Journal of Natural Resources & Environmental Law

Volume 1
Issue 1 *Journal of Mineral Law & Policy, volume 1, issue 1*

Article 7

January 1985

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INTRODUCTION

Since the inception of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[1] and the ensuing regulations promulgated by the United States Office of Surface Mining Reclamation and Enforcement (OSM),[2] federal tribunals have been increasingly burdened by litigation addressing the reasonableness of OSM's authority in implementing the Act.[3] Recently this judicial scrutiny has focused on OSM regulations redefining SMCRA's exemption for mining operations of two acres or less.[4] This comment will set out the statutory and current regulatory framework relevant to this exemption and will provide an overview of recent judicial and administrative interpretations of those guidelines. The pressing question is whether OSM regulations defining this exemption are in fact too stringent in light of Congressional intent and problems of practical implementation.

I. THE STATUTORY FRAMEWORK

In response to what was perceived as inadequate state regulation of coal mining operations,[5] Congress enacted SMCRA, a comprehensive federal regulatory program to control the adverse environmental effects of surface and underground coal development.[6] The Act, which in essence establishes minimum per-

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[1] 30 U.S.C. §§ 1201-1328 (1982).

[2] 30 C.F.R. Chapter VII (1981).

[3] *Cf.* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 456 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981) (OSM interim performance standards held not violative of constitutional guarantees provided in the fifth and tenth amendments); *In re* Permanent Surface Mining Litig., 627 F.2d 1346 (D.C. Cir. 1980) (interim blasting and prime grandfather exception rules struck down as improper expansion of statutory performance standards); Holmes Limestone Co. v. Andrus, 655 F.2d 732 (6th Cir. 1982) (*see infra* note 43 and accompanying text).

[4] 30 C.F.R. § 700.11(b) (1982).

[5] *See* 30 U.S.C. § 1201(c),(g),(h) (1982).

[6] *See generally* Bratt, *Surface Mining in Kentucky*, 71 KY. L.J. 7 (1982-83); *see also* Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevent Periodical Literature*, 81 W. VA. L. REV. 775 (1978-79).

formance standards for the extraction of coal in all mines operated in the United States,[7] requires that a permit application be submitted to the regulatory authority before any mining operation can commence.[8] For a mining permit to be issued, the applicant's permit must satisfy complex technical specifications concerning the mining operation itself and any postmining consequences associated with the specific site.[9] Compliance with these detailed requirements results in extensive and costly surveying, sampling, and engineering analysis in advance of any mining operation.[10] In addition to complying with these permit application criteria, the permittee must pay fees upon production into an Abandoned Mine and Reclamation fund as established under the Act.[11]

Pursuant to SMCRA's mandate, OSM is designated as the executive watchdog of the Act's requirements under the direction

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[7] SMCRA contains 115 performance standards which address every facet of the mining process from premining site design and development through postmining reclamation. *See* 30 U.S.C. § 1265(b) (1982).

[8] *See* 30 U.S.C. §§ 1252-1254 (1982). Under SMCRA, the states may become the regulatory authority by assuming primacy if OSM ratifies their regulatory program as being consistent with OSM regulations. If the state program is either disapproved or not submitted, OSM becomes the regulatory authority.

[9] *Id.* at § 1265(b).

[10] Permit preparation for a 30 acre permit in Eastern Kentucky will typically take from 6 to 9 months and cost approximately $16,650.00. The average costs break down as follows:

$ 2,750	State and Federal permitting fees and licenses.
$ 3,300	Preliminary evaluation and acquisition of existing data—including field evaluation, geologic surveys, preparation of maps and aerial photos, and preliminary designs.
$ 2,950	Field data collection—including surface and groundwater surveys, geologic surveys (drilling and sampling overburden, coal and soil), land use and vegetation analysis, and pre-blast surveys.
$ 700	Historic and application processing information gathering.
$ 2,000	Environmental resources information—compilation of field data collection results and drafting of requisite maps.
$ 7,100	Mining and reclamation plans—including topsoil handling, blasting, disposal of excess spoil, protection of hydrologic systems, transportation, and post-mining land use.
$ 600	Permit compilation.
$16,650	Approximate total cost.

