



COALEX STATE INQUIRY REPORT - 33

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TOPIC: ABANDONED MINE LANDS FUND

INQUIRY: SMCRA Sec. 404 discusses site eligibility expenditures under the Abandoned mine Lands Fund. (1) When a site is required to be reclaimed under state law pertaining to health and safety, does the operator's responsibility to make health and safety improvements under state law preclude the use of AML funding for additional needed environmental improvements? (2) What is the legislative history of Sec. 404, particularly with respect to the phrase "no continuing reclamation responsibility under state or federal law"?

SEARCH RESULTS:

Sec. 404 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) states:

"Lands and water eligible for reclamation or drainage abatement expenditures under this title are those which were mined for coal or which were affected by such mining, waste banks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment of this Act, and for which there is no continuing reclamation responsibility under State or other Federal laws."

The specific case, addressed by this inquiry, is as follows: a pre-1977 mining site includes a coal refuse impoundment dam. No mining has taken place since passage of the Act. Under the West Virginia Dam Control Act the operator must make necessary repairs, when required, to protect public health and safety. Does the requirement to do some reclamation work on the site by the operator preclude use of AML funding for general site improvement?

Legislative History

The House and Senate Conference Committee in considering SMCRA Sec. 404 adopted the language included in the House version, H.R. 2. H.R. 2 differed from the Senate version by including a provision for water eligibility and drainage abatement expenditures. (S. Rep. No. 95-337, 95th Cong., 1st Sess. 99 (1977)) Previous House and Senate versions had included only land eligibility under this section. Other than the additional water eligibility, this section appears almost identical to that proposed in earlier House and Senate bills identified since the 93rd Congress. The language pertaining to "continuing reclamation responsibility" was retained throughout. (See H. Rep. No. 93-1072, 93rd Cong., 2d Sess. 147 (1974).)

Both the House and Senate Reports in the 95th Congress, provided some explanation concerning AML eligibility. Senate Report No. 95-128, did not provide any further clarification of the "continuing reclamation responsibility" language. It simply explained that:



"This Section specifies that only those lands which were mined for coal or affected by such mining, waste banks, coal processing, or other mining processes and abandoned or left in an inadequate reclamation condition prior to the enactment of this Act are eligible for expenditures under the Fund. In addition, there must be no continuing responsibility for reclamation under State or other Federal laws for such lands to be eligible.

"The inclusion of lands affected by' coal mining means that in various areas the fund could be used to repair public facilities which have been damaged by activity relating to coal mining. In Eastern Kentucky, for example, public roads have suffered extensive damage from coal-hauling. This is especially true of roads which serve mines that are otherwise inaccessible." (S. Rep. No. 95-128, 95th Cong., 1st Sess. 67 (1977))

H. Rep. 95-218,, on the other hand, amplified the "continuing responsibility" language, and described eligible lands for reclamation program activities as "those which have been mined prior to the date of enactment and left or abandoned in either an unreclaimed or inadequately reclaimed condition; and for which there is not a continuing responsibility by the operator for reclamation under existing state or federal laws." (H. Rep. No. 95-218, 95th Cong., 1st Sess. 140 (1977))

The modifier to continuing responsibility, "by the operator", was also identified in earlier 94th Congressional House Reports, H.R. 94-95 and H.R. 94-896. This phrase as applied to Sec. 404 is discussed in a November 16, 1982 OSM memo, which is included as an addendum to this Report.

The OSM memo addresses the question of whether the phrase "no continuing reclamation under state or other federal laws" was intended to refer to operator responsibility or to include the coverage of state responsibility as well. The memo concludes that, in view of the legislative history, it was the intent of Congress to limit this provision to operator responsibility. (E. Bonekemper to P. Thompson, Memorandum: "Section 404 of SMCRA" (1982))

Neither the language of the Act nor its legislative history clearly explains whether the phrase "reclamation responsibility under state or other laws" refers only to environmental laws, or to laws for health and safety as well. The language on its face, does not appear to be limited with respect to the type of law, although the responsibility must clearly be for "reclamation", and not property taxes or other ancillary responsibilities. Of interest to note is that, unlike Sec. 404 which refers generally to state or federal laws, Congress, in another section of the Act, specifically referred to "any law, rule, or regulation..... pertaining to air or water environmental protection." (See SMCRA, Sec. 510(c))

