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## ABUSE OF THE SURFACE MINING ACT: A CONTINUING STORY

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### I. INTRODUCTION

The 1977 Surface Mining Control and Reclamation Act ("SMCRA" or "the Act") represented the first federal legislative effort to regulate the environmental impacts of the mining of coal.<sup>1</sup> At the core of the Act is a set of national environmental performance standards that is applied to all coal mining operations.<sup>2</sup> The scope of coverage of the Act was intended to be comprehensive, controlling the impacts of not only traditional surface mining operations, such as strip, auger and area mining, but also mountaintop removal, in situ mining, coal processing, and the surface impacts incident to underground coal removal.<sup>3</sup>

Certain extractive activities and types of coal removal, however, were for various reasons considered by Congress to be beyond the purview of the surface mining law. The Act exempted, for example, the noncommercial extraction of coal by a landowner for his own use,<sup>4</sup> commercial extraction of coal affecting less than two

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<sup>1</sup> Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified at 30 U.S.C. §§ 1201-1328 (1982)). The 1977 law was the result of years of intense national debate and congressional efforts at controlling mining impacts. The legislative history of the Act extends back to the Ninety-second Congress, and includes the history of S. 425, the Surface Mining Control and Reclamation Act of 1974, S. REP. NO. 1522, 93d Cong., 2d Sess.; H.R. 25, the Surface Mining Control and Reclamation Act of 1975, H.R. REP. NO. 45, 94th Cong., 1st Sess.; H.R. 9725, the Surface Mining Control and Reclamation Act of 1976, H.R. REP. NO. 896, 94th Congress, 2d Sess.; and H.R. 13950, the Surface Mining Control and Reclamation Act of 1976, H.R. REP. NO. 1445, 94th Cong., 2d Sess.

<sup>2</sup> Title V of the Act, 30 U.S.C. §§ 1251-79 (1982), establishes a permitting program for controlling the surface impacts of surface and underground coal mining, and imposes on each phase of the operations certain standards of performance related to aspects of the operation. Sections 515 and 516, 30 U.S.C. §§ 1265-66 (1982), set forth the environmental performance standards applicable to surface and underground coal mining operations, respectively, during the permanent regulatory program. During the initial or "interim" regulatory program, certain of these performance standards are made applicable to operations being conducted under existing state-issued permits through section 502 of the Act, 30 U.S.C. § 1252 (1982).

<sup>3</sup> Congress expressed its intent with respect to the coverage of the Act in this fashion: [The Act] . . . would enact a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior. More specifically, [it] will implement a national system of coal mining regulation by . . . covering all coal surface mining (contour, mountaintop, area stripping and open-pit operations) and the surface impacts from underground mines and coal processing[.]

H.R. REP. NO. 218, 95th Cong., 1st Sess. 57 (1977).

<sup>4</sup> 30 U.S.C. § 1278 (1982).

acres,<sup>5</sup> and coal removal incidental to government-financed construction activities.<sup>6</sup> In addition, other activities which are associated in one manner or another with the coal extraction activity were exempted from the Act, or subjected to less stringent controls. For example, coal exploration activities, while regulated by the Act, are not required to comply with the full sweep of environmental controls mandated for normal facilities subject to the Act's coverage.<sup>7</sup>

This Article will address in some detail the abuse that has surrounded the use of these exemptions since SMCRA became effective in 1978. First, it will address the abuse of the two acre exemption. Next, the discussion will turn to the problems potentially associated with the 16 2/3 exemption, that is, the exemption from the Act's requirements of extraction activities in which coal is less than 16 2/3 percent of the total "minerals" extracted by the operation.<sup>8</sup> The abuse of the so-called "on-site construction" exemption will then be considered. Finally, the Article will address the problems associated with the lesser standards applied to coal exploration activities.

## II. THE TWO ACRE EXEMPTION

Section 528<sup>9</sup> of the Act grants three purportedly limited exemptions from the Act's environmental performance standards and the payment of abandoned mine land fees:

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

- (1) the extraction of coal by a landowner for his own non-commercial use from land owned or leased by him;
- (2) the extraction of coal for commercial purposes where the surface coal mining operation affects two acres or less; and
- (3) the extraction of coal as an incidental part of Federal, state, or local government-financed highway or other construction under regulations established by the regulatory authority.<sup>10</sup>

We are concerned initially with the second exemption—the extraction of coal where the surface coal mining operation affects less than two acres. The congressional intent, as evidenced by the plain language of the statute, was to limit the

<sup>5</sup> *Id.* § 1278 (2).

<sup>6</sup> *Id.* § 1278(3). In providing the foregoing exemptions, Congress reflected its intent in this way: "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." S. REP. NO. 128, 95th Cong., 1st Sess. 98 (1977).

<sup>7</sup> 30 U.S.C. § 1262 (1982).

<sup>8</sup> *Id.* § 1291 (28)(A).

<sup>9</sup> *Id.* § 1278. Generally, the section numbers noted in the text shall be from the original SMCRA legislation. See *supra* note 1. The footnotes shall give the parallel citation to the version of the Act codified in the United States Code.

<sup>10</sup> *Id.*

exemption to very small "pick and shovel operations" or, as the legislative history of the exemption states, to "one man operations."<sup>11</sup>

The magnitude of the abuse of this exemption, in thousands of situations by some of the largest corporations in the world, is staggering. How an exemption intended by Congress for "one man operations" can be effectively used by major mining companies to avoid environmental controls on mining activity is one of the most compelling and, from an environmental standpoint, distressing stories to unfold since the passage of the Act.<sup>12</sup>

The devastation caused by these so-called two acre mines is well-captured in this Office of Surface Mining (OSM)<sup>13</sup> inspection report of a fairly typical two acre mine site:

"Commonwealth Resources, Inc."  
Buchanan County

On November 13, 1979, an OSM inspector started an inspection of this underground mine under construction. A bench had been constructed exposing the coal seam. Coal from this bench had been stockpiled. Spoil materials, rocks, out-crop bloom coal, and trees with stumps had been pushed on the outslopes. The material extended into Shop Branch below, filling up the stream bed, and thereby obstructing the stream flow. . . . [S]poil, rocks, and trees had been pushed on the downslope along this road cut. Seepage from the cuts and highwall at the face up was flowing uncontrolled through the loose material, causing slides in several areas. . . .

