



COALEX STATE INQUIRY REPORT - 203

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TOPIC: WATER SUPPLY REPLACEMENT FOR UNDERGROUND MINING (Includes COALEX STATE INQUIRY REPORTS Nos. 35 & 93)

INQUIRY: Please locate any information which discusses the state regulatory authority's ability to regulate water supply replacement for underground mining operations.

SEARCH RESULTS: Using the COALEX Library and other materials available in LEXIS, research was conducted in SMCRA legislative history, regulatory history, caselaw (federal and state) and administrative decisions (Interior and Pennsylvania). The findings are discussed below; copies of retrieved materials plus two existing COALEX State Inquiry Reports, are attached.

GENERAL INFORMATION

In July, 1991, the Office of Surface Mining Reclamation and Enforcement (OSM) issued a Notice of Inquiry indicating it was seeking comments on the need for additional rulemaking on, among several topics, the replacement of water supplies damaged by underground mining. [56 FR 33170 (JULY 18, 1991). Notice of inquiry. Underground mining performance standards -- Subsidence.] Two Notices of Public Meetings followed. [56 FR 37194 (AUGUST 5, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence. 56 FR 49286 (AUGUST 14, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence.] No proposed rules have been published to date.

Three federal decisions addressed the question of whether underground mine operators are covered by the water damage provision of SMCRA and the accompanying regulations. The most recent case, NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir 1988), provides a history of the issue:

"In 1979 Secretary Andrus promulgated regulations requiring operators of all mines, surface and underground, to replace damaged water supplies. 44 FED. REG. 15430 (1979). On review of a challenge by Industry, the district court struck down those regulations as exceeding statutory authority, because sec. 717(b) only mentions operators of surface coal mines, and no other



provisions of the Act authorized the Secretary to compel replacement of water damaged by underground operators. PSMRL I (Round II), 19 E.R.C. at 1495. In 1983 Secretary Watt promulgated new regulations that did not require underground mine operators to replace damaged water supplies. NWF challenged these regulations, arguing both that the terms of sec. 717(b) require underground operators to replace damaged water supplies, and that a similar replacement requirement can be inferred from the permitting requirements of sec. 508(a)(13) of the Act. The district court upheld the 1983 regulation, reaffirming its earlier pronouncement that sec. 717(b) does not apply to underground mines and consistent with that interpretation, refusing to read any water replacement requirement for underground mines into the permitting requirements of sec. 508(a)(13). PSMRL II (Round III), 620 F. Supp. at 1533."

[The 1979 (excerpts) and the 1983 preambles to the regulations, as well as the 1980 and 1985 court decisions are attached.]

In discussing the contradictions between SMCRA sec. 717(b)'s water replacement provisions and sec. 508(a)(13)'s permitting requirements, the court suggested:

"A more credible claim could be made that sec. 508(a)(13)(C), by requiring both surface and underground mine operators to provide a description of their plans to provide alternate sources of water where protection of the water supply cannot be assured, authorizes the Secretary to do something with that information, i.e., to require underground mine operators to replace damaged water supplies, or to allow state regulatory authorities to require from underground mine operators, as a permit condition, commitments to replace damaged water supplies. But even under that interpretation, the Secretary would not be compelled to impose a water replacement requirement on underground mine operators, since SMCRA clearly affords the Secretary wide discretion in the application of permit requirements to underground mines.... In fact, Secretary Watt relied on that discretion to exempt underground mine operators from the information requirements of sec. 508(a)(13)(C)."

PREVIOUS REPORTS

COALEX STATE INQUIRY REPORT - 35, "Water Rights and Replacement" (1985) provides the legislative history of SMCRA sec. 717, regulatory history of 30 CFR 779.17 and 816.54 [corresponding to SMCRA secs. 717(b) and 508(a)(13)], and available caselaw.

COALEX STATE INQUIRY REPORT - 93, "Water Rights and Replacement" (1988) updates Report No. 35. It addresses the question: Is there an acceptable level of water quality for water replacement and how long is the operator liable for maintenance of the replacement source? Two decisions from the Pennsylvania Environmental Hearing Board are discussed and an Interior Directive is attached.

