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Final Technical Report FY 1983 Mineral Law Program

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The Mississippi Mineral Resources Institute
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FINAL TECHNICAL REPORT

FY 1983

MINERAL LAW PROGRAM

LAW CENTER

UNIVERSITY OF MISSISSIPPI

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PRINCIPAL INVESTIGATOR

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INTRODUCTION

The 1983 fiscal year proposal for the Mineral Law Program contained proposals for research in various areas of natural resource law. These areas included a summary of the Mississippi surface mining regulations and the various laws that affect lignite surface mining in Mississippi, oil and gas law research, a survey of the law regarding penalties for non-participating interest owners in oil and gas wells, the compilation of a digest of surface mining decisions of the Department of the Interior and conflicts between oil and gas and surface mining operations and a summary of the law and regulations affecting surface mining of sand, clay and gravel. Due to the fact that all of the amount requested was not granted, several of these projects were not undertaken. The areas in which research was performed included all the above except the regulation of the surface mining of sand, clay and gravel and conflicts between oil and gas and surface mining operations.

The Director of the Mineral Law Program also performed several other "ad hoc" projects. The two most important ones were a report to Rep. Terrell Stubbs, Chairman of the House Oil, Gas and Other Minerals Committee on a "Mineral Lapse" Statute, a law which provides that severed mineral interests revert to the surface owner after a specified period of time and a survey of different statutes pertaining to penalties for non-participating working interest owners. The lapsed mineral interest report was also provided to Sen. Martin Smith, Chairman of the Senate Judiciary Committee, who has a constituency which has considerable interest in such a law. Another "ad hoc" project in which the Director participated was the development of the curriculum for the Petroleum Land Management Program initiated by the Business School in

the fall, 1982 , and the teaching of the oil and gas law course during that semester. The Director also made an informal survey of the law of various oil producing states pertaining to the assessment of penalties in situations where non-participating working interest owners do not consent to the inclusion of their interest in a oil or gas well unit. The results of this survey were informally reported to the Legislature, the Chairmen of the Oil, Gas and Other Mineral Committees in both houses.

PROJECTS COMPLETED

Attached hereto are copies of research reports completed during the project year and the various research areas.

The first group of reports is material that was intended to be included in a handbook on the law and regulations affecting surface mining in Mississippi. Due to the continuing changes in the Federal surface mining program and the other laws which affect surface mining generally and the absence of any development of lignite in Mississippi, the Director decided to postpone the publication of this material until such time as it was deemed current. At that time this material will be updated and published in a formal report for use by Mississippi officials, lawyers and landowners who are interested in or affected by surface mining. This material covers the following areas: the law of mineral leasing, federal and Mississippi; the Mississippi Surface Coal Mining and Reclamation Law; the Federal Surface Mining Control and Reclamation Law, specifically the permit program thereunder and the permit program under the Mississippi Law; the EPA Consolidated Permit Program, Environmental Impact Statements, the Clean Water Act, the Resource Conservation and Recovery Act, Safe Water Drinking Act, and the Toxic Substances Act. The second research report attached hereto

is the final draft of a summary of the Mississippi Surface Mining Regulations, excepting the procedural aspects of the agency's operation.

The third report included is entitled "Title to Railroad Roadbed After Abandonment". This report was an outgrowth of some private consulting work done by the Director involving the question of title to railroad right-of-way after the railroad abandoned railroad service on that line. This is a current topic since such abandonment proceedings are still taking place and the property involved is considerable. The report concludes that there is a great probability that railroads do not have full and complete title to much of the land on which their tracks are located. Title to this land would revert to the owner of the property of either side of the right-of-way, except under circumstances where the railroad had acquired a full fee simple title to the land as opposed to a mere right-of-way or easement.

The final formal report included is a digest of decisions under the Federal Surface Mining Law of the Department of Interiors Administrative Law Judge and Interior Board of Surface Mining Appeals Courts. This work is of significance because of the great similarity between the Federal surface mining law and state surface mining law and the fact that interpretations of federal law will provide guidance for interpretation of state law. The digest is indexed according to volume number in the case of the IBSMA decisions and year for the administrative law justice decisions. The decisions are on file in the office of the Director of the Mineral Law Program at the Law Center.

LEASES

BACKGROUND

Federal coal lands were first governed by a law controlling land entry and sale.[1] An individual could be granted up to 160 acres; groups of four or more persons could be granted up to 640 acres, if they had expended at least $5 ,000 in work on improvements, where the mines were opened or improved, and the group was in actual possession. Cost of the land ranged from $10 to $20 per acre, depending upon the distance from a railroad. Those who discovered minerals on public domain land (land acquired by cession, treaty or purchase from other countries) received a complete transfer of mineral ownership.[2]

Railroads were also granted huge tracts of Federal lands, as an inducement to build in the western territories. These were usually odd-numbered sections on both sides of the proposed railroad right-of-way, extending back from the right-of-way some 10 to 20 miles. Even-numbered sections were retained by the government. Much of the land granted to the railroads has been retained by them to this day.[3]

In 1920 , enactment of the Mineral Leasing Act of 1 920[4] allowed Federal coal lands to be leased rather than sold. The Bureau of Land Management issued leases on prospecting permits giving rights to explore, develop, and remove coal (and other minerals).[5]

In areas with no known coal deposits, permittee's were issued prospecting permits which entitled them to the exclusive right to prospect for coal. These permits had initial two-year terms, but could be extended for another two years if the permittee was unable, after the exercise of reasonable diligence, to determine the existence or workability of coal

deposits in the areas to which the permit applied. If permittees could demonstrate that the lands contained coal in commercial quantities, they were entitled to preference right leases.

Lands with known coal deposits were divided into leasing tracts and leases were awarded to the highest bidder. A lump sum cash bonus was collected by the government at the time the lease was awarded.?

The Mineral Leasing Act of 1920 restricted the acreage that could be held by one party in one state, although the original restriction was changed several times later. By 1964, any person could hold up to 46,080 acres (72 square miles) in one state.

The Act required that leases be issued for indeterminate periods, as long as conditions of diligent development and continuous operations were satisfied. The conditions could be waived if operations were interrupted by strikes, the elements, or casualties not attributable to the holder of the lease. Leases were subject to readjustment at the end of 20-year periods. In addition, leases could not be assigned or sublet without the consent of the Secretary of the Interior.

Other major provisions of the Act were:

- Leases could be modified by an additional 2 ,560 contiguous tracts,
- Additional tracts up to 2,560 acres could be leased if workable deposits of coal would be exhausted within three years,
- Single leases could contain noncontiguous tracts.
- Royalties were set at not less than five cents a ton of coal.
- Annual rentals were set at not less than 25 cents, 50 cents, and $1 per acre for the first, third through the fifth, and sixth year onward from lease issuance, respectively.

' Limited licenses or permits could be issued to municipalities (without royalties) if the coal mined was sold to local residents, without profit.[10]

Prior to 1970 , lease requests were processed on a case by case basis, with little consideration given to total coal reserves under lease, need for additional leasing, and environmental impact of leases. After a study by the Bureau of Land Management reported that "of the total acreage under lease (about 788,000 acres), over 90 percent was not producing coal," the Department of the Interior took a series of informal steps resulting in no leases being issued between May 1971 and February 1973.[12]

In February 1973 a new coal leasing policy was begun, which embodied both short-term and long-term actions. Short-term actions included a complete moratorium on issuance of new prospecting permits and a new total moratorium on the issuance of new coal leases. New leases were to be issued only to maintain existing mines or to supply reserves for production in the near future.[13] .

Long-term actions were to develop a comprehensive planning system to determine size, timing, and location of future coal leases and to prepare an environmental impact statement for the Department's entire Federal coal leasing program. The first draft of this environmental impact statement was issued in May 1974.[14] It proposed a new coal leasing system entitled The Energy Minerals Allocation Recommendation System (EMARS I). EMARS I was a three-part system: 1) allocation, 2) tract selection, and 3) leasing. During the allocation process, Federal agencies were to relate inventoried Federal coal resources to projections of coal related energy needs, which were broken into regional demands for coal. During the tract selection phase, Federal coal leasing targets, derived in part from

total national projections for coal-based energy needs, would be set for each coal region. Tracts would be selected to meet the leasing targets. Leasing would begin with detailed pre-planning of the coordinated mining and rehabilitation factors required for reclamation and subsequent surface resource management. Leasing would conclude with pre-sale evaluations, lease sales, post sale evaluation procedures, and finally, lease issuance. 15

In 1 975 , a final environmental impact statement was issued by the Department. It modified EMARS I, changing the name to the Energy Minerals Activity Recommendation System (EMARS II). The three phases of the EMARS II system were 1) nominations and programming, 2) scheduling, and 3) leasing. The program would involve annual industry nominations and public identification of areas of concern. Nominations could be accepted for any area, with industry providing information on where and how much coal to lease. Based on that information, the Department would prepare land use plans and environmental analysis, resolve or mitigate resource conflicts., and hold lease sales if coal development was found to be compatible with the environment J θ

This 1975 environmental impact statement was challenged in Natural Resources Defense Council vs Hughes, 454 F. Supp. 148 (1978). The U.S. District Court for the District of Columbia ruled that the 1975 environmental impact statement was inadequate and enjoined the Department from taking any steps to implement the new coal leasing program, including the issuing of any leases, except when the proposed lease was necessary to maintain production levels in an existing mining operation or where necessary to provide reserves needed to meet existing contracts. The Department was further ordered to prepare a supplement to the 1975

statement, receive comments on the supplement, and prepare a new final statement.[17]

Although the Department had initially intended to appeal the case, it was settled on June 14, 1978. The settlement allowed a limited amount of leasing to be continued before issuance of the final environmental impact statement, and allowed preference right lease applications for the 20 PRLA's having the least environmental impact to be processed but not issued. (A later case, NRDC v Berklund, 458 F. Supp. 925 (D.D.C. 1978), held that the Secretary did not have discretion to reject PRLA's where coal has been found in commercial quantities. The case was affirmed at 409 F. 2d. 553)/θ

The final environmental impact statement was issued in April 1976. The preferred Alternative that it proposed was later adopted as the Coal Management Program. The program is set forth in 43 CFR Part 3400, et seq.

THE FEDERAL LEASING PROGRAM .

The Federal leasing program has eight major elements:

- A planning system involving close cooperation between state and local governments, industry, and the public, to decide which Federal coal reserves would be considered acceptable locations for coal development, and 2) to delineate rank, and select for sale specific tracts of coal.
- A system for evaluating national coal needs and determining where production should be stimulated by the leasing of Federal coal.
- Procedures for conducting sales and issuing leases.
- Post-lease enforcement of terms and conditions.

- Procedures for managing leases issued before implementation of the coal management program.
- Procedures for processing existing preference right lease applications.
- A plan to intergate the National Environment Policy Act of 1969 as the coal management program.
- Procedures to implement the coal management program and to offer lease sales in emergency situations.[19]

A. COMPETITIVE LEASING

The program differentiates between competitive leases and noncompetitive leases. The regulations affecting competitive leases are found at 43 C.F.R. Part 3420, Competitive Leasing. The competitive leasing system has four parts: 1) comprehensive land use planning; 2) establishment of regional leasing targets; 3) tract deliniation, ranking, selection, and scheduling; and 4) lease sale.[20] All lands are subject to evaluation under subpart 3420.[21]

LAND USE PLANNING

In the land use planning stage, information on lands that should be considered for leasing will be solicited from industry, state, local governments, and general public sources. At the same time, a notice of intent to conduct land use planning will be published.[22]

Land use plans contain an estimate of the amount of coal recoverable by either surface or underground mining operations or both. The areas acceptable for leasing are identified by screening them for development potential. Information on development potential is derived from the Mineral Management Service and public sources. The areas are then reviewed to determine if they fit any of the unsuitability criteria set out in 43 C.F.R

subpart 3461 , or to determine if there are any resources of a locally important or unique nature which should be protected. Finally, it is determined whether surface owners other than the Federal government will consent to mining techniques other than underground coal mining. If not, the land is no longer considered for surface coal mining purposes. 23

REGIONAL LEASING LEVELS

Regional leasing levels are established by the Secretary. He receives recommendations from the appropriate Bureau of Land Management State Director, who has prepared a broadly stated range of initial leasing levels for his region. After review by the regional coal team, and the state governor, the report is sent to the Secretary, proposing alternative leasing levels in ranges of tons. The Secretary consults with the Secretary of Energy, the Attorney General, and any affected Indian tribes for possible policy conflicts concerning, but not limited to conservation and management of natural resources, and capability of the Federal land to meet the proposed leasing level. 24 .

Leasing levels are based on the following factors:

1) advice from Governors of affected states.
2) the potential economic, social, and environmental effects of coal leasing within the region.
3) industry interest in coal development in the region and indications of the demand for coal reserves.
4) expressed interests for special opportunity sales.
5) expected production from existing Federal coal leases and non-Federal coal holdings.
6) the level of competition within the region and recommendations from the Department of Justice.

7) U.S. coal production goals and projections of future demand for Federal coal.

8) consideration of national energy needs and any other pertinent factors.[25]

After consideration of these factors, the Secretary establishes a final leasing level for the proposed coal lease sale.

TRACT DELINEATION AMD RANKING

After leasing levels have been set, tracts are delineated for leasing and ranked into classes of high, medium, or low desirability for coal leasing. Ranking is influenced by coal economies, impacts on the natural environment, socio-economic impacts, and any other factor appropriate for the region. Information and comments on ranking is sought from appropriate Federal and state agencies, and the Bureau of Indian Affairs if necessary. The public is given the opportunity to comment on the proposed rankings.[26]

The tract rankings may be adjusted to reflect: 1) the compatibility of coal quality, coal type, and market needs; 2) environmental and socio-economic impacts; 3) the compatibility of reserve size and demand distribution for tracts; 4) public opinion; 5) avoidance of future emergency lease situations; and 6) special leasing opportunity requirements.[27]

After tract ranking and selection, an environmental impact statement is prepared by the Bureau of Land Management. The statements considers site-specific potential environmental impacts for each tract being considered for sale, and intraregional cumulative environmental impacts of the proposed leasing action and its alternatives. Public hearings are held on the statement, then the statement is appropriately revised and

re-published. The Director of the Regional Coal Team then forwards recommendations for specific tracts to be leased and a lease sale schedule to the Secretary.

LEASE SALES

During the lease sale phase, the fair market value of the tract is assessed. Bids that are lower than the fair market value will not be accepted. After a bid has been accepted by the authorized officer, the bidder receives four copies of the lease form. These are completed and returned with the first year's rental and his proportionate share of the cost of publishing the notice of sale. If required, he also pays the balance of the bonus bid. The bidder must also file a lease bond. [28]

At least one-half of the acreage offered for competitive lease in any one year is offered on a deferred bonus payment. The lessee may pay the bonus in five equal installments, on the anniversary date of the lease each year. The first installment is submitted with the bid. This deposit is refunded if the lease is not awarded to the bidder for reasons beyond his control. [29]

B. NON-COMPETITIVE LEASES

EXISTING LEASES

The Coal Management Program makes provisions for non-competitive leases also. 43 C.F.R. Part 3450 deals with the management of existing leases (issued prior to August 4, 1976). These leases are subject to revision at the end of their first 20 years, and after that, every 10 years. Leases issued after August 4, 1976, are also subject to the same revision scheme. Leases can be revised to bring royalty rates up to current standards, and to conform to the Federal Coal Leasing Amendments Act of 1 976. If the lessee is not notified of the

Department's intention to revise the lease, or if the Department fails to revise the lease within two years of notifying the lessee, the failure is construed as a waiver of the right to readjust the lease, unless the delay was caused by circumstances beyond the control of the Department. 30

PREFERENCE RIGHT LEASES

Section Four of the Federal Coal Leasing Amendments Act of 1 976, amending 30 U.S.C. 201(6), repealed the Secretary's authority to issue or extend coal prospecting permits on Federal lands. Therefore, the Preference Right Leases regulations apply onL to PRLA's based on prospecting permits issued before August 4, 1976. Those persons with prospecting permits issued prior to that date are entitled to a preference right lease if they can make a showing of commercial quantities of coal on the prospecting permit area. He must comply with all other requirements also. The application then goes through a land use planning and environmental analysis stage. A final showing of commercial quantities is then made, with a cost analysis, and. a determination of whether the proposed site is unsuitable for mining. The Department may attach any stipulations to the lease that it feels are necessary to protect the land. 31

If the PRLA is rejected, the applicant may appeal in accordance with 43 C. F. R. Part 4.

EMERGENCY LEASES

An emergency lease may be issued upon application, if the applicant wants the Federal coal reserves to be used as part of a mining operation that is already in existence on the date of application, and if:

1) the Federal coal is needed within 3 years to maintain the mining operation at its current average annual level of production, or to supply coal for contracts signed before July 19, 1979 , or of

2) the coal deposits are not leased, they would be bypassed in the reasonably foreseeable future, and if leased, they would be used, at least in part, within 3 years.

The need for the Federal coal deposits should have resulted from circumstances beyond the control of the applicant or that could not have been reasonably foreseen and planned for. [32]

EXPLORATION LICENSES

Exploration licenses can be issued for: 1) lands administered by the Secretary that are subject to leasing; 2) lands administered by the Secretary of Agriculture that are subject to leasing; 3) lands conveyed away by the United States subject to a mineral reservation, to the extent that those deposits are subject to leasing; 4) acquired lands set apart for military or naval purposes. Exploration licenses can not be issued for lands within an existing coal lease.

The application for an exploration license can not cover more than 25,000 acres, and should be within one state. An application covering more than 25 ,000 acres must include a justification for the additional acreage.

Before the license is issued, an environmental impact statement must be prepared for the p-u-r-poce area. If a license is issued, it is effective for only two years after the date of issuance. The license can be revoked for non-compliance with its terms and conditions. It may also be modified, upon request, if geological or other conditions warrant. [33]

LEASE EXCHANGES

A lease exchange may be requested by persons holding an existing lease or a preference right lease application. These may be exchanged for: 1) leases where Congress has specifically authorized the issuance of

a new coal lease; 2) the issuance of coal lease bidding rights of equal value; 3) a lease for a mineral listed in 43(C.F.R. Subpart 3426, by mutual agreement between the applicant and the Secretary; 4) Federal coal lease modifications; or 5) any combination of the above.[34] Applicants must meet the commercial quantities requirements before they can request a lease exchange.[35]

MISSISSIPPI LEASING PROGRAM

The Mississippi Commission on Natural Resources is authorized to lease state owned land to any reputable person, association, or company for the production of coal. Sixteenth section school land, lieu lands, forfeited tax land, and property that is subject to lawful redemption are not suitable for leasing.

Leases must provide for a lease royalty to the state of at least three-sixteenths (3/16) of the minerals, to be paid in the manner prescribed by the commission.[36]

Pursuant to section 29-7-1, Mississippi Code Annotated, (1972), the Commission has adopted a set of regulations governing the leasing of state owned lands. Leasing is through competitive bidding, although the Commission reserves the right to lease through competitive or non-competitive negotiation. Any person may request that land be put-up for lease, or the Commission may call for nominations for lands to be put-up for lease.

The Commission may require each applicant to make a prepayment for publication expenses, prior to publishing notice of the application and calls for bidding. This prepayment is forfeited if the applicant does not submit

a bid for the tract for which he applied, and he will be responsible for the remaining costs of publication.

Bids for lease are mailed to the Commission in sealed envelopes with a description of the tract covered by the bid on the face of the envelope. The bid must be accompanied by 100 percent of the bonus amount bid. The bid security will be returned to unsuccessful bidders. The bids are opened by the Commission at a place and time designated in the publications.

The Commission may set the length of the primary term of the lease as it desires. The lease must be recorded and accompanied by all required documentary stamps. 37

FOOTNOTES

LEASES

[1]Λεί of March 3, 1873, 17 Stat. 607, 30 U.S.C. 71, et seq.

[2]U.S. Department of the Interior, Bureau of Land Management, Final Environment Statement - Federal Coal Management Program, Washington D.C. , April 1 979 , p. 1-8.

[3]Id.

[4]Act of February 25 , 1920 , 41 Stat. 438 , 30 U.S.C. 201, et seq.

[5]Id. p. 1-9.

[6]Id.

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[8]Id.

[9]Id.

[10]Id.

[11]U.S. Department of the Interior, Bureau of Land Management, 1970. Holdings and Development of Federal Coal Leases. Washington D.C.

[12]Final Environmental Statement, supra, at 1-9.

[13]Id. p. 1-10.

[14]U.S. Department of the interior, Bureau of Land Management, 1974. Draft Environmental Impact Statement, Proposed Federal Coal Leasing Program (DES74 - 53).

[15]Final Environmental Statement, supra, at 1-10.

[16]Id.

[17]Id. p. 1-13.

[18]£d. pp. 1-13, 1-14.

[19]Id. pp 3-3, 3-4.

2043 CFR Part 3420 (1981) § 3420.1.

[21] 43 CFR Part 3420 (1981) § 3420.1-2.

[22] 47 Fed. Reg. 33136 (1982) (to be codified in 43 CFR § 3420.1-2).

[23] 47 Fed. Reg. 33136 (1982) (to be codified in 43 CFR § 3420.1-4).

[24] 47 Fed. Reg. 33136 (1982) (to be codified in 43 CFR § 3420.2).

[25] Id.

[26] 47 Fed. Reg. 33139 (1982) (to be codified in 43 CFR § 3420.3-4).

[27] Id.

[28] Id.

[29] Id.

[30] 43 CFR Part 3450, Subpart 3451 .

[31] 43 CFR Part 3430, Subpart 3430.

[32] 47 Fed. Reg. 33141 (1982) (to be codified in 43 CFR § 3425.1-4).

[33] 43 CFR Part 3410.

[34] 47 Fed. Reg. 33144 (1982) (to be codified in 43 CFR § 3435.1).

[35] 43 CFR Part 3430 , Subpart 3435.

[36] MS, 29- -7-3, 1972.

[37] Rules and Regulations Governing Leasing for Production or Extraction of Oil, Gas, and Other Minerals from State Owned Lands. Ms. Department of Natural Resources, Dureau of Geology, Mineral Lease Division, February 1 982 .

MISSISSIPPI SURFACE COAL MINING AND RECLAMATION LAW

I. General

The stated purposes of the Mississippi Surface Coal Mining and Reclamation Law are basically to comply with the Federal Surface Mining Control and Reclamation Act of 1977 thereby gaining exclusive jurisdiction for the state, to protect the environment, to protect the public, to protect the landowner and to develop the state's coal reserves. (Miss. Code Ann. § 53-9-5.)

The Bureau of Geology and Energy Resources of the Mississippi Department of Natural Resources is the state agency designated to administer the Act. (Miss. Code Ann. § 53-9-9.)

The Act applied to all coal exploration and surface coal mining and reclamation operations except those operations where (I) a landowner extracts coal for his or her noncommercial use; (2) a person extracts 250 tons of coal or less; (3) the extraction of coal is incidental to the extraction of other minerals; or (4) where the extraction of coal is an incidental part of Federal, State or local government - financed highway or other construction. (Regs. § 100.11).

