

## **GUIDANCE MEMORANDUM<sup>1</sup> No. 36-11**

**Issue Date: September 16, 2011**

**Subject: Coal Removal from Government Financed Construction Projects**

The Virginia Department of Energy, Mined Land Repurposing (MLR) program, and Coal Mine Safety program have developed these guidelines to assist the regulatory determination process regarding the removal of coal that may be associated with a government financed construction project. Throughout this document, the term “Project” applies to any site classified or eligible for classification as a government financed construction project.

For coal mining operations, MLR regulates the environmental and public health and safety aspects and ~~RDO&DW~~ regulates the worker safety aspects.

It issues permits and inspects coal mining and associated operations under the [Virginia Coal Surface Mining Control and Reclamation Act of 1979](#) as amended.

Coal Mine Safety issues mine licenses and inspects coal mining operations under the [Coal Mine Safety Laws of Virginia](#), as amended. The [Coal Mine Safety Act](#) of Virginia, defines “mine” under § 45.1-161.57<sup>2</sup>, and requires that a mine license be obtained prior to the “*operation of a mine*”.

In accordance with the **Virginia Coal Surface Mining Control and Reclamation Act of 1979** (Act), **Coal Mine Safety Act**, and the **Virginia Coal Surface Mining Reclamation Regulations**, (4VAC25-130) anyone that conducts surface coal mining and reclamation operations must first obtain a surface coal mining permit from MLR and mine license from Coal Mine Safety; however, there are exceptions to those requirements.

[§4VAC25-130-700.11](#)(a) (3) of the **Virginia Coal Surface Mining Reclamation Regulations** provides an exemption for, “*The extraction of coal as an incidental part of Federal, State or local government-financed project or other construction in accordance with Part 707.*” A government-financed project would qualify for a Government Financed Exemption (GFE).

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<sup>1</sup> This Memorandum is to be considered a guideline issued under the authority of § 45.1-230.A1 of the Code of Virginia which reads:

"In addition to the adoption of regulations under this chapter, the Director may at his discretion issue or distribute to the public interpretative, advisory or procedural bulletins or guidelines pertaining to permit applications or to matters reasonably related thereto without following any of the procedures set forth in the Administrative Process Act (§ 2.2-4000 et seq.). The materials shall be clearly designated as to their nature, shall be solely for purposes of public information and education, and shall not have the force of regulations under this chapter or under any other provision of this Code."

<sup>2</sup> *“Mine” means any underground coal mine or surface coal mine. Mines that are adjacent to each other and under the same management and which are administered as distinct units shall be considered as separate mines. A site shall not be a mine unless the coal extracted or excavated there from is offered for sale or exchange, or used for any other commercial purposes. The area in which coal is excavated under an exemption to the permitting requirements of § 45.1-234 shall not be a mine.*

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In order to make a determination that a Project is exempt from both the MLR and Coal Mine Safety permitting and licensing requirements, certain information must be submitted for evaluation. MLR, in consultation with Coal Mine Safety, will take the lead in determining whether an exemption is applicable.

**Procedures for Determining Regulatory Requirements**

MLR will exercise its authority under [§4VAC25-130-700.11](#) (b) in the review of a proposed GFE project. The regulation provides, *“The division may on its own initiative and shall, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section. The division shall give reasonable notice of the request to interested persons. Prior to the time a determination is made, any person may submit, and the division shall consider, any written information relevant to the determination.”*

Upon notice of an existing or proposed project (whose construction activities may result in coal removal), MLR will initiate a review under [§§4VAC25-130-700.11](#) (a)(3) and (b) and [4VAC25-130.707.11](#) of the GFE project, relative to the areas of coal removal that are or will be associated with the construction project.

Under these guidelines, the Project construction area is considered to be the area inside the right-of-way or the Project’s boundaries, including service roads, equipment staging areas, access and exit ramps, intersections with other projects, as well as any waste and borrow areas needed for construction. Any areas where coal removal is proposed that are beyond the project construction area will not be eligible for the GFE and will be subject to the normal permitting and licensing requirements of MLR and Coal Mine Safety.

**MLR Initiates Exemption Determination Process**

A Field Inspector may come upon a construction Project, which may plan to remove or is removing coal. If the extraction of coal is incidental to a government financed construction project, it is exempt from the coal surface mining regulatory program as long as the operations comply with the terms and conditions of the GFE Project.

