



## COALEX STATE INQUIRY REPORT - 311

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### **TOPIC:** WATER RIGHTS AND REPLACEMENT UPDATE

**INQUIRY:** Please provide the most recent cases and other materials available on water rights and replacement issues. Broaden the research to include case law addressed to the issue of the burden of proof as it relates to water replacement and as it relates to the scope of review where the issue involves a revision to an existing permit to mine additional coal.

**SEARCH RESULTS:** Research was conducted using the COALEX Library, LEXIS and existing COALEX State Inquiry Reports. Several recent Pennsylvania and Ohio decisions were identified that address the issue of proving responsibility for dewatering wells, contaminating water supplies, replacing water supplies, etc. Other cases were identified that address other aspects of the water supply and replacement question. No cases were identified that specifically discussed water replacement where a permit revision is involved. However, the preambles to proposed and final rules on permit revisions, hydrology and water replacement discuss revision requirements, and operator and regulatory authority responsibility with regard to these issues. Copies of the materials listed below are attached.

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### **PRIOR COALEX REPORTS**

**COALEX STATE INQUIRY REPORT - 241, "Replacement of water supply - payment of ongoing costs" (1993).**

**COALEX STATE INQUIRY REPORT - 203, "Water supply and replacement for underground mining (Includes Reports 35 & 93)" (1992).**

**COALEX STATE COMPARISON REPORT - 210, "Subsidence: compensation for damaged structures and water supply" (1992).**



## **INTERIOR ADMINISTRATIVE DECISIONS**

### **MARTHA AND ROY A. MCBRIDE, 129 IBLA 112, IBLA 91-112 (1994).**

"Under 30 CFR 816.42(h), any person who conducts surface mining activities is required to 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 from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. The replacement requirement is controlled by the owner's pre-existing uses of the water supply."

## **PENNSYLVANIA ADMINISTRATIVE DECISIONS**

### **HAYDU v COMMW. OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 92-154-MJ, 1994 Pa Envirn LEXIS 40 (1994).**

The Board found the Haydu failed to show that the Department abused its discretion in issuing a permit to PBS Coals, Inc. The evidence showed that the two seam mines will not affect the well functioning as a replacement water supply which is located above the seam mines. Coal was extracted from the two mines "to minimize the amount of subsidence that will occur. Any subsidence that does occur will fall far short of reaching the E seam aquifer or [the replacement well].... Moreover, should any repair work or replacement be required for [the replacement well], this is provided for by the trust agreement."

### **BEARER T/D/B/A NORTH CAMBRIA FUEL CO. v COMMW. OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 83-091-G, 1993 Pa Envirn LEXIS 82 (1993).**

SYNOPSIS: "The Department met its burden of establishing that the water supplies, which were in the vicinity of the operator's mine site, were degraded by his mining activities. Therefore, the Department's order to restore the supplies to a condition 'equal to or better than the pre-mining quantity and quality' was not an abuse of discretion."

## **STATE CASES**

### **CARLSON MINING CO. v DEPT. OF ENVIRONMENTAL RESOURCES (DER), 639 A 2d 1332 (Pa Commw Ct 1994). CARLSON MINING CO. v COMMW. OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-547-E, 1993 Pa Envirn LEXIS 70 (1993).**

The court affirmed the orders of the Environmental Hearing Board in ruling on the three issues on appeal:



1. Carlson was required to provide for the increased operation and maintenance costs of the Mackey replacement water supply on a permanent basis.
2. The increased operation and maintenance costs of the Mackey replacement water supply was sufficient to require Carlson to compensate Mackey ad infinitum. (The five-fold increase in the cost of operating and maintaining the water supply was "more than marginally higher" -- it was "excessive".)
3. DER may require operators to create individual trusts or escrow accounts to provide for the payments of additional costs.

**HINDMAN v SCHIAPPA, 1990 Ohio App LEXIS 5664 (Ohio Ct App 1990). [Excerpts]**

The court held that the plaintiff failed to establish that "their shortage of water was directly the result of mining operations nor did the appellants collectively establish the quantity of their water supply before mining operations as compared to after mining operations."

**SME BESSEMER CEMENT, INC. v MAMONE, 1988 Ohio App LEXIS 110 (1988).**

An investigation by the Department of Natural Resources, Division of Reclamation concluded that the Krug well was dewatered as a result of the interception of SME Bessemer Cement's surface coal mining operations with the flooded, abandoned "Old McKinley mine". The Division determined that each of the three replacement wells drilled by SME Bessemer Cement were inadequate. In the CO, the Division contended that the replacement water supply "failed to duplicate or even approach premining sodium levels of the Krug water supply and, further, that SME Bessemer Cement, Inc. had failed to perform other necessary actions for water replacement such as the plugging of the two other replacement wells so as to prevent well to well contamination...."

The court affirmed the Reclamation Board of Review's ruling vacating the CO holding that there was no premining test sample of the Krug water supply to substantiate the view of the Division.

**NATURAL RESOURCES COMMN. (NRC) OF INDIANA v AMAX COAL CO., 638 NE 2d 418 (Indiana 1994).**

This consolidated case involves the attachment of conditions to Amax's permit prohibiting the use of "dewatering" wells and requiring additional surveys on the possible effects of the depressurizing wells and the related issue of B & LS Contracting's planned pumping of water from its mining pits which would drain adjacent property owners' lakes.

In the AMAX case, the court held that NRC was acting within its statutory authority when it conditioned approval of the AMAX permit upon further hydrologic studies after



having determined that the proposed plan to preserve the hydrologic balance was deficient.

