



Office of Chief Counsel

COAL AND NON-COAL UPDATE AND HISTORICAL PERSPECTIVE

Environmental Law Forum

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DISCLAIMER

The views and positions expressed in this presentation and its materials are those of the author and do not necessarily reflect those of the Commonwealth or the Governor's Office of General Counsel or the Department of Environmental Protection.



COAL AND NON-COAL UPDATE

Proposed Regulations

OSM consistency –

<https://www.pabulletin.com/secure/data/vol48/48-43/1669.html>

Advanced Notice of Proposed Rulemaking for Manganese effluent limits –

<https://www.pabulletin.com/secure/data/vol48/48-4/138.html>



COAL AND NON-COAL UPDATE

Proposed Regulations Cont'd

Non-coal program –

<https://www.pabulletin.com/secure/data/vol48/48-5/180.html>

Proposed Program Amendments Pending Before OSM – Act 32

<https://www.federalregister.gov/documents/2018/05/08/2018-09767/pennsylvania-regulatory-program>



COAL AND NON-COAL UPDATE

EHB Decisions

Center for Coalfield Justice v. DEP and Consol Pa Coal Company, 2018 EHB 729. Opinion and Order awarding \$77,817 to Center for Coalfield Justice and Sierra Club under the Costs for Mining Proceedings law, 27 Pa.C.S. § 7708.

Center for Coalfield Justice v. DEP and Consol Pa. Coal Company, 2018 EHB 323. Opinion and Order denying Center for Coalfield Justice's and Sierra Club's Petition for Supersedeas.



COAL AND NON-COAL UPDATE

EHB Decisions Cont'd

Gary Rohanna v. DEP and Emerald Contura, 2019 EHB ____ (Adjudication dated February 13, 2019; EHB Dkt. No. 2016-148-B); and

Donna and Terry Rush v. DEP and Cumberland Coal Resources, 2018 EHB 569

Appeals by homeowners challenging the Department's denial of claims under the Mine Subsidence Act for subsidence damage to structures.



COAL AND NON-COAL UPDATE

Commonwealth Court

New Hope Crushed Stone & Lime Company v. DEP
Unreported Memorandum Opinion dated July 18, 2018
(Case No. 1373 CD 2017). Commonwealth Court affirmed
Environmental Hearing Board Order. The Environmental
Hearing Board Order dismissed New Hope Crushed
Stone's appeal of a Department letter which modified
New Hope Crushed Stone's reclamation plan. The
reclamation plan outlined work required to address
sinkholes which had opened on school grounds owned by
Solebury School.



COAL AND NON-COAL UPDATE

DEP Annual Report – Work Performed at Alternative Bonding System Legacy Sites

Report documents status of land reclamation and
treatment systems for post-mining discharges at
Pennsylvania legacy sites.

Report required under the November 2, 2016 settlement
between the Department and the Federation of
Sportsmen's Clubs in the complaint filed in U.S. District
Court Case No. 1:99-CV-1791. The complaint challenged
the Department's coal mining bonding program.



How Did We Get Here?

The Roots of the Department's Mining Regulatory Program



Reviewing the regulatory roots of Pennsylvania's coal mining program was revealing:

- Significant growth over time of the legal framework
 - Statutes and amendments to those statutes
 - Regulations
 - Environmental Hearing Board and Appellate Court decisions and the principles they established
- The Department's knowledge and expertise in permitting and reclamation
- Funding for programs



COAL AND NON-COAL UPDATE

Not possible to cover the whole story – only the highlights.



COAL AND NON-COAL UPDATE

My colleagues, Sarah and Brandon, will address developments and milestones from the perspective of citizen and environmental groups and the regulated community.



COAL AND NON-COAL UPDATE

In *Commonwealth v. Harmar Coal*, 306 A.2d 308, 312-314, the Pennsylvania Supreme Court traces the history of The Clean Streams Law from its enactment in 1937 through the 1970 Amendments.



