



**COALEX STATE INQUIRY REPORT – 134**  
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**TOPIC:** 16 2/3 EXEMPTION (UPDATE OF PRIOR REPORTS)

**INQUIRY:** What caselaw and administrative decisions are available on the 16 2/3 exemption for the extraction of coal incidental to the extraction of other minerals? If the overburden is being sold, can it be considered an "other mineral"? Is there any information on the definition of "mineral"?

**SEARCH RESULTS:** The COALEX Library and other materials in LEXIS were used to update existing Reports on the 16 2/3 exemption and the definition of "mineral".

On December 20, 1989, a new set of regulations were promulgated implementing the exemption under SMCRA Sec. 701(28). The preamble to the final rule describes the regulatory history of the exemption and a review of the relevant administrative and federal caselaw. Some of that material is discussed below. Copies of the significant material are attached.

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**FEDERAL REGULATORY HISTORY**

**From 54 FR 52092 (DECEMBER 20, 1989).**

The initial regulation implementing 701(28) appeared in 30 CFR 700.11(e) (44 FR 15315, MARCH 13, 1979). The applicability of the abandoned mine reclamation fee obligations appeared in 30 CFR 870.11(d) (1979).

**In 47 FR 33424 (AUGUST 2, 1982), the exemption located in Sec. 700.11(e) was shifted to Sec. 700.11(a)(4).** Sec. 700.11(c) was added because the original section did not contain "provisions prescribing how those seeking an exemption...could request one". It provided that "the regulatory authority may make a written determination, when requested, whether the operation is exempt and that the person requesting the exemption has the burden of establishing the exemption."

**870.11(d) was revised on June 30, 1982 (47 FR 28574).** A "tonnage measurement constraint" was imposed "under which operators had to qualify for the exemption during any twelve consecutive months."



**49 FR 19336 (MAY 7, 1984). Advanced notice of proposed rulemaking and request for public comments. [NOTE: This is part of Report 47, incorporating Report 24.]**

Additional regulations were needed to clarify the issues which had arisen since the promulgation of the "two preconditions" required for an operation to qualify for an exemption ("incidental" and "16 2/3 percent"). These issues were:

"(1) the criteria for determining when an operation qualifies for the exemption; (2) the procedures to be used by the regulatory authority in making a determination that an operation is exempt; (3) the consequences which ensue if an operation fails to meet the exemption qualifications; and (4) the procedures and criteria required by the regulatory authority for an operation to requalify for the exemption after loss of that status."

Pending promulgations of new rules, OSM developed the following guidelines:

1. Operators had to request a written exemption from the regulatory authority.
2. The regulatory authority determined whether an operation was "incidental" based on the information required to be submitted by the operator. The documentation could include: volumetric calculations, the physical layout of the mine site, stockpiles and production records.
3. Proof of the commercial value of the "other minerals" removed was required.
4. The definition of the term "other minerals" did not include topsoil and fill dirt.

**52 FR 20546 (JUNE 1, 1987). Proposed rule.**

This proposed rulemaking added a new part - 702. The purpose of the new part was to provide "specific guidance for determining whether an operation [wa]s exempt" under SMCRA Sec. 701(28). The provisions of the proposed regulation included:

1. Requirement to file a "notice of exemption for each mining area."
2. "A list of the other minerals to be extracted for commercial use or sale, annual and total tonnages of all minerals including coal, and the basis of such tonnage estimates."
3. Description of potential markets or a summary of sales commitments.
4. Three requirements had to be satisfied "in order for an operation to be exempt from SMCRA":
  - a. The 16 2/3 percentage test would apply to the total coal and other mineral production "achieved over the life of the mining at each individual excavation." [The "tonnage" test.]
  - b. Coal must be "produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use." [The "stratigraphic" test.]
  - c. "[E]ach of the other minerals upon which an exemption...is claimed is a commercially valuable mineral." [The "commercial value" test.]

**53 FR 5430 (FEBRUARY 24, 1988). Reopening of the public comment period.**

Two modifications were proposed to the June 1, 1987 proposed rules. They were:



1. An amended rule requiring operators to apply for an exemption and "receive approval from the regulatory authority before being allowed to begin operations based upon the exemption."
2. The addition of an annual reporting requirement "relating to the proposed tonnage test...to assure that the operation is proceeding as contemplated in the approved application."

**53 FR 13415 (APRIL 25, 1988). Reopening of the public comment period.**

The proposed rules were further modified to add a revenue test: the operator had to establish that the revenue derived from the coal extracted would not exceed 50 percent of the total revenue derived from the coal and other minerals extracted from the same mining area. Initial and annual reporting requirements for revenue were also proposed.

"[O]perators would also have to demonstrate compliance with either a revenue or an economic viability test to establish the coal extraction is incidental to the extraction of other minerals."

The "economic viability concept" was added in response the MCNABB ruling, discussed below.