As in the B & LS case, the court held that the Department of Natural Resources (DNR) was acting within its statutory authority when ordering B & LS to revise its permit. "Following AMAX, the DNR made a retroactive determination that B & LS's application was not in compliance with I-SMCRA, and ordered B & LS to show either that B & LS operations would not cause damage as the result of the lowering of off-site water bodies, or that B & LS had purchased a right of entry to those off-site lakes that allowed the lakes to be lowered. The DNR has the authority to require a permittee to revise or modify a permit, although the revision must be based upon a written finding and is subject to notice and hearing requirements."

**CARTER v AMERICAN AGGREGATES CORP., 611 NE 2d 512 (Ohio Ct App 1992).**

The court affirmed the trial court's ruling that the plaintiffs' claim was barred by the statute of limitations. American Aggregates interfered with the plaintiffs' underground water supply, causing their well to dry up in 1980. Plaintiffs conceded that "they have suffered no compensable injuries since 1982 when they drilled the second well, which afforded them adequate water acceptable both in quality and quantity."

**VILLAGE OF PLEASANT CITY v OHIO DEPT. OF NATURAL RESOURCES, DIV. OF RECLAMATION, 617 NE 2d 1103 (Ohio 1993).**

SYLLABUS: "In determining the unsuitability of lands for coal mining, R.C. 1513.073 (A)(2)(c) requires consideration of the impact that mining and reclamation could have on the long-range productivity of aquifers and aquifer recharge areas, not solely the impact on their current use as a water supply."

**REGULATORY HISTORY**

Attached for background are the following preambles to proposed and final rules, published in the Federal Register:

**PERMIT REVISION/RENEWAL/SIGNIFICANT REVISION**

1. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -- Final rule. Sections 788.12 Permit revisions & 788.13 Permit renewals.
2. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting.
3. 51 FR 21574 (JUNE 13, 1986). Notice of availability of a petition to initiate rulemaking. Guidelines for significant revisions.
4. 52 FR 6827 (MARCH 5, 1987). Notice of decision on rulemaking petition. Guidelines for significant revisions.



5. OSM DIRECTIVE, Subject No. REG-21, Transmittal No. 398, "Findings and Determinations for Revisions and Renewals of Federal Permits" (Issued November 10, 1987).

## **HYDROLOGY**

1. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. Hydrology permitting and performance standards.
2. 53 FR 36394 (SEPTEMBER 19, 1988). Final rule. Permit applications; probable hydrologic consequences determination.

## **WATER REPLACEMENT**

1. 58 FR 50174 (SEPTEMBER 24, 1993). Proposed rules. Underground mining performance standards.

## **ATTACHMENTS**

1. COALEX STATE INQUIRY REPORT - 241, "Replacement of water supply - payment of ongoing costs" (1993).
  1. CITIZENS ORGANIZED AGAINST LONGWALLING v DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES; SOUTHERN OHIO COAL, INTERVENOR, 535 NE 2d 687 (Ohio Ct App 1987).
  2. CITIZENS ORGANIZED AGAINST LONGWALLING, ET AL. v SOUTHERN OHIO COAL (SOCCO), 1989 Ohio App LEXIS 2262 (Ohio Ct App 1989).
  3. GIOIA COAL COMPANY v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 84-211-G, 1986 Pa Envirn LEXIS 157 (1986).
  4. BUFFY AND LANDIS v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND PBS COALS, INC., EHB Docket No. 90-284-E, 1990 Pa Envirn LEXIS 185 (1990).
  5. CARLSON MINING v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-547-E, 1992 Pa Envirn LEXIS 161 (1992).
  6. AMBROSIA COAL v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 85-078-W, 1986 Pa Envirn LEXIS 129 (1986).
  7. OSM DIRECTIVE, Subject No. REG-27, Transmittal No. 474, "Water Replacement" (Issued: November 19, 1988).
  8. 44 FR 14902 (3/13/79). Permanent Program Final Preamble -- Final Rule. 816.54 Hydrologic balance: Water rights and replacement.
  9. 48 FR 43956 (9/26/83). Final rules. Geology permitting. 816.41(h) Water rights and replacement.



10. COALEX STATE INQUIRY REPORT - 203, "Water supply and replacement for underground mining (Includes Reports 35 & 93)" (1992). [ENCLOSED WITHOUT ATTACHMENTS.]
11. COALEX STATE COMPARISON REPORT - 210, "Subsidence: compensation for damaged structures and water supply" (1992). [ENCLOSED WITHOUT ATTACHMENTS.]
2. COALEX STATE INQUIRY REPORT - 203, "Water supply and replacement for underground mining (Includes Reports 35 & 93)" (1992). [Only Reports 35 & 93 are attached.]
  - 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).
- COALEX STATE COMPARISON REPORT - 210, "Subsidence: compensation for damaged structures and water supply" (1992).
- MARTHA AND ROY A. MCBRIDE, 129 IBLA 112, IBLA 91-112 (1994).
- HAYDU v COMMW. OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 92-154-MJ, 1994 Pa Envirn LEXIS 40 (1994).
- BEARER T/D/B/A NORTH CAMBRIA FUEL CO. v COMMW. OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 83-091-G, 1993 Pa Envirn LEXIS 82 (1993).
- CARLSON MINING CO. v DEPT. OF ENVIRONMENTAL RESOURCES (DER), 639 A 2d 1332 (Pa Commw Ct 1994).
- CARLSON MINING CO. v COMMW. OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-547-E, 1993 Pa Envirn LEXIS 70 (1993).
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