COAL AND NON-COAL UPDATE

The Clean Streams Law – Act 394 of 1937, P.L. 1987

Exempted mine drainage until a practical means for the removal of the polluting properties shall become known



COAL AND NON-COAL UPDATE

1945 Amendment – P.L. 435

Declared discharge of mine drainage into clean waters unlawful (but allowed continued pollution of already degraded waters) and a public nuisance; required operator of a coal mine to submit a mine drainage plan.



COAL AND NON-COAL UPDATE

1965 Amendment – P.L. 1479

Legislative findings regarding the damage to Pennsylvania caused by mine drainage, including:

- Mine drainage is the major cause of stream pollution in Pennsylvania and is doing immense damage to the waters of the Commonwealth.
- Pennsylvania having more miles of water polluted by mine drainage than any other state in the nation is an intolerable situation which seriously jeopardizes the economic future of the Commonwealth.



COAL AND NON-COAL UPDATE

- Declared it is the policy of the Commonwealth to both prevent further damage to streams and to restore every polluted stream.
- Revised Section I:
 - “Industrial waste” includes acid mine drainage.



COAL AND NON-COAL UPDATE

- Revised Section 315(a):
 - Requires a mine drainage permit from the Sanitary Water Board to operate a mine.
 - Sanitary Water Board cannot issue permit if discharge would be injurious to the public health, animal or aquatic life, or use of water for domestic or industrial consumption or recreation.



COAL AND NON-COAL UPDATE

1970 Amendment – Act 222 P.L. 653

- No person shall open, reopen, or operate any establishment which results in the discharge of industrial waste which would flow or be discharged into any of the waters of the Commonwealth without proper treatment.
- No discharge of industrial waste unless authorized or operator has obtained a permit.



COAL AND NON-COAL UPDATE

- Enforcement options include civil and criminal penalties.
- Owners and occupiers of land are liable for correcting polluting conditions on their land under Section 316.
- The Department can require bond for treatment of discharges.



COAL AND NON-COAL UPDATE

The Act of December 3, 1970, P.L. 834

- Establishes the Department of Environmental Resources and the Environmental Hearing Board.
- Department of Mines and Minerals and other agencies become the Department of Environmental Resources.
- Section 510-108 establishes the Environmental Hearing Board.
- The EHB was staffed and functional in February 1972.



COAL AND NON-COAL UPDATE

- Under Section 510-15, Department is authorized to enforce and administer the mining laws.
- Under Section 510-16, Department is authorized to inspect mines.



COAL AND NON-COAL UPDATE

1980 Amendments – Act 157, P.L. 894

- Part of a package of legislation to amend The Clean Streams Law so that Pennsylvania could obtain primacy under the federal Surface Mining Act.
- Added Legislative Findings: purpose of the Act to regulate the impact of mining upon water quality and maintain primary jurisdiction over surface coal mining in Pennsylvania.



COAL AND NON-COAL UPDATE

- “Department” means the Department of Environmental Resources.
- “Industrial waste” includes coal refuse.
- “Mine” includes coal refuse disposal areas.



COAL AND NON-COAL UPDATE

1945 Bituminous Coal Open Pit Mining Conservation Act of May 31, 1945 P.L. 1198



COAL AND NON-COAL UPDATE

Legislative Findings:

- Provide for conservation and improvement of areas of land affected by surface mining of bituminous coal
- Aid in the protection of birds and wildlife
- Enhance the value of land for taxation
- Decrease soil erosion
- Prevent pollution of streams and rivers
- Prevent combustion of unmined coal
- Generally improve the use and enjoyment of lands



COAL AND NON-COAL UPDATE

- Register with the Department of Mines before opening if 250 tons/12 consecutive months
- Post bond - \$200/acre, minimum \$2,000
- Report to the Department within 30 days of removing overburden



COAL AND NON-COAL UPDATE

- Completion Report within 6 months of finishing or abandoning operation
- Within one year of completion, cover with overburden and plant with trees, shrubs or grasses
- Failure to register – \$5,000 penalty, misdemeanor
- Failure to comply – bond forfeited



COAL AND NON-COAL UPDATE

Dufour v. Maize, 56 A.2d 675 (Pa. 1948)

Alexander Dufour brought bill in equity against the Secretary of Mines, seeking to enjoin the enforcement of the 1945 Surface Mining Act on grounds the Act constitutes special legislation.

