



**COALEX STATE INQUIRY REPORT – 138**  
**January 18, 1990**

Michael Lepchitz  
Assistant Attorney General  
P. O. Drawer U  
Big Stone Gap, Virginia 24219

**TOPIC: HISTORY OF THE TWO-ACRE EXEMPTION**

**INQUIRY:** A civil suit has been filed against the State by the parents of a boy who drowned in a water-filled, unreclaimed pit on two-acre mine site. The accident occurred before the two-acre exemption was repealed. We would like to provide the judge, who has little familiarity with SMCRA, with a history of the development of the regulations and an overview of existing caselaw.

**SEARCH RESULTS:** Research was conducted using the COALEX Library and the other materials available in LEXIS. A synopsis of the legislative history of the SMCRA section and the changes in the regulation is followed by descriptions of relevant decisions. The chronology of the SMCRA section and the regulation in table form is included as an attachment. Unless otherwise indicated, copies of the materials listed below are attached.

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**SECTION I: LEGISLATIVE HISTORY**

**ORIGINAL LEGISLATION**

**Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub L No 95-87, 91 STAT 445 (1977), codified at 30 USC 1201.**

Purposes of the Act include: cooperation between the Department of the Interior and the States with respect to the regulation of surface coal mining operations; striking a balance between the production of coal and protection of the environment and agricultural productivity; and reclamation of abandoned mines.

**Sec. 528 (30 USC 1278). SURFACE MINING OPERATIONS NOT SUBJECT TO THIS ACT:**

"The provisions of this Act shall not apply to any of the following activities:

...

(2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less".

**ORIGINAL LEGISLATIVE HISTORY**



A succinct legislative history of SMCRA appears in the preamble to the proposed rule published in the Federal Register on JANUARY 4, 1982, 47 FR 41:

Congress provided the two acre exemption "because it perceived the exempted operations as causing minimal environmental damage and regarded the benefit to the environment of regulation as very small in relation to the burden on both the miner and the regulatory authority." 47 FR 41 [See also, S Rep No 128, 95th Cong, 1st Sess 97-98 (1977) included as an attachment.]

An early, more restrictive, version of the surface mining bill would have allowed the exemption only for "the extraction of minerals or the removal of overburden for commercial purposes in amounts of less than one thousand tons in any one location (of not more than two acres) in any one calendar year." These "pick and shovel operations", Sen. Jackson felt, should be excluded from SMCRA requirements because "the scope of their impact is so minor" and they "do not present the environmental or social costs which regulation under the Act would internalize." 119 Cong Rec 1357, 1368 (January 18, 1973). Congress later dropped the 1000 ton limitation.

"In hearings on the final bill, Senator Metcalf gave further indication of the type of operation intended to be exempted under the language finally adopted. He stated that the Act would not 'prevent this mine operator who handles a truckload of coal once a week, or something like that, from having complete opportunity to mine without any permit whatsoever.... You don't have to do it under this proposed regulation exemption of two-acres.' Senator Metcalf concluded with the statement, 'We are trying to exempt the one-man operation.' Surface Mining Control and Reclamation Act of 1977, Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the [Senate] Committee on Energy and Natural Resources, 95th Cong, 1st Sess 436 (1977)." 47 FR 41.

## **SUBSEQUENT LEGISLATION**

**Public Law 100-34 (HR 1963), 101 STAT 300, 301 (May 7, 1987).**

### **Sec. 201 REPEAL OF EXEMPTION:**

Sec. 528 paragraph (2) was repealed; paragraph (3) was redesignated paragraph (2).

## **SUBSEQUENT LEGISLATIVE HISTORY**

**Explanation for the repeal of the two-acre exemption appears in the Congressional Record for April 21, 1987, 133 Cong Rec H 2053.**

Unethical operators, "not mom and pop operators," used the provision to circumvent SMCRA's land reclamation requirements and payment of abandoned mine reclamation fees. "This gave the unethical operator a significant economic advantage."

Methods used to qualify for the exemption included the following:

1. The "string of pearls": an operator would mine a few sites along a coal seam, skip 50 to 100 feet between pits, then claim each site as a separate mine under the exemption.



2. Deeding "coal haul roads to local governments to decrease the surface area disturbed to 2 acres or less."
3. Creating shell corporations "under which separate companies were formed and operated under the 2-acre exemption using common equipment, employees, offices and stockholder."