11. Areas Unsuitable for Mining (Parts 160)

Some lands have been designated unsuitable for all or certain types of surface coal mining operations. Except for those operations which existed on August 3, 1977, or were subject to valid existing rights on that date, (§ 161.3), no surface mining operations shall be conducted:

(a) Onany lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, and National Recreation Areas designated by Act of Congress;

(b) Onany Federal land within the boundaries of any national forest unless the Secretary of the Interior finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface coal mining operations;

(c) On any land which will adversely affect any publicly owned park or any places listed on the National Register of Historic Places, unless approved jointly by the commission and the Federal, State or local agency with jurisdiction over the park or places;

(d) Within 100 feet measured horizontally of the outside right-of-way line of any public road (certain exceptions are provided for, however);

(e) Within 300 feet measured horizontally from any occupied dwelling, unless a written waiver is obtained from the owner consenting to surface coal mining operations closer than 300 feet;

(f) Within 300 feet measured horizontally of any public building, school, church, community or institutional building or public park; or

(g) within 100 feet measured horizontally of a cemetery. (§ 161.11)

111. General Requirements for Coal Exploration

Any person who intends to conduct coal exploration during which less than 250 tons of coal will be removed in the area to be explored shall, prior to conducting the exploration, file with the commission a written notice of intention to explore. (§ 176.11(a))

The notice shall include:

(a) the name, address, and telephone number of the person seeking to explore;

(b) the name, address, and telephone number of the representative who will be present at and responsible for conducting the exploration activities;

(c) a precise description and map of the exploration area;

(d) a statement of the period of intended exploration;

(e) if the surface is owned by a person other than the person who intends to explore, a description of the basis upon which the person who will explore claims the right to enter such area for the purpose of conducting exploration and reclamation; and

(f) a description of the practices proposed to be followed to protect the environment from adverse impacts as a result of the exploration activities. (§ 176.11(b))

Any person who intends to conduct coal exploration in which more than 250 tons of coal are removed in the area to be explored, shall, prior to conducting the exploration, obtain the written approval of the commission. (§ 176.12) A suggested application form for obtaining the written approval of the commissioner for such exploration is presented below.

The application should also contain a description of the methods to be used to estimate the amount of coal to be removed (§ 176.12(a)(3)(11)) and a description of the measures to be used to comply with performance standards for coal exploration or set forth in Section 215 of the Regulation (§ 176.12 (a) (3) (VI)). The applicant is also required to post public notice of the filing of the application at the courthouse (§ 176.12(b)).

IV. General Requirements for Surface Coal Mining Permit Applications

Any person who intends to conduct surface mining activities must file an application for a permit to conduct such activities. The following document is a sample application form for a surface coal mining permit.

V. Requirements for Permits for Special Categories of Mining. (Part 185)

In addition to the provisions required for general permits, additional information is required in permit applications for special categories of mining.

Permit applications for surface coal mining and reclamation operations utilizing experimental practices must include the following information:

(1) the nature of the experimental practice;

(2) how use of the experimental practice encourages advances in mining and reclamation technology or allows for an experimental postmining land use;

(3) that the proposed experimental mining and reclamations operation is not larger than necessary to determine the effectiveness and economic feasibility of the experimental practice,

(4) that the experimental practice is at least as environmentally protective and will not reduce the protection afforded public health and safety below the performance standards required by the Regulations; and

(5) that the applicant will monitor the experimental practice during and after the operations involved. (§ 185.13)

Any person who intends to conduct application sufficient information to establish that the operations will be conducted in accordance with the performance standards for steep slope mining in the Regulations. (§ 185.15)

Any person conducting surface coal mining and reclamation operations where the operation is not to be reclaimed to achieve the approximate original contour must include information in the permit application to show: (I) that the watershed control of lands within the permit area and an adjacent lands will be improved, and (2) that the land within the permit area

after reclamation will be made suitable for an industrial, commercial, residential, or public use, including recreational facilities. (§ 185.16)

Any applicant who intends to conduct coal mining and reclamation operations on prime farmland historically used for cropland must submit information in the permit application to show that the post reclamation soil productivity for prime farmlands will be returned to equivalent levels of yield as non-mined land of the same soil type in the surrounding area. (§ 185.17)

Any applicant who intends to conduct surface coal mining and reclamation operations utilizing augering operations shall include in the permit application a description of the augering methods to be used and the measures to be used to comply with the performance standards pertaining to augering operations. (§ 185.20)

Any applicant who intends to conduct surface coal mining and reclamation operations utilizing coal processing plants or support facilities not within a permit area of a specific mine must include in the mining and reclamation plan, specific plans for the construction, operation, and removal of such facilities. (§ 185.21)

Any applicant who intends to conduct surface coal mining and reclamation operations utilizing in site processing activities must include in the permit application information establishing how those operations will be conducted in compliance with the performance standards relating to in sites processing activities.

At the same time the complete permit application is filed with the commission, all applicants must place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and

reclamation operations at least once a week for 4 consecutive weeks. (§ 186.11)

Part 187 provides provision for administrative and judicial review on decisions of and failures to act by the commission on applications for coal exploration or on surface coal mining permits.

Part 188 provides provisions for:

(a) Revisions to and affirmative periodic review of permits previously issued by the commission;

(b) Renewal of permits previously issued by the commission; and

(c) Transfer, sale, or assignment of rights granted under permits previously issued by the commission.

Part 195 governs the procedures for providing assistance to qualified small mine operators who request assistance under the Act for:

(a) The determination of the probable hydrological consequences of mining and reclamation; and

(b) The statement of physical and chemical analyses of test borings or core samples.

VI. Requirements for Bonding of Surface Coal Mining and Reclamation Operations. (Part 200)

After an application for a permit to conduct surface coal mining and reclamation operations has been approved, but before such permit has been issued, the applicant shall file with the commission a performance bond payable to the commission. The performance bond will be conditioned upon the faithful performance of all the requirements of the Act, the Regulations, the regulatory program, and the provisions of the reclamation plan and permit. (§ 200 . II).

Each applicant for a permit shall submit to the commission, as part of the permit application a certificate issued by an insurance company authorized to do business in Mississippi or evidence that the applicant satisfies the applicable self-insurance requirements. (§ 200.11)

Part 205 sets forth provisions for determing the amounts and time period of liability for performance bonds for surface coal mining and reclamation operations.

Part 206 establishes provisions for the form of the bond for surface coal mining and reclamation operations, and the terms and conditions applicable to bonds and liability insurance.

Part 207 sets forth the procedures and criteria for release of the performance bonds.

Part 208 sets forth provisions to be appplicable whenever the commission initiates a proceeding for the forfeiture of all or any part of bond, as a result of the permittee's failure to meet the conditions upon the bond.

Mining and Reclamations Permits

The Federal surface mining control and Reclamation Act was passed into law on August 3, 1977.[1] The purpose of the Act was to bring all surface mining operations, whether on Federal, state, or private land, under a set of national environmental standards. The Office of Surface Mining (OSM), a branch of the Department of the Interior, promulgates and enforces regulations under SMCRA. OSM uses a set of regulations found at 30 CFR Part 700-888. OSM regulates all non-Federal, non-Indian lands which are not subject to a state regulatory program and also regulates all Federal lands.

For a state to assume exclusive jurisdiction over surface coal mining activities, it must submit a state program to the Secretary of the Interior that demonstrates that the state has the ability, authority and funding available to competently regulate surface coal mining. The proposed state program must also be at least as stringent as, or more stringent than, the Federal program.[2]

The Secretary must approve or disapprove of the state program within six months of receiving the proposed program. The state will then have 60 days to resubmit a revised program or portions thereof. The Secretary makes his final decision within 60 days of the resubmission.[3]

The procedures and criteria for approval or disapproval of state programs are found at 30 CFR Part 732.

I. Federal Permitting Program^

Until a state takes over the regulation of surface mining within its state, all persons wishing to mine privately owned land must obtain a permit from OSM. Certain information must be provided with the application for a permit. The information is divided into three categories:

1) legal, financial, compliance, and related information;

2) environmental resources information; and

3) reclamation and operations information.

Legal, Financial, Compliance, and Related Information

The first category of information is found at 30 CFR Part 778. It requires that the interests of everyone connected with the proposed mining area be identified. This includes the permit applicant; the record owner of any interest, legal or equitable, in the property; the operator; and the applicant's resident agent.[4]

Applications from business entities should have the names and addresses of the directors, officers, and principal shareholders. All applicants must describe any mining operation and reclamation operations conducted by themselves or affiliates in the United States since 1970.[5] Any suspended or revoked Federal or state mining permits should be listed, with a statement of facts concerning the reasons for loss of the permit and the current status of the permit.[6]

The proposed mining site information should include all list of all legal and equitable interests in the surface and subsurface of the site and adjacent areas.[7] The mine should be identified by name and number. The documents, whether deed or law, which the applicant bases his right to enter and surface mine on should be described, along with the current status of the right to enter.[8] If the mine is within 300 feet of a dwelling, a written waiver from the owner of the dwelling must be included. (See 30 CFR §761 .12(c))

If the mine site has designated as unsuitable for mining or is being considered for such classification, the applicant must show that he made

substantial legal and financial commitments concerning the proposed mining activities before January 4, 1977.[9]

The application should list the starting and termination dates for all phases of the mining operation and the number of acres that will be disturbed.[10]

Environmental Resources Information

Generally, each permit application must have description of the existing, pre-mining environmental resources within the proposed permit area and adjacent areas that may be affected by the proposed surface mining activities. A general description of subareas of the permit area that will require individual permits should include their size, sequence, and timing. The application should also describe historical and cultural resources within the permit area are listed in or eligible for the National Register of Historic Places.[11]

A thorough description of the hydrological and geological balance of the permit and adjacent areas must be included. The characteristics of surface and ground waters within the general area and any waters which will flow into or receive discharges of water from the general area should be described in accordance with 30 CFR §779.13—§779.17. The information on hydrology, water quality, and quantity and the geology related to hydrology outside the permit area should be obtained from the appropriate Federal or State authorities. If the information is not available from those authorities, the applicant should gather the information and submit it to the regulatory authority as part of his application. The information is necessary for the approval of the application.[12]

Test borings or core samples should be taken down to the first aquifer, and the stratum, below the lowest coal seam to be mined. These

samples should be analyzed for water table information; lithological characteristics, physical properties, and chemical analyses of each stratum; and analyses of the minerals and chemicals within the coal seam.[13]

If necessary, the applicant may be required to make analyses to a greater depth or outside the mining area. The regulatory authorities may waive the required statement of results for the analyses, if it is unnecessary.[14]

The application must also include information on aquifers and water tables within areas adjacent to the minesite. The information should include the depth and length of water tables and aquifers, their lithology and thickness, their known uses and quality, and the recharge, storage, and discharge characteristics of the aquifers.[15]

Information on surface water should include the name of the watershed that will receive discharges from the minesite, any surface drainage systems large enough to identify, and any surface water bodies within the area. Any waters flowing into, in, or discharging out of the mining area should be analyzed for dissolved and suspended solids, acidity, pH, iron, and manganese.^ If there is any possibility of existing water supplies being contaminated or interrupted, the applicant should identify alternative sources of water that could be developed.

Various other information is also required on the climate and vegetation of the area, the wildlife, and the soil. Information on the soil includes its current uses, its productivity, the effects mining will have on it, and whether or not the soil can be classified as prime farmland. Maps and cross-sections are required to show the surface boundaries as structures of the proposed mining area, and to show required geological Information.[17]

Reclamation and Operation Information

The application must describe the method(s) of mining and engineering, and the type of equipment the applicant wishes to use. The applicant should describe any facilities that are to be constructed, modified, used, maintained, or removed during the mining operations. A description of existing structures and plans for the use or removal is necessary.[18]

A blasting plan for the proposed permit area is required. It should contain information on the types and amounts of explosives used, and on the process by which the applicant intends to record and report information while blasting. Unavoidable hazardous conditions which will require deviations from the blasting schedule should also be described. (See also 30 CFR 816.61-816.68)[19]

If the surface mining activity is expected to produce more than 1 ,000,000 tons of coal per year, and is located west of the 100th meridian west longitude (the western coal producing states) , the applicant must provide an air pollution control plan in compliance with 30 CFR 816.95. Finally, a plan to minimize the adverse impacts of surface mining on surrounding fish and wildlife should be included in the operations plan.[20]

A reclamation plan must be filed with the application. It should show when and how the applicant intends to reclaim the area and estimated costs. The plan should insure protection of the hydrological balance. It should describe expected postmining use of the land and the means necessary to achieve that use. Public parks and historic places must be protected. Plans for relocating public roads and for disposing of excess spoil should also be included.[21]

Bonding

Before a permit is issued, the applicant will be required to file a performance bond with OSM, in accordance with 30 CFR Parts 805 and 806, Operations cannot begin until the bond has been filed. The bond can be paid in a lump sum, in cummative increments, or simple increments. The applicant must also show proof of liability issurance. 22

Small Operator Assistance Program

Under the Small Operator Assistance Program, an applicant may receive assistance from OSM in order to pay for hydrological studies and/or test borings or core samples that may be necessary in order to obtain a permit. The applicant must show that production from all operations; 1) owned or operated by him, 2) in which he owns more than 5 percent, 3) or which own more than 5 percent of applicants operation or, 4) owned by these owning a pro rata share of applicant will not exceed more than 1 00,000 tons per year. If the application for assistance is approved, the applicant must use a laboratory which OSM has determined to be qualified for such work. 23

II. Mississippi Permitting Program ← All OAPS

Mississippi adopted a surface coal mining and reclamation plan in 1979. It became effective on July 1 , 1979. The regulations implementing the Act were approved by the Secretary of the Department of the Interior on September 4, 1 980 . A copy of these regulations can be obtained from:

Mississippi Department of Natural Resources

Mining and Reclamation Program

Box 4915

Jackson, MS 39216

The Mississippi Program is basically taken from the Federal program. The same information is required to obtain a permit from the State and a

performance bond is also required. Mississippi does not accept cumulative bonds as OSM does. Mississippi also has a Small Operator Assistance Program. [24]

Footnotes

[1] 30 use §1201 , et seq.

[2] 30 use §1253 .

[3] Id.

[4] 30 CFR Part 778, §778.13 .

[5] 30 CFR Part 778.

[6] H.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] 30 CFR Part 779.

[12] Id.

[13] id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] 30 CFR Part 780.

[19] Id.

[20] Id.

[21] M.

[22] 30 CFR Part 800 .

[23] 30 CFR Part 795 .

[24] Miss. Code Ann., §59-9-1

CONSOLIDATED PERMITS

Under NDPES, UIC, RCRA, CAA abd §404, the EPA has devised a generai system for the issuance of permits and for hearings. These regulations apply to all permits[1] applications and to all hearing and appeals. More regulations are provided in special sections and pertain only to the specifically listed permit.

Permit Applications

Applications for permits are sent to the Regional Director. The operator of a new minesite has the duty to obtain the permit. If a mine is operating under an interim permit, the Director will inform the operator of when to apply for a new permit.

All applications must contain information on the following subjects: type of activity to be conducted, type of facility and its location, identity of the operator, what is going to be produced at the facility, and what other permits has the operator received. Maps must also be included. All this information must be completed to the. satisfaction of the Director. The operator must keep a record of all the information he submits, for future reference. The permit application must be signed by the applicant's authorized representative.

If a permit has already been acquired, but expires due to fault of the EPA, the conditions of the permit will remain in effect and be enforceable. If the state has taken over the permitting function, the conditions of the EPA permit will not remain in effect.

Conditions that are listed for permits in the regulations must either be specifically stated or incorporated by reference in a permit. The Director may also decide specific conditions for each permit, on a case-by-

case basis. The operator must begin compliance with the conditions as soon as possible.

Permits are modified to show changes in ownership, conditions, information, regulations, compliance schedules, etc. They can be terminated for noncompliance, misrepresentations in the application, or becoming a health hazard.

Hearings and Reviews

These regulations govern the procedure for modifying or revoking a permit.

Once a permit application has been completed, the Director may decide to issue a draft permit. A draft permit will contain the conditions tentatively attached to the permit. A statement of basis or a fact sheet concerning the draft permit is made available to the applicant and the public. If record of all proceedings is kept, containing all information and documents complied up till then.

Public notice must be given in all permit actions. The public is given 30 days to comment on permit actions. A hearing may be held at the Director's discretion.

Within 30 days of a final permit decision, any one who commuted on the draft permit may appeal the final decision to issue or deny a permit. If a review is denied, the issued permit is considered the agency's final action.

Mississippi One-Stop Permitting

Mississippi passed law in 1982 providing for "one-stop" permitting. A single application form for all environmental permits is to be developed, but if that is impossible, then only the minimum number of applications possible are to be developed.

The Environmental Permit Coordinator is in charge of permitting new operations that may affect the environment. He is in charge of coordinating the permit process for new industries, by helping them with permit applications and acting as a go-between for applicants and the environmental regulatory agencies. Inquiries may be directed to:

Francis Geoghegan
Environmental Permit Coordinator
Department of Economic Development
Post Office Box 849
Jackson, Mississippi 39205
(601) 359-3449

Environmental Impact Statements (EIS)

Environmental impact statements, while not a permit, are a requirement imposed on governmental agencies by statue, 42 USC §4321 , et seq. These statements are the implementation arm of the National Environmental Policy Act (NEPA).

Under NEPA, federal agencies must prepare an EIS when two conditions are present:

* A "major federal action" as a discretionary determination by agencies under NEPA are involved.

' The action, if taken, would produce a significant impact on the environment. [1]

Surface coal mining usually does not involve a major federal action, because operations are usually on privately owned land and/or mineral reserves. However, some surface coal mining does occur on federal land and an EIS must be prepared before these lands can be put-up for lease sale.

In preparing an EIS the federal agency involved to the greatest degree in the action receives environmental reports from the applicants (those who want an area of federal land to be leased for coal mining). The "lead" agency, in this case the Bureau of Land Management, uses the environmental report as the basis for the EIS. [2]

Another EIS may be required before individual applicants can receive permits for surface coal mining. This second EIS will be limited to an individual proposed mining site. The second EIS is required when the first area or regional EIS points out a suitability problem with proposed

sites. If the second EIS finds that surface coal mining on the proposed site will irrevocably damage the environment, injure a historic or landmark site, or injure some local and unique site or values, the permit will not be awarded for that proposed site.

3

A guideline is presented in Appendix I which describes the information found in an EIS. The guideline was prepared by Cooper H. Wayman, and Cail A. Genasci for their book Permits Handbook for Coal Development, (1980).^

An EIS is not necessary for non-Federal or non-Indian lands. Environmental information must be presented to the controlling state agency or federal agency in order to obtain a permit. This information is discussed under Mining and Reclamation Permits.

Mississippi Program

At this time, Mississippi has no Environmental Protection Policy and does not require an EIS to obtain a surface mining permit on state owned lands.

APPENDIX I

GUIDELINES ON
REVIEW AND PREPARATION OF
SURFACE MINING ENVIRONMENTAL IMPACT STATEMENTS

The purpose of this document is to provide a detailed checklist of criteria upon which the review and/or preparation of site-specific surface mining (principally surface coal mining) Environmental Impact Statements (EIS's) can be based. The developed checklist of criteria has taken the form of necessary informational elements and analyses which should appear in EIS's for proposed surface mining activities. identified informational elements and anlyses have been fitted to the "standard" EIS outline (see below) which has been extensively utilized by federal agencies involved in the preparation of such EIS's.

PART SURFACE MINING EIS OUTLINE

I. Description of Proposed Action

11. Description of Existing Environment

111. Environmental Impacts of the Proposed Action

IV. Mitigating Measures

V. Adverse Environmental Impacts Which Cannot be Avoided

VI. Relationship Between Short-Term Uses of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity

VI I. Irreversible and Irretrievable Commitment of Resources

VI11. Alternatives to the Proposed Action

The following represents informational elements and analyses which should be included in the respective sections on surface mining EIS's.

1. Description of Proposed Action

An integral component of an EIS is an objective description of the proposed action which should be as detailed and quantitative as possible.

With regard to a surface mining EIS, the following information should be included:

1. Specific site location, purpose of proposed project and statement of federal action(s) to be examined in the EIS; also, land ownership map and relation to Known Coal Leasing Areas and to existing and anticipated mining activities and conversion facilities in the vicinity
2. Method of mining, including mining sequence and proposed production rate
3. The anticipated starting and termination dates of each phase of the mining operation, number of acres of land to be affected by phase, and employment requirements (including any plans for new communities)
4. Location of surface structures and facilities, including service and loading facilities, impoundments and water treatment facilities, constructed or natural drainways, discharges to any surface body of water on the area of land to be affected or adjacent thereto
5. Distribution, abundance, and habitat of fish and wildlife, particularly threatened and endangered species
6. A description of the condition of the land covered by the mining plan, including the uses existing at the time the mining plan is submitted, and the capability of the land immediately prior to any mining to support alternative uses, giving consideration to soil characteristics, including series, types, depths, distribution, topography, annual precipitation, vegetative cover

and sediment loss, including identification of dominant species, and identification of alluvial valley floors

7. Logs and analyses of overburden samples of each stratum from a number of drill holes sufficient to obtain a representative sample of the overburden and the stratum immediately below the coal to be mined (shall not be less than one hole on each 40 acres). Such logs and analyses shall identify each stratum penetrated, and shall contain an analysis of each such stratum for at least the following: nitrogen, phosphorus, potassium, pH, specific conductance, exchangeable sodium percentage and sodium absorption ratio. Based on analysis, toxicity to proposed vegetative cover should be evaluated

8. The hydrology of the area, including quantity and quality of water in surface and ground water systems, water table measurements, aquifer characteristic determinations, and data with respect to pertinent water quality constituents (see list below)

Pertinent Water Quality Constituents

Major Constituents:

Acidity	Strontium, total and dissolved
Alkalinity	Zinc , total and dissolved
Aluminum, total and dissolved	Chloride
Boron, total and dissolved	Total Dissolved Solids
Calcium, total and dissolved	Fluoride
Iron, total and dissolved	Hardness
Magnesium, total and dissolved	Potassium, total
Manganese, total and dissolved	Sodium, total

Nickel, total and dissolved Total Supspended Solids

Silicon, total and dissolved

Minor Constituents:

Arsenic, total and dissolved	Cyanide, total
Barium, total and dissolved	Lead, total and dissolved
Cadmium, total and dissolved	Mercury, total and dissolved
Chromium, total and dissolved	Molybdenum, total and dissolved
Copper, total and dissolved	Selenium, total and dissolved

Additional Analyses:

Acidity, net	Ammonia
Acidity, pH	Color
Ferrous Iron	Specific Conductance
Oils (preparation plants only)	Turbidity

9. Existing air quality conditions (e.g., particulate, hydrocarbon and sulfur dioxide concentrations) in the affected area

10. Topographic maps or aerial photographs showing topographic, cultural, archeological, natural drainage features, roads, and vehicular trails

11. Identification of surface and ground water users in the local area

12. Cross sections and plan views of the land to be affected, including the actual area to be mined, showing elevation and location of drill holes and depicting the following information:

    (a) Nature and depth of various strata of overburden, etc.

    (b) Nature and thickness of any coal (or rider) seams, etc.