Pennsylvania Supreme Court dismissed, holding legislature had a legitimate and reasonable basis to regulate one class – in this case, surface mining operations.



COAL AND NON-COAL UPDATE

1963 Amendments – P.L. 238

Required operators to obtain a license and permit; permit application required maps, drill holes, analysis of coal seams, mining plan and reclamation plan



COAL AND NON-COAL UPDATE

1971 Amendments – P.L. 554

Renamed as “Surface Mining Conservation and Reclamation Act;” additional requirements for reclamation and overburden analysis



COAL AND NON-COAL UPDATE

1977 Amendments – P. L. 99, Act 36

Required restoration or replacement of public and private water supplies affected by surface mining



COAL AND NON-COAL UPDATE

1977 Federal Surface Mining Control and Reclamation Act

- Established broad regulatory program for coal mining
- Cooperative Federalism
- Title V – Regulatory program
- Title IV – Abandoned minelands program



COAL AND NON-COAL UPDATE

1980 Amendments – Act 155, P.L. 835

- Part of a package to amend Pennsylvania SMCRA to be consistent with federal SMCRA and obtain Primacy
- Purpose:
 - To protect and maintain water supplies, to protect land, and to enhance land use management and planning
 - To designate lands unsuitable for mining and to maintain primary jurisdiction over surface coal mining in Pennsylvania



COAL AND NON-COAL UPDATE

- To assure that the coal supply essential to the nation's and the Commonwealth's energy requirements, and to their economic and social well-being, is provided
- To strike a balance between protection of the environment and agricultural productivity, and the Nations' and the Commonwealth's need for coal as an essential source of energy.



COAL AND NON-COAL UPDATE

- Permit application must include demonstration that mining operations will comply with other Pennsylvania environmental law
- Public notice and comment requirements
- Citizen suit provisions
- Designate areas unsuitable for mining
- Permit block based on failure or inability to comply



COAL AND NON-COAL UPDATE

1992 Amendments – Act 173, P.L. 1384 and 1966 Amendments – Act 43, P.L. 43

- Added provisions for government-financed reclamation projects
- Designating areas suitable for re-mining
- Requirements for treatment of post-mining discharges
- Alternative financial assurance for treatment of post-mining discharges



COAL AND NON-COAL UPDATE

1966 Bituminous Mine Subsidence Land Conservation Act April 27, 1966; Act No.1, P.L.31

Legislative Findings:

- Mine subsidence legislation and coal mining laws have failed to protect the public interest in preserving land.
- Damage from mine subsidence has seriously impeded land development and caused a very clear and present danger to the health, safety and welfare of the people of Pennsylvania.
- Damage by subsidence erodes the tax bases of the affected municipalities.



COAL AND NON-COAL UPDATE

- Coal and related industries and their continued operation are important to the economic welfare and growth of the Commonwealth.
- There has been inadequate notice to owners of surface structures regarding the adequacy of support.



COAL AND NON-COAL UPDATE

- It is the policy of the Commonwealth to protect surface structures.
- Damage to surface structures and land is against the public interest and may adversely affect the health, safety and welfare of our citizens.
- It is the intent of this act to harmonize the protection of surface structures and the land supporting them and the continued growth and development of the bituminous coal industry in the Commonwealth.



