



COALEX STATE INQUIRY REPORT - 202

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TOPIC: OFFSITE DISPOSAL OF EXCESS SPOIL

INQUIRY: Can excess spoil from a surface coal mining operation be used as fill in the construction of a highway near the mine site? If the excess spoil can be used, must the site be permitted? Please locate any information which addresses these issues.

SEARCH RESULTS: Searching the legislative history of SMCRA, OHA decisions, case law and Federal Register materials in COALEX and related LEXIS libraries, retrieved little that was directly on point. What was retrieved indicated that Congress's primary concern in regulating excess spoil disposal was to prevent damage to offsite areas, particularly to the water quality. The Secretary, in commenting on submitted state program amendments, stressed the need for disposal areas to be permitted and bonded. Several relevant OHA decisions and an excerpt from an early Flannery ruling are also discussed below.

Materials searched raised questions relating to additional topics not included here: affected area; roads; 2 acre exemptions (offsite storage or spoil disposal areas count toward total acreage).

Copies of the materials listed below are attached.

LEGISLATIVE HISTORY

S. REP. 402, 93rd Cong., 1st Sess. 63 (September 21, 1973). S. 425.

Reclamation Criteria: Protect offsite areas from damage; insure "that the permit will encompass an area which covers the entire mining activity, including the storage or disposal of spoil and waste. Therefore, the entire activity will be subject to all of the terms of the permit. The Committee intends that permits be limited to the minimum area necessary to accommodate the operation."

119 CONG REC 33299 (October 9, 1973)



Senator Baker introduced amendment No. 610 to S. 425 which would require that storage of excess spoil "be made at areas designated and monitored by the regulatory authority. And additionally that such areas be stabilized and revegetated as required for other lands affected by the mining operation." The Senator reasoned:

"If uncontrolled, disposition of spoil material out of the permit area could become a serious hazard to water quality."

CONFERENCE REPORT, 94th Cong., 1st Sess. 84 (May 2, 1975). Major Provisions. S. Rep. 101.; H.R. 25

Placement of Spoil on the Downslope. "Permanent placement of spoil from initial cut of steep slope mining operation would be allowed under limited conditions. This was permitted to balance the stated needs of the industry and environmental protection. The conferees are aware that initial cut spoil can be disposed of in many other ways including use in construction of haul roads or placed on less steep slope disposal areas identified in approved plan including previously mined lands not reclaimed to approximate original contour".

H.R. REP. 218, 95th Cong., 1st Sess. 150 (April 22, 1977). H.R. 2. Committee Recommendations. Departmental Reports.

Recommendations of Interior Secretary Cecil Andrus to the Committee on Interior and Insular Affairs on HR 2 called for "strong spoil placement standards...to insure that there will be no offsite damages." In a later letter, the Secretary suggested adding the following subparagraph to the performance standards: "The least spoil possible to placed off the mined area".

INTERIOR OFFICE OF HEARING APPEALS DECISIONS

MARIO L. MARCON, 109 IBLA 213, IBLA 88-43 (1989).

Marcon, cited by Pennsylvania Department of Environmental Resources (DER) for nonconcurrent reclamation of his minesite, allowed Valley Landfill to use soil from his minesite to build haulage roads and to cover garbage dumped at a nearby landfill site. Finding that the state had responded appropriately to OSM's 10-day notice and no federal inspection was required, the IBLA affirmed Valley Landfill's use of soil or spoil from the abandoned minesite:

"Though appellant continues to seek written authorization of Valley Landfill's action, he does not contradict DER's assertion that written authorization is unnecessary where, as here, the owner of the property from which the cover material is removed is operating the landfill site."

BONE COAL CO. v OSM, Docket No. NX 9-82-R (1980).

The ALJ affirmed the issuance of the NOV for disposing of spoil off the permit area. In ruling at the conclusion of the hearing, the Judge said:



"The fact that the property all belongs to Mr. Bone is not material.... The crucial point in these cases is the permit area. You could permit the area and you could make it as a part of your plan in disposing of spoil to widen a county road; that would be all right. But you didn't do that in this case. The reason for the permit, of course, is to have control over how strip mining is done."

PARAMOUNT MINING CORP. v OSM, Docket Nos. CH 8-7-R, CH 8-11-R (1978).

Paramount, operating under a state permit (which was later amended when SMCRA became effective), was found not to be in violation of the Interim Regulations for disposing of spoil in a hollow area "for the purpose of establishing a road to connect with an interstate system of highway from the property which was being reclaimed as an industrial park."

"I do not believe that it was the intention of the Secretary of the Interior or the Congress of the United States [to] create such rules and regulations governing surface mining that would, by their very nature, impede or restrict other economic development important to a state or to a locale especially in view of overwhelming evidence that such construction or development would harm neither the public nor the environment and could do nothing but aid in the reclaiming of orphaned mine property and improving the economics of the community. I further find that the letter [from the state] did not amend [the pre-SMCRA permit] so as to require the applicant to dispose of all spoiled material within the permit property."

CASE LAW

SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978).

The court, ruling that the Secretary properly included regulations covering the disposal of spoil in the interim program, restated the Secretary's reasons for regulating spoil disposal: to preserve the hydrologic balance and prevent water pollution; and to control the restoration of land to its approximate original contour and prevent land erosion.

