



COALEX STATE INQUIRY REPORT – 93
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TOPIC: WATER RIGHTS AND REPLACEMENT

INQUIRY: SMCRA Sec. 717 and the regulations promulgated thereunder at 30 CFR Sec. 816.41(h) require, among other things, that the operator of a surface coal mine replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial or other legitimate use where the water supply has been adversely impacted from surface mining activities. Is there any legislative history or case law addressing the question of what would be considered an acceptable level of water quality for water replacement and how long is the operator liable for maintenance of the replacement source?

SEARCH RESULTS: The Surface Mining Control and Reclamation Act required, 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 coal mining operations. (SMCRA Sec. 717(b); 30 USC Sec. 1307(b); 30 CFR 816.41(h)) Although several states have used this statute's state equivalent to hold coal operators liable for water replacement, no administrative cases have addressed whether water treatment and consequent maintenance fees are an adequate alternative to full water replacement. Common law principles may supply the answer.

LEGISLATIVE HISTORY

The legislative history of Sec. 717 and 30 CFR Sec. 816.41(h) is presented in COALEX STATE INQUIRY REPORT - 35. It is attached as Document A to this Report.

CASE DECISIONS

Although several courts and administrative agencies have addressed "replacement of water supplies", the COALEX search has found none that have specifically addressed a situation directly on point. Many of the cases addressing "replacement of water supplies" have addressed it tangentially to other central issues such as continuing liability in bankruptcy, burdens of proof, joint and several liability, and miscellaneous procedural contests.



Two Pennsylvania cases address regulatory remedies to water supply replacement. In *GIOIA COAL CO. v DER, PAEHB*, Docket No. 84-211-G, the Pennsylvania Department of Environmental Resources, pursuant to its authority under the Surface Mining Act, 52 P.S. 1396.4b(f), ordered the coal company to replace a private water supply. The central issue in *GIOIA* was whether the alternate water supply provided was adequate since it did not allow each affected party to totally control their own supply. (The replacement well pump was supplied with power from only one of the property owners affected.) While addressing the issue, the Pennsylvania Environmental Hearing Board shed light on what may be interpreted as suitable replacements under the Act.

The EHB recognized that the replacement system, which was a well, as opposed to the original supply, which was a spring, does require some routine maintenance and payment of an electric bill. The EHB addressed the difference between the original and replacement water supplies:

"The first question we must decide is whether this additional apparatus, which must be maintained and obviously has some possibility of failure, per se implies that the well system is not an alternate source of water adequate in quantity and quality' under 52 P.S. Sec. 1396.4b(f).

"We do not believe the Legislature intended or expected that replacement sources of water complying with Sec. 1396.4b(f) necessarily would require no more maintenance than the original source. The Legislature must have been aware that many residences in Pennsylvania have a spring as primary water supply. When a spring must be replaced, a well is likely to be the best replacement from the standpoint of the user. A well, with an attendant pump - which frequently is required, as this appeal illustrates - is likely to require more maintenance than the original spring. To construe Sec. 1396.4b(f) as requiring that the replacement water supply need no more maintenance than the original supply would imply that the Legislature did not intend that Sec. 1396.4b(f) be a remedy for households whose original water supply was a spring which required little or no maintenance. We find this implication absurd; the Legislature is presumed not to intend an absurd result. 1 Pa.C.S.A. Sec. 1922(1). We conclude that a replacement water supply which requires more maintenance than the original supply can be consistent with the requirements of Sec. 1396.4b(f).

"On the other hand, we doubt the Legislature intended that a replacement water supply which (compared to the original water supply) is unreliable or needs excessive maintenance would satisfy the requirements of Sec. 1396.4b(f). The question becomes, therefore, whether the replacement water supply installed by Gioia can be characterized as unreliable or as needing excessive maintenance."

The EHB left it to the parties to prove what is excessive and held that the replacement water supply met the requirements of the Pennsylvania Act in so far as reliability, maintenance and operating costs are concerned. However, the EHB pointed out that its jurisdiction was limited regarding dangerous claims:

"We stress that this conclusion does not imply that the Novotnaks (and/or McGregor) have no possible damage claims against Gioia; the replacement water supply Gioia installed may be



somewhat less reliable and does require somewhat more maintenance and operating costs. We are holding only that on the evidence presented these deficiencies, whether or not quantifiable in money damages, do not rise to a level warranting a finding that the replacement water supply Gioia installed failed to satisfy the requirements of Sec. 1396.4b(f). Damages against Gioia, if warranted, must be awarded by the Court of Common Pleas, not by DER or this Board."

In a second opinion, *AMBROSIA COAL AND CONSTRUCTION CO. v DER, PAEHB*, Docket No. 85-078-W, the EHB addressed an appeal from a DER order charging the coal company with failure to restore and replace a water supply pursuant to 52 P.S. Sec. 1396.4b(f). The coal company drilled an alternative well. However, the replacement water supply contained hydrocarbons that were not present in the original water supply. The Board addressed its authority under the Act:

"The Board construes this statutory provision as empowering DER to issue orders under two circumstances, one where the water supply has been affected and the operator refuses to acknowledge its obligation to replace it, and the other, where effect has been established and the supply has been replaced, but it is not adequate in quality or quantity for the purposes served or, after the passage of time, it becomes inadequate for the purposes served."

The Board then determined that no hydrocarbons may have arisen due to an intervening cause that DER had not proved cessation. This case serves, for this report, to show how a statute similar to Maryland's water replacement statute has been interpreted.

Obviously, only a general framework has been provided by the cited cases. Each state, as indicated in the legislative history still has its common law remedies. One Pennsylvania case found during the COALEX search does address the issue of damages for loss of water supply based not on the Surface Mining Act or its equivalent but, rather, based on concepts of remedies. In *HUGHES v EMERALD MINES CORP.*, 450 A2d 1 (1982) the coal company operating on adjacent property caused the failure of one water well and pollution to a second one located on the Hughes property.

The jury awarded the plaintiff a diminution in value (salvage value) remedy of \$32,500, the original property value was \$42,500. On appeal, the Superior Court addressed this award and reversed, "as to the necessary assumption that the entire property would remain without water and the damages should be based on a salvage value, we find that assumption incredible". The court agreed with the appellant that water could be replaced at a cost much lower than the jury award, noting the measure of damages -- is the cost of the remedy unless it exceeds the value of the property...." *HUGHES* shows that the remedy for the situation is attempting to resolve may in fact be found outside the administrative arena and in the civil court.

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 35, "Water rights and replacement".