**54 FR 52902 (DECEMBER 20, 1989). Final rule.**

The purpose of adopting regulations concerning the extraction of coal incidental to the extraction of other minerals is to "establish criteria and procedures for determining whether an operation qualifies initially and on a continuing basis for the exemption. This action is necessary to halt and prevent abuse of the exemption. The final rule is intended to provide a fair and consistent basis for determining the applicability of the Act to operations producing both coal and other minerals in order to ensure that the mining of coal is appropriately regulated."

The main requirements for obtaining an exemption under SMCRA Sec. 701(28) include the "tonnage" test and "two straightforward and easily measured criteria to define incidental mining, the stratigraphic test and the revenue test." (See 54 FR 20546, above.)

Some additional requirements of the new Part 702 - Exemptions for Coal Extraction Incidental to the Extraction of Other Minerals follows. (For explanations on how the final rule differs from the various proposed rules, see the attached Federal Register item.)

1. A complete application for exemption must be filed for each mining area. Mining may not commence until the regulatory authority approves the application for the exemption. Existing operations must also apply for an exemption.
2. The application must include:
  - a. Estimates of the annual production of coal and other minerals within each mining area over the anticipated life of the mining operation.
  - b. Estimated annual revenues to be derived from bona fide sales of the coal and other minerals to be extracted.
  - c. Where coal and other minerals are to be used rather than sold, the estimated annual fair market values at the time of projected use.
  - d. Submittal of the basis for the above estimates.



- e. A summary of sales commitments and agreements for future delivery.
3. Requirements for exemption.
  - a. The "tonnage" test is based on the "cumulative production...determined annually" and reported in an annual report. The original proposal called for the "total tonnage" over the life of the mine.
  - b. The "revenue" test is based on the "cumulative revenue...determined annually" and reported in an annual report.
  - c. Each of the other minerals upon which the exemption is claimed must be a "commercially valuable mineral". Either "a market presently exists or the mineral is mined in bona fide anticipation that a market will exist...within a 12-month period."
4. OSM is authorized to inspect and enter sites to verify the validity of claimed exemptions.
5. Up to a 12-month supply of stockpiled coal and other minerals may be excluded from the calculation of cumulative production until the time of its sale.
6. The annual report will include:
  - a. Annual production of coal and other minerals and annual revenue derived from them during the preceding 12-month period.
  - b. Cumulative production of coal and other minerals and cumulative revenue derived from them.
  - c. Annual and cumulative figures are to be included for coal and other minerals sold, coal and other minerals used or transferred by the operator as well as for coal and other minerals stockpiled.
  - d. "Other minerals" is defined as "any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material." This definition allows regulatory authorities "the flexibility to consider local conditions in determining whether the mineral has commercial value."

NOTE: For states with federal programs and on Indian lands, the effective date of this rule is April 1, 1990. In primacy states, the rule does not become effective until each primacy state modifies its own program to incorporate regulations "promulgated pursuant to this final rule". Until a state program is modified, "operations and regulatory authorities should rely on the 1984 guidelines, as interpreted by recent legal decisions, particularly MCNABB [see discussion below], in implementing the incidental mining exemption."

## FEDERAL DECISIONS

"In recent court decisions and administrative hearings before the DOI, the requirement that the incidental mining exemption is based on more than just the relative tonnages of coal and other minerals extracted has been upheld." 54 FR 52092, 52093 (DECEMBER 20, 1989).

### **S & G EXCAVATING, INC. v U.S., 15 CI Ct 157 (1988).**

S & G claimed that their production of coal was "incidental" to that of sand, gravel and topsoil; they were, therefore, exempt from the provisions of SMCRA and were due a refund of reclamation fees which had been collected. OSM had at times claimed the coal production was



greater than 16 2/3% and at times claimed it was less than 16 2/3%. The court granted S & G's motion for summary judgment, ruling as follows on the issues:

- a. "In the absence of a regulation on this subject topsoil should be included as an 'other mineral.'"
- b. OSM could not retroactively apply the June 30, 1982 amended version of the regulation, 30 CFR 870.11(d), which required S & G to "account for its mineral production on a twelve consecutive month basis." The Secretary's amendment "was published three months after S & G ceased all mineral production".
- c. "The distinction between accounting for the minerals when sold rather than when removed is critical due to the different market demands for the minerals....The express statutory language of Surface Mining Act specifically provides that the exemption is based on minerals removed for commercial use or sale, not on minerals actually sold." Thus, stockpiles of sand and gravel, which had not been sold as quickly as the coal, were to be included in calculating the production figures and coal percentages.

**UNITED STATES v BEAIRD COAL CO. AND CORDOVA CLAY CO., INC., slip op. (N D Ala 1986), rev'd on other grounds, 825 F2d 1471 (11th Cir 1987). [NOTE: Both decisions are attached.]**

The court ruled that the "extraction of coal" by Beaird Coal "was not incidental to the extraction of other minerals", shale and clay. The court also held that Cordova Clay "could not aggregate the clay and shale" produced at a pit where "no coal was extracted" with the clay and shale taken from the coal producing pit, located across the river.