Interview with Steve Gardner, President of Tri-State Engineering, Lexington, Kentucky. (Aug. 28, 1984).

[11] 30 U.S.C. § 1231 (1982). The fund is established to restore land degraded by mining practices prior to the enactment date of SMCRA (Aug. 3, 1977).

of the Secretary of the Interior.[12] Under SMCRA, the Secretary has the power to supersede state regulation and to issue notices of violation to operations which are violating the Act. Also, in extreme cases, the Secretary has the power to issue cessation orders when the operation either poses an imminent threat to the public health or safety or when the operator fails to abate a continuing violation.[13] SMCRA also grants OSM the authority to establish the guidelines and regulations necessary to implement the Act. Accordingly, OSM has promulgated regulatory provisions of its own as a vehicle for administration and enforcement of the federal scheme.[14] The regulations defining SMCRA's exemption for two acre or less mining operations are but a few examples of the regulatory provisions promulgated by OSM pursuant to this authority.

II. THE EXEMPTION DEFINED

According to the Act, the provisions of SMCRA are inapplicable to commercial operations "where the surface mining operation affects two acres or less."[15] Although the wording of the exemption appears on its face to be simple and straight-forward, the language is actually open to a variety of interpretations. Furthermore, since state legislatures are free to promulgate regulations of their own to control their smaller operations,[16] the application requirements for exempted areas are inconsistent from state to state. Generally, however, the performance specifications and ensuing permit costs required by the state regarding

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[12] *Id.* at § 1211(a),(b),(c),(e).

[13] *Id.* at § 701.4(b)(2)(3).

[14] *See, e.g.*, 30 C.F.R. Chapter VII (1982). These regulations were meant to apply when a state decides not to submit a program for approval. OSM then no longer acts as the oversite agency but rather is *the* regulatory authority.

[15] 30 U.S.C. § 1278 (1982) states:

> The provisions of this chapter shall not apply to any of the following activities:
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> (1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him;
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> (2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less; and
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> (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.

[16] *See* 30 C.F.R. § 720.11 (1982).

federally exempted operations are substantially less than those required in the permanent program.[17]

As an aid to implementation of SMCRA, the Secretary has promulgated regulations which define the two-acre exemption[18] and which contain specific criteria which must be satisfied before an operation is exempted from the SMCRA performance standards and the abandoned mine reclamation fees.[19] Under the Secretary's definition, the requirements of SMCRA do not apply to commercial coal mines where the surface or reclamation operation, together with any "related" operation, has or will have an "affected area" of two acres or less.[20] More specifically, the "affected area" is defined by OSM as including land or water located above underground mine workings[21] and all access and haulage roads to or from the mining or reclamation operation[22] (unless designated as a public road, maintained with public funds, and having substantial public use).[23] Two or more mines are considered by OSM as "related" if drainage from both operations flows into the same watershed within five aerial miles (physically related)[24], if the operations are under common ownership or control (economically related),[25] and if

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[17] *See, e.g.*, 405 KY. ADMIN. REGS. 1:040 §§ 3-4 (1984). Kentucky regulations except two acre or less operations from numerous permit specifications under SMCRA including those which require the operator to (1) submit a transportation plan and map with the permit detailing the road systems affected by the operations, (2) demonstrate that the land to be affected is not prime farmland or in the alternative that it will be adequately reclaimed to meet state specifications, (3) demonstrate that the area affected will have an adequate postmining land use as dictated by the state, (4) demonstrate how the removed topsoil is to be segregated, stored, and replaced, (5) monitor surface water runoff and quality standards, and (6) monitor groundwater runoff and recharge characteristics and quality standards.

[18] 30 C.F.R. § 700.11(b) (1982).

[19] *Id.*

[20] *Id.*

[21] *See* 30 C.F.R. § 701.5 (definition of "affected" area). This is referred to in the proposed amendments to 30 C.F.R. § 701.5 as the "shadow" area of a mine. *See* 47 Fed. Reg. 46 (1982).

