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TOPIC: PRIME FARMLANDS REGULATIONS

The regulation of surface mining on prime farmlands has been a hotly debated topic since the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Several court cases have challenged the constitutionality and the legality of these requirements. As a result, the regulations concerning prime farmlands have undergone numerous changes.

This Report traces the legislative history of the prime farmland provisions and discusses the applicable SMCRA sections and OSM regulations. The "grandfather clause" found at Sec. 510(d)(2) of SMCRA is not addressed.

STATUTORY AUTHORITY

Several different provisions of SMCRA deal with the mining and reclamation of prime farmlands. Sec. 701(20) defines "prime farmland" as "having the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, erosion characteristics, and which historically have been used for intensive agricultural purposes." (NOTE: the Secretary of Agriculture's definition is found at 7 CFR Sec. 657.5) In his application for a permit, the operator must identify any areas which a reconnaissance survey suggests may be prime farmlands. If any are included, a soil survey must be made or obtained to confirm the exact location of the prime lands. (SMCRA Sec. 507(b)(16), 30 USC Sec. 1257)

Once any prime farmlands are identified, the operator must include in his reclamation plan a statement of the condition of the land prior to mining. This statement must include the productivity of the land, including the average yield of food, fiber, forage, or wood products obtained under high levels of management. (SMCRA Sec. 508(a)(2), 30 USC Sec. 1258) A permit for mining on prime farmland is to be granted only if the operator can demonstrate to the regulatory authority the technological capability to restore the mined area to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. (SMCRA Sec. 510(d)(1), 30 USC Sec. 1260)

The operator must also demonstrate to the regulatory authority an ability to meet the soil reconstruction standards of Sec. 515(b)(7). The A and B or C horizons must be segregated, stockpiled, and protected from erosion and contamination. Once mining is completed, the B and C horizons must be replaced and regraded with proper compaction and uniform depth over the regraded spoil material. The surface soil horizon must then be redistributed and graded in a uniform manner. Exceptions from the segregation requirements are made if it can be shown that



other available soil materials (for the A horizon) or a combination of materials or strata (for the B and C horizons) will provide a more favorable material for plant growth.

Under Sec. 519(c)(2), an operator's bond will not be released until revegetation has been established successfully. For prime farmlands, the bond may not be released until soil productivity has returned to equivalent yields as non-mined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey.

LEGISLATIVE HISTORY

The regulation of prime farmlands was a hotly contested issue during the 1977 Congressional debates concerning SMCRA. While most legislators seemed to agree that some regulation was needed, the various amendments reflect very different opinions of the amount necessary.

H.R. 2 in the 95th Congress made provisions for the segregation, stockpiling, and replacement of the soil horizons which are found in the final version of SMCRA at Sec. 515(b)(7). The revegetation requirement for bond release, found at Sec. 519(c)(2) of SMCRA, was also included in this version. (However, no provision was made for the initial permit approval similar to final Sec. 510(d).) The committee report accompanying H.R. 2 explained that in order to qualify as prime agricultural land, the land had to meet specific criteria established by the Soil Conservation Service (SCS). The committee also noted that "since mining is only a temporary use of the land, it appeared especially important to require restoration of productivity levels as part of the mining and reclamation process." (H.R. Rep. No 218, 95th Cong., 1st Sess. 105 (1977))

The Carter Administration advocated the inclusion of a provision which would have imposed a five-year moratorium on surface mining of prime agricultural lands, subject to a grandfather exemption. The amendment called for the prohibition of surface mining when prime farmland comprised more than 10% of the area to be disturbed. A variance from this moratorium could have been granted if the regulatory authority determined that the operator could restore the land. Secretary Andrus' letter to Congress explained: "this Nation has abundant coal resources and we can afford to be selective in deciding how they are used. Time and study are needed to find out whether and how strip mining of prime farmland should be permitted. I therefore strongly urge Congress to incorporate . . . a five-year prime farmland moratorium . . ." (S. Rep. No. 218, 95th Cong., 1st Sess. 116-17 (1977))

The moratorium was not included in either the House or Senate versions of the bill as reported out of committee. However, a modified version of the moratorium was considered as an amendment to the Senate bill. The Senate amendment would have stated that no surface mining was to take place on an area containing more than 10% prime farmland, subject to the same exemptions and variances as the Andrus amendment, except that the Secretary of the Interior, with the concurrence of the Secretary of Agriculture, could grant a variance from the moratorium if the operator demonstrated that he could restore the land to a condition fully capable of supporting the uses which it was capable of supporting prior to mining. One of the sponsors of the amendment, Senator Culver, explained the reason for not accepting the House version:



