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BUREAU OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
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RECLAMATION ADVISORY MEMORANDUM 8

TO: All Area Engineers  
Coal Operators and Company Engineers  
Consulting Engineers  
Bureau of Surface Mine Reclamation and Enforcement Directors

FROM: Gene Brandenburg, Commissioner *Gene Brandenburg*  
Bureau of Surface Mining Reclamation and Enforcement

SUBJECT: On-site Construction; Variance From Return to Approximate Original  
Contour Requirements; and Reference Areas

DATE: December 27, 1978

The purpose of this memorandum is to transmit information and requirements related to on-site construction, variances from approximate original contour, and vegetation reference areas. The requirements transmitted herein are immediately effective.

On-Site Construction. Because of wide-spread attempts to abuse the statutory provisions relating to an exemption from the permitting requirements for bonafide construction projects, it has become necessary to require a greater burden of proof before an exemption can be granted. The Division of Permits has prepared an Engineering Guideline entitled "On-Site Construction". A copy of that guideline is enclosed and all future requests to remove coal incidental to on-site construction should be tailored to meet the requirements of the guideline.

Variance From Return to Approximate Original Contour Requirements. Because of numerous inquiries concerning the possibility of a variance from the requirements to return mined areas to the approximate premining contours, the Division of Permits has developed a procedure for requesting such variances. This procedure is based on the statutory provisions related to variances from the approximate original contour requirements and has been incorporated into an Engineering Guideline entitled "Variance From Return to Approximate Original Contour Requirements". A copy of that guideline is enclosed and should be followed in preparing a variance request. Please note that, even with a variance, the highwall must be eliminated.

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Reference Areas. Effective December 18, 1978, permit applications were required to incorporate vegetative reference areas. These reference areas are required as described in 405 KAR 1:110 Section 6. Approval of the proposed reference area(s) should be obtained during the on-site premining review.

If an application number was obtained before December 18, 1978, and no reference area was selected during the on-site premining review, the applicant should identify the areas he considers adequate for the purpose. These areas should be noted on the topographic maps and submitted with the application. If these areas are not approved as sufficient by the Division of Permits, it will be necessary to select, in consultation with the Division of Permits, a suitable alternative reference area.

Inclusion of an appropriate reference area is required for the final release of any performance bond posted in connection with surface mining permits issued after May 2, 1978. Underground mines are exempt from the reference area requirement.

## 13.3 ON-SITE CONSTRUCTION

**ON-SITE CONSTRUCTION.** Excavation for the purpose of extracting coal constitutes "strip mining" under Kentucky law. However, excavation for some other purpose may not be deemed strip mining even though coal is excavated and extracted in the ordinary course of such activities. The removal of coal incidental to excavation and grading associated with a bonafide construction project does not require a surface mining permit. This relief from the permitting requirements is allowed so as not to pose an impediment to legitimate construction where the primary purpose is to construct a project unrelated to mining and coal is encountered purely incidental to the construction work. Stated another way, the project would be undertaken strictly on its merit whether or not coal was present. Therefore, the key word in the determination of legitimate construction projects is "incidental". In general, "incidental" means that the final grade of the construction project as designed without reference to any coal deposits must be below the elevation of the coal seam or so close to the final grade line that it would create an unsuitable foundation for the project.

In evaluating proposed projects, a very careful analysis will be performed on the final grade of the project as it relates to access roads, main roads, and other structures. In other words, the final grade should not appear contrived - it should flow as a natural consequence of engineering and aesthetic considerations and not be chosen so as to merely intercept the coal seam.

**LIMITATIONS.** While it is not our desire to pose an obstacle to legitimate construction projects, neither do we want the mechanism used as a vehicle to avoid obtaining a surface mining permit. The procedures detailed below are designed to allow this office to determine the legitimacy of a request to remove coal incidental to on-site construction. Although the information required is rather detailed, it should not present an insurmountable burden to those sincerely interested in conducting bona-fide construction projects.

It is recognized that the detailed procedure would present an unreasonable burden to the individual landowner that wants to construct a residence or other improvement for his own personal use. Therefore, if the development involves less than two acres, is on land owned by the applicant, and is for his personal, non-commercial use, the applicant need only request in writing that he be allowed to remove the coal incidental to on-site construction and does not need to comply with the more detailed requirements outlined in subsequent sections of this guideline. The written request should describe why the authorization is sought; affirm that the development is to occur on land owned by the applicant, will involve less than two acres and is for personal use; and detail the location by county, distance and direction to nearest public road intersection, and latitude and longitude.