The result of the abuse of the exemption was a "flurry of lawsuits, a disproportionate expenditure of State and Federal funds, and the circumvention of the reclamation provisions of SMCRA." This amendment "would correct these problems and require proper reclamation at all mines, regardless of size."

## **SECTION II: REGULATORY HISTORY**

### **44 FR at 14915 and 15315 (MARCH 13, 1979). ACTION: Final rule.**

Promulgation of final rules implementing the permanent regulatory program under SMCRA. The two-acre exemption is located at 30 CFR Sec. 700.11 Applicability:

"This Chapter applies to all coal exploration and surface coal mining and reclamation operations, except -

...

(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites, or ANY SUCH OPERATION CONDUCTED BY A PERSON WHO AFFECTS OR INTENDS TO AFFECT MORE THAN TWO ACRES AT PHYSICALLY UNRELATED SITES WITHIN ONE YEAR".

### **44 FR 67942 (NOVEMBER 27, 1979). ACTION: Notice of suspension of certain rules.**

The language in capital letters above was suspended as the result of litigation over the permanent regulatory program in which the Commonwealth of Virginia challenged the two-acre rule as being "overly broad". [In re: Permanent Surface Mining Regulation Litigation, No 79-1144 (D D C 1979)] "The section was modified to reflect more closely congressional intent."

NOTE: The rule, with this modification, continued in effect until September 1, 1982.

### **45 FR 8241 (FEBRUARY 6, 1980). ACTION: Proposed rulemaking.**

OSM proposed to delete the language previously suspended. The original language was intended to avoid potential abuse of the exemption by "unscrupulous operators"; however, it also covered legitimate operations of less than two acres conducted by the same operator. The proposed regulation stated that "all land disturbed by coal extraction", such as haul roads, would be included in the two-acre calculations and that the exemption did not apply to coal preparation and processing plants. Although not included as part of the proposed regulation, the Secretary requested comments on establishing a set of criteria to be used in determining whether sites are physically related.

### **46 FR 7902 (JANUARY 23, 1981). ACTION: Final rule.**

These regulations were to become effective on February 23, 1981. Comments received by



OSM and OSM's subsequent investigation revealed widespread abuse of the two-acre exemption. These methods were to be adopted to halt the abuse:

1. Definition of "affect" would include land or water above underground mine workings, streams and roads, regardless of their ownership, in the two-acre calculations.
2. Mandatory and discretionary criteria for determining whether two or more sites are related:
  - o Mandatory: Sites are located within the same state AND operations are conducted by the same operator within a one year period.
  - o Discretionary: Two or more operations are conducted using the same personnel and equipment; the operations are conducted or controlled by the same person(s); or the coal removed from various sites is owned by the same person(s).
3. Processing and support facilities are excluded from the exemption.

**PRESIDENT'S MEMORANDUM of January 29, 1981.**

The effective dates of all final rules which were not yet effective were postponed for 60 days. [Text of this item is not attached.]

**46 FR 10707 (FEBRUARY 4, 1981). ACTION: Extension of effective date.**

The effective date of the final rule was postponed until March 30, 1981. [Text of this item is not attached.]

**46 FR 18023 (MARCH 23, 1981). ACTION: Notice of suspension of certain rules.**

In error, a notice was published which purported to suspend the two-acre rule pending the outcome of rulemaking.

**46 FR 20211 (APRIL 3, 1981). ACTION: Cancellation of prior notice and deferral of effective dates for final rules.**

The effective dates for the final rules were postponed until May 4, 1981 in order to provide time to receive comments on the necessity to initiate further rulemaking on these issues. Many states were just beginning to implement their approved programs. Implementation of new federal final rules would require the States to begin the process of amending their own programs to meet the new federal rules. This would have imposed an "unnecessary burden " on the States.

**46 FR 23924 (APRIL 29, 1981). ACTION: Deferral of effective dates and reopening of public comment period.**

The effective date of the final rule was further extended until June 14, 1981 and the comment period was reopened "in response to requests for additional time to allow public comment as to whether the rules should be modified or suspended indefinitely pending the outcome of rulemaking."

**46 FR 31258 (JUNE 15, 1981). ACTION: Deferral of effective dates.**

In order to "fully consider the voluminous comments" received on the proposed suspension of the two-acre rule, OSM extended the effective date until August 10, 1981.



