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## Jurisdiction and Exemptions under the Surface Mining Control and Reclamation Act of 1977

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## STUDENT MATERIAL

### Notes

## JURISDICTION AND EXEMPTIONS UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

### I. INTRODUCTION

An ever-increasing demand for energy has prompted production of coal to rise rapidly.<sup>1</sup> In addition, the concurrent dramatic increase in the percentage of coal that is surface mined demonstrates the pressing need that existed for national legislation to control the surface effects of both deep and surface mining.<sup>2</sup> The Surface Mining Control and Reclamation Act of 1977<sup>3</sup> is the product of a six-year effort to protect the nation's economy and environment from the increasing external impacts of the surface mining industry.<sup>4</sup>

The Act represents an earnest attempt to balance the interests of the coal industry and its contribution to the nation's energy supply with equally important social, economic and environmental interests of people living in the nation's mining regions. Congress expressly recognized in SMCRA that while "coal mining operations presently contribute significantly" to our country's energy needs, "the expansion of coal mining . . . makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public."<sup>5</sup>

Thus, while coal has played a vital part in the industrial and economic growth of this country, the impacts of surface mining have continually presented substantial economic and environmental problems.<sup>6</sup> Owners of land adjoining surface mining activity have undoubtedly been affected the most. Adverse effects, such as losses in property value, damage to water sources,

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<sup>1</sup> Total production of coal in this country has more than doubled between 1961 (402.9 million tons) and 1981 (814.7 million tons). See *KEYSTONE COAL INDUSTRY MANUAL* (McGraw-Hill 1982).

<sup>2</sup> The percentage of coal that is produced by surface mining methods has nearly doubled between 1961 (32.3%) and 1981 (59.4%). *Id.*

<sup>3</sup> Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. V 1981)) [hereinafter cited as either the Act or SMCRA].

<sup>4</sup> See generally Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

<sup>5</sup> 30 U.S.C. § 1201(b) and (d) (Supp. V 1981).

<sup>6</sup> H.R. No. 95-218, 95th Cong., 1st Sess. 57, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 593, 595.

vibration damage from blasting, and landslides primarily affect those living or doing business near stripping activity. But surface mining operations have interfered with interests beyond those of neighboring landowners. Major examples of the more far-reaching external consequences of surface mining are pollution of streams from mine acid and silt, loss of productive farmland and recreational areas, and an overall diminution in aesthetic quality of mined areas.

The Act was designed to deal with these problems in three ways. First, titles III, VIII and IX of SMCRA encourage (and fund) mining research in the states affected.<sup>7</sup> Second, title IV created the Abandoned Mine Reclamation Fund, a program supported by a severance tax on current mining operations.<sup>8</sup> The monies collected are distributed to eligible states to reclaim lands which were surface mined and abandoned before the passage of the Act in 1977. Finally, the most vital to SMCRA goals, is title V, which sets out detailed environmental protection standards, penalties for noncompliance, citizen participation provisions and a procedure for designation of certain lands as unsuitable for coal mining.<sup>9</sup>

The Department of Interior's agency which was created by the Act—the Office of Surface Mining Reclamation and Enforcement (OSM), is primarily responsible for the implementation and enforcement of these legislative goals.<sup>10</sup> The Act itself provides two stages of implementation, and OSM's involvement varies with each stage. Initially, under the interim program, OSM has been the primary regulatory agency in all states.<sup>11</sup> The second, or permanent, stage involves federal oversight of all states with their own OSM-approved programs, along with permanent federal programs in any mining state without an approved state program.<sup>12</sup>

#### A. *Issues Discussed*

The effectiveness of SMCRA and the underlying federal and state regulatory programs is primarily dependent upon the breadth of the Act's authority. Simply stated, if the Act's provisions do not cover a particular mining operation, OSM is without jurisdictional authority to regulate it. Therefore, an issue of major concern that has arisen since the passage of SMCRA is what activities and entities are within the jurisdiction of the Act and OSM regulation.

This Note examines the major jurisdiction and exemption questions

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<sup>7</sup> 30 U.S.C. §§ 1221-1229, 1311-1316, 1321-1328 (Supp. V 1981).

<sup>8</sup> *Id.* §§ 1231-1243.

<sup>9</sup> *Id.* §§ 1251-1279.

<sup>10</sup> *Id.* § 1211.

<sup>11</sup> *Id.* § 1252.

<sup>12</sup> *Id.* §§ 1254 and 1255.

presented under SMCRA. Initially, the Act's scope of authority is dependent upon how the terms "operator" and "surface coal mining operations" are defined.<sup>13</sup> Only if an entity or activity falls within these definitions must it follow SMCRA's permitting and performance requirements. At first glance, these provisions do not appear to implicitly exempt any surface mine operator or operation by definitional lack of jurisdiction. But as cases illustrate, OSM's jurisdictional reach under the definitions of "operator" and "surface coal mining operations" have been hotly litigated issues, especially regarding off-site support facilities such as coal processing and loading units.<sup>14</sup>

Other major areas covered by this Note are the express exemptions under section 528 of the Act.<sup>15</sup> Three types of surface coal operations are explicitly not subject to SMCRA. Basically, these are: 1) noncommercial land-owner extractions;<sup>16</sup> 2) operations which affect two acres or less;<sup>17</sup> and 3) operations where coal is removed incidental to government-financed construction projects.<sup>18</sup> The first and last of these three exemptions have met with relatively little controversy and will be discussed in less detail.<sup>19</sup> The second, the "two acre" exemption, has been the subject of constant litigation since the passage of the Act and will be discussed at greater length.<sup>20</sup>

## II. EXEMPT BY DEFINITIONAL LACK OF JURISDICTION

### A. *Who Are "Operators"?*—Section 701(13)

Challenges by some who feel that they are not "operators" have been raised in spite of the simple and straightforward language used in the definition. The Act defines an operator as "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve

<sup>13</sup> See 30 U.S.C. § 1291(13) and (28) (Supp. V 1981).

<sup>14</sup> See *supra* notes 21-103 and accompanying text. See generally McMillan & Means, *The Outer Limits of OSM Jurisdiction: Regulation of Operations Separated From a Minesite*, 1 EASTERN MIN. L. INST. 4-1 (1980); Barry, *The Surface Mining Control and Reclamation Act of 1977 and the Office of Surface Mining: Moving Targets or Immovable Objects?*, 27 ROCKY MT. MIN. L. INST. 169 (1982).

<sup>15</sup> 30 U.S.C. § 1278 (Supp. V 1981).

<sup>16</sup> *Id.* § 1278(1).

<sup>17</sup> *Id.* § 1278(2).

<sup>18</sup> *Id.* § 1278(3).

<sup>19</sup> See *supra* notes 104-24 and accompanying text.

<sup>20</sup> See *supra* notes 125-63 and accompanying text. SMCRA and the regulations also do not cover any operation which mines coal incidental to the extraction of some other mineral, and the coal mined is less than 16.6% of the total minerals mined. SMCRA § 701(28), 30 U.S.C. § 1291(28) (Supp. V 1981); 48 Fed. Reg. 20,400 (1983). However, this exemption is built into the definition of "surface coal mining operations" and will be dealt with only as it becomes relevant to the discussion of that definition. This Note also does not address the issues surrounding certain "lands" which are exempt from the Act or regulated separately. See, e.g., 30 U.S.C. §§ 1262(e) and 1300(h) (Supp. V 1981).

consecutive calendar months in any one location."<sup>21</sup> The regulations promulgated by OSM define "operator" in essentially the same language, clarifying that it also includes those who remove coal from refuse or gob piles.<sup>22</sup>

In some cases, the application of the "operator" and "operations" definitions are at issue simultaneously.<sup>23</sup> However, the more ambiguous "operations" definition is more frequently litigated, but not due solely to any greater ambiguity of the "operations" definition. Other factors help explain this result. First, SMCRA does not rely heavily upon its definition of "operator" to find jurisdictional authority; instead, SMCRA relies predominantly on its "surface coal mining operations" definition, which gives it broad jurisdiction over mining activities. The nucleus of SMCRA, the performance standards, were drafted to apply to "operations."<sup>24</sup> More important is the fact that "operations" includes many support facilities not involved in the actual removal of coal. Thus, there are many instances when the definition of "operator," which is dependent upon intent to remove or actual removal of coal, is not a material issue.<sup>25</sup>

Nevertheless, there are some situations where jurisdiction may be solely dependent upon the definition of "operator." The only real definitional issue here is not determining *who* is an operator,<sup>26</sup> but rather *when* one is considered an operator. Unquestionably, and by the Act's explicit language, one who removes 250 tons of coal or more is within the definition. However, since the section also says "or intends to remove," the question of timing is not always so clear.

