



COALEX STATE INQUIRY REPORT - 35

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TOPIC: WATER RIGHTS AND REPLACEMENT

INQUIRY: SMCRA Sec. 717 requires that an operator replace the water supply of an owner that has been contaminated, diminished, or interrupted by a surface mining operation. Is there any legislative history or case law addressing the question of what would be considered an acceptable level of water quality for the replacement water supply?

SEARCH RESULTS:

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires, among other things, that the operator of a surface coal mine replace the water supply of an owner of real property where the supply is contaminated, diminished, or interrupted due to surface coal mine operations. (SMCRA, Sec. 717(b); 30 USC Sec. 1307(b)) To meet the requirements of this provision, the operator is required to include in his permit application information on measures to be taken to assure the protection of the rights of the present users of water. (SMCRA Sec. 508(a)(13); 30 USC Sec.1258(a)(13))

Legislative History

Language similar to that included in Sec. 717(b) of SMCRA was initially offered during the 93rd Congress and similar language was either included or proposed to be included in two major bills, H.R. 11500 and H.R. 425. However, the replacement requirement did not appear to have enough support to be included in the bill (H.R. 25) that was reported out of Committee a year later, in the 94th Congress. (See 120 Cong. Rec. 23639-40 (JULY 16, 1974); 120 Cong. Rec. 25851 (JULY 30, 1974).)

In the 94th Congress, H.R. 25, as reported out of Committee, did not include language requiring the replacement of water rights for users whose supply was adversely affected by mining. (See H. Rep. No. 94-45, 94th Cong., 1st Sess. (MARCH 6, 1975).) During the floor debate, however, Congressman Melcher of Montana, and Congressman Evans of Colorado, introduced amendments paralleling those offered in the 93rd Congress, relating specifically to replacement of water rights.

First, Congressman Melcher proposed to amend Sec. 515(b)(10) by adding a new subsection as follows:

"(E) Replacing the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination,



diminution, or interruption proximately resulting from mining." (121 Cong. Rec. 6830 (MARCH 17, 1975))

In explaining his proposed amendment to Sec. 515, Congressman Melcher stated:

"[S]ection (E) deals with replacing the water supply of an owner in interest of real property; in other words, the owners and the ranchers around the area. If they are deprived of their water, the mining company would have to replace it. It is accepted by the Montana Power Co. who is in the business of mining at Colstrip; they know it is needed because they are having this very problem with the ranchers and the farmers surrounding the area where they are engaged in mining. They have cooperated with the Montana Legislature, which is now in session and which has adopted this type of language for a new requirement in the State of Montana.

"It is time we put it into the national bill also, and I urge the Committee to look favorably on this amendment and pass it." (Id.)

Second, Congressman Evans proposed to add a new Sec. 717, providing that:

"(a) In those instances in which it is determined that a proposed surface= coal mining operation is likely to adversely affect the hydrologic balance of water on or offsite, or diminish the supply or quality of such water, the application for a permit shall include either - (1) the written consent of all owners of water rights reasonably anticipated to be affected; or (2) evidence of the capability and willingness to provide substitute water supply at least equal in quality, quantity, and duration to the affected water rights of such owners.

"(b) (1) An owner of water rights adversely affected may file a complaint detailing the loss in quantity or quality of his water with the regulatory authority;

(2) Upon receipt of such complaint the regulatory authority shall -

(A) investigate such complaint using all available information including the monitoring data gathered pursuant to Section 517;

(B) within 90 days issue a specific written finding as to the cause of the water loss in quantity or quality, if any;

(C) order the mining operator to replace the water within a reasonable time in like quality, quantity, and duration if the loss is caused by the surface coal mining operations, and require the mining operator to compensate the owner of the water right for any damages he has sustained by reason of said loss; and

(D) order the suspension of the operator's permit if the operator fails to comply with any order issued pursuant to subparagraph (C)." (121 Cong. Rec. H6740 (MARCH 14, 1975); 121 Cong. Rec. 7065 (MARCH 18, 1975))

The amendments were accepted on the floor of the House during the 94th Congress and included in H.R. 25 as it initially passed the House. In the Senate, an amendment was added to Sec. 515(b)(10) of S. 7, providing that mining operations are to minimize impacts to the hydrologic balance by:

"(E) replacing the water supply of an owner of any interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground source other than a subterranean stream channel where such supply has



been affected by contamination, diminution, or interruption proximately resulting from mining." (S. 7, S. Rep. No. 94-28, 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 5653 (MARCH 7, 1975) and 121 Cong. Rec. 6212 (MARCH 12, 1975))

Language similar to the Evans amendment to H.R. 25, which specifically required that the replacement be of like quality, quantity, and duration as the original supply, was not included in the Senate version.