**46 FR 40650 (AUGUST 10, 1981). ACTION: Withdrawal of final rule.**

The two-acre exemption regulations published January 23, 1981 was withdrawn for the following reasons: the "rule may unnecessarily restrict the availability of the exemption to underground mines by including all land above underground mine workings in determining the size of a mine"; the "related sites" issue and the "complex issues involved in counting haul roads and access roads as part of a mine" were inadequately addressed in these rules.

**47 FR 41 (JANUARY 4, 1982). ACTION: Notice of proposed rulemaking.**

A number of changes to the existing rule were proposed. The principal changes are outlined below. In some cases, comments were requested on several alternative rules being considered by OSM.

- a. The exemption would apply where the operation "has or will have" an affected area of two acres or less. This language would clarify Congressional intent to exempt small operations not "the first two acres of any operation."
- b. Criteria for "determining how to treat haul or access roads used by two or more operations" would be added. Five alternatives were described.
- c. Two or more operations would be deemed related if the operations occurred within 12 months of each other and met both a physical relatedness test (three alternatives were provided to establish this criteria) and a common ownership or control test.

**47 FR 33424 (AUGUST 2, 1982). ACTION: Final rule.**

The new rule, which became effective on September 1, 1982, was considered by OSM to be "interpretative in the sense that it clarifies, but does not change the ambit of, an exemption that currently exists." [See the attachments for the full text of the new 700.11(b). Principal changes are discussed below.]

- a. The wording "has or will have an affected area of two acres or less" was adopted from the proposed rule. "This is a change in wording, not a change in substance, from the previous regulation. OSM believes that this is the proper interpretation of the Act and its legislative history...."
- b. "[T]he entire area of any segment of a road used by more than one operation will be included in the 'affected area' of each of those operations." However, "if two or more 'related' operations use the same segment of a haulage or access road, the entire area of that segment will be included only once in their combined acreage to avoid counting the same segment of road more than once in the acreage of the same operation." The regulatory authority must "first determine the affected area of the surface coal mining operation and any related operations. If a road used by a surface coal mining operation is part of its 'affected area,' it is counted for purposes of determining whether that operation affects two acres or less."
- c. The relatedness regulation adopted will help prevent abuse by operators who seek to "evade the permitting and environmental protection performance standards of the Act" by dividing "what is essentially one mine site into numerous sites of two acres or less." The three components of the test are:



1. Temporal limitation: Operations are related if they occur within twelve months of each other.
2. Physical relatedness: "Drainage from both operations flows into the same watershed at or before a point within five aerial miles of either operation." A "geographical relationship is the most appropriate measure of physical relatedness....The five-mile watershed test is broad enough to encompass those operations that use common equipment, personnel and facilities." The alternative adopted "will provide uniform and understandable rules" and is consistent with the "intent of Congress to exempt only operations which have minimal effects on the environment."
3. Related by direct or indirect ownership or control, where "control" means ownership of at least 50 percent of the voting shares in a company or enough shares to give the 'ability in fact or law to direct" what the company does: Two or more operations owned or controlled by the same person, two or more persons, members of the same family.
  - d. After considering all of the history and circumstances of two or more operations, the regulatory authority may exempt these operations, despite being "related". The written determination must be "consistent with the purposes of the Act."
  - e. Support facilities "incidental to the extraction of coal on a less than two-acre operation" as well as the extraction of coal itself are exempt.
  - f. An operator may request a written determination of exemption in advance. The regulatory authority may "make such a determination on its own initiative." If a determination of exemption is later reversed, an operator who has acted in good faith will not be cited for "violations which occurred prior to the date of the reversal."

**52 FR 21228 (JUNE 4, 1987). ACTION: Notice of suspension.**

Effective June 6, 1987, the rules governing the two-acre exemption were suspended. This action, an "interpretive statement", was taken to conform the regulatory program to the "enacted legislation repealing the exemption previously provided in section 528(2)....The suspension is not intended to affect any pending or future enforcement action against persons who incorrectly asserted that exemption when it was in effect." All surface mining operations, regardless of size, were made subject to the requirements of SMCRA, e.g., obtain an approved permit, pay a reclamation fee and fulfill reclamation requirements, unless entitled to an exemption under some other provision of SMCRA.

"Pub. L. 100-34 preempts any State law or regulation which permits surface coal mining operations affecting two acres or less without satisfying the requirements of SMCRA. The legislation invalidates applicable State laws or regulations as of June 6, 1987...." Operations which began prior to June 6, were allowed to continue until Nov. 8, 1987. On that date, all surface coal mining operations "not otherwise exempt under SMCRA" could not be conducted without "an approved permit under the applicable regulatory program."