    (c) Nature of strata beneath the material to be mined for a vertical distance of at least 20 meters beneath the case of the coal seam

(d) Location of the next deeper coal seam below the deepest seam to be mined

(e) Location of any other minerals encountered

(f) Hydrologic data (specification of aquifer systems and diversion channels) and other information relevant to the mining plan

(g) All mineral crop lines and the strike and dip of the coal to be mined within the area of the land to be affected

(h) Location and extent of known surface and underground mine workings, oil or gas wells, and water wells within ¼ mile of the affected lands

(i) The estimated elevation of the water table and potentiometric surface of proximate aquifer system(s)

13. Description of archeological, historical and paleontological values and aesthetics

14. Description of local recreational activities, including principal types of recreation, use, and location

15. Description of local transportation networks with consideration given to types, existing conditions, utilization, and expected improvements

16. Description of existing local socioeconomic conditions, including data with respect to population, employment, income, housing, education, and community services and attitudes.

11. Description of the Existing Environment

in order to properly assess environmental impacts of the proposed action (and possible alternatives), the existing environment must be described in an adequate fashion to provide baseline conditions upon which

to make such assessments. With regard to surface mining EIS's, a description of the existing environment should include the following:

1. Geologic conditions, including potential geologic hazards, over-burden, quantity and quality of coal (maximum, minimum, and average) with respect to BTU content, ash, water, sulfur, volatile matter and carbon content; also estimated recoverable reserves and trace element composition of coal
2. Types, depths, and distribution of soils
3. Types, density, productivity, dominance, and distribution of vegetation
4. Climatological data, including a monthly range of temperatures, precipitation, and average direction and velocity of prevailing winds (also notation of any unusual seasonal characteristics).
5. Information with respect to coal preparation, storage, loading, and transportation systems
6. The engineering techniques proposed to be used in mining, processing, and reclamation, including the location, design, and construction of haul roads, coal beneficiation and storage facilities, and water retention, treatment, dewatering and diversion facilities; sewage, sludge, and industrial waste disposal systems; spill prevention measures, the control of water drainage and accumulation; and the control of air emissions
7. A list of all major equipment
8. Plans for protecting oil, gas, and water wells, as well as oil, gas, and underground water resources

9. If auger mining is proposed, the location and diameter of auger holes, the depth to be drilled, and estimated percentage of recover

10. The method of operation and measures by which the operator plans to comply with the obligations and requirements of applicable standards and any special terms and conditions of the lease, permit, or license (e.g., plans for selective placement of toxic overburden)

11. Nature and timing of measures to be taken for surface reclamation, including, as appropriate:

    (a) A reclamation schedule, including the estimated time table for each phase of the work and final completion of the program (including expected time period from overburden removal to replacement of topsoil)

    (b) The method of grading, backfilling, soil stabilization, and compacting and contouring

    (c) The method of soil preparation (including final depth of topsoil) and fertilizer application (including type and amount of fertilizer)

    (d) The expected type and mixture of shrubs, trees, grasses, forbs, and other vegetation to be planted

    (e) The method of planting, including approximate quality and spacing

    (f) Need, source, and methods of application for supplementary irrigation and measures to be taken to protect vegetation until established (e.g., mulches, netting, barriers to prevent grazing, and soil amenities)

(g) Utilization of interim erosion control methods (e.g., chiseling, gouging, and dozer basins)

12. Location of spoil, waste, or refuse areas; sequence of placement, and topsoil preservation

13. Cross sections and final topographic map(s) of the anticipated final surface configuration that will be achieved pursuant to the operator's proposed reclamation activities

14. A description of the use which is proposed to be made of the land following reclamation, which shall take into account all applicable land use plans and programs

15. A description of how the proposed post-mining land use is to be achieved, including any necessary support activities and facilities

16. An estimate of the approximate cost per acre of reclamation

17. Identification and quantification of all expected effluents and emissions from the mine area, and related facilities (including expected soil losses and effects on ground waters) and a comparison to applicable water and air quality standards

18. Description of planned blasting procedures including information with respect to patterns, depth, amount, and type of explosive used and planned noise abatement methods

19. Description of planned air and water quality monitoring during construction, operation and after shutdown, including location of sampling points, frequency of sampling, and constituents monitored, including monitoring of storage tanks, pipelines, and waste disposal areas; and blasting monitoring, including noise and vibration

20. Procedures for extinguishing coal fires

21 . Method of abandonment

22. Any requests for variances from applicable standards and status of necessary permits.

III. Environmental Impact of the Proposed Action

The impacts resulting from the proposed action as described in Part I should be carefully identified, estimated, and interpreted. Impacts should be assessed utilizing baseline conditions as defined and the best data and analyses available with regard to specific impacts. Where applicable, quantitative and semi-quantitative analyses (or models) should be used to project or estimate potential environmental effects which might result from the proposed action. Impacts should be evaluated with respect to construction, operational and post-reclamation periods. Information with respect to related actions, developments, and research efforts (e.g., reclamation studies) should be integrated into the EIS. As a goal, the EIS should conclude as to the significance of each identified impact (i.e., the EIS should not simply seek to list in an exhaustive manner all impacts, however minor).

A very broad range of physical and social impacts may result from surface mining activities. Areas of potential environmental impact include the following:

Areas of Potential Environmental Impact

1. Mineral Resources:

   (a) Effects of the action on reduction of coal resources and related non-coal mineral resources

   (b) Net-energy balance for proposed mining activity.

2. Topography:

(a) Effects due to reduced surface elevation and alteration in slope and land form

(b) Consideration of potential geologic hazards (subsidence, landslides, etc.).

3. Soils:

(a) Effects of changes in soil structure and its properties on life support capabilities (i.e., natural productivity), soil permeability, and percolation rates

(b) Effects on runoff rates and potential for sediment loss (i.e., alteration of erosional patterns).

4. Surface and Ground Water:

(a) Quantity

(1) Effects of mining phases on flow regimes of proximate surface water courses

(2) Effects on water phases on potentiometric surfaces of effected aquifer systems, pertinent aquifer characteristics, and impacts to related recharge and discharge areas

(3) Effects on local surface and ground water users.

(b) Quality

(1) Effects of mining on the quality of proximate surface water courses which may result from point and non-point discharges and related disturbances (e.g., channel diversions)

(2) impact of mining phases on the quality of ground water systems resulting from mining-related

disturbances (e.g., seepage to ground water through spoil material, dewatering, injection, etc.)

5. Air Quality:

Effects of air quality indices resulting from point and non-point source emissions (e.g., fugitive dust emissions resulting from haul road traffic, topsoil and overburden removal, and blasting; and emissions from vehicular traffic and coal beneficiation, storage, and load out facilities).

6. Terrestrial and Aquatic Ecosystems:

(a) Effects of mining phases upon extant vegetation

(b) Types of vegetation proposed for revegetation efforts, the expected probability of success with respect to that effort, and long-term implications with regard to maintenance of a viable vegetative community

(c) Effects of mining phases on small game and nongame animals, browsersand grazers, resident and migratory birds, pest species, rare and endangered species, and general species diversity

(d) Effects of mining phases on aquatic vegetation, fish, benthic organisms, pest species, and rare and endangered species.

7. Land Use:

(a) Relation of proposed mining activity to "critical areas" (e.g., rare or fragile ecosystems; scenic rivers, river corridors; national parks, monuments, forests, and trails; historic sites; unique physiographic, topographic areas;

recreation areas; and areas with archeological and paleontological value)

(b) Short- and long-term effects of proposed mining activity on on-site and off-site land uses including the feasibility of attaining planned use(s) and compatibility to land uses in immediate vicinity.

8. Transportation Networks:

Effects of mining phases on transportation systems such as automobile usuage, public (mass) transportation (number and trip patterns), rail traffic (e.g., unit coal trains), air and water transportation systems, and streets and highways (capacity, types and mileage).

9. Socioeconomic Conditions: Effects of the proposed mining activity (by phase) on:

(a) Economic conditions (e.g., employment, tax base, regional income, and land values)

(b) Demographic and population characteristics (e.g., population and distribution)

(c) Health and safety characteristics (e.g., accident incidence)

(d) Institutions and services (e.g., ability of affected communities to provide public services and meet educational needs)

(e) Recreational patterns (e.g., types of activities and facilities available and participation rates)

(f) Aesthetic characteristics (e.g., surface configurations, water and air conditions, man-made structures, and unique features)

(g) Community attitudes.

IV. Mitigating Measures

Specific activities or programs which will be undertaken during construction, operation, and post-reclamation periods to mitigate or reduce undesirable environmental impacts, as described in the previous section, should be specified and described in a detailed manner. Consideration should be given to measures which relate to all significant environmental effects listed in Part III. Commitments on the part of the applicant to specific mitigating measures and to possible contingency plans should be definitively spelled out.

This section should specify features of the proposed mining activity design that are included to control (or minimize) negative environmental impacts, including, as appropriate, the following:

(a) Description of how expected effluents, emissions, and waste materials will be controlled, treated, and/or handled

(b) Estimates of the probable effectiveness of mitigation measures described

(c) Other planned mitigation measures (e.g., subsidence control, selective overburden placement, land exchanges, and relocation of residences)

(d) Statements with respect to procedures to assure compliance with applicable standards

(e) Plans for monitoring and research programs.

V. Adverse Impacts Which Cannot be Avoided

Based on information and anlyses presented in Part 111, Environmental Impact of the Proposed Action, and Part IV, Mitigating Measures, potential adverse environmental effects of the proposed mining activities which are

unavoidable should be described and assessed in a definitive manner. Potential effects, as listed in Part ill, should receive careful consideration. Where standards (e.g., air and water quality standards) apply, expected violations should be identified. With respect to impacts where no standards exist, interpretation is essentially judgmental and should consider such factors as:

1 . Location and extent of impacts

2. Expected time of occurrence and duration of impacts

3. Comparison of conditions without the project

4. Degree of certainty with which the impacts are thought to occur

5. Identification of who may be affected by certain impacts

6. Consideration of cumulative or synergistic impact relationships

7. Consideration of relative effects (i.e., impacts on natural resources in terms of remaining stock of such resources).

VI. The Relationship Between Short-Term Uses of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity

A careful analysis should be performed which identifies and relates future options foreclosed and trade-offs between short-term and long-term benefits of the proposed mining activity., in such an analysis, the following factors should be given special attention:

1 . Long-term cumulative effects of the proposed mining activity and related actions and developments (e.g., long-term disruption of ecological relationships such as long-term recovery of soil and vegetation and disturbance of the ground water system which causes long-term changes in naturally supported vegetative cover)

2. Changes in natural biological productivity of mine site

3. Post-operational use of land affected by mining and use upon abandonment.

VII. Irreversible and 1 rretrievable Commitment of Resources

Careful consideration should be given to the consumption of resources during the life of the proposed mining activity and upon abandonment and any irreversible curtailment of the range of potential uses of the environment. Consumption of stock resources (e.g., coal), loss of other mineral, natural, historical, and archeological resources, changes in "life style," and use of electrical power, liquid fuels, and other materials should be assessed, and broader implications should be evaluated.

VIII. Alternatives to the Proposed Action

Alternatives to the proposed action should be developed described, and carefully evaluated. With regard to surface mining EIS's, a feasible list of alternatives might include the following:

1 . No action

2. Rejection or approval of proposed mining activity

3. Alternative resources available (e.g., developing other resources to meet specified need) and/or alternative sites

4. Alternative rates of production

5. Alternative technologies for exploiting resource (e.g., different methods of mining and resource transport).

Such alternatives should be treated in a substantive manner in terms of alternative description and environmental assessment. Detailed comparisons between viable alternatives should be attempted where possible.

Footnotes

[1] Permits Handbook for Coal Development. Wayman, Cooper H. 1980 Colorado School of Mines Press; Golden, Colorado, pp 341-348.

[2] Id.

[3] Id.

[4] Id.

CLEAN WATER ACT

Introduction

in the 1970's a major effort was begun to clean up the national waters. The Refuse Act of 1899 (33 U.S.C. 407) was brought back into use in 1970. It required a permit in order to discharge any pollutants into navigable waters. This system proved unworkable and in 1972 the Federal Water Pollution Control Act (33 U.S.C. 1251) was passed. It provides the basic frameworks for control of water pollution and has been amended twice. The 1977 amendments deal with the discharge of toxic substances and the 1978 amendments deal with accidental discharges of hazardous substances. The Act is due for renewal in 1 983 and Congress is considering amending certain parts of it. Those parts that affect surface coal mining that may be amended are:

- extension of best available technology control deadlines from the current July 1984 deadlines;
- the section 404 dredge and fill materials program and the scope of its application to the nation's wetlands and navigable waters; and
- administrative penalties and criminal penalties for industrial discharges.

The goals of the 1972 Act are to achieve zero pollutant discharge into the nation's waters by 1 985 , and to protect and preserve fish, shellfish, and wildlife and recreation areas in and on the nation's waters by 1983.

Those areas of the Act which affect surface coal mining activities are:

- the National Pollutant Discharge Elimination System (NPDES) permit system to regulate point source discharges
- water quality standards to be achieved for each body of water
- dredge and fill permits program as it applies to navigable waters.

National Pollutant Discharge Elimination System (NPDES)

The NPDES program requires that a permit be obtained before any pollutants can be discharged into navigable waters from a point source. The EPA has original jurisdiction of the NPDES program, but states may implement their own if they meet the requirements of EPA. If a state does not have an approved program, or if approval of its program is withdrawn, EPA will issue NPDESNfor the state. (33 U.S.C. §1342)

According to 33 U.S-.C. §1362 , a pollutant is dredged spoil, solid waste, incinerator residue, sewage, garbage, s-a^rag-e sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into water. Navigable waters means any of the waters within the United States and its territorial seas. Point sources are any conveyance by which pollutants are discharged into water. A point source at a surface coal mining operation would be a diversion ditch, sedimentation pond, or any other structure that allows mine pollutants to run-off the area into water bodies.

The NPDES permit is the instrument EPA uses to force compliance with its effluent limits and water quality standards.

An effluent limitation is a restriction placed on the discharge of chemical, physical, biological, or other constituentsinto navigable waters from a point source. Effluent limits for each pollutant are based on the

"best practicable control technology currently available" (BPT), or in other words, the average of the limits achieved by the best existing plants or mines. From this base level, limits are tightened for specific discharges, for each pollutant that he discharges. The BPT's were required to be in use by 1977.

By 1984, dischargers must have in use the "best available technology economically achievable" (BAT), unless they qualify for an extension of the deadline under 33 U.S.C. §1311 (c). To qualify for the extension, the operator must shov; that the modification will:

1) represent the maximum use of technology within his economic capability; and

2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

BAT's limitations reflect levels achieved by the best performing plants, even those using pilot processes or transfers of technology from other industries, and taking economic constraints into account.

New sources, i.e., those facilities that do not begin construction until after effluent standards have been issued, or that make major alterations in their existing facilities, receive the most stringent limits applied. The limits are defined in conjunction with guidelines for each industry. EPA has issued final effluent guidelines for new source, and existing coal mines at 40 C.F.R. Part 434 (1983), 47 Fed. Reg. 45393 (1982).

The guidelines apply to all active mines, whether surface or underground, all coal preparation plants and associated areas, all nev^ source coj^min e s and to all post-mining areas. The guidelines cover four types of drainage: 1) drainage from coal preparation plants and

associated areas; 2) acid or ferruginous mine drainage; 3) alkaline mine drainage; and 4) drainage from post-mining areas.

Each type of drainage has 3 sets of effluent limits. The first deals with allowable effluent limits using best practicable control technology currently available (BPT). The second deals with allowable effluent limits using best available technology economically achievable (BAT). The last deals with allowable effluent limits for new sources of drainage. A separate set of limits are established for discharge caused by a 10-year, 24-hour precipitation event.

Water Quality Standards

Under 33 U.S.C. 1314(a), the EPA and each state must set standards of water quality for all water bodies within the United States. EPA -Epa-sets criteria for some 65 pollutants, which each state then may use in developing enforceable water quality standards for their state.

The water quality standards are composed of three items: surface water classifications; numerical or narrative criteria; and antidegradation policies. Surface water classifications are the beneficial uses rø which a particular stretch of river, lake or coastal waters arr V ustA Åe, to-be-pert. This can include using the water as a public water supply, fish and wildlife area, recreation area, industry-agriculture area, or any combination of these uses. Criteria reflect the latest scientific knowledge of the effects of pollutants on public health and welfare, aquatic life, and recreation. Criteria are numerical or narrative estimates of how much of a particular pollutant can be present in water without harming or impeading the water's designated use. Antidegradation policies are commitments to maintain water quality gains and prevent backsliding.

Criteria do not reflect economic considerations. They reflect the physical, chemical, microbiological, biological and radiological properties of water, toxic chemicals, and biochemical constituents of water. Economic considerations may be used in determining a water body's beneficial use or as a factor in stream use downgrading.

Hypothetical "Downgrading" is a reclassification of a water body when the current classification requires more stringent water quality criteria than is being currently attained. A state may request a downgrade from EPA for one of three reasons: 1) natural background conditions; 2) irretrievable man-induced conditions; and[c/] 3) controls above or in addition to BAT or BPT would have to be imposed, resulting in substantial or widespread adverse economic and social impact.

Water quality standards are usually set by each state after public hearings. They adopt criteria to meet the classifications assigned to each water body. The program is then submitted to the EPA regional office for approval. Standards may be revised, with EPA approval. If a dispute arises between EPA and a state over standards, EPA has the authority to promulgate and enforce standards of its own. If EPA does not approve a state program, the state must be notified within 90 days after EPA received its proposed program. The state then has 90 days to make changes required for approval. If the state does not comply, EPA will promulgate its own program for the state.

Water quality standards are enforced by the NPDES permits.

Dredge and Fill Permits

Under 33 U.S.C. §1344, all persons wishing to discharge dredged or fill material into the nation's waters must obtain a dredge *or fill permit from the Army Corps of Engineers. A permit is also necessary

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to locate a structure on, or excavate any waters. Activities that would require a permit include building dams, roads, railroad fills, and outfall and intake pipes.

The Corps issues permits by districts within watersheds, not according to state boundries. However, under the Consolidated Permit Program, a state may administer Section 404 permits for certain waters within their jurisdiction. These are waters which are traditionally called non-navigable.

Although a permit is not always required, the Corps retains the discretion to require a permit for any given activity.

After a request for a permit is filed, the Corps issues a public notice and allows 30 days for public comment. An environmental assessment is required, and an Environmental Impact Statement may be required. The EPA will also review the application for compliance with its guidelines at 40 C.F.R. 230.

If the application is approved, the permit will contain general and site specific conditions. Processing of an application can take from 60-90 days if there are no objections, or up to two years if there are objections.

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MISSISSIPPI PROGRAM

NPDES Permit and Water Quality Criteria

Mississippi's water pollution control program has been approved by the EPA. The program includes water quality standards, promulgated by the Mississippi Air and Water Pollution Control Commission, and NPDES and underground injection control permits, promulgated by the Department of Natural Resources Bureau of Pollution Control.

Water Quality Standards

The water quality criteria basically follow the federal plan of not allowing the quality of water in any existing body to deteriorate below the established standards. Water that hasexisting quality better than the established standards is to be maintained at that level. Certain exceptions to the standards are allowed for three reasons: 1) the existing designated use is not attainable because of natural background conditions, 2) the existing designated use is not attainable because of irretrievable man-induced conditions, or 3) in order to attain the existing use designation, it would be necessary to apply effluent limits more stringent than those required by 33 U.S.C. 1312(b)(2)(A) and (B) of the Federal Water Pollution Control Act Amendments of 1972 , which would result in substantial and widespread adverse economic and social impact.

The Commission uses all available information to evaluate pollutants. A major source of information is latest editions of Quality Criteria for Water, prepared by the EPA pursuant to §1315(a) of the Act. The use of such information is limited to the parts applicable to the indigenous aquatic community found in Mississippi.

Water bodies within the state are divided into five groups, 1) public water supply, 2) Shellfish harvesting Areas, 3) Recreation, 4) Fish and Wildlife, and 5) Ephemeral Streams. The designation a water body receives will determine the specific water quality criteria that are applied to it. All designations include criteria for bacteria.

There are minimum conditions which apply to all of the designations. All waters are to be free of any sludge deposits, floating debris, oil, or scum, and any discharges which produce color, odor, or other conditions that create a nuisance. No toxic material may be dumped into waters. The levels of dissolved oxygen and toxic substances, the pH levels and temperature of water bodies are also regulated.

NPDES Permits

Mississippi requires a NPDES permit or underground injection permit for any discharge into state waters, or state surface waters, or state underground waters. Water treatment plants also r-eq^uhre a state NPDES permit. The permit must be applied for at least 180 days before the commencement of any discharge. It is the operator's duty to obtain the permit. There are only threeexemptierrs from the requirement to obtain a permit. They are:

1) human sewage discharged from vessels;
2) water, gas, or other materials injected into a well to facilitate production of oil and gas; and
3) storm sewers not connected to wastewater treatment works or sanitary sewers, or sewers discharging under a NPDES permit.

When the Commission receives an application for a NPDES permit, the Executive Director transmits a copy to the EPA's Regional

Administrator for his comments on the application^ outlintng any deficiencies or other changes he feels are necessary to complete the application. The Permit Board can request N:he applicant supply more information, and can take enforcement actions if the applicant refuses to submit the additional information. (The Board can also take enforcement action if an operator refuses to file an application.)

When the application is complete, the Board makes a preliminary determination to issue or deny the permit. If they propose to issue the permit, they will also make preliminary determinations on the effluent limitation, the schedule of compliance, and any other restriction or conditions they find are necessary. A copy of the draft permit will be sent to the Regional Administrator and to the applicant.

The Executor Director will then provide the public with notice of the proposed permit. The notice will include:

1) the address and telephone number of the Commission Office in Jackson, and the name and address of applicant;

2) a concise description of the applicant's activities and operations;

3) the name of the waters that will be receiving the discharges;

4) the Board's preliminary determinations;

5) a concise description of the procedures for making the final determinations; and

6) the address and telephone number of the Commission office where more information, copies of the draft permit, or copies of other relevant documents may be obtained.

The public has 30 days after the notice to submit comments, in writing, to the Permit Board. The Board may extend the comment period if it feels it is necessary. The public also has access to a fact sheet,

prepared by the Executive Director, briefly describing the type of operation and discharge involved, the preliminary determination of the Board, the water quality standards involved, and how the final determination will be made.

During the 30 day comment period, a public meeting may be held. Any interested person may file a petition for a hearing with the Board. If there is significant public interest in a hearing, or if the petitioner has sufficient cause, the Board will hold a hearing within four to eight weeks. The public must be given 30 days notice for the hearing.

After the public comment and hearing period is over, the Board will issue a final determination. Appeals from the Board's decision should be in the form of a request for a formal evidentiary hearing before the Permit Board. The Permit Board will make a final decision affirming, reversing or modifying its earlier decision. Appeals from this decision may be taken to the Chancery Court. NPDES and "VIC permits issued by EPA have the same purpose and effect as permits issued by the state.

