



COALEX STATE COMPARISON REPORT - 167

February 5, 1991

Laura Shufett, Esquire
Natural Resources and Environmental Protection Cabinet
Department of Law
Capital Plaza Tower, Fifth Floor
Frankfort, Kentucky 40601

TOPIC: AUGER MINING: DISTANCE REQUIREMENTS FOR BACKFILLING AND GRADING

INQUIRY: Kentucky contemporaneous reclamation regulations for auger mining require backfilling and grading to follow coal removal by not more than 60 days and by not more than 1,500 linear feet [405 KAR 16:020; Proposed rule 30 CFR 816.101]. The Cabinet takes the position that the 1,500 linear feet requirement can be arrived at by adding all auger mining activities on a single-bonded permit area. A permittee is making the argument that the disturbance has to be a continuous 1,500 linear feet before any violation exists. How do other states with similar regulations interpret the 1,500 linear feet requirement? Is there any relevant case law on this point?

SEARCH RESULTS: Research included conducting a telephone survey and using the COALEX Library in LEXIS. Results of the survey are discussed below; copies of relevant state regulations are attached. Also included are the Federal Register notices which discuss 30 CFR Section 816.101 and relevant Interior Office of Hearings and Appeals (OHA) decisions.

SURVEY

Few states have federally approved program regulations which specify time and distance requirements for backfilling and grading on auger mining sites. Two states with auger mining, Virginia and West Virginia, were canvassed for their interpretation of the 1,500 linear feet requirement.

1. VIRGINIA.

Due to the nature of auguring in Virginia, the regulatory authority (RA) relies on the timing not the distance requirement of the Virginia equivalent of 816.101. Auger mining sites in this state tend to disturb 300-400 linear feet at a time. The RA encourages the operators to reclaim the holes and benches quickly and the inspectors monitor the 60 day limit.



Under Virginia's Coal Surface Mining Reclamation Fund regulations, "[f]or mining operations bonded [by the Fund], the total cumulative amount of exposed highwall shall not exceed 1,1500 linear feet." [Emphasis added.]

2. WEST VIRGINIA.

There are separate state regulations for operations which include only augering and those which include both contour mining and augering. For augering only, backfilling and grading "shall follow augering by a period not to exceed thirty (30) days or 1,000 linear feet". [Emphasis added.] For operations which include contour mining and auguring, the backfilling and grading "shall follow the auguring by not more than thirty (30) days or 1,500 linear feet, but in no event shall more than 3,000 linear feet of pit be exposed at any time". Enforcement is usually based on the time requirement. If an operator's augering activities were non-linear, the RA would count the total area disturbed in calculating the 1,000 feet requirement.

3. PENNSYLVANIA.

This state uses some different language in its regulations for the timing of backfilling and grading: "rough backfilling and grading shall not be more than 300 horizontal feet from the face of the highwall and no more than 1500 horizontal feet of pit shall be open at one time." [Emphasis added.]

REGULATORY HISTORY

1. 47 FR 26760 (JUNE 21, 1982). Proposed rule. 30 CFR Parts 816, 817 and 826: Backfilling and Grading.

"It is proposed that Sections 816.101 and 816.102 be combined and the Section 816.101 be removed, because some of the requirements in Section 816.101 are duplicative of requirements in Section 816.102. In addition, specific design criteria in both sections would be removed.

"The timing and distance requirements in paragraph (a) of Section 816.101 for rough backfilling and grading of contour, open pit and area strip mining operations would be removed from the backfilling and grading requirements. A detailed timetable for each step in the reclamation plan already is required by Section 780.18(b)(1), and the specific design criteria would more properly be described in a technical report."

Responding to comments on the draft of the proposed rules, OSM agreed on the need for flexibility in these rules:

"OSM believes that each regulatory authority should establish time periods and design criteria for reclamation that would be compatible with the type of mining in a particular area. The reclamation plan is the proper place for specifying time periods and design criteria for backfilling and grading, not rules that are national in scope."



2. 48 FR 23356 (MAY 24, 1983). Final rule. 30 CFR Parts 816, 817 and 826: Backfilling and Grading.

For the reasons stated above, OSM removed 816.101. Responding to requests made by state regulatory authorities (RAs) for authorization to specify time and distance requirements for backfilling and grading in their state programs, OSM added language to Section 816.100 which allows the RAs to set their own requirements for "mining operations that take into account conditions that are unique to their locale....Under final Section 816.100, the time frame chosen by each State will have to be the shortest practicable period between mining and backfilling given the particular conditions in that State."

3. IN RE PERMANENT SURFACE MINING REGULATION (ROUND II), 21 ERC 1724 (D DC October 1, 1984). [Copy of case not attached.]

The District Court remanded the regulations governing contemporaneous reclamation, Section 861.100 and others, finding that the remanded regulations lacked sufficient guidance to RAs beyond what was provided in the Act.