On April 10, 1980, OSM had the minesite surveyed. Peggy-O Coal Company had "punched in" and was actively mining. Black water was pouring off the mine working bench uncontrolled and flowing into Shop Branch (lab analysis showed 23,198 mg/1) . . . Shop Branch was black from the mine faceup all the way to where it empties into Levisa Fork, which is approximately 3,300 feet in distance (lab analysis showed 7,334 mg/1 in the water entering Levisa Fork). A sample of the undisturbed stream above the minesite showed 64 mg/1 total suspended solids.<sup>14</sup>

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<sup>11</sup> *Hearings on S.7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 436 (1977).

<sup>12</sup> A typical example of abuse by a large company, in this case Clinchfield Coal Company, a "Division" of Pittston Coal Company, can be found in the state of Virginia Division of Mine Land Reclamation files concerning several mines of Clinchfield located near Lick Creek in Dickenson County where, even according to the state, some thirteen acres of roads and eight to nine acres of mining area were affected by several Clinchfield mines. According to the files, Clinchfield performed the outside work which did the environmental damage. Another example of Clinchfield's actions in regard to face-up work, pushing spoil over the slope, and deeding the haulroad to the county, was found in a June 1981 site near West Bank in Dickenson County. "Two Acre Files," Virginia Division of Mine Land Reclamation, Big Stone Gap, Virginia (available on microfilm).

<sup>13</sup> The Office of Surface Mining Reclamation and Enforcement (OSM) was established by § 201 of SMCRA, 30 U.S.C. § 1211 (1982).

<sup>14</sup> Administrative Record, Two-Acre Rulemaking (on file in the Office of Surface Mining, U.S. Dep't of Interior, Washington, D.C. and Lexington Field Office, Lexington, Ky.).

The methods used by operators to avoid the Act have taken a number of different forms, all of which are aimed at bringing the size of the mine site under the magic number of two acres. First there is the so-called "string of pearls" approach. Under this method an operator, large or small, will survey a number of small sites of two acres or less along a coal seam, skipping 50 or 100 feet between each pit. He will then claim each site as a separate mine for purposes of the two acre exemption. Five, six, or more of these sites will often be strung together, making (from the operator's viewpoint) a "string of pearls." Often a large operator will use his own surveyors to mark off these "separate" two acre sites.<sup>15</sup>

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<sup>15</sup> *Id.* A good illustration of the "string of pearls" problem is provided by the following March 31, 1981 OSM memorandum:

Titan Coal Corporation (Tom Collins—president, Harold West—vice-president and treasurer) has conducted coal surface mining operations on eight less than two acre sites since June 1980. The Virginia Division of Mines and Quarries (DMQ), state mine safety division, has issued Titan Coal Corporation a license for each of these operations. Below is the mine number, DMQ license number and date issued for each license:

| MINE # | LICENSE # | DATE ISSUED |
|--------|-----------|-------------|
| 4      | 1216      | 6-6-80      |
| 5      | 1293      | 7-17-80     |
| 6      | 1437      | 10-2-80     |
| 7      | 1471      | 10-21-80    |
| 8      | 1535      | 11-21-80    |
| 9      | 1564      | 12-11-80    |
| 10     | 0313      | 1-21-81     |
| 11*    | 1076      | 3-24-81     |
| 12     | 1077      | 3-24-81     |

\*On mine Number 11, Mr. Collins has stated no coal was found.

The Virginia Division of Mine Land Reclamation (VDMLR) has adopted the same exemption as the federal law allows. All of these sites have been surface mined with no underground mining operations. Each individual site is less than two acres. There are different surface owners, but the mineral rights are owned by Greater Wise, Co., and leased to Paramount Mining Corporation. Mr. Collins has stated that they only have a verbal agreement with Paramount Mining Corporation. The mining has been taking second cuts on existing highwalls. On some sites the coal seam had been previously deep mined.

Mine numbers 4, 5, 9, 10 and 12 are located beside state road. Mine numbers 6, 7 and 8 are located adjacent to and using a haul road permitted to Paramount Mining Corporation, permit number 2346. . . Mine numbers 4 and 5 are connected by a common haul road, which is also a driveway for a residence. The farthest distance from the site is about 2.3 miles and the closest distance is about 50 feet. Two sites (mine numbers 6 and 7) have been cited on November 14, 1980 with NOV 80-1-15-10 for failure to pass surface drainage through a sediment pond. The company has admitted to the violation in a settlement decision before an ALJ hearing (Docket No. CR-1-54-R). Harold Chambers handled this case.

Upon abandonment of these sites, the coal pit is covered and some of the spoil piles are graded, with none of the highwalls eliminated. The areas are seeded with very little, or no fertilizer and no mulch. . . .

The major violations observed at these sites are: 1. failure to pass surface drainage through a sediment pond, 2. haul road maintenance, 3. failure to grade all spoil piles and

A second method to reduce the size of mine sites involves the deeding of the haulroads to the county government. In 1979, the Virginia legislature, at the behest of the coal industry, passed a law allowing coal companies to convey their haulroads to county governments,<sup>16</sup> thereby reducing the acreage "affected" by the two-acre mine since public roads are not considered in the calculation of "affected" acreage.<sup>17</sup> Deeding of haulroads is a common practice, for example, in Russell, Dickenson, and Buchanan counties in southwestern Virginia, where the two acre abuse first became widespread. Over 250 miles of haulroads have been deeded to these county governments in an effort to avoid being subject to SMCRA's regulatory provisions.<sup>18</sup> One major operation, the Pittston Company, was responsible for over half the roads deeded in Dickenson and Russell Counties.<sup>19</sup> Under this technique, the haulroad to a single site or the common haulroad to several sites is "deeded" to the county government, and the operator argues that it can no longer be attributed to him for purposes of determining whether his "surface coal mining operation" affects two acres of land. Once deeded, the haulroad is generally not maintained by the county and is public in name only. There have been instances, in fact, where the coal company that "deeded" the haulroad maintained locked gates at the entrances to the "public" road.<sup>20</sup>

Also, the "deeded" roads are not generally well-maintained. Often the deed itself will state that the acquisition and maintenance of the road will be at no cost to the county. Since the coal operator is no longer responsible for maintenance under the Act (according to Virginia officials), the result is often similar to that illustrated in the following OSM inspection report:

The investigation was continued by proceeding up the newly constructed haulroad for approximately 0.4 mile to the active pit (Pit # 2). This portion of the haulroad would average ten to fifteen percent in grade and in addition, was extremely muddy and slippery. There were no ditchlines, culvert pipes, or surfacing material present on this section of the haulroad. Material comprised of spoil and vegetative debris had been placed on the downslope below the road cut along the entire length of the road. As a result of this material being placed on the downslope in an uncontrolled manner, one landslide had occurred in the vicinity of a "switch back" in

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depressions so as to eliminate all highwalls, and possibly, 4. mining without a permit. [However, 30 CFR 710.11(a)(2) states "a person conducting surface coal mining operations shall have a permit *if required* by the State in which he is mining . . ."] Presently VDMLR has not required Titan Coal Corporation to obtain a permit for any of these areas.