At Conference of H.R. 25 during the 94th Congress, "the Evans language was . . . completely dropped." (121 Cong. Rec. 12996 (MAY 5, 1975)) In discussing the deletion of Evans amendment, Congressman Udall noted that:

"The House bill contains certain procedural mechanisms for the protection of water rights. The conferees rejected this language as it could possibly interfere or modify well developed State law on the subject of water rights and was viewed as unnecessary." (121 Cong. Rec. 13370 (MAY 7, 1975))

The Conference also noted other differences between the House and Senate versions as follows:

"Both the House and Senate bills were amended to include a new provision that required the replacement of the water supply of an owner whose supply had been affected or interrupted by mining. The Senate amendment, however, precluded such replacement for water from a 'subterranean stream channel' and did not include surface sources. The House bill provided the protection for both all underground and surface sources. The conferees adopted the House provision." (121 Cong. Rec. 13370 (MAY 7, 1975))

As revised after the Conference in the 94th Congress, H.R. 25 passed both Houses, but was vetoed by President Ford in May, 1975.

In the 95th Congress, S. 7 continued to include the language in Sec. 515(b)(10)(E) providing for the replacement of water supplies which was adopted during the 94th Congress. (S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977)) The House version, H.R. 2, moved the provision for water replacement from Sec. 515(b)(10) to Sec. 717(b). There was no discussion in either Houses on specific requirements for the quantity, quality, or duration of the replacement source, or on what standard would be used to judge mining effects. (H. Rep. No. 95-218, 95th Cong., 1st Sess. (1977))

The Conference Committee in the 95th Congress, which provided the final language of P.L. 95-87, accepted the House version noting simply that: "There were no significant differences between the House bill and the Senate amendment." (Conf. Rep., S. Rep. No. 95-337, 95th Cong., 1st Sess., at 115 (1977))

The OSM permanent program regulations promulgated in March, 1979 included the requirements of Secs. 508(a)(13) and 717(b) nearly verbatim, in 30 CFR Secs. 779.17 and 816.54, for surface mines, and 783.17 and 817.54, for underground mines. Litigation on these provisions in IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, (see



discussion of cases, below) resulted in the removal of the provisions applicable to underground mines from the federal regulations.

In June 1982, as part of OSM's regulation revisions, a proposal was made to revise Sec. 816.41 to include the requirements for water replacement which would be suitable in quality and quantity to meet the needs of the damaged party. The rule would have further required that the baseline information developed during the permitting process be used to determine the impact of mining on the water resource. (47 FR 27725 (JUNE 25, 1982))

In the final rule, the language requiring that the replacement supply be "suitable" was deleted. OSM explained that:

"This sentence is unnecessary since it is implicit in the requirements of Section 717(b) of the Act, which are repeated in the first sentence of paragraph (h), that the alternative water supply must be capable of restoring the water user's supply which was lost due to surface mining impacts. The requirements of paragraph (h) to replace water supplies are thus tied to preexisting uses and not to postmining land use." (48 FR 43981 (SEPTEMBER 26, 1983))

The language providing that the permitting baseline data be used to determine the extent of the impact of the mining, was, however, retained in the final rule. (Id.)

Case Decisions

Two cases were identified in the search which related directly to the application of the requirements of Sec. 717(b) of SMCRA.

IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, Civ. No. 79-1144, slip op. at 36-37 (DDC May 16, 1980); and IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, slip op. at 11-13 (DDC October 1, 1984).

In IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, the National Coal Association objected to the 1979 OSM regulations on the grounds that the requirements to replace water supplies by underground operators lacked statutory authority. The Flannery court found that Sec. 717(b) was meant to apply only to surface coal mines and not to underground coal mines.

WIGGINS v BRAZIL COAL AND CLAY CORP., 440 N.E.2d 495 (Ind. Ct. App. 1982).

In WIGGINS, the Brazil Coal Co. opened a strip mining operation on property adjacent to that owned by Wiggins. The Wiggins property contained a lake that was formed prior to 1960 as a result of past strip mining. In the course of the new mining operation, the Wiggins' lake was dewatered. The trial court found that water in Brazil's pit was coming from Wiggins' lake by abandoned deep mine shafts, but that Brazil was entitled to pump the water since it was both reasonable and necessary as part of its mining operation.

The court of appeals reversed the trial court and ruled that the Surface Mining Control and Reclamation Act of 1977, and other developments, necessitated a change in the common law, and that Brazil must be held responsible for the loss of water in the lake.



ATTACHMENTS:

- A. Excerpts from Congressional Records (1974-1975).
- B. Excerpt from S. Rep. 95-337, 95th Cong., 1st Sess. 115 (1977).
- C. Excerpt from 47 FR 27724, Sec. 816.41(l) (1982).
- D. Excerpt from 48 FR 43956, 43980, Sec. 816.41(h) (1983).
- E. Excerpt from IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION No. 79-1144 (DDC May 16, 1980).
- F. IN RE: PERMANENT SURFACE MINING REGULATIONS LITIGATION, No. 79-1144 (DDC October 1, 1984).
- G. WIGGINS v BRAZIL COAL AND CLAY CORP., 440 N.E. 2d 495 (Ind. Ct. App. 1982). ,/
- H. WIGGINS v BRAZIL COAL AND CLAY CORP., 452 N.E. 2d 958 (Ind. 1982).