



COALEX STATE INQUIRY REPORT - 292

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TOPIC: HIGHWALL ELIMINATION & AOC: "BLENDING IN"

INQUIRY: Please locate recent decisions and other materials that discuss highwall elimination or restoring disturbed lands to their "approximate original contour". Of particular interest is material on the definition of "approximate" or what constitutes "blending in" with the surrounding terrain.

SEARCH RESULTS: An OSM Directive and a number of Interior administrative decisions were identified that were exactly on point. These are listed below and copies are attached. Some additional relevant but less persuasive materials are also included for your review.

FROM KAREN JACOBS, ILLINOIS DMM:

Illinois has a case involving Consolidated Coal Co., AOC and "blending in" before Judge Torbett, an Interior Administrative Law Judge. The case was briefed in mid-spring. They are awaiting Torbett's decision. Karen used these materials in the state's brief:

OSM DIRECTIVE, Subject No. INE-26, Transmittal No. 338, "Approximate Original Contour" (Issued May 26, 1987).

3. Policy-Procedures.

"a. Background. In modifying the phrases 'original contour' and 'surface configuration', in the definition of AOC with the terms 'approximate' and 'general', respectively, Congress recognized and acknowledged that there would likely be differences between the premining and postmining topography. Furthermore, the reclamation of any minesite must take into consideration and accommodate site-specific and unique characteristics of the surrounding terrain and postmining land uses. Consequently, AOC determinations must necessarily retain a certain amount of subjectivity and often rely principally on the judgment of the regulatory authority, which has been given the primary responsibility for such decisions under the Act."



...

c. Procedures.

...

"(2) Inspection Criteria. AOC is achieved through a reasonable, but not necessarily exact, rendering of the approved postmining topography. Inspectors shall determine whether AOC requirements have been met by applying the following three elements contained in the definition of AOC.

(a) General surface configuration....

(b) Drainage....

(c) Highwalls and spoil piles...."

IN THE MATTER OF WILLIAM H. PULLEN, JR., ET AL., Docket No. IBLA 88-452 (1992).

The Pullens, landowners of two permitted surface areas, objected to the Phase I bond release applied for by American Standard Coal Company, Inc. on behalf of Jackson County Mining. Judge Torbett found that the requirements for Phase I bond release were met: sites were backfilled and graded to AOC, highwalls were properly reclaimed, the slope angles posed no threats of slides and erosion was minimized. Regarding AOC, the ALJ stated:

"The two key words in this definition [of AOC] are 'general configuration'. Approximating the original contour does not require an exact match with the original contours."

...

"The nature of coal mining dictates that the topography will change. The elevation is permanently changed when the coal is removed. The contour changes again when the overburden is replaced. It would be virtually impossible for the reclaimators to match exactly what nature took centuries to do in weathering the slopes."

PETER J. ROSATI, 119 IBLA 219, IBLA 89-228 (1991).

As a result of Rosati's citizen's complaint, OSM undertook an inspection of the minesite. Although the inspection revealed a "somewhat significant change in the slope of the mined land immediately adjacent to appellant's fence line", OSM, exercising its oversight responsibility, independently determined that Daugherty Coal Company, Inc. had backfilled and graded the disturbed area so that the contour closely resembled the general surface configuration of the premined area.

PACIFIC COAST COAL CO. v OSM, 118 IBLA 83, IBLA 91-121 (1991). PACIFIC COAST COAL CO. v OSM, Docket No. IBLA 90-201 (1990).

The Board and the ALJ discussed federal cases, OSM Directive INE-26, as well as statutory and regulatory requirements in affirming OSM's denial of Pacific Coast's permit revision application for creation of a permanent water impoundment. Retention of the



spoil piles as permanent topographical features would not conform to the AOC of the premined area.

NICKEL PLATE MINING CO., Inc., Docket No. NX 5-112-R (1987).

Citing to congressional intent that the AOC standard be flexible and OSM Directive INE-26, the ALJ gave greater weight to the applicant's witnesses "who had the benefit of seeing the subject site before, during, and after mining" in concluding that the "alleged highwall" was a premining logging road, the "alleged spoil pile existed as a hill prior to mining, though it now has increased elevation", and that the "hollow existed prior to mining, though it may be deeper now." The reclaimed site "blends into the surrounding terrain, complements the drainage of the area, is suitable for its intended postmining use, and is not aesthetically offensive."

