



COALEX STATE INQUIRY REPORT - 176

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TOPIC: SUBSTITUTING ALTERNATIVE MATERIALS FOR TOPSOIL

INQUIRY: What administrative cases are available which discuss the use of alternative materials for topsoil? In particular, must the "best available" material used to cover a previously mined area be from the previous mine's old spoil pile or does "best available" material mean material from anywhere in the permit area?

SEARCH RESULTS: Research was conducted using the COALEX Library and the other materials available in LEXIS. Only Interior administrative decisions dated before 1984 were identified. These are discussed below. Copies of these decisions and three relevant Federal Register notices are attached.

OHA ADMINISTRATIVE DECISIONS

CARBON FUEL CO. v OSM, 1 IBSMA 253, IBSMA 79-9 (1979).

The Board reversed the ALJ's ruling that Carbon Fuel was excused from compliance with the interim program regulations. Despite the fact that there was insufficient topsoil in the area being mined that could be recovered and stockpiled, and that Carbon Fuel's topsoil handling methods were acknowledged as appropriate, the Board found Carbon Fuel in violation of 30 CFR 715.16(a): "An operator must obtain approval from a state regulatory authority before using alternative materials instead of removing, segregating, and redistributing topsoil."

BURGESS MINING AND CONSTRUCTION CORP., 1 IBSMA 293, IBSMA 79-28 (1979).

Burgess interpreted the language of 30 CFR 715.16 ("All topsoil to be salvaged shall be removed") to mean that "less than absolutely all of the available topsoil need be removed in every case and that circumstances will direct the exact amount that must be salvaged." While this suggestion appealed "to common sense" the Board ruled that any deviation from the norms must be approved by the appropriate regulatory authority.



**ALABAMA BY-PRODUCTS CORP. (ABC) , 2 IBSMA 298, IBSMA 80-44 (1980).
ALABAMA BY-PRODUCTS CORP. v OSM, Docket Nos. NX 8-26-R, NX 8-27-R (1980,
amends 1979 decision).
ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (1979).**

The Board affirmed the ALJ's and its prior decisions that "ABC was using alternative materials in place of topsoil, that ABC had obtained approval for the use of alternate materials from the State regulatory authority, and that ABC had shown that the use of alternative materials was equal to or better than the use of native topsoil in achieving revegetation." The Board ruled that the state's reliance on topsoil analysis based on the USDA Soil Conservation Service's published data instead of requiring specific topsoil analysis was appropriate.

FALCON COAL CO. v OSM, Docket No. NX 0-198-R (1983).

Falcon had applied for a variance from the requirements of 715.16 but at the time of the inspection no variance existed. The ALJ ruled the OSM inspector could issue a violation for non-compliance with 715.16(b) since Falcon did not have an approved modification of its permit.

FALCON COAL CO. v OSM, Docket No. NX O-124-4 (1983).

"The evidence convincingly discloses that petitioner did not stockpile, segregate, or redistribute topsoil on the permit area."

FEDERAL REGULATIONS

**44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble and Final Rule.
[Excerpts]**

701.5 Definition of topsoil. "The intent of the Act with regard to substitution for topsoil is clear and is accurately spelled out in the regulations. The regulations provide the regulatory authority with the options that the commenters suggested. The definition of topsoil as the A horizon is no hinderance where it is too thin, too poor in quality, or missing altogether, because alternatives are clearly spelled out in both the Act and the regulations."

Also see preambles to 816.21 and 816.22 (attached).

47 FR 10742 (MARCH 11, 1982). Proposed rule.

Included for background; see the final rule, below.

48 FR 22092 (MAY 16, 1983). Final rule. 816.22(b) Topsoil substitutes and supplements.

"The rule provides that selected overburden materials may be substituted for, or used as a supplement to, topsoil if the operator demonstrates to the regulatory authority that the resulting soil medium is equal to, or more suitable for sustaining vegetation than, the existing topsoil, and



the resulting soil medium is the best available in the permit area to support revegetation. The phrase 'in the permit area' has been added in the final rule to make it clear that the operator need not go outside the permit area to secure the topsoil substitute or supplement material."

ATTACHMENTS

- A. CARBON FUEL CO. v OSM, 1 IBSMA 253, IBSMA 79-9 (1979).
- B. BURGESS MINING AND CONSTRUCTION CORP., 1 IBSMA 293, IBSMA 79-28 (1979).
- C. ALABAMA BY-PRODUCTS CORP., 2 IBSMA 298, IBSMA 80-44 (1980).
- D. ALABAMA BY-PRODUCTS CORP. v OSM, Docket Nos. NX 8-26-R, NX 8-27-R (1980, amends 1979 decision).
- E. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, IBSMA 79-16 (1979).
- F. FALCON COAL CO. v OSM, Docket No. NX 0-198-R (1983).
- G. FALCON COAL CO. v OSM, Docket No. NX O-124-4 (1983).
- H. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble and Final Rule.
- I. 47 FR 10742 (MARCH 11, 1982). Proposed rule.
- J. 48 FR 22092 (MAY 16, 1983). Final rule.