

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF MINING PROGRAMS**

DOCUMENT NUMBER: 563-2111-102

TITLE: Building Construction Exemption from Requirements of the Noncoal SMCRA

EFFECTIVE DATE: October 30, 1997

AUTHORITY: Noncoal Surface Mining Conservation and Reclamation Act (Noncoal SMCRA), Section 3; 25 Pa. Code Chapter 77, §77.1

POLICY:

The Department will establish guidelines to define the qualifications for a building construction exemption from the requirements of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal SMCRA).

PURPOSE:

This policy provides for consistent evaluations regarding the qualifications for a building construction exemption from the definition of surface mining under the Noncoal SMCRA.

APPLICABILITY:

This guidance applies to building construction operations where noncoal minerals are removed from a building construction site.

DISCLAIMER:

The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework, within which the Department will exercise its administrative discretion in the future. The Department reserves the discretion to deviate from this policy statement if circumstances warrant.

PAGE LENGTH: 6

LOCATION: Vol. 12, Tab 105 (BMP PGM Section VIII, Part 1, Subpart 2)

TECHNICAL GUIDANCE:

BACKGROUND

The Noncoal SMCRA contains an exemption from the definition of “surface mining” for building construction activities when the extraction, handling, processing, or storing of minerals from the building construction excavation is incidental to the building construction excavation. This exemption from the definition of “surface mining” applies regardless of the commercial value of the minerals.

Although building construction and related activities do not need a permit under the Noncoal SMCRA, they usually need either an earth disturbance plan or permit under the Clean Streams Law and 25 Pa. Code Chapter 102.

PROCEDURE

A. GENERAL CONSIDERATIONS

The Department may disapprove an exemption to “surface mining” if it has reason to believe that the excavation of the noncoal minerals is not incidental to the building construction or that such excavation is being used as a subterfuge merely to avoid obtaining a surface mining permit, license and bond. Most building construction activities do not involve the removal and marketing of noncoal minerals and are therefore not regulated under the Noncoal SMCRA. The building construction activities which concern the Department are those activities where noncoal materials are being removed in excess of that necessary for the building construction.

Most boroughs and townships require a building permit to build any structure and the development of a housing subdivision or an industrial site normally requires various planning or zoning approvals by the township or borough. A building permit issued by the political subdivision (city, borough, township or county) having jurisdiction over the building activity (or other proof of construction) should be available at the site and would indicate a legitimate building project.

Some political jurisdictions, usually in rural areas, may not require building permits or approvals. In such cases, the Department can ask to see the plans which should show the type and extent of the building and related facilities (driveways, parking lots, erosion controls, etc.). Erosion control plans approved by the County Conservation District can also be used to determine the extent of building-related excavation.

Approved financing may provide additional evidence of a legitimate building construction project.

B. SPECIFIC CONSIDERATIONS

The key word in the Noncoal SMCRA building construction exemption is incidental. Mineral removal is incidental if the excavation is essential to accomplish the building construction.

Under the definition of noncoal surface mining activities in §77.1, mineral removal is incidental if an excavator demonstrates that:

1. Extraction, handling, processing or storing are conducted concurrently with construction.

Concurrent is defined as “running together; acting in conjunction; contemporaneous; or accompanying.” The building construction activity should take place soon after the excavation which is necessary for the construction. On most building construction sites, the pouring of footers and construction of the foundation walls begins very soon after the excavation (usually within a month, unless delayed by weather).

In some cases, due to the topographic setting of the site, extensive excavation and regrading may be required before the actual construction can begin. In these cases, there will be a longer period between initial excavation and the actual start of building construction. The time period should be reasonably related to the proposed construction plan on a case-by-case basis. If the noncoal material is removed from the site and the construction project is not completed, the Department may consider the site to have been mined without a permit and license and the excavator may be subject to penalties prescribed in the Noncoal SMCRA unless a satisfactory demonstration is provided as to why the construction was not completed.

2. The mineral removal area is limited to the area necessary for construction and is reasonably related to the proposed use of the site.

Excavation and marketing of materials from areas where the excavation of the materials is not necessary for the building construction or related facilities would not qualify for an exemption.

Examples:

- a. A restaurant which seats 150 people would not need an area excavated large enough to park 500 cars. In most cases, when a construction plan is approved by a municipality, the construction plan will show the extent or limit of the project. Excavation outside of the construction area may be considered mining.
- b. Taking away a substantial portion of a hilly area and then building a small shed in one corner of the excavated area would not represent a building construction exemption situation.

C. ACTIVITIES NOT CONSIDERED TO BE NONCOAL MINING

The following activities, which often involve demolition or maintenance of existing facilities, are not considered to be encompassed within the definition of noncoal surface mining.

1. The demolition and removal of stone walls.
2. The removal and marketing of sediment from sediment ponds and drainage swales, in order to maintain such facilities.

