



COALEX STATE INQUIRY REPORT - 112
April 24, 1989

Hon. Marlin V. MacLaughlin
P.O.B. 643
Jasper, Alabama 35502

TOPIC: REVEGETATION: TIMING

INQUIRY: Locate cases which discuss 30 C.F.R. 816.113 (Ala Reg. Sec. 880-X-10C-.60). Do the cases define the phrase "first normal period for favorable planting conditions" or specify specific planting materials?

SEARCH RESULTS: Searches were conducted using Interior's Office of Hearing and Appeals decisions in COALEX as well as the state and federal opinions in LEXIS. Materials retrieved as a result of the research are discussed below. Copies are attached.

REGULATIONS

The Alabama Regulation, which went into effect on July 27, 1983, reads as follows:

"Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected. When necessary to effectively control erosion, any disturbed area shall be seeded as contemporaneously as practicable with the completion of backfilling and grading, with a temporary cover of small grains, grasses, or legumes until a permanent cover is established."

The corresponding version of the federal regulation presently in effect does not contain the sentence highlighted above [the last sentence of the previous paragraph]. The preamble to the current rule (48 FR 40146-40147, SEPTEMBER 2, 1983) states that "the provision concerning the use of temporary cover has not been adopted because it is redundant of" these sections of the regulations:

1. 816.111(c) which "allows the use of quick-growing, temporary, stabilizing cover";
2. 816.114 which "requires the use of soil-stabilizing practices";
3. 816.22(d)(1)(iii) which "requires that topsoil and all other segregated materials be redistributed in a manner that protects the material from wind and water erosion before and after it is seeded and planted";
4. 816.95 which "requires stabilization of surface areas"; and
5. 816.100 which "requires that reclamation efforts, including revegetation, occur as contemporaneously as practical with mining operations".



STATE AND FEDERAL OPINIONS

No state or federal cases were identified that addressed the issue raised in the inquiry.

ADMINISTRATIVE DECISIONS

No cases from Interior's Office of Hearings and Appeals were identified that defined the phrase in question or specified which planting materials were to be used. However, a number of relevant Administrative Law Judge (ALJ) decisions were retrieved. Each case discussed different aspects of the requirement for operators to establish permanent vegetative cover as contemporaneously as possible with surface mining operations or to establish a temporary cover if the "first normal period" for the planting materials selected does not immediately follow the regrading of the topsoil.

In *CARBONEX COAL CO. v OSMRE*, TU 5-58-R (September 23, 1988), the operator's initial attempts at revegetation of the Oklahoma mine site "didn't take". Reseeding was performed after the NOV was issued (in mid-winter). The ALJ affirmed the validity of the NOV. Citing to the initial program regulations (30 C.F.R 715.20), he stated: "Assuming arguendo that a citation for failure to establish a permanent vegetative cover was premature, Carbonex nevertheless failed to establish a temporary cover."

The ALJ in *TURNER BROS., INC. v OSMRE*, TU 7-17-R (August 5, 1987), cited to Oklahoma Permanent Regulatory Program Regulation (OPRPR) 816.111(b) and 816.113 in affirming the issuance of the NOV. In this case, one half of the Turner Brothers (TBI)'s permitted area had been revegetated, but not with the species required by the State-approved revised reclamation plan. The remaining area had been topsoiled; however, no seeding had taken place during the "first normal period" for "the type of plant material selected".

TBI was issued an NOV for another Oklahoma mine site for "failing to seed and plant the prepared area during the first favorable planting season...." *TURNER BROS., INC. v OSMRE*, TU 6-68-R (May 13, 1987).

Neither TBI case mentioned the operators' failure to establish a temporary cover on the unplanted area.

Two decisions discuss the timeliness of restoration and vegetation efforts. In *GLENN COAL CO. v OSM*, CH 0-279-R (May 16, 1984), the operator halted mining operations, temporarily, due to an "unfavorable market for coal", and did not restore the "disturbed" areas. The issue raised in *CONSOLIDATION COAL CO. v OSM*, IN 1-12-R (August 1, 1983) concerned the time schedule for stabilizing rills and gullies deeper than nine inches where "topsoil has been replaced but vegetation has not been established." 30 C.F.R. 715.14(i). Both ALJs quoted 30 C.F.R. 715.20 and section 102(e) of SMCRA to emphasize the importance of reclaiming "surface areas as contemporaneously as possible with the surface coal mining operations."



One ALJ commented on the issuing of NOVs and Cessation Orders (COs) in the application of 30 C.F.R. 715.30 to surface mining operations. He wrote: "The mens legis of the Act is to restore natural balance to the environment at the conclusion of mining activity and not to create costly and useless exercises in conservation whose only purpose is to satisfy the cosmetic appearance for an inspector. This is essentially true when the proper time for such exercise has not arrived." GREATER PARDEE, INC. v OSM, CH 0-284-R (February 6, 1981).

The two decisions cited in GREATER PARDEE which also discuss this matter, DELTA MINING CORP. v OSM, IN 0-10-P and IN 0-17-P (January 22, 1981) and OLD HOME MANOR, INC. v OSM, CH 1-55-R (December 8, 1980), are included as attachments.

ATTACHMENTS

- A. 42 FR 62690 (DECEMBER 13, 1977). Sec. 715.20 Revegetation.
- B. 44 FR 15234, 15413 (MARCH 13, 1979). Preamble and Sec. 816.113.
- C. 48 FR 40140-40162 (SEPTEMBER 2, 1983). [See pp. 40146-40147 for Preamble to Sec. 816.113.]
- D. CARBONEX COAL CO. v OSMRE, Docket No. TU 5-58-R (September 23, 1988).
- E. TURNER BROS., INC. v OSMRE, Docket No. TU 7-17-R (August 5, 1987).
- F. TURNER BROS., INC. v OSMRE, Docket No. TU 6-68-R (May 13, 1987).
- G. GLENN COAL CO. v OSM, Docket No. CH 0-279-R (May 16, 1984).
- H. CONSOLIDATION COAL CO. v OSM, Docket No. IN 1-12-R (August 1, 1983).
- I. GREATER PARDEE, INC. v OSM, Docket No. CH 0-284-R (February 6, 1981).
- J. DELTA MINING CORP. v OSM, Docket Nos. IN 0-10-P and IN 0-17-P (January 22, 1981).
- K. OLD HOME MANOR, INC. v OSM, Docket No. CH 1-55-R (December 8, 1980).