[22] 30 C.F.R. § 700.11 (b)(1) (1982).

[23] *Id.* at § 710.5.

[24] *Id.* at § 700.11(b)(2)(i).

[25] *Id.* at § 700.11(b)(2)(ii). Under this provision, two or more mines are deemed economically related if they are owned or controlled by the same person, two or more persons (one of whom controls, is under common control with, or is controlled by the other), or members of the same family (unless it is found that no business relation exists between them). Furthermore, "control" means: ownership of 50% or more of the voting shares of, or general partnership in, and entity; any relationship that gives one person the ability to direct what the other does; or any relation which gives one person express or implied authority to determine the manner in which the coal at the two mines will be mined, handled, sold, or disposed of. *See infra* note 69 and accompanying text.

they occur within twelve months of each other (temporally related).[26]

A literal reading of the Secretary's defining criteria reveals that the test for relatedness appears very broad. The Secretary can effectively force adjacent two-acre operations to comply with the Act's requirements, even though separated by as many as five aerial miles, by simply demonstrating a physical, economic, and temporal relationship.[27] A single two acre or less operation is nonetheless subjected to the Act if access or haulage roads, subsurface disturbance, and/or land or water located above underground workings comprise greater than two acres when considered with the actual operation.[28] The regulatory agency, however, must demonstrate *all* of these relationships before the acreage from adjacent operations can be lumped together in the exemption determination.

It is within these boundaries that the controversy materializes. Has the Secretary abused his congressionally mandated discretion by implementing regulations so broad as to, in effect, eliminate the exemption, or does the burden of proving disqualification from the exemption in fact rest so heavily on the regulatory authorities that the exemption becomes available to operations not intended by the Act? To properly address this problem, it is important to investigate legislative, judicial, and administrative interpretations of both the exemption and the Secretary's defining criteria.

III. THE EXEMPTION INTERPRETED

A. Congressional Intent Versus Practical Implementation

In granting the exemption, Congress recognized that subjecting individuals or corporations to costly regulatory requirements, particularly when their mining operations were incidental to their regular businesses, would be manifestly unjust.[29] The Legislature felt that individual, non-commercial, and extremely

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[26] 30 C.F.R. § 700.11(b)(2) (1982).

[27] *See supra* notes 24-26 and accompanying text.

[28] *See supra* notes 21-23 and accompanying text.

[29] *See* S. REP. No. 128, 95th Cong., 1st Sess. 97-99 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS. 593.

localized activities which do not cause significant environmental damage should be exempted from SMCRA not only for equitable considerations, but also to relieve the regulatory authority of undue regulatory burdens.[30] Congress clearly indicated that the "pick and shovel" operation should not fall victim to the regulatory burdens imposed by SMCRA.[31]

Theoretically, the exemption should be hailed as a valuable method of insulating already economically burdened "family" operations from a costly and complex statutory scheme. Practically, however, this two-acre loophole has been utilized extensively by both large and small coal operators as a vehicle for avoiding the SMCRA complexities.[32] Not infrequently, large operators will sublet various parcels of two acres or less to subsidiary operations to thereby avoid the permitting requirements and environmental standards.[33]

In addition, operators will often deed their haul roads to the county in order to remove that acreage from the exemption calculation. This has the adverse effect of adding to the county's road maintenance burden.[34] Recognition of these abuses was acknowledged by OSM as a motivating concern in issuing the final regulations[35] redefining the limits of the two-acre exemption.[36] These regulations, however, have resulted in several judicial and administrative decisions addressing the reasonableness of the Secretary's interpretation.

B. The Federal/State Regulatory Overlap

In *Jaward v. Watt*,[37] a Virginia mine operator sought a temporary injunction enjoining the Secretary from enforcing a

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[30] *See* 119 CONG. REC. 1368 (1973) (dealing with then § 203 exemptions).

[31] *Id.*

[32] Editorial, *2-acre loopholes make mockery of mining law* (sic), Lexington Herald-Leader, Nov. 28, 1984, at A10, col. 1. *See also* Sam Blankenship, 5 IBSMA 32, 90 ID 174 (1983).