**SECTION III: ADMINISTRATIVE DECISIONS**



**LLOYD D. LIVESAY, D.B.A. NU-WAY COAL CO. v OSM, Docket No. NX 7-46-R (1989).**

In 1981, the Administrative Law Judge (ALJ) determined that Livesay's mining operations had "disturbed a surface area in excess of 2 acres". The Interior Board of Surface Mining Appeals (IBSMA) dismissed Livesay's appeal because "the parties had filed a joint motion for consent decision" which detailed a compromise settlement involving the consolidated cases. In 1986, members of the Virginia Two-Acre Task Force (VTATF), conducting an oversight inspection, determined that the required reclamation activities had not been performed and issued a Ten-Day Notice (TDN) to the Virginia Division of Mined Land Reclamation (DMLR). DMLR took no enforcement action, relying that the site was covered by the two-acre exemption. VTATF issued a Notice of Violation (NOV) and later a Cessation Order (CO), when the violations were not abated. The ALJ ruled that the 1986 actions were not res judicata because no final judgment on the merits of the 1981 actions had been issued by the appellate board. In addition, OSM had grounds to issue the 1986 CO because: "the question of whether DMLR had properly granted to Livesay a less-than-2-acre exemption in 1979 concerning the mining activities at Nu-Way...could not have been raised in the earlier proceedings which were concluded on November 6, 1981, since the triggering circumstances which resulted in the VTATF inspections ...had not been entered until June 7, 1985."

**LLOYD D. LIVESAY, D.B.A. NU WAY COAL CO. v OSM, 112 IBLA 137, IBLA 90-28 (1989).**

The appeal was dismissed. Livesay's brief, filed late, contained insufficient grounds to support an appeal.

**CHERRY HILL DEVELOPMENT v OSM, 110 IBLA 185, IBLA 86-387 and 88-655 (1989).**

OSM cited Cherry Hill for "failure to backfill to eliminate all highwalls" after the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE) took no action on the TDN. DSMRE stated that the Cherry Hill operation had a state permit "issued for two acres or less with a variance to leave the highwall." The ALJ sustained the issuance of the NOV and CO by OSM and ruled that a portion of the country road used by Cherry Hill as a haul road should be included in calculating the operation's "affected area", thus, at the time the NOV and CO were issued, the area affected by the Cherry Hill operation was greater than two acres. However, the ALJ concluded that no civil penalty should be assessed since Cherry Hill was following its state permit requirements in leaving the highwall. On appeal, the Interior Board of Land Appeals (IBLA) ruled as follows: (1) it upheld the OSM's issuance of the NOV and CO, stating that the state's earlier enforcement actions "did not arise from the same operative facts" as the federal actions; (2) affirmed that the area affected by the operations was greater than two acres; (3) determined that the exemption "will not be deemed finally reversed...until the applicable administrative or judicial review process had been exhausted"; and (4) reversed the ALJ's decision regarding removal of the highwall, ruling that once coal was removed from the Cherry Hill development, and "those operations affected more than two acres, they became subject" to regulation under SMCRA and its state equivalent, where the requirement to eliminate highwalls "is an absolute requirement."



**CUMBERLAND RECLAMATION CO., 102 IBLA 100, IBLA 85-583 (1988).**

The IBLA affirmed the decision of the Lexington Field Office of OSM which held that Cumberland's dredging operation was a surface coal mining operation and that the area the operation affected was greater than two acres when all factors were considered: disturbance on the riverbank, area of the riverbed dredged and area of downstream pollution.

**THOMPSON BROTHERS COAL CO. v OSM, 105 IBLA 69, IBLA 86-1394 (1988).**

In reversing the ALJ decision and vacating the CO, the IBLA determined that: "No violation of [SMCRA] occurred where, during the interim program for the regulation of surface coal mining in Pennsylvania, surface drainage was passed from one permit area to an adjacent permit and then passed through a sedimentation pond before leaving the second permit area, where both permit areas were embraced within the same mine drainage permit issued by the state regulatory authority."

**OSM v C-ANN COAL CO., 94 IBLA 14, IBLA 85-75 (1986).**

This appeal involved the interim regulatory program. C-Ann mined an area of just under two acres. The IBLA ruled that the [preexisting] refuse storage pile C-Ann used should be included in the calculation, thus the total area disturbed by their operation was greater than two acres. In addition, the Board noted that C-Ann's permit application called for the disturbance of a total of three acres and stated that: "where an entity that is extracting coal intends to affect more than 2 acres, that entity is not exempted from coverage under [SMCRA] regardless of whether or not it has actually affected 2 acres."