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**PRELIMINARY REQUIREMENTS.** The applicant should notify the appropriate area office of his intent to file a request to remove coal incidental to on-site construction and schedule an inspection of the proposed site. A field report concerning the feasibility and apparent legitimacy of the proposal will be filed by the area office. The report should be sent to the attention of the Director, Division of Permits in Frankfort and should reference the name of the person or company conducting the construction and the date of the request as they appear in Items 1 and 23, respectively, of the request form.

**DESIGN REQUIREMENTS.** The plan must meet the following standards:

1. Be designed under the supervision of a registered professional engineer.
2. Excavated material shall not be placed on the downslope. Waste areas shall be constructed so as to achieve a minimum factor of safety of 1.5 or such other factor of safety necessary to support the proposed use.
3. Drainage structures required to support the facility shall be designed to carry the peak discharge from a 100-year 24-hour precipitation event or such lesser peak discharge as determined by the Department to be necessary to support the proposed use.
4. Drainage pipes shall be selected to safely support the proposed static and dynamic loading.

**SUBMISSION FORMAT.** An application for on-site construction is available at any of the seven (7) area offices or from the Division of Permits in Frankfort. Applications should be filed in the original with the Frankfort Office with one (1) copy to the area office having jurisdiction for the county in which the activity is proposed. The application form should be completed and placed in an 8½" X 11" folder with supporting documentation. The supporting documentation shall include the following:

1. A plan view of the area before disturbance showing the contours of the area at 10-foot intervals, the projected elevation of the coal seam, and existing natural and man-made features. The map scale should be not smaller than 1" = 400'.
2. A site plan, at a scale not smaller than 1" = 400', of the excavated area showing the location of all the facilities to be constructed including roads and drainage structures. Additionally, the final contours at 10-foot intervals should be shown.
3. A drainage and erosion control plan, including any necessary sediment control during construction, for the area to be affected by the excavation. It will be necessary to submit a plan for the removal of any proposed sediment control structures.

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4. A revegetation plan, especially for sloped areas, with a description of any necessary topsoil handling to insure a proper base for vegetative cover.
5. A road plan with profile and cross sections shown.
6. The results of a drilled sample, either rock chip or core type, shall be depicted on a drawing which includes the elevation and descriptions of all strata encountered.
7. A stability analysis which demonstrates that the coal must be removed to achieve the stability necessary to support the improvement to be constructed. This is required in those instances where the assertion is made that the coal must be removed to promote stability.
8. A 7½ minute USGS map showing the location of the project.
9. A performance bond in an amount equal to the estimated total cost of reclamation for the area proposed to be disturbed.
10. Proof that applications have been made for any required permits from the Division of Water Quality, Division of Water Resources, and the Division of Hazardous Materials and Waste Management.
11. A copy of the "Certificate of Registration" from the Department of Revenue on which the severance tax number is identified.
12. A copy of a contract for the excavation work if it is to be accomplished by a person other than the applicant.
13. A copy of a contract for the construction of any proposed facility on the site to be constructed by a person other than the applicant.
14. An economic, needs, and locational analysis for the project. For example, an applicant seeking to develop a subdivision should submit an analysis of the demand and supply of housing in the specific area, the availability of mortgage funds, and the feasibility and desirability of the proposed location.
15. A copy of letters from utility companies affirming that electricity, water, or sewer, as appropriate, will be available to the site. In the event that septic tanks or well water are proposed, attach a letter of approval from the County Health Department.
16. A copy of commitments for temporary and permanent financing for the project.

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17. Construction schedule showing planned date of commencement of excavation and date of completion of excavation, date of completion of the project as it involves earthmoving activities, and date of commencement of any construction activities on the site not involving earthmoving activities.

**INSPECTION.** Construction authorizations are issued based on an evaluation of the representations made in the request. Periodic inspections of an exempted construction site will be made by the Division of Operations and Enforcement to insure that the project is on schedule and in accordance with the plans presented. The frequency of inspection will vary, but will not be less than once each month.

**TIME EXTENSION.** A person who holds an authorization for on-site construction may be given a time extension provided:

1. The extension is necessary to complete the project.
2. The reason for the extension does not involve the marketability of the coal.
3. The extension will not be greater than the original time estimated for project completion.

**PERFORMANCE BOND.** The performance bond may be cash, surety, irrevocable letter of credit, or certificate of deposit. A partial (60%) release of the performance bond posted for the project may be obtained when the site has been prepared according to the approved plan. This means that all excavation and grading has been done; drainage structures and roads are in place; and temporary vegetation has been established. A final bond release will be effected when it is demonstrated to the satisfaction of the Department that no further environmental damage will occur.

**DEFAULT.** Any person who holds a construction authorization and who has not completed the project by the approved completion date, may be found to be in default. Additionally, failure to abide by the approved plan will be grounds for a default finding. Violations of this type may be cause to forfeit the bond, revoke or amend the exemption, and seek such other legal remedies as may be appropriate.