"It is true, . . . that implicit in this is that a reasonable person may interpret [H.R. 2], and so construe it, that a restoration to prime agricultural use would be a minimal essentiality under that language. But that caveat of a higher or better use is the hooker. That is, the loophole you can drive a truck through Without this amendment, someone in the short-term can determine that a better use is a recreational use, a better use is a residential use, a higher use is an industrial use." (123 Cong. Rec. S8083, S8111 (daily ed. May 20, 1977) (statement of Sen. Culver))

Proponents of the amendment stressed that the regulations would not be an all-out ban on prime farmland mining:

"The amendment does not bar strip mining; it is not a moratorium. It simply says that no one may strip prime farmland unless and until he can guarantee its return to prime condition. The mining companies have assured us that full restoration is possible and that they will achieve it I do not yet share their confidence, but I would not deny them the chance to show that full restoration is possible. The amendment gives them that opportunity." (Id. at 8113 (statement of Sen. Stevenson))

The Conference Committee modified the prime farmlands provisions by accepting the performance standards contained in the House bill and deleting the 10% test found in the Senate bill. A revised permit approval provision was added, which is now found at SMCRA Sec. 510(d).

The Conferees noted:

"It is the intention of the Conferees that the written finding that the regulatory authority is required to make before a permit is granted to mine on prime farmland can be based in part on the expert opinion of the regulatory authority; the operator has the technological capability to perform the soil reconstruction standards of Sec. 515(b)(7) and the performance of those standards will result in the restoration of the mined area to equivalent or higher levels of agricultural yield as non-mined prime farmland in the surrounding area under equivalent levels of management." (S. Rep. No. 337, 95th Cong., 1st Sess. 105 (1977))

FEDERAL REGULATIONS

OSM's permanent regulations pertaining to prime farmland have undergone numerous changes as a result of court challenges. (see Federal Court Decisions *infra*.) These regulations are found at 30 CFR Secs. 785.13, 785.17, 800.40, and 823. They parallel much of the language found in SMCRA.

Sec. 785.17 of the OSM regulations describes the information an operator must provide in his permit application. All applications must include the results of a reconnaissance inspection to indicate whether prime farmland exists. This reconnaissance inspection could be a review of an existing soil survey or, if none is available, an onsite field survey. If this inspection shows that no land within the proposed permit area is prime farmland, the operator must submit a substantiated statement to that effect. This negative determination can be based upon either historical cropland use or a soil survey. (30 CFR 785.17(b) (1983); 48 FR 21446-48 (1983))



If the reconnaissance inspection indicates that land within the proposed permit area may be prime farmland historically used for cropland, the applicant must obtain a soil survey and determine whether soil mapping units within the proposed permit area have been designated as prime farmland. If no soil survey exists, the applicant is responsible for providing one. In either case, the survey must be one used for operational conservation planning as defined by the Soil Conservation Service (SCS). This soil survey only applies to the permit area and includes only prime farmland soil. (Id.)

Once prime farmland has been identified within the permit area, the operator must include the additional permit application information found at Sec. 785.17(c). Permit applications for mining on prime farmland must include a soil survey made according to the standards of the National Cooperative Soil Survey (NCSS). The regulations also incorporate by reference various SCS and USDA handbooks which give acceptable procedures for conducting soil surveys. The SCS plays a major role in the survey process by determining what tests must be included in the representative soil profile. In all cases, these tests must include soil horizon depths, pH, and the range of soil densities for each prime farmland soil unit within the permit area. The applicant may use other soil-profile descriptions from the local area if approved by the SCS. In addition, the regulatory authority has the power to require information on other physical and chemical properties if needed to show that the operator has the technological capability to restore the prime farmland. (30 CFR Sec. 785.17(c) (1983); 48 FR 21446, 21449 (1983))

To assist the regulatory authority in its evaluation of the operator's restoration capability, the operator must submit a plan which gives soil reconstruction, replacement, and stabilization methods. Scientific data for areas with comparable soils, climate, and management are to be included to demonstrate that the proposed method of reclamation will achieve, within a reasonable time, levels of yield equal to or greater than those of non-mined prime farmland in the surrounding area. The applicant must also determine the productivity of the land prior to mining, including the average yield of food, fiber, forage, or wood products under a high level of management. This soil productivity is routinely documented within the SCS soil surveys and may be obtained from SCS offices. (Id.)

