



## COALEX STATE INQUIRY REPORT - 337

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**TOPIC:** APPLICABILITY OF STATE ADMINISTRATIVE PROCEDURE ACT PROVISIONS TO SMCRA; DECISIONS RE: REPLACEMENT OF WATER SUPPLY

**INQUIRY:** In primacy states, have state administrative procedure act (APA) provisions for mandatory informal fact finding in agency adjudications been held to apply to state versions of SMCRA? Also, please locate administrative and court decisions addressing the meaning of "replacement of water supply" that have been handed down since March 31, 1995.

**SURVEY AND SEARCH RESULTS:** A quick survey of five states indicated a variety of regulatory schemes with regard to the relationship between the state APA and the state SMCRA. In two states, the state APA and state SMCRA are totally separate. In three states, the state APA is part of or referenced in state SMCRA, but SMCRA regulations take precedence. See the summary of the survey, below.

A number of Interior administrative decisions, Pennsylvania Environmental Hearing Board opinions and state court cases handed down in 1995 or after were identified addressing "replacement of water supply" issues. These are listed below. Copies are attached.

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### SURVEY RESULTS

#### ALABAMA

For hearings and appeals processes, state SMCRA takes precedence over state APA. The rulemaking portions of the state APA are applicable to state SMCRA.

#### ILLINOIS

The state APA is referenced in state SMCRA. If an area is not covered under SMCRA, the state would then follow APA regulations.



## **INDIANA**

The state APA is part of the state SMCRA.

## **OHIO**

State APA has no impact on the Ohio Revised Code that contains coal mining laws. SMCRA has its own appellate requirements that are separate and distinct from the state APA.

## **UTAH**

State APA and state SMCRA are separate. The APA may govern if the application is reviewed and approved by the state SMCRA-regulating agency.

## **RESEARCH RESULTS**

### **JERRY HYLTON et al., IBLA 93-618, 135 IBLA 369, 1996 IBLA LEXIS 69 (1996).**

The Hyltons filed a complaint against Kodiak Mining Company for failure to replace the water supply feeding a lake on the Hylton property that was interrupted by Kodiak's mining operations. Kodiak had provided a system to replace the water feeding the lake; however, the Hyltons were required to pay the electrical and other maintenance costs to maintain the replacement system. Prior to Kodiak's mining, no payments had been required.

The OSM Assistant Deputy Director, in reviewing the Big Stone Gap Field Office's decision, concluded that Kodiak was required "to pay costs associated with maintaining the level of the Hyltons' water supply at levels existing before mining" and ordered a federal inspection to follow the 5-day period allowed for the state to request an informal review. The Hyltons appealed the Assistant Deputy Director's decision to allow the state a 5-day period to request an informal request. The appeal was subsequently dismissed as a result of a settlement agreement reached in the Hyltons' civil suit against Kodiak.

### **BETTY L. AND MOSES TENNANT, IBLA 92-437 & 92-509, 135 IBLA 217, 1996 IBLA LEXIS 46 (1996).**

HEADNOTES: "An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint that a permittee was responsible for methane dissolved in his water supply will be set aside and the matter remanded for further action where the record indicates that OSM's decision was inconsistent with other OSM determinations finding the permittee liable for methane contamination of appellant's water well."



**PATRICIA A. MARSH, IBLA 93-118, 133 IBLA 372, 1995 IBLA LEXIS 98 (1995).**

HEADNOTES: "Under West Virginia State law, an operator of a surface mining operation is required to replace the water supply of an owner of interest in real property when that owner's underground or surface source of supply is contaminated, diminished, or interrupted by such operation, unless waived by the owner."

**ALICE WATER PROTECTION ASS'N v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL PROTECTION AND AMERIKOHL MINING, INC.; Penn. Environmental Hearing Board Docket No. 95-112-R, 1997 Pa. Environ. LEXIS 14 (1997).**

SYNOPSIS: "In this appeal of a transfer of a mining permit, the Appellants have not met their burden of demonstrating that the Department of Environmental Protection abused its discretion in approving the permit transfer. Although the Appellants demonstrated that water supplies in their community are, in some instances, plagued by water quality problems, there is insufficient evidence to link the water quality problems to mining activity at the site in question."

**PEOPLE UNITED TO SAVE HOMES AND PENNSYLVANIA AMERICAN WATER COMPANY v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL PROTECTION AND EIGHTY-FOUR MINING COMPANY, Penn. Environmental Hearing Board Docket No. 95-232-R consolidated with 95-233-R, 1996 Pa. Environ. LEXIS 82 (1996).**

SYNOPSIS: "A mining company's mine subsidence control plan must set forth the measures it will take to prevent or minimize damage, destruction or disruption to a water line under which the company has received approval from the Department of Environmental Protection to conduct longwall mining. Providing notice to the water company prior to the start of mining is one measure which may be taken but, by itself, does not fulfill the requirements of the statute and regulations."

