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Opinion No. 08-51

Validity of Pending Legislation Affecting Surface Coal Mining Operations

QUESTIONS

1. Are any of the provisions of Senate Bill 3822, which purports to regulate certain aspects of surface coal mining operations under Tennessee's Water Quality Control Act, preempted by federal law?

2. If any provision of the proposed legislation is preempted, are there alternative methods of regulation that the State could employ?

3. Would the enforcement of a state law that prohibits the Commissioner of Environment and Conservation from permitting coal surface mining operations that would alter or disturb any ridge line more than two thousand feet above sea level amount to an unconstitutional taking of property?

OPINIONS

1. Yes. While there is no case law directly on point, it is the opinion of this Office that the prohibitory provisions contained in subsections (a) and (b) of Senate Bill 3822 would likely be held to be preempted by implication under federal law as conflicting with the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.*

2. The Surface Mining Control and Reclamation Act of 1977 (SMCRA) expressly provides that it does not supersede, amend, modify, or repeal the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq*., or state laws enacted pursuant thereto. 30 U.S.C. § 1292(a)(3). Thus, it is the opinion of this Office that changes to the Tennessee Water Quality Control Act that are based on the Federal Water Pollution Control Act would not be preempted by SMCRA.

3. This question is pretermitted by our response to Question 1.

ANALYSIS

1. Congress enacted the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* (SMCRA), to establish a nationwide program to ensure that surface coal mining operations are conducted in an environmentally protective way. *See* 30 U.S.C. § 1202(a).

In enacting SMCRA, Congress, however, recognized the need to balance environmental protection with the energy needs of the country that are met through coal. *See* 30 U.S.C. § 1202(f). To accomplish these goals as well as other goals, Congress established the Office of Surface Mining (OSM) within the United States Department of the Interior to enforce the provisions of SMCRA. 30 U.S.C. § 1211. Section 503 of SMCRA provides that states that desire to exercise exclusive jurisdiction over surface coal mining within their boundaries may submit to the Secretary of the Interior a state program that is consistent with SMCRA and that meets certain minimum federal requirements. 30 U.S.C § 1253. Such state program is then approved or disapproved by the Secretary. 30 U.S.C. § 1253. For states that do not submit such a program, SMCRA provides that the Secretary of the Interior shall prepare a federal program for the state. 30 U.S.C. § 1254. Section 504 of SMCRA establishes the federal program and specifically provides that "[p]romulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface mining and reclamation" within such state. 30 U.S.C. § 1254(a).

You have inquired whether any of the provisions of Senate Bill 3822, which would regulate certain aspects of surface coal mining operations under Tennessee's Water Quality Control Act, are preempted by federal law. Congress may address preemption expressly within a federal law, or preemptive intent may be implied. Implied preemption seeks to determine whether Congress intended to occupy the entire field of regulation. *See Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Implied preemption may also occur when it is impossible to comply with both the federal law and the state law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963). Finally, implied preemption may occur when state law stands as an obstacle to the accomplishment of the federal law's purpose. *See Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981)*; Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941).

SMCRA contains a provision expressly addressing when state surface coal mining laws enacted after the federal law's August 3, 1977, effective date will be deemed not to be inconsistent with SMCRA. Under SMCRA section 505(b), state law that "provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this chapter or any regulation issued pursuant thereto shall not be construed to be inconsistent with this chapter." 30 U.S.C. § 1255(b). Accordingly, an argument could be made that this language would permit Tennessee to adopt the provisions of Senate Bill 3822. Our research indicates, however, that section 505(b) to date has been applied only in the context of when a State regulates surface coal mining under a program authorized by the federal OSM in accordance with SMCRA section 503, 30 U.S.C. § 1253. *See Pennsylvania Coal Association v. Babbitt*, 63 F.3d 231, 238 (3rd Cir. 1995); *Budinsky v. Commissioner of Pennsylvania Department of Environmental Resources*, 819 F.2d 418, 422-23 (3rd Cir. 1987).

Tennessee had an OSM-conditionally authorized surface coal mining program briefly in the early 1980's. But the State decided it did not want to implement a fully authorized program, and relinquished authority back to the federal government. In 1984, OSM began enforcing the federal program in Tennessee under SMCRA. *See* 49 Fed. Reg. 27325 (July 3, 1984). Thus, because the

State does not regulate surface coal mining in lieu of OSM, current case law would indicate that section 505(b) is inapplicable to the analysis of Senate Bill 3822.

Senate Bill 3822 imposes restrictions on the authority of the Commissioner of Environment and Conservation to issue or renew a water quality permit, certification or variance for a surface coal mining operation under the Tennessee Water Quality Control Act (TWQCA), Tenn. Code Ann. §§ 69-3-101 to -133. Subsection (a) of Senate Bill 3822 withholds this authority from the Commissioner until:

> a new programmatic environmental impact statement (EIS) addressing direct and indirect site specific and cumulative impacts is completed and a record of decision is published in the Federal Register by the office of surface mining. The new EIS must be conducted in good faith and in cooperation with this state using the best available scientific methods, information, and research.

