



COALEX STATE INQUIRY REPORT – 133
December 1, 1989

Jim Hamilton
Department of Mines, Minerals and Energy
P.O. Drawer U
Big Stone Gap, Virginia 24219

TOPIC: EXEMPTION FOR GOVERNMENT-FINANCED CONSTRUCTION

INQUIRY: A portion of a permitted area is to be used as a government-financed landfill. The request for an exemption (from reclaiming that portion of the minesite) for the government-financed construction project was not made at the time the original permit was issued because the need for the landfill was not identified until recently. Must the exemption be in place at the time the permit is issued or may the exemption be authorized after the permit is issued? Is there any legislative history which discusses this issue?

SEARCH RESULTS: Using the COALEX Library in LEXIS, committee prints, reports, Congressional Record entries, etc. were searched to identify discussions of SMCRA Sec. 528(2), 30 UCS 1278(2). Little discussion of the section was found.

Additional research on the timing of the approval of an exemption was performed in the Interior Board of Surface Mining Appeals (IBSMA) decisions, federal and state case law and the preambles to proposed and final rules published in the Federal Register.

The legislative history materials identified are presented here in chronological order. Excerpts are attached. The first item presented contains the most relevant information. Discussion of the other items identified follows.

LEGISLATIVE HISTORY

119 CONG REC S1357 (daily ed. Jan. 18, 1973)(statement of Sen. Jackson).

"This section [Surface mining operations not subject to the Act] provides specific exemptions for certain types of activities which might otherwise be construed to fall within the definition of 'surface mining operations' and thus be subject to the Act. Activities specifically excluded are (1) those which should not be included because the scope of their impact is so minor; (2) those which have a few characteristics in common to surface mining but which are primarily for other useful and, in some cases, public purposes; and (3) those which do not present the environmental or social costs which regulation under the Act would internalize. Neither the House-passed measure nor the committee-reported bill in the 92nd Congress provided this exemption. However, it is apparent that Federal legislation should not, because of ambiguity, address local



conditions and the actions of individuals which have no national, State, or regional significance or which present no important questions of Federal or State policy."

"The exempted activities include:...Highway and railroad cuts and other excavations for public projects where the Federal, State or local government requires reclamation of the affected areas".

"The Secretary may identify other activities not subject to the Act and issue regulations further defining the exempted activities taking into consideration their magnitude (in tons and acres), their potential environmental impact, and whether the class, type, or types of activity are already subject to existing Federal, State, or local regulatory systems. In identifying and defining other exempted activities, the Secretary is expected to follow a rule of common sense. The purpose of the Act is to insure that social and environmental costs of surface mining are internalized by reclamation. Any activity which inflicts significant costs and which should be accompanied by reclamation should, of course, not be exempted. On the other hand, individual, non-commercial, extremely localized, activities which do not cause environmental damage should be exempted not only to insure fairness but also to relieve the administrative burden of the regulatory authorities so that the authorities can concentrate on those activities which truly require careful regulation."

Regulation of Surface Mining, Hearings on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess (April, 1973).

1. Statement of Dr. Darnell Whitt, Deputy Administrator for Field Services, Soil Conservation Service, from page 852. Included among the activities which "may be exempted" under these versions of the Act are: "Excavations by a governmental agency or its authorized contractors for highway and railroad cuts and fills."
2. Statement of Frank C. Wachter, National Industrial Sand Association, from page 1189. "[T]he wording of the subparagraph...[regarding exempt excavations] appears to create a competitive inequity in the construction aggregates industries by creating an exempt category of aggregate producers...who apparently can avoid the cost of reworking the excavated land. We suggest the following for clarification of what appears to us to be ambiguous wording: '...(2) excavations by an agency of Federal, State or Local government or its authorized contractors for highway and railroad cuts if the Federal, State or Local government requires reclamation of the area affected.'"

Surface Mining Control and Reclamation Act of 1977, S REP No 95-128, 95th Cong, 1st Sess 98 (May 10, 1977).

"This section [Surface mining operations not subject to this Act] provides specific exemptions for three types of coal surface mining which would otherwise be subject to the Act.

"These are (1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him, (2) the extraction of coal where surface mining affects 2 acres or less, and (3) extraction of coal in the process of highway or other construction.



"The Committee felt that these three classes of surface mining cause very little environmental damage and that regulation of them would place a heavy burden on both the miner and the regulatory authority."