On March 25, 1981, Mr. Collins stated that they plan to mine three additional two acre sites.

<sup>16</sup> VA. CODE § 46.1-181.5 (1980).

<sup>17</sup> 46 Fed. Reg. 7902 (1981).

<sup>18</sup> *Hearing on Implementation of Surface Mining Control and Reclamation Act of 1977 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 97th Cong., 1st Sess. 242 (1981) (statement of Sandra Williams).*

<sup>19</sup> *Id.* (citing deed books of Russell and Dickenson Counties (Feb. 1981)).

<sup>20</sup> DIVISION OF MINED LAND RECLAMATION, STATE OF VIRGINIA, Insp. Report (Dec. 1, 1980) (Clinchfield Coal Co., Permit No. 1578); *see also* OFFICE OF SURFACE MINING, U.S. DEP'T OF INTERIOR, SECOND ANNUAL REPORT, KENTUCKY PERMANENT PROGRAM 79-81 (1984).

the 32° plus terrain. There were numerous places where water drained in an uncontrolled manner off the haulroad, over loose spoil, and into undisturbed land.<sup>21</sup>

This practice of "deeding haulroads" can be extremely significant because in many cases the haulroad itself will affect far more than two acres of land, and make the operation subject to the Act.

A subset of the haulroad issue has emerged in Kentucky, where the state regulatory authority accepted letters from the local county judge executive stating that a "deeded" road was a "public road" which could properly be omitted in making the acreage computations for the section 528(2) exemption.<sup>22</sup> As a result, many roads that were in fact not public, and for which there is no continuing responsibility, have been cut and left to become prime candidates for runoff, sedimentation, and unauthorized garbage dumping.

A third technique used to invoke the two acre exemption involves the failure to include the "underground workings" of the deep mines that attempt to avoid the Act's provisions. OSM, in both Democratic and Republican administrations, has counted the so-called "shadow area" that lies above underground workings within the definition of the affected area, because of the potential surface effects of underground mining operations.<sup>23</sup> This has not, however, dissuaded state legislatures, such as that of Kentucky, from repeated attempts to exclude the shadow area from the two acre computation.<sup>24</sup>

A fourth method of utilizing the two acre exemption involves the use of "shell corporations." In this situation, several different companies mine a number of sites in close proximity. These "separate" companies share the same equipment, employees, officers, and stockholders. In this way, a single operating concern may, by forming a host of smaller companies, mine a large tract of land and reap substantial profits while claiming to come within the two acre exemption.<sup>25</sup>

These and other techniques have been used on a systematic basis, by both large and small companies, to avoid the mandatory provisions of the Act. Since 1978, over 1,000 mines have claimed the exemption in Virginia, 1,500-1,800 in Kentucky, and some 200-300 in Tennessee.<sup>26</sup> In all, some 3,000 mines have claimed the exemption.<sup>27</sup> It is the opinion of the authors that, judged by the federal standards for determining proper two acre sites (accepted by both Democratic and Republican administrations), at least 75 percent of these exemptions have been improper.<sup>28</sup>

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<sup>21</sup> OFFICE OF SURFACE MINING, U.S. DEP'T OF INTERIOR, Two Acre Mine Situation Memorandum (June 4, 1980).

<sup>22</sup> OFFICE OF SURFACE MINING, *supra* note 20, at 79-80.

<sup>23</sup> The "shadow area" is the surface area directly above the workings of an underground mine.

<sup>24</sup> See, e.g., H.B. 680, Regular Leg. Sess. (Ky. 1984); H.B. 762, Regular Leg. Sess. (Ky. 1982).

<sup>25</sup> 46 Fed. Reg. 7902 (1981).

<sup>26</sup> Administrative Record, Two-Acre Rulemaking (on file in the Office of Surface Mining, U.S. Dep't of Interior, Washington, D.C. and Lexington Field Office, Lexington, Ky.).

<sup>27</sup> *Id.*

Moreover, the abuse of the two acre exemption is increasing, especially in Kentucky.

Most of these 3,000 exempted mines have now been mined out and abandoned, just as had occurred before the Act was passed. Indeed, if one visits a two acre site, it is indistinguishable from still unreclaimed sites which resulted from the mining practices that prompted the passage of SMCRA in the first place—spoil over the downslope, little if any drainage controls, black water discharges, poor revegetation, and unreclaimed highwalls.<sup>29</sup>

One might fairly ask what the OSM has done in response to what political officials as far apart as the Republican Director of OSM and Democratic members of the House Interior Committee have considered to be gross abuse.<sup>30</sup> Initially, because no one expected the exemption to be used for other than the limited purpose Congress had intended, no particular regulations were developed. However, by 1980 it had become clear that there was major systemic abuse of the exemption, particularly in southwest Virginia, and especially in the contract mines of the large operations. The OSM, then under Democratic control, promulgated a comprehensive rule to address the problem after a year of study and rulemaking.<sup>31</sup> However, this rule was caught in the freeze on all regulations imposed by President Reagan when he assumed office in January 1981.<sup>32</sup> Secretary Watt, after consideration, withdrew the regulation and proposed another which, while somewhat weaker, still attempted to plug the major holes where the abuse was occurring.<sup>33</sup> This rule was promulgated in August 1982 and was promptly challenged by both the state of Virginia and Virginia coal mine operators in the federal district court for the Western District of Virginia.<sup>34</sup> (This case was argued before Judge Williams who has previously, at the request of the same plaintiff, found major provisions of SMCRA to be unconstitutional.<sup>35</sup> His decision in that case was later reversed by a unanimous Supreme Court). The district court struck down the new rule, the Fourth Circuit reversed on the merits, and the Supreme Court granted certiorari on a procedural issue. That case has now been settled, with the federal OSM assuming responsibility for enforcement of the 1,000-1,100 inactive sites.

