COALEX STATE INQUIRY REPORT - 181

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TOPIC: CURRENT LIABILITY FOR ACID MINE DRAINAGE UNDER A PRE-SMCRA PERMIT

INQUIRY: What is a surface coal operator's current liability for a discharge of acid manganese from its operations if the coal miner operated under a pre-primacy state permit and coal removal stopped before Pennsylvania achieved primacy but after the initial federal regulations became effective? Effluent limits for manganese appear in both initial and permanent federal SMCRA regulations but were not regulated under pre-SMCRA state laws. Reclamation of the site continued until after Pennsylvania achieved primacy; however, the operator did not apply for either an interim or a permanent permit. Please locate relevant Interior administrative decisions and federal and state caselaw.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. Only one decision, an Administrative Law Judge (ALJ) opinion, with a similar fact situation was identified; however, it was reversed by the Interior Board of Land Appeals (IBLA). The IBLA and ALJ decisions listed below address the question of which set of rules are controlling: the state (pre-primacy) regulations, initial federal regulations, or state or federal permanent regulations. No relevant state or federal decisions were identified. Copies of the decisions are attached.

The cases found indicate: (1) that a permanent program permit (either state or federal) is not required if active mining has ceased and only reclamation remains; (2) if an operator does not obtain a permanent program permit, it continues to be subject to the initial federal regulations; and (3) an operator with a state (pre-primacy) permit must still comply with the initial federal regulations.

DARMAC COAL CO., 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983). DARMAC COAL CO. v OSM, Docket No. CH 1-107-R (May 1, 1981).

An operator, mining under a Pennsylvania state permit, was issued an NOV for discharge which exceeded the maximum allowable numerical effluent limitations for pH and manganese in violation of interim regulation 30 CFR 715.17(a). The ALJ affirmed the issuance of the NOV,

finding that all of the water analyses revealed that the pH level was "outside the parameters established in the interim regulations." [No mention was made of any difference between state regulations and initial program regulations.]

While the Board agreed that there was "sufficient evidence to establish the essential facts of the violation", it reversed the ALJ's decision, finding that Darmac did not "disturb" the area around the pre-existing seep; therefore, there was "no showing of adverse physical impact".

CEDAR COAL CO., 1 IBSMA 145, IBSMA 79-5 (April 20, 1979).

The Board determined that Cedar Coal was subject to the performance requirements of the initial program despite the fact that it operated under state mine permit issued before the federal initial program became effective. The state regulations at the time did not contain provisions for the complete elimination of any portion of an orphaned highwall. While Cedar was found to be subject to the performance standards of the interim program, the Board ruled that Cedar had not violated the standards in that it had not "disturbed" the orphaned highwall.

ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (September 14, 1979).

"Regardless of whether a permittee has a mining and reclamation plan approved by the state regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations."

TOLLAGE CREEK ELKHORN MININC CO., 2 IBSMA 341, IBSMA 80-32 (November 24, 1980).

Although Tollage Creek's state permit contained language allowing part of the highwall to remain in the area in question, initial federal performance standards required the elimination of all highwalls and did not contain any provision for a variance from that requirement.

Tollage Creek contended that OSM was estopped from asserting the alleged violation because of the "failure of the Secretary to designate an inconsistent state law as required by section 505(b) of the Act." The Board ruled that the Act requires the Secretary to designate inconsistent "laws which are on their face inconsistent." The Kentucky law was not "on its face inconsistent" but was interpreted by the state hearing officer in a way which was inconsistent with federal law. "Since the state is responsible for issuing permits which are consistent with Federal requirements, the state must assume the burden of conforming its permit to Federal standards during the initial program."

CONSOLIDATION COAL CO., 3 IBSMA 228, IBSMA 81-26 (July 31, 1981).

The Board stated that an operator must comply with the obligations of the initial regulatory program [here, the surface impacts of underground coal mining] "'until he has received a permit to operate under a permanent State or Federal regulatory program.' Alternately, if mining and

reclamation operations have been terminated, the obligation to comply with the initial performance standards ends when an operation is no longer subject to regulation by a state with respect to any requirements of the initial program."

Consolidation Coal's NOV was vacated as its failure to monitor water it pumped out of its inactive underground mine did not fall within the scope of "underground operation" as defined in the interim regulations.

GREATER PARDEE, INC., 3 IBSMA 313, IBSMA 81-1 (September 24, 1981). GREATER PARDEE, INC. v OSM, Docket No. NX 0-219-R (September 18, 1980).

