



COALEX STATE INQUIRY REPORT - 84
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TOPIC: ABANDONED MINE LANDS FUNDING ELIGIBILITY

INQUIRY: SMCRA Section 404 discusses site eligibility under Title IV Abandoned Mine Reclamation. (1) Is damage by subsidence covered under the scope of Title IV? If so, to what extent? (2) Ohio received their permanent program approval in 1981. What options are available to a state for securing funding for subsidence problems caused by coal operations falling between the enactment of SMCRA and the state's adoption of regulations governing subsidence? (3) do other states have this problem and if so, how do they deal with it?

SEARCH RESULTS: Section 404 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) states:

"ELIGIBLE LANDS AND WATER

Lands and water eligible for reclamation or drainage abatement expenditures under this title are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment of this Act, and for which there is no continuing reclamation responsibility under State or other Federal laws." (SMCRA Section 404, 30 USC Sec. 1234)

Once a project clears the hurdle of basic eligibility requirement under Sec. 404, it must also qualify under one of the objectives of the Abandoned Mine Land Reclamation Fund:

"Expenditure of moneys from the fund on lands and water eligible pursuant to section 404 for the purposes of this title shall reflect the following priorities in the order stated:

- (1) the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices;
- (2) the protection of public health, safety, and general welfare from adverse effects of coal mining practices;
- (3) the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources and agricultural productivity;
- (4) research and demonstration projects relating to the development of surface mining reclamation and water quality control program methods and techniques;



(5) the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by coal mining practices;

(6) the development of publicly owned land adversely affected by coal mining practices including land acquired as provided in this title for recreation and historic purposes, conservation, and reclamation purposes and open space benefits."

(SMCRA Sec. 403, 30 USC Sec. 1233)

The specific case, addressed by this inquiry is as follows: an underground mine completes coal extraction in a portion of the mine prior to August 3, 1977. Coal extraction continues in other portions of the mine and the mine is sealed and abandoned prior to Federal approval of Ohio's permanent surface mining regulatory program. Does the continuation of coal extraction activities in other portions of the same mine preclude use of the Title IV - AML funding for subsidence damage from the pre-1977 mined portions?

LEGISLATIVE HISTORY

Both the House and Senate Reports in the 95th Congress provided some explanation concerning AML eligibility. S. Rep. No. 95-128, however, did not provide any further clarification of the "continuing responsibility" language, and described eligible lands for reclamation program activities as "those which have been mined prior to the date of enactment and left or abandoned in either an unreclaimed or inadequately reclaimed condition; and for which there is not a continuing responsibility - by the operator - for reclamation under existing state or federal laws." (H. Rep. No. 218, 95th Cong., 1st Sess. 140 (1977). Also see COALEX STATE INQUIRY REPORT - 33 (March 20, 1985), pp 2-3)

Congress clearly intended subsidence from pre-1977 mining, if covered under the basic eligibility statutes, to qualify for funding as evidenced by H. Rep. 95-218 which estimated the cost of rehabilitation of abandoned mine lands at \$7 billion to \$10 billion, including \$1 billion for "control of subsidence under urbanized areas." The report also refers to "surface subsidence of land due to caving of abandoned underground mines" as one of the environmental impacts of past coal mining to be corrected by the Fund. (H. Rep. No. 218, 95th Cong., 1st Sess. 134-135 (1977))

FEDERAL REGULATIONS

The Federal regulations pertaining to Section 404 of the Act were promulgated by the Office of Surface Mining (OSM) in 1978 at 30 CFR Sec. 874.12. Relative to the meaning of "left or abandoned in either an unreclaimed or inadequately reclaimed condition", OSM states in the Federal Register preamble discussion that "though no comment was received addressing this change, Sec. 874.5 definitions were added as a result of changes made in this part that made it necessary to define [this phrase]." (See Part 874, 43 FR 49932 (1978))



Later, as a part of the regulatory review conducted under President Reagan's administration, the rules concerning the establishment and administration of the Abandoned Mine Land Reclamation (AML) Program by the states were revised. Definitions for "eligible lands and water" and "left or abandoned in either an unreclaimed or inadequately reclaimed condition" were added to the list of definitions under 30 CFR Sec. 860.5.

