



COALEX STATE INQUIRY REPORT – 98
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TOPIC: DEFINITION OF "REASONABLY AVAILABLE SPOIL"

INQUIRY: Research the Federal Register for any discussion pertaining to the definition of "reasonably available spoil".

SEARCH RESULTS: The term "reasonably available spoil" is used in conjunction with the regulations promulgated by the Office of Surface Mining Reclamation and Enforcement (OSMRE) pertaining to the remining of previously mined areas. These regulations allow the regulatory authority to grant exceptions to the requirement of highwall elimination "where the volume of all reasonably available spoil is demonstrated to be insufficient to completely backfill the reaffected or enlarged highwall." (30 CFR Sec. 816.104(b)) The operator is required to eliminate the highwall "to the maximum extent technically practical" and in accordance with the following criteria:

"(1) All spoil generated by the remining operation and any other reasonable available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

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"(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment." (30 CFR Sec. 816.106(b) (1987))

"Reasonably available spoil" is defined at 30 CFR Sec. 701.5 as:

"spoil and suitable coal mine waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to public safety or significant damage to the environment."

It should be noted that the language of SMCRA contains no specific language regarding remining, and no regulations specifically dealing with remining requirements were promulgated until 1982, including the definition of "reasonable available spoil". The issue of the availability of sufficient spoil to backfill an area affected by previous mining first arose in early 1982. Responding to concerns voiced by the Commonwealth of Virginia, OSMRE proposed regulations addressing the problems faced by operators attempting to remine a steep slope area.



These rules contained OSMRE's first attempt to implicitly define the term "reasonable available spoil".

In the preamble to the January, 1982 proposed regulations, OSMRE discussed the necessity of providing some sort of modification to SMCRA's performance standards for previously mined areas. On some previously contour mined areas, spoil was placed on the outslope. If an operator wished to remine the area by placing an additional cut along the contour, OSMRE noted, the probability was high that the new cut would not generate sufficient spoil to completely backfill the entire highwall. Thus, the operator could choose to either not mine the area, leaving the reclamation work to be completed using AML funds, or to create a borrow area, which would create a new disturbance and possibly cause more environmental damage. As OSMRE noted, "surely Congress did not intend either result." Thus, the regulations were proposed to allow variances from the requirement to eliminate the highwall in remining situations.

OSMRE's proposed regulations of January, 1982 provided that an operator could obtain a variance from the requirement that an existing highwall be completely eliminated if it could be demonstrated in writing that "the volume of all reasonably available spoil" would be insufficient to completely backfill the existing highwall. If such a demonstration could be made, the "new highwall" was to be eliminated "to the maximum extent practical" in accordance with certain criteria. (47 FR 928930 (1982)) These criteria required the operator to use "all spoil generated by the mining operation or other reasonable available spoil."

In June of 1982, OSMRE proposed a second set of regulations on remining and reprocessing which applied to all areas on which remining might take place, whereas the previously proposed regulations applied only to steep slopes. While the language pertaining to the use of "reasonably available spoil" for backfilling remained essentially the same as that found in the steep slope regulations, OSMRE shed some light on its interpretation of the term.

In its discussion of the proposed rule, found at 30 CFR Sec. 816.109(a), which required an operator to use spoil generated by the mining operation and all "reasonably available spoil" to backfill the area, OSMRE explained its use of this term:

"For the purposes of these rules, reasonably available spoil is considered to be spoil that is generated by the mining operation and other spoil located on the permit site that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment. OSM anticipates that the required showing that sufficient spoil is not available will be demonstrated by a certification of a registered professional engineer." (47 FR 27734 (1982))

The preamble also discussed the prohibition on the movement of previously generated spoil. OSMRE noted that, while "certain precautions" were necessary to insure that the disturbance of any preexisting spoil did not cause further environmental damage, the spoil should be used for highwall elimination whenever possible. (Id.) Thus, while not specifically defined, the term "reasonable available spoil" was at least partially explained by OSMRE.



On November 12, 1982, OSMRE issued an "interim final rule" which implemented the steep slope remining regulations. These rules were classified as interim final rules, because OSMRE repropoed the regulations in June, 1982. In the preamble to these rules, OSMRE noted that it had received numerous comments concerning the interpretation of the term "reasonably available spoil." These comments illuminated the interpretative problems which arose from the use of the term.

