

DENNIS ZACCAGNINI

IBLA 85-762

Decided March 9, 1987

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, concluding that the Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, responded appropriately to a citizen's complaint alleging a failure to return certain lands to approximate original contour.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

A decision of the Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action in response to a citizen's complaint stating that an operator has failed to comply with Federal and state requirements that the land be returned to approximate original contour, will be affirmed when the record establishes that the operator reclaimed the land in accordance with Federal and state regulations, which allow an exemption from the approximate original contour requirements when the land has been previously mined.

APPEARANCES: Dennis Zaccagnini, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Dennis Zaccagnini has appealed a letter decision dated April 3, 1985, of the Director, Office of Surface Mining Reclamation and Enforcement (OSM), advising him that Consolidation Coal Company (Consol) had reclaimed his property, following surface mining activities on previously mined land under permit D-0054, in accordance with applicable statutory and regulatory provisions administered by the Ohio Division of Reclamation (ODR), and that the Columbus Field Office, OSM, appropriately responded to Zaccagnini's citizen's complaint. 1/

1/ In his letter dated Feb. 21, 1985, to the Director, OSM, appellant states that he is vice president of Diana Coal & Land Corporation, "the owners of the land in question."

By memorandum dated September 19, 1984, the Director, Columbus Field Office, requested that the Administrator, Eastern Technical Center (ETC), OSM, provide assistance in reviewing a citizen's complaint which alleged a failure to return the permit area of permit D-0054 to approximate original contour (AOC). ^{2/} Specifically, the Columbus Field Office asked ETC to review the permit application and the permit "to determine if they meet the requirements of the approved program and the federal rules so the [Columbus Field Office] can respond to the citizen complaint in a timely manner." The Columbus Field Office explained that under Ohio law, the AOC requirements could be modified by the Chief, ODR, when the mining was affecting previously mined lands which had not been returned to AOC. The Columbus Field Office then stated:

The question is: how much of this area can be considered to fall into the category of being previously mined and does the exemption from AOC apply to the entire area regardless of how far the pre-existing highwall is advanced? Also, does the Ohio rule comply with the requirements in 30 CFR 816.106?

ETC responded by memorandum dated January 16, 1985 (ETC Memo), stating that its review of the land mined by Consol under permit D-0054 was based upon "field visits, permit evaluations, and discussions with Consol officials and the Chief, Division of Reclamation, Ohio Department of Natural Resource (ODNR) * * * which enabled the development of an understanding of site conditions and mining practices as well as state permit review and approval procedures for remining situations." The ETC findings are quite detailed and demonstrate that OSM's eventual determination that Consol's reclamation practices comported with applicable law was based upon a thorough investigation of the allegations. As to Consol's mining and reclamation practices, ETC provided the following discussion:

Consol's current and planned mining is complex and involves a large capacity shovel using modified area/contour cuts on previously mined highwalls followed by augering. The remining occurs in rolling terrain with natural slopes in the rate of 8-14°. ETC [Eastern Technical Center] review involved approved Permit D-0054 which is substantially reclaimed and where coal removal will be completed in February * * *.

When remining along the contour on a hillside, these Consol operations take few cuts (1-4) and place the first cut spoil into the pre-existing pit, backfilling and grading the pre-mined area

^{2/} The case record does not include a copy of the citizen's complaint which precipitated the letter to ETC. However, there is a copy of a Nov. 21, 1984, letter from Louie Zaccagnini, to the Columbus Field Office, indicating Consol wanted him to sign release forms for completion of reclamation operations under permit D-0054. He registered objection to the reclamation, including a failure to return the land to AOC. In a Nov. 29, 1984, letter to the Columbus Field Office, Louie Zaccagnini represented himself as the president of Diana Coal & Land Corporation.

to approximate original contour (AOC). When remining cross-ridge, numerous cuts (6-18) are taken with lateral placement of spoil into the pre-existing pits on either side of the ridge. In both cases, because spoil is used to reclaim the pre-existing pits, there is insufficient spoil to totally backfill the final cut— although the highwall is completely eliminated. The resultant backfill configuration for the final cuts is either an incised drainway or impoundment producing spoil-side slopes of 10°-12° and a highwall reduction creating highwall backfill at 16°-20°. The following table illustrates the actual or proposed slopes of the highwall backfill and the regraded spoil.

<u>Permit</u>	<u>Highwall Backfill</u>	<u>Regraded Spoil</u>
D-0054	20°	12°

* * * * *

On Permit D-0054 the remining operation resulted in a backfill configuration with less than 20,000 feet of backfilled highwall —compared with approximately 33,000 feet of abandoned, unreclaimed pit and highwall that resulted from past mining. * * * It is for this reason that all spoil technically practical has been utilized in eliminating the final highwall and that insufficient spoil is available to reclaim the entire operations to AOC.