Federal Regulations

The Federal Regulations pertaining to Sec. 404 of the Act were promulgated by the Office of Surface Mining (OSM) in 1978 at 30 CFR Sec. 874.12. Relative to the meaning of "continuing responsibility," OSM states in the Federal Register preamble discussion that "responsibility will be determined only by State Statutory law and will not include common law." Further, the regulatory "language was broadened to allow lands to remain eligible in the event a forfeited bond is insufficient to do an adequate job of reclamation." (See Part 874(3), 43 FR 49932 (1978))



Later as a part of the regulatory review, conducted under President Reagan's administration, the rules concerning the establishment and administration of the Abandoned Mine Land Reclamation (AML) Program by the states were revised. Definitions for "eligible lands and water" and "left or abandoned in either an unreclaimed or inadequately reclaimed condition" were added to the list of definitions under 30 CFR Sec. 870.5.

Little substantive change was made to the eligibility requirements under Sec. 874.12. The word "coal" was added to the section title "Eligible Coal Lands and Water" as well as to Subsection 874.12(a). The eligible requirements pertaining to non-coal lands and water were moved to Part 875. (47 FR 28574 (1982))

Under the final rules, coal lands and water are eligible for reclamation activities if:

- "(a) They were mined for coal or affected by coal mining processes;
- (b) They were mined prior to August 3, 1977, and left or abandoned in either an unreclaimed or inadequately reclaimed condition; and

There is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State or Federal government, or as a result of bond forfeiture. Bond forfeiture will render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, additional moneys from the Fund may be sought under Parts 886 or 888 of this chapter." (30 CFR Sec. 874.12)

In its preamble discussion, OSM did not further define the meaning of the words "responsibility for reclamation", but did recognize in the definition of "Left or abandoned in either an unreclaimed or inadequately reclaimed condition", the "complexity of the factual situations faced by the reclamation authorities and the need to consider each project on a case-by-case basis." Generally, in OSM's view, the agency responsible for conducting the reclamation, whether State, Indian Tribe, Department of Agriculture or OSM, is the one responsible for the determination of reclamation project eligibility. The definition is intended to provide "sufficient latitude" for determination of eligibility on a case-by-case basis.

OSM went on to include the following examples of eligibility:

"Example 1 - OSM considers lands and water eligible, if the following conditions are met: (1) All conditions in Section 404 of the Act are met; (2) All mining processes have ceased but a permit did exist as of August 3, 1977; and (3) The permit has since lapsed and has not been renewed or superseded by a new permit as of the date of the request for reclamation assistance.

"Example 2 - Where a permit has lapsed prior to August 3, 1977, but subsequent reclamation attempts were made after that date to satisfy State regulatory or bond requirements, the area would still be eligible.

"Example 3 - (One commenter suggested that a third example should be given). OSM considers lands and water eligible if the following conditions are met: (1) Mining ceased prior to August 3, 1977; (2) No mining activity occurred or will occur after August 3, 1977; (3) A permit or bond exists as of August 3, 1977, and this permit or bond is released after all



conditions are met; and (4) The land was inadequately reclaimed due to State requirements in existence at the time." (47 FR 28576 (1982))

While the search results are inconclusive in resolving the eligibility issue raised, a follow-up discussion with Chris Warner at OSM suggests at least one reasonable alternative: the state could determine the part of the reclamation work required specifically by the West Virginia statute ineligible for AML funding; but allow the site in general to be declared eligible, as seen by Example 3 discussed in the 1982 preamble to the regulations. (See above) In that way, further reclamation work, such as seeding, could be eligible for funding.

ATTACHMENTS:

- A. Excerpt, H. Rep. No 93-1072, 93rd Cong., 2d Sess. 147 (1974).
- B. Excerpt, S. Rep. No. 94-28, 94th Cong., 1st Sess. 199 (1975).
- C. Excerpt, H. Rep. No. 95-218, 95th Cong., 1st Sess. 140 (1977).
- D. Excerpt, H. Rep. No. 94-45, 94th Cong., 1st Sess. 131 (1975).
- E. Excerpt, H. Rep. No. 94-896, 94th Cong., 2d Sess. 90 (1976).
- F. Excerpt, S. Rep. No. 95-128, 95th Cong., 1st Sess. 67 (1977).
- G. Bonekemper to P. Thompson, Memorandum: "Section 404 of SMCRA" (1982).
- H. Excerpt, 43 FR 49932 (1978). 1978 Preamble to General Reclamation Requirements, Part 874.
- I. Excerpt, 47 FR 29574-28582 (1982). Revision of the Abandoned Mine Land Reclamation Program Rules.