

Coal Mining Bill Could Put Pa. Streams in Jeopardy

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Following a vote of 32-17 in the Senate earlier this month, the Pennsylvania House of Representatives Committee on Environmental Resources & Energy is considering an amendment to the Bituminous Mine Subsidence and Land Conservation Act of April 27, 1966, P.L. 31, as amended, 52 P.S. Sections 1406.1-1406.21 (BMSLCA or Mine Subsidence Act). The bill, SB 624 sponsored by Sens. Joseph B. Scarnati III and Gene Yaw, was introduced to clarify the interplay between the Mine Subsidence Act and The Clean Streams Law of June 22, 1937, P.L. 1987, as amended, 35 P.S. Sections 691.1-691.1001 (Clean Streams Law).

If enacted as currently drafted, under SB 624, "planned subsidence in a predictable and controlled manner, which is not predicted to result in the permanent disruption of existing or designated uses of water of the commonwealth" is not to be considered presumptive evidence that a bituminous coal mine has the potential to cause pollution. Subsidence, or the sinking of land, has the potential to affect stream flow and other hydrological properties.

The bill provides, further, that such a determination shall apply only if a bituminous coal mine subject to the BMSLCA submits a plan to the Pennsylvania Department of Environmental Protection (DEP) for the "mitigation of predicted subsidence-induced impacts," and the plan is approved by the DEP.

The BMSLCA and the Clean Streams Law

The Pennsylvania General Assembly enacted the BMSLCA, commonly known as Act 54, to "protect the public health and safety by regulating the mining of bituminous coal," and "declare the existence of a public interest in the support of surface structures." Section 5(e) of the BMSLCA requires coal mine operators applying for a permit to include a plan to "prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land." A proviso that follows, however, clarifies that an operator's plan may provide for some subsidence so long as it is planned and in a "predictable and controlled manner."

While contemplating certain predicted and controlled subsidence, the Mine Subsidence Act preserves other statutory protections for the waters of the commonwealth. More specifically, Section 9.1(d) of BMSLCA provides that "nothing in this act shall be construed to amend, modify or otherwise supersede ... any standard contained in the Clean Streams Law, or any regulation promulgated thereunder." The Clean Streams Law was enacted to "preserve and improve the purity of the waters of the commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption and recreation," and "regulate the operation of mines and regulate the impact of mining upon water quality, supply and quantity."

In 2007, the Commonwealth Court of Pennsylvania confirmed that the DEP's authority to regulate activities under the Clean Streams Law was supplemented, rather than superseded, by regulations concerning mining operations promulgated pursuant to the BMSLCA, as in *UMCO Energy v. Department of Environmental Protection*, 938 A.2d 530 (Pa. Commw. Ct. 2007). Further, in accordance with the DEP's permit regulations, a mining permit will not be approved unless "the applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this commonwealth."

Pollution, as defined in the Clean Streams Law, includes rendering waters harmful by the alteration of the physical, chemical or biological properties of the waters of the commonwealth. Pennsylvania courts have recognized that "mine subsidence can cause deleterious changes in the physical and biological integrity of streams. It can change the movement, circulation and flow of streams, and, as this case demonstrated, it can cause stretches of a natural streambed to be essentially dry and thus unavailable as a habitat." The Pennsylvania Environmental Hearing Board (EHB) in *UMCO* held that subsidence causing permanent flow loss constitutes harmful changes to the physical or biological properties of a stream, and therefore pollution. As such, the EHB agreed that the DEP acted properly in denying UMCO's permit revision given presumptive evidence of potential pollution of the waters of the commonwealth. However, the EHB expressly declined to address whether temporary flow loss caused by subsidence would violate the Clean Streams Law.

Mine Expansion Permit Challenged

Proposed SB 624 was introduced in response to an appeal by the Center for Coalfield Justice and Sierra Club (the appellants) to the DEP's approval of Consol Pennsylvania Coal Co.'s (Consol) permit revision for longwall mining at its Bailey Mine in Greene County. The revisions to Consol's permit—Permit Revision No. 180 issued on May 1, 2014, and Permit Revision No. 189 issued on Feb. 26, 2015—authorize Consol to add approximately 3,000 acres for longwall mining in an area below several streams and parts of Ryerson Station State Park.

The appellants believe that the planned subsidence from longwall drilling beneath the streams and Ryerson Station State Park will result in potentially permanent flow loss to 14 streams above the expansion. Further, the appellants argue that the Clean Streams Law and the regulations promulgated under the Clean Streams Law require that pollution be prevented in the first place, rather than predicted, permitted to occur and then mitigated.

While the EHB has held that permanent flow loss would constitute "pollution," see *UMCO Energy, Inc. v. DEP*, 2006 EHB 489 ("we can say without fear of reasonable contradiction that the permanent elimination of all surface and shallow groundwater flow in a watershed as a result of subsidence not only constitutes 'pollution,' but that such pollution also completely interferes with the values and the present and reasonably foreseeable future uses of the system."), the appellants argue even temporary diminution of stream flow should be considered presumptive evidence of pollution.

The Pennsylvania DEP, on the other hand, interprets the Clean Streams Law and Mining Subsidence Act to not require a zero-impact standard. In the DEP's view, the *UMCO* standard adopted by the EHB "would allow for longwall mining under streams where subsidence impacts are temporary, are readily restored, and the permit imposes the legal obligation on the permittee to maintain stream flow and use during mining and mitigation." The DEP's post-hearing brief, EHB Docket No. 2014-072-B at 105, 143, ("a permit which authorizes a temporary disruption of a stream, coupled with mandatory mitigation and maintenance of stream uses during and after mitigation, does not authorize pollution or constitute potential pollution in violation of The Clean Streams Law or the Mine Subsidence Act or their regulations.").

At issue before the EHB is whether the Pennsylvania DEP may issue a permit for a longwall mine where a temporary loss of flow or pooling is predicted to occur and the permittee is required to mitigate subsidence-caused damage to the stream. The EHB held a hearing in August 2016. While the EHB decision is pending, the Senate is attempting to codify the DEP's authority to issue a mining permit where temporary disruption to a stream is predicted to occur so long as the permittee is required to implement a Pennsylvania DEP-approved mitigation plan. If SB 624 is enacted, the DEP should promulgate regulations formally establishing the criteria for evaluating whether subsidence-impact mitigation plans adequately protect the waters of the commonwealth.

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