3. The removal of noncoal materials from facilities constructed to comply with Chapter 102 or other facilities constructed to comply with a valid Department permit.
4. Regrading of land (cut and fill operations) during which the noncoal materials are not removed from the site for sale or stockpiled for purposes of future sale.

D. EXAMPLES OF SITUATIONS REGARDING POSSIBLE BUILDING CONSTRUCTION EXEMPTION

The following are examples of situations relating to a potential “building construction exemption.” Some situations may qualify for a “noncommercial use” exemption. (See Guidance Document 563-2111-101.)

Situation		Qualified for Building Construction Exemption?
(1)	Noncoal materials are excavated and marketed in order to dig a basement, septic system, and driveway for a house. A building permit or equivalent is available.	Yes
(2)	Noncoal materials are excavated and marketed in order to dig foundations, septic system, and parking lot (consistent with the seating capacity of the restaurant) for a restaurant. A building permit is available.	Yes
(3)	Noncoal materials are excavated and marketed at a site with no evidence of building construction and no building permit or equivalent documentation available.	No
(4)	Noncoal materials are excavated and marketed in excess of that necessary for the construction of the buildings and necessary support facilities. A building permit is available.	No
(5)	Noncoal materials are excavated and marketed in order to construct a golf course with township and County Conservation District approval of the plans:	
(a)	Noncoal materials are excavated and marketed for a clubhouse or restaurant having a building permit or equivalent.	Yes
(b)	No noncoal materials are removed from the golf course and the site is only regraded in order to develop the golf course.	Yes
(c)	During golf course construction, substantial amounts of noncoal materials are excavated, stockpiled and removed/marketed off-site.	No
(6)	Noncoal materials are excavated and marketed in order to build a car dealership along a highway. A building permit, plans, financing, etc. is available for the site. The area for the buildings and the car lot is lowered 15 to 20 feet to the approximate level of the highway in order to provide a reasonable access to the site.	Yes

E. PERMITS, LICENSES, BONDS

If an excavation site does not qualify for a waiver under the building construction exemption or other exemption (i.e., noncommercial use) the person doing the excavation (whether landowner or lessee) must obtain a small noncoal or a large noncoal permit, license, and bond as appropriate to the site. Those sites requiring a surface mine permit must comply with the distance limitation requirements under §77.504 unless granted a waiver under that section.

Those sites not requiring a permit under Noncoal SMCRA will fall under the jurisdiction of the Division of Conservation Districts and Nutrient Management. Any complaints received regarding site excavation that the District Mining Office (DMO) has determined does not require a surface mining permit, license or bond should be referred to the appropriate County Conservation District.

F. COMPLIANCE

1. When the DMO or Mine Conservation Inspector receives a complaint or notice that someone without a surface mining permit is excavating noncoal minerals and the minerals are being moved off-site, the appropriate technical or inspection staff member will conduct a field investigation of the site to determine if the excavation qualifies for a building construction or other exemption under the Noncoal SMCRA. An inspection report will be filed with the DMO.
2. In cases where no surface mining permit is required, the DMO will inform the excavator that he should contact the County Conservation District regarding the requirement to have either an earth disturbance plan or permit under the Clean Streams Law. If no surface mining permit is required the DMO will give notice to the County Conservation District that a determination has been made that the excavation is not regulated under the Noncoal SMCRA (see sample letter in Appendix I). No further action is required unless site actions would change the eligibility for the exemption.
3. If a permit is required, the DMO staff will order the removal of noncoal minerals from the site to be ceased and will take appropriate action, as necessary, to achieve compliance with the permitting requirements.
4. If a building construction site qualifies for an exemption from a noncoal permit and then fails to follow through with the construction project, the excavation of the minerals will not be considered incidental to building construction. The Department may consider the site to have been mined without a permit and license and the excavator may be subject to penalties prescribed in the Noncoal SMCRA.

APPENDICES: Appendix I - Sample Notice

**APPENDIX I
SAMPLE NOTICE**

COMMONWEALTH OF PENNSYLVANIA
Department of Environmental Protection
Date

SUBJECT: Notice of Earth Disturbance Activity

TO: County Conservation District
_____ County

FROM: _____ District Mining Office

This office has determined that the earth disturbance activities described below do not qualify as noncoal surface mining activities under the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal SMCRA) and are therefore not regulated by this office.

The earth disturbance activity meets the following exemption under the Noncoal SMCRA:

☐ Noncommercial Use Exemption

The term “surface mining” does not include: The extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him.

☒ Building Construction Exemption

The term “surface mining” does not include: The extraction, handling, processing or storing of minerals from any building construction excavation on the site of the construction where the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals.

This earth disturbance may require an Earth Disturbance Permit or plan subject to your review.

(description and location of earth disturbance activity)

cc: MCI
File