If a permit is issued, it will contain all terms and conditions the operator must comply with. The effluent limitations, standard of performance, and any more stringent limitations deemed necessary will be listed. The permit must be consistent with the water quality standards, and can not allow discharge of any material prohibited by another Act, in conflict with an areawide waste treatment management plan, or objected to by the EPA Regional Administrator.

NPDES permits have a fixed term, which should not exceed five years. Permits must be reviewed at least 180 days before the permit is due to expire. Modifications may be granted, if they willPextend the

compliance schedule by more than four months or cause an increase in effluent limits.

Sources

33 U.S.C. 407

33 U.S.C. 1251

Permits Handbook for Coal Development. Wayman, Cooper H. 1980, Colorado School of Mines Press; Golden, Colorado.

33 U.S.C. 1314(a)

Questions and Answers on Water Quality Standards. Issued by Environmental Protection Agency Office of Water and Hazardous Materials, Criteria and Standards Division, July 12, 1979.

40 C.F.R. §35.1 550 Water Quality Standards.

Air and Water Pollution Control Law: 1 982. Reed, Phillip D. 1982, Environmental Law Institute; Washington, D.C.

Mississippi Water Quality Criteria for Intrastate, Interstate, and Coastal Water: February 25 , 1 982 . Mississippi Air and Water Pollution Control Commission, Jackson, Mississippi.

Mississippi Wastewater Permit Regulations

RESOURCE CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act (RCRA) was passed in 1976 to control the disposal of solid wastes. The Act divides wastes into two types, hazardous and other solid wastes.

The states are required to draw up programs at least as stringent as EPA's to control solid and hazardous wastes. Mississippi has adopted the EPA's regulations and all but the last phase (land disposal of wastes) of the program has been approved by EPA. The regulatory authority in Mississippi is the Department of Solid Wastes Management.

Briefly, solid wastes fall into two categories; (1) sanitary landfills, which are dumps that are in compliance with regulations; and (2) open dumps, which are dumps that are not in compliance with the regulations. The regulations must ensure that open dumps are brought into compliance and that sanitary landfills do not pose a threat to health or the environment. The regulations protect floodplains, endangered species, surface and groundwaters, food-chain cropland, and air. The spread of disease, sewage, or explosive gases is prohibited. If the site is located within 5,000 to 10,000 feet of an airport, birds cannot be attracted, since they are a threat to air safety.

Surface coal mine wastes are not included under solid wastes, if the overburden removal is going to be returned to the mine site for reclamation purposes. However, if the overburden is removed from the minesite for any reason, the

operation is no longer in situ and the regulations apply. The regulations do not apply to point source discharges at the minesite, if they are covered by a NPDES permit.

Hazardous wastes are solid wastes that cause or contribute to death or serious irreversible illness, or incapacitating illness, or that causes a present or potential hazard to health and the environment if improperly handled. These characteristics must be measurable by a standardized test which is within the capabilities of generators of solid waste or private laboratories or be recognizable by the generators of solid waste. EPA has defined hazardous wastes as having any of the following characteristics; ignitability, corrosivity, reactivity, or EP toxicity. EPA has also listed known substances that it considers hazardous at 40 CFR Part 261.31, 261.32, 261.33.

Mining wastes of any kind are explicitly listed in the federal and Mississippi regulations as not being hazardous waste.

RCRA contains a provision in its section on hazardous wastes permits which allows a surface coal mining permit, obtained under SMCRA, to function as a hazardous wastes permit. RCRA regulations will not apply to such wastes that are covered by the SMCRA permit.

SOURCES

42 USC 6901 (1976)

42 USC § 6943, §6926

40 CFR Part 257, § 257.2 (1982)

40 CFR Part 257, § 257.1(a) (1982)

40 CFR Part 257, § 257.3-8 (1982)

40 CFR Part 257, § 257.1 (c) (2) 1982)

40 CFR Part 257 § 257.1(c)(6) (1982)

40 CFR Part 261 § 261.10

40 CFR Part 261 § 261.20, 261.21, 261.22, 261.23, 261.24

40 CFR Part 261 § 261.4(6) (3)

42 USC § 6925 (f) (1980)

SAFE DRINKING WATER ACT

The Safe Drinking Water Act (SDWA) was passed in 1974 as a measure to protect the nation's drinking water supplies. The Act regulates the actual suppliers of public water, and establishes controls for the underground injection of fluids which could contaminate drinking water sources. Underground mining operations are covered by both of the Act's regulatory provisions, but surface mining operations are not affected by the SDWA unless the operation actually threatens a source of public drinking water.

In the case of a mining operation actually contaminating a drinking water supply, the EPA has the power to enter orders necessary to protect human life, and/or commence a civil action for appropriate relief. Willful violation of such an order, or failure to comply can result in fines of up to $5,000 for each day of violation or failure to comply. Thus, persons not normally regulated by the Act may be subject to orders issued under Act if their activities threaten sources of drinking water.

The SDWA also allows citizen participation in the enforcement process. A citizen may bring a civil action on his own behalf against any person, including the United States, for violation of the SDWA, or against the EPA and state agencies for failure to perform non-discretionary duties. The activities must be in violation of the Act's standards before the suit can be brought. The defendants and enforcement agencies must have 60 days notice before the suit is filed. The court may, at its discretion, award costs of litigation and attorney's fees.

Sources

" ^afe Drinking Water Act." Cathy Jacobs; 3 Water Log, January-March 1983. (Mississippi-Alabama Sea Grant Consortium)[4] *J*

TOXIC SUBSTANCES ACT

The Toxic Substances Act was passed in 1976 to control dangerous chemicals that were not otherwise under the control of EPA. The Act is not a permitting system, but a system for the reporting of and control of toxic chemicals.

The Act essentially is a testing and recordkeeping one, requiring manufacturers and importers to report to EPA any chemicals that may endanger human life or the environment. Records must be kept on the chemicals for 30 years for human reactions and five years for environmental reactions. EPA issues a list of chemicals that are toxic based on those reports and test data (testing is done by the manufacturer).

Under the regulations, if a manufacturer produces a toxic chemical as a by-product or impurity of another material, then that manufacturer is not required to report to EPA for initial inventories, or plant site reports. Surface mining operations fall into this exception. However, under another regulation these same people may report any new substances to the EPA.

SOURCES

15 USC 2601

40 CFR 704.95 (e) (3) (4)

40 CFR 710.4 (a) (3)

40 CFR 710.4 (c)

40 CFR 712.25(d) (1) (2) (3)

PART 100

Sec. 10.0.Ц Responsibility

The commission shall assume primary responsibility for regulation of coal exploration and surface coal mining and reclamation operations on non-Federal lands in Mississippi. The commission has responsibility for review of and decisions on permits and bonding for surface coal mining and reclamation operations, approval of coal exploration which substantially disturbs the natural land surface and removes more than 250 tons of coal from the earth in any one location, inspection of coal exploration and surface coal mining and reclamation operations for compliance with the Act, these regulations, the State program, permits and exploration approvals, and for enforcement of the State program.

Sec. 100.11 Applicability

This section provides that any person who conducts surface coal mining and reclamation operations on non-Indian or non-Federal lands shall have a permit. Each structure used in connection with coal exploration or surface coal mining shall comply with the performance standards and design requirements of Parts 210-228 , except that an existing structure which meets the performance standards of these Parts 210-228 , but does not meet the design requirements of Parts 210-228 may be exempted from meeting those design requirements by the commission. The commission may grant exemption on non-Indian and non-Federal lands only as part of the permit application process.

This section also provides that exemptions shall not apply under certain circumstances.

Sec. 100.12 Petitions to Initiate Rulemaking

This section provides that any person may petition the commission to initiate a proceeding for the issuance, amendment, or repeal of any regulation under the Act. Within 90 days from receipt, the commission shall issue a written decision either granting or denying the petition.

Sec. 100.13 Notice of Citizen Suits

This section provides that a person who intends to initiate a civil action on his or her own behalf under Section 28 of the Act shall give notice of intent to do so. Notice shall be by certified mail to both the commission and the violator. This section also sets forth requirements of what information should be included in the notice.

Sec. loo.m Availability of Records

This section provides that records shall be made available to the public and retained at the courthouse of the county in which the mining operation is located. Other records and documents in possession of the commission may be examined at the Office of the Mississippi Geological Survey in Jackson.

Sec. 100.15 Computation of Time

This section provides for the computation of time under these regulations.

PART 101 - Definitions

PART 105 - Restriction on Financial Interests of State Employees

PART 107 - Exemption for Coal Extraction Incident to GovernmentFinanced Highway or Other Construction

Sec. 107.1 This part establishes the procedures for determing those surface coal mining and reclamation operations which are exempt from the Act and these regulations because the extraction of coal is an incidental part of Federal, State, or local government-financed highway or other construction.

Sec. 107.12 Information to be Maintained on Sites

This section provides that any person extracting coal incident to government-financed highway or other construction who extracts more than 250 tons of coal or affects more than two acres shall maintain, on the site, documents which show description of the project, location, and the government agency which is providing the financing and the kind and amount of public financing.

PART 161 - Ares Designated by the Act

Sec. 161.2 Objective

This objective sets out the objectives of this Part; to implement the prohibitions and limitations for surface coal mining operations on or near certain private, Federal, and other public lands under the Act.

Sec. 161.3 Authority

This section sets out that the commission is authorized by the Act to prohibit or limit surface coal mining operations

on or near certain private, Federal, and other public lands, except for those operations which existed on August 3, 1977 , or were subject to valid existing rights on that date.

PART 210 - Permanent Program Performance Standards - General Provisions

Sec. 210.1 Scope

Parts 210-228 set forth the minimum performance standards and design requirements for coal exploration and surface coal mining and reclamation operations.

Sec. 210.11 Applicability

Part 215 applies to coal exploration. Part 216 applies to surface mining activities. Part 217 applies to underground mining activities. Parts 218 through 228 apply to certain special categories of surface coal mining and reclamation operations. Parts 216 and 217 apply to each of those special categories of operations, except to the extent that a provision of Part 218 through 228 specifically exempts a particular category from a particular requirement of Part 216 or 217.

PART 215 Permanent Program Performance Standards - Coal Exploration

Sec. 215.11 General Responsibility of Persons Conducting Coal Exploration

(a) Each person who conducts coal exploration which substantially disturbs the natural land surface and in which 250 tons or less of coal are removed shall file the notice of intention to explore required under Section 176.11 and shall comply with Section 215.15 of this part.

(b) Each person who conducts coal exploration which substantially disturbs the natural land surface and in which more than 250 tons of coal are removed in the area described by the written approval from the commission shall comply with the procedures described in the exploration and reclamation operations plan approved under Section 176.12 and shall comply with Section 215.15 of this Part.

Sec. 215.13 Required Documents

This section requires that the operator who removes more than 250 tons of coal to obtain written approval of the commission for the activities granted under Section 176.12.

Sec. 215.15 Performance Standards for Coal Exploration

The intent of this section is to set forth performance standards for coal exploration pertaining to preservation of habitats for fish, wildlife, and other related environmental areas, measurement of environmental characteristics, vehicular travel on other than established surfaced roads, reclamation of existing roads, revegetation, stream diversion, exploration holes, boreholes, wells, and removal of facilities and equipment.

Sec. 215.17 Requirement for a Permit

This section deals with the requirement for a permit during coal exploration.

PART 216 Permanent Program Performance Standards - Surface Mining Activities

Sec. 216.11 Signs and Markers

The intent of this section is to set forth specifications for the posting of signs and markers including mine and permit identification signs, perimeter markers, buffer-zone markers, blasting signs and topsoil markers.

Sec. 216,14 Casing and Sealing of Drilling Holes: Temporary

This section provides for the temporary sealing of exploration holes before use and the barricading of such holes after use.

Sec. 216.15 Casing and Sealing of Drilling Holes: Permanent

This section provides for permanent sealing of exploration holes, and wells when no longer needed.

Sec. 216.21 Topsoil - General Requirements

■ This section provides for the segregation of topsoil and subsoils before disturbance of an area.

Sec. 216.22 Topsoil - Removal

This section sets forth the general requirements for the removal of topsoil including the timing of removal, material to be removed and topsoil substitution and supplementation. Also provided are the limitation of the topsoil removal area where the removal may result in erosion leading to pollution.

Sec. 216,23 Topsoil - Storage

This section provides for the storage of topsoil where it is not promptly redistributed on a regraded area.

Sec. 216.24 Topsoil - Redistribution

This section sets out the general requirements for the redistribution of topsoil.

Sec. 216.25 Topsoil - Nutrients and Soil Amendments

This section provides for the application of nutrients and soil amendments to the redistributed surface layer.

Sec. 216.41 Hydrologic balance - Requirements

The purpose of this section is to set out requirements to minimize changes in the hydrologic balance in both the mine plan and adjacent areas, including changes in water quality and quantity, water pollution, and surface water drainage channels.

Sec. 216.42 Hydrologic Balance - Water Quality Standards and Effluent Limitations

This section provides for use of sedimentation ponds and other treatment facilities and effluent limitations for water drainage.

Sec. 216.43 Hydrologic Balance - Diversions and Conveyance of Overland Flow and Shallow Ground-water Flow, and Ephemeral Streams

This section provides the requirements for overland flow and shallow ground-water flow, and ephemeral streams to be diverted from disturbed areas by means of temporary or permanent diversion.

Sec. 216.44 Hydrologic balance - Stream Channel Diversions

This section sets forth the requirements for the diversion of flow from perennial and intermittent streams within the permit area including commission approval and compliance with local, state, and Federal statutes and regulations.

Sec. 216.45 Hydrologic Balance - Sediment Control Measures

The purpose of this section is to set forth the requirements for sediment control measures within and adjacent to the disturbed area.

Sec. 216.46 Hydrologie Balance - Sedimentation Ponds

The section sets out the general requirements for sedimentation ponds including construction, location, storages, volume, detention time, dewatering, principal and emergency spillways, inspection and certification, stabilization, removal, and revegetation. If the pond is approved by the commission for retention, the sedimentation pond shall meet the requirements for permanent impoundments of Section 216.46 and 216.56.

Sec. 216.47 Hydrologic Balance - Discharge Structures

This section provides that discharge shall be controlled by energy dissipaters, riprap channels, and other devices.

Sec. 216.48 Hydrologic Balance - Acid-forming and Toxic-forming Spoil

This section provides for the avoidance of drainage from acid-forming and toxic-forming spoil into ground and surface water. Methods used are such as identifying and treating where necessary, preventing water from coming into contact with the spoil, and burying.

Sec. 216.49 Hydrologic Balance - Permanent and Temporary Impoundments

Permanent impoundments are prohibited unless authorized by the commission. This section then follows with the basis for authorization. This section goes on to provide for slope protection, inspection, maintenance, and initial and annual certification.

Sec. 216.50 Hydrologic Balance - Ground Water Protection

The purpose of this section is to prevent contamination of ground water systems with acid, toxic, or otherwise harmful mine drainage.

Sec. 216.51 Hydrologic Balance - Protection of Ground Water Recharge Capacity

The intent of this section is to protect ground water recharge capacity by providing a rate of recharge the approximates premining recharge capacity.

Sec. 216.52 Hydrologic Balance - Surface and Ground Water Monitoring

This section provides for monitoring of ground water including ground water levels, infiltration rates, subsurface flow and storage characteristics, and water quality. This section further provides for the monitoring of quantity and quality of discharges from the permit area.

Sec. 216.53 Hydrologie Balance - Transfer of Wells

An exploratory or monitoring well may only be transferred by the person who conducts surface mining activities for further use as a water well with prior approval of the commission. Upon approval, the transferee assumes primary liability for damages to person or property. The transferor is secondarily liable until release of the bond or other equivalent guarantee.

Sec. 216,54 Hydrologic Balance - Water Rights and Replacement

This section provides for replacement of the water supply of an owner of interest in real property where the water supply has been affected by contamination, diminution, or interruption approximately resulting from the surface mining activities.

Sec. 216,55 Hydrologic Balance - Discharge of Water Into an Underground Mine

Surface water shall not be diverted or otherwise discharged into underground mine workings except under certain enumerated circumstances.

Sec. 216.56 Hydrologic Balance - Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities

Before abandoning the permit area, the person who conducts the surface mining activities shall renovate all these areas to meet specified criteria.

Sec. 216.57 Hydrologic Balance - Stream Buffer Zones

No disturbance is permitted on land within 100 feet of a perennial stream or a stream with a biological community except in accordance with Sections 216.43 - 216.44 unless specifically authorized by the commission. This area shall be designated a buffer zone and marked as specified in Section 216.11.

Sec. 216.61 Use of Explosives - General Requirements

This section sets out the requirements that explosives of more than 5 pounds or blasting agents shall be conducted by trained persons and to the schedule required by Section 216.64. All use of explosives must comply with State and Federal laws.

Sec. 216.62 Use of Explosives - Pre-blasting Survey

Those persons who conduct the surface mining activities shall conduct a pre-blasting survey of dwelling or structure

and submit a report to the commission if there is a request by a resident or owner of a dwelling or structure to the commission if that structure is within one-half mile of any part of the permit area. The survey shall determine the condition of the dwelling or structure and document any pre-blasting damage or other physical factors that could reasonably be affected by the blasting. The written report shall be signed by the person conducting the survey.

Sec. 216.64 Use of Explosives - Public Notice of Blasting Schedule

A blasting schedule shall be published at least 10 days but not more than 20 days before beginning blasting using more than 5 pounds of explosive or blasting agent. The schedule shall be published in a newspaper of general circulation in the locality of the blasting. Copies of the schedule shall also be mailed to local governments and public utilities and by mail or delivered to each resident within one-half mile of the permit area. Republish and redistribution of the schedule is required every 12 months. This section also sets out what must be contained in the schedule e.q. exact location, dates, and times.

Sec. 216.65 Use of Explosives - Surface Blasting Requirements

All blasting shall be conducted during daylight hours with one specified exception. This section also requires that warning and all clear signals be audible within a range of one-half mile from the point of the blast. Access to the area must be controlled until the area is determined to be clear of danger. Access to an area possibly subject to flyrock from blasting shall be regulated. Blasting is prohibited, except in certain exceptions, within 1000 feet of any building used as a dwelling, school, church, hospital, or nursing facility.

Sec. 216.67 Use of Explosives - Seismographic Measures

The commission may require a seismograph record of any or all blasts and may specify the location at which such measures are taken.

Sec. 216.68 Use of Explosives - Records of Blasting Operations

A record of each blast, including seismograph reports shall be retained for at least 3 years and shall be available for inspection by the commission and the public. They are to contain various information such as name of operator, date, location, time of blast, etc. as well as other specified contents.

Sec. 216.71 Disposal of Excess Spoil - General Requirements

Spoil not required to achieve the approximate original contour within the area shall be hauled to a designated

disposal area within a permit area. This spoil shall be placed in a controlled manner to ensure a number of specified occurrences, e.g. stability of the fill, slope protection, mass movement, erosion, etc.

Sec. 216.72 Disposal of Excess Spoil - Valley Fills

Valley fills shall be required to meet the standards set forth in Section 216.71 as well as other specific requirements set forth in this section including a long-range safety factor of 1.5, construction requirements of a subdrainage system, hauling and compacting requirements, diversion of surface water runoff away for the fill, and terracing.

Sec. 216.73 Disposal of Excess Spoil - Head-of-Hollow Fills

Head-of-hollow fills shall meet all the standards set forth in Sections 216.71 and 216.72 as well as other specific requirements set forth in the section including fill design, design of the alternative rock-core chimney drain system, specification of the vertical rock core, filter system specification, maximum slope of the fill, and drainage control system specs.

Sec. 216.7Ц Disposal of Excess Spoil - Durable Rock Fills

In lieu of the requirements of Sections 216.72 and 216.73, this section provides that the commission may approve alternate methods for disposal of hard rock spoil, including fill placement by dumping in a single lift under specified conditions. Hard rock spoil for this section is defined as rockfill of at least 80% by volume of sandstone, limestone, or other rocks that do not slake in water.

Sec. 216.79 Protection of Underground Mining

The section provides that no surface coal mining shall be conducted closer than 500 feet to any point of an active or abandoned underground mine except under specified conditions.

Sec. 216.81 Coal Processing Waste Banks - General Requirements

All coal processing waste shall be hauled or conveyed to a disposal area approved by the commission for such purpose within certain requirements.

Sec. 216.82 Coal Processing Waste Banks - Site Inspection

This section provides for the inspection of coal processing waste banks which shall occur at least quarterly, beginning within 7 days after preparation of the disposal area begins. Copies of the inspection findings shall be maintained.

Sec. 216.83 Coal Processing Waste Banks - Water Control Measures

This section sets forth the requirements for water control for coal processing waste banks.

Sec. 216.85 Coal Processing Waste Banks - Construction Requirements

This section sets forth construction requirement of coal processing waste banks. Construction shall be in compliance with Sections 216.71 and 216.72 with specific variations provided for in this section.

Sec. 216.86 Coal Processing Waste - Burning

Coal processing waste fires shall be extinguished by the person who conducts the surface mining activities.

Sec. 216.87 Coal Processing Waste - Burned Waste Utilization

This section provides that before any burned coal processing waste, other materials, or refuse is removed from a disposal area, approval shall be obtained from the commission. A plan for the method of removal, etc., must be submitted as well.

Sec. 216.88 Coal Processing Waste - Return to Underground Workings

Coal processing waste may be returned to underground mine workings only in accordance with the waste disposal program approved by the commission.

Sec. 216.89 Disposal of Noncoal Wastes

This section provides for the disposal of noncoal wastes.

Sec. 216.91 Coal Processing Waste - Dams and Embankments: General Requirements

This section sets forth the general requirements for dams and embankments constructed of coal processing waste or intended to impound coal processing waste.

Sec. 216.92 Coal Processing Waste - Dams and Embankments: Site Preparation

This section provides for site preparation before coal processing waste is placed at a dam or embankment site.

Sec. 216.93 Coal Processing Waste - Dams and Embankments: Design and Construction

This section sets forth the requirements for the design and construction of dams and embankments constructed of coal processing waste or intended to impound such waste.

Sec. 2I6.95 Air Resources Protection

This section provides for fugitive dust control measures in the permit area including periodic watering of unpaved roads, chemical stabilization, paving, restricting speed of vehicles, revegetation, restricting travel, and treating loaded trucks to reduce loss of material in the wind.

Sec. 2I6.97 Protection of Fish, Wildlife, and Related Environmental Values

This section provides for the protection of fish, wildlife and other environmental values.

Sec. 2I6.99 Slides and Other Damage

This section provides for the prevention and reporting of slides.

Sec. 2I6.I00 Contemporaneous Reclamation

Reclamation efforts shall occur as contemporaneously as practicable with mining operations.

Sec. 2I6.I0I Backfilling and Grading - General Requirements

The section sets forth the general requirements for timing of backfilling and grading.

Sec. 2I6.I02 Backfilling and Grading - General Grading Requirements

This section sets forth the general grading requirements for backfilling and grading including cut-and-fill terraces and small depressions.

Sec. 216.103 Backfilling and Grading - Covering Coal and Acid-and-Toxic-Forming Material

This section provides for the cover of coal and acid-and-toxic-forming materials during backfilling and grading. This section also provides for stabilization by compacting backfilled materials wherever necessary to prevent leaching of acid-forming and toxic-forming materials into surface and ground waters.

