



COALEX SIGNIFICANT ISSUE REPORT - 38

TOPIC: ELIMINATION OF HIGHWALLS

Sec. 515(b)(3) of the Surface Mining Control and Reclamation Act (SMCRA) requires that all surface coal mining operations backfill, compact and grade the mine site in order to restore the approximate original contour of the land, and eliminate all highwalls. The definition of approximate original contour (AOC) in Sec. 701 of SMCRA also provides that all highwalls must be eliminated.

The only explicit variance in SMCRA from the highwall elimination requirement is contained in Sec. 527 which applies to Special Bituminous Coal Mines. That section allows variations from the requirements for return to approximate original contour for a special class of mines and requires only that "remaining highwalls are stable." (Sec. 527(c)) Other sections of SMCRA provide variances from the requirements to return land to the approximate original contour (See Secs. 515(b)(3), (c)(2), (d)(2), and (e)), but do not provide an explicit variance from the requirement to eliminate highwalls.

Given this statutory framework, the question arises as to what flexibility the states and OSM have to consider variations from the requirements for highwall elimination. To analyze this issue requires consideration of both the legislative history and approved regulations.

Legislative History

The issue of highwall elimination was a hotly contested one in the development of SMCRA. The final statutory language was not agreed upon until the House and Senate Conference in 1977, which resulted in the drafting of P. L. 95-87.

Senate bill 7 would have provided a variance to the approximate original contour and highwall elimination requirement for a wide range of postmining land uses. In addition, if "sound engineering technology" indicated that the highwall could not be completely backfilled, then the operator would have been required to reduce the highwall to the maximum extent consistent with "sound engineering technology" and develop a revegetation plan that is "reasonably calculated: to screen the remaining highwall within 5 years." The House bill included no such provision.

The final bill, agreed upon in conference, included some variances from AOC, but did not include the highwall variances or the "sound engineering technology" provision of the Senate bill. The Conference Report indicated that the final language providing AOC, but not highwall, variances "amounts to a variance from the configuration aspects' of the regrading standard..." and "would give an opportunity for a broad range of postmining land uses on those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for the planned land uses." (H.R. Rep. No. 95-493, S. Rep. No. 95-337, 95th Cong., 1st Sess. 108-109 (1977))

Congress on the other hand, did indicate that where a superior land use would be obtained by leaving a highwall and a bench, that the experimental practices provision of Sec. 711 of SMCRA



should apply on a case-by-case basis to allow exceptions from the approximate original contour standard. (H.R. Rep. 95-718, 95th Cong., 1st Sess. 71 (1977))

The proponents of the highwall elimination requirement found support in a study, "The Design of Surface Mining Systems in Eastern Kentucky Coal Fields," directed by the Kentucky Department of Natural Resources and Environmental Protection and conducted by two consulting firms: Mathematica, (Princeton, N.J.) and Ford, Bacon & Davis (New York, N.Y.). With respect to the environmental impacts of conventional contour mining methods, the study states that:

"[The] conventional methods employed always result in permanent fill bench= - the result of disposal of overburden on slopes below the coal seam. And, except where entire mountaintops are removed, the conventional methods leave an exposed highwall after mining. These two characteristics of conventional mining - the permanent fill bench and exposed highwall - are the direct cause of many of the undesirable environmental effects of mining. Landslides occur when the fill benches become unstable, erosion results from unvegetated outcrops, and exposed highwall degrade esthetic values immediately following mining, at least."

The study concluded that the "Elimination of the highwall and permanent fill bench would, in our opinion, significantly reduce the major remaining environmental impact of surface mining." Following this recommendation, the House included the highwall elimination provisions in the bill which later became SMCRA. (H.R. Rep. No. 55-218, 95th Cong., 1st Sess. 122-123 (1977))

Federal Court Decisions

The constitutionality of SMCRA was challenged in *Hodel v Virginia Surface Mining Reclamation Association*, 452 U.S. 264 (1981). One of the questions raised in that case was whether the steep slope sections of the Act which provide for return to the approximate original contour and highwall elimination were constitutional.

In ruling on the issue, the U.S. Supreme Court found that the highwall provision was not on its face unconstitutional. The Court did, however, leave open the question of whether the highwall elimination requirement would be an unconstitutional taking under a specific circumstance. The Court stated:

"Although we conclude that mere enactment' of the Act did not effect a taking of private property, this holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking." (Id., at 304)

There have not been any additional Federal court decisions interpreting SMCRA's highwall elimination requirements. Three cases are currently pending in Federal court. These are:



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This case is a challenge to OSM's permanent program regulations. These regulations provide some variances from the highwall elimination requirement. OSM's regulations are further discussed below.

BUCKLEY MINING et al. v WATT.