Little substantive change was made to the eligibility requirements under Sec. 874.12. The word "coal" was added to the section title "Eligible Coal Lands and Water" as well as to Subsection 874.12(a). The eligibility requirements pertaining to non-coal lands and water were moved to Part 875. (47 FR 28574 (1982))

Under the final rules, coal lands and water are eligible for reclamation activities if:

"(a) They were mined for coal or affected by coal mining processes;
(b) They were mined prior to August 3, 1977, and left or abandoned in either an unreclaimed or inadequately reclaimed condition; and
(c) There is not continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the State or Federal government, or as a result of bond forfeiture. Bond forfeiture will render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, additional moneys from the Fund may be sought under Parts 886 or 888 of this chapter." (30 CFR Sec. 874.12)

In its preamble discussion, OSM did not further define the meaning of the words "responsibility for reclamation", but did recognize in the definition of "left or abandoned in either an unreclaimed or inadequately reclaimed condition", the "complexity of the factual situations faced by the reclamation authorities and the need to consider each project a case-by-case basis." Generally, in OSM's view, the agency responsible for conducting the reclamation, whether State, Indian Tribe, Department of Agriculture, or OSM, is the one responsible for the determination of reclamation project eligibility. The definition is intended to provide "sufficient latitude" for determination of eligibility on a case-by-case basis.

OSM went on to include the following examples of eligibility:

"Example 1 - OSM considers lands and water eligible, if the following conditions are met: (1) All conditions in Section 404 of the Act are met; (2) All mining processes have ceased but a permit did exist as of August 3, 1977; and (3) The permit has since lapsed and has been renewed or superseded by a new permit as of the date of the request for reclamation assistance.

"Example 2 - Where a permit has lapsed prior to August 3, 1977, but subsequent reclamation attempts were made after that date to satisfy State regulatory or bond requirements, the area would still be eligible.

"Example 3 - (One commenter suggested that a third example should be given.) OSM considers lands and water eligible if the following conditions are met: (1) Mining ceased prior to August 3,

Search conducted by: Stephen G. Allen



1977; (2) No mining activity occurred or will occur after August 3, 1977; (3) A permit or bond exists as of August 3, 1977 and this permit or bond is released after all conditions are met; and (4) The land was inadequately reclaimed due to State requirements in existence at the time." (47 FR 28576 (1982))

While the search results are inconclusive in resolving the eligibility issue raised, a phone conversation with Chris Warner at OSM in Washington, DC, supports the view that complicated eligibility situations such as the one presented in Ohio should be determined on a case-by-case basis by the state program director. Mr. Warner indicated that such a highly technical question as that presented had never been reviewed, but stated that on several occasions surface mined projects had qualified for AML funding even though continued operational activities had disqualified certain portions of the site.

Mr. Warner went on to say that an underground mine might be viewed as a unit unless certain facts (e.g., no work activity at all in the subject portion of the mine occurred after August 3, 1977, including the use as a travelway, etc.) tended to show a lack of need for that portion of the mine. Need would presumably include ventilation purposes as well. The approach to such eligibility problems will necessarily be heavily fact-based.

Concerning the "gap" in eligibility presented by this situation, if the site is ultimately determined ineligible, OSM recognizes that such gaps do occur but without Congressional action, to the contrary, both the Act and Congressional intent are clear that lands which were mined and abandoned or inadequately reclaimed after August 3, 1977, are not eligible for expenditures under Title IV of the Act.

It appears that other coal states also face gaps in AML funding for operations falling between enactment of SMCRA and adoption of their permanent regulatory program. At least one state, Pennsylvania, has its own abandoned mine land reclamation program funded by a \$200 million bond issue. In fact, it was the Pennsylvania program that served as a prototype for Title IV of SMCRA.

ATTACHMENTS

- A. Excerpt, H. Rep. No 95-218, 95th Cong., 1st Sess. 134 (1977).
- B. COALEX STATE INQUIRY REPORT - 33 (March 20, 1985), discussion Abandoned Mine Lands Fund.
- C. Excerpt, 43 FR 49932 (1978). Preamble to General Reclamation Requirements, Part 874.
- D. Excerpt, 47 FR 29574 (1982). Revision of the Abandoned Mine Land Reclamation Program Rules.