



COALEX STATE INQUIRY REPORT - 291

September 1991 [Updated December 1991]

Hon. Marlin McLaughlin
P.O. Box 643
Jasper, Alabama 35502

TOPIC: IS FILL DIRT CONSIDERED A "MINERAL" FOR REGULATORY PURPOSES? (Includes State Inquiry Reports 134, 47, 24, 113 and 182.)

INQUIRY: A sand and gravel dealer identified two coal seams separated by shale below an area being excavated. If the intervening layers of shale are sold as fill dirt, can the dealer obtain an exemption, based on the 16 2/3 rule, for extraction of the lower seam of coal? What case law and other materials are available on this issue in addition to MCNABB COAL CO. v OSM, 101 IBLA 282 (1988), CORDOVA CLAY CO. v OSM, Docket No. NX 5-3-R (1986) and W.S. NEWELL, INC. v RANDALL, 373 So 2d 1068 (Ala 1979)?

SEARCH RESULTS: Several existing COALEX State Inquiry and Comparison Reports were identified that addressed similar issues. These reports were updated using the COALEX Library and other materials available in LEXIS. The information in the Reports is discussed below. Copies of the Reports and attachments are included here, as indicated. The Report was updated to include the Alabama Surface Mining Commission ruling on this issue.

16 2/3 EXEMPTION

COALEX STATE INQUIRY REPORT - 134, "16 2/3 Exemption" (January, 1990).

This Report incorporated prior Reports 47 and 24, covering legislative history material on the exemption, with the regulatory history, from Federal Register preambles, and federal and administrative case law.

The latest Federal Register notice on the 16 2/3 exemption was published on December 20, 1989 (54 FR 52092).

NOTE: Also enclosed are the MCNABB COAL CO., INC. v LUJAN SETTLEMENT AGREEMENT (CA Nos. 88-C-281-E, 88-C-1525-E (N.D. Okla 1990) and the subsequent Interior ALJ Consent Decision, Docket No. TU 6-19-P (1991). These cases update Report - 134.



SOIL AND MINERAL

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

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

NOTE: Report - 113 appears as an Attachment to Report - 182.

COMMONWEALTH OF VIRGINIA v MAY BROTHERS, INC., 396 SE 2d 695 (Va Ct App 1990). [The case for which the above research was conducted.]

The Virginia Court of Appeals affirmed the Circuit Court decision which reversed the Virginia Board of Surface Mining Review's holding that May Brothers was engaged in mining without having obtained a state mining license and surface mining permit:

"We hold that the simple removal of dirt from a construction site, without more, does not constitute 'mining' as contemplated by the legislature in Code sec. 45.1-180."

KIMBLE v DIERINGER, Case No. 90-CA-19, 1991 Ohio App LEXIS 2229 (May 1, 1991).

The court affirmed the Ohio Reclamation Board of Review's finding that "Kimble's extraction of coal was incidental to a permitted highway project, and was therefore not a coal mining operation under R.C. 1513.01."

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

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

DUNN CONSTRUCTION CO., INC. v ALA. SURFACE MINING COMMISSION, Case No. DHA 91-027 (1991).

The denial of the exemption application for the mining of coal incidental to the mining of other minerals was affirmed. Shale material was proposed to be sold for use in constructing pads for methane drilling towers. Witnesses stated that shale material was not suitable for areas used by heavy rigs or trucks. The Chief Hearing Officer found that the shale material was "not a mineral having any commercial value or reasonable commercial use other than as waste or fill material for the purpose of bona fide sale".

ATTACHMENTS



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- A. COALEX STATE INQUIRY REPORT - 134, "16 2/3 exemption" (January, 1990). (Includes copy of Reports 24 and 47, Federal Register preambles but not the case law.)
- B. MCNABB COAL CO., INC. v LUJAN SETTLEMENT AGREEMENT (CA Nos. 88-C-281-E, 88-C-1525-E (N.D. Okla 1990).
- C. MCNABB COAL CO. v OSM, Interior ALJ Consent Decision, Docket No. TU 6-19-P (1991).
- D. COMMONWEALTH OF VIRGINIA v MAY BROTHERS, INC., 396 SE 2d 695 (Va Ct App 1990).
- E. KIMBLE V DIERINGER, Case No. 90-CA-19, 1991 Ohio App LEXIS 2229 (May 1, 1991).
- F. COALEX STATE INQUIRY REPORT - 182, "Definition of soil and mineral" (1991). [Includes COALEX COMPARISON REPORT - 113, "Definitions of soil and mineral" (June, 1989).]
- G. DUNN CONSTRUCTION CO., INC. v ALA. SURFACE MINING COMMISSION, Case No. DHA 91-027 (1991).