TOPIC: ACID MINE DRAINAGE

INQUIRY: Please locate legislative history, Federal Register preambles or other materials which discuss the following: does a coal company have to guarantee there will be no acid mine drainage in order to obtain a mining permit or is it sufficient for the company to present its plans for preventing or treating toxic drainage in order to receive a state-issued permit [SMCRA secs. 515(b)(10) and 516(b)(9)]?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. Retrieved House and Senate Reports indicate that Congress recognized the potential impacts mining can have on the hydrology of area. Congress' intent in passing SMCRA was to establish "attainable standards to minimize such damages" because the "total prevention of adverse hydrologic effects from mining is impossible...."

Preambles to OSM's focus on a permit applicant's responsibility to identify potential acid or toxic forming materials and plan the mining operations to prevent or treat acid drainage. No preambles were identified that indicated the need for a guarantee that a mining operation will produce no acid mine drainage. However, applications of the rules in Interior administrative and state court proceedings indicate that permits may be denied when acid mine drainage is likely to occur during mining operations.

LEGISLATIVE HISTORY


"Acid mine drainage must be prevented from entering surface and groundwater sources by preventing the contact of water with acid forming materials, retaining acid waters, or treating acid waters to acceptable standards of acidity and iron content before releasing them to water courses. Whichever means are adopted, the reclamation plan must provide for continuation of the protection after the completion of reclamation for so long as may be required."

"The conferees recognize that total prevention of all these adverse hydrologic effects from mining is impossible and thus the conference report sets attainable standards to minimize such damages, protect the hydrologic balance of impacted areas and protect the rights of persons whose water rights are affected by mining operations."


"The total prevention of adverse hydrologic effects from mining is impossible and thus the bill sets attainable standards to protect the hydrologic balance of impacted areas within the limits of feasibility. For most critical areas uncertain fragile hydrologic settings, the bill sets standards that are imperative to begin to assure that adverse impacts to the hydrologic balance are not irreparable. It is not intended by such minimum standards that these measures will be considered wholly sufficient to meet the objectives of 'minimizing disturbance to the prevailing hydrologic balance.' It is anticipated that the State regulatory authorities will strengthen such provisions and require whatever additional measures are necessary to meet local conditions."


"The operator is required to minimize disturbances to the hydrologic balance on the mine site and in associated off-site areas by avoiding toxic mine drainage, preventing off-site flows of suspended solids using the best available technology...."

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -- Final rule. [Excerpts from Parts 701 and 779]

"Section 779.14(b)(1)(iv) requires statements of chemical analyses of the overburden and strata immediately below the coal to be mined, to identify those portions which contain potentially alkaline, acid, or toxic-forming materials. These requirements...will be used by the regulatory authority to evaluate the potential of the proposed operation to produce acid or other toxic drainage requiring special treatment and prevention measures."

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 653 F 2d 514 (DC Cir April 1, 1981).

"In an approved and properly enforced state program, the state has the primary responsibility for achieving the purposes of the Act. First, the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. See Act sections 506, 510. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable."

Enclosed for background.


"Gravity discharge. One commenter stated that sufficient evidence was not available to be sure that acid mine drainage would not occur in flooded mines....OSM believes that Congress did not intended to ban all mining of potentially acid- or toxic-forming coal seams or to have all discharges from underground mines considered as gravity discharges....Merely because a mine will discharge water is an insufficient basis to conclude that the mine should not be permitted. Since as a practical matter all mines do discharge water, such a provision would amount to a complete prohibition on underground mining, a result Congress clearly did not intend."


Enclosed for background.

INTERIOR ADMINISTRATIVE CASES


"HEADNOTES: OSMRE properly denies an application for permit revision when the applicant does not provide sufficient operational data to demonstrate that reclamation...can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area...OSMRE is required to avoid acid or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance."


The ALJ upheld the denial of a permit to Rex Coal on the basis that "a mine to be grandfathered in, so to speak, to escape the prohibition of the above cited regulation [30 CFR 817.41(i)(2)] must be a legally and currently operating mine at the time it applies for a permit."

"There is no factual dispute that the Applicant's mine would be acid-producing and would be so situated that the coal seam is updip from the proposed mine entries. This would create a situation which would allow gravity discharge from a mine that is acid-producing. Thus, if the Applicant's mine is a new mine, there is no question that a permit could not be issued."

STATE CASES
HARMAN COAL CO. v COMMONWEALTH, 384 A 2d 289 (Pa Commw Ct 1978).

The court affirmed the denial of a mine drainage permit to Harman Coal. Harman failed to carry out "the burden to prove that the drainage is not acidic and that adequate measures can and will be taken to insure that the drainage will not result in any pollution of the clean streams of the Commonwealth."


Under 1965 and 1970 amendments to Pennsylvania's Clean Streams Law, Harmar coal and Pittsburgh Coal were required to treat the entire discharges of acid mine drainage from their mines. [Harmar's discharge originated from an adjacent inactive mine; Pittsburgh's discharge included drainage that flowed from adjacent inactive mines.] In reversing the lower court's ruling, the court stated:

"[T]he Commonwealth Court failed to recognize the obvious nexus between the discharging of the acid mine drainage into the surface waters and the clear legislative intent to not only prevent further pollution but also to restore and reclaim those waters presently polluted."

In addressing the "takings" aspect of this issue, the court said:

"[T]he Clean Streams Law only regulates the process to be used in gaining access to the coal and in no way makes coal mining impracticable."

ATTACHMENTS

E. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -- Final rule.
   [Excerpts from Parts 701 and 779]
F. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 653 F 2d 514 (DC Cir April 1, 1981).
J. RITH ENERGY, INC. v OSM, 111 IBLA 239, IBLA 89-393 (1989).
ADDENDUM

February 1995

The enclosed materials update COALEX State Inquiry Report - 192:

REGULATORY HISTORY


Enclosed for background.


Due to the possibility of a remining operation unintentionally causing a sudden discharge of water releasing acid mine drainage, the operator applying for a remining permit must "identify the potential environmental and safety problems associated with the site, maximum impacts associated with these problems, and the probability for each type of problem to occur."

PENNSYLVANIA ADMINISTRATIVE CASE


"Hamilton failed to demonstrate that it would prevent damage to the hydrologic balance".

DER's expert witness concluded that there was a strong likelihood of acid mine drainage and that Hamilton's proposed treatment plan was insufficient to remedy the drainage problems. The Board ruled that the certainty requirement did not apply to the expert's opinions:

"The Department need not show that discharge of pollution will result; it will prevail if it shows that the potential for pollution exists."

WEST VIRGINIA STATE AMD CASES


"[T]he Commissioner of the Division of Environmental Protection has a duty to utilize the proceeds from forfeited bonds to accomplish the completion of reclamation of affected lands of a surface mine."
STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA HIGHLANDS CONSERVANCY, INC. v WEST VIRGINIA DIV. OF ENVTL. PROTECTION, 447 SE 2d 920 (W VA 1994).

West Virginia DER "has a mandatory, nondiscretionary duty to utilize moneys from the Special Reclamation Fund...to treat acid mine drainage at bond forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation."

"Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director [of OSM] as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment."