

CHAPTER 13

Some Recent Developments in the Water Resource Protection Obligations of the Coal Industry: Can Coal and Water Mix?

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§ 13.01. Introduction.

The Appalachian region's coal resources and its water resources are two of our nation's most valuable resources. The nation needs a viable strong coal industry. Many communities in the region depend upon the coal industry for economic survival. Every community in the region needs adequate and potable water for drinking purposes and for use by local businesses. We all benefit from the recreational and aesthetic opportunities afforded by the region's many lakes, streams, and wetlands. However, unlike another of the region's valuable resources, Bourbon, coal does not always mix well with water.

The abundance of coal within portions of the region is, all too often, not accompanied by an abundance of potable water. These facts of nature create a tension between the coal industry and residents because a natural consequence of all forms of mining can be the disruption of surface and underground water sources relied upon by local residents.

Further, it is common for coal reserves within the region to lie beneath rural and wilderness areas where good quality streams and valuable wetlands abound. These facts of nature create a further tension between the coal industry and the governmental agencies charged with the responsibility of protecting our water resources because another natural consequence of mining is the potentially adverse impacts which mining can have on water quality and water resources, during and after mining.

Because of these natural tensions there has developed an extensive body of law and regulatory requirements which attempt, not always in a consistent or even-handed way, to balance the rights of the coal industry to mine coal, the interest of individuals in adequate water supplies, and the interest which we all have in protecting and preserving our water resources.

It is not possible to touch upon, in one presentation, all or even most of the legal and regulatory issues related to "coal and water." Rather than discuss generally a variety of issues, this Chapter will focus on four areas where recent developments have affected the water resources protection obligations of the coal industry: (1) water replacement obligations of the mining industry; (2) underground disposal of coal mine

waste; (3) regulation of stormwater discharges emanating from areas associated with mining activities; and (4) regulation of in-stream coal mining facilities.

§ 13.02. The Water Replacement Obligations of the Coal

Industry – Did SMCRA Provide All the Answers?

[1]--Introduction.

Coal mining activities can alter the recharge area of regional ground water supplies, relocate streams and springs, or lessen the quality of water supplies relied upon by local residents. In the "big picture" these natural effects of coal mining do not generally cause a "water loss" as such; instead these activities tend generally to cause a relocation, or localized degradation, of water resources. However, to the individual users of water supplies that have been "relocated," either off their property or to a different and less accessible location on their property, or have become degraded, the effect of these natural consequences of coal mining activity can be very significant.

Although the Federal Surface Mining Control and Reclamation Act (SMCRA)⁽¹⁾ has dramatically altered the common law water replacement obligations of the surface or open pit mining industry,⁽²⁾ the common law of water replacement continues to have relevance because SMCRA imposes no water replacement obligation upon the underground mining industry. In addition, SMCRA does not afford surface owners any right to seek compensatory or consequential damages. Therefore, some brief discussion of these common law principles is warranted.⁽³⁾

[2]--The Common Law.

The early common law drew a distinction between surface water and ground water supplies; imposing liability upon coal operators more readily for injuries caused by their activities to surface waters than for injuries caused to ground water.

With respect to diversions of surface water caused by mining activity which resulted in a loss or diminution of supply available to downstream users, the common law of riparian rights was generally applicable. If a mine operator diverted more natural flow than was reasonably necessary, causing damage to downstream users, a cause of action would lie at common law.⁽⁴⁾

With respect to the pollution of surface water courses caused by mining activity, the common law was somewhat more "pro-mining." Many jurisdictions, recognizing the economic importance of the mining industry, adopted the rule that mine operators were not liable for downstream pollution if drainage from their operations flowed naturally into and along the watercourse.⁽⁵⁾ However, if the mine operator constructed a conduit to enable mine drainage to reach a stream, a common law cause of action would lie.⁽⁶⁾ Moreover, the common law of some jurisdictions recognized that a right to discharge mine drainage into nearby streams could be acquired by prescription.⁽⁷⁾

When coal mining activity caused injury to ground water sources of supply, the early common law drew further distinctions; applying one set of rules when the ground water was determined to be flowing in a defined underground channel and another when the ground water supply was derived from percolating waters.

In situations where the affected underground source of water was determined to be flowing in a defined channel, the same principles which governed liability for injury to surface water sources generally