
G. MULLINAX v HODEL, 1988 U.S. Dist. LEXIS 520, Civil Action No. 87-G-0687-S (ND Ala 1988).
H. NATIONAL COAL ASSOCIATION (NCA) AND AMERICAN MINING CONGRESS (AMC) v LUJAN, 979 F 2d 1548 (DC Cir December 1, 1992).
I. JO D. MOLINARY v POWELL MOUNTAIN COAL CO., INC. D/B/A/ WAX COAL CO., 779 F Supp 839 (WD Va 1991).

J. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir January 29, 1988).
K. SIERRA CLUB v MORTON, 405 U.S. 727 (1972).
L. DATA PROCESSING v CAMP, 397 U.S. 150 (1970).
M. U.S. v STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES, 412 U.S. 669 (1973).
N. NATURAL RESOURCES DEFENSE COUNCIL, INC. v TRAIN, 510 F 2d 692 (DC Cir 1974).
O. FRIENDS OF THE EARTH et al. v CAREY et al., 535 F 2d 165 (2nd Cir 1976).