



COALEX STATE INQUIRY REPORT - 248

February 1993

G. Milton McCarthy
Assistant Attorney General
Alabama Surface Mining Commission
P.O. Box 2390
Jasper, Alabama 35502-2390

TOPIC: INTERPRETATION OF "FIRST NORMAL PERIOD FOR FAVORABLE PLANTING"

INQUIRY: Alabama has a case in which the primary issue is the proper interpretation of the state counterpart to 30 CFR 816.113 regarding the timing of revegetation on reclaimed lands. Please locate any cases interpreting the term "first normal period for favorable planting" referenced in this regulation.

SEARCH RESULTS: Research was conducted using the COALEX Library and other material available in LEXIS. Several state administrative decisions were identified that list specific dates that are considered to be "the normal period for favorable planting." An OSM notice in the Federal Register provides a discussion of a Kentucky program amendment from 1992 which included a definition of "growing season". A COALEX Report from 1989 provides relevant Interior administrative decisions; this Report was updated adding regulatory and legislative information as well as additional Interior decisions. No relevant state or federal cases were identified.

Copies of the items listed below are attached.

STATE ADMINISTRATIVE DECISIONS

R & H SURFACE MINING v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), EHB Docket No. 87-424-R (1989).

R & H did not object or respond to DER's assertion that it failed to revegetate backfilled areas "during the first normal period for favorable planting after backfilling and grading". Pa Code Sec. 87.148(a) describes the normal periods for favorable planting as:

"(1) Early spring until May 30, and August 10 until September 15 for permanent herbaceous species.

"(2) Early spring until May 20 for woody species."



BEAVER CREEK RESOURCES v DIV. OF RECLAMATION, Case No. RBR-10-92-107 (1992).

In discussing the criteria for successful revegetation, i.e., "vegetation must survive two growing seasons", the Board identified the "period between March 1 and November 15" as being "generally accepted as a favorable planting and growing season."

MUSKINGUM MINING, INC. V DIV. OF RECLAMATION, Case Nos. RBR-4-86-015 & RBR-4-86-086 (1987).

In addressing the issue of whether Muskingum failed to maintain contemporaneous reclamation, the Board discussed O.A.C. 1501:13-9-13(A)(3) which requires planting to take place "not later than the next appropriate season for such planting, following the completion of backfilling, grading, resoiling, and other work..." but does not "specifically articulate a time frame within which final grading and resoiling must occur."

The Division of Reclamation asserted that to be contemporaneous, final grading and resoiling had to occur "after the 180 days for rough grading work, but before the next-approaching growing season." Muskingum interpreted the requirements to mean that "grading and resoiling must take place 'as soon as practicable,' and the planting must occur during the next growing season thereafter." The Board emphasized the need to read "time limits" into the rule.

COALEX REPORT AND REPORT UPDATE

COALEX STATE INQUIRY REPORT - 112, "Revegetation: Timing" (1989).

A number of Interior administrative decisions were listed that addressed some aspect of the revegetation timing and planting issues. Some regulatory material (preambles to rules from the Federal Register) are also included as part of the Report.

OLD HOME MANOR, INC., 3 IBSMA 241, IBSMA 81-29 (1981).

HEADNOTES: Backfilling and grading requirements: Generally.

"Whether particular backfilling and grading activity is timely must be determined taking into account the overall circumstances of a surface coal mining and reclamation operation."

Also see:

CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988)

ALABAMA BY-PRODUCTS CORP. AND DRUMMOND COAL CO., INC. v OSM, 103 IBLA 264, IBLA 86-1277 (1988).



CARBONEX COAL CO. v OSM, Docket Nos. TU 5-68-R, et al. (1989). [The Consent Decision amends the 1988 Decision included in Report 112.]

ADDITIONAL INTERIOR ADMINISTRATIVE DECISIONS

C & K COAL CO. v OSM, Docket No. CH 0-117-R (1980).

The ALJ vacated the NOV issued for failure to protect stockpiled topsoil by providing effective vegetative cover stating: "I further find that from November until January reseeded the topsoil stockpile was not necessary since it obviously is not a normal period for favorable planting."

TWIN OAKS COAL CO. v OSM, Docket No CH 9-156-R (1980).

In affirming the NOV issued for failure to seed stockpiled topsoil with effective cover, the ALJ ruled: "In the instant case the testimony was the July was not the normal period for favorable planting conditions. It did appear from Respondent's Exhibits Nos. 2 and 3 that erosion of the topsoil stockpiled had occurred which tended to confirm the testimony of the inspectors regarding this violation. Perhaps it would have been more accurate for the violation to have alleged that there was a failure to protect the topsoil by seeding or other approved measures and permitted an alternative type of remedial action."

PRINCESS CINDY MINING, INC. v OSM, Docket No. CH 1-13-R (1980).

"Temporary relief from Notice of Violation 80-I-70-14 is granted, and all remedial action required by the notice of violation is stayed until the end of the first favorable planting season in 1981 as determined by the West Virginia Department of Natural Resources."

Also see these ALJ decisions that mention the phrase in question but do not define it:

LAKE COAL CO., INC. v OSM, Docket No. NX 0-111-P (1980).

COAL ENERGY, INC. v OSM, Docket No. NX 6-76-R (1986).

TURNER BROS., INC. v OSM, Docket Nos. TU 6-55-R & TU 6-75-R (1987).

R.C.T. ENGINEERING, INC. v OSM, Docket Nos. NX 7-7-R & NX 6-103-R (1987).
[Excerpt]

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule.



Sec. 816.111 Revegetation: General requirements is enclosed for background.

