



COALEX STATE INQUIRY REPORT - 107
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TOPIC: EFFLUENT LIMITATION REQUIREMENTS

INQUIRY: Does a coal company discharging water with a ph level failing to meet effluent limitation requirements have a responsibility to bring up the ph level when the receiving water does not meet the effluent limitation requirements? In particular, if the permit area naturally contains water with a ph level that does not meet the 6.0 requirement, does the coal company's discharge off the permit area have to meet the 6.0 ph requirement or can the discharge just meet whatever ph level the water on the permit has naturally?

SEARCH RESULTS: Research was conducted in the Office of Hearings and Appeals (OHA) decisions in COALEX and in the federal and state opinions in LEXIS.

A list of the decisions identified as a result of the research and the issues they address follows. Copies of the decisions are attached.

FEDERAL DECISIONS

No federal court decisions were identified that addressed the specific issues raised in the inquiry. However, several cases were identified that discuss effluent limitations, discharging and receiving waters issues under the Environmental Protection Agency (EPA)'s control. Three of these cases, which argue the validity of regulations promulgated by EPA under the Federal Water Pollution Control Act (the Act), were identified prior to the production of this report and are not discussed here. These cases are:

EPA v NATIONAL CRUSHED STONE ASS'N, 449 U.S. 64 (1980)

APPALACHIAN POWER CO. v TRAIN, 545 F.2d 1351 (4th Cir., 1976)

DUPONT v TRAIN, 541 F.2d 1018 (4th Cir., 1976)

The fourth case, CROWN SIMPSON PULP CO. v COSTLE, 642 F.2d 323 (9th Cir., 1981), rules on a factual issue; i.e., should the EPA "consider receiving water quality as a factor" in granting variances from effluent limitations? The court determined that granting variances on the



basis of receiving water quality would be contrary to the purpose of the Act, which is to "shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent".

STATE DECISIONS

Two Pennsylvania cases were identified which discuss the need to treat acid mine drainage from prior mining operations.

In *WILLIAM J. MCINTIRE COAL CO., INC. v COMMONWEALTH OF PA.*, 530 A.2d 140 (Pa. Commw. Ct., 1987), the court affirmed the Environmental Hearing Board (EHB)'s findings that "the pre-existing deep mine workings were likely to be the primary source of the acid mine drainage discharge.... It also found that the McIntires increased the potential for the acid mine drainage by failing to abide by [the conditions] of the mine drainage permit." The court determined that "a mine-operator is liable under both common law and statutory nuisance theories for post-mining discharges...."

The court stated further that: "[a] mine operator cannot escape liability for acts which further degrade water quality or cause additional pollution to the waters of this Commonwealth simply because a polluting condition existed from a prior operation...However, before liability will attach it must be shown that the owner or occupier knew of the polluting condition and positively associated with it by engaging in some affirmative conduct, indicating an intent to adopt the condition."

The same court, in an earlier case, *LUCAS v COMMONWEALTH OF PA.*, 420 A.2d 1 (Pa. Commw. Ct., 1980), also agreed with the EHB ruling, stating "that although there was a pre-existing acid mine discharge on Appellants' property when they started mining, the discharge increased during Appellants' operations and thus result[ed] from Appellants' operations. The Appellants' responsibility to "abate a public nuisance continues until the nuisance is abated, regardless of economic considerations and subsequent determinations of fault."

DOI ADMINISTRATIVE DECISIONS

Decisions from the Interior Board of Land Appeals, as well as Administrative Law Judge (ALJ) Hearings, find coal companies responsible for reclaiming pre-existing conditions.

The facts in *LAROSA FUEL CO., INC. v OSM*, Docket Nos. CH-0-101-R & CH-0-171-R (1983), are analogous to the issue stated in the inquiry: prior to the company's mining effort, the pH level of the receiving water did not meet regulatory standards. Despite the fact that "testing results...disclosed a pH level...lower downstream than that revealed by testing conducted upstream from the discharge point", the ALJ found that: "there is nothing in the Act or the regulations that countenances deviations from the pH standards of 30 CFR 715.17(a) even in those instances in which it is shown that the discharge is no worse than that found in the receiving stream. Nor has the Department, in construing the scope of 30 CFR 715.17(a), considered such benign discharges to be a possible exception to the pH range requirement".



In determining that the discharge from the LaRosa Fuel Company's sedimentation ponds (which contained water flowing from "areas being mined by [LaRosa] as well as from previously-mined areas") must meet the effluent limitations, the ALJ provided a summary of relevant administrative decisions: "In one of its early decisions, the Department held that discharges from any portion of a permitted area disturbed in the course of a mining operation must meet the effluent limitations of 30 CFR 715.17(a), even though the offending water discharges resulted from the commingling of drainage from other areas. THUNDERBIRD COAL CORP., 1 IBSMA 85, 86 I.D. 38 (1979). The Department later refined the ruling in Thunderbird by holding that an operator was responsible for meeting the requirements of 30 CFR 715.17(a) 'irrespective of [the] source' of the waters to be discharged from a disturbed area. CRAVAT COAL CO., 2 IBSMA 249, 255 87 I.D. 416, 419 (1980). More recently, the Department held that where waters originating beyond the permit area, and claimed by the permittee to have been unknown to exist at the time operations commenced, commingled with water from areas disturbed by the operator, the latter remained responsible for the effluent limitations of those commingled waters discharged, as here, from the sedimentation ponds. JEFFCO SALES AND MINING CO., 4 IBSMA 140, 89 I.D. 467 (1982)."

(NOTE: The cases cited here are included as part of STATE INQUIRY REPORT - 90. See below.)

The responsibility for reclaiming pre-existing conditions is further discussed in NATIONAL MINES CORP. v OSM, Docket No. CH-5-19-P (1986) and in STATE INQUIRY REPORT - 90, both of which are attached.

ATTACHMENTS

- A. CROWN SIMPSON PULP CO. v COSTLE, 642 F.2d 323 (9th Cir., 1981).
- B. WILLIAM J. MCINTIRE COAL CO., INC. v COMMONWEALTH OF PA., 530 A.2d 140 (Pa. Commw. Ct., 1987).
- C. LUCAS v COMMONWEALTH OF PA., 420 A.2d 1 (Pa. Commw. Ct., 1980).
- D. LAROSA FUEL CO., INC. v OSM, Docket Nos. CH-0-101-R & CH-0-171-R (1983).
- E. NATIONAL MINES CORP. v OSM, Docket No. CH-5-19-P (1986).
- F. STATE INQUIRY REPORT - 90.

RELEVANT DECISIONS NOT ATTACHED:

- A. EPA v NATIONAL CRUSHED STONE ASS'N, 449 U.S. 64 (1980).
- B. APPALACHIAN POWER CO. v TRAIN, 545 F.2d 1351 (4th Cir., 1976).
- C. DUPONT v TRAIN, 541 F.2d 1018 (4th Cir., 1976).