Surface Mining Control and Reclamation Act of 1977, HR REP No 95-493, 95th Cong, 1st Sess 112 (July 12, 1977).

"The Senate amendment...included an exemption for all construction. The conferees agreed to a modified version of the Senate amendment which limits the exemption to extraction of coal as an incidental part of government-funded construction only, rather than all construction as originally provided in the Senate language."

IBSMA DECISIONS

HARDLY ABLE COAL CO., 2 IBSMA 270, IBSMA 80-31 (1980).

Hardly Able received a Notice of Violation (NOV) for mining within 100 feet of a county road. (They subsequently applied for and received a waiver of the 100-foot rule.) In the validity of the NOV, the Board concluded: "The Act contemplates that a miner obtain permission from the regulatory authority to mine within 100 feet of a public road before the mining takes place. The ex post facto approval by the regulatory authority of mining within 100 feet of a county road generally defeats the purpose of the Act, that is, giving interested parties notice allowing them to protest before the actual mining takes place."

ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, 86 I.D. 446 (1979).

The Board ruled that the regulatory authority's approval of an exemption under the Act or regulations (the use of alternative materials in place of topsoil) must be obtained prior to the start of any action to which the exemption applies.

FEDERAL DECISIONS

MONONGAHELA POWER CO. v MARSH, 809 F2d 41 (D D C 1982).

The Appeals Court reversed the District Court ruling and determined that the Monongahela Power was required to obtain a permit from the Army Corps of Engineers in order to "discharge fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission."

"Section 404 [of the Clean Water Act] transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement, must be subjected to Section 404(b)(1) scrutiny or its equivalent."

FEDERAL REGISTER ENTRIES

53 FR 5430 (FEBRUARY 24, 1988).

This is a notice of reopening of the comment period on proposed regulations pertaining to the



"exemption for coal extraction incidental to the extraction of other minerals", SMCRA Sec. 701(28), 30 CFR Part 702.

"Under Sec. 702.11(a), new operations would be required to file a complete application for exemption which would require an administrative decision by the regulatory authority before the operator would be allowed to commence coal extraction based upon the exemption. Requiring operators to apply for and receive exemptions is a procedure OSMRE successfully used earlier with regard to the special small operator exemption in 30 CFR 710.12."

See STATE INQUIRY REPORT - 115 (attached) which includes Administrative Law Judge and Interior Board of Land Appeals decisions which address the government-financed exemption issue. In these decisions, mine operators claimed exemptions under SMCRA 528, 30 CFR 700.11 and 30 CFR 707.5. To be eligible for exemptions, operators had to meet more or more of the criteria set out in 707.5: (1) the extraction of coal was "incidental" and the construction was "50 percent" government funded.

See also STATE INQUIRY REPORT - 129 which discusses the change of premining pasture land to the postmining use as a landfill. (Report 129 is not attached.)

ATTACHMENTS

- A. Excerpts from 119 CONG REC S1357 (daily ed. Jan. 18, 1973)(statement of Sen. Jackson).
- B. Excerpts from Regulation of Surface Mining, Hearings on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 852 (April, 1973)(statement of Dr. Darnell Whitt, Deputy Administrator for Field Services, Soil Conservation Service).
- C. Excerpts from Regulation of Surface Mining, Hearings on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 1189 (April, 1973)(statement of Frank C. Wachter, National Industrial Sand Association).
- D. Excerpts from Surface Mining Control and Reclamation Act of 1977, S REP No 95-128, 95th Cong, 1st Sess 98 (May 10, 1977).
- E. Excerpts from Surface Mining Control and Reclamation Act of 1977, HR REP No 95-493, 95th Cong, 1st Sess 112 (July 12, 1977).
- F. HARDLY ABLE COAL CO., 2 IBSMA 270, IBSMA 80-31 (1980).
- G. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, 86 I.D. 446 (1979).
- H. Excerpts from MONONGAHELA POWER CO. v MARSH, 809 F2d 41 (D D C 1982).
- I. 53 FR 5430 (FEBRUARY 24, 1988). Notice of reopening of public comment period on all issues of "Exemptions for Coal Extraction Incidental to the Extraction of Other Mineral", 30 CFR 702.
- J. STATE INQUIRY REPORT - 129 on "Landfill as a postmining use" (October, 1989).