Sec. 216.104 Backfilling and Grading - Thin Overburden

This section sets forth the specific requirements for the backfilling and grading of thin overburden. This section applies only where the final thickness is less than 0.8 of the initial thickness.

Sec. 2I6.105 Backfilling and Grading - Thick Overburden

This section sets forth the general requirements for backfilling and grading of thick overburden. After defining final thickness, the provisions of this section only apply where the final thickness is greater than 1.2 of the initial thickness.

Sec. 2I6.I06 Regrading or Stabilizing Rills and Gullies

This section provides for the filling, grading, or stabilization when rills or gullies are deeper than 9 inches.

Sec. 2I6.11I Revegetation - General Requirements

This section sets forth the general requirements for revegetation. Each person who conducts surface mining activities shall establish on all affected land, a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of disturbed land.

Sec. 216.II2 Revegetation - Use of Introduced Species

This section provides for the substitution of introduced species for native species on approval by the commission under certain conditions.

Sec. 2I6.I13 Revegetation - Timing

This section provides that revegetation shall be conducted during the first normal period for favorable planting conditions after final preparation.

Sec. 216.114 Revegetation - Mulching and Other Soil Stabilizing Practices

This section provides for mulching and other soil stabilizing practices during revegetation.

Sec. 216.115 Revegetation - Grading

When the approved postmining land use is range or pasture land, the reclaimed land shall be used for livestock grazing at a grazing capacity approved by the commission approximately equal to that for similar non-mined lands, for at least the last two full years of liability required under Section 216.116.

Sec. 216.116 Revegetation - Standards for Success

This section sets forth the standards for success to be applied to revegetation including determining annual precipitation.

Sec. 216.117 Revegetation - Tree and Shrub Stocking for Forest Land

This section sets forth forest resource conservation standards for reforestation operations to ensure that a cover of commercial tree species, non-commercial tree species, shrubs or half-shrubs, sufficient for adequate use of the available growing space, is established after surface mining activities.

Sec. 216.131 Cessation of Operations - Temporary

This section sets forth the general requirements for the temporary cessation of operations including a notice of intention to cease or abandon mining and reclamation operations.

Sec. 216.132 Cessation of Operations - Permanent

This section sets forth the general requirements for permanent cessation of operations.

Sec. 216.133 Postmining Land Use

All affected areas shall be restored in a timely manner to conditions capable of supporting the uses which they were capable of supporting before any mining or to higher or better uses achievable under procedures set out in this section.

Sec. 216.150 Roads: Class I - General

This section sets forth the general requirements for the construction and removal of Class I Roads and provides that design and construction or reconstruction shall be certified by a registered qualified professional engineer.

Sec. 216.151 Roads: Class I - Location

Class I Roads shall be located, as possible, on ridges or on the most suitable available slopes. No part of any Class I Road shall be located in the channel of an intermittent or perennial stream without commission approval. Stream fords are also prohibited without approval.

Sec. 216.152 Roads: Class I - Design and Construction

This section sets forth standards to be applied to the design and construction of Class I Roads in order to control erosion and disturbance of hydrologic balance. These standards include vertical and horizontal alignment, road cuts, road embankments, and topsoil removal.

Sec. 216.153 Roads: Class 1 - Drainage

This section sets forth the general requirements for drainage of Class 1 Roads using ditches, cross drains, and ditch relief drains.

Sec. 216.I54 Roads: Class 1 - Surfacing

■ This section sets forth the surfacing requirements for Class 1 Roads.

Sec. 216.I55 Roads: Class 1 - Maintenance

Class 1 Roads shall be maintained in such a manner that the approved design standards are met throughout the life of the entire transportation facility. Maintenance shall include repairs to the road surface and revegetating.

Sec. 216.I56 Roads: Class 1 - Restoration

This sets forth the restoration requirements of Class 1 Roads which must be fulfilled immediately after the road is no longer needed for operations, reclamation, or monitoring unless the commission approves retention of the road.

Sec. 216.I60 Roads: Class 11 - General

This section sets for the general requirements for Class II Roads.

Sec. 2I6.16I Roads: Class II - Location

Class 11 Roads shall be located, as possible, on ridges or the most suitable available slopes to minimize erosion. No part shall be located in the channel of an intermittent or perennial stream unless approved by the Commission.

Sec. 216.I62 Roads: Class 11 - Design and Construction

This section sets forth standards to be applied to the design and construction of Class II Roads in order to control subsequent erosion and disturbance of the hydrologic balance. These standards apply to vertical and horizontal alignment, road cuts, road embankments and topsoil removal.

Sec. 216.163 Roads: Class II - Drainage

This section sets forth the general requirements for the drainage of Class II Roads using structures such as ditches, cross drains, surface dips, stream crossing, and culverts and bridges. This section provides that natural-channel drainageways shall not be altered or relocated without prior approval of the Commission.

Sec. 216.164 Roads: Class 11 - Surfacing

This section sets forth the general surfacing requirements for Class II Roads.

Sec. 216.165 Roads: Class II - Maintenance

Class II Roads shall be maintained in such a manner that the approved design criteria are met throughout the life of the facility. They shall include basic custodial care as required to protect the road investment and prevent damages to adjacent resources.

Sec. 216.166 Roads: Class 11 - Restoration

This section sets forth the restoration requirements for Class II Roads which must be fulfilled immediately after the road is no longer used for operations, reclamation, or monitoring unless the Commission approves retention of the road.

Sec. 216.170 Roads: Class 111 - General

This sets forth the general requirements for Class III Roads.

Sec. 216.171 Roads: Class III - Location

Class 111 Roads shall be located on ridges or on the most stable available slopes to minimize erosion. No part of any road shall be located in the channel of an intermittent or perennial stream unless approved by the Commission.

Sec. 216.172 Roads: Class 111 - Design and Construction

Field-design methods shall be utilized for Class III Roads including vertical alignment, horizontal alignment, road cuts, road embankments, and topsoil removal.

Sec. 216.173 Roads: Class 111 - Drainage

This section sets forth the general requirements for the drainage of Class III Roads using structures such as temporary culverts, bridges, and stream crossings. This section provides that natural channel drainageways shall not be altered or relocated.

Sec. 216.174 Roads: Class 111 - Surfacing

This section sets forth the general surfacing requirements for Class 111 Roads.

Sec. 216,175 Roads: Class 111 - Maintenance

Class III Roads shall be maintained sufficiently to minimize erosion for the life of the road.

Sec. 216.176 Roads: Class 111 - Restoration

This section sets forth the general requirements for the restoration of Class 111 Roads which must be fulfilled immediately after a Class HI Road is no longer needed for operations, reclamation, or monitoring.

Sec. 216.180 Other Transportation Facilities

This section sets forth the general requirements for the design, construction, and maintenance of other transportation facilities.

Sec. 216.181 Support Facilities and Utility Installations

This section sets forth the general requirements for the design and construction of support facilities and utility installations.

PART 217 Permanent Program Performance Standards - Underground Mining Activities

PART 218 Special Permanent Program Performance Standards - Concurrent Surface and Underground Mining

Sec. 218.1 . Scope

This Part sets forth the minimum performance standards with which each person who combines surface mining activities with underground mining activities must comply under a variance from the requirement that reclamation efforts proceed as contemporareously as practicable for specific areas within the permit area.

Sec. 218.4 Responsibilities

This section provides that the commission shall review and grant or deny requests for variances.

Sec. 218.15 Additional Performance Standards

This section sets forth additional performance standards to supplement the requirements of Parts 216 and 217.

PART 219 Special Permanent Program Performance Standards - Auger Mining

Sec. 219.1 This Part sets forth environmental protection performance standards in addition to those of Part 216 for surface mining activities involving auger mining.

Sec. 219.11 Auger Mining - Additional Performance Standards

Auger mining associated with surface mining activities shall be conducted to maximize recoverability of mineral reserves remaining after the mining activities are completed. Each person who conducts auger mining operations shall leave areas of undisturbed coal to provide access for removal of those reserves by future underground mining activities, unless the commission determines that the coal reserves have been depleted. Undisturbed areas of coal shall be left in unmined sections. This section also sets forth additional performance standards for auger mining.

PART 223 Special Permanent Program Performance Standards Operations on Prime Farmland

Sec. 223.11 Prime Farmland - Special Requirements

This section sets forth special requirements for surface coal mining and reclamation operations conducted on prime farmlands including permit application, soil removal, and revegetation.

Sec. 223.12 Prime Farmland - Soil Removal

This section sets forth the specific requirements for soil removal on prime farmland.

Sec. 223.13 Prime Farmland - Soil Stockpiling

if not utilized immediately, the A horizon or other suitable soil materials specified in Section 223.12(a)(1) and the B horizon or other suitable soil materials specified in Sections 223.12(a)(2) and 223.12(a)(3) shall be stored separately from each other and from spoil. These stockpiles shall be placed within the permit area.

Sec. 223.Ш Prime Farmland - Soil Replacement

This section sets forth requirements for soil replacement on prime farmland including minimum depth of soil and soil material to be reconstructed for prime farmland, as well as replacement of soil horizons, A horizon, and B horizon.

Sec. 223.15 Prime Farmland - Revegetation

This section sets forth revegetation requirements including soil replacement and use of the prime farmland for corps.'

PART 226 Special Permanent Program Performance Standards Operations on Steep Slopes

Sec. 226.1 Scope

This part sets forth special, additional environmental protection performance, reclamation, and design standards for surface coal mining and reclamation operations conducted on steep slopes meaning any slope of 20 degrees or more or as defined in Part I0I.

Sec. 226.II Applicability

This section provides that the standards of the Part do not apply to mining conducted on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area.

Sec. 226.12 Steep Slopes - Performance Standards

This section sets forth specific performance standards for surface coal mining and reclamation operations conducted on steep slopes.

Sec. 226.15 Steep Slopes - Limited Variances

This section provides for limited variances from the approximate original contour requirement where certain specified standards are met and a permit incorporating the variance is approved.

PART 227 Special Permanent Program Performance Standards - Coal Processing Plants and Support Facilities Not Located at or Near the Minesite or Not Within The Permit Area for a Mine

Sec. 227.1 Scope

This part sets forth requirements for coal processing plants and their support facilities not located within the permit area for a mine, to ensure the protection of public property and the environment, in accordance with the Act.

Sec. 227.12 Coal Processing Plants: Performance Standards

This section sets forth performance standards for coal processing plants including posting of signs and markers for the coal processing plant, construction of roads, transport, and other associated structures, sediment control structures, and permanent impoundments among other requirements.

PART 228 Special Permanent Program Performance Standards - In Site Processing

Sec. 228.1 Scope

This Part sets forth special environmental protection performance, reclamation and design standards for in site processing activities.

Sec. 228.II In Site Processing - Performance Standards

This section sets forth specific performance standards for in site processing including conducting activities to comply with Part 2I7 and to minimize disturbance to the prevailing hydrologic balance.

Sec 228.12 In Site Processing - Monitoring

Each person who conducts in site processing activities shall monitor the quality and quantity of surface and ground water and the subsurface flow and storage characteristics in a manner approved by the commission.

PART 240 Inspection and Enforcement

Sec. 240.1 Scope

This Part sets forth provisions for inspection and enforcement of surface coal mining and reclamation operations and of coal explorations which substantially disturb the natural land surface.

Sec. 240.II Inspections by the Commission

This section provides that the commission shall conduct an average of at least one partial inspection per month of each surface coal mining and reclamation operation under its jurisdiction. The commission shall also conduct at least one complete inspection per calendar quarter. The commission shall make periodic inspections of all coal exploration operations required to comply with the Act.

Sec. 240.12 Right of Entry

Within its jurisdiction, the commission shall have a right of entry without advance warning or search warrant upon presentation of appropriate credentials. The commission shall also have the right to inspect any monitoring equipment and have access to and copy any records required under the Act.

Sec. 240.14 Availability of Records

Copies of all records except as provided by Section 176.17 and 188.15 shall be made available to the public in the area of the mining.

Sec. 240.16 Citizen's Requests for State Inspections

This section provides that a citizen may request a state inspection by furnishing to a representative of the commission a signed, written statement or an oral report followed by a written statement, giving the representative reason to believe that a violation exists. The citizen shall be afforded the opportunity to participate in the inspection.

Sec. 240.17 Review of Adequacy and Completeness of Inspections

Any person who is or may be adversely affected by a surface coal mining and reclamation operation or coal exploration operation, may notify the executive director, in writing, of any alleged failure on the part of the commission to make adequate or periodic state inspections.

Sec. 240.18 Review of Decision Not to Inspect or Enforce

This section provides for any person who is or may be adversely affected by coal exploration or surface coal mining may ask the executive director to review informally a representative's decision not to inspect or take appropriate enforcement action with respect to any alleged violation. The executive director must conduct the review and inform the person of the results within 30 days of receipt of the request.

PART 243 Enforcement

Sec. 243.1 Scope

This Part sets forth general rules regarding enforcement by the commission of the Act, these regulations, and all conditions of permits and coal exploration approvals imposed under the Act or these regulations.

Sec, 243.II Cessation Orders

This section provides that upon a finding of any violation of the Act, an authorized representative of the commission shall immediately order a cessation of surface coal mining and reclamation operations. The cessation order shall be in writing and signed by the authorized representative setting out the nature of the violation, remedial action required, time for abatement, and reasonable description of the portion of the mining to which it applies.

Sec. 243.12 Notices of Violation

This section provides for notice of the cessation order to be in writing and signed by the authorized representative.

Sec. 243.13 Suspension or Revokation of Permits

This section provides that the administration shall issue an order to a permittee requiring him to show cause why his permit and right to mine under the Act should not be suspended or revoked if he determines that a pattern of violations exists, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with requirements. The pattern of violations may be determined based upon two or more inspections of the area within a 12-month period. If the permittee files an answer and requests a hearing, a public hearing shall be provided. Thirty days written notice shall be given.

Sec. 243.14 Service of Notices of Violations and Cessation Orders

This section sets forth the requirements for service of a notice of violation or cessation order served on the person to whom it is directed or his designated agent.

Sec. 243.15 Informal Public Hearing

This section provides that the cessation order shall expire within 30 days after it is served unless an informal public hearing has been held within that time.

Sec. 2M3,I6 Formal Review of Citations

This section provides that any person issued a notice of violation or cessation order may request review of that action by filing an application for review or request a hearing within 30 days after receiving notice of the action. Application for review will not operate as a stay of any notice or order.

Sec. 243.18 Inability to Comply

No cessation order or notice of violation issued under this Part may be vacated because of inability to comply.

Sec. 243.19 Injunctive Relief

This section provides that the commission may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other order, in the court of jurisdiction for the area in which coal exploration is located or in which the person to whom notice of violation was issued has his principal place of business. This section also sets forth the conditions that must be met before such action may be taken.

PART 245 Civil Penalties

Sec. 245.1 Scope

This Part covers the assessment of civil penalties under the Act with respect to cessation orders and notices of violation issued under Part 243 (enforcement).

Sec. 245.12 When Penalty Will Be Assessed

The commission shall assess a penalty for each cessation order. If the violation is assessed 31 points or more under the point system described in Section 245.13 , the commission shall assess a penalty for each notice of violation. If 30 points or less are assigned the commission may access a penalty.

Sec. 245.13 Point System for Penalties

This section sets forth the point system used to determine the amount of the penalty and whether a mandatory penalty should be assessed. Points shall be assigned in accordance with but not limited to history of previous violations, seriousness, negligence, and good faith in attempted to achieve compliance.

Sec. 245.14 Determination of Amount of Penalty

This section provides that the commission shall determine the amount of any civil penalty by converting the total number of points assigned to a dollar amount according to a specified schedule.

Sec. 245.15 Assessment of Separate Violations for Each Day

This section provides that the commission may access separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. The commission shall consider the factors listed in Section 245.13 in determing

whether to make such an assessment. A minimum penalty of $750 is provided for whenever a violation has not been abated within the period set unless review proceedings have been initiated.

Sec. 245.16 Waiver of Use of Formula to Determine Civil Penalty

This section gives the commission the power, upon its own initiative or upon written request received within 15 days of issuance of a notice of violation or a cessation order, may waiver the use of the formula contained in Section 245.13 to set the civil penalty, if it determines that taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust.

Sec. 245.17 Procedures for Assessment of Civil Penalties

This section provides that within 15 days of service of notice or order, the person to whom it was issued may submit written information about the violation to the commission and to the inspector who issued the notice of violation or cessation order. The commission shall consider this information in determing the facts surrounding the violation. The commission shall, within 30 days, serve a copy of the proposed assessment and the worksheet showing the computation to whom the notice or order was issued.

Sec. 245.18 Procedures for Assessment Conference

The commission shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued if the request is received within 15 days for the date of the proposed assessment is mailed. The conference shall be held within 60 days from date of issuance of the proposed assessment. Notice shall be posted of time and place of the conference.

Sec. 245.19 Request for Hearing

This section provides that the person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and the amount equal to the proposed penalty, or if a conference has been held, the reassessed or affirmed penalty, within 30 days from receipt of the assessment of 15 days from the date of service of the conference officer's action, whichever is later. All funds submitted shall be held in escrow pending completion of the administrative and judicial review process.

Sec. 245.20 Final Assessment and Payment of Penalty

This section sets forth that if the person to whom notice of violation or cessation order is issued fails to request a

hearing, the proposed assessment shall become a final order and the penalty assessed shall become due and payment upon expiration of time allowed to request a hearing. This section also provides that if any party requests judicial review of a final order, the penalty shall continue to be held in escrow until completion of the review.

TITLE TO RAILWAY ROADBED AFTER ABANDONMENT

INTRODUCTION

This memorandum deals with a subject that could have great significance in certain areas of Mississippi. Abandonment of rail lines has become more common as the railroads seek to eliminate marginal lines or to avoid the expenditure of substantial sums for upkeep or renovation. The question of title to the roadbed upon abandonment has become important because of the formation of regional railroad authorities to acquire and operate those abandoned rail lines which are so vitally important to local economies.

The financing of such operations is difficult in an economy which has seen the decline of the sales tax, the most important source of revenue to local governments. Increased millage is politically unpopular and probably would not be sufficient. Loans or grant from federal and state governments are also doubtful, and loans at least must be repaid. Bond financing is thus an important part of the overall package, but favorable rates depend greatly on the security available. An important source of security has always been the real property owned by a railroad. The question examined herein is what type of title does a railroad have to its roadbed. The answer has a significant effect on the security available for bonds, and thus an impact on the acquisition price of the rail roadbed.

FACTUAL BACKGROUND

The particular railroad line involved in this case is most of the portion of the Illinois Central Gulf's track which lies between Bemis, Tennessee, and Grenada, Mississippi. An abandonment petition covering this portion of ICG's line was filed with the Interstate Commerce Commission, but the abandonment

has been denied by the Administrative Law Judge hearing the case. This memorandum assumes that the ICC will eventually prevail and actually abandon this portion of the line.

The question of title becomes important because of ICG's offer to sell the roadbed to a regional railroad authority created in Marshall, Lafayette, Benton and Yalobusha counties in Mississippi. Based on the asking price, ICG's offer assumes that it has full title to its roadbed. If it does then its asking price is at least not preposterous, and the roadbed could be used as security for bonds. If it does not have full title to the roadbed, then its asking price is too high and a serious question is raised regarding the use of the roadbed as security. This could lead to disastrous financial consequences for the regional railroad authority and may even prevent the purchase of the roadbed. The latter situation and its attendant economic impact on the local economies would also be disastrous.

The legal question involved is the consequence of abandonment of the roadbed for railroad purposes. Simply stated, if ICG has full fee simple title, abandonment has no adverse effects on ownership. However, if ICG has only an easement to operate a railway over the roadbed, then abandonment of the roadbed would cause the extinguishment of the easement and full title would "revert" back to the owners of the roadbed. In the latter case, the effect of such a result on the use of the roadbed as security for bonds is obvious - the roadbed is not available as security. Of course, the authority could condemn the abandoned roadbed and insure that it gets fee simple title, but to pay ICG its asking price and then pay compensation to landowners in condemnation proceedings would place a heavy financial burden on the new enterprise. (A regional railroad authority can not condemn property of an existing railroad until abandonment is granted by the ICC. § 19-29-l7(f), MISS CODE ANN. 1972.)

The task then becomes one of determining the exact nature of ICG's title to the roadbed. This task involves researching several legal points, which are generally:

1. The legal capacity. of ICG to acquire a fee simple title to the roadbed.

2. The interpretation of instruments as conveying either a fee simple title or an easement.

3. The creation of a fee simple subject to a condition subsequent or to a possibility of a reverter.

4. The nature of the title acquired under adverse possession.

These issues raise certain factual questions that are vitally important to the resolution of the legal issue. These factual questions will be fully discussed under the applicable legal issue.

LEGAL CAPACITY

This question is vitally important in the first instance because of the corporate nature of ICG. Corporations are creatures of statute or charters and their legal capacity to own land is governed thereby. In this case the question does not seem to involve ICG's legal capacity to acquire fee simple title (hereinafter referred to as "a fee") to the roadbed. As the historical background below reveals, the question involves the legal capacity of the ICG's predecessor on the line - the Mississippi Central Railroad Company, chartered in 1852 by the Mississippi legislature. Laws of 1852 (Regular Session), Chapter 21.

Groundbreaking for the railroad took place on November 16, 1853, in Holly Springs. It would be January, I860, before the line was completed to Canton, and it was then operated as one line with the New Orleans, Jackson and Great Northern Railroad. After the Civil War, the line suffered through a period of financial difficulty, and was kept alive with considerable financial backing by Illinois Central. The panic of 1873 led to further problems for

both the IC and its southern connection to New Orleans. The relationship gradually worsened until the IC decided to place the Southern lines into receivership. They were later sold with the IC purchasing both at auction, buying the Mississippi Central in Jackson, Mississippi, on August 23, 1877. Shortly thereafter, the two southern lines were consolidated by the IC into the Chicago, St. Louis and New Orleans railroad. The IC in 1882 negotiated a 400-year lease of this road. Stover, History of the Illinois Central Railroad (1975) , 144-171.

Assuming that the roadbed which was acquired by the Mississippi Central was later acquired in the 1877 foreclosure, ICG's title is the same as Mississippi Central's. If Mississippi Central could not obtain a fee to the roadbed, then the ICG does not have a fee but an easement. See, Mississippi Cent. R. Co. v. Ratliff, Miss.,59 So. 2D 311 (1952) at 313.

The charter of the Mississippi Central do not unequivocably prohibit it from obtaining a fee to its roadbed, but also did not, as many railroad charters did, unequivocably give it the right to obtain a fee to roadbed. The applicable charter provisions are as follows:

CHAPTER 21

AN ACT to incorporate the Mississippi Central Rail Road Company.

> SECTION 1. . . . they are hereby created a body corporate, by the name and style of the Mississippi Central Rail Road Company, and as such, shall have perpetual succession, and by that name and style, shall be, and are hereby made capable in law to have, purchase, receive and enjoy real and personal estate, and retain to them, their successors and assigns, all such lands, tenements and hereditaments, as shall be requisite for their accommodation and convenience in the transaction of their business, and such as may in good faith be conveyed to them by way of security, or in satisfaction of debts, or by donation or purchase, and the same to sell, grant, rent or otherwise dispose of; . . .

