



## COALEX STATE INQUIRY REPORT - 209

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**TOPIC:** REPLACEMENT OF TOPSOIL; PERMIT REQUIREMENTS MORE STRINGENT THAN THE REGULATIONS

**INQUIRY:** Prior to final bond release, an operator was found to have reclaimed the mined area with 14 inches of topsoil; the permit and reclamation plan required 18 inches to be replaced. The pre-mining topsoil depth is believe to be 14 inches. Does the operator have to put back what was not there originally to get his final bond release? Please locate any Interior administrative decisions which discuss the definition of "topsoil", topsoil replacement and the need to meet permit requirements which are more stringent than the regulations.

**SEARCH RESULTS:** Using the COALEX Library and other materials available in LEXIS, several relevant documents were identified which address the issues in this inquiry. These are discussed below; copies are attached.

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### TOPSOIL REPLACEMENT

**OSM v P & K CO., LTD., 99 IBLA 257, IBLA 85-485 (1987). P & K Co., LTD. v OSM, Docket No. TU 5-32-R (1985).**

A surface owner complained that the amount of topsoil redistributed at the completion of mining (14 to 16 inches) was less than that required by the terms of P & K's permit (24 inches). The exact amount of the topsoil originally present could not be determined - it was estimated at between 0 and 24 inches. The ALJ concluded that the 14 to 16 inches of topsoil replaced was sufficient - it was greater than the mean between 0 and 24 inches (12 inches) and, therefore, no violation had occurred. He reasoned that requiring a replacement depth of 24 inches was an unreasonable interpretation of the permit: "30 CFR 715.16 does not require more topsoil to be replaced than was removed".

The Board reversed, finding that P & K accepted the 24 inch topsoil replacement depth as a term of its approved permit and was responsible for meeting that obligation even though it might "ultimately be required to provide more topsoil that originally existed." The surface owner had



"every reason to rely on the approved permit as providing him with assurances that the damage attendant to surface mining would, at a minimum be ameliorated by the actions agreed to be the operator in obtaining the permit.... To permit P & K to...amend its permit...at this late date, in order to avoid the clear obligations which it had undertaken as a condition of obtaining the permit, would ultimately prove destructive to fair dealings between operators and surface owners and would engender endless litigation."

**CARBON FUEL CO. v OSM, 1 IBSMA 253, IBSMA 79-9 (1979). CARBON FUEL CO. v OSM, Docket Nos. CH 9-1-R, CH 9-2-R, CH 9-2-P, CH 9-3-P, CH 9-6-P (1979).**

The ALJ vacated the NOV, issued for failure to remove, segregate and store topsoil, determining that "the weight of the evidence shows that there was insufficient topsoil in the areas being mined...that could be recovered and stockpiled." The regulatory authority of West Virginia recognized the "geographical anomalies" of the area and gave its approval "for the haul-back and recovery method being used by the Applicant which did not include stockpiling of topsoil unless it was encountered by the Applicant."

The Board reversed and remanded the ALJ's decision, ruling that despite the geographics of the area and the acknowledged practicality of Carbon Fuel's topsoil handling methods:

"An operator must obtain approval from a state regulatory authority before using alternative materials instead of removing, segregating and redistributing topsoil."

Topsoil, as defined in the ALJ decision and affirmed in the IBSMA ruling, is "either all the A horizon or the A horizon plus unconsolidated material to a depth of 6 inches or all unconsolidated material where less than 6 inches of material exists.

**IN THE MATTER OF WILLIAM H. PULLEN, Docket No. IBLA 88-452 (1992). WILLIAM HELTON PULLEN, 112 IBLA 218, IBLA 88-452 (1989).**

"[E]ven though the approved reclamation plan required American Standard to put down a nine inch layer of topsoil, OSMRE had discretion to disregard it. OSMRE's exercise of that discretion in not requiring topsoil replacement in Phase I was entirely appropriate."

**FALCON COAL CO. v OSM, Docket No. NX 0-198-R (1983).**

"When the OSM inspector issued the Notice of Violation for failure to redistribute all of the salvaged topsoil, Falcon had applied for a variance from the requirements of Section 715.16 [redistribution of topsoil after final grading]. This request, however, was never approved and at the time of the inspection no variance existed. Until Falcon obtained approval for a variance it remained subject to the requirements of Section 715.16."