When finding a GFE Project that is not under a MLR permit, or has not obtained an exemption determination, the Inspector will initiate an inspection of the site to determine whether the project is exempt from the Act. This will be done in coordination with Coal Mine Safety to determine whether a mine license application for the site has been submitted or is required.

Whenever the GFE Project removes more than 250 tons of coal, certain documents must be maintained at the Project site. The documents should include the information required by [4 VAC 25-130-707.12](#) of the regulations.

In reviewing the Project information, the Inspector will focus on the documents which:

- Describe the construction Project;
- Set forth the exact location of the construction, right of way, or boundaries of the area which will be directly affected by the construction;

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- List the government agency which is financing the Project (noting the kind and amount of public financing, and the percentage of the entire construction costs represented by government financing);
- Identify the government agency contact person; and,
- May indicate the anticipated amount of coal which may be removed during the Project; whether such coal would be commercially sold; and whether the coal removal is necessary for the Project completion.

The Inspector will contact the person representing the government financing authority for verification of the information and to ensure any coal extraction does not go beyond the scope of the Project. The Inspector will monitor the Project at least monthly to verify that the operation continues to meet the exemption criteria. These reviews will be documented in an inspection report.

If the Inspector's investigation reveals that the construction company's coal extraction is no longer exempt, appropriate enforcement action will be initiated to cause the immediate cessation of coal removal (until a mine license is issued by Coal Mine Safety and a MLR permit is approved under the Act) or to require the reclamation of disturbed areas in accordance with the Act.

**Request for Exemption Determination Submitted to MLR**

Upon receipt of a GFE determination request, the MLR's Reclamation Program Manager (RPM) will -

1. Determine whether the request is complete.
2. Notify the area Inspector and Supervisor of the proposed project. The Inspector will submit data, any pictures documenting the proposed Project site, and/or investigation report(s) to the RPM. The investigation report(s) will include the Inspector's finding or recommendation as to whether the site meets the exemption criteria.
3. Determine whether additional information is necessary from the party requesting the GFE.
4. Notify the Director, Reclamation Services Manager, Chief Engineer, OSM, and other interested parties (including appropriate government agencies) of the request.
5. Provide written notice of the MLR's intent to consider the GFE request to all parties with an identified interest in the exemption determination (this may include state and local agencies, appropriate planning districts, the mineral owner(s), the surface owner(s), the state OSM field office, the site contractor, utilities, or others). This notice will allow a person with a valid legal interest to submit written comments or concerns to the MLR Director or RPM within a reasonable time period (usually within 15 workdays, unless unique circumstances require an extended period).
6. Evaluate comments submitted from Coal Mine Safety and any interested parties.

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7. Review Project documentation or reports provided by the funding agency().
8. Evaluate any additional information that may be requested from any involved party or determine whether additional field investigation by the Inspector may be necessary.
9. Work with the Project applicant and/or MLR staff to prepare an “engineering necessity determination.
10. Designate a team to review the GFE request, which will review the request, all applicable data, visit the site if necessary, and provide comments on the Project. The team may collect any available data not already provided that would assist the exemption eligibility determination, such as –
  - a. Documentation of the site conditions.
  - b. Amount of government financing (and type).
  - c. Projected cost of the GFE Project.
  - d. Whether the government authorization has been given to proceed with the Project.
  - e. The amount of coal to be removed during the Project term; where the coal will be sold; whether coal removal meets the engineering necessity for the Project; and whether the coal is located within the Project’s boundaries.

Based upon the available information, the team will provide the RPM with its determination as to whether an exemption is warranted.

11. Once the necessary information is received from the team and reviewed, prepare a written decision concerning the GFE request.

**Exemption Determination**

After determining whether the GFE is warranted, the RPM will summarize the agency’s decision for the MLR Director’s signature. In the event the proposed Project is determined to not be exempt from the Act, the applicant will be required to obtain a coal surface mining permit under the Act (and any other necessary federal and State permits/licenses) for the site prior to any activity to facilitate or cause coal removal.

The GFE determination letter will be sent by mail or electronic media to the applicant with a copy sent concurrently to each interested party.

