



COALEX STATE INQUIRY REPORT - 83
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TOPIC: SMALL DEPRESSIONS

INQUIRY: 30 CFR Sections 816.102 and 817.102 allow the construction of small depressions if they are needed to retain moisture, minimize erosion, create and enhance wildlife or assist revegetation. Please research the legislative history of SMCRA to determine how Congress intended to define the term "small depressions".

SEARCH RESULTS: See below.

LEGISLATIVE HISTORY

Section 515(b)(3) of SMCRA requires the operator to restore the mined area to approximate original contour with all highwalls, spoil piles, and depressions eliminated unless "small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to [the] Act." (30 CFR Sec. 1265(b)(3)) A search was conducted of the legislative history file in the COALEX Library to determine whether Congress specified any parameters regarding the definition of a "small depression".

The provision allowing the retention of small depressions in certain circumstances was included in every version of SMCRA proposed beginning in 1974. However, the legislative history provides very little insight into the meaning of the phrase.

The first discussions concerning the benefits of retaining small depressions occurred in the first session of the 93rd Congress. In testimony on the problems of revegetating mined land in the West, one commenter noted that, while most of the area being discussed was largely barren, "where vegetation occurred, it occurred in the small depressions which caught rainfall and snow melt." (Coal Surface Mining and Reclamation: Hearings Before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 1st Sess. 83 (1973)) Thus, it appears that Congress was at least aware of the benefits of allowing an operator to leave a depression of sufficient size to hold water.

The first version of the small depression exception appeared in bills passed by both houses in the second session of the 93rd Congress. The language used in these earlier bills was slightly



different than that found in the 1977 version, and read: "...and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to paragraph (9) of this subsection)...." Paragraph (9) of the passage dealt with permanent impoundments, and allowed them to be left if approved in the mining plan and if certain requirements were met. (120 Cong. Rec. 24594 (1974)) Thus, it appears that Congress intended to tie the size of the small depressions to its ability to retain water; possibly the capacity of the depression and the amount of water it would retain was the critical element; however, Congress made no attempt to specifically define the parameters of the definition.

By 1975, the language concerning small depressions was changed so that it was identical to the version passed in 1977. No reason was given for this change, and Congress made no further attempt to define what it meant by the phrase. Thus, the legislative history provides no real insight into the factors which differentiate a "small depression" from an impoundment.

REGULATORY HISTORY

As with the legislative history, the regulations promulgated by OSM provide very little insight into the agency's interpretation of the phrase "small depressions". The original regulation dealing with small depressions was found at 30 CFR Sec. 816.102(c), and read as follows:

"Small depressions may be constructed if they --

- (1) Are approved by the regulatory authority to minimize erosion, conserve soil moisture, or promote vegetation;
 - (2) Do not restrict normal access; and
 - (3) Are not inappropriate substitutes for lower grades on the reclaimed lands."
- (43 FR 41661, 41895 (1978))

Thus, small depressions were required to meet the above three tests to be approved. Note, however, that it appears from the language used in the regulation that whether or not something was considered to be a "small depression" was left to the discretion of the regulatory authority. This language was not explained in the preamble to the proposed regulations, and apparently, OSM received no comments on this rule. Thus, the rule was implemented with no discussion.

In 1983, OSM revised the regulation pertaining to small depressions and moved it from Sec. 816.102(c) to Sec. 816.102(h). In this instance, there was some limited discussion as to the meaning and application of the rule. In response to a comment suggesting that the language used in subsection (h) be added to subsection (a)(2) (the section essentially tracks the language of the Act), OSM replied:

"The depressions which Section 151(b)(3) of the Act requires to be removed are those formed during the mining operation before any backfilling and grading of the spoil has been accomplished. They may be of any size and are not planned as part of the postmining land-use plan. The small depressions allowed to remain by the Act and Sec. 816.102 are small depressions



used for specific purposes and formed during the reclamation operation." (48 FR 23355, 23358 (1983))

Another commenter suggested that under Sec. 816.102(h), depressions could be used as a method of requiring less backfilling in the final cut area of a mine. OSM disagreed, saying:

"The depression would undoubtedly collect water during some periods of the year. However, the Act, in Section 151(b)(3), does not allow depressions to circumvent the AOC restoration requirements. Also, the depressions described by the commenter should not qualify as small depressions under Sec. 816.102(h). Depressions cannot substitute for fully backfilling the mining pit. Congress intended that depressions that would collect and store water be barred from the surface area unless permanent impoundments are approved." (Id. at 23363)

This regulation, which has not been revised since 1983, now reads: "Small depressions may be constructed if they are needed to retain moisture, minimize erosion, or assist revegetation." Note that the language which apparently gave the regulatory authority the discretion to determine what constituted a "small depression" was eliminated. Furthermore, the language quoted above, in which OSM indicates Congressional intent regarding these depressions, was actually found in the section of a Congressional report which dealt with impoundments. Thus, it is nearly impossible to determine what Congress meant by the term "small depression", but one's conclusion can only be that the definition was left to the discretion of the regulatory authority.

BOARD DECISIONS

A search was conducted of the Administrative Law Judge and Interior Board of Land Appeals files for administrative decisions pertaining to the definition of "small depressions". No applicable cases were located.

ATTACHMENTS

- A. Excerpt, Coal Surface Mining and Reclamation: Hearings Before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 1st Sess. 83 (1973).
- B. 120 Cong. Rec. 24594 (1974).
- C. 43 FR 41661 (1978).
- D. 48 FR 23355 (1983).