## **ADMINISTRATIVE DECISIONS**

**MCNABB COAL CO. v OSM, 101 IBLA 282, IBLA 86-1559 (1988). [MCNABB COAL CO. v OSM, Docket No TU 6-34-R (July 23, 1986 {amended by May 23, 1988 Order}).]**

McNabb failed "to sustain the burden of establishing an exemption from SMCRA." The primary issue, the court stated, was "whether the production of coal was incidental to the production of other minerals [limestone and shale] for commercial use and profit at the McNabb mine, notwithstanding the fact the tonnage of coal produced was less than 16-2/3 percent."

In its ruling, the court referred to the preambles to the Advanced Notice of Proposed Rulemaking, 49 FR 19336 (MAY 7, 1984), and the Proposed Rules 52 FR 20546 (JUNE 1, 1987): "The extraction of coal is not incidental to the extraction of other minerals where the mining of coal is essential to the economic viability of the mine; the coal is the deepest strata mined for commercial use or sale; the acreage of the shallower deposits extracted for commercial use or sale is less than 50 percent of the acreage of the coal deposit extracted; the acreage of the mineral deposit immediately above the coal seam is less than 5 percent of the acreage of coal extracted; and the decision to mine the deposit immediately above the coal is based on the decision to mine the coal."



### **CORDOVA CLAY CO. v OSM, Docket No NX 5-3-R (1986).**

The ALJ ruled that the operator was entitled to an exemption because he showed that his primary intent was the removal of clay and shale.

"The fact that the value of the coal mined approaches the value of the clay, or for that matter may exceed the value of the clay, does not prove that the Applicant is primarily mining coal as opposed to the clay."

OSM, in the preamble to the new rules, interpreted the CORDOVA decision in light of the new regulations: "OSM's opinion is that the ALJ was correct in perceiving that the Act requires a two-part test for the incidental mining exemption [primarily seeking clay and no more than 16 2/3 percent of the material removed for commercial purposes was coal] However, the ALJ's application of a 'primary intention' test in this case points out the benefits of establishing objective criteria. In the CORDOVA case, the ALJ relied on peripheral issues, such as the operator's longevity and credibility as a witness, instead of the fact that the operator mined through relatively worthless rock and clay to reach marketable coal." 54 FR at 52110.

### **EARLIER COALEX REPORTS**

#### **STATE INQUIRY REPORT - 47 (June, 1985), incorporating STATE INQUIRY REPORT 24 (December, 1984). Topic: 16 2/3 exemption.**

REPORT 24 provides legislative history on SMCRA 701(28) and includes the May 7, 1984 notice of proposed rulemaking from the Federal Register. REPORT 47 updates the prior report.

#### **STATE COMPARISON REPORT - 113 (June, 1989). Topic: Definitions of soil and mineral.**

This report contains a table summarizing state code sections (as searched using LEXIS) which define "mineral", "soil", and "dirt". Also included are some relevant federal and state opinions.

### **ATTACHMENTS**

- A. 54 FR 52092 (DECEMBER 20, 1989). Final rules.
- B. STATE INQUIRY REPORT - 47, June, 1985 incorporating STATE INQUIRY REPORT - 24 (December, 1984). REPORT - 24 includes legislative history information and the "Advance notice of proposed rulemaking" published in the Federal Register, 49 FR 19336 (MAY 7, 1984).
- C. 52 FR 20546 (JUNE 1, 1987). Proposed regulations relating to the exemption contained in SMCRA Sec. 701(28).
- D. 53 FR 5430 (FEBRUARY 24, 1988). Notice of reopening of public comment period on proposed rule relating to the exemption for coal extraction incidental to the extraction of other minerals.
- E. 53 FR 13415 (APRIL 25, 1988). Notice of reopening of public comment period on proposed rule relating to the exemption for coal extraction incidental to the extraction of other minerals.
- F. S & G EXCAVATING, INC. v U.S., 15 Cl Ct 157 (1988).



- G. UNITED STATES v BEAIRD COAL CO. AND CORDOVA CLAY CO., INC., slip op. (N D Ala 1986), rev'd on other grounds, 825 F2d 1471 (11th Cir 1987). [NOTE: Both decisions are attached.]
- H. MCNABB COAL CO. v OSM, 101 IBLA 282, IBLA 86-1559 (1988).
- I. MCNABB COAL CO. v OSM, Docket No TU 6-34-R (July 23, 1986 [amended by May 23, 1988 Order]).
- J. CORDOVA CLAY CO. v OSM, Docket No NX 5-3-R (1986).
- K. STATE INQUIRY REPORT - 113, June, 1989. Definitions of soil and mineral.