## 13.4 VARIANCE FROM RETURN TO APPROXIMATE ORIGINAL CONTOUR REQUIREMENTS

**GENERAL.** The creation of flat land by filling hollows is allowed under existing state and federal laws and regulations. However, the areas from which coal is mined must be returned to approximate original contour, except in certain circumstances.

The Kentucky statutes allow a variance from the approximate original contour requirements under certain conditions. However, we have been advised by the Office of Surface Mining that such variances are not permissible under the federal statutes at this time. Consequently, even if a variance is granted by this department, the federal agency may take action to require that the land be returned to approximate original contour.

**LIMITATIONS.** The granting of variances by this department under state law is not automatic. In fact, the statutory requirements under which we may grant such variances are quite restrictive. The statutes governing variances from approximate original contour requirements in contour mining operations are contained in KRS 350.450(3). Under this statute a substantial burden of proof is placed on the applicant to demonstrate and substantiate the need for the variance.

The allowed variance does not obviate the necessity for highwall elimination except in one very narrow circumstance. This circumstance concerns any necessary highwall in connection with the road or roads required to serve the area. The road must flow naturally as an integral part of the overall design and not be contrived to follow an existing highwall simply as a matter of economy and convenience. Stated another way, the road should be located according to the standard engineering techniques that would be employed if the highwall and bench were not present. Further, the road should be designed to the accepted standards for the given use. As an example, there is no apparent justification for a four lane road to serve a small residential development. On the other hand, a one lane road would not be sufficient to support any proposed use.

For all other circumstance the highwall must be eliminated by backfilling and grading. In planning the elimination of highwalls, the land above the highwall may be disturbed if it can be shown that such disturbance is necessary to blend the solid highwall and the backfilled material; control surface runoff; or provide access to the area above the highwall. In cases where disturbance above the highwall is authorized, the horizontal distance for the disturbance shall not exceed more than one-half the high-wall distance.

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The variance can be granted for the following post mining land uses only:

- (1) Industrial
- (2) Commercial
- (3) Residential
- (4) Public use, including recreational facilities.

The landowner must request the variance in writing as part of the application for a new permit. In the case of ongoing mining operations, there must have been a written contractual agreement between the landowner and permittee which stipulated that the mined area or a portion thereof would be left flat. Further, the contract must have been executed prior to the issue date of the permit. In the case of existing permits, the permittee should submit a copy of the contract along with an application to revise the permit.

**SUBMISSIONS PROCEDURE.** The variance may be requested as part of the application for an original permit or as a revision to an existing permit. In either case, the applicant should follow established procedures as to form and content in making the application.

**APPLICATION REQUIREMENTS.** In addition to the specific requirements noted above, the application should contain the following:

- (1) A plan for highwall elimination. This plan should show that the highwall will be completely covered with spoil material which will remain stable following mining and reclamation. It must be demonstrated, using standard geotechnical analyses, that a minimum static safety factor of 1.5 will be achieved;
- (2) A description of the results of actual or attempted contacts with land use planning agencies. The purpose of these contacts is to determine the suitability and compatibility of the proposed land use as compared to adjacent land uses;
- (3) A demonstration, through appropriate analyses, that the proposed land use constitute an equal or better economic or public use of the land;
- (4) A complete site plan of the proposed area designed and certified by a qualified registered professional engineer in conformance with established professional standards. The site plan shall depict, at 10 foot intervals, the final contours of the site as well as the location of all drainage structures, roads and streets, and other man made features.



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- (5) Sufficient longitudinal and cross sectional drawings to clearly depict the premining and postmining ground lines.
- (6) A complete drainage and watershed control plan designed by a qualified registered professional engineer in conformance with established professional standards. The plan must demonstrate that the watershed control of the area has been improved. This includes reduction in peak flows and suspended solids or other pollutants. The total volume of flow must not adversely affect the ecology of any surface water or any existing or planned public or private use of surface or ground water.
- (7) A plan for backfilling, grading, and placement of spoil designed and certified by a qualified registered professional engineer in conformance with professional standards established to insure the stability, drainage, and surface configuration necessary for the intended use of the site. The plan must show that only such amount of spoil will be placed off the mine bench as is necessary to achieve the planned post mining land use, insure the stability of the spoil retained on the bench, and meet all other requirements of KRS Chapter 350.

REVIEW PROCEDURE. Since variance requests will be included as part of an original permit application or a revision to an existing permit, the established permit review procedures and mechanisms will be used to conduct the review. This means that a decision to grant or deny the request variance will be rendered within 30 working days of receiving a complete application.