The net result of this litigation was that no enforcement was occurring in the field under the tightened rules, and the 1,100 or so mines which claimed the

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<sup>29</sup> This figure was derived by the Authors from a conscientious review of the OSM's administrative files and interviews with various federal mine inspectors.

<sup>30</sup> See, e.g., 30 U.S.C. § 1201(c) (1982) (statement of congressional findings).

<sup>31</sup> *Hearings on Implementation of SMCRA*, *supra* note 18, at 31.

<sup>32</sup> 46 Fed. Reg. 7902 (1981).

<sup>33</sup> *Id.* at 11,227.

<sup>34</sup> 47 Fed. Reg. 33,424 (1982).

<sup>35</sup> *Virginia v. Clark*, No. 82-0385-B (W.D. Va. Feb 8, 1984 order granting summary judgment), *rev'd*, No. 83-1889 (4th Cir. 1984).

<sup>36</sup> *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 483 F. Supp. 425 (W.D. Va. 1980), *rev'd*, 452 U.S. 264 (1981).



exemption during this period in Virginia had very few enforcement actions pending against them. Most were mined through and abandoned without continuing responsibility. However, because of the visibility of the dispute and the tough line taken in court by successive administrations, the number of new mines claiming the exemption in Virginia decreased.<sup>36</sup> However, as the abuse was slowing in Virginia, it was apparently picking up steam in Kentucky. As of the publication of this Article, well over 1,500 sites have claimed the two acre exemption there, with the largest number of exemptions granted in 1983 and 1984, corresponding directly with the phasing in of the permanent regulatory program in that state.<sup>37</sup>

The abuse of the two acre exemption is one of the major problems confronting the OSM today. While the regulation governing abuse of this provision is sound, and if applied in the field would provide an effective deterrent, there is insufficient manpower at both the state and federal levels to properly enforce it. This is especially true because inspection of mine sites is very resource-intensive, given the number and complexity of subterfuges employed by the operators, the falsification of records, and other artifices.

While the two-acre exemption has been and continues to be the major current problem in open abuse of the surface mine act, the so-called 16 2/3 exemption looms as a potential invitation to abuse in the near future.

### III. THE 16 2/3 EXEMPTION

The operative definition of "surface coal mining operation," which triggers application of SMCRA's regulatory provisions, specifically excludes from the Act coal removal which is incidental to extraction of other minerals for commercial sale where the coal is less than 16 2/3 percent of the total tonnage of mineral removed.<sup>38</sup> In promulgating the regulations intended to implement the permanent regulatory program and to provide the minimum environmental and permitting standards of this program, the Secretary of Interior did not, in 1979, publish

<sup>36</sup> Louisville Courier Journal (Nov. 18, 1984).

<sup>37</sup> *Id.*

<sup>38</sup> 30 U.S.C. § 1291 (28)(A) (1982). The full text of this section reads:

"[S]urface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site; *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal exploration subject to section 512 of this Act. . . .

regulations addressing the 16 2/3 exemption. Rather, the Secretary adopted a case-by-case approach to determine which operations could properly avail themselves of this exemption.<sup>39</sup>

It has become apparent that this ad hoc approach is problematic, and has led to inconsistent application of the exemption in the individual states. In 1984, the Secretary proposed to conduct a rulemaking, solicited comments on the exemption, and published interim guidelines to assist the regulatory authorities in the handling of such cases.<sup>40</sup>

The approach of the OSM in this area will determine to a large extent whether the exemption will be limited to legitimate forms of extractive activity properly excluded from the Act's scope, or become yet another invitation to abuse by those who seek to avoid the regulatory responsibilities attendant to commercial extraction of coal. This section of the Article will review the history of the provision and analyze the practical problems relating to its application. In addition, the Authors propose an approach to allow for legitimate exclusion of incidental coal removal, while dissuading abusive resort to the exemption.

As stated above, the scope of coverage of SMCRA hinges on the definition of "surface coal mining operations," found at Section 701(28) of the Act. It is the "surface coal mining operation" that must obtain a mining permit,<sup>41</sup> comply with the substantive performance standards governing each phase of land disturbance and extractive or processing activities,<sup>42</sup> design mitigative measures for conducting such operations,<sup>43</sup> develop a mining and reclamation plan,<sup>44</sup> and bond the operation to assure performance of all conditions under the law and permit.<sup>45</sup> Also, an operator mining under a permit is responsible for making payments into the abandoned mine land fund, established under Title IV of the Act, in order to reclaim areas disturbed prior to the enactment of the law and left in an unreclaimed status.<sup>46</sup>

The commercial mining of coal has become a far more expensive and long-range process since the enactment of SMCRA, requiring extensive planning and expenditures of funds in permitting and regulatory compliance. Because the full

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<sup>39</sup> For a discussion by OSM of the history of this exemption, see generally 49 Fed. Reg. 19,337-38 (1984).

<sup>40</sup> *Id.* at 19,336-40.

<sup>41</sup> 30 U.S.C. § 1256 (1982).

<sup>42</sup> *Id.* § 1265.

<sup>43</sup> *Id.* §§ 1258, 1265(b).

<sup>44</sup> *Id.* § 1258.

<sup>45</sup> *Id.* § 1259.

<sup>46</sup> Title IV of the Act, 30 U.S.C. §§ 1231-43 (1982), established the Abandoned Mine Reclamation Fund as a trust fund in the Treasury of the United States, and imposed a reclamation fee of 35 cents per ton on all coal produced by surface coal mining, and 15 cents per ton on coal produced by underground coal mining. The fee is imposed on "all operators of coal mining operations *subject to the provisions of [the Act].*" 30 U.S.C. § 1232(a) (1982). An operation which removes coal under the 16 2/3 exemption would not be liable for this fee.

costs of mining activity are internalized economically through the permit process, some small operators and others are "marginalized," and either cannot or do not mine under those requirements. In states where there is no or little regulation of coal and other mineral extraction beyond the state-adopted requirements of the 1977 law, the incentive is great to seek to utilize the exemptions available under the law in order to avoid the economic costs attendant to compliance. Therein lies the danger of the 16 2/3 exemption, for a decision by a regulatory agency to exempt a mining operation places that operation beyond the reach of the law, without any regulatory controls or financial assurances of proper performance. Any regulatory mechanism for implementing the exemption must be grounded in practicality, and must be narrowly construed to assure proper scrutiny by OSM before the operation is placed beyond the ambit of the Act's intended protections.