REGULATORY HISTORY

Research in Federal Register preambles of proposed and final federal rules yielded only a mention of highway fills in the discussion of safety factors under 816.106 Backfilling and grading: Previously mined areas. 49 FR 41720 (SEPTEMBER 16, 1983). Final rule. Remining.

Relevant sections from the MARCH 13, 1979 (44 FR 14902) preamble are attached for background. A list of other relevant Federal Register notices is included as an Attachment.

STATE PROGRAM AMENDMENTS

The following are excerpts from the Secretary's discussions of state program amendments which were published in the Federal Register. The Secretary approved program amendments which allow for the disposal of excess spoil outside the permit area as long as these disposal areas are permitted and bonded. [NOTE: Amendments are included here to indicate OSM's explanations



of its rulings. Disapproved amendments indicated below may have been revised and approved in subsequent state submissions; that information is not tracked in this Report.]

ALABAMA

47 FR 22030 (MAY 20, 1982). Final rule. Conditional approval of the Alabama submission.

The Alabama program contained a subsection not found in the federal program. The section concerned the disposal of excess spoil generated by a current operation on areas previously disturbed but not adequately reclaimed. The Secretary allowed the implementation of the plan "on a controlled basis" for a one year trial period.

KENTUCKY

45 FR 71590 (OCTOBER 29, 1980). Discussion of comments.

A commentator wanted language added to allow the transportation of excess spoil or topsoil off the permitted area to building sites. The Secretary responded that "all activities associated with the mining operation must be within a permit area to assure that the disposal areas are covered by the performance standards and bonding requirements of SMCRA."

51 FR 30486 (AUGUST 27, 1986). Final rule. Amendment approval.

Kentucky elected not to adopt a counterpart to the federal program "which provides for the disposal of spoil outside the mine-out area in a manner other than that specified for the disposal of excess spoil." Kentucky will consider all spoil disposed of outside the mined-out area to be excess spoil.

VIRGINIA

46 FR 61088 (DECEMBER 15, 1981). Final rule; conditional approval of Virginia's proposed permanent program.

Virginia regulations allowed disposal of excess spoil on areas other than the permit area where environmental benefits would occur. The Secretary approved those portions of the regulations which were equivalent to the federal regulations requirement for a permit and a bond. Program approval was conditioned on the deletion of those portions of the regulations that were inconsistent with SMCRA.

55 FR 2240 (JANUARY 23, 1990). Disapproval of proposed amendment.

The Secretary disapproved an amendment to the permanent program which would have allowed spoil placement on no-cost contract sites because the revised regulation would not require the sites to be permitted.



WEST VIRGINIA

45 FR 69249 (OCTOBER 20, 1980). Proposed rule. Partial approval of the permanent program.

The state law which allowed the placement of spoil outside the permit area if environmental benefits resulted was disapproved because it did not provide "appropriate environmental protection standards."

ATTACHMENTS

1. S. REP. 402, 93rd Cong., 1st Sess. 63 (September 21, 1973). S. 425. [Excerpts]
2. 119 CONG REC 33299 (October 9, 1973). [Excerpts]
3. CONFERENCE REPORT, 94th Cong., 1st Sess. 84 (May 2, 1975). Major Provisions. S. Rep. 101. H.R. 25. [Excerpts]
4. H.R. REP. 218, 95th Cong., 1st Sess. 150 (April 22, 1977). H.R. 2 Committee Recommendations. Departmental Reports. [Excerpts]
5. MARIO L. MARCON, 109 IBLA 213, IBLA 88-43 (1989).
6. BONE COAL CO. v OSM, Docket No. NX 9-82-R (1980).
7. PARAMOUNT MINING CORP. v OSM, Docket Nos. CH 8-7-R, CH 8-11-R (1978).
8. SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978). [Excerpts]
9. 49 FR 41720 (SEPTEMBER 16, 1983). Final rule. Remining. [Excerpts]
10. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. [Excerpts]
 - a. 701.5 Definitions
 - b. 780.35 Disposal of excess spoil
 - c. 816.71-74 Disposal of excess spoil
 - d. 816.71 Disposal of excess spoil: General requirements.
 - e. 816.72 Disposal of excess spoil: Valley fills.
 - f. 816.73 Disposal of excess spoil: Head-of-hollow fills.
 - g. 816.74 Disposal of excess spoil: Durable rock fills.
11. List of relevant Federal Register notices.
12. ALABAMA: 47 FR 22030 (MAY 20, 1982). Final rule. Conditional approval of the Alabama submission. [Excerpts]
13. KENTUCKY
 - a. 45 FR 71590 (OCTOBER 29, 1980). Discussion of comments. [Excerpts]
 - b. 51 FR 30486 (AUGUST 27, 1986). Final rule. Amendment approval. [Excerpts]
14. VIRGINIA
 - a. 46 FR 61088 (DECEMBER 15, 1981). Final rule; conditional approval of Virginia's proposed permanent program. [Excerpts]
 - b. 55 FR 2240 (JANUARY 23, 1990). Disapproval of proposed amendment. [Excerpts]
15. WEST VIRGINIA: 45 FR 69249 (OCTOBER 20, 1980). Proposed rule. Partial approval of the permanent program. [Excerpts]