This case is a challenge by Kentucky surface landowners and a coal mine operator to the requirement to restore the approximate original contour with all highwalls eliminated. The surface landowners requested that Buckley mine their land in a manner that, after completion, would leave flat land suitable for residential development. The civil action seeks to enjoin OSM from taking enforcement action and a declaration that SMCRA's highwall elimination requirement violates the Fifth Amendment.

RIVER PROCESSING, INC. v CLARK.

This case is an appeal by a Kentucky operator from a decision of the Interior Board of Land Appeals (IBLA) ruling that River Processing must eliminate all highwalls at the mine site. The Board decision is significant since it overturned an ALJ decision which did not require complete highwall elimination because the environmental harm that would result from requiring the highwall elimination would be worse than leaving the highwall. The Board ruled that there was no authority in SMCRA or in OSM's regulations for an evaluation of comparative harms to allow highwall retention.

Other IBLA decisions that have ruled on the side of highwall elimination under a variety of fact situations include:

LITTLE SANDY COAL SALES, 2 IBSMA 25 (1980).

The Board ruled that highwall elimination was a specific requirement of 30 CFR Sec. 715.14 and must be complied with.

GRAFTON COAL CO., INC., 3 IBSMA 175 (1981).

The Board held that leaving a 525 foot long section of vertical rock face 3 to 12 feet in height constituted a violation of 30 CFR Sec. 715.14, even though the highwall had apparently been approved by the regulatory authority as part of a terrace.

TOLLAGE CREEK ELKHORN MINING CO., 2 IBSMA 341 (1980).

The Board ruled that highwalls must be completely eliminated even where retention of an access road has been approved as part of the postmining land use and that compliance with the state mining permit did not excuse noncompliance with the performance standard for highwall elimination.

On the other hand, at least one Board decision held that under certain circumstances complete elimination of highwalls would not be required. This case is the CEDAR COAL CO., 1 IBSMA 145 (1979). In that case the Board ruled that the requirements of 30 CFR Sec. 715.14 apply only to lands which are used, disturbed or redistributed in connection with or to facilitate mining under SMCRA or OSM's regulations. They do not apply to previously mined lands on which "no adverse physical impact" to a pre-existing highwall results from surface coal mining operations conducted after the effective date of the interim program performance standards.



In the parallel case of MIAMI SPRINGS PROPERTIES, 2 IBSMA 399 (1980), the Board found that the augering of a coal seam in a pre-existing highwall may make a permittee responsible for returning the entire highwall to the approximate original contour. In this case, the Board applied the criteria of "adverse physical impact" to determine that highwall elimination could be required.

Federal Regulations

OSM's permanent program regulations include the general provisions of SMCRA providing for the return of mine sites to the approximate original contour and elimination of highwalls. In addition to this general proscription, the regulations provide recognition of a potential that highwalls may be acceptable under certain limited circumstances. These circumstances exist primarily where the mining operation is remaining abandoned mine lands.

In OSM's rules revising the permanent regulatory program for remaining, exceptions are recognized to the highwall elimination requirement in the backfilling and grading area where there is insufficient spoil available from the remaining operation to completely backfill the mine and eliminate the highwall. Under such circumstances, the highwall must be eliminated to the extent technically practical and other environmental standards met. (See 48 FR 41734 (SEPTEMBER 16, 1983)) A similar exception is provided under the revised auger mining regulations. (See 48 FR 19314 (APRIL 28, 1983))

Further, in accordance with the CEDAR COAL CO. decision, discussed above, the final OSM regulations also recognize a highwall variance where the remaining operation does not have an "adverse physical impact" on a pre-existing highwall. (See 48 FR 41734 (SEPTEMBER 16, 1984))

Finally, the revised regulations allow the disposal of excess spoil on pre-existing benches without the complete elimination of highwalls provided other standards are met. These regulations also require highwall elimination to the maximum extent technically practical. (See 48 FR 32929 (JULY 19, 1983))

The legality of these regulations will be determined in the near future as part of the existing challenge in the IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION.

State Regulations

Most state proposals to approve variances from the highwall elimination requirements have been rejected in the program approval process by OSM. New Mexico's program contains a notable exception from this general rule.

Under New Mexico's approved program, highwalls must be eliminated unless retention of portions of the highwall is approved by the Director. To obtain approval, the operator must demonstrate that the highwall:

- "Will have a static safety factor of 1.3;
- Will not pose a hazard to persons or wildlife in the area;
- Will be backfilled to cover the uppermost minable coal seam to a minimum depth of 4 feet;



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The retained portion left standing shall not exceed 800 feet in length, and shall be at a minimum of at least 3,000 feet from any other portion of any highwall which has been approved as part of the postmining land use;

It is necessary to replace cliff type habitats that existed in the natural topography prior to mining;

and The ends of the highwall portions left standing will be contoured into the surrounding topography with slopes of 3:1 or less." (N.M. Reg., Sec. 20-102)

OSM's approval of New Mexico's variance was based upon the natural topographic conditions in the state.