

Timbering and Surface Coal Mining

Background

The definition of the term “surface mining activities” at 25 Pa. Code §86.1 includes a list of supporting activities related to the extraction of coal. The definition does not explicitly list timbering. It does list site preparation and exploration activities including mine road construction, land excavation, shaft construction, borehole drilling and other activities that facilitate mining.

Consequently, the Pennsylvania Department of Environmental Protection (DEP) considers a multitude of case-specific issues when determining whether timbering is mine site preparation, including but not limited to: the nature of the timbering (clear cutting vs. grubbing); the timing of the timbering relative to the mining, i.e., is the timbering integrated into, or coordinated with, mine site preparation activities; and whether the mine operator or mine permit applicant controls, or can otherwise be linked to, the timbering operations. Timbering, particularly timbering that does not include grubbing and that is done by a landowner independent of the mine permit holder or applicant, has not historically been considered mine site preparation. These are the same types of issues considered as part of previous similarly situated cases, such as *Sierra Club v. Kempthorne* (W.D. Va. 2008), where the federal Office of Surface Mining, Reclamation and Enforcement (OSMRE) determined that timbering was not surface mining. In the recent *Curry* case, the federal Interior Board of Land Appeals (IBLA) found that “... *Sierra Club v. Kempthorne* does demonstrate that the question of whether any particular logging activity is also surface mining activity is a fact-specific question that must be answered on a case-by-case basis.”

The analysis of this matter also includes indications provided by OSMRE in the development of the federal regulatory requirements. In response to comments suggesting that timbering should be specifically included in the definition of “surface coal mining operations” at 30 CFR 700.5, OSMRE stated, “,,the line between site preparation in anticipation of mining and independent work is sometimes difficult to draw, and can only be accurately drawn after experience with specific factual situations.”

To complicate matters, the Pennsylvania Environmental Hearing Board, in its *Keck* decision, found that “...a person cannot be cited for surface mining coal without a permit unless the person extracts or exposes and retrieves some coal.” Because of that decision, DEP is currently modifying its definition of “surface mining activities” to conform with the federal definition.

Evaluating Specific Situations

The following factors should be weighed in evaluating if timbering is a mining activity.

1. Timing

If the timbering is done before a mining application is submitted, then it is unlikely that the timbering can be characterized as being related to or being done to facilitate the mining. Once a

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permit application is submitted, there is a greater chance that any timbering will be a mining activity. If it is clear that the timbering is done in anticipation of mining, then it is a mining activity.

2. Is the timber area coincident with the mining area?

If the area timbered coincides with the permit area then it is more likely that the timbering is a mining activity. If the timbering is part of a larger project, then it is less likely that the timbering can be characterized to be a mining activity.

3. Is there a Protection and Enhancement Plan (PEP)?

If there is an approved PEP for an issued permit that involves timber management and the timbering is done under the terms of the PEP then the timbering is a surface mining activity.

4. Does the permittee have any control over the timbering?

If the lease agreement includes language that requires the area to be timbered prior to mining, then the timbering is more likely to be considered a mining activity. Other areas of possible control include coordination of the timing and location of the tree removal.

5. Is the timbering conducted in a manner to facilitate the mining?

If the timbering includes clearing and grubbing then the timbering is a mining activity. Clear-cutting would facilitate mining to a larger degree than selective cutting.

6. Is the timbering permitted separately from the mining permit?

The earth disturbance for timbering is subject to permitting requirement under Chapter 102. If there is a Chapter 102 permit in place, it is less likely that the timbering will be construed to be a mining activity.

7. Did the permittee benefit from the timbering?

If the permittee is a party to the contract for the timbering then it is likely that the timbering is a mining activity.

Pertinent Cases

Walters Mine

In the Walters case, the timbering was done by a logging company under contracts with two landowners. The area timbered did not match the area of the proposed mining permit for which a pre-application was filed. The earth disturbance for the timbering was permitted under a Chapter

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102 permit issued through the county conservation district. Under these facts, OSMRE agreed with DEP that the timbering was not a surface mining activity.

Curry Mine

The Curry case is informative as to how OSMRE, IBLA and DEP weigh the various factual circumstances. This case is complicated by the fact that the Department issued an order to the coal mine permittee for the erosion and sedimentation (E & S) issues (citing Chapter 87) related to the timbering activities then vacated that order. Then the county conservation district took enforcement action against the logging company and the landowner under Chapter 102. OSMRE took enforcement action against the permittee which was appealed to IBLA. During the proceedings with IBLA some additional information came to light that DEP was not previously aware of. The facts that IBLA determined as supporting OSM's conclusion that the timbering was a mining activity include:

- There was an issued coal mining permit for the area timbered
- The timbering was coordinated to accommodate the mining plans (e.g. the timbering included the area designated by the permittee where the mining was planned to begin)
- The timbering was conducted at a time that complied with the restrictions in the PEP
- The permittee benefitted from the timbering activity

Other factors which it was argued failed to support the conclusion that the timbering was a mining activity include:

- The area was timbered leaving a tangle of stumps and tops (this was argued to complicate the mining by making it more difficult to be clear and grub the mining area).
- The timbering was done under a contract with the landowner
- The lease included a notice requirement that the permittee needed to provide notice 90 days before mining began to provide the landowner an opportunity to complete the timbering (this notice was not provided)
- The permittee was unsure of its plans to mine the area (the mining was not initiated within the three-year activation period and the permit has since been cancelled)

Penn Virginia

In 2008 the federal District court concluded in a case in Virginia, that the timbering was not a mining activity in a case where the Sierra Club petitioned the court to compel OSMRE to initiate enforcement against the property owner, Penn Virginia Operating Company LLC and the permit applicant (A & G Coal Corporation) for timbering activity. In this case there was a pending application for a mining permit. The permit application stated that the timber would be removed as a separate operation. OSMRE found that the logging was not being done on behalf of the mining company. Penn Virginia hired a contractor to cut the timber on their property. Part of the logging area was beyond the proposed permit area.