Citing the thin overburden provisions of Sec. 515(b)(3), one commenter suggested that the rule be revised to require the use of "all available spoil", thus deleting the use of the term "reasonable". OSMRE rejected this comment, finding that the thin overburden provisions of Sec. 515(b)(3) did not apply to remining operations. As it had suggested in the preamble to the January, 1982, proposed regulations. OSMRE noted that the possibility of causing further environmental damage through movement of material previously placed on the outslope outweighed any benefit which could be gained by moving these materials. (47 FR 51316, 51317 (1982))

Other commenters recommended that waste materials be included as spoil. OSMRE rejected these comments, noting that any such use of coal processing waste in the backfill would violate other regulatory provisions. Concern over the improper disposal of acid and toxic materials was cited as the reason for not changing the proposed rule in this manner.) (Id.) (This interpretation was changed in a later rulemaking, discussed below.)

One change was made to the proposed regulations in response to comments questioning OSMRE's use of the term "at or near the permit site" in its description of "reasonably available spoil." Noting that the term "at or near" had been used in other regulations and had been subject to many different interpretations, OSMRE change the language of the regulation to "in the permit area." Thus, the agency held that reasonable available spoil should be limited to that found on the permit area, as there was "no provision for requiring an operator to disturb areas outside the permit area." (Id.)

While stating that an operator was not required to go outside the permit area or to dig borrow pits in order to utilize all "reasonable available spoil", OSMRE made it clear that the regulation did not preclude an operator from using excess spoil generated by another mining operation to backfill an existing highwall. Citing an earlier rule which allowed the disposal of excess spoil on preexisting benches, the agency noted that "the regulatory authority will have the authority to allow the use of excess spoil created at another location in the reclamation of a remining operation." (Id.) However, the preamble also stated that an operator would not be required to use such spoil unless the operations were within the same permit areas. (See additional discussion below regarding OSMRE's September, 1983 final rule.)

The key to OSMRE's use of the term "reasonably available spoil" is the attempt to provide flexibility through a fairly broad description. As the agency explained, a "more restrictive" reading of the term might result in a spoil which could have been utilized being eliminated from consideration, while a requirement that all spoil be used could result in further environmental damage. Thus, OSMRE intended that the regulatory authority "decide on a site-specific basis as



to whether all reasonably available spoil has been identified in the permit application." (Id. At 51318.) The final rule, found at 30 CFR Sec. 826.12, read as follows:

"(2) All spoil generated by the mining operation and other reasonably available spoil shall be used to backfill the area. Reasonably available spoil shall include spoil generated by the mining operation and other spoil located in the permit area that is accessible and available for use and that when rehandled will not cause a hazard to the public safety or significant damage to the environment.

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"(5) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety to the environment." (Id. At 51321.)

On September 16, 1983, OSMRE issued its final rules for remining, which included a definition of "reasonably available spoil." While this definition was not included in the proposed rules of June, 1982, OSMRE determined that it was necessary to formally define the term in order to avoid interpretative confusion. Several commenters noted that the definition in the preamble to the proposed rules might not be binding, and that, under some interpretations of the proposed rule, an operator might be required to obtain spoil from borrow pits. It should be noted that OSMRE had previously provided a "definition" of "reasonably available spoil" at Sec. 816.12 of the steep slope remining regulations. While the language found in this regulation was instructive as to OSMRE's interpretation of the term, it did not have any binding effect on other remining operations.

In the preamble to the final rules, OSMRE stated that the "discussion of the definition and response to comments in the November 12, 1982 Federal Register notice continue to be applicable "to the definition" of "reasonably available spoil". (48 FR 41723 (1983)) Indeed, the final definition at 30 CFR Sec. 701.5 was essentially the same as that found at 30 CFR Sec. 816.12. The only major change that was incorporated into the final rule was the addition of "suitable coal mine waste material" to the description of proper materials. OSMRE noted that a suggestion to include coal mine waste in the definition was rejected in the interim final rule; however, other rules were subsequently revised to allow disposal of coal mine waste in mined out areas. Consequently, OSMRE decided to include coal mine waste material in the description of "reasonably available spoil". The final definition read as follows:

" Reasonably available spoil' means spoil and suitable coal mining waste material generated by the remining operation or other spoil or suitable coal mine waste material located in the permit area that is accessible and the when rehandled will not cause a hazard to public safety or significant damage to the environment." (Id. At 41734)

The related regulation, found at 30 CFR Sec. 816.106(a)(1), was also revised to require the permit area to "encompass all reasonably available spoil in the immediate vicinity of the remining operations." This language was added to "ensure that permit boundaries are not manipulated so as to allow the operation to avoid its reclamation obligations." (Id. At 41724) Thus, while OSMRE intended to encourage remining of previously mined areas, certain



standards were imposed, including a definition of "reasonably available spoil", to ensure that operators did not take undue advantage of the less strict performance standards.

ATTACHMENTS

- A. 47 FR 928 (1982).
- B. 47 FR 27734 (1982).
- C. 47 FR 51316 (1982).
- D. 49 FR 41820 (1983).