SEC. 8. BE IT FURTHER ENACTED, That said coporation be and they are herby authorized to cause such examination and surveys to be made on the ground before indicated, as shall be necessary to determine the most eligible route, on which to construct said road, and it shall be lawful for said corporation, by its members, officers, or agents, to enter upon and take possession of all such lands, timbers, stone, gravel, earth or other materials, as may be necessary for the construction or repair of said Railroad, and the requisite erections; and the president and directors of said company may agree with the owner of said land, timber, earth, gravel, stone, or other material, or any article whatever, which may be wanted in the construction, or repair of said road, or any of its works for the purchase or occupation of the same; and in case of disagreement with the owner as to price of the land required for said road, or any of the materials for the same, or if the owners are under any disability in law to contract, or are out of the county where such lands or materials are, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant under his hand and seal, to the Sheriff of such county requiring him to summon a jury of twelve disinterested freeholders of the county to appear at or near the land or materials or property to be valued, on a day named in said warrant, not less than five not more than ten days after issuing the same; and if any one of the persons summoned do not attend, the said Sheriff shall immediately summon as many as may be necessary to furnish a panal of twelve jurors, who shall act as a jury of inquest of damages, having an oath or affirmation administered first to each by said Sheriff or justice of the peace, justly and impartially to value the damages which the owner or owners will sustain by the use or occupation of the land, materials or property required by said company; and the jury in estimating the damages, if for the ground occupied by said road shall take into the estimate the benefit resulting to such owner or owners by reason of said road passing through or upon said land, towards the extinguishment of such claim for damages; and the jury shall reduce their inquisition to writing and shall sign and seal the same; and such valuation when paid or tendered to the owner or owners of such property, his, or her or their legal representatives, if found in the county or thereafter paid on demand of any person legally authorized to receive the same shall entitle said company to the land, the estate and interest thus valued as fully as if it had been conveyed by the owner or owners of the same, for such term of time as said company shall occupy the same as a Railroad .... [Emphasis Added]

This writer has examined the cases in which the Mississippi Central RR has been involved over the years and found no construction of these provisions. In fact, the only case in which it was discussed involved the capacity of another railroad to acquire a fee to its roadbed. In Whelan v. Johnston, 192 Miss. 673, 6 So. 2d (300 (1942), the Court was faced with an argument that a reference to the condemnation provision of Mississippi Central's charter (Section 8, above) prevented the Yazoo and Mississippi Valley Railroad Company (chartered in 1882) from being able to condemn a fee to its roadbed. The charter of the Y. 8 Miss. V.R.Co. specifically stated that "... upon such condemnation being had, the title in fee to such lands or materials shall vest in the said company, its successors and assigns." 6 So. 2d at 301. The Court held that the reference to the Mississippi Central Charter was to incorporate the procedural provisions thereof, assuming for the sake of argument that the Mississippi Central Charter would only allow it to take an easement but specifically withholding decision on that question. 6 So. 2d at 303.

However, the language of the Mississippi Central charter provision relating to condemnation of land (Section 8, above) seems to be more restrictive than other provisions in the charter in that it states that condemnation "shall entitle said company to the land, the estate and interest thus valued as fully as if it had been conveyed by the owner or owners of the same, for such term of time as said company shall occupy the same as a railroad; . . . ." [Emphasis added.] Although the other provisions may seem clear to authorize the purchase of a fee, it seems equally as clear that condemnation results only in an easement or a fee subject to a reverter.

Assuming that there are probably few instances in which the Mississippi Central actually condemned property, this still poses a serious probelm to the

acquisition of full and complete title to ICG roadbed. As with roadbed that was deeded to Mississippi Central, an uncertainty exists about the actual state of title. The problem is not that the instrument of conveyance must be examined, but that there is no interpretation of the applicable charter provision.

According to the abandonment petition filed by the ICC much of the property outside the existing municipalities was occupied and title asserted by adverse possession. There may be few instances in which title was obtained by condenmation, but those instances may be the most important since they more likely involve property inside present municipal boundaries which brings considerably higher prices. (This writer is personally aware of two such condemnation suits within Oxford's municipal boundaries.)

FEE OR EASEMENT

A question that has resulted in much litigation in Mississippi is whether the language of a particular instrument conveys a fee or an easement. In the instant factual situation this is much more of a theoretical than practical problem because the legal principles involved would require an examination of the language of every conveyance to the roadbed. The practical problem is the immense effort required in finding the original conveyances.

There are several basic principles which can be gleaned from the cases which consider the question:

1. When an instrument speaks in terms of a right, it conveys an easement; when it conveys land the title is a fee.

2. The conveying and granting clauses of a deed prevail over a subsequent portion tending to qualify or reduce the estate theretofore conveyed.

3. The parties' intent can be determined by the practical construction given it by the parties. This rule is applied when language is ambiguous and should be given much weight in determining its meaning.

4. If an instrument is ambiguous and two constructions are possible, it should be construed to convey a fee.

Because of some inconsistency in the various holdings, the cases will be discussed in chronological order. Inconsistency will be noted as it occurs.

One of the first cases on this question was Mobile, J. & K.C.R.Co. v. Kamper, 88 Miss. 817, 41 So. 513 (1906). This case is brief but illustrative of two important points. The deed was in the form of a general warranty deed, that is, a conveyance of a fee, and contained the following language: "It is distinctly understood that the above-mentioned lots and rights of way are donated for railroad purposes only." 41 So. at 514. It is not clear what the exact language of the entire deed was, but the Court did not consider the above language as contradicting the granting clause, probably because the railroad company filed a demurrer which admitted the complainant's allegations. Thus the Court construed the donation as one for railroad purposes and held that a fee was not conveyed. The demurrer also admitted the complainant's allegation that a portion of the land had been abandoned, and therefore he could recover that portion of the land. 41 So. at 51.

In Williams v. Patterson, 198 Miss. 120, 21 So. 2d 477 (1945), the deeds under which the railroad's successor in title claimed the land contained language in the habendum clause specifying that the grant was for the purpose of "building, constructing and operating a line of railroad on the right of way . . . ." 21 So. 2d at 478-79. The Court held that the deeds conveyed an easement, and that this is what the railroad's successor in title acquired. Since his complaint alleged that the property involved was "abandoned right of way", the easement was extinguished.

The appellant also claimed title by adverse possession, but the court held that an easement:

> is consistent with, rather than hostile to, the title of another to the fee, and possession attributable to the easement will not be regarded as adverse to the fee title

> of another unless and until there is notice of a hostile claim to the fee .... No adverse user can arise from a use permissive in its inception (as is the case at bar), until a distinct and positive assertion of a right hostile to the owner has been brought home to him. 21 So. 2d at 480. "

The Court held that abandonment of an easement could occur without a deed or other writing and that abandonment required two elements: "a cessation of the use, coupled with any act indicative of an intention to abandon the right . . . ." 21 So. 2d at 480. Since intent to abandon was not indicated until the railroad sold its rights to appellant, the requisite period of adverse possession had not passed.

New Orleans & Northwestern R. R. v. Morrison, 203 Miss. 791, 35 So. 2d 68 (1948), presents a complicated factual situation because of the nature of the claims involved, but illustrates the inconsistency of the Court in its bases for deciding these types of cases. Mrs. Taylor conveyed to the railroad "a right of way for 200 feet, through the following lands, . . . reserving the privilege of using any timber on said land and cultivating any of the same not used in the construction and operating [sic] said road." 35 So. 2d at 69. In the description (habendum clause), Mrs. Taylor covenanted "to warrant and defend the title of said company to said lands . . . . " 35 So. 2d at 69.

The railroad contended that it got a fee and therefore owned the minerals under its roadbed. It argued that the contemplated use for railroad purposes was only an incident to its acquisition of a fee. The Court, however, held that the deed conveyed only a right, that there was no certain identification of land that a fee conveyance would require and that only a "floating" easement or right of way was conveyed. It then proceeds to give several other reasons for its holding which contradict, to some extent, later holdings. (However, the Court was essentially correct in stating that these rules do not apply in the case because there is no ambiguity in the instrument.)

First, the Court holds that the reservations of timbering and cultivation were consistent with the grant of an easement rather than a fee. The covenant to warrant and defend the title was a guaranty but not a grant. The Court also held that "where an easement will satisfy the purpose of the grant a fee will not be included in the grant unless expressly provided." 35 So. 2d at 70. The Court also considered the fact that the railroad had paid taxes on the 200 foot strip for years, but held that such fact was irrelevant because the instrument was not ambiguous. 37 So. 2d at 70.

An interesting point concludes the case. There were numerous parties claiming the title to the minerals under the roadbed who claimed under deeds which had described the property therein conveyed as being bounded on either side by the railroad right-of-way. The Court held that "such conveyances carry title in fee to the center line of the easement as to subsurface minerals and reversionary rights to the surface. 35 So. 2d at 71. (Emphasis added.)

Jones v. New Orleans & Northeastern R. Co., 214 Miss. 804, 59 So. 2d 541 (1952), is a case almost identical to Morrison. The parties involved were the heirs of the railroad's grantor and persons claiming the abutting property by adverse possession. The adverse possessors claimed title up to the center line of the railroad easement. The heirs countered by stating that the instruments conveyed a fee rather than an easement. There were three instruments, containing four conveying or granting clauses. Two were nearly identical and stated basically that the grantors did "hereby grant, bargain, sell and quitclaim unto the said . . . [railroad], a right of way for two hundred feet, through the following lands, to-wit: . . ." 59 So. 2d at 542, 543. These were held to convey easements.

The remaining two were substantially identical also: "we sell and warrant to said . . . [railroad] the land described as follows: . . ." 59 So.

2d at 543. These two conveyances, in the habendum clause, also contained virtually identical language as follows: "... to have and to hold for depot sidings switches [sic] and other railroad purposes." 59 So. 2d at 543. The Court held that this language

> can not limit the effect of the granting clause, if it is considered as repugnant to the granting clause. We think that this recitation is simply descriptive of the use to which the land will be put, and does not limit or restrict the estate conveyed. 59 So. 2D at 543.

The Court thus held that the landowners who held title by adverse possession to the land abutting the railroad's easement also held title to the minerals to the center line of the easement. 59 So. 2d at 545.

The Court cited as authority for its holding that the limiting language in the habendum clause must yield to the granting clause the case of Mississippi Cent. R. Co. v. Ratcliff, 214 Miss. 674, 59 So. 2d 311 (1952), decided the same day as Jones. (It should be noted that Mississippi Central had acquired title to the land in question through the Natchez & Eastern Railway Company, and that no question of the legal capacity of Mississippi Central to take a fee simple title was raised.) The limiting language involved in the Ratcliff conveyances was not as clear as that found in the Jones case, and followed a metes and bounds description of each of the seven tracts involved: "the above described tract or right of way containing . . . acres, more or less." 59 So. 2d at 312-313.

The Court first cited a statute of general application to conveyances, § 2764 MISS. CODE of 1906 (§ 89-1-5 MISS. CODE ANN. 1972)

> Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby. 59 So. 2D at 314.

The Court next cited 74 C.J.S. Railroads § 84, pp. 474-75:

> A grant or conveyance to a railroad company which has power to acquire by purchase such real estate as may be necessary for the construction and operation of its road, and to take a fee-simple title thereto, will be held to convey a fee simple title in the land and not a mere easement where such appears to be the intention of the parties as gathered from the entire instrument, particularly where the conveyance is in the usual form of a general warranty deed, or quitclaim deed, without any words of limitation or restriction and without purporting to convey merely a right of way; or where the only reservation made is the use of the granted premises by the grantor for ingress and egress to and from adjoining lands. This rule is particularly applicable under a statutory provision that every estate in land conveyed shall be deemed an estate in fee simple unless limited by express words. 59 So. 2d at 314.

The Court noted that it was not impressed by the argument that "tract" was meant to be synonomous with "right of way", but, if significance was attached to the words, "the granting clause controls." 59 So. 2d at 314. Thus the instruments were held to convey a fee. (The Court was evidently not concerned with the portion of the above C.J.S. cite that speaks of "words of limitation or restriction.")

The Court made an observation as an alternative ground for its holding which seems to directly contradict language in Morrison, supra, to the effect that "... where an easement will satisfy the purpose of the grant a fee will not be included in the grant unless expressly provided." 35 So. 2d at 70. In Ratcliff, citing 26 C.J.S. Deeds § 109, p. 399, the Court stated that while the modern trend was to ascertain the intention of the parties to determine whether an instrument conveys a fee or easement, "if the language of the deed is ambiguous and uncertain as to the estate intended to be conveyed, it will be construed to pass a fee rather than a less estate." 59 So. 2D at 315.

In both cases, the instruments were not considered "ambiguous and uncertain: , but the fact that different rules were advanced in cases barely four years apart is indicative of the uncertainty title certifiers may feel in this area. The Ratcliff decision makes passing reference to certain facts

which might control if an instrument is ambiguous and uncertain. 35 So. 2d at 70. In such situations, the title examiner is faced with a search and analysis of facts outside the record title and then with the unpleasant task of "certifying" a title if there is such an attorney brave (or foolish) enough to do so. Even in cases where the instrument is unambiguous and certain, the task of examining each instrument carefully and applying the case law to it is almost as frightening as well as immensely time-consuming.

The question of title to minerals under a railroad right of way was again raised in Texas Company v. Newton Naval Stores Company, 223 Miss. 468, 78 So. 2d 751 (1955). However, this case involved the exception of an easement from an oil and gas lease. The problem arose because the railroad, some years before the execution of the lease, had obtained permission to abandon the line from the Interstate Commerce Commission and had subsequently taken up the tracks. The Court stated that the easement was "dead", and that the grantor had become "the fee owner of the surface of the right of way." 78 So. 2d at 753. Thus, be excepting the easement of the railroad, the grantor meant to exclude it from the lease.

The interesting point of this case is that it illustrates both the elements of abandonment of a railroad easement and the effect of such abandonment on the railroad's title to an easement. The two elements are: (1) intent to abandon (obtaining ICC approval); and (2) physical acts that "consummate the abandonment" (taking up the tracks). 78 So. 2d at 752-53. The effect of abandonment was that "full title had become vested in the [grantor]." 78 So. 2d at 751.

Alabama 8 Vickburg Railway Co. v. Mashburn, 235 Miss. 346, 109 So. 2d 533 (1959) is a peculiar case since a deed with no description - only a reference to a survey - was held to convey a fee. The Court's basic arguments were that the deed conveyed "land" not a "right", albeit not

described, and that the tracks had been in place for well over one hundred years. The deed did not contain the survey, and the actual survey could not be found. The deed did say "all that portion of our tract of land . . . which is or may be necessary or useful to the said company in the construction, use and preservation of the railroad from Vicksburg to Jackson, the route whereof, according to the located survey . . . , runs through my said land." 109 So. 2D at 534.

Reliance on Morrison was held to be ill-founded, although the situation was much the same insofar as the description of the location of the roadbed was described only as over and across certain lands. The reservations as to timber cutting and cultivation in the Morrison conveyance were found to be the turning point although the Court therein also stated: "No particular strip was identified with that certainty which a conveyance of the fee would require." 35 So. 2d at 70. The Court reiterated that "[g]enerally when a right is conveyed it is an easement; when land is conveyed grantee is vested with a fee simple." 109 So. 2d at 536. This seems to be more in line with past cases and lends some significance to Mashburn as a continuation in a line of cases that can be used to interpret individual instruments. This point and not the length of use in time seems to be a criterion which can be reliably used to determine whether a fee was intended to be conveyed or some lesser estate. This allows the title examiner to look at the instrument without the necessity of analysis of extrinsic facts, which the Mashburn Court seems to take into consideration. See, comments at 109 So. 2d at 534, 535 and 536-37.

The last and latest case which considers the question of fee or easement is Dossett v. New Orleans Great Northern Railroad Co., 295 So. 2d 771 (Miss. 1974). The Court considered the deed in this case ambiguous because it referred in the granting clause to "a strip of land for a right of way" (to be selected by a survey although a plat was attached to the deed), but also

If the parties' actions yield two possible constructions, then the one more favorable to the grantee is adopted. 295 So. 2d at 775.

This series of cases, while inconsistent in reasoning in several instances, seems to provide a stable set of rules for the construction of conveyances to railroads. However, these rules, set out at the beginning of this section, provide little comfort to a title examiner who is asked to certify a title. Any attorney with any sense of caution will note the problems inherent in the language that is bound to appear in many instruments. There will not be much security to bond holders in such a situation and therefore little to justify a large expenditure by a regional railroad authority. Again, it should be stressed that either of two choices are available to insure that complete fee simple title is acquired: (1) examination of each instrument or (2) condemnation of every foot of roadbed. The former may still reveal title problems that can only be resolved by court proceedings. Both choices involve the expenditure of huge amounts of time and money.

Another possible construction of a conveyance to a railroad has appeared in two cases, Columbus & Greenville Ry. v. City of Greenwood, 390 So. 2d 588 (Miss. 1980); Hathorn v. Illinois Central Gulf R. Co., 374 So. 2d 813 (Miss. 1979).

The factual situations in both cases are unimportant to the present discussion, but the legal conclusion of the Court is. The instruments in the cases provided that title to the land conveyed would revert to the grantors (Hathorn) or the heirs of the grantors (C & G Ry. Co.). In the former, the Court held that a reversionary interest, not a personal right, was created, and it thus passed to the heirs of the grantor. 374 So. 2d at 816.

Thus in both cases a reversionary interest was created that would cause full fee title to revert to the successors of the original grantors upon abandonment of the railroad. This serves only to create more confusion as to

refers, in a subsequent clause to "said right of way." 295 So. 2d at 775.

TheCourt held that extrinsic facts must be looked at to determine the parties' intentions, i.e., the practical construction placed on the instrument by the parties. The process is outlined as follows:

> (I) [T]he deed must be read in the lightof the circumstances surrounding the parties when it was executed; (2) that the construction should be upon the entire instrument, and each word and clause therein should be reconciled and given a meaning, if that can be reasonably done; (3) that the main document and that to which it refers must be construed together; (4) that if the wording of the deed is ambiguous, the practical construction placed thereon by the parties will have much weight in determining the meaning; and (5) that in case the deed is ambiguous, and subject to two possible constructions, one more favorable to the grantee, and the other more favorable to the grantor, that construction favorable to the grantee will be adopted. [Citing Richardson v. Moore, 198 Miss. 771, 750, 22 So. 2d 494, 495 (1945).] 295 So. 2d at 772.

The facts considered by the Court to determine the parties' meaning under practical construction illustrate the problem a title examiner would have in an individual situation, much less the nightmare involved in the case of a multitude of instruments:

> (1) The appellee railroad has paid taxes on the property at least since 1955.
>
> (2) Exception in the tax assessment of the strip of land from appellants' taxes.
>
> (3) The strip of land was expressly left out of a deed of trust from M.D. Dossett and husband to the Federal Land Bank, June 16, 1924.
>
> (4) A similar deed of trust dated July I, 1924, excepted the right-of-way of the N.O.G.N. RR Co.
>
> (5) An oil and gas lease from Mrs. Mabel Dossett, et al, to Joseph Moore, excepted the N.O.G.N. RR right-of-way on May 1, 1941.
>
> (6) Five recorded contracts between Western Union Telegraph Company and the railroad permitted the telegraph the right to use the right-of-way. 29 So. 2D at 775.

construction of instruments and further complicates the job of the title examiner.

ADVERSE POSSESSION

In the instant case, the question of the type of title a railroad obtains by adverse possession is of paramount concern. It can be estimated with some accuracy that title to almost ninety per cent of the roadbed presently used by ICG is asserted by adverse possession. Two factors complicate a determination of whether such title would be a fee or an easement. First, this writer has been unable to find any authority in which the question of whether a railroad can acquire a fee by adverse possession has been positively settled. Second, the normal principles of adverse possession require an examination of factual evidence in each specific case of adverse possession, which is a worse problem than examining record title to a piece of property. Adverse possession cases usually end up in court and the burden of proof is on the person claiming by adverse possession. In the instant case, the problem of determining the chances of proving adverse possession is further complicated by the lack of a decision on the legal capacity of a railroad to acquire a fee by such means.

There is, in fact, authority for the opposite result, i.e., that the title a railroad acquires to roadbed through adverse possession is merely an easement. See, Anno., 127 A.L.R. 517 and supplemental citations. However, a brief examination of the cases cited therein reveals that most turn not upon a question of legal capacity alone, but upon a consideration of the basic principles of adverse possession. This requires an examination of these principles as applied under Mississippi Law to a particular factual situation.

The basic theory of adverse possession is that a person who occupies property of another for a certain length of time is vested with full and

complete title to that property. This principle is codified in Mississippi, in § 15-1-13 MISS. CODE ANN. 1972, the general adverse possession statute. Although there are various nuances in this area of the law, the basic principles can be summarized as follows:

1. Possession must be under a claim of right. This means, in effect, that the person claims ownership and nothing more. "Color of title" is not required, although this may affect the amount of property a person can gain by claiming adverse possession. See, Page v. O'Neal, 207 Miss. 350, 42 So. 2d 391 (1949).

2. Possession must be uninterrupted for the statutory period and be:
   a. open,
   b. notorious,
   c. adverse,
   d. exclusive,
   e. actual, and
   f. hostile.

   See, McCaughn v. Young, 85 Miss. 277, 37 So. 839 (1905).

The rational for what seems to laymen to be a preposterous legal theory is that land should be put to use, and one who abandons land for a long period of time to the use and occupation of another should not be in a position to complain. It is a principle that arose because of absentee ownership of large tracts of land. The principles set out above are designed to insure that a person claiming title by adverse possession is put to high standards of proof and to protect against harsh results.

Thus, possession must be actual, not constructive; it must be open and notorious, not secretive; it must be adverse and hostile, not permissive or in a fiduciary capacity; and it must be exclusive, not mutual.

The key words in the instant situation are adverse, hostile and exclusive. It is a well settled rule that possession which is permissive in its inception does not rise to adverse possession until some event occurs which is sufficient to put the true owner on notice of the hostile claim. This gives rise to the requirement of open and notorious possession. See, Williams v. Patterson, supra, and New Orleans 8 Northwestern R.R. v. Morrison, supra.

In the instant ease, where no instruments are recorded, the presumption is

that the then owner of the property gave permission to the Mississippi Central to lay its tracks across his property. The permissive character of such possession would continue until the railroad had taken some action that would serve to put the owner on notice that it was claiming any sort of title to the property.

This applies whether or not the type of title in question is a fee or an easement. An easement can be obtained by prescription just as a fee can be obtained by adverse possession. Still the use of land for easement purposes cannot be permissive and ripen into an easement by prescription. See, Person v. Roane, 218 Miss. 621, 67 So. 2d 534 (1953).