COAL AND NON-COAL UPDATE

- No owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of cave-in, collapse or subsidence of the following structures in place on April 27, 1966:



COAL AND NON-COAL UPDATE

- Public buildings
- Noncommercial structures used by the public (such as schools, churches, hospitals, municipal buildings)
- Dwellings
- Cemetery or public burial ground



COAL AND NON-COAL UPDATE

- If mining causes subsidence damage, operator must repair within six months
- Option to post bond as security for the repairs
- Secretary of Mining can revoke mining permit if repairs not made



COAL AND NON-COAL UPDATE

- Requires:
 - Permit from the Department of Mines and Minerals
 - Bond
 - Notice of mining operations to local officials and land owners
 - Access by local officials
 - Deed notice
 - Option to purchase right of support for structures not covered by 1966 Statute



COAL AND NON-COAL UPDATE

Keystone Bituminous Coal Association v. DeBenedictis,
480 U.S. 470 (1987):

1966 statute was upheld by U.S. Supreme Court in challenge brought by mine operators who argued the requirement to leave coal in place to provide a right of support was not a taking under the 5th Amendment to the U.S. Constitution.



COAL AND NON-COAL UPDATE

1980 Amendments – Act 156, P.L. 874

- Part of the package to make Pennsylvania statute consistent with federal SMCRA and obtain primacy
- Department of Environmental Resources replaces Department of Mines and Minerals
- Operators must adopt measures:
 - To prevent subsidence causing material damage to the extent technologically and economically feasible
 - To maximize mine stability
 - To maintain the value and reasonable foreseeable use of such surface land



COAL AND NON-COAL UPDATE

- Nothing prohibits planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining
- Added provisions related to:
 - Public notice and comment
 - Bonding



COAL AND NON-COAL UPDATE

1994 Amendments – Act 54, P.L. 357

- Amended 1966 Statute to require replacement or restoration of water supplies
- Deleted right of support for structures in place as of April 1966 and added requirement to restore or compensate structures damaged by mine subsidence



COAL AND NON-COAL UPDATE

Mining Program Regulations

- Regulations first promulgated at Chapters 77, 99, and 100 under The Clean Streams Law.
- Specific regulations for the mining statutes promulgated at 10 Pa. Bull. 4789 (December 20, 1980) and 12 Pa. Bull. 2473 (July 31, 1982) as part of Pennsylvania obtaining primacy.



COAL AND NON-COAL UPDATE

- The Department obtained primacy on July 31, 1982 and was deemed the regulatory authority for all surface mining and reclamation activities on all non-federal and non-Indian lands. 30 CFR Part 938, 30 CFR § 938.10.



COAL AND NON-COAL UPDATE

Abandoned Mine Lands

The legacy of coal mining from the 1800s through more recent times continues.

- Coal refuse piles
- Untreated mine drainage
- Unreclaimed surface mines
- Underground mine fires



COAL AND NON-COAL UPDATE

Since the 1960s, the Department has pursued funding and resources to address abandoned mine lands.

January 1968 –

- Land and Water Conservation and Reclamation Act, Act No. 443, P.L. 996, 32 P.S. §§ 5101 *et seq.*
- Section 5116 directed \$200,000,000 in funds to the Department for reclamation and water treatment.
- Amended 1980, Act No. 158: established restricted account specifically for abandoned mine reclamation.



COAL AND NON-COAL UPDATE

- Funds used to:
 - Identify and monitor acid mine discharges from abandoned deep mines
 - For abatement projects
 - To extinguish mine fires
 - To stabilize areas
 - To abate air pollution
- For more information on Operation Scarlift and history of reclamation, funding, and research:
<https://www.dep.pa.gov/Business/Land/Mining/AbandonedMineReclamation>



COAL AND NON-COAL UPDATE

Coal Mine Drainage Prediction and Pollution Prevention in Pennsylvania (October 1998)

Technical reference – the result of research to develop understanding of the sources and causes of acid mine drainage and methods to predict, minimize, and prevent discharges and reclaim lands after mining.