**SECTION IV: FEDERAL CASE LAW**

**SAVE OUR CUMBERLAND MOUNTAINS, INC. v HODEL, Civil Action No. 81-2238 (D DC, Settlement Agreement filed June 7, 1985). (The text of this settlement agreement is not attached.)**

The following description of the agreement is quoted from LIVESAY v OSM, Docket No. NX 7-46-R, pp 7-9.)

"The central issue in that lawsuit was whether some 3,000 surface coal mining operations, as well as underground coal mining operations with attendant surface impacts, located in Kentucky and Virginia had properly been granted less-than-2-acre type exemptions by the appropriate State regulatory authorities. The granting of those exemptions relieved those permittees from the provisions of the Act and the implementing regulations...."

According to the terms of the settlement agreement, Kentucky and Virginia agreed to develop inventories of all mining sites which have claimed exemption from the Act under the two-acre provision at any time since May 3, 1978. Under the specific inspection and enforcement procedures developed, each state created a "Two-Acre Task Force (TATF)" responsible for conducting initial inspections, plus any required followup inspections, of sites listed in the inventory. Review of all mine sites was to be completed within a 7-year period.

**W.D. MARTIN, D/B/A MARTIN COAL CO. v HODEL, 692 F Supp 637 (W D VA 1988).**

In 1981, the ALJ vacated OSM's NOV, holding that Martin's operation disturbed less than



two acres and was exempt from provisions of the Act. In 1988, the TATF, citing numerous violations, issued another NOV for the site Martin mined in 1981. Martin filed suit in district court to "enjoin the federal defendants from prosecuting the 1988 NOV on the legal ground of res judicata." The court concluded the case was res judicata, that it was not premature for the court to hear the case and that OSM had failed to prove that Martin deliberately tried to conceal mining activities at another nearby small minesite which occurred shortly before the mining operation in question began.

**HARMAN MINING CORP. v HODEL, 662 F Supp 629 (W D VA 1987).**

This case involves the surface effects of underground mines. When Virginia DMLR determined the affected area of Harman's mine, it did not include in the calculations the acreage of several access roads which DMLR considered public roads. DMLR took no action in response to OSM's TDN since it concluded it had no jurisdiction over the matter. Harman's request for temporary relief from the OSM-issued NOV was denied by the ALJ and Harman appealed the district court. The court also denied the request for temporary relief for the following reasons: (1) the unsafe conditions [improperly sealed portal entries] would "adversely affect the public health or safety" - they were a hazard to "unwary children and hunters"; (2) the Virginia Code section Harman sites with respect to the deeding of the haul road to the county was invalidated by the Secretary of the Interior at the time Virginia's proposed permanent program was approved because that section was inconsistent with SMCRA; and (3) "Harman did not act in good faith"; their attempt to categorize the roads as "public" was a "sham and a stratagem" used to avoid "strictures of the Act" - there was not evidence that the county maintained the roads with public funds and the road was chained to bar traffic.

**PATRICK COAL CORP. v OSM, 661 F Supp 380, 27 ERC 1338 (W D VA 1987).**

Patrick appealed to the district court to temporarily enjoin OSM from enforcing the CO and NOV OSM's TATF had issued after the Interior ALJ denied Patrick's temporary relief request. The court held that: (1) the CO and NOV were valid even though OSM had failed to provide Virginia DMLR with the TDN, finding that "the state can waive a provision [the ten-day notice] intended solely for its benefit"; (2) additional areas, including an access road, were properly included by OSM in "determining the affected area's total acreage"; (3) "estoppel [against the United States] is not an assertable defense" - Patrick relied "on DMLR's advice, not on the United States' advice", and "has not changed its position in reliance of advice"; and (4) the scope of 30 CFR 700.11(c) does not "prevent OSM from reversing DMLR's earlier decision that [Patrick's] mine affected area is less than two acres", however, the regulation does preclude OSM's application of civil penalties "prior to reversal".