The question then becomes one of exclusivity. If one assumes that the railroad has adversely possessed the land on which its tracks lie, the question is whether their possession is exclusive to all rights of the owner. The situation is somewhat akin to the cases in which an easement for ingress and egress is obtained by prescription. See, Lindsey v. Shaw, 210 Miss. 333, 49 So. 2d 580 (1951). However, a railroad roadbed is a permanent structure and is continually present. The railroad usually maintains the right of way on either side by clearing brush and may even build fences. The Mississippi Supreme Court has noted that a railroad's occupation of an easement is "practically exclusive" and that another could gain title by adverse possession only by actual enclosure or possession of it. Wilmot v. Yazoo 8 M. Va. R. Co., 76 Miss. 374, 24 So. 701 (1899). In Paxton v. Yaxoo 8 M. V. R. Co., 76 Miss. 536, 24 So. 536 (1899), the Court, in a similar case, stated that "[t]he easement granted to the railroad company, until lost by adverse possession, gave it a right to the exclusive possession of the whole right of way whenever it desired such possession." 24 So. at 537.

The possession of a railroad of its roadbed, assuming such possession is adverse, is exclusive enough to yield a fee simple title in ordinary

circumstances. However, it would seem that such possession is consistent with use as an easement, without anything more than normal operation of the right-of-way. To assert title by adverse possession to more than an easement, the railroad would have to put the owner on notice - actual notice - that it is claiming more than an easement.

Two cases which intimate that a railroad usually acquires only an easement in its roadbed by use thereof are Williams v. Patterson, supra, and New Orleans 8 Northwestern R.R. v. Morrison, supra. The issue in those cases, however, was whether the exclusive use of the roadbed ripened the railroads' original title of an easement into a full fee. The Morrison Court upheld the exclusion of a deposition of a railroad official, saying

> We find no error in the exclusion of the deposition of Jones. Its only relevancy was upon the issues of contemporaneous construction and adverse possession. Yet it purported to sustain these issues only by disclosure of the appellant's legal conclusions and assumptions and its "exclusive possession of the land". There was never any defiance of appellees[1] title. The exclusive use of the surface was consistent with its mere right of way and its permissive user is inconsistent with the acquisition of prescriptive rights. 35 So. 2d at 71.

The Williams Court answered the same argument by stating that an easement:

> is consistent with, rather than hostile to, the title of another to the fee, and possession attributable to the easement will not be regarded as adverse to the fee title of another unless and until there is notice of a hostile claim to the fee .... No adverse user can arise from a use permissive in its inception (as is the case at bar), until a distinct and positive assertion of a right hostile to the owner has been brought home to him. 21 So. 2d at 480.

In the present situation, it would seem that the ICG would have to show more than use of its roadbed for ordinary railroad purposes to gain a fee by adverse possession. Such a showing would involve such things as conveying mineral interests in the property, paying ad valorem taxes on the property and similar acts, all to the actual knowledge of the owner. A determination

of whether or not ICG could make such a showing rests upon an extensive examination of the record title and certain extrinsic facts. Findings tending to support such a showing would then be subject to legal interpretation by an examiner unenlightened by legal precedent.

CONCLUSION

The basic problem in the situation under discussion is that there are too many unknowns which either can not be finally resolved or which can be resolved only after exhaustive and expensive title examinations. Even in the latter case, a final resolution will likely be impossible in many cases. The problem is that ICG is not willing to warrant full and complete title to its roadbed. Without such a warranty, the property can not be adequate security for bondholders, and bonds can not be sold to finance the purchase. ICG should either reduce its price so that the amount of the bond issue can be sufficiently secured by other property or it should provide a warranty that can serve as a basis for title insurance, which would then serve as security for the bond issue.

30 CFR 700

General

700.5 - Definitions

700.5 Definitions

1-186	- permittee -	includes person who through ignorance or dishonesty fails to obtain a permit before engaging in state regulated activities.
1-259	—permittee —	includes person who fails to obtain a state permit.
3-128	—permittee —	OSM's prima facie showing of who is a permittee is rebuttable.
3-350	—permittee —	person named in state permit for SCMO is permittee w/respect to that operation and proper person to issue NOV's to.
1-2-2	—SCMO —	definition is ambiguous and should be construed in favor of the entity seeking relief.
3-182	- SCMO -	definition includes operations to extract coal from coal refuse piles.
1-259	— SCMO —	excavation to obtain coal is governed by the act even if incidental to a postmining land use plan.
1-279	— SCMO —	OSM has no jurisdiction where excavation to build homesite exposes coal, but none is removed.
2-96	— SCMO -	coal processing facility "in connection with" surface coal mine.
2-189		
2-406	- SCMO -	coal processing facility "in connection with" surface coal mine.
2-165	— SCMO —	preparation plant 1 mile from mine "in connection with" the mine.
3-260	— SCMO —	coal processing facility w/in 8 and 11 miles of mine is not "at or near" mine.
3-322	— SCMO -	processing plant 22 miles from minesite is not "at or near" mine.
2-215	— SCMO —	coal loading facility is "in connection with".
2-284	— SCMO —	tipple located 200-300 feet from minesite is a SCMO.
2-325	- SCMO -	tipple operated "in connection with" SCMO.

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ALJ DECISIONS

700.5 Definitions

79-121 - What is an operator?
81-665 - Operator cannot be established by hearsay and assumptions.
81-676
80-676 - Is operation a surface coal mining operation? (SCMO)
80-482
80-629
79-143 - SCMO - Is a tipple operation covered by the act?
79-481
80-153
80-181
80-541
80-604
80-730
80-752
81-593
81-737
80-309 - SCMO - Is the operation "at or near the mine site"?
79-479 - Is the coal loading operation "at or near the mine site"?
81-737
80-49 - SCMO - Does OSM have jurisdiction over "the transfer point" between two mines?

700.11 Applicability

IBSMA Decisions

700.11 Applicability
(b) 2-359 - 2 acre exemption.

(d) . 3-92 - extraction of coal necessary to enable the construction of any governmently financed highway.

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ALJ DECISIONS

700.11 Applicability

(a) 80-576 - Extraction of coal for non-commercial use

(b) 80-315 - Is operationless than two acres?
80-384
80-573
80-604
80-722
81-306
81-311 - Does 2 acres of owner's property provide OSM jurisdiction, if coal is commercially sole?

81-446 - 30 CFR Chapter 7 does not apply to operations of 2 acres or less.

81-432

81-503

80-743 - Is it permissible to aggregate several tracts of disturbed land which are each less than 2 acres in order to include the entire disturbed area under the Act.

81-352

(d) 81-650 - Act is applicable to SCMO where mining is incidental to road construction, where construction is not in accordance with 30 CFR 707.5.

30 CFR 701

Permanent Regulatory Program

701 - Scope

IBSMA Decisions
None

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ALJ Decisions

701 Scope

81-713 - 2 acre exemption depends upon the actual physical use land is put to.
81-725 - deeding road to county is ineffective to make SCMO less than 2 acres.
81-727 - small mines of less than 2 acres each located w/in same general vicinity will exceed the 2 acre exemption.
81-700
81-750
81-754
81-593 - SCMO is more than 2 acres when all minesites must deliver to same contractor.

701.11 Applicability

IBSMA Decisions

701.11 Applicability

3-124 - proof of intention to mine coal is sufficient to establish OSM authority to regulate.

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ALJ Decisions

701.11 Applicability
(e) 81-609 - tipple located 25 miles from minesite is not "at or near" a surface mine, and thus it is not necessary for owner to obtain waivers from residents w/in 300 feet of tipple.

701.13 -

IBSMA Decisions
None

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ALJ Decisions

701.13

81-628 - mines of less than 2 acres located w/in 14 miles of tipple are w/in one "location".
81-721 - Act applies to any operator who removes 250 tons of coal w/in 12 consecutive months in any one location, even though each mine pit is less than 2 acres.

701.19 -

IBSMA Decisions
None

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AL J Decisions

701.19

81-628 - Owner of mine, if he has related businesses stemming from mining, is subject to the Act even though he does not actually run the mine.

30 CFR 707

Exemption for SCMO Incident to Construction of Highways

707.5 -

IBSMA Decisions

707.5

3-301 - definition of government - financed projects, applying to 30 CFR 700.11 (d).

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ALJ Decisions
None

30 CFR 710

Initial Regulatory Program

710.4 - Responsibility

IBSMA Decisions

710.4 Responsibility

3-118 - OSM has independent responsibility to review states initial determination on valid existing rights to property.
(b) 3-338 - state must issue permits which comply w/Federal regulations.

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AU Decisions
None

710.5 Definitions

710.5 Definitions

1-229 - valley fill and head-of-hollow fill- discussion of definition.
2-173
3-111 - definition of types of roads Act applies to.

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ALJ Decisions

710.5 Definitions

78-92 - downslope and highwall - redefinition of.
70-492 - downslope - interpretation of definition.
81-639
80-337 - roads - exemption of roads maintained with public funds.
81-13
80-462
80-553

81-2.76
81-579 - roads - haul road can be under jurisdiction of permittee w/out being used exclusively for mining purposes.
81-603 - where county maintains road as public only so long as it is used for mining road is not exempt as a public road.
81-683 - haul road is part of the area mined for purpose of coverage by the Act. Occasional public use does not make it a public road.

710.11 Applicability

IBSMA Decisions

710.11 Applicability

3-301 - cessation order for abatement of mining operations and revegetation is inappropriate for NOV for failure to obtain permit.
(a)(2) 3-200 - conducting mining operations off permitted area.
(ii) 3-207 - definition of imminent danger to public health and safety.
(a)(3) 3-338 - permittee must comply w/Federal regulations.

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ALJ Decisions

710.11 Applicability

(a)(2) 79-505 - mining outside permit area without approval from regulatory authority.
80-591
81-24
80-499 - no state permit
80-616 - operating without permit
81-449 .
(a)(2)
(i) 81-546 - insufficient grounds for not ceasing operations off permit area, after issuance of cessation order.
(ii) 81-1 - imminent danger to public health & safety
(a)(2) 80-181 - discharge of extremely turbid water
(iii) 79-194 - excessive sedimentation in stream
(a)(3) 80-499 - permittees compliance with requirements of initial regulatory program.
80-363 - lands affected by the initial regulatory program.

30 CFR 715

General Performance Standards

715.11 - General Obligations

IBSMA Decisions

715.11 General Obligations

(b) 2-209 - authorization to operate must be kept "at or near" minesite

715.12 Signs and Markers

(b) 2-23 - failure to maintain mine and permit signs
2-26 - no mine identification sign
3-292 - where mine identification sign is located on one side of highway and is clearly visible from other side. Board is unwilling to say that is insufficient to comply w/30 CFR 715.12(i).

(c) 1-293 - no definition of "permit area" in act therefore an interpretation consistent with the purpose of the Act will be upheld.

(e) 2-26 - no blasting sign

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ALJ Decisions

715.11 General Obligations

(b) 79-318 - failure to maintain all necessary papers for inspection "at or near" mine site
80-120
81-376
81-379
81-532
81-583
79-335 - necessary papers misfiled and lost

(c) 78-23 - failure to submit mine maps
78-77

715.12 Signs and Markers

IBSMA Decisions
None

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ALJ Decisone

715.12 Signs and Markers

78-1 - failure to post signs and markers
80-20
(b) 80-9 - failure to re-erect signs after Inspector forced removal
80-98 - failure to have mine identification signs
80-181
80-492 (at all access points)
80-536 (at all points of access from public road)
81-10
81-149 - sign must be posted on all roads, if any part of SCMO is covered by state regulations
(c) 78-69 - failure to post perimeter markers
78-77
79-10
79-212
79-318
79-369
79-376
79-407
80-59
80-115
80-337
80-378
80-591
81-75
81-442
81-647
79-447 - lack of markers ok when they existed prior to inspection and permittee had no knowledge they had been removed.
(d) 79-1 - failure to post buffer zone markers
(e) 78-77 - failure to post blasting area signs
80-9 - failure to re-erect signs after Inspector forced removal
(f) 79-252 - failure to post topsoil markers
80-115
80-144
81-438

715.13 - Postmining Use of Land

IBSMA Decisions
None

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ALJ Decisons

715.13 Postmining Use of Land

(a) 81-41 - Restoration of disturbed areas in a timely manner
81-379
81-292
81-617

715.14 Backfilling and Grading

IBSMA Decisions

715.14 Backfilling and Grading

3-241 - requirement to backfill and regrade must be done as contemporaneously w/surface mining as possible, in order that it be completed in "timely" manner.
3-287 - NOV for violation of approximate original contours requirements.
(b) 2-316 - authorized change of permit because of unforeseen circumstances during regrading
(b)(1) 2-25 - failure to return mined are to original contour - failure to eliminate highwall
2-341
3-107
3-175
3-188
3-338 - failure to eliminate highwalls where new mining is adversely effecting previously mined site. Spreading spoil along beach of highwall does not constitute backfilling.
2-399 - augering of coal seam in orphan highwall - failure to eliminate
(b)(1) 1-145 - must permittee eliminate orphaned highwall located adjacent to its permitted area?

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ALJ Decisions

715.14 Backfilling and Grading

(b)(1) 79-376 - failure to return mined area to original contour
80-181
80-206
80-369
80-487 (failure to eliminate highwall)

	80-496	(how much of highwall has to be reclaimed?)
	80-154 -	failure to return mined area to original contour (failure to eliminate highwall)
	80-564	(failure to eliminate highwall)
	81-622	
(ii)	78-14 -	failure to backfill and grade to eliminate highwall
	80-98	
	80-328	
	80-437	
	80-799	
	81-76	
	81-647	
	81-520 -	relief granted from Cessation order b/c original NOV was too vague to be understood.
(b)(2)	80-263 -	Highwall or Terrace?
	80-437 -	failure to permittee to obtain authority to allow terrace to remain
(J)d)	80-144 -	failure to cover exposed coal seams
	80-9	
	80-328 -	failure to cover acid, toxic, and combustible materials with a minimum of 4 feet of materials

715.15 Disposal of Excess Spoil

IBSMA Decisions

715.15 Disposal of Excess Spoil

	3-145 -	excess of spoil is that not necessary to achieve approximate original contour of disrobed area.
(a)	3-357 -	temporary relief will not be granted from NOV for improper disposal of excess when there is no evidence that spoil is being used to achieve the approximate contour of area.
(a)(8)	1-229 -	the fact that operator violated 715.15 (b) and 715.15 (a) (8) before May 3, 1978, does not excuse him from complying with Federal requirements when he subsequently continues construction of valley fill.
' (b)	1-229	
	1-105 -	construction of valley fill without approval

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ALJ Decisions

715.15 Disposal of Excess Spoil

(a)(1)	81-319 -	Definition of Spoil
(a)(1)	80-222 -	failure to have plans approved for disposal areas of excess rocks and earth from underground mines.
	81-61	

	80-448	- failure to place excess rocks and earth material from underground mine in surface disposal area.
	80-328	- fill design not certified by registered professional engineer.
	81-635	- use of bulldozer to move spoil to permanent disposal area.
(a)(2)	80-591	
(a)(3)	80-591	- spoil disposed of in one area other than valley fill
	80-667	- failure to remove top soil from spoil disposal area of fill.
	80-794	
(a)(6)	80-794	- failure to place sail in a controlled manner in a hollow fill.
(a)(10)	80-794	- no quarterly inspection of hollow fill.
(b)	78-69	- wrongful construction of valley fill
	78-97	
	78-77	- construction of valley fill without approval
	81-548	
	81-635	- use of bulldozer to move spoil to permanent disposal area.
(b)(2)	79-369	- no drainage channels at side of hollow fill
(b)(3)	79-312	- failure to compact soil in lifts less than 4 feet thick during construction of hollow fill
	80-667	
	81-315	
(b)(4)	81-192	- failure to remove organic materials from hollow fill site
	81-379	- improper construction of hollow fill
	80-667	
(b)(6)	79-369	- no drainage channels at side of hollow fill
(c)	81-635	- use of bulldozer to move spoil to permanent disposal area

715.16 Topsoil Handling

IBSMA Decisions

715.16 Topsoil Handling

	1-316	- contamination is not required in establishing a topsoil removal violation, it is only a reason for such violation
' (a)	1-253	- definition of "topsoil" for purpose of removal requirements
	1-293	- topsoil must be salvaged
(a)(4) (i)	2-298	- in comparing alternative materials for topsoil regulatory authority may rely on data published by the Department of Agriculture
(a)(4) (iii)	1-239	- alternative materials for topsoil must be handled in accordance with this section
	1-253	- must get permission from state regulatory authority before using alternative materials for topsoil
(b)	3-100	- "topsoil", for purposes of redistribution, means same as described in 30 CFR 715.16(a). All topsoil is included.

3-292 - definition of contaminate. Where OSM shows spoil was mixed w/topsoil, there is prima facie case for failure to protect topsoil from contaminants. Rebuttable by showing that topsoil is still capable of supporting vegetation.

ALJ Decisions

715.16 Topsoil Handling

78-1 - topsoil contaminated by spoil and waste materials
78-77
79-125
81-379 - failure to salvage topsoil

(a) 79-10 - failure to remove, segregate, and stockpile all topsoil
79-46
79-160
79-178
79-212
79-225
79-233
79-252
79-296
79-312
80-125
80-181
80-328
80-667
80-771
80-794
81-208
81-496
81-644

(a)(4)
(D 80-136 - proof that selected overburden materials are more suitable for restoring land capability
81-716 - topsoil must be redistributed despite state approval to leave it as dumped.

(b)(2) 79-70 - failure to protect topsoil from wind and water
80-231
80-582 - erosion after respreading
80-269 - as long as area is permitted, permittee can set own timetable for restoration

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715.16 Topsoil Handling

(c) 80-108 - failure to seed stockpiled topsoil
80-550 - failure to protect stockpiled topsoil with effective vegetative cover
81-10

715.17 Protection of the Hydrologic System

IBSMA Decisions

715.17 Protection of the Hydrologic System

(a)	1-305	- failure to pass discharge from disturbed area through sedimentation ponds
	2-110	
	2-158	
	2-277	
	2-34	- discharge from disturbed area failed to meet effluent limitations
	2-249	- effluent limitations apply even if discharged water originates as contaminated ground water from previously mined area
	3-165	- inspector has right to issue NOV for exceeding effluent limitations, on consideration of individual facts of case
(a)(1)	2-232	- permittee has burden of demonstrating entitlement to exemption
(d)(1)	2-222	- Diversion of intermittent stream without authority
	3-200	
(d)(3)	2-180	- disturbing of area within 100 feet of intermittent stream is ok with authority
	3-136	- cessation order for violation of another section of Act cannot require permittee to do an illegal act (build sedimentation ponds w/in 100 feet of intermittent stream)
(k)	3-188	- failure to comply w/permanent impoundments standards. OSN does not have to issue NOV if so much time has elapsed from time of violation to time of inspection, that OSM feels it cannot prove the charge.
(1)(2)	3-111	- failure to comply w/the hydrologic impact standards for road construction

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ALJ Decisions

715.17 Protection of the Hydrologic System

(a)	78-23	- failure to pass surface drainage through sedimentation pond
	78-69	
	78077	
	79-5	
	79-61	
	79-87	
	79-125	
	79-133	
	79-160	
	79-178	

79-290
79-303
79-352
79-428
79-522
79-528
80-1
80-62
80-115
80-120
80-132
80-144
80-174
80-181
80-226
80-260
80-299
80-324
80-492 - failure to pass surface drainage through sedimentation pond
80-499
80-536
80-558
80-591
80-629
81-27
81-49
81-192
81-284
81-327
81-397
81-453
81-496
81-644
81-647
81-700
81-737
81-149 - no necessary to take samples of discharge to show failure to pass drainage thru sedimentation pond
81-267
81-161 - permittee has burden of proof to show excessive effluents were caused by a precipitation event larger than a 10-year 24-hour frequency event
81-240 - effluent limits don't apply to discharge from an area that is not being used for SCMO
81-688 - OSM does not have to evaluate the quantity and quality of water emunating from sources other than permittee's operations, and offset such water before charging permittee w/violation of effluent limits.
80-35 (diversion ditch with no pond)
80-9 - exemption from use of sedimentation pond
78-6 - discharge from disturbed area failed to meet effluent limitations
81-356

	81-373	
	81-579	
	81-575	— time for abatement of sedimentation pond violation can not be extended until state permit has been reissued
	80-31	
	80-39	(suspended solids)
	80-111	
	80-144	
	80-160	
	80-181	
	80-629	
	80-780	
	80-282	(tributary)
	80-307	(violation void because Inspector failed to state with reasonable specificity)
	80-390	(exemptions)
	80-9	— permittee responsible for controlling the effluent limitations of <u>all</u> drainage leaving disturbed property
	81-341	
	80-544	- must OSM calculate quality and quantity of water emanating from sources other than the mine before charging permittee with violations of effluent limitation regulation
	81-267	
	81-512	
(a)(2)	80-80	- failure to install and maintain water treatment facilities
	81-6	
	81-280	
	81-622	
	81-713	
(b)	78-23	- no surface water monitoring program
	79-1	
	80-328	
	80-591	
	81-39	
	81-449	
	81-548	
	80-499	- failure to construct stream channel diversions
(c)(3)	81-161	- NOV is not vacated by OSM's technically incorrect citation, when correct citation (this section) would be under same code section, require same remedial action, and caused permittee no confusion or prejudice
(d)(1)	80-54	— diversion of water from intermittent stream without approval
(d)(3)	79-1	- mining within 100 feet of perennial stream
	79-160	
	80-144	
	80-128	
	79-26	- what constitutes an intermittent stream?
	79-352	— sedimentation pond within 1.00 feet of intermittent stream - in violation excused because of weather conditions
(e)	80-9	— use of drainage ditches and pumps instead of sedimentation ponds
(f)	80-115	— failure to control discharge from sedimentation pond to reduce erosion

81-19
81-575 - time for abatement of sedimentation, pond violation cannot be extended until state permit has been re-issued

(h)(3) 78-23 - failure to monitor ground water levels
79-5
80-591
81-449
80-274 - failure to submit ground water monitoring plan
81-700

(1) 81-456 - failure to replace the water supply of an owner of property, where supply is used for agriculture, domestic use, or industry

(L) (1) 80-76 - failure to maintain access road to prevent additional contribution of suspended solids to stream flow
80-517
81-52
89-98 - failure to remove, regrade, and re egitate all access and haul roads
80-499 - failure to construct haul road and bindge to or to prevent additional contribution of suspended solids to stream flow

(L) (2) 80-144 - establishing stream ford
80-591 - failure to construct stream ford

(l)(2) 79-272 - failure to surface haul road with durable material

(IV) (1) When does a road become a "haul" road?
(2) What is meant by "durable" material?