[33] *Id.*

[34] *See* Fetterolf Mining Sales, 4 IBSMA 29 (1982).

[35] In response to litigation over the permanent regulatory program, OSM reorganized 30 C.F.R. § 700.11(b) to reflect more closely congressional intent. *See Introduction to the Proposed Changes to Two-Acre Exemption*, 47 Fed. Reg. 47 (1982); *see also* Save Our Cumberland Mountains v. Clark, 725 F.2d 1422 (D.C. Cir. 1984) (an action brought against the Secretary claiming that suspension of two-acre rule was arbitrary and capricious).

[36] 47 Fed. Reg. 33,424, 33,426 (1982).

[37] 564 F.Supp. 797 (W.D. Va. 1983). *Jaward* has since been reversed and remanded

cessation order issued under SMCRA.[38] The operation consisted of an underground mine with a "faced-up" area of only 1.2 acres.[39] On the basis of this acreage, the state of Virginia issued a two-acre permit, exempting the operation from the Federal Regulations.[40] Disregarding the state's determination, OSM officials subsequently issued a cessation order preventing the operator from mining under the Virginia two-acre permit. OSM based the cessation order on its contention that more than two acres were *affected* by the operation when access roads and underground disturbance were considered as required under the Secretary's defining criteria.[41] No showing was made by OSM or the state that the operation posed an imminent danger to the environment or public safety.

After determining jurisdiction to hear the case under SMCRA,[42] the district court granted an injunction prohibiting the Secretary from issuing cessation orders based on the assumption that an operation with a Virginia two-acre permit must be permitted under SMCRA, absent a showing of "serious harm to the environment."[43] The court recognized the potential abuses of the exemption, noting that "if two mines are opened side by side, with a common ownership, workmen, and managers, the operation could be a subterfuge to get around the two-acre exemption."[44] However, the court also expressed the

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by the Fourth Circuit Court of Appeals for want of jurisdiction. The lower court's interpretation of 30 U.S.C § 1276 as giving the district court in which the mining operation is located jurisdiction to hear federal questions regarding the Secretary's application of the Act was contrary to the Fourth Circuit's opinion that this was instead an attack on the regulations themselves and therefore reviewable only in the District Court for the Dictrict of Columbia under 30 U.S.C. § 1276(a)(1). Commonwealth of Va., *ex rel.* Dep't of Conservation v. Watt, 741 F.2d 37 (1984).

[38] *See infra* note 42. For the purpose of discussion, this comment will address *Jaward* soley in terms of its merits.

[39] The faced-up area encompasses the surface acreage incidental to the underground operation itself, including stock pile and storage areas, personnel facilities, and the actual operation itself.

[40] *See* VA. CODE ch. 23 (Supp. 1984).

[41] *Jaward*, 564 F. Supp. at 798.

[42] *Id.*

[43] *Id.* at 802. A consent order and dismissal has since been entered wherein the Commonwealth of Virginia has agreed to apply to those permits and permit applications the federal "two-acre" criteria set forth in 30 C.F.R. §§ 700.11. Commonwealth of Virginia v. Clark, No. 82-0385-B, slip op. at 2 (W.D. Va. January 9, 1985).

[44] *Jaward*, 564 F. Supp. at 801

need for smaller operations in Virginia where "two-acre mines are leased to small coal companies in the more isolated areas, usually small hollows and pockets, where large scale mining is not feasible . . . [where] fewer men and less expense will be involved . . . and the net result is that this coal can be produced more inexpensively than coal in larger mines."[45] The court therefore held that the OSM criteria as applied to operations not posing a threat to the environment were possibly unreasonable, arbitrary, and capricious.[46]

The *Jaward* opinion hinged on the assumption that the Virginia regulations which governed two acre or less operations adequately protected the environment.[47] This rationale closely tracks a Sixth Circuit Court of Appeals case decided two years prior to *Jaward*. In *Holmes Limestone Co. v. Andrus*,[48] the Secretary issued a notice of violation based on a permanent program regulation prohibiting mining within 100 feet of a cemetery.[49] The *Holmes* court, in validating the district court's jurisdiction and thereby remanding,[50] ruled that OSM's regulations which redefined "cemetery" to include private family burial plots[51] arbitrarily and capriciously interfered with the state's power to regulate the mining operation.[52] As in *Jaward*, the court felt that the state definition afforded adequate pro-