The definition of "surface coal mining operations" is:

activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of [section 516] surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining. . . .<sup>47</sup>

Excavation with the intent to remove coal, subject to the exceptions for non-commercial use, removal of less than 250 tons, or disturbance of less than two acres,<sup>48</sup> triggers the definition that brings with it the full gamut of environmental performance standards and procedural responsibilities under the law. It is the excavation with the *purpose* of removing coal that keys the definition.

Limiting this broad definition is the exemption for incidental removal, contained in the same subsection of Section 701(28) of the Act, which states that "such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale. . . ."<sup>49</sup> Thus the removal of coal for commercial sale, which would otherwise be subject to the Act, may fall outside of the law's coverage provided certain preconditions are met. The questions are many and thorny. What is "incidental" coal extraction? What is an "other mineral"? How is the tonnage of the mineral measured? What is a commercial use or sale of that other mineral?

A "wrong" answer to any of these questions would allow the unscrupulous coal operator to evade the law; too narrow an interpretation would punish legitimate

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<sup>47</sup> 30 U.S.C. § 1291 (28)(A).

<sup>48</sup> These are some of the specific statutory exemptions listed in sections 528 and 512 of the Act. See *supra* notes 4-6 and accompanying text.

<sup>49</sup> 30 U.S.C. § 1291 (28)(A).

extraction of other minerals. The answer must lie in a pragmatic and realistic appraisal of the extraction of coal vis-a-vis other minerals in the coal-bearing states. The initial OSM proposal does not adequately reflect such an approach, and risks sanctioning widespread evasion of the law.

#### A. *The Regulatory History of the Exemption*

The initial approach of the OSM to the 16 2/3 exemption was an ad hoc, case-by-case determination.<sup>50</sup> In the "basis and purpose" statement accompanying the publication of the 1979 rulemaking, the Secretary of Interior stated the issue in this fashion:

OSM received two comments recommending the addition of a definition of "other minerals" in order to prevent operators, who are in fact mining coal, from using the loophole of "other minerals" when coal does not exceed 16 2/3 per cent of the other mineral. The commenters cited an enforcement action arising under initial program regulations in which an operator alleged he was exempt from the Act because he was removing overburden as fill for a commercial construction project and that the coal being removed as an incidental matter was less than 16 2/3 percent of the tonnage of the overburden. OSM believes that situations such as this can be taken care of by case-by-case inspection and enforcement actions. The Act defines "other minerals" in Section 701(14). Application of this definition to the phrase as it appears in the definition of surface coal mining operations should prevent abuse. For dirt or earth to be included within the definition, an operator would have to show that the dirt or earth had commercial value and that coal was only an incidental byproduct of the extraction operation that amounted to less than 16 2/3 percent of the tonnage of the earth. Moreover, ambiguous cases would be governed by enforcement consistent with the remedial purposes of the Act.<sup>51</sup>

There is probably nowhere in the drafting of the 1979 permanent regulations that the Secretary failed more miserably to address a significant and basic warp in the regulatory fabric of the Act. The analysis of the Secretary failed to define "commercial value" or state how a determination that the coal was an "incidental byproduct" could be made. Further, given the fact that almost any Appalachian contour or mountaintop removal operation could be engineered so as to remove six times more overburden, topsoil, and fill material than coal, the tacit determination by the Secretary that the broad definition of "other minerals" in Section 701 applies to the definition of "surface coal mining operations" invites a construction of the Act which could realize commentators' worst fears. Under the commentators' scenario, the Secretary would apparently find the exemption proper notwithstanding the operator's intent to remove coal and avoid the Act, for the removal would be for a commercial use and would have met the tonnage requirement. The

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<sup>50</sup> See text accompanying note 39. The general statutory language exempting coal removed incidental to other mineral extraction is codified, without further guidelines, at 30 C.F.R. § 700.11 (1984).

<sup>51</sup> 44 Fed. Reg. 14,914-15 (1979).

failure to establish meaningful guidelines for determining the propriety of granting these exemptions was in derogation of the Secretary's responsibility to establish national minimum standards for implementing the Act's provisions.<sup>52</sup>

By contrast, the proposal by the OSM in 1984 to conduct a rulemaking on this exemption is a step toward full implementation of the law in this regard. However, the rulemaking focuses on certain aspects of the issue while avoiding the key problems posed by the exemption—what is an “other mineral” and how is a “commercial use or sale” established? The proposed rulemaking implemented interim guidelines to assist the states in making such determinations, but those guidelines beg the central questions by focusing primarily on the documentation of comparative tonnages of material removed.<sup>53</sup> Any proposed rulemaking must begin with a careful analysis of the law and its legislative history, and with a strong bias toward *inclusion* of any commercial mineral extraction activity that involves removal of coal.<sup>54</sup>

#### B. *The State Experience with the 16 2/3 Exemption*

The experiences of the state regulatory authorities with the implementation and enforcement of the 16 2/3 exemption have been as varied as the geology of the various coal-producing states. Those states which have coal resources which are not located geographically or lithologically near other significant mineral resources have been able to virtually ignore the 16 2/3 exemption problem. Examples of these states, according to administrative officials, are Colorado and Virginia. In New Mexico, coal deposits lie so far below uranium reserves that the question does not arise. In Illinois, coal and other mineral deposits mix only slightly. There was only one application for exemption pending in that state, and one such operation approved as of November 1984. Other states, including West Virginia and Indiana, also appear to have had no problems with the exemption.<sup>55</sup>

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<sup>52</sup> Section 201(c)(2) of the Act, 30 U.S.C. § 1211(c)(2) (1982), authorized and required the Secretary to publish such regulations as are necessary to carry out the purposes and provisions of the Act. The primary purpose of the Act was to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations . . . .” 30 U.S.C. § 1202(a) (1982).

<sup>53</sup> The guidelines promulgated by the Secretary through the OSM are located at 49 Fed. Reg. 19,336-40 (1984). The guidelines focus primarily on volumetric calculations of comparative tonnages removed and do not address the issue of what constitutes an “other mineral” or what is incidental removal. The guidelines take an interim stance that topsoil and fill dirt are not an “other mineral,” but reserve the issue pending final rulemaking. *Id.* at 19,338. The guidelines require documentation of commercial value, but do not purport to establish criteria for determining the commercial nature of the mineral or the substance of the documentation required. *Id.*

<sup>54</sup> See *infra* text accompanying notes 65-70.