COAL AND NON-COAL UPDATE

Cases that Laid the Foundation for the Requirement to Treat Mine Discharge



COAL AND NON-COAL UPDATE

Environmental Hearing Board

- *Adam Greece d/b/a Cherry Run Fuel Co. v. Department of Environmental Resources*, 1980 EHB 135
 - Mine operator liable under § 315(a) of The Clean Streams Law for discharge from mine where mine was sealed but seals later failed, resulting in a discharge with pH=3 and Iron at 50-135 mg/l.



COAL AND NON-COAL UPDATE

- *John Kaites v. Department of Environmental Resources*, 1985 EHB 625
 - Mine operator liable under § 315 of The Clean Streams Law to treat post-mining discharge even where the mine was sealed and the discharge may have been caused by subcontractors.



COAL AND NON-COAL UPDATE

- *Bologna Mining Co. v. Department of Environmental Resources*, 1989 EHB 270
 - Mine operator liable under § 315(a) of The Clean Streams Law for all discharges from its mining operation where pre-existing discharges from previous operations co-mingled with discharges from current operations.



COAL AND NON-COAL UPDATE

Commonwealth Court

- *Harman Coal Co. v. Department of Environmental Resources*, 384 A.2d 289 (Pa. Cmwlth. 1978)
 - Commonwealth Court affirmed the EHB's Order, which had affirmed the Department's denial of Harman Coal's application for a mine drainage permit.



COAL AND NON-COAL UPDATE

- The Board has found, on evidence submitted by the Department, that there was a high probability that the proposed surface coal mining would result in a discharge of acid mine drainage that would result in pollution of the waters of the Commonwealth.
- Focused on evidence of acidic soils in the overburden.
- Court held that the Board's Findings of Fact were supported by substantial evidence.



COAL AND NON-COAL UPDATE

- *William McIntire Coal Co. v. Department of Environmental Resources*, 530 A.2d 140 (Pa. Cmwlth. 1987)
 - Commonwealth Court affirmed the EHB's Order, which had affirmed the Department's Order issued against McIntire Coal.
 - The Department's Order directed McIntire to treat or abate an acid mine discharge from a surface coal mine.



COAL AND NON-COAL UPDATE

- Commonwealth Court held that McIntire Coal is responsible under Section 315(a) of The Clean Streams Law to treat the discharges where some of the discharge originates from older deep mines connected to the surface mine and McIntire Coal's surface mining activities.



COAL AND NON-COAL UPDATE

- *Ingram Coal v. Department of Environmental Resources*, 595 A.2d 733 (Pa. Cmwlth. 1991)
 - Commonwealth Court affirmed the EHB's Order, which had affirmed the Department's Order issued against Ingram Coal.
 - The Department's Order directed Ingram Coal to abate a discharge associated with surface mining from 1976-1982.



COAL AND NON-COAL UPDATE

- Commonwealth Court held that parties that owned the site from 1982 onward are liable under Section 315(a) of The Clean Streams Law because they allowed the discharge to enter the waters of the Commonwealth, whether or not the party conducted mining activities on the property.



COAL AND NON-COAL UPDATE

Pennsylvania Supreme Court

- *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973)
 - Two coal mining companies, Harmar Coal and Pittsburgh Coal, each submitted an application for a mine drainage permit, which included discharge from the proposed mine.



COAL AND NON-COAL UPDATE

- The issue was whether the operator is required under Section 3159a) of The Clean Streams Law to treat: only the water that will be discharged from its own operations; or all the water that may flow into the mine; or water that must be pumped from an adjacent mine.



COAL AND NON-COAL UPDATE

- Harmar Coal needed to pump water from adjacent Indianola Mine to protect the Harmar Mine.
- Pittsburgh Coal needed to pump water from adjacent mines that flowed into its Hutchinson Mine.