Two cases which illustrate the ambiguity inherent in the "intent" language are *Russell Prater Land Co.*<sup>27</sup> and *L.C. Coal v. OSM.*<sup>28</sup> In the first case, the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) held that proof of intention to mine, together with a disturbance of the surface, was sufficient to establish OSM jurisdiction over the site. The proof of intent in *Prater* was that two company officials had told an OSM inspector that they intended to open a mine at the site.<sup>29</sup> The Board, while noting that in this

<sup>21</sup> SMCRA, § 701(13); 30 U.S.C. § 1291(13) (Supp. V 1981).

<sup>22</sup> 30 C.F.R. § 701.5 (1982). See also *United States v. Devils Hole, Inc.*, 548 F. Supp. 451 (E.D. Pa. 1982); *United States v. H.G.D. & J. Mining Co.*, 561 F. Supp. 315 (S.D. W. Va.).

<sup>23</sup> E.g., *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083 (6th Cir. 1981); Sam Blankenship, 5 IBSMA 32 (1983).

<sup>24</sup> See 30 U.S.C. § 1265 (Supp. V 1981).

<sup>25</sup> See also 44 Fed. Reg. 14,916 (1979) ("The word 'operator' is not used in all places at which responsibilities are imposed on those mining coal.")

<sup>26</sup> Determining *who* is an operator is often an evidentiary issue though. See, e.g., *Harry Smith Constr. Co. v. OSM*, 78 IBLA 27, 31-32 nn.11 & 12 (1983); *Watkins v. OSM*, No. NX 0-225-R (Sept. 30, 1980).

<sup>27</sup> 3 IBSMA 124, 88 Interior Dec. 498 (1981).

<sup>28</sup> No. CH 0-199-R (Oct. 1, 1980).

<sup>29</sup> 3 IBSMA at 126, 88 Interior Dec. at 499.

type of situation it may be possible to produce facts to deprive OSM of its authority, did not specify what facts would trigger this loss of jurisdiction. It most likely was referring to two situations: when a company's intent was to remove less than 250 tons, or if the operation was not going to disturb more than two acres. In those circumstances, the company's "intent" would not subject it to the Act.<sup>30</sup> However, the burden is ultimately on the operator to prove that the amount of coal mined will be (or was) less than 250 tons<sup>31</sup> or that the area affected will be (or was) less than two acres.<sup>32</sup> Jurisdiction is essentially presumed unless the miner can clearly establish otherwise.<sup>33</sup>

A comparison of *Prater* with the second case, *L.C. Coal v. OSM*,<sup>34</sup> demonstrates the ambiguity of the "intent" aspect of section 701(13). L.C. Coal had begun mining a previously abandoned deep mine<sup>35</sup> to determine whether coal could be safely removed. The mine had been abandoned by another company after it had discovered that the roof of the mine could not be bolted properly. The administrative law judge (ALJ) held that there was no basis on which OSM could claim jurisdiction, since the evidence showed that, after L.C. Coal had removed only 120 tons of coal, it had stopped mining. The ALJ stated, "[i]t is obvious that the Applicant did not intend to remove more than 250 tons of coal per year if the mining could not be done safely."<sup>36</sup> But this statement does not appear to comply with the statutory definition of "operator." The facts of the *L.C. Coal* case clearly indicate that the company intended to remove more than 250 tons as long as the mine could be operated safely. Thus, the confusion evolves as to *when* to judge intent—before the removal as in *Prater*, or after the fact, as the ALJ seems to suggest in *L.C. Coal*. If intent is to be examined after the fact, the "intent" provision is superfluous. For example, if OSM must wait to determine its authority, based upon a company's assertion that it is unsure whether it will be able to mine a particular site successfully, then the only effective part of the definition is the "actual removal" criterion. Therefore, the test is necessarily that expressed by the Board in *Prater*—OSM need not wait until coal is actually removed to exercise its authority. The burden of proving no intent to mine more than 250 tons is on the coal company.<sup>37</sup>

<sup>30</sup> See 30 U.S.C. §§ 1278(2) and 1291(13) (Supp. V 1981).

<sup>31</sup> See James Moore, 1 IBSMA 216, 86 Interior Dec. 369 (1979); see also Squire Baker, 1 IBSMA 279, 86 Interior Dec. 551 (1979).

<sup>32</sup> See Titan Coal Corp. v. OSM, 78 IBLA 205 (1984); Harry Smith Constr. Co. v. OSM, 78 IBLA 27 (1983); Sam Blankenship, 5 IBSMA 32, 90 Interior Dec. 174 (1983); Virginia Fuels, Inc., 5 IBSMA 1 (1983); Virginia Fuels, Inc., 4 IBSMA 185, 89 Interior Dec. 604 (1982).

<sup>33</sup> See Harry Smith Constr. Co. v. OSM, 78 IBLA 27 (1983); see also 43 C.F.R. § 4.1171 (1982).

<sup>34</sup> No. CH 0-199-R (Oct. 1, 1980).

<sup>35</sup> The surface effects of deep mines are also covered by the Act. See 30 U.S.C. § 1266 (Supp. V 1981).

<sup>36</sup> *L.C. Coal*, at 2 (emphasis added).

<sup>37</sup> See *supra* note 31 and accompanying text.

A final question concerning the "operator" definition focuses on the opposite end of the time line. At what point does one cease being an operator under section 701(13)? This issue was raised in *Shawnee Coal Co. v. Andrus* before the Court of Appeals for the Sixth Circuit.<sup>38</sup> The district court had granted Shawnee Coal injunctive relief against OSM enforcement of some cessation orders. Shawnee asserted that OSM did not possess jurisdiction over them.<sup>39</sup> Its claim was partially based on its contention that it was not an "operator" under section 701(13). Shawnee had mined in excess of 250 tons between August, 1977, and December, 1978, when it closed its surface mine on the site. Shawnee continued to operate an off-site tippie where it processed both its own stockpiled coal and coal from contracted mines. OSM inspectors issued a number of notices of violation (NOV) to Shawnee in September, 1979, which were based upon violations at the tippie site.

This timetable illustrates the basis for Shawnee's argument. At least nine months before the issuance of the NOVs, the company had ceased removing (or intending to remove) any coal from the location. Therefore, while it had unquestionably been an operator under section 701(13) in 1977 and 1978, the company contended that it had lost this status once it closed its mine. The circuit court unequivocally rejected this argument, relying on the fact that at the time the NOVs were issued, Shawnee was still *reclaiming* the mine site. This was the only logical conclusion the court could have reached, since the Act's environmental performance standards are ultimately directed toward reclamation.<sup>40</sup> If OSM authority ended with the final removal of coal it would be impossible to enforce the primary goals of the Act.

The counter-argument on this issue would be that the bonding provisions of the Act,<sup>41</sup> and not the penalty provisions, provide OSM authority over reclamation sites. Thus, while the company ceased being an operator under the Act, OSM still had enforcement leverage over it via their unreleased bond. But the performance standards and penalty provisions of SMCRA refute this position since, under title V, all operations are required to meet all "criteria as are necessary to achieve reclamation" under the Act,<sup>42</sup> and "any permittee who violates any . . . provision of this title, may [or shall] be assessed a civil penalty . . ." <sup>43</sup> Therefore, while the bonds required under the Act are an incentive for the company to reclaim (and surety for OSM), the jurisdictional authority of OSM does not end with the last shovel-load of coal.<sup>44</sup>

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<sup>38</sup> 661 F.2d 1083 (6th Cir. 1981).

<sup>39</sup> *Id.* at 1093.

<sup>40</sup> See 30 U.S.C. §§ 1257(d), 1258, 1259, 1265 (Supp. V 1981).

<sup>41</sup> See *id.* §§ 1259 and 1269.

<sup>42</sup> *Id.* § 1265(23).

<sup>43</sup> *Id.* § 1268(a).

<sup>44</sup> See Sam Blankenship, 5 IBSMA 32, 90 Interior Dec. 174 (1983) (Even "a pure reclamation operation can claim no greater exemption than could the coal removal operation upon which it is based.") *Id.* at 37 n.1; see also Grafton Coal Co., 3 IBSMA 175, 88 Interior Dec. 613 (1981).

In summary, the definitional problems related to section 701(13), standing alone, have been relatively rare. The definition has not been the subject of much confusion or litigation, primarily due to its secondary importance to the "surface coal mining operation" definition discussed below. Accordingly, no changes in the "operator" definition in either the Act or the regulations have been officially proposed.

B. *What Are "Surface Coal Mining Operations"?*—Section 701(28)

It is not as clear that the court of appeals in *Shawnee Coal Co. v. Andrus*<sup>45</sup> could have found jurisdiction over the off-site tippie if the "operator" status of Shawnee had already ended. The court, however, was not faced with this issue because Shawnee was still reclaiming the mine site when the NOV's were issued. Additionally, the court held that the tippie itself, as a "surface coal mining operation" within the definition in section 701(28),<sup>46</sup> was therefore subject to the agency's enforcement powers. As emphasized by the *Shawnee* court, regardless of who the person or entity is, the mining activity is independently covered under SMCRA.<sup>47</sup>

Section 701(28) is the "heart of OSM's regulatory authority."<sup>48</sup> The term "surface coal mining operations" is used constantly throughout the Act and has by far the most lengthy definition.<sup>49</sup> Subsection (A), which lists the activi-

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<sup>45</sup> 661 F.2d 1083 (6th Cir. 1981).

