



COALEX STATE INQUIRY REPORT - 262

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TOPIC: NON-COMMERCIAL USE OF "OTHER MINERALS"

INQUIRY: A landfill operator occasionally runs into patches of coal while excavating shale and clay ("other minerals"). These other minerals are used by the landfill operator rather than sold for commercial use. Does the 16 2/3 exemption apply to this situation? Related topics: Definition of mineral; commercial development; government financed construction and landfill.

SEARCH RESULTS: Existing COALEX Reports were identified for each of the main and related topics. Additional research was conducted using COALEX and LEXIS to update these Reports. The Reports and additional materials are listed below. Copies are attached (NOTE: Reports are included without their attachments).

COMMERCIAL DEVELOPMENT

COALEX COMPARISON REPORT - 173, "Coal removal incident to private development" (1991).

During the course of constructing a private, commercial project, the construction company found coal. Both a survey and research were conducted to determine if the construction company needed a permit to remove the coal.

Generally, the retrieved Interior administrative decisions stated that if the privately funded construction projects fell within the scope of SMCRA, a permit was required. However, a 1990 opinion was identified that reversed precedent: the ALJ used a two-part test to determine that a particular privately funded project was not subject to OSM's jurisdiction: (1) Does the coal enter commerce? (2) What is the underlying purpose of the excavation through which the coal is encountered?

GOVERNMENT FINANCED CONSTRUCTION



COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).

This Report provides Interior administrative decisions which discuss the exemption from obtaining a mining permit when the extraction of coal is an incidental part of government-financed construction.

In determining whether the extraction of coal is "necessary to enable construction", "necessary" was defined as an engineering, not an economic, necessity.

COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989). [Includes 115]

The Report provides legislative history on exemptions. No material was identified that addressed the issue of whether a request for an exemption for a government-financed construction project (a landfill) must be made at the time the original permit is issued or if it may be authorized after the permit is issued.

ADDITIONAL DECISIONS

WILDER COAL CO. v OSM, 112 IBLA 107, IBLA 87-576 (1989).

The Board affirmed the ALJ decision, finding that the auguring of coal was performed in order to finance the grading the airport commission wished done and not because it was necessary to the construction of the airport. "Although the excavation down to the level of that seam may have been advisable as a means of assuring the stability of the surface, the extraction of the coal was not necessary to enable the construction of the airport facilities."

VICTOR CONTRACTING CORP. v OSM; DICKENSON COUNTY, VA. v OSM, Docket Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, NX 91-26-R (1992).

The ALJ upheld the Virginia Division of Mined Lands Reclamation determination that the Honeycamp Landfill project qualified for the government-financed construction exemption. The primary purpose of the project was to bring the landfill into compliance with new waste management regulations and to expand the landfill to increase its use for an additional 10 plus years. Removal of the previously mined coal beneath the ridge created greater stability and lessened possible leachate problems.

T-SQUARE, INC. v OSM, Docket No. NX 6-77-R (1988).

T-Square had a permit to mine clay and shale but did not have a permit to mine the coal they removed. Their defense was the 16 2/3 exemption. The ALJ cited to CORDOVA CLAY CO., INC. v OSMRE, Docket No. NX 5-3-R (1986) to determine whether the exemption applied:



"The test, then is what was the primary intention of the Applicant in conducting this operation and, of course, the only way to determine this intention is by examining its outward manifestations. The Applicant in this particular case must first prove by competent evidence that it is primarily seeking clay and, secondly, that no more than 16 2/3 percent of the material removed for commercial purposes was coal. In proving this the Applicant must necessarily show that there was reasonable expectation of selling all the material, other than coal, in order to claim it was removed for commercial purposes."

16 2/3 EXEMPTION

COALEX STATE INQUIRY REPORT - 47 (June, 1985), incorporating COALEX 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.

COALEX STATE INQUIRY REPORT - 134, "16 2/3 exemption" (1990). [Updates earlier Reports]

Included here are the regulatory history of the exemption, including the December 20, 1989 final rules, and relevant decisions.

The 1989 rules established criteria and procedures for determining whether an operation qualifies for the exemption. The main requirements for obtaining the exemption include a tonnage test and "two straightforward and easily measured criteria to define incidental mining, the stratigraphic test and the revenue test."

DEFINITION OF MINERAL

COALEX COMPARISON REPORT - 113, "Definitions of soil and mineral" (June, 1989).

This Report addressed the question of whether clay extracted from a borrow pit and used for fill dirt is a "mineral", requiring permitting, or "dirt". Included is a table summarizing state definitions of "mineral" and "clay" and a discussion of relevant case law.

COALEX STATE INQUIRY REPORT - 182, "Definition of soil and mineral" (1991). [Includes 113]

REPORT - 182 is an adjunct to REPORT - 134. It includes additional MCNABB decisions and the Indiana administrative decision for which both Reports were prepared.



COALEX STATE INQUIRY REPORT - 191, "Is fill dirt considered a 'mineral' for regulatory purposes? [Includes Reports 24, 47, 113, 134 and 182]

This Report updates Report 182 by the addition of a more recent state case and the inclusion of the Alabama administrative decision for which the research was conducted.

ADDITIONAL DECISIONS

JDG, INC. v OSM, 107 IBLA 210, IBLA 87-158 (1989).

HEADNOTES: "To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1291(28)(A) (1982), exemption of coal must be incidental to the extraction of other minerals and constitute less than 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it."

ROBERT L. CLEWELL et al., 123 IBLA 253, IBLA 91-321 (1992).

HEADNOTES: "An operation is exempt from SMCRA if extraction of coal is incidental to extraction of other materials and constitutes less than 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. If an operation is not exempt, mining without a valid permit would constitute a violation."

ATTACHMENTS

1. COALEX COMPARISON REPORT - 173, "Coal removal incident to private development" (1991).
2. COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).
3. COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989). [Includes 115]
4. WILDER COAL CO. v OSM, 112 IBLA 107, IBLA 87-576 (1989).
5. VICTOR CONTRACTING CORP. v OSM; DICKENSON COUNTY, VA. v OSM, Docket Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, NX 91-26-R (1992).
6. T-SQUARE, INC. v OSM, Docket No. NX 6-77-R (1988).
7. COALEX STATE INQUIRY REPORT - 47 (June, 1985), incorporating State Inquiry Report 24 (December, 1984). Topic: 16 2/3 exemption.
8. COALEX STATE INQUIRY REPORT - 134, "16 2/3 exemption" (1990). [Updates earlier Reports]
9. COALEX COMPARISON REPORT - 113, "Definitions of soil and mineral" (June, 1989).
10. COALEX STATE INQUIRY REPORT - 182, "Definition of soil and mineral" (1991). [Includes 113]



11. COALEX STATE INQUIRY REPORT - 191, "Is fill dirt considered a 'mineral' for regulatory purposes? [Includes Reports 24, 47, 113, 134 and 182]
12. JDG, INC. v OSM, 107 IBLA 210, IBLA 87-158 (1989).
13. ROBERT L. CLEWELL et al., 123 IBLA 253, IBLA 91-321 (1992).