**HARMAN MINING CORP. v OSM, 659 F Supp 806, 25 ERC 2092 (W D VA 1987).**

Harman was granted temporary relief from OSM's enforcement of two NOV's which resulted from an "oversight inspection". The NOV's were issued for failure to permit a haulage road. Virginia DMLR had determined previously that the road in question was "a public road under the Virginia State Program" and did not have to be permitted. Ruling in Harman's favor, the district court described the standards used to review the decision of an ALJ: in reviewing an ALJ's decision "on merits," the court "must affirm if the findings are 'supported by substantial evidence on the record considered as a whole'"; when considering a request for "temporary relief pending



final determination", the court must conduct "its own examination of the criteria in [30 USC] sec. 1276(c) to determine if temporary relief is proper." The court had to look "to the Act itself" to make its decision because the federal regulation concerning the determination of public road had been remanded to the Secretary of Interior and no new federal regulations had been promulgated; once the federal regulations were ruled invalid, "Virginia's identical regulation" was also considered invalid. "To hold otherwise would allow Virginia's regulation to be inconsistent with the Act."

**SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v CLARK, 725 F2d 1422, 14 ELR 20205 (D DC 1983). SAVE OUR CUMBERLAND MOUNTAINS, INC. v WATT, 558 F Supp 22 (D D C 1982).**

SOCM charged that the Secretary "failed to enforce the Act" by "unlawfully" withdrawing the two-acre exemption regulation. [See 46 FR 40651 (August 10, 1981) in the Regulatory History section above.] The court affirmed the district court ruling that the "withdrawal of the regulation was mooted by the agency's subsequent promulgation of a regulation covering the same subject matter." [See 47 FR 33424 (August 2, 1982) above.]

**JAWARD CORP. v WATT, 564 F Supp 797, 13 ELR 20874 (W D VA 1983).**

OSM stated that Jaward's operation affected more than two acres "because of an access road and certain underground disturbance or shadow area". The court determined that it had jurisdiction "to hear procedural due process violations as a result of the Secretary' application of the Act", since it was the district court in which the surface mining operation was located. It ruled that Jaward satisfied the criteria for granting an injunction: there were no violations of the regulations, only a question of the inclusion of the haul road; therefore, there was no adverse effect on the public health and safety. OSM was enjoined from issuing cessation orders, to Jaward and all other similar "two-acre mines", based "upon the charge that an operation with a Chapter 23 permit [operations of two acres or less] must obtain a Chapter 19 permit [larger operations subject to 'extensive regulation']". However, OSM is not enjoined from issuing cessation orders against operations which are causing serious harm to the environment." [See Virginia, below.]

**VIRGINIA, ex rel. VIRGINIA DEPT. OF CONSERVATION AND ECONOMIC DEVELOPMENT v WATT, 741 F2d 37, 14 ELR 20492 (4th Cir 1984), cert granted 469 US 979, cert dismissed 469 US 1198 (1985).**

Subsequent to the approval of its regulatory program, Virginia passed regulations governing two-acre exemptions (Chapter 23). The Secretary alleged that these regulations were inconsistent with federal regulations because Chapter 23 does not include haulage roads and the land above underground mine workings in their two-acre calculations. The Secretary began enforcement actions, including the issuance of CO's, against Virginia and certain coal operators to force compliance with the federal laws. The coal miners and the Commonwealth of Virginia challenged the OSM issued CO's, claiming compliance with Chapter 23. The Secretary contended that the district court in Jaward "lacked subject-matter jurisdiction." The circuit court ruled that the proper forum for the "review of the Secretary's rulemaking actions" was the US District Court for the District of Columbia", reasoning that "[c]onflicts among various district



courts concerning validity of the federal regulations would impair or prevent the establishment of nationally uniform minimum standards."

**US v E & C COAL CO., INC., 846 F2d 247, 18 ELR 21079, 27 ERC 2031 (4th Cir 1988).**  
**US v E & C COAL CO., INC., 647 F Supp 268, 25 ERC 1734 ( W D VA 1986).**

These cases involve the definition of "affected area", the inclusion of the "area above underground mine workings" in the calculations for eligibility under the two-acre exemptions and the payment of reclamation fees. Both E & C and the US appealed the district court's judgment which held E & C not liable for reclamation fees for coal mined prior to August, 1982 (see the regulatory section above) and liable for fees for coal mined after August, 1982. The circuit court determined the March 13, 1979 definition of "affected area" included the shadow area and that Virginia's definition "would have to conform" with the federal definition. E & C was "required to pay fees for coal mined both prior and subsequent to August, 1982."