<sup>46</sup> 30 U.S.C. § 1291(28) (Supp. V 1981).

<sup>47</sup> 661 F.2d at 1094.

<sup>48</sup> McMillan & Means, *supra* note 14, at 4-8.

<sup>49</sup> SMCRA, § 701(28); 30 U.S.C. § 1291(28) provides as follows:

"surface 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 [30 USCS § 1266] 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, mountain-top 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 explorations subject to section 512 of this Act [30 USCS § 1262]; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas



ties that are considered within the definition, has received the most attention. Subsection (B), which speaks in terms of areas rather than activities, is somewhat complementary and adds to the definition any adjacent *areas* used incidental to the activities in subsection (A).<sup>50</sup> As in the *Shawnee* case, the primary focal point of litigation has been on the subsection (A) issue of what activities come within the Act. Even more precisely, the real subject of controversy between OSM and the coal industry has been whether off-site processing plants and other support facilities should generally be included in the definition.

In *Shawnee*, the court had little trouble concluding that Congress intended off-site tipplers to be considered as surface coal mining operations. For support, the court cited *In re Permanent Surface Mining Regulation Litigation*<sup>51</sup> and merely stated that for the reasons outlined in that decision, *Shawnee's* tippler was within OSM's jurisdiction.<sup>52</sup> The decision relied on by the court in *Shawnee* is one of a series of District of Columbia district court and circuit court decisions dealing with the validity and interpretation of the Act and more than 100 different parts of the regulations promulgated under it.<sup>53</sup> The only one relevant here is a decision in May 1980 by Judge Flannery, which was relied on by the *Shawnee* court and is generally known as *Flannery II*.<sup>54</sup>

In *Flannery II*, one issue was the interpretation of the section 701(28) definition—"surface coal mining operations." This definition, particularly with regard to off-site processing facilities, has been the subject of various interpretations by the administrations of OSM and the IBSMA, and by at least three federal district courts and one circuit court of appeals.<sup>55</sup> The controversy first arose under the Act's 701(28) definition and its parallel definition in the interim regulations.<sup>56</sup> The portions of the definition which have generated the controversy are: "activities conducted on the surface of lands *in con-*

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and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.  
(emphasis added.)

<sup>50</sup> See, e.g., *Alabama Power Co.*, No. NX 9-82-0 (Jan. 30, 1980); *Badger Coal Co.*, No. CH 0-164-R (July 17, 1980); *Badger Coal Co.*, No. CH 0-92-P (Aug. 25, 1980). See also *infra* note 68.

<sup>51</sup> No. 79-1144 (D.D.C. May 16, 1980).

<sup>52</sup> *Shawnee Coal*, 661 F.2d at 1094.

<sup>53</sup> See *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978); 456 F. Supp. 1301 (D.D.C. 1978); 627 F.2d 1346 (D.C. Cir. 1980) (all dealing with the interim regulations). See also *In re Permanent Surface Mining Regulation Litigation*, 13 E.R.C. 1586 (D.D.C. Aug. 21, 1979), *aff'd*, 617 F.2d 807 (D.C. Cir. 1980); 14 E.R.C. 1083 (D.D.C. Feb. 26, 1980); 14 E.R.C. 1813 (D.C. Cir. July 10, 1980); 653 F.2d 514 (D.C. Cir.), *cert. denied sub nom. Peabody Coal Co. v. Watt*, 102 S. Ct. 106 (1981). See also *In re Permanent Surface Mining Regulation II*, No. 79-1144 (83-1092) (D.D.C. filed April 14, 1983) (pending litigation).

<sup>54</sup> No. 79-1144 (D.D.C. May 16, 1980); see also Barry, *supra* note 14, at 280.

<sup>55</sup> See *infra* notes 75-81 and accompanying text. See generally Barry, *supra* note 14, at 309-14.

<sup>56</sup> The interim regulations can be found in 42 Fed. Reg. 62,639 (1977). 30 C.F.R. § 700.5 defines

nection with a surface coal mine . . . . Such activities include . . . 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."<sup>57</sup> In *Western Engineering*,<sup>58</sup> the IBSMA decided that a company which owned a river terminal that received strip-mined coal for preparation and loading onto barges was not a "surface coal mine operation." The Board reasoned that because of the ambiguity in the statutory and regulatory definitions, primarily in the phrases "in connection with a surface mine" and "at or near the mine site," the matter should be resolved in favor of the company.<sup>59</sup>

This was not the first request for clarification of these two ambiguous phrases. During the drafting stage of the permanent regulations attention was directed to the phrase "at or near" and the fact that it was easily subject to different interpretations.<sup>60</sup> The first interpretation, one favored by the coal industry, was that the phrase "at or near" modified the entire sentence segment: "and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce . . ." This interpretation would have the effect of allowing OSM jurisdiction over only those loading facilities *and processing plants* which are located on or near the minesite.

However, OSM, in the preamble to the permanent regulations, took the opposite position that "at or near" only modified the phrase "loading of coal for interstate commerce . . ."<sup>61</sup> This broader interpretation allows OSM control over *all processing plants* as long as they are "in connection with" mine operations, regardless of the geographical proximity ("at or near") to the mines they serve. Only loading facilities are subject to both the "at or near" and the "in connection with" criteria before finding jurisdiction.

The legislative history of SMCRA gives little insight into whether Congress intended coverage of processing plants to be dependent upon "nearness" to the mine site. However, somewhat indicative of the position that Congress intended what is now the broad OSM interpretation is a House Interior and Insular Affairs Committee Report which states that Public Law 95-87 "would enact a set of national environmental performance standards to be applied to *all* coal mining operations . . . (1) Covering all coal surface mining (contour, mountaintop, area stripping and open-pit operations) and the

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"surface coal mining operations" in virtually the same language as the statutory definition. *See* Fed. Reg. 62,676 (1977).

<sup>57</sup> 30 U.S.C. § 1291(28)(A) (emphasis added).

<sup>58</sup> 1 IBSMA 202, 86 Interior Dec. 336 (1979).

<sup>59</sup> 86 Interior Dec. at 341.

<sup>60</sup> *See* 44 Fed. Reg. 14,928 (1979).

<sup>61</sup> *See id.* at 14,915. ("The Office interprets the Act as setting no territorial limitation on its jurisdiction over other facilities identified in the statutory definition preceding 'loading of coal.')" *See also id.* at 14,928.

surface impacts from underground mines *and coal processing . . .*"<sup>62</sup> Therefore, it is arguable that anything not expressly exempted was intended to be covered.

The Board in *Western*, aware of the interpretation favored by OSM, found it unpersuasive, especially since the permanent regulations and their preamble were not published until after the violations were filed against *Western*.<sup>63</sup> Moreover, the Board noted that OSM had stated its above-mentioned interpretation only in the preamble;<sup>64</sup> the agency did not change the wording of the definition for the permanent regulation. The interim definition construed in *Western* had been codified (unamended) into the permanent regulations;<sup>65</sup> thus, the Board generally ruled that OSM jurisdiction required both a connection and geographic proximity.<sup>66</sup>

*Flannery II* was decided approximately one year after the *Western* case. Judge Flannery resolved the dispute in favor of the OSM position, stating that "at or near the minesite" referred only to the loading of coal.<sup>67</sup> According to Judge Flannery, processing plants come under OSM jurisdiction when only one prerequisite is met—that they are operated "in connection with" a mining operation.<sup>68</sup>

Apparently, the Board was not persuaded by Judge Flannery's concurrence with the OSM interpretation. Two weeks after *Flannery II*, the IBSMA decided *Drummond Coal Co.*<sup>69</sup> There, the Board ruled that before any processing plant comes under OSM jurisdiction it must pass two tests: "Its activities must be conducted in connection with a surface coal mine, and the plant must be located at or near the minesite."<sup>70</sup> With the *Drummond* decision, the Board was no longer going to merely rule, as it did in *Western*, that the language was ambiguous. Rather, the Board firmly decided in favor of the coal industry's interpretation of section 701(28) and instituted what was known as the *Drummond* two-part test.

<sup>62</sup> H.R. No. 95-218, 95th Cong., 1st Sess. 57, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 593, 595 (emphasis added).

<sup>63</sup> See 86 Interior Dec. at 340-41 n.9.

<sup>64</sup> *Id.*

<sup>65</sup> 44 Fed. Reg. 15,313 (1979).

<sup>66</sup> *Thoroughfare Coal Co.*, 3 IBSMA 72, 88 Interior Dec. 406, (1981); *Falcon Coal Co.*, 2 IBSMA 406, 87 Interior Dec. 669 (1980); *Wolverine Coal Co.*, 2 IBSMA 325, 87 Interior Dec. 554 (1980); *Roberts Bros. Coal Co.*, 2 IBSMA 284, 87 Interior Dec. 439 (1980); *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 Interior Dec. 380 (1980).