ADDITIONAL LEGISLATIVE HISTORY



120 CONG. REC. H23639 (daily ed. July 16, 1974) (statement of Rep. Evans). In this excerpt, Rep. Evans discusses the introduction of two amendments to HR 11500 (SMCRA of 1974).

123 CONG. REC. S8083 (daily ed. May 20, 1977) (statement of Sen. Danforth). Discussion of amendment to SMCRA of 1977.

1977 versions of SMCRA sections:

1. S. 7, 95th Cong, 1st Sess (January 10, 1977). Excerpt from Sec. 415 Environmental Protection Performance Standards.
2. HR 2, 95th Cong, 1st Sess (April 1, 1977). New sec. 717. Water Rights and Replacement of Supplies.
3. HR REP. No. 218, 95th Cong, 1st Sess 181 (April 22, 1977). Section-by-Section Analysis. Section 717 - Water Rights.

ADDITIONAL REGULATORY HISTORY

52 FR 45920 (DECEMBER 2, 1987). Final rule. Underground coal mining activities; hydrologic balance; protection recharge capacity. The preamble cites to the legislative history and the 1979 rules to prove that:

"The limited effect of underground operations on surface recharge capacity has been recognized from the outset of regulation under the Act."

MISCELLANEOUS MATERIALS

UTAH POWER & LIGHT CO. v OSM, Docket Nos. UT-001; TU 6-1-PR (1988). This consent decree states that the State of Utah and Utah Power agree to the inclusion of a condition to the permit requiring the replacement of water supplies adversely affected by Utah Power's mining operations.

OSM DIRECTIVE, Subject No. REG-27, Transmittal No. 474, "Water Replacement" (Issued October 19, 1988). This directive is a guide for implementing 717(b) where OSM is the regulatory authority and also for evaluating water supply replacement provisions of approved State programs.

ATTACHMENTS

- A. 56 FR 33170 (JULY 18, 1991). Notice of inquiry. Underground mining performance standards -- Subsidence.]
- B. 56 FR 37194 (AUGUST 5, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence.
- C. 56 FR 49286 (AUGUST 14, 1991). Notice of public meeting. Underground mining performance standards -- Subsidence.



- D. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir 1988).
- E. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule.
 - a. Section 817.54. Hydrologic balance: Water rights and replacement.
 - b. Introduction to Part 783. Underground Mining Permit Application - Minimum Requirements for Information on Environmental Resources.
 - c. Section 783.17. Alternate water supply information.
- F. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION [PSMRL I (ROUND II)], 19 ERC (BNA) 1477 (D DC May 16, 1980).
- G. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology Permitting and Performance Standards.
- H. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION [PSMRL II (ROUND III)], 620 F Supp 1519 (D DC July 15, 1985).
- I. COALEX STATE INQUIRY REPORT - 35, "Water Rights and Replacement" (1985).
- J. COALEX STATE INQUIRY REPORT - 93, "Water Rights and Replacement" (1988).
- K. 120 CONG. REC. H23639 (daily ed. July 16, 1974) (statement of Rep. Evans). [Excerpt]
- L. 123 CONG. REC. S8083 (daily ed. May 20, 1977) (statement of Sen. Danforth).
- M. 1977 versions of SMCRA sections:
 - a. S. 7, 95th Cong, 1st Sess (January 10, 1977). Excerpt from Sec. 415 Environmental Protection Performance Standards.
 - b. HR 2, 95th Cong, 1st Sess (April 1, 1977). New sec. 717. Water Rights and Replacement of Supplies.
 - c. HR REP. No. 218, 95th Cong, 1st Sess 181 (April 22, 1977). Section-by-Section Analysis. Section 717 - Water Rights.
- N. 52 FR 45920 (DECEMBER 2, 1987). Final rule. Underground coal mining activities; hydrologic balance; protection recharge capacity.
- O. UTAH POWER & LIGHT CO. v OSM, Docket Nos. UT-001; TU 6-1-PR (1988).
- P. OSM DIRECTIVE, Subject No. REG-27, Transmittal No. 474, "Water Replacement" (Issued October 19, 1988).