## ATTACHMENTS

- A. CHRONOLOGY OF THE TWO-ACRE EXEMPTION.
- B. Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub L No 95-87, 91 STAT 445 (1977), codified at 30 USC 1201. Sec. 528 (30 USC 1278). SURFACE MINING OPERATIONS NOT SUBJECT TO THIS ACT, amended by Public Law 100-34 (HR 1963), 101 STAT 300, 301 (May 7, 1987). Sec. 201. REPEAL OF EXEMPTION.
- C. S REP No 128, 95th Cong, 1st Sess 97-98 (1977).
- D. 119 Cong Rec 1357, 1368 (JANUARY 18, 1973).
- E. Surface Mining Control and Reclamation Act of 1977, Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the [Senate] Committee on Energy and Natural Resources, 95th Cong, 1st Sess 436 (1977).
- F. 133 CONG REC H 2053 (April 21, 1987).
- G. 44 FR 14902, 14915 and 15315 (MARCH 13, 1979).
- H. 44 FR 67942 (NOVEMBER 27, 1979).
- I. 45 FR 8241 (FEBRUARY 6, 1980).
- J. 46 FR 7902 (JANUARY 23, 1981).
- K. 46 FR 18023 (MARCH 23, 1981).
- L. 46 FR 20211 (APRIL 3, 1981).
- M. 46 FR 23924 (APRIL 29, 1981).
- N. 46 FR 31258 (JUNE 15, 1981).
- O. 46 FR 40650 (AUGUST 10, 1981).
- P. 47 FR 41 (JANUARY 4, 1982).
- Q. 47 FR 33424 (AUGUST 2, 1982).
- R. 52 FR 21228 (JUNE 4, 1987).
- S. LLOYD D. LIVESAY, D.B.A. NU-WAY COAL CO. v OSM, Docket No. NX 7-46-R (1989).
- T. LLOYD D. LIVESAY, D.B.A. NU WAY COAL CO. v OSM, 112 IBLA 137, IBLA 90-28 (1989).



- U. CHERRY HILL DEVELOPMENT v OSM, 110 IBLA 185, IBLA 86-387 and 88-655 (1989).
- V. CUMBERLAND RECLAMATION CO., 102 IBLA 100, IBLA 85-583 (1988).
- W. THOMPSON BROTHERS COAL CO. v OSM, 105 IBLA 69, IBLA 86-1394 (1988).
- X. OSM v C-ANN COAL CO., 94 IBLA 14, IBLA 85-75 (1986).
- Y. W.D. MARTIN, D/B/A MARTIN COAL CO. v HODEL, 692 F Supp 637 (W D VA 1988).
- Z. HARMAN MINING CORP. v HODEL, 662 F Supp 629 (W D VA 1987).
- AA. PATRICK COAL CORP. v OSM, 661 F Supp 380, 27 ERC 1338 (W D VA 1987).
- BB. HARMAN MINING CORP. v OSM, 659 F Supp 806, 25 ERC 2092 (W D VA 1987).
- CC. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v CLARK, 725 F2d 1422, 14 ELR 20205 (D DC 1983).
- DD. SAVE OUR CUMBERLAND MOUNTAINS, INC. v WATT, 558 F Supp 22 (D D C 1982).
- EE. JAWARD CORP. v WATT, 564 F Supp 797, 13 ELR 20874 (W D VA 1983).
- FF. VIRGINIA, ex rel. VIRGINIA DEPT. OF CONSERVATION AND ECONOMIC DEVELOPMENT v WATT, 741 F2d 37, 14 ELR 20492 (4th Cir 1984), cert granted 469 US 979, cert dismissed 469 US 1198 (1985).
- GG. US v E & C COAL CO., INC., 846 F2d 247, 18 ELR 21079, 27 ERC 2031 (4th Cir 1988).
- HH. US v E & C COAL CO., INC., 647 F Supp 268, 25 ERC 1734 (W D VA 1986).

**ATTACHMENT I: CHRONOLOGY OF THE TWO-ACRE EXEMPTION  
SMCRA Sec. 528(2), 30 USC 1278, and 30 CFR 700.11(b)**

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**ACTION  
DATE; CITE  
SUMMARY**

**SMCRA PASSED**

**Aug. 3, 1977; P L 95-87, 91 STAT 445, 30 USC 1201**

Exempted: "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less."

**FINAL RULE**

**Mar. 13, 1979; 44 FR 15311**

Exempted: "The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year."