<sup>67</sup> *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144, slip op. at 52 (D.D.C. May 16, 1980).

<sup>68</sup> Judge Flannery also noted that subsection (B) of section 701 gave OSM an additional basis for jurisdiction over processing plants not "at or near" the mine. *Id.* at 52-53.

<sup>69</sup> 2 IBSMA 96, 87 Interior Dec. 196 (1980).

<sup>70</sup> *Id.* at 101, 87 Interior Dec. at 198.

In *Drummond*, the first part of the test, the "connection" criterion, was easy enough to find since Drummond Coal owned both the processing facility and the mine supplying it. The second criterion, "nearness," gave the Board more of a problem.<sup>71</sup> The mines involved were between nine and thirty miles from the facility. If "nearness" was considered solely in terms of geographical proximity, nine to thirty miles away may be stretching the common sense meaning of "near." However, the Board, while conceding that geographical distance was relevant, took a more functional approach to determining "nearness." The more "functionally and economically integrated" the facility was with the mines, the nearer it was. This balancing or sliding-scale approach, which into consideration many circumstances, including geographical distance, percentage of coal coming from mines connected to the facility, the dependence of the facility on the continued operation of such connected mines, and the nature and extent of activities carried on at the coal facility. Subsequent Board decisions placed very little emphasis on geographical distance though, relying almost exclusively on factors relating to the functional and economic integration between the facility and mine(s).<sup>72</sup>

One reason that distance became relatively unimportant was because the *Drummond* decision involved mines nine to thirty miles from the facility. Since this benchmark case involved such substantial distances, this factor became somewhat immaterial to later cases where the distances were less.<sup>73</sup> In theory, though, the distance should still be relevant under the Board's test. For example, the further the facility is from the mine, the degree of functional and economic integration required to find it "near" should be greater. The most persuasive argument for this exclusive emphasis on looking at integration is that the lack of express geographical distance or other definition of the term "near" in the Act or regulations means that a functional rather than geographical line was intended to be used.<sup>74</sup>

The next significant development in this area was the reversal of *Drummond* by a federal district court in Alabama.<sup>75</sup> First, the court disagreed with the Board's functional approach to the term "near." The court reasoned that because the phrase "in connection with" already required an inquiry into whether there was an economic, legal or some other functional relationship, to interpret "near" to mean essentially the same thing makes its inclusion in the Act and regulation redundant and unnecessary. Rather, the court ruled

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<sup>71</sup> *Id.* at 102, 87 Interior Dec. at 198-99.

<sup>72</sup> *See, e.g.*, Bethlehem Mines Corp., 2 IBSMA 215, 87 Interior Dec. 380 (1980); Wolverine Coal Co., 2 IBSMA 325, 87 Interior Dec. 554 (1980); Falcon Coal Co., 2 IBSMA 406, 87 Interior Dec. 669 (1980).

<sup>73</sup> *See, e.g.*, Ross Tipple Co., Nos. NX 9-17-P & NX 9-49-R (Oct. 29, 1980), *rev'd*, 3 IBSMA 322, 88 Interior Dec. 851 (1981).

<sup>74</sup> *See* Reitz Coal Co., 3 IBSMA 260, 266 n.5, 88 Interior Dec. 745, 748 n.5 (1981).

<sup>75</sup> *Drummond Coal Co. v. Andrus*, No. CV 80-M-0829 (N.D. Ala. April 20, 1981).

that "it is plain that the Act and regulations intended 'near' to describe location of a processor with respect to a mine rather than its functional relationship to a mine."<sup>76</sup> While finding Drummond's mines (nine to thirty miles away) not to be "near," the court did not define what geographical proximity would constitute a processing plant being "near" a mine. Nevertheless, the Board appears to have been at least partially persuaded by the *Drummond* court that "near" should be primarily a geographical test rather than a functional one.<sup>77</sup>

Additionally, though, while the court disagreed with the Board's meaning of "near," it did agree with the Board's two-part test. That is, it followed the interpretation that "at or near" was intended to modify not only "loading" but the full "processing" phrase. This was the first court decision after *Flanery II* to interpret the definition of "surface coal mining operations," and the *Drummond* court took the opposite view of the one taken by Judge Flanery.

However, this one-to-one split of authority did not remain for long. The Sixth Circuit decided *Shawnee Coal Co. v. Andrus*<sup>78</sup> five months after the *Drummond* decision; with little discussion, the court sided with Judge Flanery. Shawnee's tipple was held to be a "surface coal mining operation" without any finding that it must be "near" the mines.<sup>79</sup>

The debate became even more weighted in favor of OSM's position that "near" only modified "loading facilities" with the *Debord v. Dinco Sales* decision in September, 1982.<sup>80</sup> The Federal District Court for the Eastern District of Kentucky found that the Board's interpretation that section 701(28) required the company's processing tipple to be "at or near" the mine site was clearly erroneous. The *Debord* court, citing *Shawnee Coal* as the proper interpretation, stated that the Sixth Circuit had correctly construed the Act "to encompass off-site processing operations such as here, finding that Congress intended for tipping operations to fall within the Act's gambit."<sup>81</sup>

### 1. The Revised Regulation

It had become obvious to OSM during the Carter administration, and even before most of the aforementioned court decisions, that the only way to resolve the "at or near" controversy was to amend the regulations to clarify the "operations" definition's meaning and, hence, solve OSM's jurisdictional

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<sup>76</sup> *Id.* at 6.

<sup>77</sup> See *Reitz Coal Co.*, 3 IBSMA 260, 88 Interior Dec. 745 (1981); *Ross Tipple Co.*, 3 IBSMA 322, 88 Interior Dec. 851 (1981).

<sup>78</sup> 661 F.2d 1083 (6th Cir. 1981).

<sup>79</sup> *Id.* at 1094.

<sup>80</sup> No. 82-99 (E.D. Ky. Sept. 23, 1982).

<sup>81</sup> *Id.*

confusion.<sup>82</sup> In its first attempt to clarify the permanent regulation, OSM proposed to amend the "surface coal mining operations" definition to comply with its longstanding interpretation as stated in the preamble to the original permanent regulations,<sup>83</sup> that the term "at or near" only modified "loading of coal." To accomplish this purpose the only revision necessary was to simply incorporate the phrase "loading of coal for interstate commerce at or near the mine site" into a separate sentence.<sup>84</sup> Then the "at or near" proximity requirement unquestionably would apply only to loading facilities.

The June, 1980, proposed revision was a casualty to the change in administrations. President Reagan's actions to curb the number of federal regulations effectively suspended this amended definition.<sup>85</sup> However, the massive overhaul of the federal surface mining program by the Reagan-Watt administration brought a renewal of this same proposed revision in the section 700.5 regulatory definition.<sup>86</sup> The proposed change was announced in the *Federal Register* on June 25, 1982, but the revision was again forestalled. This time, the proposed revision was only a small part of a series of OSM-proposed changes throughout the entire surface mining regulatory scheme.<sup>87</sup> To settle a lawsuit filed by the National Wildlife Federation,<sup>88</sup> OSM agreed to prepare a supplemental environmental impact statement (EIS) to assess the effects of the massive regulatory changes.

The supplemental EIS assessed the impact of all proposed regulations and revisions which were published in the *Federal Register* between July 1, 1981, and June 25, 1982.<sup>89</sup> On January 20, 1983, OSM released final drafts of the regulations.<sup>90</sup> The revised "surface coal mining operations" definition was eventually approved and reached final publication in the *Federal Register* in May, 1983.<sup>91</sup> Consequently, the regulatory definition of "surface coal mining operations" has its much needed "at or near" revision. The revised regulation, however, does not make a clean break from past problems. Admittedly, it will be clear under the new definition that OSM authority is not dependent upon a facility being "near" the mine site, *unless* it is a loading facility. But

<sup>82</sup> See 45 Fed. Reg. 42,333 (1980).

<sup>83</sup> See 44 Fed. Reg. 14,915 (1979).

<sup>84</sup> See 45 Fed. Reg. 42,335 (1980). The revised portion reading: "and the cleaning, concentrating or other processing or preparation [of coal. Such activities also include] the loading of coal for interstate commerce at or near the mine site." (revision in brackets.)

<sup>85</sup> See ENV'T REP. 115.0101 (BNA) (1982).

<sup>86</sup> 47 Fed. Reg. 27, 692 (1982).

<sup>87</sup> See *Special Report*, ENV'T REP. 1684 (BNA) (1983).

<sup>88</sup> National Wildlife Fed'n v. Watt, No. 82-0320 (D.D.C. filed Feb. 3, 1982).

<sup>89</sup> See OSM, U.S. DEPT. OF THE INTERIOR, PROPOSED REVISIONS TO THE PERMANENT PROGRAM REGULATIONS IMPLEMENTING SECTION 501(b) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, vol. I, p. V (1983) [hereinafter cited as PROPOSED REVISIONS].