Secs. 785.17(d) and (e) detail the role of the Secretary of Agriculture and the SCS in the prime farmland permitting process. The responsibilities of the Secretary have been assigned to the SCS State Conservationist within each state. The State Conservationist's duties include: (1) providing data necessary to support prime farmland descriptions; (2) assisting in describing the nature and extent of reconnaissance inspections; and (3) providing review and comment on the proposed method of soil reconstruction. In turn, the regulatory authority is required to consult with the State Conservationist before approving any permits containing prime farmland.

Part 823 of the OSM regulations describes the special performance standards applicable to operations on prime farmlands. Thus, an operator mining on these lands must comply with these standards in addition to those found in other sections of the regulations. Certain operations are excluded from the special standards of Part 823, including those lands which fall under the "grandfather clause" of Sec. 785.17(a). In addition, coal preparation plants, support facilities, and roads of underground mines are excluded if used over extended periods of time and if they affect



a minimum amount of land. However, the operator must protect the productive capacity of the soils in accordance with Sec. 817.22 where permanent retention has not been included as part of the approved post-mining land use. The terms "coal preparation plant" and "support facilities" are defined in Sec. 701.5, and include nonexclusive lists of facilities that may qualify. Such facilities will be exempted only if they affect a minimal amount of land and are actively used over an extended period of time. It is up to the regulatory authority to establish the maximum amount of land and the minimum amount of time to be excluded. (30 CFR Sec. 823.11 (1983); 48 FR 21446, 21452-21454 (1983))

Surface mining facilities and approved water bodies were also excluded under Sec. 823.11. However, these exemptions have been suspended as a result of Judge Flannery's October, 1984 decision. (see Federal Court Decisions, *infra*, and 50 FR 7274 (1985))

Sec. 832.12 deals with the removal and stockpiling of soil on prime farmlands. All soils are to be removed from the areas to be disturbed, with the minimum depth governed by Sec. 823.14(b). Topsoil or other suitable materials are to be removed and, if not utilized immediately, stockpiled separately from the spoil and other excavated materials. Soil supplements and substitutes may only be used if the final soil will have a greater productive capacity than that which existed prior to mining. The B or C horizons are to be similarly removed and stockpiled. Where combinations of such soil materials have been shown to be equally or more favorable for plant growth than the B horizon, separate handling is not necessary. The stockpiled materials are then to be placed within the permit area where they will not be disturbed or subject to erosion. When stockpiles are left in place for more than 30 days, the general topsoil-storage standards of Secs. 816.22 and 817.22 apply.

Once mining has been completed, the operator must replace the soil in accordance with Sec. 823.14. The specifications for soil reconstruction are to be established by the SCS and based on NCSS standards. Tests that must be run on the soil include: physical and chemical characteristics of reconstructed soils and soil descriptions containing soil horizon depths, soil densities and soil pH. These tests, which are the same ones run before mining begins, are used to evaluate the reconstruction for release of the performance bond. The reconstructed soils are to have the capability of achieving levels of yield equal to, or higher than, those of non-mined land in the surrounding area.

Sec. 823.14(b) requires that, in general, the depth of reconstructed prime farmland is to be 48 inches. However, the preamble to the final rules notes that "this depth requirement is a general requirement, to be delineated more specifically by the SCS on the basis of the soil survey." (48 FR 21446-21457 (1983)) This 48 inch depth may be increased or decreased, according to soil productivity and root-inhibiting capacities. The operator must replace and regrade the soil horizons or other root-zone material with proper compaction and uniform depth; the B and C horizons at a thickness which will inhibit root penetration; and the topsoil at a thickness equal to or exceeding the thickness of the original soil surface layer.

Once the various soil horizons have been replaced, the operator must demonstrate the productivity of the soil by cropping. This measurement of soil productivity must begin within 10



years after completion of soil replacement and must be on a representative sample or on all of the mined and reclaimed prime farmland area. The sampling technique used must have a 90% or greater statistical confidence level. The measurement period for determining the average annual crop production (yield) must be at least three years before the operator's bond will be released under Sec. 800.40, at a level of management used on non-mined prime farmland in the surrounding area. The preamble notes that the three crop years need not necessarily be consecutive years. They could be three crop years in a particular crop-rotation sequence. Thus, "average annual crop production" means the average yield of the specified crop during the three crop years used for the test.