Greater Pardee contended that it was exempted by Kentucky from the requirement that all surface drainage pass through a sedimentation pond. The ALJ ruled, and the Board affirmed, that the Kentucky regulations exempted underground mines which existed "before May 3, 1978 from having to submit certain information to obtain a permit but this did not exempt an underground mine from any performance standards."

CITIZENS FOR THE PRESERVATION OF KNOX COUNTY, 81 IBLA 209, IBLA 86-631, 83-2 (June 5, 1984).

The Board ruled that an operator, with an interim program permit, who had ceased all coal mining operations prior to the approval of a state's permanent program was not required to obtain a permanent program permit to conduct only reclamation activities, and that such reclamation activities were subject to the Department's initial program regulations.

"The language of the statute specifies that 'operators' of surface coal mines who expect to be mining after the expiration of 8 months from the approval of a state program must file for a permanent program permit to cover those lands to be mined." Midland ceased mining operations prior to the approval of the Illinois permanent program. "Thus, at the time the permanent program was approved, Midland was not an operator of a surface coal mine at Mecco with any expectation of operating such mine."

PEABODY COAL CO. v OSM, 101 IBLA 167 (February 17, 1988).

Peabody held an interim program permit and had applied for, but not yet received, a state permanent program permit when the NOV was issued. The Board held that:

"Under the Act, surface mining operations were required to comply with the Federal interim regulatory program until a permanent State or Federal program was in place. 30 U.S.C. sec. 1252(e) (1982); 30 CFR 710.11(a)(3)....[U]ntil an operator received a permit to operate under a permanent state or Federal regulatory program, it was required to comply with the terms of the interim program permit. 30 CFR 710.11(a)(3)(iii)."

The Board also rejected the operator's argument that OSM could not enforce the interim program after the effective date of Indiana's permanent program because the statutory authority to enforce the interim program had expired.

JOSEPHINE COAL CO. v OSM, 111 IBLA 316, IBLA 87-208 (October 30, 1989).

"[C]ompliance with state mining permit conditions less stringent standards does not excuse applicant from complying with the interim program standards."

Josephine Coal, operating under an initial program permit, was cited for failing to totally eliminate a pre-existing highwall. The appellant argued that since the Virginia authorities revised its permit to allow for leaving an unreclaimed highwall and the Virginia "permanent program regs now allow it, that this action on the NOV and CO by federal authorities should be dismissed." The Board confirmed the ALJ's rejection of this argument "on the ground that appellant's actions occurred under the interim program and, in fact, appellant never received a permanent program permit."

HARMAN MINING CORP. v OSM, 114 IBLA 291, IBLA 87-525 (May 10, 1990).

"A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii)."

See attached Pennsylvania Environmental Hearing Board decision for background.

ATTACHMENTS

A. BOLOGNA MINING CO. v COMMONWEALTH OF PENNSYLVANIA, DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envirn LEXIS 60, EHB Docket No. 86-555-M (March 3, 1989).
B. DARMAC COAL CO., 74 IBLA 100, IBLA 83-615, 81-66 (June 30, 1983).
C. DARMAC COAL CO. v OSM, Docket No. CH 1-107-R (May 1, 1981).
D. CEDAR COAL CO., 1 IBSMA 145, IBSMA 79-5 (April 20, 1979).
E. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (September 14, 1979).
F. TOLLAGE CREEK ELKHORN MINING CO., 2 IBSMA 341, IBSMA 80-32 (November 24, 1980).
G. CONSOLIDAITON COAL CO., 3 IBSMA 228, IBSMA 81-26 (July 31, 1981).
H. GREATER PARDEE, INC., 3 IBSMA 313, IBSMA 81-1 (September 24, 1981).
I. GREATER PARDEE, INC. v OSM, Docket No. NX 0-219-R (September 18, 1980).
J. CITIZENS FOR THE PRESERVATION OF KNOX COUNTY, 81 IBLA 209, IBLA 86-631, 83-2 (June 5, 1984).
K. PEABODY COAL CO. v OSM, 101 IBLA 167 (February 17, 1988).
L. JOSEPHINE COAL CO. v OSM, 111 IBLA 316, IBLA 87-208 (October 30, 1989).

M. HARMAN MINING CORP. v OSM, 114 IBLA 291, IBLA 87-525 (May 10, 1990).