<sup>90</sup> *Id.*, vol. III.

<sup>91</sup> 48 Fed. Reg. 20,392, 20,400 (1983).

there is still the need for guidance as to what facilities are "near" enough to be within OSM jurisdiction.<sup>92</sup>

Many of these facilities may be on-site, which presents no jurisdiction problem since they are "at" the mine. But which off-site loading facilities are "near" is not so clear. The term obviously gave the Board and courts difficulty before.<sup>93</sup> Now, because it will only apply to loading facilities does not mean it will be any easier to define. One solution engineered by OSM was to provide an alternative way to reach loading facilities under the Act. Based upon subsection (B) of section 701(28),<sup>94</sup> OSM has generated a new definition in the regulations—defining "support facilities."<sup>95</sup> One type of support facility is coal loading facilities.<sup>96</sup> However, under this definition a loading facility is regulated only if it is "resulting from, or incident to, an activity identified in paragraph (a) of the definition of 'surface coal mining operations.'"<sup>97</sup> And OSM interprets this phrase to connote an element of *proximity* to the operation.<sup>98</sup> It is highly questionable whether there can be any discernable difference, at least one capable of consistent application by the Board and

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<sup>92</sup> The issue of what activities are "in connection with" a surface coal mine is also not always so clear. *See, e.g.*, Virginia Iron, Coal and Coke Co., 2 IBSMA 165, 171-72, 87 Interior Dec. 327, 330 (1980); Dayton Mining Co. v. OSM, No. NX 0-252-R (Oct. 3, 1980). *See also* 48 Fed. Reg. 20,393 (1983) (OSM listing of examples of relationships which meet their interpretation of "in connection with").

<sup>93</sup> *See supra* notes 71-77 and accompanying text.

<sup>94</sup> The language in subsection (B) upon which OSM relies for jurisdiction over off-site loading facilities is as follows:

such areas shall also include any adjacent land the use of which is incidental to any such activities, . . . and *other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities* [those activities listed in subsection (A)].

30 U.S.C. § 1291(28)(B) (Supp. V 1981) (emphasis and bracketed material added).

<sup>95</sup> 48 Fed. Reg. 20,392, 20,401 (1983) (to be codified at 30 C.F.R. § 701.5). The new definition reads as follows:

Support facilities means those facilities resulting from, or incident to, an activity identified in Paragraph (a) of the definition of "surface coal mining operations" in § 700.5 of this chapter and the areas upon which such facilities are located. Support facilities may consist of, but need not be limited to, the following facilities: mine buildings; bath houses; *coal loading facilities*; coal crushing and sizing facilities; coal storage facilities; equipment and storage facilities; fan buildings; hoist buildings; sheds, shops, and other buildings; facilities used to treat and store water for mine consumption; and railroads, surface conveyor systems, chutes, aerial tramways, or other transportation facilities, but not including roads. "*Resulting from or incident to*" an activity connotes an element of *proximity to that activity*.

*Id.* at 20,401 (emphasis added).

<sup>96</sup> *See also* 48 Fed. Reg. 20,400-01 (1983) (new definition of coal preparation plant includes loading facilities if they are associated with a plant that separates coal from its impurities).

<sup>97</sup> *See supra* note 95.

<sup>98</sup> *Id.* *See also* 48 Fed. Reg. 20,397 (1983).

courts, between a "proximity" test under the "support facilities" definition and the "near" test under the "operations" definition. Being "incident to" under the Act and the new "support facility" definition would more likely refer to a *functional* relationship.<sup>99</sup> That is, if a facility is economically integrated or related with the mining operations, then it is "incident to" that operation.

OSM, however, apparently is seeking to leave flexibility in the definitions.<sup>100</sup> Moreover, the current OSM position appears to be that tipples engaged in loading, as well as those storing, crushing and screening, generally do not need regulated.<sup>101</sup> The rationale for this particular relinquishment of regulatory authority is two-fold: 1) that these processes are unlikely to create any toxic discharges since they use very little water; and 2) even if placed outside OSM control, these facilities may still be answerable to the Environmental Protection Agency and various state agencies.<sup>102</sup>

However, the Environmental Impact Statement comments accompanying the proposed regulations also admit there is "the potential for locally significant adverse impacts with regard to uncontrolled acid and toxic drainage from coal storage piles located at unregulated crushing and screening facilities."<sup>103</sup> Therefore, the better approach, from an environmentally cautious standpoint, would be to maintain consistency with the intent and objectives of SMCRA and keep these facilities clearly within OSM jurisdiction, rather than encounter constant litigation over a "proximity" text when OSM does find the need to curb harmful effects at such a facility.<sup>104</sup>

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<sup>99</sup> Being "incident" is defined as "dependent on or appertaining to another thing; directly and immediately relating to or involved in something else though not an essential part of it." WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1976). See also *Mola v. Reiley*, 100 N.J. Super. 343, 241 A.2d 861 (1968) (similar definition).

In *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), the Court stated: "In cases of statutory construction we begin, of course, with the language of the statute. And 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Id.* at 308 (citations omitted).

<sup>100</sup> 48 Fed. Reg. 20,397 (1983).

<sup>101</sup> See 48 Fed. Reg. 20,394-95 (1983). "OSM intends to reach only those activities that actually clean, concentrate, process, or prepare coal; that is, operations which separate coal from its impurities." *Id.* at 20,395. OSM has effectuated this change through its new regulatory definition of coal preparation plants. See 48 Fed. Reg. 20,392-402 (1983). "Under this definition, coal loading, crushing, sizing and other such activities do not constitute coal processing or preparation unless they result in separation of coal from its impurities." *Id.* at 20,394.

<sup>102</sup> See PROPOSED REVISIONS, *supra* note 89, vol. I at IV-56.

<sup>103</sup> *Id.* at 56-57.

<sup>104</sup> See *Harry Smith Constr. Co. v. OSM*, 78 IBLA 27 (1983) ("Where legislation is remedial, as the Surface Mining Act is, 'exemptions from its sweep should be narrowed and limited to effect the remedy intended.'" *Id.* at 30 (quoting *Piedmont and Northern Ry. v. Comm'n*, 286 U.S. 299, 311-12 (1932)).



### III. EXEMPT BY EXPRESS PROVISION IN THE ACT

Section 528 of SMCRA provides that three specific mining situations are totally exempt from the requirements of the Act.<sup>105</sup> Subsection (1) allows an individual to be free of regulation when mining coal for his or her own non-commercial use. Subsection (2) also removes from OSM authority any operation where the affected area is two acres or less. The third subsection exempts coal extraction which is incidental to government-financed construction.

Section 528 appears somewhat out of place in such a broad, remedial act as SMCRA. These express exemptions, at first glance, seem contrary to the strict environmental objectives and requirements of the Act.<sup>106</sup> The legislative history, however, indicates that Congress felt that these three provisions were warranted simply because the limited environmental damage caused in these situations was not worth the extra burden which would be placed on OSM if regulation of these comparatively miniscule operations was mandated.<sup>107</sup> In fact, when explaining these exemptions, the Senate Committee on Interior and Insular Affairs offered that "these three classes of surface mining cause very little damage and . . . regulation of them would place a heavy burden on both the miner and the regulatory authority."<sup>108</sup>

#### A. *The "Own Use" Exemption—Section 528(1)*

The first exemption has received little, if any, attention. This subsection frees from OSM control "the extraction of coal by a landowner, for his own noncommercial use from land owned or leased by him."<sup>109</sup> The permanent regulation which addresses the subject has not been changed, or even proposed for change, since its promulgation in March of 1979.<sup>110</sup> The language of the regulation parallels the language in the Act, except for an additional clarification laid out in the regulation: the second sentence of regulation section 700.11(a) adds that "own noncommercial use" does not mean that manufacturing or power plants with their own "captive" mines are exempt.

<sup>105</sup> 30 U.S.C. § 1278 (Supp. V 1981).

<sup>106</sup> See 30 U.S.C. §§ 1202 and 1265 (Supp. V 1981).

<sup>107</sup> See 44 Fed. Reg. 14,949 (1979). In comparison, the Mine Safety and Health Act [30 U.S.C. §§ 801-962], with its first-priority objective of the safety and health of all miners, evidences Congress' intent to exercise its fullest federal legislative reach. See 30 U.S.C. § 803. See also S.R. No. 95-181 (Human Resources Committee), 95th Cong., 1st Sess. 14 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3401, 3414. ([I]t is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possible interpretation . . .").

<sup>108</sup> S. REP. NO. 128, 95th Cong., 1st Sess. 97-98 (1977); see also *Blackwood Fuel Co.*, 2 IBSMA 359 (1980) (Mirkin, J., dissenting).

<sup>109</sup> 30 U.S.C. § 1278(1) (Supp. V 1981).

<sup>110</sup> 30 C.F.R. § 700.11(a) (1982).