4. NATIONAL WILDLIFE FEDERATION V HODEL, 839 F2d 694 (DC Cir 1988). [Excerpts.]

The Court of Appeals agreed with the Secretary that "the Act does not automatically ...require him to 'flesh out' the prescriptions of Sections 515(b)(3) and (b)(16). Nonetheless, we affirm the remand of the contemporaneous reclamation and thick and thin overburden regulations, for only with respect to terracing did the Secretary adequately explain why guidance beyond the statutory requirements sensibly could not be given to local regulators."

Regarding the removal of Section 816.101, the court said: "The core deficiency...is that the Secretary has published barely more than a conclusion that the variety of mining conditions across the nation made Section 816.101 of the regulations infeasible..." If the Secretary "determines there is no need to 'flesh out' the statute, [he] must first 'flesh out' his explanation so that we can review the rationality of his decision."

5. 53 FR 43970 (OCTOBER 31, 1988). Proposed rule. 30 CFR Parts 761, 785, 816 and 817: Surface and Underground Mining Activities.

In conformance with the court decisions, OSM proposed to amend 816.100 by removing the sentence which gives to the RAs authority to establish their own contemporaneous reclamation schedules and adding a new Section 816.101 to govern the scheduling of backfilling and grading. Section 816.101(a) which is the same as the 1979 rule, establishes surface coal mining backfilling and grading time and distance schedules for contour and area mining, and authorizes the RA to establish schedules for other surface mining methods through the state program approval process.



In preparing the proposed rule, OSM reviewed the backfilling and grading schedules in approved state programs. "All State programs have adopted either the 1979, or more stringent, schedules.

Proposed 816.101(b) would allow the RA to establish, "through the state program approval process, alternative backfilling and grading schedules in lieu of those set out in Section 816.101(a)." This provision would give the state RAs flexibility "to adopt backfilling and grading schedules which meet State-specific conditions."

Proposed 816.101(c) would require the RA "to incorporate in any backfilling and grading schedule it established either of the two alternative standards set out in the rule":

"(1) The maximum time interval between removal of the coal and the completion of backfilling and grading or (2) the maximum extent of the operation between coal removal and the completion of backfilling and grading, as measured in linear feet, number of spoil ridges, or other quantifiable criteria."

6. 53 FR 52433 (DECEMBER 28, 1988). Proposed rule; extension of comment period.

The comment period on the proposed rules were extended until the end of January, 1989.

Final rules have not yet been promulgated.

OHA DECISIONS

SHAMROCK COAL CO. v OSM, 81 IBLA 374, IBLA 83-633 (1984). SHAMROCK COAL CO. v OSM, Docket No. NX 3-6-R (1985 correcting a 1983 decision).

The Board affirmed the ALJ's denial of temporary relief from a Notice of Violation (NOV). The NOV had been issued by a federal inspector for "exceeding the distance criteria for backfilling and grading as set forth in the guidelines for contemporaneous reclamation." A highwall 3,000 feet in length had been created by a predecessor mining company in a contour surface mining operation. Shamrock attempted to obtain a reclamation deferment for the area from the Commonwealth of Kentucky under an amended version of state law which had not been approved by OSM. The Board ruled that the new state law could not be implemented until approval was given.

ATTACHMENTS

- A. KENTUCKY: 405 KAR 16:020E, Sec. 2 (1981). Contemporaneous reclamation; backfilling and grading.
- B. VIRGINIA:
 - a. Coal Surface Mining Reclamation Regs., Sec. 480-03-19.816.100 (1985). Contemporaneous reclamation.
 - b. Va. Code Ann. Sec. 45.1-270.2 (1990). Coal Surface Mining Reclamation Fund; participation in fund.



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- C. WEST VIRGINIA: W Va Surface Mining Reclamation Regs., Sec. 6B.09 (1983).
Performance standards; backfilling and grading.
- D. PENNSYLVANIA: Pa Dept. of Environmental Resources Coal Mining Regs., Sec. 87.141 (1982). Backfilling and grading; general requirements.
- E. 47 FR 26760 (JUNE 21, 1982). Proposed rule. 30 CFR Parts 816, 817 and 826:
Backfilling and Grading.
- F. 48 FR 23356 (MAY 24, 1983). Final rule. 30 CFR Parts 816, 817 and 826: Backfilling
and Grading.
- G. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F2d 694 (DC Cir 1988).
[Excerpts.]
- H. 53 FR 43970 (OCTOBER 31, 1988). Proposed rule. 30 CFR Parts 761, 785, 816 and 817:
Surface and Underground Mining Activities.
- I. 53 FR 52433 (DECEMBER 28, 1988). Proposed rule; extension of comment period.
- J. SHAMROCK COAL CO. v OSM, 81 IBLA 374, IBLA 83-633 (1984).
- K. SHAMROCK COAL CO. v OSM, Docket No. NX 3-6-R (1985 decision correcting a
1983 decision).