(L)(3) 79-497 - failure to maintain proper surface and drainage on access road
80-499
81-75
81-369

(L)(3) 80-9 - failure to maintain access and haul roads to prevent ditch line
80-54
80-328
80-356
80-570
81-681

(m) 80-277 - uncontrolled run-off

715.19 Use of Explosives

IBSMA Decisions
None

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ALJ Decisions

715.19 Use of Explosives

(d)(4) 81-379 - failure to keep records of blasting available for inspection
(e)(1)(ii) 80-588 - blasting outside allowed time periods
(e)(1)(iii) 80-558 - no audible blasting warning which is audible within 4 mile of blast
(vi) 81-492 - failure to control airblast so that it does not exceed 128 decibels at any dwelling w/in 4 mile of permit area
(vii)(a) 78-77 - within 4 mile of blast, blasting within 1000 feet of dwelling
See proposed amendment 46 Fed. Reg. 6982
79-225
79-284
79-474
(e)(2)(i) 79-344 - failure to conduct blasting to prevent injury to person
(ii) 80-321 - exceeded maximum peak velocity of 1 inch/serv. of ground motion
See proposed amendment 46 Fed. Reg. 6982
(e)(2)(v) 80-540 - invalid or "arbitrary and capricious" - NOV
78-77 - detonation of explosives in excess of maximum amount
(e)(3) 80-318 - failure to seismograph shot when equation is not used
(e)(4) 79-5 - incomplete blasting records
80-328 - no blasting records
80-558

715.20 Revegetation

IBSMA Decisions

715.20 Revegetation

(e) 2-372 - proof of violation
(d) 3-241 - noncompliance w/30 CFR 715.14 is not excuse for non-compliance w/revegetation standards

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ALJ Decisions

715.20 Revegetation

(a)(1) 80-98 - failure to establish diverse, effective and permanent vegetative cover
80-115
80-328
80-640
81-588 - NOV for failure to revegetate is improper when permittee has started the process successfully, and only a few acres are not revegetated

(a)(2)	80-98	- failure to carry out revegetation capable of stabilizing the soil surface
	80-251	- prompt revegetation - timely issuance of NOV
(c)	80-251	- revegetation time limit - timely issuance of NOV
	81-569	
(f)(1)	80-524	- failure to have a reference area identified and approved by the regulatory authority
(g)	80-108	- failure to protect (seed) stockpiled topsoil with effective vegetative cover
	80-115	
	80-550	

30 CFR 716

Special Performance Standards

716.2 Steep Slope Mining

IBSMA Decisions

716.2 Steep Slope Mining

3-292 - when permittee admits violations and OSM does not put on evidence of the violation. Administrative Law Judge must give OSM notice to put on evidence before vacating the NOV.

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ALJ Decisions

716.2 Steep Slope Mining

(a) 78-74 - spoil and debris on downslope
78-94
79-46
79-312
79-510
79-525
80-98
80-181
80-237

(a)(2) 81-535 - NOV will be vacated if need to property cover highwall w/spoil is not shown

(b) 80-65 - failure to cover highwall

716.3 Mountain Top Removal

IBSMA Decisions
None

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ALJ Decisions

716.3 Mountain Top Removal

(b)(5) 80-237 - improper placement of spoil on bench

716.7 Prime Farmland

IBSMA Decisions

716.7 Prime Farmland

(e) 3-200 - failure to provide mining and restoration maps of prime farmlands areas

(g)(1) 3-200 - failure to remove prime farmland soil horizons

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ALJ Decisions

716.7 Prime Farmland

(a)(2) See proposed amendment - 46 Fed. Reg. 7208

(e) 80-499 - no mining restoration plan for prime farmland

(g)(1) 80-499 - failure to remove soil horizon from prime farmland before mining

30 CFR 717

Underground Mining General Performance

717.11 General Obligations

IBSMA Decisions

717.11 General Obligations

(a)(1) 3-228 - "underground operations" do not include inactive mines where accumulated water is being removed.

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ALJ Decisions

717.11 General Obligations

(b) 81-425 - failure to keep authorization permits at minesite for inspection

717.12 Sign and Marker

IBSMA Decisions
None

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ALJ Decisions

717.12 Sign and Marker

(b) 79-194 - no mine identity maps
80-410
80-673 - no mine permit and identification signs

717.14 Backfilling and Grading

IBSMA Decisions
None

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ALJ Decisions

717.14 Backfilling and Grading

79-194 - failure to retain earth or non-waste material on solid portion of bench
(a) 79-271 - barren rocks excess on land surface in violation of 717.15
(c) 79-247 - material on downslope below road cuts
81-415
(e) 79-264 - failure to cover waste material from under
80-412 - failure to treat spoil that will be toxic to vegetation or water

717.15 Disposal of Excess Rocks and Earth Materials

IBSMA Decisions
None

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ALJ Decisions

717.15 Disposal of excess rocks and earth materials on surface areas

81-425 - failure to dispose of excess rock and earth in the approved area
81-475
(b)(a) 79-376 - failure to construct top of fill to drain surface water to sides of fill to join stabilized surface channels
(1) Is notice of violation by OSM precluded while state is processing the same noncompliance?
(2) Termination of state's same NOV or per judicate

717.17 Protection of the Hydrologic System

IBSMA Decisions

717.17 Protection of the Hydrologic System

(a) 3-313 - compliance s/state standards for passing drainage through sedimentation pond does not excuse permittee from compliance w/30 CFR 717.17 (a)
(a)(1) 2-158 - failure to pass discharge from disturbed area through sedimentation ponds

3-260 - coal processing facilities w/in 8 and 11 miles of mine are not "at or near" mine for purposes of 30 CFR 717.17 (a)

(ъ)(1) 3-136 - reinstatement of cessation order based on NOV for failure to pass drainage through sedimentation pond

(d)(3) 3-228 - inactive mine where accumulated water is being removed is not subject to ground water monitoring requirements

(h)(1) 3-136 - reinstatement of cessation order based on NOV for failure to monitor ground water systems

(j)(3)
(i) 1-285 - failure to maintain access and haul roads
2-9 - partially constructed access road falls within this regulation
3-83 - definition of "haul road". What constitutes failure to maintain haul road?

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ALJ Decisions

717.17 Protection of the Hydrologic System

(a)(1) 79-264 - discharge from disturbed area failed to meet effluent limitations
80-203
80-296 (NOV void because of lack of specificity)
80-315
80-423
80-585
81-356
81-453
81-539
81-579
81-707 - exceeding effluent limits for total iron being discharged into creek, is not excused because of emergency situation caused by flooding and pumping-out of mine
79-194 - failure to pass surface drainage through sedimentation pond
79-264
80-83 - failure to pass surface drainage through sedimentation pond
80-203
80-226
80-260
81-400
81-425
81-475
81-713
81-415 - NOV for failure to pass drainage through sedimentation pond vacated because new pond was being built
80-430 (717.17 (a)(3) exemption)
80-517
80-673

	81-65	
	80-282	- adverse change in water quality of tributary
(g)(1)	80-412	- failure to treat spoil that will be toxic vegetation or water
(h)(1)	81-475	- failure to have approved ground water monitoring plan
(h)(2)	81-295	- failure to monitor ground water systems according to submitted plans
(h)(2)	80-774	- failure to monitor ground water level
(j)(D	80-1	- roads not maintained to prevent additional contribution of suspended solids to stream flows
	80-673	
(j)(2)		
(i)	80-430	- crossing stream fords not approved by regulatory authority
(j)(2)		
(iii)	79-194	- failure to properly construct and maintain access and haul roads
	80-471	
(j)(2)		
(iv)	80-471	
(j)(3)		
(i)	79-271	- failure to maintain haul roads
	79-247	
	80-20	
	80-237	
	80-287	
	80-471	
	81-400	
	81-622	
	81-542	- standard for determining if access and haul road violate conditions of 30 CFR 717.17
	81-528	- on-site evidence must be sufficient to sustain a NOV for failure to maintain access and haul roads, or NOV will be vacated
(□) (3)		
(ii)	81-415	- NOV for failure to keep drainage ditch unblocked vacated because the inspector did not see the ditch himself. NOV for failure to drain roads properly vacated for insufficient evidence
	81-622	
(j)(3)		
(iii)	80-410	- failure to maintain access and haul roads so as to prevent proper drainage therefrom
	80-471	

717.20 Topsoil Handling and Revegetation

IBSMA Decisions
None

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ALJ Decisions

717.20 Topsoil Handling and Revegetation

79-194 - failure to remove topsoil as a separate operation
81-475
81-672 - outer slope areas still used for mining operations do not have to be revegetated, even when not in continuous use. Revegetation would significantly reduce usefulness of area for rock disposal

(b) 81-65 - failure to establish permanent vegetation cover on disturbed land

30 CFR 721

Federal Regulations

721.12 Right of Entry

IBSMA Decisions

721.12 Right of Entry

(a) 1-273 - failure to present credentials prior to inspection is violation absent extraordinary circumstances
2-21 - failure to present credentials is ok if extraordinary circumstances exist
3-377 - inspectors not required to present credentials before inspection of inactive mine w/no operator present
2-261 - inspection without presentation of credentials is ok when no mine employee of supervisory authority can be found after diligent search

(b) 2-70 - refund to let inspector photograph mine site

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ALJ Decisions

721.12 Right of Entry

(a) 79-168 - right of entry by inspectors without warrant or abandoned notice
79-296
79-399 - Inspectors failure to present credentials - justified
80-726 - (not justified)
80-437
79-503 - (failure to present credentials - justified
80-9 - Does failure of 1st inspector to present credentials taint evidence obtained by 2nd inspector who properly presented his credentials?
80-520 - refusal to let inspector on site

(b) 79-414 - inspectors right to take pictures - permittees attempt to control

30 CFR 722

Enforcement Procedures

722.11 Imminent Dangers and Harms

IBSMA Decisions
None

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ALJ Decisions

722.11 Imminent Dangers and Harms

78-32 what is an imminent" danger?
78-45
78-57

722.12 Non-Imminent Dangers and Harms

IBSMA Decisions

722.12 Non-imminent Dangers or Harms

(a) 2-5 - authority to issue NOV for violation not covered by 722.11
2-158 - OSM required to issue NOV during initial regulatory program
3-241 - temporary relief cannot be extended beyond the 90 day abatement period
(d) 3-220 - total time of abatement not to extend more than 90 days. including modification time of NOV

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ALJ Decisions

722.12 Non-Imminent Dangers or Harms

81-359 - does excavation of area immediately adjacent to and beyond permitted area constitute a violation of 30 CFR 722.12? Does conducting SCMO w/in 300 feet of occupied dwelling

without waiver of owner constitute violation of 30 CFR 722.12?

81-650 - OSM inspectors cannot require specific actions to abate NOV before a cessation order has been issued

722.13 Failure to Abate

IBSMA Decisions

722.13 Failure to Abate

2-238 - failure to abate - grounds sufficient to sustain

3-287 - inspector shall immediately issue cessation order if abatement has not occurred

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ALJ Decisions

722.13 Failure to Abate

80-762 - failure to abate (grade all spoil materials to approximate original container)

722.16 Pattern of Violation

IBSMA Decisions

None

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ALJ Decisions

722.16 Pattern of Violation

(a) 81-117 - OSM has power to revoke state permits and licenses for "patterns of violations" during interim regulatory period under the Act

(b)(3) 81-117 - neither willful violations, or unwarranted failure to comply with regulations will be found, where permittee's SCMO is not perfectly designed and operated, and where permittee follows every remedial suggestion made by OSM as quickly as possible

(b)(4) 81-117

722.17 Mobility to Comply

ÏBSMA Decisions
None

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ALJ Decisions

722.17 Mobility to Comply

(a) 79-439 - a notice of violation or cessation order will not be vacated because of inability to comply
79-190 - NOV not to be vacated because termination of violation was prevented by inclement weather
81-650 - NOV and cessation orders cannot be vacated because of inability to comply, but inability may be used to mitigate amount of civil penalties

30 CFR 723

Civil Penalties

723.11 When Assessment Made

IBSMA Decisions
None

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ALJ Decisions

723.11 When Assessment Made

(1) 79-87 - criteria used to determine whether to assess a civil penalty

723.12 When to Access After NOV

IBSMA Decisions

723.12 When to Access After NOV

(c) (2) 3-301 - proper method for determing proper number of extent-of-damage points

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ALJ Decisions

723.12 When to Access After NOV

78-11 - criteria for assessing penalty points
79-87
79-185
79-225
79-296
79-344
79-399
81-149
79-462 (low ph level)

79-468 (no perimeter signs, no permit, no sedimentation ponds, spoil on downslope)
79-481 (no sedimentation ponds)
79-510 (debris on downslope)
80-149 (failure of discharge to meet effluent limitations
80-156 (no sedimentation ponds)
80-216 (storing coal off permit area, no sedimentation control)
80-246 (no sedimentation ponds)
80-390 (negligent operation)
80-466 (failure to maintain treatment facilities)
80-523 (no sedimentation ponds)
80-640 (no revegetation - failure to cover waste material)
80-767 (no water treatment facilities)
80-786 (failure of discharge to meet effluent limitations)
80-784 (11 and no sedimentation ponds)
81-27 (no sedimentation ponds)

(a) 79-327 - OSM may assign no penalty if total penalty points is less than 30

(c)(1) 79-390 - penalty points based on probability of occurrence

(e) 79-66 - good faith in attempting compliance with NOV

723.13 Determination of Amount of Penalty

IBSMA Decisions

723.13 Determination of Amount of Penalty

3-292 - Administrative Law Judge is bound to adhere to point system for accessing violations contained 30 CFR 723.13, unless he determines that a waiver would further abatement, under 43 CFR 4.1157 (b)(1)

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ALJ Decisions

723.13 Determination of Amount of Penalty

79-362 - conversion of points to dollars

723.14 Assessment of Separate Violations for Each Day

IBSMA Decisions

723.14 Assessment of Separate Violations for Each Day

(a) 2-249 - ALJ can't reduce the number of days for which civil penalty may be assessed when the obligation to abate has not been suspended

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ALJ Decisions

723.14 Assessment of Separate Violations for Each Day

80-111 - no penalty shall be assessed for period that obligation to abate is suspended

723.16 Waiver of Use of Formula to Determine Civil Penalty

IBSMA Decisions

723.16 Waiver of Use of Formula to Determine Civil Penalty

(b) 3-371 - 30 days to issue proposed assessment of NOV is directory, not mandatory. Actual prejudice must result from issuance after 30 day in order to gain administrative relief

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ALJ Decisions

723.16 Waiver of Use of Formulat to Determine Civil Penalty

(b) 81-499 - permittee is entitled to receive a copy of assessments within 30 days of issuance of NOV
81-569 - procedure for Assessment of Civil Penalties - Failure by OSM to serve proposed assessments and worksheets within 30 days of issuance of NOV
81-507 - does failure to issue notice of proposed civil penalty assessment within 30 days of NOV vacate the assessment?
81-617 - a fine cannot be imposed which is manifestly disproportionate to the value of the land which is to be reclaimed

723.17 Procedure for Conference

IBSMA Decisions
None

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ALJ Decisions

723.17 Procedure for Conference

(b) 81-507 - does failure to issue notice of proposed civil penalty assessment within 30 days of NOV vacate the assessment?

723.18 Request for Hearing

IBSMA Decisions

723.18 Request for Hearing

(a) 1-118 - petition for hearing on proposed assessment must be filed within 30 days of receipt of proposed assessment

(b) 2-147 - action to be taken by permittee when OSM fails to hold assessment conference within 60 days

30 CFR 731.12

See proposed amendment 46 Fed. Reg. 6997, 6998

30 CFR 787

Administrative Review

787.11 Administrative Review

IBSMA Decisions

787.11 Administrative Review

3-154 - once right of appeal has been granted, it cannot be revoked

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ALJ Decisions
None

43 CFR

• Public Lands: Interior

Dept. Hearing and Appeals Procedures

Subpost Z

43 CFR 4.1115

IBSMA Decisions
None

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ALJ Decisions

4.1115

79-83 - Burden of Proof in Civil Penalty Cases

43 CFR 4.1116

IBSMA Decisions

4.1116

3-287 - filing of application for review shall not operate to stay any order or notice, unless temporary relief is granted

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ALJ Decisions
None

43 CFR 4.1123

IBSMA Decisions

4.1123

(b) 2-136 - parties entitled to written, advance, notice of the time, place, and nature of hearing to review cessation order

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ALJ Decisions
None

IBSMA Decisions

4.1127

1-186 - compliance

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ALJ Decisions
None

43 CFR 4.1152

IBSMA Decisions
None

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ALJ Decisions

4.1152

(a)(2) 79-115 - Statements concerning misapplication of penalty formula
(c) 79-156 - OSM has 30 days to file answer to petition for review

43 CFR 4.1153

IBSMA Decisions

4.1153

2-90 - OSM has absolute right to answer within 30 days from receipt of copy of petition. After 30 days, ALJ has discretion to regulate the scope of the answer in any reasonable manner

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ALJ Decisions

4.1153

79-394 - OSM has 30 days to file answer to petition for review
79-397
79-490
79-510
80-415

IBSMA Decisions
None

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ALJ Decisions

4.1157

(a) 79-362 - method of determining penalty points
81-694 - motion to waive use of point system as far as cessation order was concerned, allowed

43 CFR 4.1161

IBSMA Decisions

4.1161

2-191 - error for ALJ not to dismiss untimely application for review

ALJ Decisions
None

43 CFR 4.1162

IBSMA Decisions
None

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ALJ Decisions

4.1162

81-650 - less than 30 days to abate NOV not causing imminent crisis is denial of 30 day right of appeal

43 CFR 4.1165

IBSMA Decisions
None

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ALJ Decisions

4.1165

80-400 - OSM must file answer within 20 days of receipt of application for review by permittee - distinguishes 4.1153 and 4.1165
80-402
80-404
80-406
80-408
80-458
80-460

43 CFR 4.1171

IBSMA Decisions

4.1171

(b) 2-397 - ultimate burden or persuasion rests with the applicant for review

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ALJ Decisions

4.1171

(a) 80-337 - burden of going forward with evidence on OSM to establish prima facie case as to NOV

(b) 80-337 - ultimate burden of persuasion on applicant to slow NOV improperly issued

43 CFR 4.1261

IBSMA Decisions

4.1261

3-218 - requests for temporary relief must be filed before the Administrative Law Judge makes a decision in the case

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ALJ Decisions
None

43 CFR 4.2163

IBSMA Decisions

4.1263

2-63 - failure to include required elements for temporary relief results in dismissal

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ALJ Decisions

4.1263

81-645 - where temporary relief is sought, the party must allege and prove to satisfaction of ALJ that the applicant is likely to succeed on the merits, and the health and safety of the public and the air and water resources will not be adversely affected

43 CFR 4.1270

IBSMA Decisions
None

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ALJ Decisions

4.1270

(a) 79-390 - any party can petition Board for review of ALJ Decisions
(e) 79-390 - Board must grant or deny petition within 30 days
(f) 79-390 - Board can recalculate assessment

43 CFR 4.1274

IBSMA Decisions
None

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ALJ Decisions

4.1274

79-390 - Board has power to remand cases if needed

30 USCA 1201 et seq.

Surface Mining Control and Reclamation Act

30 USCA § 1252

IBSMA Decisions

1252

2-118 - lease agreement between permittee and private party doesn't relieve permittee of responsibility under act
(c) 2-45 - small operator exemption - must demonstrate entitlement

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ALJ Decisions

1252

80-71 - permittee responsible for violation by subcontractor
80-169
80-375 - permittee who acts in good faith, not responsible for violation of "wildcat operator".
79-194 - mining without a permit
(a) 79-424 - is a failure to get a permit "reasonably expected to cause imminent environmental harm"?
80-144 - permittee affected area outride permit area

30 USCA § 1255

IBSMA Decisions

1255

(b) 2-341 - Sec. of Interior not obligated to set forth every state interpretation of state law which might be inconsistent with Fed. law

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ALJ Decisions
None

30 USCA §1256

IBSMA Decisions
None

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ALJ Decisions

1256

79-386 - 79-38, acts application to one who has no permit

30 USCA §1265

IBSMA Decisions
None

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ALJ Decisions

1265

(b)(3) 80-90 - portion of highwall left exposed
80-333 - failure to restore to the approximate original contour, with all highwalls, spoil piles and depressions eliminated
(b) (10) 89-98 -failure to construct conforming siltation structures
(B)(ii)

30 USCA §1268

IBSMA Decisions
None

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ALJ Decisions

1268

81-435 - appeal of assessment of civil penalties

30 USCA §1271

IBSMA Decisions

1271

(a)(f)	1-125	- does notification provisions apply to OSM during initial regulatory program?
(a)(2)	2-81	—environmental harm must be objectively described before cessation order is proper
(a)(3)	2-158	—10 day notice requirement not applicable during initial regulatory program
	2-238	—grounds sufficient to sustain cessation order
	3-128	- NOV may be issued to permittee or to his agent
(a)(5)	2-38	—failure to specifically set forth the nature of violation
	2-372	— when NOV is reasonably specific

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ALJ Decisions

1271

(a)(1)	79-225	—vacation of penalty for failure of OSM to comply
	79-74	—failure of OSM to give notice of a violation to the state regulatory authority
(a)(3)	80-369	—constructing haul road off permitted area
	80-625	—failure to build bench sediment pond that was referred to in the original plans for permit
(a)(5)	79-439	- failure to give notification of violation
	79-54	—SCMO
	98-98	- SCMO - when is a construction project covered by the act?
	79-106	- SCMO - upon cessation of mining activities pursuant to OSM order, the act has no further application to non-permittees

30 USCA §1272

IBSMA Decisions

1272

(e)(4) 2-270 - mining within 100 feet of public road
2-308 - discussion of the exception clause
(e) (5) 2-382 - term "cemetery" may include a private burial ground

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ALJ Decisions

1272

(e)(4) 80-144 - topsoil storage within 100 feet of right-of-way
- operating within 100 feet of right-of-way
81-737 - "valid existing rights" most rights obtained prior to enactment of Act, with exercise of that particular right in mind
(e) (5) 80-418 - mining within 300 feet of occupied dwelling
81-57 - mining within 300 feet of occupied dwelling - failure to obtain letter of waiver from owners
(See also 30 CFR 761.11(e) and §522 (e)(5) of Surface Mining Control and Reclamation Act of 1977)
81-649(a)
79-194 - Is log cabin an occupied dwelling?
81-264 - NOV for mining within 300 feet of occupied dwelling is incorrect when building is used only as "summer" or "hunting" cabin
79-407 - mining within 300 feet of dwelling; ok with answers permission
81-700 - SCMO within 300 feet of National Park boundaries

30 USCA §1275

IBSMA Decisions

1274

(c) 2-63 - failure to meet requisites for temporary relief
(e) 1-248 - costs and expenses awarded only if permittee shows OSM acted in bad faith and for the purpose of harassing and embarassing the permittee

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ALJ Decisions

1275

80-164 - mining within 100 feet of cemetery
(c) 80-111 - temporary relief from NOV
80-567 - criteria for temporary relief
81-649(a)
79-174 - acts in applicability to extraction of coal for non-commercial use

30 USCA §1278

IBSMA Decisions
None

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ALJ Decisions

1278

(2) 81-405 - Act not applicable to operations of 2 acres or less

30 USCA §1291

IBSMA Decisions

1291

(28) 1-158 - Act not applicable to operation located on state land which is not subject to state regulations within the scope of any of the initial performance standards

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ALJ Decisons

1291

(28)(a) 80-477 - SCMO - application of definition
80-482
81-535 - definition of SCMO
(28)(b) 80-363 - which operations fall within the Act

1292

(a)(3) 30-530 - variance between OSM regulation and EPA regulation -ie. "net gross variance."