**NOTICE OF SUSPENSION OF CERTAIN RULES Nov. 27, 1979; 44 FR 67942**

As a result of legal challenges to the permanent regulatory program, the portion of the rule highlighted above was suspended. The rule, in this modified form, remained in effect until Sept. 1, 1982.

**PROPOSED RULEMAKING**

**Feb. 6, 1980; 45 FR 8241**

The proposed rule would delete the suspended language. All land disturbed, e.g., haul roads, would be included in the two-acre calculations. The exemption was not to apply to processing plants.

**FINAL RULE**

**Jan. 23, 1981; 46 FR 7902**

This version of the rule never became effective. The effective date (Feb. 23, 1981) was extended several times and eventually, due to the large number of comments, was withdrawn. The rule would have: (1) included land or water above underground mine workings, streams and roads in the two-acre calculations; (2) sites had to be located within the same state and operations conducted within 12 months; (3) operations were considered related if they used the same personnel and equipment or were controlled by the same person(s); and (4) support facilities were excluded from the exemption.

**EXTENSION OF EFFECTIVE DATE**

**Jan. 29, 1981; Presidential memo**

The effective date of all final rules not yet in force was postponed 60 days.

**EXTENSION OF EFFECTIVE DATE**

**Feb. 4, 1981; 46 FR 10707**

The effective date of the Jan. 23, 1981 final rule was postponed until Mar. 30, 1981.

**NOTICE OF SUSPENSION OF CERTAIN RULES Mar. 23, 1981; 46 FR 18023**

In error, a notice was published which purported to suspend the Jan. 23, 1981 final rule, pending the outcome of rulemaking.

**CANCELLATION OF PRIOR NOTICE AND DEFERRAL OF EFFECTIVE DATES FOR FINAL RULES**

**April 3, 1981; 46 FR 20211**

The effective date for the final rule was postponed until May 4, 1981 in order to provide time to receive comments on the necessity to initiate further rulemaking.

**DEFERRAL OF EFFECTIVE DATES AND REOPENING OF PUBLIC COMMENT PERIOD April 29, 1981; 46 FR 23924**

The effective date was further extended until June 14, 1981. The comment period was reopened to allow additional time for comments to determine whether the rules should be modified or suspended pending the outcome of new rulemaking.



## **DEFERRAL OF EFFECTIVE DATES**

**June 15, 1981; 46 FR 31258**

In order to "fully consider the voluminous comments" received, OSM extended the effective date to Aug. 10, 1981.

## **WITHDRAWAL OF FINAL RULE**

**Aug. 10, 1981; 46 FR 40651**

The final rule published Jan. 23, 1981 was withdrawn to reconsider the "related sites" and "counting haul road" issues.

## **NOTICE OF PROPOSED RULEMAKING**

**Jan. 4, 1982; 47 FR 41**

A number of changes were proposed. Comments were requested on a number of alternative rules: (1) Language was changed to "has or will have an affected area"; (2) five alternative criteria were provided for treating haul roads; (3) relatedness = conducting operations within 12 months + physical relatedness (three alternatives were provided) + common ownership and control.

## **FINAL RULE**

**Aug. 2, 1982; 47 FR 33424**

This final rule became effective on Sept. 1, 1982: (1) The wording "has or will have an affected area of two acres or less" was adopted; (2) a segment of a road used by more than one operation will be used in the two-acre calculations for each operation; (3) operations will be considered related if - conducted within 12 months of each other + drainage from operations flow into the same watershed within five aerial miles of each other + are related by direct or indirect ownership and control; (4) under certain circumstances, the regulatory authority may exempt certain operations, despite being "related"; (5) support facilities are included in the exemption; (6) the regulatory authority may initiate a written determination or provide one in response to an operator's request and a person operating in "good faith" will not be cited for violations which occurred while an operation is exempted even if the exemption is later reversed.

## **AMENDMENT TO SMCRA PASSED**

**May 7, 1987; P L 100-34, 101 STAT 300, 30 USC 1278**

The two-acre exemption was repealed due to excessive abuse by some operators. After Nov. 8, 1972, all surface coal mining operations, not exempted by some other SMCRA provision, will be subject to all requirements of SMCRA.

## **NOTICE OF SUSPENSION**

**June 4, 1987; 52 FR 21228**

This "interpretive statement" suspended the two-acre exemption regulations, conforming to "enacted legislation". Pending or future enforcement actions "against persons who incorrectly asserted that exemption when it was in effect" were not suspended.