<sup>55</sup> The source of information for this discussion of state experience with the 16 2/3 exemption was a series of telephone interviews with administrative personnel in various coal-producing states, conducted in mid-November 1984. A complete list of those state administrative agencies and representatives contacted is available from the Authors.

In states where mining industries other than coal are regulated, "incidental" removal of coal is managed through, or in conjunction with, the regulations governing those other minerals. Wyoming, in particular, has specific rules to cover areas where the laws concerning coal removal and other mineral removal overlap. Ohio also subjects other mining to permitting, though under less restrictive regulations than coal mining operations. This facilitates inspection for possible violations of the exemption, and removes, in part, the incentive for avoiding the regulatory bite of SMCRA.

Ohio currently has the most activity in the area of incidental coal extraction, with forty to fifty operators claiming exemption for operations removing limestone and clay for commercial sale. The state also regulates mining of other minerals under a separate regulatory program. Such operations are inspected at least annually and records of tonnage removed are reviewed. Problems have surfaced with the comparable percentages of coal and other minerals, but these have been addressed through auditing procedures.

Oklahoma, like Ohio, has a separate regulatory program for non-coal mining operations. In the northeast part of the state, much of the coal reserve lies below limestone deposits, and has been allowed to be removed under non-coal permits. Opposition to this has arisen from coal companies, which are concerned about the competitive advantage of such "non-coal" operations removing coal for commercial sale without having to adhere to the more stringent coal regulations, and to pay the surcharge of abandoned mine land fund fees under Title IV of SMCRA.

Kentucky has a regulatory program for non-coal mining, governing the surface effects of the mining of clay, flourspar, sand, gravel, and rock asphalt. The entire program comprises five pages and requires minimal standards for revegetation and submission of maps and plans. Because Kentucky did not adopt the exemption in its state program until the 1984 legislative session, there have been no exemptions granted. Pressure on the agency from legislative committees seeking to utilize the exemption in order to "build shopping centers" and otherwise avoid the regulatory requirements under surface coal mining permits, including the requirement to return to the approximate original contour, has been intense and continuous since 1982. Specifically, the question of treating "fill dirt" and "overburden" as other minerals has arisen repeatedly in the commonwealth of Kentucky.

### C. *The History of the Exemption*

The 16 2/3 exemption first appeared in a precursor to the 1977 law, S. 425, during the Ninety-third Congress.<sup>56</sup> The exemption was thereafter contained in the bills of the Ninety-fourth Congress,<sup>57</sup> and was adopted by the Congress during the

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<sup>56</sup> S. REP. NO. 402, 93d Cong., 1st Sess. 160 (1973).

<sup>57</sup> S. REP. NO. 28, 94th Cong., 1st Sess. (1975).

1977 legislative session.<sup>58</sup> The Senate committee described the intent of the provision in this way:

Activities not included [in the definition of "surface coal mining operations"] are the extraction of coal in a liquid or gaseous state by means of wells, . . . and the extraction of coal incidental to extraction of other minerals where the coal does not exceed 16 2/3 percent of the tonnage removed. The last exception is designed to exclude operations, such as limestone quarries, where coal is found but is not the mineral being sought.<sup>59</sup>

This last sentence imports a test that should precede any determination of incidental removal of coal, but which has heretofore been ignored by the OSM. In order to effectuate the intent expressed by Congress in one of the only sentences specifically describing this exemption, the removal of coal must be incidental to removal of another mineral to fall outside of the Act's coverage. Thus, the coal must either lie atop of, or be imbedded in, a deposit of another mineral that is being sought. If the coal lay below the other mineral deposit being sought, there would be no justifiable reason to allow the coal removal without requiring full adherence to the mining laws, since the coal would then become the primary mineral being removed. Topsoil removal would not be eligible for the exemption, nor would removal of overburden materials for commercial use or sale since, by definition, "overburden" is merely consolidated or disaggregated material overlying the mineral deposit sought to be removed.<sup>60</sup>

The impact of this test, applied as a first threshold, would be to preclude many of the abuses of the exemption in steep-slope areas, where pressure has been mounting to authorize use of the exemption for fill-dirt removal. This threshold does not entirely eliminate the potential for abuse, but it does at least further narrow the categories of "other minerals" eligible for the exemption and definitively dispels the idea that topsoil or overburden could ever constitute an "other mineral."<sup>61</sup>

The legislative history also answers a second question, which is whether the various rock strata overlying or underlying the coal seam (the clays, stones and gravel) constitute "other minerals" for purposes of the exemption. The Secretary suggested in the 1979 rulemaking that the general definition of "other minerals" in section 701(14) of the Act, which is exceptionally broad, should be applied in interpreting the scope of the 16 2/3 exemption in section 701(28)(A).<sup>62</sup> A closer

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<sup>58</sup> S. REP. NO. 128, 95th Cong., 1st Sess. (1977).

<sup>59</sup> *Id.* at 98.

<sup>60</sup> This view is in accord with the interim position of the OSM. *See supra* note 53.

<sup>61</sup> One state, Oklahoma, allows the extraction of coal as a matter of course under the exemption, where the coal seam underlies limestone formations being quarried. The justification for this is that the exposed coal seam may cause environmental problems, particularly where the seam may be acid-producing. Under the analysis suggested above, the mining operation would need to apply for a surface coal mining permit, which would more directly address the environmental problems attendant to acid-producing seams and would impose environmental standards directly bearing on the coal removal.

<sup>62</sup> 44 Fed. Reg. 14,915 (1979).

look at the legislative history suggests that this definition should not be applied, but that a more narrowly drawn and precise definition should be developed to implement the true intent of Congress in creating the exemption.

At first blush, it appears incongruous to suggest that the definition of "other minerals" contained in section 701 of the Act does not provide the meaning of that phrase as it is used in the definition of "surface coal mining operations" in the same section. However, a review of the report of the Senate committee that first drafted the exemption illuminates that the definition of "other minerals" was broadly painted for a very different reason.

As stated earlier, the 16 2/3 exemption applies to operations where the coal removal is incidental to extraction of "other minerals."<sup>63</sup> Section 701(14) contains a definition of "other minerals" which includes:

Clay, stone, sand, gravel, metalliferous and non-metalliferous ores and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form[.]<sup>64</sup>

A review of the legislative history suggests that this definition was not adopted to clarify the use of the term "other minerals" in Section 701(28)(A), as suggested by the OSM. Rather, the term was intended to define the scope of a study, under an entirely different provision of the law, for further inclusion of non-coal mining under the scope of regulation for environmental impacts.