The second sentence of section 700.11(b) is essentially a regulatory afterthought, where OSM was simply clarifying what it perceived to be Congress' intent regarding this exemption.<sup>111</sup> Presumably, Congress felt, in adopting section 528(1), that those individuals who dig a small amount of coal from their land to keep their houses heated should be free to continue doing so unregulated. This type of activity poses no real environmental threat.

This "own use" exemption fits into the overall philosophy of SMCRA, since the Act was designed to ensure that burdensome environmental costs imposed by many commercial coal operations be internalized. By the use of the word "noncommercial," Congress apparently meant to emphasize that only personal consumption was to be exempted under section 528(1). An industrial plant digging and burning its own coal might make a plausible argument that its consumption is not only for its "own use," but also noncommercial in the sense that it is not placing the coal into the stream of commerce. But the coal is being used in a production process for some commercial purpose, and no matter how low on the chain of production it is used, it is still being put to a "commercial use".<sup>112</sup>

"[O]ne seeking an exemption from the coverage of a statute [must] affirmatively demonstrate entitlement to that treatment."<sup>113</sup> Exemptions such as this should be strictly construed so as not to contravene the objectives of the legislation.<sup>114</sup> Given the broad, remedial purposes of SMCRA, it is consistent with the Act to say that a "captive" mine situation is not a type of "own use" that Congress intended to exempt. A contrary reading would only encourage abuses. For example, there would then be strong incentive for a coal-burning plant to locate on a large tract and mine out the surrounding coal unregulated.

#### B. *The "Incidental to Government Construction" Exemption—Section 528(3)*

Section 528(3) of the Act exempts "the extraction of coal as an *incidental* part of Federal, State or local *government-financed* highway or other construction . . ." <sup>115</sup> The subsection of regulation 700.11 covering this exemption mirrors the rather ambiguous language in the Act.<sup>116</sup> Additionally, though, part 707<sup>117</sup> of the regulations "limits the scope of the exemption in a manner

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<sup>111</sup> See 44 Fed. Reg. 14,915 (1979).

<sup>112</sup> See, e.g., *Gulf States Utilities Co. v. Traigle*, 310 So. 2d 78 (La. 1975) (automobiles used by public utility employees were put to a "commercial use" within the meaning of the vehicle license tax statute).

<sup>113</sup> *Daniel Bros. Coal Co.*, 2 IBSMA 45, 51, 87 Interior Dec. 138, 141 (1980).

<sup>114</sup> See *Blackwood Fuel Co.*, 2 IBSMA 359, 367, 87 Interior Dec. 579, 584 (1980) (Mirkin, J., dissenting).

<sup>115</sup> 30 U.S.C. § 1278(3) (Supp. V 1981) (emphasis added).

<sup>116</sup> 30 C.F.R. § 700.11(d) (1982).

<sup>117</sup> 30 C.F.R. § 707.1, -.12 (1982).

believed to be consistent with the congressional intent of Section 528 . . . ."<sup>118</sup> With the clearly defined criteria set up in part 707, this exemption has remained relatively free of controversy. The only two issues of any significance have been challenges to the meanings of "incidental" and "government-financed."

"Incidental" extraction of coal is strictly defined as only that amount *necessary* to enable the construction to be accomplished.<sup>119</sup> In *Concord Coal Corp.*,<sup>120</sup> The company agreed to build a county airport on a particular site for a very reasonable price, primarily because it had intended to mine the coal anyway. The Board ruled that because the company was removing more overburden and coal than was necessary for construction of the airport, their coal extraction went beyond the section 707.5 necessity test for what was "incidental."<sup>121</sup>

Likewise, the term "government-financed" is given a narrow definition and only exempts those projects where government involvement is significant. Only if the construction is funded fifty percent or more by a government agency or by government general revenue bonds will the project fall within the definition of "government-financed."<sup>122</sup> This essentially has the effect of exempting only those projects where the government is deeply involved in, or at least overseeing, the construction process and thus will be concerned about the success of the overall project, including reclamation of the construction site.<sup>123</sup>

These definitions and the rest of part 707 of the regulations combine to make section 528(3) a very narrow exemption which could seldom be used, much less abused. In an earlier bill, this exemption was originally drafted to apply to all construction projects, whether funded privately or by the government. No doubt realizing the potential for abuse inherent in such a broad exemption, the final bill was amended to exempt only government-financed construction.<sup>124</sup> The reason for substantially limiting the exemption to governmental-financed projects is a valid one. Construction projects in the private sector could often be superficially imposed upon what is predominantly a mining operation which would otherwise circumvent the requirements of the Act.<sup>125</sup>

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<sup>118</sup> 43 Fed. Reg. 41,672 (1978).

<sup>119</sup> 30 C.F.R. § 707.5 (1982) (emphasis added).

<sup>120</sup> 3 IBSMA 92, 88 Interior Dec. 456 (1981).

<sup>121</sup> *Id.* at 98, 88 Interior Dec. at 459 ("[T]he extraction . . . is not necessary, as a matter of engineering, to facilitate that construction.").

<sup>122</sup> 30 C.F.R. § 707.5 (1982).

<sup>123</sup> See *West Virginia Energy, Inc.*, 3 IBSMA 301, 88 Interior Dec. 831 (1981).

<sup>124</sup> See H.R. REP. No. 493, 95th Cong., 1st Sess. 112 (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 743.

<sup>125</sup> See *J.P.W. Co. v. Andrus*, No. 80-193 (E.D. Ky. Jan. 29, 1981); *Goebel Bartley*, 4 IBSMA

C. *The "Two Acre" Exemption—Section 528(2)*

1. Synopsis

Section 528(2) of SMCRA removes from OSM reach "the extraction of coal for commercial purposes where the surface coal mining operation affects two acres or less."<sup>126</sup> A regulation implementing this exemption was eventually promulgated under the permanent program.<sup>127</sup> Since then, this exemption has been the subject of considerable confusion, abuse and litigation. The "two acre" exemption was presumably intended to allow the one or two person "pick and shovel" operations, which cause little environmental harm, to escape the Act's requirements.<sup>128</sup> However, it quickly became what some commentators predicted—"a tremendous loophole which would be continuously abused."<sup>129</sup>

Obviously, there is a substantial economic incentive for operations to find ways to qualify for this exemption. If exempt, the operation can ignore all the permitting and bonding requirements, performance standards and payments to the reclamation fund. It is not surprising that the "two acre" issues are hotly litigated ones. This is one exemption that many operators apparently feel they have a chance of qualifying for, especially in the East where surface mines tend to be smaller.

With all the confusion and litigation, the section 700.11(b) regulation has had a complicated history of various proposed revisions.<sup>130</sup> For one reason or another all these were delayed and eventually withdrawn. Finally, on September 1, 1982, a new "two acre" regulation was put into effect.<sup>131</sup> Whether or not this new regulation has solved all problems is not yet clear. The recent cases discussed below illustrate the most common problem/abuse areas that have arisen in past years under the old regulation. Whether the new regulation provides the remedies needed is also addressed. Additionally, however, a recent challenge to OSM's new "two acre" regulation may present serious questions as to how broadly OSM can exercise their regulatory authority in order to curb these abuses.<sup>132</sup>

2. Problems and Abuses

The two broad areas which have been consistently problematic to a clear

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219, 89 Interior Dec. 628 (1982); James Moore, 1 IBSMA 216, 86 Interior Dec. 369 (1977) (decided under interim regs.).

<sup>126</sup> 30 U.S.C. § 1278(2) (Supp. V 1981).

<sup>127</sup> 44 Fed. Reg. 15,311 (1979) (codified at 30 C.F.R. § 700.11(b)).

<sup>128</sup> See 47 Fed. Reg. 48 (1982).

<sup>129</sup> 44 Fed. Reg. 14,915 (1979).

<sup>130</sup> See 47 Fed. Reg. 47 (1982); 47 Fed. Reg. 33,424 (1982).

<sup>131</sup> 47 Fed. Reg. 33,424 (1982).

<sup>132</sup> *Jaward Corp. v. Watt*, 564 F. Supp. 797 (W.D. Va. 1983).

resolution of the "two acre" exemption are: a) the affected area and roads issues, and b) the related sites issues.

a. *Affected areas and roads.* A good definition of "affected area" is vital to a workable "two acre" provision since section 528(2) exempts operations which "affect two acres or less." The previous regulatory definition was almost no definition at all. It simply stated that, as to a surface mine, an affected area was "any land or water upon or in which [surface mining activities] are conducted or located."<sup>133</sup> This circular definition merely said that any place there was mining activity (as defined in section 701) was an affected place.

A federal court case which illustrates the fundamental shortcoming of this definition is *United States v. Dix Fork Coal Company*.<sup>134</sup> In *Dix Fork*, the coal company claimed that its operation was exempt since its state mining permit covered only 1.84 acres. The company took the position that the area of its operation was clearly defined by what the permit allowed it to mine. The court, however, took a broader approach after noting that the evidence showed that the coal company's operation had actually affected an area of 2.89 acres. The court stated, "[t]he only pertinent jurisdictional inquiry is the acreage which was *actually* affected by the mining operation rather than the acreage which was authorized to be affected."<sup>135</sup> Without a clear statutory or regulatory definition of "affects" in the Act to rely on, the court was still able to apply the normal meaning of the word to the simple facts in this case.