Restoration of soil productivity is considered to be achieved when the average yield during the measurement period equals or exceeds the average yield of the reference crop established for the same period for non-mined soils of the same or similar texture or slope phase. The reference crop used to prove restoration of soil productivity is to be selected from the crops most commonly grown on surrounding prime farmland. Where row crops are selected as the reference crops and two or more row crops are produced in the area, the row crop used should be the one that requires the greatest rooting depth. Bay crops may also be used in rotation with row crops during the period for proving soil productivity, since they are included in the definition of cropland in Sec. 701.5. The use of perennial plants for hay as the test crop is within the regulatory authority's discretion if those kinds of crops are among those most commonly produced on surrounding prime farmland.

Two means may be utilized to establish reference crop yields for a given season. If, given SCS approval, the current yield records of representative local farms in the surrounding area may be used. The other method is to use the USDA average county yields. These are to be adjusted by the SCS for local yield variation within the county that is associated with differences between non-mined prime farmland soil and all other soils that produce the reference crop. In either case, the SCS may allow an adjustment of the average crop yield for disease, pest, and weather induced variations, or differences in specific management practices where the overall management practices of the crops being compared are equivalent. The preamble to OSM's final rules notes that these adjustments could be needed to account for unusual conditions that are beyond an operator's control and that skew comparisons. The allowance for differences in specific management practices recognizes that there are many individual crop-management variables which could appreciably change crop yields. (30 CFR Sec. 823.15(5)-(7) (1983), 48 FR 21446, 21459 (1983))

OSM's regulations provide a variance from some prime farmland rules for experimental practices. Variances may be granted from the special performance standards if approved by the SCS. However, the preamble to Sec. 785.13(e) notes that an experimental practice only grants a variance from the soil reconstruction standards, and not the productivity standards of SMCRA. (30 CFR Sec. 785.13 (1983); 48 FR 9478, 9481 (1983))

FEDERAL COURT DECISIONS



The constitutionality of the prime farmland regulations was challenged in *INDIANA v ANDRUS*, 501 F Supp 452 (1980). The State of Indiana, the Indiana Coal Association, and several coal operators filed suit alleging that the prime farmland regulations exceeded the government's powers under the commerce clause, that they were unconstitutional land use control and planning regulations, and that they constituted a taking of property without just compensation. The District Court issued an order and opinion declaring the regulations unconstitutional and permanently enjoining the enforcement of the challenged sections of the Act. The Court held that the prime farmland provisions were beyond the congressional power to regulate interstate commerce because they were "directed at facets of surface coal mining which have...an infinitesimal effect or trivial impact on interstate commerce", and were not "reasonably related to the protection of interstate commerce". The land use and taking challenge were also sustained.

The Supreme Court overturned this ruling in *HODEL v INDIANA* (69 L Ed 2d 40, 452 US 314 (1981)) In rejecting the District Court's commerce clause rationale, the Court noted that "the pertinent inquiry is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce". The Court also held that since SMCRA regulates only the activities of operators and not the states as states, the land use provisions of the Tenth Amendment were not violated. Furthermore, since the District Court's ruling did not pertain to a particular piece of property, the only question was whether "mere enactment" of SMCRA effected an unconstitutional taking of private property. The Court held it did not, saying: "the prime farmland provisions do not prohibit surface mining; they merely regulate the conditions under which the activity may be conducted . . . [W]e therefore conclude that these provisions do not, on their face, deprive a property owner of economically beneficial use of his property." (Id.)

;Prime farmland regulations were also challenged in three of the Flannery decisions. The soil survey and cropping requirements were contested in *IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION*, No. 79-1144, slip op. (DDC February 26, 1980). An earlier version of the OSM regulations required soil survey information for lands failing to qualify as prime farmland. Judge Flannery remanded those regulations as inconsistent with Congressional intent, since SMCRA only requires a soil survey when the reconnaissance inspection reveals prime farmland. The cropping regulations were also remanded as lacking statutory authority. "Sections 515(b)(7), 510(d)(1), and 515(b)(20) of the Act . . ." noted Flannery, "do not command a coal operator to actually farm the land. Instead, they direct the operator to demonstrate capability of prime farmlands to support pre-mining productivity. The capability can be demonstrated by a soil survey." (Id.),/