The Senate committee report which introduced the exemption for removal of other minerals also provided for two studies to be authorized with respect to the mining and extraction of other minerals.<sup>65</sup> The Senate committee had originally considered including non-coal minerals within the purview of the Act but opted instead to commission further study, as explained in its report:

Open pit mines and surface mining for minerals other than coal are not subject to the bill . . . The Committee is fully cognizant of the adverse impacts of these mining operations and intends that these mining operations should be regulated as soon as possible. Of particular concern to the Committee is the need to regulate sand and gravel operations, which account for 25 percent of the acreage disturbed by surface mining, and open pit operations. However, in the case of open pit mining and mining for minerals other than coal, the Committee felt that it did not have sufficient information or understanding of the available mining and reclamation technologies for such operations to legislate their regulation in the best possible manner.

In order to assure that appropriate regulations for all surface mining can be developed, appropriate information must be gathered concerning mining opera-

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<sup>63</sup> 30 U.S.C. § 1291(28)(A). See *supra* text accompanying note 49.

<sup>64</sup> *Id.* § 1291 (14).

<sup>65</sup> S. REP. No. 402, 93d Cong., 1st Sess. (1973).



tions not now covered by S. 425. The bill therefore provides for two studies to be undertaken. . . . The first study covers mining and reclamation technologies for minerals other than coal and for open pit mining. The study report on sand and gravel is due 1 year after enactment. That part of the study dealing with all other minerals is due in 18 months.<sup>66</sup>

In furtherance of this expressed intention, the Senate committee included in S. 425 sections 401 and 402, which were later incorporated into SMCRA as Section 709 with some minor revisions. Section 401 read, in pertinent part:

The Chairman of the Council on Environmental Quality is directed to contract with the National Academy of Sciences-National Academy of Engineering . . . for an indepth study of current and developing technology for surface mining and reclamation for *other minerals* and open pit mining designed to assist in the establishment of effective and reasonable regulation of *all* surface and open pit mining and reclamation.<sup>67</sup>

The 1977 version of the same provision, included in the final bill as section 709, was entitled "Study of Reclamation Standards for Surface Mining of Other Minerals."<sup>68</sup>

The Senate report contained a discussion of the broad definition of "other minerals," which was incorporated into the 1977 law as section 701(14). That discussion provided some insight into the intent behind the adoption of the definition:

"Other minerals" is defined to include clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substance of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form.

The study required by Section 401 is designed to provide a basis for future legislation to regulate surface mining and reclamation for these minerals.<sup>69</sup>

Thus, by referring back to Section 401 in the context of explaining the inclusion of the definition of "other minerals" in the proposed legislation, Congress made it abundantly clear that the definition was intended to reference a specific provision of the law, namely section 401. The definition of "other minerals" in what became section 701(14) was intentionally broad, not for the purpose of exempting those operations that incidentally remove coal, but rather to provide broad authority to the Chairman of the Council of Environmental Quality to commission a study to later include those minerals with the ambit of the regulatory program.

It would be fundamentally inconsistent with the intent of the Act to construe the statutory definition of "other minerals" to apply to the 16 2/3 exemption.

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<sup>66</sup> *Id.* at 40.

<sup>67</sup> *Id.* at 24-25.

<sup>68</sup> See 30 U.S.C. § 1299 (1982).

<sup>69</sup> S. REP. No. 402, *supra* note 65, at 75.

Congress cannot be presumed to have engaged in such an exercise in futility as to recognize, on the one hand, the environmental impacts of extraction of other minerals and commission a study to develop a program to regulate them and, on the other hand, to create a broad exemption that would eliminate regulatory coverage of coal removal incidental to that other mineral extraction. It appears that Congress did not intend that the definition in section 701(14) be used to modify any provision except that to which it referred, section 401 (later codified at section 709 of SMCRA).

Application of the broad definition of "other minerals" by the OSM will invite the abusive application of that definition to situations where sham sales of fill dirt and rock are created in order to evade the full cost of coal extraction operations.<sup>70</sup> A more defined and circumscribed approach, reflective of the narrow nature of the exemption, should be specifically created to address and foreclose the potential for abuse. The approach should focus as well on the existence of general commercial markets for the minerals, and should place the burden on the applicant to demonstrate exclusion in the face of a presumptive inclusion under the Act.

#### IV. ON-SITE CONSTRUCTION EXEMPTION

Section 528(3)<sup>71</sup> contains yet another exemption from the coverage of the Act which might appear to be non-controversial and not subject to significant abuse. This section creates an exemption from the standards of the Act for "the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority."<sup>72</sup>

Both the scope and purpose of this exemption seem relatively straightforward. The Act was not intended to apply to highway or other government-financed construction activities where coal was removed only as an incidental part of construction. The reason for the exemption seems as obvious as its intended scope. Government-financed construction activities would be regulated by other environmental standards and the fact that coal was removed incidentally should not make the construction activity a "mine" or, more accurately, a "surface coal mining operation" subject to the provisions of the surface mining act.

In short, the exemption was the essence of common sense and was essentially non-controversial. However, as with the other exemptions, it did not take long for the development of abuse mainly in, and in part because of actions taken by, the state of Kentucky. Somewhat incredibly, the state of Kentucky construed the "government-financed" limitation on the scope of the exemption to apply only

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<sup>70</sup> See *supra* text accompanying note 52.

<sup>71</sup> 30 U.S.C. § 1278 (3) (1982).

<sup>72</sup> *Id.*

to "highway" construction, and not to "other" construction. According to an informal policy of the state, which was never codified but authorized the granting of hundreds of such exemptions, "other construction" activities under section 528(3) did not have to be government-financed to fall within the scope of the exemption.<sup>73</sup> This action, of course, drastically expanded the scope of the exemption,<sup>74</sup> and it did not take long for that interpretation of the law to become the clarion call for enterprising coal companies to develop scams to avoid the Act.