**PERMIT CONDITIONS/REQUIREMENTS**

**THE PITTSBURG & MIDWAY COAL CO. (P & G)v OSM, Docket No. TU 7-53-R (1987).**



P & G argued that "an NOV cannot stand when it alleges noncompliance with a permit condition where the regulation which required the permit condition" had been suspended. [The NOV as issued for failure to pass all surface drainage through a sedimentation pond.] The ALJ found that:

"the section of the permit here in question...was, in fact, agreed to by P & M more than a year subsequent to suspension of the regulation. P & M must be deemed to be on notice of the suspension in the Federal Register. Further, and in any event, P & M is not precluded from entering into permit conditions or provisions which may be more stringent than regulatory requirements then existent.

...

"Even if it be accepted that but for the suspended regulation the applicant would not have agreed to that permit provision, the fact remains that it was agreed to and remains in effect until and unless revised in an appropriate manner."

**TURNER BROS., INC. v OSM, 101 IBLA 327, IBLA 86-594 (1988).**

Headnotes: "In enforcing SMCRA and the regulations promulgated pursuant thereto, OSMRE is entitled to rely upon the permit package for terms and conditions under which mining and reclamation have been approved. An operator must obtain a variance or amendment of the permit before engaging in conduct that would otherwise violate the terms of the permit and/or the regulations."

Also see: RITH ENERGY, INC., 101 IBLA 190, IBLA 88-89 & 88-90 (1988) and RITH ENERGY, INC. v OSM, Docket No. NX 88-9-R (1987).

**COAL ENERGY, INC. v OSM, Docket No. NX 90-82-R (1991).**

The ALJ affirmed the issuance of the NOV for failure to meet the special conditions on the permit (relating to groundwater monitoring).

**48 FR 44344, 44370 (SEPTEMBER 28, 1983). Final rule. Section 773.17 Permit conditions.**

"Under the final rule, the conditions of Sec. 773.17 are applicable to all permits. The regulatory authority may always impose additional conditions as necessary to ensure compliance with the intent and purpose of the Act and its own regulatory program".

**44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final rule. Part 786 Review, approval or disapproval or permit applications and permit terms and conditions. 786.29 Conditions of permits: Environment, public health and safety.**

"Subsection (c) allows the regulatory authority to place special conditions on permits in order to protect the environment in situations not specifically handled in the regulations. The Office feels this Section is necessary to carry out the environmental protection purposes of the Act found in Section 102(a) and (d), and retained it in the final rules."



NOTE: Part 786 was incorporated in Part 773 in 1983; see entry above.

## ATTACHMENTS

- A. OSM v P & K CO., LTD., 99 IBLA 257, IBLA 85-485 (1987).
- B. P & K CO., LTD. v OSM, Docket No. TU 5-32-R (1985).
- C. CARBON FUEL CO. v OSM, 1 IBSMA 253, IBSMA 79-9 (1979).
- D. CARBON FUEL CO. v OSM, Docket Nos. CH 9-1-R, CH 9-2-R, CH 9-2-P, CH 9-3-P, CH 9-6-P (1979).
- E. IN THE MATTER OF WILLIAM H. PULLEN, Docket No. IBLA 88-452 (1992).
- F. WILLIAM HELTON PULLEN, 112 IBLA 218, IBLA 88-452 (1989).
- G. FALCON COAL CO. v OSM, Docket No. NX 0-198-R (1983).
- H. THE PITTSBURG & MIDWAY COAL CO. (P & G)v OSM, Docket No. TU 7-53-R (1987).
- I. TURNER BROS., INC. v OSM, 101 IBLA 327, IBLA 86-594 (1988).
- J. RITH ENERGY, INC., 101 IBLA 190, IBLA 88-89 & 88-90 (1988).
- K. RITH ENERGY, INC. v OSM, Docket No. NX 88-9-R (1987).
- L. COAL ENERGY, INC. v OSM, Docket No. NX 90-82-R (1991).
- M. 48 FR 44344, 44370 (SEPTEMBER 28, 1983). Final rule. Section 773.17 Permit conditions.
- N. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final rule. Part 786 Review, approval or disapproval or permit applications and permit terms and conditions.