



## COALEX STATE INQUIRY REPORT - 175

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**TOPIC:** 400 YEAR PRECIPITATION EVENT: LIABILITIES AND REMEDIES FOR OFF-SITE DAMAGE

**INQUIRY:** Several years ago, a 400 year storm event caused the breach of a sedimentation pond resulting in offsite damage. Are there any EPA or state regulations that would establish potential liability against the operator or provide the landowner whose property was damaged with some remedy? Are there any Interior or other administrative cases which address these issues?

**SEARCH RESULTS:** Research consisted of conducting a limited telephone survey and searching the COALEX Library and other materials available in LEXIS. The results of the survey and a list of the administrative and state court decisions identified follow. Copies of the decisions are attached. Federal Register preambles of the Environmental Protection Agency (EPA) and the Office of Surface Mining (OSM) regulations on effluent limitations are included for background.

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### SURVEY RESULTS

Maryland, Virginia and Pennsylvania were contacted. The summary of their comments follows:

1. When rainfall exceeds certain limits, operators are exempt from effluent limitations provided they were in compliance with relevant performance standards prior to the precipitation event.
2. After the event, operators must rebuild failed structures promptly.
3. Regarding compensation to the landowner:
  - a. A landowner may be able to file against an operator's offsite damage liability insurance; or
  - b. The regulatory authority may ask the operator to provide compensation to the landowner even though no NOV has been issued and the request is unenforceable.



## **ADMINISTRATIVE DECISIONS - INTERIOR**

### **P & N COAL CO., INC. v OSM, Docket No. CH 9-60-R (1979).**

P & N received an NOV for exceeding effluent discharge limitations. They claimed they were unable to repair the breach of the diversion ditch because of the extreme weather conditions that existed at that time; no authority was cited for extreme weather being an excuse for non-compliance. Mining was not halted by the weather. The ALJ sustained the issuance of the NOV but stated that weather was an issue that could be raised at a penalty assessment conference.

### **PACIFIC COAST COAL CO., INC. v OSM, Docket Nos. DV 7-1-R, DV 7-7-R, DV 7-1-P (1988). [Pacific Coast's IBLA appeal was dismissed for failure to file a brief.]**

The ALJ sustained the NOV, finding that while the evidence showed that a major precipitation event in excess of a 10-year, 24-hour event had occurred, the length of time between the precipitation event and the date of the violation cast doubt on the assertion that the elevated level of total suspended solids resulted from the storm. The alternate precipitation limitations did not apply.

### **THE PITTSBURG & MIDWAY COAL MINING CO. (P&M) v OSM, Docket No. 88-4-R (1988).**

P&M began reconstruction on its berm at the beginning of the rainy season and left it in a "non-conforming state" through the rainy season which resulted in the cited erosion. P&M claimed it was proceeding with reconstruction in a timely manner. The ALJ sustained the NOV, noting that the previous year when the berm was damaged by a heavy rainstorm early in the rainy season, P&M was able to repair the damage during the rainy season, despite muddy conditions.

### **LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).**

Lone Star was diligent in trying to keep the landowner's cattle from entering and grazing on the area being reclaimed. The Board ruled that Lone Star's efforts to ensure compliance, which ultimately failed, did not relieve it from compliance with the regulations: An NOV or CO may not be vacated because of an inability to comply; inability to comply may be considered in mitigation of the amount of civil penalty.

### **ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (1990).**

"Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site...and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance, an NOV...will be upheld. The regulations at 30 CFR 722.17 require that an NOV may not be vacated because of an operator's inability to comply."



## **ADMINISTRATIVE DECISIONS - PENNSYLVANIA**

### **BETHLEHEM MINES CORP., 1973 [Pennsylvania] Environmental Hearing Board 35, Docket No. 72-170 (1973).**

The Board dismissed the Department of Environmental Resources' complaint alleging that Bethlehem knowingly and willfully allowed a discharge of coal fines from its settling pond into the local creek: The freezing weather which ruptured pipes throughout the treatment facility over a weekend when most of the personnel were not at work was unanticipated; there were no regulations that required the pumping of water from silt slurry ponds to be supervised continuously. The Board found that Bethlehem had acted in good faith, notified the Bureau of Water Quality within a reasonable time and taken all reasonable measures to correct the pollution problem.