It is our conclusion that the reclaimed Consol remining operation blends into and complements natural drainage and surrounding terrain with a surface configuration capable of supporting the proposed post-mining land use (pasture/grazing) and, conceivably, higher or better land uses. [3/] All highwalls have been eliminated and spoil graded to gently to moderate rolling topography which enhances long-term stability and is very similar to adjacent, unmined topography.

The mining practices utilized by Consol are promoting reclamation of land which might otherwise go unreclaimed. Remining at these sites is generally resulting in net environmental improvement, the elimination of safety hazards, reducing restricted access caused by unreclaimed pits, and thus enabling greater utility and productivity of the reclaimed land than existed prior to remining. Open pits, steep spoil piles, sloughing and hazardous highwalls, erratic and interrupted drainage patterns, and non-diverse nor totally effective vegetation are replaced by gently to moderately sloped backfills, more positive

3/ There is no indication in the record that Consol attempted to comply with the regulations allowing exemptions from the approximate original contour (AOC) requirements when a higher and/or better postmining use is proposed. See Ohio Rev. Code Ann. § 1513.16(B)(3) (1986); 30 CFR 785.16.

drainage, topsoiled, and revegetated areas. Considering the topography, equipment used to mine, height of overburden, and the existence of previously mined areas, the Consol operations are maximizing recoverability of coal while reclaiming land left in a state of continuing environmental degradation.

(ETC Memo at 1-2).

ETC concluded that Consol had met the AOC requirements of Ohio Admin. Code § 1501:13-9-14(C)(1) and 30 CFR 816.106, although the Ohio AOC rules pertaining to remined land were deemed inconsistent with the Federal standards on one basis:

As stated in your memorandum, the Ohio [Admin.] Code * * * at § 1501:13-9-14(C)(1) provides for modification of AOC requirements by the Chief, Division of Reclamation in remining situations. The rules do not specifically state what is allowed or how the Chief would implement remining exemptions from backfilling to AOC. 30 CFR § 816.106, on the other hand, requires specific demonstrations by the applicant prior to granting backfilling exemptions. In short, the Federal rules grant waivers from both highwall elimination and AOC where "reasonably available spoil" does not exist to eliminate highwalls except to the "maximum extent technically practical." Other requirements for drainage, land use compatibility, and long-term stability apply.

The Ohio program has not yet been revised to be consistent with OSM's regulatory reform regulations, by not specifying the written demonstration required by § 816.106(a). Consol and ODNR were notified of this requirement in discussions with ETC, and the company has subsequently submitted the "written demonstration" prescribed by § 816.106(a) to ODNR. Consol now appears to have fulfilled the requirements of § 816.106 in these regards, and all permits reviewed were approvable under the state mining rules. [4/]

(ETC Memo at 2-3).

Based upon the report submitted by ETC, the Columbus Field Office, OSM, informed Louie Zaccagnini by letter dated January 22, 1985, that OSM found that the State's approval of Consol's reclamation on permit D-0054 was appropriate. The letter stated that a copy of the ETC memorandum was enclosed. The letter further advised him of the right to request an informal review by the Director, OSM, if he felt that OSM had not taken appropriate action.

By letter dated February 21, 1985, Dennis Zaccagnini requested that the Director, OSM, review the determination of the Columbus Field Office that "the final slopes were deemed adequate * * *." According to him, the reclaimed land did not conform to the original topography:

4/ This same memorandum recommended that Ohio's surface mining statute and implementing

regulations be revised to reflect the more stringent requirements embodied in 30 CFR 816.106(a).

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We maintain approximately 150 head of cattle on this farm. With the steep slope remaining in the Phase I release procedure, it will be impossible for our cattle to descend this final slope to reach the majority of the property. Farm machinery or 4 wheel drive trucks cannot function with the extreme degree of this slope.

Therefore, the final slopes do not conform to the original topography, but to the altered version of Consols [sic] mining procedure, instead of the original contour of the land prior to mining. The final slope is approximately 2000 linear feet to the east of the original highwall that pre-existed.

By letter decision dated April 3, 1985, the Director, OEM, "concluded that the area was reclaimed according to the applicable regulations administered by the ODR and that the [Columbus Field Office] made an appropriate determination." The Director explained:

Since the mining in question occurred in an area that was previously mined, return to approximate original contour (AOC) is not required by the Ohio State program which governs the regulation of surface coal mining operations in Ohio. The Ohio provision in 1501:13-9-14(C)(1) states that the AOC requirements may be modified upon approval by the Chief of the Division of Reclamation where the mining is re-affecting previously mined lands that have not been restored to the standards of this rule. The mining and reclamation plan contained slopes that did not reflect AOC because the area was a remaining situation and the ODR approved those slopes in accordance with their regulations.