In his May, 1980 decision, Judge Flannery seemed to reverse his earlier opinion on the requirement to grow crops and upheld OSM's rules which require an operator to designate cropland as the post-mining land use. Other issues considered in Flannery's May, 1980 opinion included consideration of coal industry's argument that small and odd shaped parcels of land should be added to the list of exclusions, and National Wildlife Federation's (NWF) objections to allowing "other factors" to provide the basis for negative prime farmland determination. Flannery rejected both arguments. Several challenges were mooted by OSM revisions. The application of



prime farmland requirements to the surface effects of underground mining were also upheld, but with some reservations. The Court noted that the reclamation standards technically applied to the surface effects of underground mining; however, an across-the-board application was "unduly harsh and arbitrary". "It appears arbitrary", Flannery noted, "to command operators to segregate the topsoil and underlying horizons for 20-40 years in situations where reclamation will affect a small area of land". Therefore, the application of Part 823 of the regulations to underground mining was suspended, with the suggestion that an exemption be promulgated for long-term surface facilities which affect small amounts of land. (IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No. 79-1144, slip op. (DDC May 16, 1980))

The cropping requirement for prime farmlands was subject to more judicial scrutiny in Flannery's October, 1984 opinion. In this opinion, Flannery clearly upheld OSM's requirement to demonstrate productivity through growing crops on prime farmland. Judge Flannery explained the distinction from his February, 1980 opinion:

"[The Court] stated, on the basis of the record before it, that the capability of prime farmlands to support pre-mining productivity could be demonstrated by a soil survey The present record contains the conclusion of the Secretary that only cropping can effectively measure restoration of prime farmland. This is a technical determination which is entitled to great deference. This same finding was not present when the court issued its February, 1980 opinion." (IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No. 79-1144, slip op. at Footnote 9 (DDC October 1, 1984))

Implementing Flannery's suggestion relating to long-term support facilities, OSM created a regulatory exemption for coal preparation plants, support facilities and roads that affect a minimal amount of land. OSM made this exemption applicable to both surface and underground operations; however, the Court remanded this regulation as it applies to surface mining. Judge Flannery noted that in underground mining the soil must be maintained and stored for long periods of time. The same is not true of surface mining operations, where the soil may be distributed in other areas. Thus, the exemptions should not apply to surface mining facilities. The Court also ordered the Secretary to provide some guidelines limiting the scope of the exemption by setting some limits on the amount of time or land needed to qualify.

In addition, the OSM allowance for a variance from the prime farmland regulations for permanent impoundments was remanded as overly broad and an impermissible use of prime farmland. (Id.)

OHA (OFFICE OF HEARING AND APPEALS) DECISIONS

Two Board decisions involving prime farmland were identified by the COALEX search. In *BANNOCK COAL CO. v OSM*, No. CH 4-27-R (November 9, 1984), an NOV was issued to an operator for failure to demonstrate equivalent yields on prime farmland. The operator argued that the post-mining use of the land was to be pastureland, and thus not subject to the cropland regulations. ALJ McGuire found that merely designating the post-mining use of land, previously



designated as prime farmland by a permittee, as pastureland rather than cropland did not relieve the operator of the crop yield requirements.

In *UNIVERSAL COAL & ENERGY CO. v OSM*, No. KC 9-6-R (September 8, 1980), ALJ Luoma held that a negative prime farmland determination, made two years after mining began, was invalid. The Missouri regulatory authority was unable to conduct a thorough investigation of the soil's pre-mined characteristics, since the land had already been disturbed. However, a negative determination was issued, based on a lack of flood protection in the area. This decision was rejected, since the negative determination was not based on scientific findings and soil surveys as required by the federal regulations. ALJ Luoma's finding was upheld in *UNIVERSAL COAL CO.*, 3 IBSMA 200 (1981).

ATTACHMENTS

- A. H.R. Rep. No. 218, 95th Cong., 1st Sess. (1977).
- B. S. Rep. No. 218, 95th Cong., 1st Sess. (1977).
- C. 123 Cong. Rec. 8083, 8111 (daily ed. May 20, 1977) (statement of Sen. Culver).
- D. S. Rep. No. 337, 95th Cong., 1st Sess. (1977).
- E. 48 FR 21446 (1983).
- F. 50 FR 7274 (1985).
- G. 48 FR 9478 (1983).
- H. *INDIANA v ANDRUS*, 501 F Supp 452 (SD Ind 1980).
- I. *HODEL v INDIANA*, 452 US 314 (1981).
- J. *IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION*, No. 79-1144, slip op. (February 26, 1980).
- K. *IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION*, No. 79-1144, slip op. (May 16, 1980).
- L. *IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION*, No. 79-1144, slip op. (October 1, 1984).
- M. *BANNOCK COAL CO. v OSM*, No. CH 4-27-R (November 9, 1984).
- N. *UNIVERSAL COAL & ENERGY CO. v OSM*, No. KC-9-6-R, (September 8, 1980).
- O. *UNIVERSAL COAL CO.*, 3 IBSMA 200 (1981).