



COALEX STATE INQUIRY REPORT - 53
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TOPIC: REVEGETATION REQUIREMENTS

INQUIRY: Are there any guidelines in the legislative history or regulations that specify when tree cover or fish and wildlife enhancement may be required for the revegetation cover of mined areas? Do any other states contain an effective mechanism that encourages forestry or wildlife enhancement either: (1) on land that was originally forested or (2) on land that did not have forest originally. In particular, an investigation of the following state programs would be helpful: Virginia, West Virginia, Ohio, and Indiana.

SEARCH RESULTS: If the pre-mining land use was forest or wildlife habitat, the mechanism by which the regulatory authority can require reforestation appears straightforward. The revegetation standard applied under the Act is based on the approved post-mining land use which in turn is a function of the pre-mining use of the disturbed land. SMCRA Sec. 515(b)(2) requires that the permittee "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood". (See SMCRA Sec. 515(b)(19), 30 CFR Sec. 816.133.)

OSM's 1979 regulations included specific revegetation success standards for tree and shrub stocking of forest lands. (See 44 FR 15414, MARCH 13, 1979.) These regulations were removed from the federal code in September, 1983 to provide additional flexibility to the states in establishing revegetation requirements applicable to the particular state's climate, soils, and other local conditions. (48 FR 40160 (SEPTEMBER 2, 1983), 30 CFR Sec. 816.116) The preamble to the final rule implies that a state could elect to continue to prescribe standards for tree or shrub planting on forest or wildlife lands.

The regulations are unclear on the question of whether the regulatory authority can prohibit an operator from changing the land use if the pre-mining land use was forestry or wildlife habitat. The Act and regulations include provisions for instances where the proposed post-mining land use may differ from the pre-mining land use -- such as reclaiming land for agricultural, commercial forestry, or recreational use. (SMCRA Sec. 515(c)(3) and 30 CFR Sec. 816.133(c))

The regulations imply that the regulatory authority may disapprove such a change even if the criteria are met. Thus, Sec. 816.133 of the regulations specifies that "higher or better uses may be approved by the regulatory authority". Not that they must be approved. No legislative history or case law was identified on the issue of whether such approval is discretionary.



A search of COALEX was conducted to identify legislative intent where the regulatory authority could require the coal mining operation to establish a forestry or wildlife post-mining use when the pre-mining use was not forestry or wildlife habitat. None was identified. Although a provision was included to allow, for example, commercial forestry as a new post-mining use, it appears to be the prerogative of the permittee to propose the alternative.

A search of the state regulatory programs also failed to identify any provisions in state programs requiring an operator to adopt a post-mining use plan for the mined area different than that established as its pre-mining use.

A final consideration is the requirements of Sec. 515(b)(24) of SMCRA and 30 CFR Sec. 816.97 which require preservation and enhancement of fish and wildlife resources. Arguably this section would give the regulatory authority some latitude with respect to requirements for restoration of wildlife habitat or enhancement of areas to wildlife habitat. No legislative history or other indication in the COALEX file was found, however, clearly indicating that this section was intended to allow the regulatory authority to require an operator to create a wildlife habitat if one did not previously exist in the area.

ATTACHMENTS

- A. 44 FR 15414 (1979).
- B. 48 FR 40160 (1983).