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[45] *Id.*

[46] *Id.* The district court applied the scope of review of agency action as set out in 5 U.S.C. § 706 in addressing the likelihood-of-success criteria for preliminary relief under 30 U.S.C. § 1276(c). *See* National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 696 (3rd Cir. 1979) (scope of judicial review of regulations promulgated by the Secretary).

[47] *See supra* note 17 and acompanying text.

[48] 655 F.2d 732 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982) (White & Blackmun, JJ., dissenting).

[49] *Holmes*, 655 F.2d at 734. *See also* 30 U.S.C. § 1201 (1982).

[50] By virtue of the *Holmes* decision, the Sixth Circuit is the only circuit which has determined that § 1276(a)(1) *does not* provide for exclusive review of the Secretary's regulations in the District Court for the District of Columbia. Furthermore, the court concluded that there are "serious questions about the propriety" of the rulemaking actions contained in § 1276(a)(1). *Holmes*, 655 F.2d at 738. This decision becomes important with respect to the possible review of the Secretary's two-acre criteria in circuits taking the *Jaward* position that judicial review of the regulation must be conducted in the District of Columbia within 60 days of promulgation. *See supra* note 37.

[51] 30 C.F.R. § 761.5 (1983).

[52] *Holmes*, 655 F.2d at 736. The Ohio Reclamation Board of Review had ruled that private family burial plots were not a cemetery within the Ohio's definition and therefore not subject to the 100 foot requirement in 30 U.S.C. § 1201 (1982).

tection to the interest involved.[53] In addition, there was no showing by OSM that the mining operation posed an imminent threat to the environment or public, a distinction likewise noted in *Jaward*.

It would seem that *Jaward*, in light of the *Holmes* decision, offers a strong argument for the proposition that an operation, though not qualifying for the two-acre exemption by OSM standards, should nonetheless be exempted from the Act and subjected only to the state standards if there is no showing of real or potential environmental or public harm as determined by the state. This fairly liberal interpretation of the Secretary's rules, however, contrasts with the very narrow construction rendered by OSM in a series of administrative opinions.

C. *Administrative Interpretation*

Prior to the effective date of the revisions to the Secretary's defining criteria,[54] the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) addressed several disputes regarding the exemption. In an almost cursory fashion the Board has consistently upheld the Secretary's defining criteria, in the face of various claims to the exemption. As noted in *Sam Blankenship*,[55] the Board has interpreted the exemption literally by applying the general rule that exceptions from remedial legislation should be narrowly construed.[56] Subsequent administrative opinions contruing two-acre regulations indicate that this is a difficult burden to overcome.[57]

As pointed out in *Jaward*, a recurring controversy arises over which access or haul roads should be included in the affected area determination.[58] The Board has resolved these disputes by applying federal regulations which exclude from the acreage only those roads maintained with public funds.[59] As

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[53] *Holmes*, 655 F.2d at 738.

[54] September 1, 1982. *See* 47 Fed. Reg. 33,424 (1982).

[55] 5 IBSMA 32 (1983).

[56] "In construing the scope of exceptions contained in generally remedial legislation the courts have been firm in applying a strict standard." *Id.* at 39.

[57] *Id.*, *citing* Spokane Inland Empire R.R. v. United States, 241 U.S. 344, 350 (1916); Piedmont & Northern Ry. v. Commission, 286 U.S. 299, 311-12 (1932).

[58] *See* Virginia Fuels, Inc., 4 IBSMA 185, 89 ID 604 (1982); *See also* Daniel Brothers Coal Co., 2 IBSMA 45, 87 ID 138 (1980).