The facts and circumstances of other cases were more complicated. The Interior Board or a court, when presented with this issue, was inevitably left with the question of what effects on areas outside the mine boundaries were to be included. Situations such as coal waste piles or valley fills could clearly be included in the acreage. But different types of roads associated with mines have not been susceptible to clear answers. The "roads" issue has definitely been the largest problem in this area, presenting a number of questions, such as: Are access and haul roads always to be included in acreage computations? What about public roads used incident to the mining? How much of a particular road is to be included when two or more mining operations use the same road?

Under the definitions in the Act and regulations, access and haul roads used with a mine site are part of the "surface coal mining operation."<sup>136</sup> However, some coal companies began a practice of deeding their roads to local

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<sup>133</sup> 44 Fed. Reg. 15,317 (1979).

<sup>134</sup> 692 F.2d 436 (6th Cir. 1982).

<sup>135</sup> *Id.* at 438 (emphasis added). See also *United States v. Signal Mining Co.*, No. 1-80-392 (E.D. Tenn. July 27, 1981).

<sup>136</sup> 30 U.S.C. § 1291(28)(B) (Supp. V 1981); 48 Fed. Reg. 20,400 (1983) (to be codified as amended at 30 C.F.R. § 700.5).

municipalities or counties (and coincidentally reducing their mine sites below two acres at the same time). They then asserted that these "public" roads were not a part of their operations and, therefore, could not be included in the acreage computations. The Board never bought this argument, stating, for example, that "the mere nominal status of a road as a 'public' road . . . is not sufficient to bring the road within the exclusionary language of 30 C.F.R. 710.5."<sup>137</sup> For a road to be excluded it had to be both public *and* publicly maintained. Under these "deed-over" schemes, the county was merely accepting title and the coal companies were still maintaining the roads for their own use.

While the Act states that roads are to be included as part of the operation,<sup>138</sup> no definition of "roads" is present in the Act. The regulations, though, have always defined them. The "roads" definition in interim regulation 710.5<sup>139</sup> differed from the original permanent regulation definition of "roads" in section 701.5. The 710.5 interim definition had explicitly stated that publicly maintained roads were not "roads" for purposes of the definition; while the original permanent regulation definition of "roads" in section 701.5 was silent on the matter.<sup>140</sup>

The new OSM definition of "roads" is also silent on the public versus private issue.<sup>141</sup> However, OSM also recently revised its "affected area" definition in such a fashion that the two definitions ("roads" and "affected area") are intertwined.<sup>142</sup> This new definition not only made it clear that haulage and access roads are to be counted as part of the "affected area," but also resolved the public versus private road issue by establishing four criteria to aid in determining when a road can be excluded from an "affected area" computation. If the road is: 1) a legally designated public road, 2) maintained with public funds, 3) constructed similarly to other roads of same type, and 4) substantially used by the public, then even if it is frequently used by a coal company for hauling and access it nevertheless will not be included when determining affected acreage.<sup>143</sup>

These criteria appear to be stringent enough to prevent any "deed-over" practice from defeating the objectives of the Act. Even if a local government would legally designate a road deeded to it as a public road, the company would still have the burden of showing that the road was publicly maintained, similarly constructed and substantially used by the public. It is un-

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<sup>137</sup> Jewell Smokeless Co., 4 IBSMA 51, 89 Interior Dec. 313 (1982); *see also* L. & R. Mining Co., 5 IBSMA 16 (1983). *But see* Jaward v. Watt, 564 F. Supp. 797, 801 (S.D. Va. 1983).

<sup>138</sup> 30 U.S.C. § 1291(28)(B) (Supp. V 1981).

<sup>139</sup> 42 Fed. Reg. 62,678 (1977) (codified at 30 C.F.R. § 710.5).

<sup>140</sup> 44 Fed. Reg. 15,320 (1979) (codified at 30 C.F.R. § 701.5).

<sup>141</sup> 48 Fed. Reg. 22,122 (1983) (to be codified as amended at 30 C.F.R. § 701.5).

<sup>142</sup> 48 Fed. Reg. 14,821-22 (1983) (to be codified as amended at 30 C.F.R. § 701.5).

<sup>143</sup> *Id.* at 14,822.

likely that all these criteria would be met, especially since not many local governments would want to pay public monies for the expensive upkeep of roads used solely by heavy coal trucks.

The other "roads" problem involves the issue of how much of a road should be counted as part of each operation when more than one coal operation uses a particular road or segment thereof. It was simple enough to rule that when only one company was using a haul road the entire road could be attributed to that operator.<sup>144</sup> But often parts of one road are used by more than one operation. The old regulations gave no answer to the questions of whether to, and how to, proportion roads among two or more users.

Past Board decisions appear to have ambiguously ruled that a common haul road should be proportioned among the users.<sup>145</sup> The acreage questions in these cases were not so critical that actual proportioning had to be calculated. Rather, the Board merely ruled that the operations were not within the "two acre" exemption by simply stating that the common road "is properly attributed, at least in part, to each operator . . ."<sup>146</sup> These decisions and the old regulations did not answer the close cases where the method of figuring the amount of road to attribute to each operator may make a difference on the two-acre exemption question.

The new "affected area" definition, together with the revised "two acre" regulation, gives an absolutely clear answer to the road proportionment issue. The "affected area" includes "every road used for purposes of access to, or for hauling coal . . ."<sup>147</sup> But most significant is the revised "two acre" regulation which leaves no doubt as to the method of computation by stating that "[w]here a segment of a road is used . . . by more than one . . . operation, the entire segment shall be included in the affected area of each of those operations."<sup>148</sup> In other words, for purposes of computing acreage, all of the road used by an operation is counted, regardless of whether any other operations use the same segment of road. The Interior Board of Land Appeals<sup>149</sup> has even adopted this rationale in a case which arose before the adoption of these new definitions.<sup>150</sup>

<sup>144</sup> See, e.g., *Virginia Fuels, Inc.*, 5 IBSMA 1 (1983).

<sup>145</sup> See, e.g., *Goebel Bartley*, 4 IBSMA 219, 89 Interior Dec. 628 (1982); *Virginia Fuels*, 4 IBSMA 185, 89 Interior Dec. 604 (1982); *Rhonda Coal Co.*, 4 IBSMA 124, 89 Interior Dec. 460 (1982).

<sup>146</sup> *Virginia Fuels*, 4 IBSMA at 189.

<sup>147</sup> 48 Fed. Reg. 14,821 (1983) (to be codified as amended at 30 C.F.R. § 701.5).

<sup>148</sup> 47 Fed. Reg. 33,431 (1982) (to be codified as amended at 30 C.F.R. § 700.11).

<sup>149</sup> The Interior Board of Surface Mining and Reclamation Appeals was consolidated into the Interior Board of Land Appeals on May 12, 1983, "in view of the declining number of appeals arising under [SMCRA]." 48 Fed. Reg. 22,370 (1983).

<sup>150</sup> *Kimberly Sue Coal Co.*, 74 IBLA 170 (1983) ("The fact that the road is used by more than one operator has no bearing on the determination.") *Id.* at 171-72.

Therefore, multiple counting of the same road area will occur whenever more than one operation uses all or part of the same road. This may be the simplest and most practical method of coming up with consistent regulatory results<sup>151</sup> that effectuate the intent of the Act to include within regulated surface mining operations "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage . . ."<sup>152</sup> If a rule were adopted where roads were to be apportioned equally according to the number of users or amounts of use, the acreage of each operation using the road would constantly fluctuate as some operations ceased or new ones opened up. However, the new rule promulgated by OSM may, in effect, remove the "two acre" exemption from the reach of even the small operators which Congress intended to exclude from the Act's jurisdiction.<sup>153</sup> The inclusion of all access and haul roads in the acreage computation of each operation will mean only those small sites which are fairly close to a public road will stay within this exemption.

b. *Related sites.* The second area of past confusion and abuse under the "two acre" exemption is the "related sites" problem. Operators wanting to take advantage of the "two acre" exemption have utilized various methods of dividing up what is, in reality, one large mine site or operation into a number of smaller sites of two acres or less. The most common abuses under the Act have been: a) to mine two acres and then skip 50 or 100 feet and begin again,<sup>154</sup> or b) to divide a large tract into a number of two-acre sites which would then be contract-mined by different operators.<sup>155</sup> OSM, when it promulgated the original permanent program regulations, had anticipated such abuses but apparently believed the language of section 700.11(b) would sufficiently guard against them.<sup>156</sup> Nevertheless, the above-mentioned evasive practices (and others) arose, primarily because the regulation failed to define what it meant by "physically related." Also, by speaking only in terms of *physical* relationships, the regulation even further encouraged the practice of contracting out two-acre sections.