Sec. 816.113 Revegetation: Timing. "The requirements of Section 816.113 are intended to assure that there will be no major time lag between completion of regrading and seeding and planting of the area to be revegetated. As stated by Sampson (1952, p. 245), the time of seeding depends upon the method of land preparation and the forage species used; and Vogel (1974, p. 175) states that seedbed preparation is essential for successful establishment of seeded vegetation. Annuals such as small grains, grasses, or legumes can be used to protect the site and aid in the establishment of perennial species (Plass, 1978, p. 58). In many locations, suitable species are available and climatic conditions are favorable for establishing seedlings that provide ground cover for erosion control throughout a major portion of the year (Plass, 1978, p. 58)."

47 FR 12596 (MARCH 23, 1982). Proposed rule. Revegetation. Discussion on Proposed Sec. 816.111(b).

"OSM believes that 'seasonal variety' in Section 515(b)(19) of the Act and 'seasonal characteristics of growth' discussed on page 106 in House Report 95-218, supra, have essentially the same meaning. The term 'seasonal characteristics of growth,' which is more easily understood than the language in existing Sec. 816.111(b)(3), refers to the major season of growth for herbaceous species.

"In general, herbaceous species can be grouped into cool season and warm season species (Cook, Hyde, and Sims, 1974, and Raffail and Vogel, 1978). Cool season species grow mostly in the spring and fall, but are nearly dormant or grow poorly in the summer. In contrast, warm season species grown primarily during late spring and summer but are dormant in early spring and fall.

...

"Species useful in achieving a quick and temporary cover may not have the same seasonal characteristics of growth as the original vegetation and may not be capable of self-regeneration and plant succession. For this reason, proposed Sec. 816.111(c) provides an exception that allows regulatory authorities to approve their use whenever measures to establish permanent vegetation are included in an approved permit and reclamation plan."

See COALEX Report 112, Attachment C for the final rule.

LEGISLATIVE HISTORY

Four excerpts from Committee Hearings and Prints are enclosed for background. They do not specifically discuss or interpret the phrase in question.

STATE REGULATORY INFORMATION

KENTUCKY



57 FR 45295 (OCTOBER 1, 1992). Final rule; approval of amendment. Definitions.

"Kentucky proposes to add a definition of 'growing season' at 405 KAR 8:001, 16:001, 18:001 and 24:001. As proposed, growing season means the period during a one (1)-year cycle, from the last killing frost in the spring to the first killing frost in the fall, in which climatic conditions are favorable for plant growth. Kentucky identifies this period as normally extending from mid-April to mid-October. While there is no direct Federal counterpart, the Director finds that the definition adds clarity to Kentucky's program and will not render the program inconsistent with the requirements of SMCRA and the Federal regulations."

West Virginia and Illinois were contacted regarding this issue. Their responses follow:

WEST VIRGINIA

West Virginia has a spring and fall planting season. The specific dates which appeared in the old regulations are used as guidelines and are considered "optimum times" for planting. If the planting season for the species approved in the reclamation plan is missed, the operator must plant appropriate temporary cover.

ILLINOIS

Illinois does not have formal regulations on planting seasons. The state uses University handbooks for farmers and Soil Conservation Service guidelines for recommended planting periods for each species. The planting periods are usually spring and fall. If the optimum time for seeding permanent species passes, the operator is required to plant temporary cover or mix temporary cover with permanent plantings.

ATTACHMENTS

1. R & H SURFACE MINING v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), EHB Docket No. 87-424-R (1989).
2. BEAVER CREEK RESOURCES v DIV. OF RECLAMATION, Case No. RBR-10-92-107 (1992).
3. MUSKINGUM MINING, INC. v DIV. OF RECLAMATION, Case Nos. RBR-4-86-015 & RBR-4-86-086 (1987).
4. COALEX STATE INQUIRY REPORT - 112, "Revegetation: Timing" (1989).
 - 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).
 - 5. OLD HOME MANOR, INC., 3 IBSMA 241, IBSMA 81-29 (1981).
 - 6. CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988).
 - 7. ALABAMA BY-PRODUCTS CORP. AND DRUMMOND COAL CO., INC. v OSM, 103 IBLA 264, IBLA 86-1277 (1988).
 - 8. CARBONEX COAL CO. v OSM, Docket Nos. TU 5-68-R, et al. (1989).
 - 9. C & K COAL CO. v OSM, Docket No. CH 0-117-R (1980).
 - 10. TWIN OAKS COAL CO. v OSM, Docket No CH 9-156-R (1980).
 - 11. PRINCESS CINDY MINING, INC. v OSM, Docket No. CH 1-13-R (1980).
 - 12. LAKE COAL CO., INC. v OSM, Docket No. NX 0-111-P (1980).
 - 13. COAL ENERGY, INC. v OSM, Docket No. NX 6-76-R (1986).
 - 14. TURNER BROS., INC. v OSM, Docket Nos. TU 6-55-R & TU 6-75-R (1987).
 - 15. R.C.T. ENGINEERING, INC. v OSM, Docket Nos. NX 7-7-R & NX 6-103-R (1987). [Excerpt]
 - 16. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule.
 - a. Sec. 816.111 Revegetation: General requirements is enclosed for background.
 - b. Sec. 816.113 Revegetation: Timing.
- 47 FR 12596 (MARCH 23, 1982). Proposed rule. Revegetation. Discussion on Proposed Sec. 816.111(b).
Four excerpts from Committee Hearings and Prints.
Kentucky: 57 FR 45295 (OCTOBER 1, 1992). Final rule; approval of amendment.
Definitions.