[59] *Jaward*, 564 F. Supp. at 801.

might be expected, this application has resulted in collusive attempts between operators and public officials to classify such roads as property of the municipal or county road system. In dealing with this abuse, the Board in *Fetterolf Mining Sales*[60] held that the mere nominal status of a road as a "public" road, by virtue of its acceptance by a municipal corporation, is insufficient to exclude it from the determination of the affected acreage.[61] The Board further qualified the exemption in *Jewells Smokeless Coal Corp.*[62] by holding that the mere dedication of a road to a county will not disqualify that acreage from the exemption calculation absent a showing that the actual public use is more than "nominal" and that the road is maintained with public funds.[63]

The Board has also upheld the Secretary's definition of "physical relatedness."[64] In *Mullins and Bolling Contractor*,[65] the Board held that two adjacent two-acre sites were clearly related:

> because the operator treated them as related, using fill material from the second site to cover an open pit on the first site, in a situation where he conducted mining operations on both sites, where the two sites were no more than 60 feet apart, and where the sites, taken together, obviously encompassed more than 2 acres.[66]

Additionally, in *Blackwood Fuel Co., Inc.*,[67] the Board determined that the test for relatedness is independent of state borders. As a consequence, adjacent mines which are physically related, though located in different states, will also be subject to SMCRA if their accumulated interstate acreage is two acres or more.[68]

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[60] 30 C.F.R. § 710.5 (1984).
[61] 4 IBSMA 29 (1982).
[62] *Id.* at 32.
[63] 4 IBSMA 51 (1982).
[64] *Id.* at 64.
[65] 30 C.F.R. § 700.11(b)(2)(i) (1984).
[66] 4 IBSMA 156, 89 ID 475 (1982); *see* Rhonda Coal Co. Inc., 4 IBSMA 124, 89 ID 460 (1982).
[67] 4 IBSMA at 163.
[68] 2 IBSMA 359, 87 ID 579 (1980).

In criticizing the Secretary's criteria for economic relatedness, the court in *Jaward v. Watt* noted that "to blanket all mines that have interlocking ownership, even where they are several miles apart, and consider them as one mine in considering the two-acre exemption calculation may be found unreasonable. . . ."[69] The Board, however, has taken a position contrary to that articulated in *Jaward*. While the original draft of the Secretary's regulations did not contain the test for economic relatedness,[70] the Board has incorporated an interpretation similar to that adopted by OSM. In *Sam Blankenship*,[71] the Board verified OSM's determination that the exemption applies exclusively to "operations" and not merely "operators."[72] Therefore, as is the case under present OSM regulations, an operator whose activity affects less than two acres cannot claim the exemption if he has contracted with the permittee of more than two acres.[73] It should be noted, however, that the present regulations require a more detailed showing of economic relation before an operation can be denied entitlement to the exemption.[74] Therefore, this burden, when coupled with the need to prove that economic relation, physical relation *and* temporal relation exist contemporaneously, makes it very difficult to submit an application for a two-acre operation which will *not* comply with the federal requirements.

CONCLUSION

While the precedential value of *Jaward v. Watt* may very well be limited in light of the recent agreed order, the reasoning incorporated should be carefully scrutinized. The need for reasonable regulation and enforcement of bona fide two-acre operations has been clearly expressed by Congress. Although the financial burdens imposed by SMCRA are excessive when applied to these smaller operations, the need for enforcement must be balanced against the reality that the exemption has been repeatedly abused by large and small operations alike. In a

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[69] *Jaward*, 564 F. Supp. at 801.
[70] *See* 30 C.F.R. § 700.11 (1980).
[71] 5 IBSMA 32 (1983).
[72] *Id.* at 38.
[73] *Id.* at 40.
[74] *See supra* note 25 and accompanying text.

literal sense, the regulations promulgated by the Secretary are easily sidestepped by operators who simply divide a large operation into parcels of less than two acres.

In order to fulfill the environmental protection purpose of SMCRA, such activities cannot be allowed to occur. On the other hand, the regulatory system should not be so rigid that an exception cannot be made for those instances where the purpose of SMCRA will not be compromised by the mining operation. Therefore, the Secretary's criteria should provide for exempting those two-acre operations which can conclusively show that they pose no real or potential threat to the environment or to public safety.

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