## **STATE CASE LAW**

### **LACY v MUSKINGUM MINING CO., INC. AND OHIO DEPT. OF NATURAL RESOURCES, 1990 Ohio App LEXIS 287 (Ohio Ct App 1990).**

The Hearing Officer and the Ohio Reclamation Board of Review found that Muskingum Mining had caused the damage to Lacy's lands but determined that the NOV was "non-remedial": Muskingum's failure to properly maintain the sedimentation ponds, compounded by a heavy rainfall event and a wet spring, caused the offsite damage; however, because of the topography, environmental harm resulting from remedial efforts would outweigh any environmental benefits. The court reversed these decisions, instructing the Board of Review to state the duty of the Division of Reclamation in enforcing remedial measures "in the case of proven damage to an adjacent landowner...."

## **REGULATORY HISTORY**

Complete copies of Federal Register preambles to proposed and final rules regulating effluent limitation promulgated by the EPA and OSM from January, 1981 through the most recent notice, October, 1985, are attached. The relevant points of the most recent notices are summarized below.

### **47 FR 45382 (OCTOBER 13, 1982). EPA Final rule. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines for Existing Sources and Standards of Performance for New Sources.**

For a precipitation even greater than a 10-year, 24-hour event, only a pH of 6 to 9 must be met.

### **47 FR 47216 (OCTOBER 22, 1982). OSM Final rule. 30 CFR Parts 816 and 817. Water Quality Standards and Effluent Limitations.**

OSM adopted the effluent regulations promulgated by EPA under 40 CFR Part 434.



**48 FR 44032 (SEPTEMBER 26, 1983). OSM Final rule. 30 CFR Parts 816 and 817.  
Siltation Structures.**

Sedimentation ponds must be designed, constructed and maintained to contain or treat a 10-year, 24-hour precipitation event.

**50 FR 41296 (OCTOBER 9, 1985). EPA Final rule. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards.**

EPA classified the alternate storm limits into 8 specified categories, giving operators and the permit authority a clear understanding of which limits apply in particular situations. A pH of 6 to 9 is required at all times.

**ATTACHMENTS**

- A. P & N COAL CO., INC. v OSM, Docket No. CH 9-60-R (1979).
- B. PACIFIC COAST COAL CO., INC. v OSM, Docket Nos. DV 7-1-R, DV 7-7-R, DV 7-1-P (1988).
- C. TGE PITTSBURG & MIDWAY COAL MINING CO. v OSM, Docket No. 88-4-R (1988).
- D. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).
- E. ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (1990).
- F. BETHLEHEM MINES CORP., 1973 [Pennsylvania] Environmental Hearing Board 35, Docket No. 72-170 (1973).
- G. LACY v MUSKINGUM MINING CO., INC. AND OHIO DEPT. OF NATURAL RESOURCES, 1990 Ohio App LEXIS 287 (Ohio Ct App 1990).
- H. 50 FR 41296 (OCTOBER 9, 1985). EPA Final rule. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards.
- I. 49 FR 19240 (MAY 4, 1984). EPA Proposed rule. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards.
- J. 48 FR 44032 (SEPTEMBER 26, 1983). OSM Final rule. 30 CFR Parts 816 and 817. Siltation Structures.
- K. 47 FR 47216 (OCTOBER 22, 1982). OSM Final rule. 30 CFR Parts 816 and 817. Water Quality Standards and Effluent Limitations.
- L. 47 FR 45382 (OCTOBER 13, 1982). EPA Final rule. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines for Existing Sources and Standards of Performance for New Sources. [Includes corrections to the final rule published on November 1, 1983.]
- M. 46 FR 34784 (JULY 2, 1981). OSM Proposed rules. 30 CFR Parts 715, 717, 816 and 817. Permanent and Interim Regulatory Programs; Effluent Limitations and Sedimentation Pond Design Criteria.



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- N. 46 FR 28873 (MAY 29, 1981). EPA Changes to proposed rulemaking. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines for Existing Sources and Standards of Performance for New Sources.
- O. 46 FR 3136 (JANUARY 13, 1981). EPA Proposed regulation. 40 CFR Part 434 Coal Mining Point Source Category; Effluent Limitations Guidelines for Existing Sources, Standards of Performance for New Sources and Pretreatment Standards.