PRIOR COALEX STATE INQUIRY REPORTS:

COALEX STATE INQUIRY REPORT - 16, "Approximate original contour" (1984).

This Report investigates the legislative history of the phrase. Included with attachments. In particular, see Document A, Excerpts from H.R. 218, 95th Cong., 1st Sess. (April 22, 1977).

From "Elements of Mine Regulation Program", "Return to approximate contour". (p 96):

"[T]he regrading standard of H.R. 2 was formulated to cover all types of mining operations under all conditions. Thus it is, of necessity, a flexible standard which contemplates different mining circumstances."

COALEX STATE INQUIRY REPORT - 56, "Approximate original contour" (1985).

Report 56 provides federal decisions and Interior administrative decisions defining AOC.

ADDITIONAL INFORMATION

The following materials are relevant but less persuasive than those above:

1. FREMONT COAL v OSM, Docket Nos. CH 91-1-R, CH 91-2-R (1991).
2. BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v OSM, 97 IBLA 285, IBLA 85-845 (1987).
3. DENNIS ZACCAGNINI, 96 IBLA 97, IBLA 85-762 (1987).
4. CLINCHFIELD COAL CO. v OSM, 95 IBLA 360, IBLA 84-159 (1987).
5. KENNETH MARSH, 82 IBLA 3, IBLA 83-616 (1984).
6. BIG FORK MINING CO., INC. v OSM, Docket No. NX 1-102-R (1984).
7. ST. CHARLES MINING CO., INC. v OSM, 94 IBLA 183, IBLA 84-862 (1986).
8. LITTLE SANDY COAL SALES, 2 IBSMA 25, IBSMA 80-3 (1980).



9. LITTLE SANDY COAL SALES v OSM, Docket Nos. NX 9-56-R, NX 9-73-R (1979).
10. OSM DIRECTIVE, Subject No. INE-39, Transmittal No. 543, "Highwall Elimination on Interim Program Sites" (Issued 6/7/89) [Incorporates INE-39, Issued 7/20/93.]
11. TEMPORARY OSM DIRECTIVE, Subject No. 88-3, Transmittal No. 426, "Highwall Elimination" (Issued 2/16/88).

Also included are four cite lists from COALEX and LEXIS:

1. Interior Administrative Decisions containing the search terms "highwall" and "AOC" or "approximate original contour".
2. Interior Administrative Decisions containing the search terms "highwall" and "AOC" or "approximate original contour" as well as some form of "blend" or "resemble" or "complement".
3. Federal SMCRA cases containing the search terms "highwall" and "AOC" or "approximate original contour".
4. Federal Register notices on federal regulations containing the search terms in the preamble.

ATTACHMENTS

- A. OSM DIRECTIVE, Subject No. INE-26, Transmittal No. 338, "Approximate Original Contour" (Issued May 26, 1987).
- B. IN THE MATTER OF WILLIAM H. PULLEN, JR., ET AL., Docket No. IBLA 88-452 (1992).
- C. PETER J. ROSATI, 119 IBLA 219, IBLA 89-228 (1991).
- D. PACIFIC COAST COAL CO. v OSM, 118 IBLA 83, IBLA 91-121 (1991).
- E. PACIFIC COAST COAL CO. v OSM, Docket No. IBLA 90-201 (1990).
- F. NICKEL PLATE MINING CO., Inc., Docket No. NX 5-112-R (1987).
- G. COALEX STATE INQUIRY REPORT - 16, "Approximate original contour" (1984).
- H. COALEX STATE INQUIRY REPORT - 56, "Approximate original contour" (1985).
- I. FREMONT COAL v OSM, Docket Nos. CH 91-1-R, CH 91-2-R (1991).
- J. BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v OSM, 97 IBLA 285, IBLA 85-845 (1987).
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- R. OSM DIRECTIVE, SUBJECT No. INE-39, Transmittal No. 543, "Highwall Elimination on Interim Program Sites" (Issued 6/7/89) [Incorporates INE-39, Issued 7/20/93.]
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 - 4. Federal Register notices on federal regulations containing the search terms in the preamble.