With respect to your concern that the reclaimed area is too steep to allow cattle or farm equipment to descend it, our field staff addressed this issue in their review and determined that the reclaimed operation blends into and complements natural drainage and surrounding terrain with a surface configuration capable of supporting the proposed post-mining land use (pasture/grazing) and, conceivably higher or better land uses. I also agree with that finding.

Appellant has sought review of the Director's decision.

[1] Since August 16, 1982, ODNR has been the regulatory authority in Ohio for all surface mining and reclamation operations on non-Indian and non-Federal lands. Ohio's regulatory program includes provisions requiring the operator to restore an area subject to surface coal mining operations to its "approximate original contour," which is defined as

that surface configuration achieved by backfilling and grading of a mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated

* * *

Ohio Rev. Code Ann. § 1513.01(A) (1986). 5/

Ohio's general rule requiring that land subject to surface mining operations be returned to its AOC, mirrors, to a great degree, the Federal counterpart found at section 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1265(b)(3) (1982). 6/ Ohio Rev. Code Ann. § 1513.16(A) (3) (1986) provides:

Except as provided in division (B) of this section, [7/] with respect to all coal mining operations, backfill, compact where advisable to ensure stability or to prevent leaching of toxic materials, and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter * * *.

OSM's conclusion that Consol was not required to return the land embraced by permit D-0054 to its AOC was based upon a narrow exception for land which has been previously mined. This exception for remined land is embodied in subsection (C) of Ohio Admin. Code § 1501:13-9-14:

(C) Final graded slopes.

(1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (B)(1) [8/] of this rule and approved by the chief or any

5/ This definition of "approximate original contour" is identical to that set forth at section 701(2) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(2) (1982).

6/ Section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1982), provides:

"[E]xcept as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter) * * *."

7/ Division (B) of Ohio Rev. Code Ann. § 1513.16 (1986) contains provisions for an exemption from AOC requirements when "an industrial, commercial, agricultural, residential, or public facility, including recreational facilities, use is proposed for the postmining use of the affected land * * *."

The Department's version of this exemption is found at 30 CFR 785.16.

8/ Paragraph (B) (1) describes methods for determining the natural slopes of the area before mining. The requirement of Ohio Admin. Code § 1501:13-9-14(C)(1) that "[t]he final graded slopes shall not exceed either the approximate premining slopes * * * or other characteristics of the surrounding area" is obviously inapplicable in the situation where the operator mines a previously mined area which has not been reclaimed in accordance with the minimum standards of SMCRA.

lesser slope specified by the chief based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform. The requirements of this paragraph may be modified, upon approval of the chief of the division of reclamation, where the mining is re-affecting previously mined lands that have not been restored to the standards of this rule. [Emphasis added.]

As noted, supra, ETC expressed reservations about whether Ohio's regulation regarding reclamation of remined land was consistent with the Department's regulation, since Ohio's rule did not specifically state what was allowed or how the Chief would implement remining exemptions, whereas 30 CFR 816.106 required the permittee to demonstrate in writing to the regulatory authority that the volume of all reasonably available spoil is insufficient to completely backfill the reaffected or enlarged highwall.
9/

In this case, however, Consol eliminated all highwalls located on the remined land, and the only question is whether Consol met Federal and state requirements as to grading the spoil to backfill the mined area. Appellant argues that Consol should have returned the subject land to the AOC in existence before it was mined. Such an argument would be reasonable under the general rule reflected in both the Federal and state schemes; however, as pointed out, appellant ignores both the Federal and state provisions for variances from that general requirement if the land has been previously mined.

OSM advised both Consol and ODNR that the Ohio standards were less stringent than those contained in 30 CFR 816.106(a), in response, Consol submitted the "written documentation" prescribed by 30 CFR 816.106(a), and in OSM's view "fulfilled the requirements of § 816.106 in this regard."

OSM determined that the reclaimed Consol remining operation "blends into and complements natural drainage and surrounding terrain with a surface configuration capable of supporting the proposed post-mining land use (pasture/grazing)" (ETC Memo at 2). OSM found that "all spoil technically practical has been utilized in eliminating the final highwall and that insufficient spoil is available to reclaim the entire operations to AOC." Id. at 2. Appellant has offered no independent evidence to suggest that

9/ This regulation became effective on Sept. 16, 1983 (48 FR 41734). As adapted, it contained a subsection (b), which provided that "[t]he requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall." However, by notice published in the Federal Register on Jan. 3, 1985, this exception was suspended, since "[t]he effect of [subsection (b)] was no longer to require the achievement of approximate original contour and complete elimination of preexisting highwalls in remining operations * * * even where there was reasonably available spoil to eliminate the highwalls in the immediate vicinity of the highwalls." 50 FR 257.

OSM's determination was erroneous. We agree with the decision of the Director, OSM, that Consol's reclamation efforts comply with Federal and Ohio standards concerning the return of remined land to AOC.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

R.W. Mullen
Administrative Judge