COAL AND NON-COAL UPDATE

- Relying on the 1970 Amendments to The Clean Streams Law, the PA Supreme Court held that:
 - Harmar Coal is required to treat the discharge from the Indianola Mine because that pumping is part of the mine's operation
 - Pittsburgh Coal must treat all the water entering the Hutchinson Mine, including fugitive water.



COAL AND NON-COAL UPDATE

- The fugitive water flowing into the mine is mine drainage and “industrial waste.”
- All polluting discharges essential to mine operations must be treated.
- Allowing operators to discharge untreated acid mine drainage that originates from other mines, or because pumping and discharge of the fugitive water without treatment is necessary as part of mine operations, is to promote pollution, not abate pollution.



COAL AND NON-COAL UPDATE

- Citing Article I, section 27 of the PA Constitution, “there cannot be any doubt that an overriding public interest in acid mine drainage pollution control does exist.”
- It is the discharge of polluted water that is critical, not the source.
- Harmar Coal and Pittsburgh Coal may not be responsible for polluting the water, but they certainly harm the Commonwealth by discharging that water into surface waters.



COAL AND NON-COAL UPDATE

- *Commonwealth v. Barnes and Tucker*, 319 A.2d 871 (Pa. 1974) (*Barnes and Tucker I*)
 - Barnes and Tucker operated the Lancashire No. 15 underground coal mine in Cambria County from 1939 to 1969.
 - The mine was first opened in 1915.



COAL AND NON-COAL UPDATE

- Acid mine discharges from the mine were identified in 1970.
- The Department pursued injunctive action under The Clean Streams Law and common law public nuisance.
- Court examined The Clean Streams Law Section 3159a).



COAL AND NON-COAL UPDATE

- Court concluded the discharge constitutes a public nuisance.
- Abatement of the discharge is a reasonable exercise of the Commonwealth's police power, even where the discharge is the result of past activities.



COAL AND NON-COAL UPDATE

- *Commonwealth v. Barnes and Tucker*, 371 A.2d 461 (Pa. 1977) (*Barnes and Tucker II*)
 - Following remand from the PA Supreme Court in *Barnes and Tucker I*, Commonwealth Court entered an Order requiring Barnes and Tucker to treat the discharge from the Lancashire No. 15 mine.



COAL AND NON-COAL UPDATE

- Barnes and Tucker appealed on grounds that 6 million of the 7.2 million gallons of water per day that it was required to treat was “fugitive water” from other mines.
- PA Supreme Court upheld the Commonwealth Court Order.



COAL AND NON-COAL UPDATE

- The objective of The Clean Streams Law is to prevent further discharges of pollution, not just the cessation of future activities that create the pollution.
- “The deleterious conditions of our waterways attributable to acid mine drainage which is being discharged from abandoned underground mines has reached a critical state.”



COAL AND NON-COAL UPDATE

- The focus is on the discharge into waters of the Commonwealth, not the source of polluted water.
- To allow operator to avert responsibility for the nuisance it created could nullify the environmental policy of the Commonwealth.



COAL AND NON-COAL UPDATE

Since these landmark decisions, the Department's regulation of coal mining has focused on permitting, enforcement, and continued abatement of discharges from legacy sites. Board and appellate decisions have established the legal framework for issuing permits, challenges to those permits, civil penalty determinations with respect to water supplies and structure damage claims, and bond releases and forfeiture.



COAL AND NON-COAL UPDATE

In 1972, the Board, in its first volume of cases, issued just under 50 decisions. Since, the Board's decisions have required as many as 3 volumes.



COAL AND NON-COAL UPDATE

Although we are often on opposite sides of the “v.” in appeals and other legal challenges, the work we all do as the Pennsylvania environmental bar reflects the evolution of the regulatory program. It is also based on the work done by our predecessor counsel, the legislature, and the courts – it was rewarding to me to revisit that history.



QUESTIONS?



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