The new "two acre" exemption<sup>157</sup> has attempted to close these avenues of

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<sup>151</sup> See 47 Fed. Reg. 48-50 (1982) (discussion of five proposed alternatives for treating roads used by more than one operation).

<sup>152</sup> SMCRA § 701(28); 30 U.S.C. § 1291(28) (Supp. V 1981). See also H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 128 (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 593, 660.

<sup>153</sup> See *Jaward Corp. v. Watt*, 564 F. Supp. 797, 801 (W.D. Va. 1983) ("[T]o include the area of roads that were not even built in connection with the mine, in calculating the total mine area, could prove to be unreasonable.").

<sup>154</sup> See, e.g., *Mullins & Bolling Contractors*, 4 IBSMA 156, 89 Interior Dec. 475 (1982).

<sup>155</sup> See, e.g., *Capital Coal Corp.*, CH 1-157-R (March 16, 1982).

<sup>156</sup> See 44 Fed. Reg. 14,915 (1979).

<sup>157</sup> 47 Fed. Reg. 33,432 (1982) (to be codified as amended at 30 C.F.R. § 700.11(b)). See also 48 Fed. Reg. 14,814, 14,821 (1983) (based upon analysis of this revised "two acre" regulation in OSM's supplemental Environmental Impact Statement, the revised regulation shall remain as adopted).



abuse, not by changing the scope of the exemption's originally intended availability, but by adopting clearly defined criteria for determining what operations are "related" and thus are to be counted together when determining whether the exemption applies. The new regulation includes one subsection devoted solely to defining related operations.<sup>158</sup> This "relatedness" test is comprised of three components, all three being necessary before two or more operations will be defined as related. Operations are only considered related when: 1) they occur within twelve months of each other, 2) are physically related and 3) are commonly owned or controlled. The last two criteria incorporate both a "physical relatedness" test and an "ownership or control" test into the new overall relatedness definition. The "physical relatedness" test is aimed at ending abuses such as skipping 100 feet between two-acre sites. If the drainage from two operations "flows into the same watershed at or before a point within five aerial miles of either operation," then the two sites are *physically* related.<sup>159</sup> While this definition will make reasonably adjacent operations physically related, that alone will not make the sites "related" under the new section 700.11(b). The operations still have to come under both the time and the ownership/control criteria before their acreage is counted together.

The "ownership/control" test is a rather complex definition which essentially says that if a person, persons or entity has control, whether it be by law, contract, or mere proven ability in fact over the different operations, then they are under common ownership or control.<sup>160</sup> This test should effectively curb the exemptions claimed by coal owners and lessors who contract out their mining to separate "two acre" contractors; or where an operator at one site sets up a "shell" corporation to begin mining nearby. Previously, under the old regulation, the Board had been compelled to create its own economic integration doctrine in an attempt to limit these kinds of avoidance schemes. But this doctrine was not developed fully enough to be applied consistently.<sup>161</sup> The new regulation's "common ownership or control" definition provides clear, uniform guidelines which should lead to more consistent results, according separate site status only to those operations being mined by truly different entities.

Discussion of the twelve-month criterion was reserved for last because it presents the most significant threat to the effectiveness of the comprehensive regulatory definition of "relatedness" in the new "two acre" regulation. The problem can be approached best by first looking at the old regulation.<sup>162</sup>

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<sup>158</sup> *Id.* at § 700.11(b)(2).

<sup>159</sup> *Id.* at § 700.11(b)(2)(i) (emphasis added).

<sup>160</sup> *Id.* at § 700.11(b)(2)(ii), -(2)(iii).

<sup>161</sup> *See, e.g.,* S. & M. Coal & Jewell Smokeless Coal, CH 2-31-R (Mar. 25, 1982); W. D. Martin, CH 2-29-R (Mar. 11, 1982).

<sup>162</sup> 44 Fed. Reg. 15,315 (1979).

There was a twelve-month time factor involved in the old regulation, but it only applied to physically *unrelated* sites. The "two acre" exemption was not available "at physically related sites, or . . . at physically unrelated sites within one year."<sup>163</sup> In other words, under the former regulation, "physically related sites" (which was not defined) operated by the same or economically integrated entities would *always* be counted together no matter how much time elapsed between the mining operations at the sites.

The time period in the former regulation was adopted simply because OSM realized that without a time factor, an operator would only be allowed one "two acre" exemption in his or her lifetime.<sup>164</sup> The compromise solution built in with the one-year time factor in the old regulation was that the exemption could not ever be used on two related sites of an operator, but operators could still be allowed one exemption per year on physically *unrelated* sites. This compromise was designed to prevent abuse and still carry out the intended purpose of the exemption—to avoid unduly burdening the small "pick and shovel" operator.<sup>165</sup>

Even though the new "two acre" regulation eliminates some abuses by better defining overall "relatedness," it may have over-defined the term. The new section 700.11(b) applies the twelve-month factor to physically *related* operations. This opens up a wide avenue for abuse that was not present under the former regulation. For example, an operator can now lease a number of large tracts which are not *physically* related (i.e., will not drain into same watershed at a point within five miles). In the Appalachian area, especially, these could all be located within the same county. Then, the operator can remain exempt from the Act by "phasing" the mining, still being able to completely mine out each tract. This can be done by mining two acres at one tract, then moving to another tract, and so on. Once two acres have been mined from each tract, one year having passed, the operator can begin a new two-acre mine back at the first tract mined and begin the cycle over again. Eventually, all tracts could be completely mined out without ever coming under OSM jurisdiction.

This could not have happened under the old regulation since the twelve-month factor *never* applied to physically related sites. The new regulation gives operators an implied license to operate exempt under a phased mining method. Since all three criteria must be met before two sites are "related," the anomalous result is that two sites immediately adjacent to one another will be defined as totally unrelated simply if they are mined twelve months apart.

While the above "phasing" practice may not be economically feasible for

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<sup>163</sup> *Id.*

<sup>164</sup> See 44 Fed. Reg. 14,915 (1979).

<sup>165</sup> *Id.*

most operations, there is little doubt that it would be attractive to some operators. Since it is quite likely that this would often be much cheaper than the costs of permitting, meeting performance standards, bonding, and paying reclamation fund fees under SMCRA, there are strong economic incentives to find ways of utilizing such a method of operation. Those operations which avoid SMCRA requirements will place all the operations which comply in good faith at a competitive disadvantage.

One way to avoid this abuse of the otherwise effective new regulation would be to either remove the twelve-month criterion from the overall "relatedness" test or to increase the time period so substantially that it would not be economically feasible to create a "phased" operation. Such an operation, to work profitably, now needs only enough tracts to complete the cycle in one year. If the time factor was increased substantially, for example, to five or ten years, it would greatly diminish the likelihood of an economically viable "phased" operation since a very large number of physically unrelated tracts would be required to make the cycle. However, this would mean that the *bona fide* small operators would be limited to one exemption every five or ten years.

A better solution would be to remove the twelve-month factor from the "relatedness" test but keep it in the regulation. This could be done by adding another subsection to 700.11(b) which would allow the "two acre" exemption on *unrelated* sites if twelve months apart. This way, sites would be related, *and remain related*, if only two criteria are met, the "physical relatedness" and "common ownership/control" tests. Unrelated sites would then always be on separate tracts, and the exemption would again be available on a once-per-year basis. This solution would prevent abuse and still be fair by not limiting the exemption to once a lifetime. The definitional effectiveness of the new regulation would be combined with the fairness of the old regulation.

#### IV. CONCLUSION

An initial conclusion which can easily be drawn from a reading of SMCRA and its history is that Congress intended its reach to be broad and all-inclusive. While it is clear that the object of the Act is to preserve our coal industry as well as our environment, the focus of the Act is on environmental vigilance. The intended result is to allow surface mining to continue but have a complete internalization of the costs.

The experience of the first few years under the Act has shown that it can be very difficult to apply this Act consistently and effectively under ambiguous definitions and exemptions. This is true even when courts are aware that SMCRA should be strictly construed in order to accomplish its goals. Some of the jurisdictional provisions in SMCRA, such as the section 701(13) and (28) definitions, have been fairly effective. These have needed only some fine-tuning via court interpretations and OSM clarifications in the regula-

tions. However, other provisions, most notably the "two acre" exemption, have needed considerable revision from the outset.

The evolutionary process of legal challenge and agency rule revision has been particularly characteristic of the section 528 exemptions, most notably the "two acre" exemption. There has been a common trend in the revisions of these regulations which may indicate what is required for these types of strict regulatory provisions to be consistent and effective. In each of these cases, these definitional regulations have steadily moved toward a heavy emphasis on specific criteria. Many of the regulations replaced the broader language that made them subject to confusion and abuse, with definition by criteria. These criteria tests seem to be well-suited to laws such as SMCRA, where one objective is strict enforcement across-the-board with very limited exemptions. Nevertheless, as the new "two acre" regulation illustrates, if criteria tests are used, they can also drastically reduce effectiveness by being so specific and narrow that they create new problems.

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