**GUIDANCE FOR EXISTING MLR PERMITS**

When land disturbances for construction activities and/or coal extraction incidental to any GFE Project is proposed on an existing MLR permit, the procedures and guidelines described in the table and narratives below will apply.

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The MLR must make its determination that the Project is exempt and release the permit or applicable permitted areas prior to disturbance of those Project areas. An existing MLR permit may be utilized under the Project at different stages of the permit. For example, the permit may be at the status where it has been approved with boundaries established but mining has not yet started; active mining may be underway on the permit; or the permit may be in the process of reclamation or has reclamation completed. These various operational statuses will require a different series of MLR administrative processes for release of the permit or applicable permitted areas prior to Project disturbances.

<b>OPERATIONAL STATUS PRIOR TO PROJECT DISTURBANCE</b>		Modification to mine plan will be necessary.	Modification to reclamation/drainage control plans will be necessary.	Post Mining Land Use Change will be necessary.	Revision application to release area/bond submitted to MLR.
1	Permit area approved but mining not started.				X
2	Permit area being actively mined.	X	X	X	X
3	Permit area being actively reclaimed.		X	X	X
4	Permit area reclaimed and waiting for bond release.			X	X
5	Underground mining areas (PMU) to be encountered.	X			

Operational Status 1 – Permit area approved but mining not started

Acreage may be deleted by a revision without public participation. The permittee should allow 30 days for the application review and approval process. Bond adjustment may be necessary to the permit due to acreage deletion. Operations and drainage control plans will need to be reviewed but may not need to be changed due to the acreage deletion.

Operational Status 2 – Permit area being actively mined

Acreage cannot be deleted until modifications to the operations, reclamation, and post mining land use plans are approved and implemented. The modifications will be made via revision applications that will require public participation. The permittee should allow 180 days for the application review and approval process.

Operations could receive an extension on contemporaneous reclamation timeframes to allow for time to modify permit and for Project construction to approach.

If the active mining operations within the Project corridor were taken over by the Project and information supplied to document GFE, acreage could be deleted by the same processes as in situation 1, but the existing MLR permit would still need a revision(s) to re-organize operations, drainage, and reclamation plans.

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Operational Status 3 – Permit area being actively reclaimed

Acreage cannot be deleted until reclamation and post mining land use changes are approved and implemented. The modifications will be made via revision application that will require public participation. The permittee should allow 180 days for the application review and approval process.

Operations could receive an extension on contemporaneous reclamation timeframes to allow for time to modify permit and time for Project construction to approach.

Operational Status 4 – Permit area reclaimed and awaiting bond release

Acreage cannot be deleted until post mining land use changes are approved. Bond release applications and land use revisions will require public participation. After post mining land use changes are approved, and in order to expedite the release of the site, the permittee should submit the bond release application up to 90 days prior to the Project construction encountering the permitted area.

Operational Status 5 – Underground mining areas to be encountered

Deletion of underground mining areas and modification to underground mining plans will be necessary via revision application. The application should not require public participation. The permittee should allow 30 days for the application review and approval process.

**Exemption Approval/Inspection**

If the Project is deemed exempt, the Inspector will conduct monthly inspections of the site to verify that the Project is being conducted in accordance with §§4VAC25-130-707.11, 4VAC25-130-707.12, and the exemption justification submitted to and approved by the MLR. The Inspector will -

- Document the site conditions (mining equipment present and areas of coal removal) and summarize the Project's progress (i.e., cost, amount and type of government funding, total tonnage of coal removed, and revenues received from the sale of the coal).
- Respond to citizen complaints concerning the Project. The Inspector may relay the complaint or refer the complainant to the funding agency (ies).
- Report to the RPM any instance where the site activities or conditions appear to be inconsistent with the GFE determination.

Should the Inspector determine that coal removal at the site has exceeded the limits anticipated in the GFE determination, and coal removal is not an engineering necessity for the Project (assistance may be obtained from the Chief Engineer, or other MLR/Coal Mine Safety technical personnel), immediate action to halt the coal removal operation will be taken.

**Final Inspection** - The Inspector will conduct a close out inspection of the Project once coal removal is completed. The inspection report will document the total Project cost, amount of public financing, and the total revenues received from the coal removed.