**AL HAMILTON CONTRACTING COMPANY v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, Penn. Environmental Hearing Board Docket No. 93-072-MJ, 1995 Pa. Environ. LEXIS 84 (1995).**

DER proved the "hydrogeologic connection" between the contamination of the off-site, water supply springs and the acid mine drainage from the Hamilton mine.

**STATE OF OHIO EX REL R.T.G., INC. AND CHARLES AND RAE HAUGHT v STATE OF OHIO, OHIO DEPT. OF NATURAL RESOURCES, No. 96APE05-662, 1997 Ohio App. LEXIS 1239 (Ohio Ct App 1997).**

A number of cases prior to this one addressed the issue of the Village of Pleasant City's attempt to have its aquifer system designated as unsuitable for mining. The Ohio



Reclamation Board of Review did declare the entire area - 833 acres - as unsuitable for mining. At issue, here, was whether or not the appellants were entitled to compensation for this land.

The court discussed the takings test enunciated in *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992):

"Based on this new test, the state, to avoid compensating for the taking, must do more than proffer the legislature's declaration that the claimant's property uses are inconsistent with the public interest. Rather, in the same manner as if the state sought to restrain the claimant in a common-law action for public nuisance, it would be required to identify background principles of nuisance and property law that prohibit the uses of the property the claimant now intends, in the circumstances in which the property is currently found."

The case was remanded to the trial court "with instructions to hold an evidentiary hearing and apply the law as set forth in this opinion to determine whether or not a complete or partial taking has occurred for which appellants should be compensated."

**CASTLE VALLEY SPECIAL SERVICE DISTRICT, NORTH EMERY WATER USERS ASS'N, AND HUNTINGTON-CLEVELAND IRRIGATION COMPANY v UTAH BOARD OF OIL, GAS AND MINING; C.W. MINING CO. dba CO-OP MINING COMPANY, INTERVENOR, 938 P2d 248 (Utah 1996).**

Water Users opposed the revision to Co-Op's permit which would allow Co-Op to mine the Tank seam, claiming that the mining would reduce the quantity and quality of water from two springs. Water Users wanted Co-Op "to either (1) identify or (2) actually provide water resources to replace spring water that had been or might be diverted or contaminated as a result of Co-Op's mining."

The court found that 30 U.S.C.A. 1309(a)(2) requires restoration of a water supply that has been affected by underground coal mining operations. The statute "does not authorize water resource identification as a preventative measure." In addition, Water Users failed to prove that the springs and the mine were hydrologically connected and that Co-Op had in fact "damaged the springs."

## **ATTACHMENTS**

- A. JERRY HYLTON et al., IBLA 93-618, 135 IBLA 369, 1996 IBLA LEXIS 69 (1996).
- B. BETTY L. AND MOSES TENNANT, IBLA 92-437 & 92-509, 135 IBLA 217, 1996 IBLA LEXIS 46 (1996).
- C. PATRICIA A. MARSH, IBLA 93-118, 133 IBLA 372, 1995 IBLA LEXIS 98 (1995).
- D. ALICE WATER PROTECTION ASS'N v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL PROTECTION AND AMERIKOHL MINING, INC., Penn.



Environmental Hearing Board Docket No. 95-112-R, 1997 Pa. Environ. LEXIS 14 (1997).

- E. PEOPLE UNITED TO SAVE HOMES AND PENNSYLVANIA AMERICAN WATER COMPANY v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL PROTECTION AND EIGHTY-FOUR MINING COMPANY, Penn. Environmental Hearing Board Docket No. 95-232-R consolidated with 95-233-R, 1996 Pa. Environ, LEXIS 82 (1996).
- F. AL HAMILTON CONTRACTING COMPANY v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, Penn. Environmental Hearing Board Docket No. 93-072-MJ, 1995 Pa. Environ. LEXIS 84 (1995).
- G. STATE OF OHIO EX REL R.T.G., INC. AND CHARLES AND RAE HAUGHT v STATE OF OHIO, OHIO DEPT. OF NATURAL RESOURCES, No. 96APE05-662, 1997 Ohio App. LEXIS 1239 (Ohio Ct App 1997).
- H. CASTLE VALLEY SPECIAL SERVICE DISTRICT, NORTH EMERY WATER USERS ASS'N, AND HUNTINGTON-CLEVELAND IRRIGATION COMPANY v UTAH BOARD OF OIL, GAS AND MINING; C.W. MINING CO. dba CO-OP MINING COMPANY, INTERVENOR, 938 P2d 248 (Utah 1996)