One typical on-site construction exemption was that of the Black and White Land Developers, Inc. in eastern Kentucky which in the process of excavating coal disturbed over forty acres of land abutting the Rockcastle River, which at a lower segment is designated as the Kentucky Wild River.<sup>75</sup> The area was given an exemption for the construction of "Sportsman's Paradise," a residential subdivision. The exemption was for 300 acres, and was granted based on scant evidence of an intent to construct such a subdivision, such as evidence that would follow a request for a change in pre-mining land use under the Act. The subdivision was never built. However, the land was raped and left unreclaimed and the coal removed. The operator failed to save topsoil, failed to control sediment, and allowed slides to occur into the Wild River. The operation dumped spoil over the downslope, and failed to eliminate highwalls. Moreover, the operator destroyed the sole access road of an elderly couple living on top of the hill, causing them to walk through the woods and to access an interstate highway in order to leave the land.<sup>76</sup>

This abuse was more the rule than the exception. Before the state of Kentucky ended the policy, hundreds of such exemptions had been granted; however, only a fraction of these were legitimate construction sites. An OSM report of 100 "construction" sites showed that abuse had occurred in 80 percent.<sup>77</sup> Before OSM pressure brought an end to the policy, the state had sanctioned what was to be the spawning of a new generation of post-SMCRA orphaned mine lands, without fund or bond to save them. Under the policy, coal mines suddenly became sites for shopping centers, housing developments, and subdivisions in the midst of nowhere. It should

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<sup>73</sup> KENTUCKY DEP'T FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION, DEPARTMENTAL POLICY MEMORANDUM No. 78-0004 (1978).

<sup>74</sup> The interpretation given to section 528(3) by Kentucky officials was contrary to the express intention of Congress, as evidenced by this excerpt from the conference report on H.R. 2 (which became SMCRA):

The Senate amendment also 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.

H.R. CONF. REP. No. 493, 95th Cong., 1st Sess. 112, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 728, 743 (emphasis added).

<sup>75</sup> Information for this discussion was obtained from the files of Appalachia-Science in the Public Interest v. Dep't of Natural Resources & Envtl. Protection, No. 79-0596 (Ky. Cir. Ct. filed Apr. 25, 1979).

<sup>76</sup> *Id.*

<sup>77</sup> Lexington Herald, Sept. 2, 1980, at A-10, Col. 1 & 2.

not come as a surprise that when the coal had been removed most of these sites were abandoned, the stated construction purpose forgotten, and the surface mine law successfully avoided. One of the most disturbing aspects of this exemption was that the state regulatory authority's policy unwittingly invited abuse of the exemption and the state was slow to respond to the mounting evidence of abuse.

#### V. COAL EXPLORATION ACTIVITIES

The Act also contains special and less stringent provisions regulating coal exploration activities. Section 512 of the Act<sup>78</sup> provides that coal exploration activities which substantially disturb the land shall be subject to statutory regulation, including requirements that the coal explorer (1) provide notice of his proposed activity and (2) show that he can reclaim the land disturbed by the exploration activity.<sup>79</sup>

Again, as with the other limitations on the scope of coverage of the Act, the special provisions governing coal exploration make sense in the abstract. The view from Capitol Hill, however, fails to see clearly into the hollows of eastern Kentucky. Undoubtedly, much coal mining has gone on in the name of coal exploration. Under the coal exploration regulations, a person is allowed to extract as much as 250 tons of coal as part of the exploration.<sup>80</sup> To avoid the permitting requirements of the Act it has now become common, especially in Kentucky, for persons to go in and start mining without a permit. The operator simply informs the state that he is "exploring," and begins mining. Neither the state nor OSM has placed sufficient inspection personnel in the field to monitor these activities, and while they candidly concede this fact to the press by way of excusing the continued abuse, the agencies continue to defend in lawsuits the sufficiency of the state inspection force.<sup>81</sup> The 250 ton limit is ignored with impunity. An operator simply mines out the area and moves on to another site, usually under another name, and repeats the process. If he wishes to remain on site and is concerned that an inspector may arrive, he may simply apply for and receive a two acre exemption, thus combining the abuses.

The scope of abuse of the coal exploration provisions is staggering. In Kentucky alone, in the past three years, over 2,800 notices of intent to explore have been filed.<sup>82</sup> The most conservative estimate is that over half of these were improper.<sup>83</sup> In actuality, the abuse is almost certainly a far higher percentage.

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<sup>78</sup> 30 U.S.C. § 1262 (1982).

<sup>79</sup> *Id.* § 1262(a).

<sup>80</sup> *Id.* § 1262(d).

<sup>81</sup> Louisville Courier Journal, *supra* note 36.

<sup>82</sup> *Id.*

<sup>83</sup> This figure was derived from a review of OSM's administrative files and interviews with various federal mine inspectors.

## VI. CONCLUSION

This Article has not exhausted the areas of abuse of the surface mine act. For example, there is no discussion of the over 2,000 incidents in which coal operators have ignored orders to stop mining until environmental harm is cleaned up.<sup>84</sup> In fact, almost 50 percent of the cessation orders issued by the OSM since it was first established have been unheeded by coal operators.<sup>85</sup> Similarly, there is no mention of the 1,000-2,000 other sites which were left unreclaimed, but against which OSM and the states did not bother to take enforcement action.<sup>86</sup>

However it is cast, the abuse of the surface mining law has been massive. It is a certainty that over 5,000 mines have been left unreclaimed since the Act was passed.<sup>87</sup> A new legacy of environmental devastation in the form of abandoned, unreclaimed mines has been created—exactly what the Act was intended to prevent. States such as Kentucky and Virginia have played an active, and sometimes willing, role in aiding such abuse or tacitly allowing it to continue.

Other than simply ignoring the law and its enforcement sanctions, the most common and effective way to evade the law is through one of its exemptions. The use of these exemptions is on the increase, not the decrease, and yet the states fail even in the face of clear-cut abuse to take steps to assure full enforcement. The excuses are many—lack of personnel, fear of the state legislatures, and poor management, to name a few. Whatever the causes or combination of excuses offered by those charged with enforcement of the law, the abuse continues while the hands wring.

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<sup>84</sup> *Save Our Cumberland Mtns., Inc. v. Clark*, No. 81-2134 (D.D.C. 1982) (Seventh Bimonthly Report, filed by OSM upon order of the court).

<sup>85</sup> *Id.*

<sup>86</sup> This figure was derived from a review of the records of state bond forfeitures occurring during the pendency of the interim program. A list of affected sites is available from the authors.

<sup>87</sup> This figure was derived as follows:

|             |  |
|-------------|--|
| 2,000-3,000 | Mines claiming the two-acre exemption          |
| 2,000       | Bond forfeiture mines                          |
| 1,700       | Estimated avoidance of stop-mining orders      |
| 1,200-1,500 | Mines improperly claiming to be "explorations" |
| 6,900-8,200 | TOTAL unreclaimed mines                        |