A federal agency, such as OSM, may be required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 to 4370(f), to prepare an EIS. Once OSM resumed regulating surface coal mining in Tennessee, it prepared an EIS in 1985. *See* 50 Fed. Reg. 10546 (Mar. 15, 1985). It is our understanding that OSM continues to utilize this EIS at present when it considers an application for a surface coal mining permit.

Subsection (a) of Senate Bill 3822 conditions the Commissioner's authority to issue or renew TWQCA permits, certifications or variances upon OSM developing a new EIS. It is our understanding that OSM has previously decided not to supplement the 1985 EIS. The responsibility to determine under NEPA when an EIS should be prepared initially or when it should be supplemented is one imposed by federal law on federal agencies. Determining the sufficiency of an existing EIS is not a decision committed to a state legislature.

While the issue is not without doubt, it is our opinion that under current law a court would likely find subsection (a) of Senate Bill 3822 to be preempted as an obstacle to the accomplishment of Congress' purposes and goals under SMCRA. In *Maryland v. Louisiana*, 451 U.S. 725, 750-51, 101 S.Ct. 2131 (1981), the United States Supreme Court held that a Louisiana statute taxing natural gas transported into the state from the Gulf of Mexico was preempted by the Natural Gas Act of 1978. The Louisiana statute defined the tax to be a cost of processing which would then ultimately be passed to the consumer. The Court found that the Federal Energy Regulatory Commission alone had the authority to set costs of processing natural gas under the Natural Gas Act and that the Louisiana Act was "inconsistent with the federal scheme and must give way." *Id*. Like the Louisiana statute, Senate Bill 3822 also impacts a federal scheme established under SMCRA to regulate surface coal mining in Tennessee. Senate Bill 3822 effectively prohibits all surface coal mining in Tennessee by banning the issuance of necessary water quality permits until OSM prepares a new EIS. This would likely be found to interfere impermissibly with the federal scheme under SMCRA, which gives exclusive authority to the federal government over surface coal mining in Tennessee. *See* 30 U.S.C. § 1254(a).

Even if OSM were to prepare a new EIS in accordance with subsection (a) of Senate Bill 3822, subsection (b) of the bill still withholds TWQCA permitting authority from the Commissioner in two circumstances. One is issuance or renewal of a water quality permit, certification, or variance that would allow:

> (1) Surface coal operations, or resulting waste, fill or in stream treatment within one hundred feet (100') of any waters of the state; provided, however, that a permit, certification, or variance may be issued or renewed for operations to improve the quality of streams previously disturbed by mining.

This subsection also would likely implicate an implied preemption analysis because, like subsection (a), it interferes with the federal scheme established under SMCRA. Because Tennessee currently does not have a federally authorized program, SMCRA provides that OSM has exclusive jurisdiction within Tennessee to regulate surface coal mining. 30 U.S.C. § 1254. OSM has promulgated a Stream Buffer Zone Rule that precludes surface coal mining within 100 feet of perennial or intermittent streams, unless a finding is made that such activity will not violate state or federal water quality laws, or adversely affect water quantity or other environmental resources of a stream. 30 C.F.R. § 816.57 (2007). Senate Bill 3822 would essentially prohibit surface coal mining under all conditions within one hundred feet (100') of waters of the state even if mining operations closer to the stream could be shown to protect water quality. Senate Bill 3822 presents too great an interference with the exclusive authority given to OSM to regulate the activity of surface coal mining in Tennessee. Therefore, it is the opinion of this Office that subsection (b)(1) would be held to be impliedly preempted.

Subsection (b)(2) of Senate Bill 3822 restricts the Commissioner's authority to issue or renew permits, certifications or variances under the TWQCA for "[s]urface coal mining operations to alter or disturb any ridge line above two thousand feet (2000') elevation above sea level." Like subsection (b)(1), this section of Senate Bill 3822 also attempts to regulate surface coal mining by prohibiting the Commissioner from issuing water quality permits for all surface coal mining activities above a certain elevation. This restriction also conflicts with OSM's regulation of surface coal mining under SMCRA, which does not automatically prohibit mining above certain elevations. A blanket prohibition on surface coal mining above certain elevations is the type of exclusive authority given to OSM in states without approved programs such as Tennessee. Therefore, subsection (b)(2) would likely be held impliedly preempted as well.

2. You have also inquired about alternative methods of regulation in this area. Section 702(a)(3) of SMCRA provides that nothing in this law "shall be construed as superseding, amending, modifying, or repealing the . . . Federal Water Pollution Control Act (79 Stat. 903), as amended, the State laws enacted pursuant thereto, or other Federal Laws relating to preservation of water quality." 30 U.S.C. § 1292(a)(3). *See, e.g.*, *American Mining Congress v. U.S. EPA*, 965 F.2d 759, 766-67 (9th Cir. 1992). In view of this provision, it is the opinion of this Office that changes to the TWQCA that are based upon provisions of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, would not be preempted because of conflict with

SMCRA. This, in essence, distinguishes the restrictions in subsections (a) and (b) of Senate Bill 3822 from the process currently utilized by the Commissioner in making water quality permitting decisions under TWQCA for surface coal mining operations.

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