COALEX STATE INQUIRY REPORT - 28

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TOPIC: RECLAMATION OF PREVIOUSLY DISTURBED AREAS

INQUIRY: A company permits totally a site which was previously mined but unreclaimed by another company. This permittee redisturbs only a portion of the original area or only conducts incidental disturbances on portions of the previously disturbed area such as sediment basins or haulroads. Is there any case law defining the permittee's obligation or responsibility to reclaim those portions of the previously disturbed area which were permitted by him but not redisturbed?

SEARCH RESULTS:

A search of the Department of Interior's COALEX Library containing administrative law judge opinions* did not identify any decisions concerning a permittee's responsibility to reclaim portions of previously disturbed areas which were permitted by the operator but not redisturbed. Also, a LEXIS search for state cases did not locate any pertinent decisions.

*The ALJ File is currently being updated by OSM and may not be complete.

Three Interior Board of Surface Mining Appeals (IBSMA) decisions concerning reclamation of orphan highwalls were identified. Those opinions, as well as relevant federal regulations and a district court settlement, are discussed below.

Remining has been recognized by OSM as a viable alternative to AML funding to reclaim previously mined areas -- especially in steep slope areas of Appalachia where removal of mountaintop remnants, auger mining, and second cuts on single and multiple seams are common mining methods. In general, the regulations appear to address the reclamation of premined areas in terms of areas of redisturbance. (See 47 FR 27734 (1982) for a general discussion of remining regulations.)

In the preamble discussion to the regulations on the elimination of preexisting highwalls, OSM made the following remarks concerning previously mined areas which are not disturbed by the remining operation:

> "[T]he final rule does not impose a burden on operators to reclaim surrounding areas undisturbed b the remining operation. It addresses only reclamation of preexisting highwalls and not other possible preexisting conditions. The proposal did not extend any special requirements to such areas,= and the reclamation responsibility for surrounding areas will depend upon whether or not they are disturbed by the remining operation." (48 FR 41731-41732 (1983))

> In general, therefore, reclamation responsibility for a previously mined area ensues if the area has been redisturbed. However, the Interior Board and OSM went one step further for highwall elimination requirements. The relevant question changed from that of whether an area had been disturbed to whether, in the case of an orphan highwall, the new mining operation had an "adverse physical impact".*

*Recently, the definition and application of "adverse physical impact" was suspended from the federal regulations. (50 FR 257 (1985))

Interior Board Decisions

> CEDAR COAL CO., 1 IBSMA 145 (1979).
> A West Virginia coal operation's only effect on an orphaned highwall was that the highwall had been partially covered by excess spoil material - backfilled during reclamation of an adjacent permit area. The Board found no basis for finding that the partial covering of the orphaned highwall had caused an adverse physical impact on the remaining exposed portions of the highwall, and that Cedar did not "disturb" the orphan highwall within the meaning of 30 CFR Sec. 710.11(d)(1). Thus, the Board held that the interim regulation concerning backfilling and grading (30 CFR Sec. 715.14) did not apply to previously mined lands on which no adverse physical impact had resulted from surface coal mining and reclamation operations conducted after the effective date of the federal initial performance standards.
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> MIAMI SPRINGS PROPERTIES, 2 IBSMA 399 (1980).
> The Miami Springs operation had auger-mined a previously mined coal seam at the base of an orphan highwall. The Board held that "a permittee who did disturb an orphan highwall in such a way as to cause an adverse physical impact on the highwall might be responsible for its complete elimination." The Board then remanded the case to the Administrative Law Judge to determine if the Miami Springs' operations had caused an adverse physical impact on the highwall. The case was subsequently dismissed when the ALJ, on rehearing, found no adverse physical impact had occurred.
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> MOUNTAIN ENTERPRISES COAL CO., 3 IBSMA 338 (1981).
> The Board restated its position concerning the application of the highwall elimination requirements when previously mined land was involved. The Board focused on "whether the new mining has had an adverse physical impact on the orphaned highwall."

OSM interpreted these Board decisions to mean that "in order for OSM to require an operator to eliminate all or part of a preexisting highwall, the operator's activities must, in some way, have had an adverse physical impact on that portion of the highwall." (47 FR 27737 (1982)) As a consequence, federal regulations were promulgated defining "adverse physical impact" and allowing for a variance to highwall elimination. (48 FR 41720 (1983))

The federal regulation concerning the backfilling and grading of previously mined areas, promulgated in September, 1983, consists of two parts. The first part, 30 CFR Sec. 816.106(a), contains a variance to highwall elimination when the available spoil is shown to be "insufficient to completely backfill the reaffected or enlarged highwall."

The second part, 30 CFR 816.106(b), has recently been suspended as a result of a district court settlement. Sec. 816.106(b) stated that:

> "[The regulations] requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall. Such remining operations shall comply with the following:
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> "(1) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability. (2) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment."

Along with Sec. 816.106(b) (and Sec. 817.106(b)/underground mining), OSM suspended the definition of "adverse physical impact". The suspensions were a result of an agreement between the parties in Round III of IN RE: PERMANENT SURFACE MINING LITIGATION II, Civil Action no. 79-1144 (DDC). In the suspension notice, OSM states that:

> "This suspension will mean that the concept of adverse physical impact will no longer apply and all persons conducting remining operations will be required to use all reasonable available spoil in the immediate vicinity of the remining operation to backfill the highwall to the maximum extent technically practical." (50 FR 257 (1985))

The Cedar Coal and Miami Springs decisions also appear in OSM's preamble discussion of the remining variance under auger mining. The permanent program performance standards for backfilling and grading in auger mining operations are codified at 30 CFR Sec. 819.19. Under certain conditions, subsection (b) of that regulation grants to permittee a variance from the approximate original contour restoration requirement in previously mined areas. The justification for the variance is found in the preamble discussion of the final rule:

> "[Cedar Coal and Miami Springs] provide that OSM is without authority to require an operator to eliminate a preexisting highwall unless the operator's activities will have an adverse physical impact on that portion of the highwall." (48 FR 19320 (1983))

This statement is essentially the same as that made by OSM in the preamble discussion of 30 CFR Secs. 816.106(b) and 817.106(b). The auger mining regulations were upheld by Judge Flannery in IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, SURFACE MINING II - ROUND I, CA-79-1144 (1984).

ATTACHMENTS

A. 47 FR 27734-42 (1982).
B. CEDAR COAL CO., 1 IBSMA 145 (1979).
C. MIAMI SPRINGS PROPERTIES, 2 IBSMA 399 (1980).
D. MOUNTAIN ENTERPRISES COAL CO., 3 IBSMA 338 (1981).
E. 48 FR 41720-35 (1983).
F. 50 FR 257 (1985).
G. 48 FR 19319-21 (1983).
H. Excerpt, in IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, SURFACE MINING II - ROUND I, CA-79-1144 (1984).