



COALEX STATE INQUIRY REPORT - 192

September 1991 [Updated February 1995]

Steven C. Keen, Director
Mines and Minerals
Division of Energy
1615 Washington Street, East
Charleston, West Virginia 25311

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

S. REP. No. 402, 93rd Cong., 1st Sess. 64 (S. 425, September 21, 1973).

"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."



H.R. REP. No. 101, 94th Cong., 1st Sess. 79 (H.R. 25, Conference Report, May 2, 1975).

"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."

H.R. REP. No. 218, 95th Cong., 1st Sess. 110 (H.R. 2, April 22, 1977).

"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."

H.R. REP. No. 218, 95th Cong., 1st Sess. 170 (H.R. 2, April 22, 1977).

"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."



47 FR 27712 (JUNE 25, 1982). Proposed rules. Hydrology permitting and performance standards.

Enclosed for background.

48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology permitting and performance standards.

"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 intend 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."

53 FR 36394 (SEPTEMBER 19, 1988). Final rule. Probable hydrologic consequences determination.

Enclosed for background.

INTERIOR ADMINISTRATIVE CASES

RITH ENERGY, INC. v OSM, 111 IBLA 239, IBLA 89-393 (1989). RITH ENERGY, INC. v OSM, Docket No. NX 89-1-PR (1989).

"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."

REX COAL CO. v OSM, Docket No. NX 88-1-PR (1987).

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."

COMMONWEALTH v HARMAR COAL CO., 306 A 2d 308 (Pa 1973).

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

- A. S. REP. No. 402, 93rd Cong., 1st Sess. 64 (S. 425, September 21, 1973).
- B. H.R. REP. No. 101, 94th Cong., 1st Sess. 79 (H.R. 25, Conference Report, May 2, 1975).
- C. H.R. REP. No. 218, 95th Cong., 1st Sess. 110 (H.R. 2, April 22, 1977).
- D. H.R. REP. No. 218, 95th Cong., 1st Sess. 170 (H.R. 2, April 22, 1977).
- 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).
- G. 47 FR 27712 (JUNE 25, 1982). Proposed rules. Hydrology permitting and performance standards.
- H. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology permitting and performance standards.
- I. 53 FR 36394 (SEPTEMBER 19, 1988). Final rule. Probable hydrologic consequences determination.
- J. RITH ENERGY, INC. v OSM, 111 IBLA 239, IBLA 89-393 (1989).
- K. RITH ENERGY, INC. v OSM, Docket No. NX 89-1-PR (1989).
- L. REX COAL CO. v OSM, Docket No. NX 88-1-PR (1987).
- M. HARMAN COAL CO. v COMMONWEALTH, 384 A 2d 289 (Pa Commw Ct 1978).
- N. COMMONWEALTH v HARMAR COAL CO., 306 A 2d 308 (Pa 1973).



ADDENDUM

February 1995

The enclosed materials update COALEX State Inquiry Report - 192:

REGULATORY HISTORY

55 FR 47430 (NOVEMBER 13, 1990). Proposed rule. Hydrologic balance.

Enclosed for background.

59 FR 28744 (JUNE 2, 1994). Proposed rule. Lands eligible for re-mining.

Due to the possibility of a re-mining operation unintentionally causing a sudden discharge of water releasing acid mine drainage, the operator applying for a re-mining 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

**AL HAMILTON CONTRACTING CO. V COMMONWEALTH OF PENN., DER, EHB
Docket No. 85-392-W, 1991 Pa Envirn LEXIS 188 (1991).**

"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

**STATE OF WEST VIRGINIA EX REL. LAUREL MOUNTAIN/FELLOWSVILLE
AREA CLEAN WATERSHED ASSN., INC. v CALLAGHAN, 418 SE 2d 580 (W VA
1992).**

"[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."