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March 25, 2008

Opinion No. 08-67

Validity of Amendment to Pending Legislation Affecting Surface Coal Mining Operations

## QUESTIONS

1. The opinion issued by your Office on March 11, 2008, concerning House Bill 3348/Senate Bill 3822 raised federal preemption issues. A proposed amendment was drafted to address your concerns. Would the attached amended bill be preempted by federal law?

2. Would enforcement of House Bill 3348/Senate Bill 3822, as amended, constitute a taking requiring compensation to affected property owners?

## OPINIONS

1. It is the opinion of this Office that a court could conclude that House Bill 3348/Senate Bill 3822, as modified by the proposed amendment, is not preempted by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.*

2. It is the opinion of this Office that enforcement of the provisions of House Bill 3348/Senate Bill 3822, as amended, prohibiting the permitting of surface coal mining operations within 100 feet of state waters, or above a certain elevation if a ridgeline is altered or disturbed would not, on their face, constitute a taking. Whether enforcement of the provisions would be deemed a taking, as applied to a particular case will be fact-dependent and is beyond the scope of this opinion.

## ANALYSIS

1. House Bill 3348/Senate Bill 3822 restricts the authority of the Commissioner of the Tennessee Department 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, until the Office of Surface Mining (OSM) in the United States Department of the Interior completes and publishes a new Environmental Impact Statement (EIS) for surface coal mining in Tennessee. Even if OSM prepares a new EIS, the bill still precludes the Commissioner from issuing or renewing a TWQCA permit, certification, or variance for surface coal mining activities within 100 feet of any waters of the State, or at elevations of more than 2000 feet above sea level.

The proposed amendment to House Bill 3348/Senate Bill 3822 would remove the provision withholding the Commissioner's TWQCA permitting authority until OSM prepares a new EIS. The amendment retains the provisions precluding the Commissioner from issuing or renewing a TWQCA permit, certification, or variance for surface coal mining activities within 100 feet of any State waters, or at elevations greater than 2000 feet. The amendment also adds language clarifying that otherwise allowable surface coal mining above 2000 feet is not precluded if it would not alter or disturb a ridgeline.

In Tenn. Op. Att'y Gen. No. 08-51 (Mar. 11, 2008), this Office opined that the buffer and elevation provisions of the original bill would likely be held impliedly preempted by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201, *et seq*. Central to the opinion's analysis was the fact that Tennessee does not have "primacy" under SMCRA, meaning that the SMCRA surface coal mining regulatory program in Tennessee is implemented by OSM rather than the State. The opinion concluded that the language in SMCRA section 505(b), 30 U.S.C. § 1255(b), which states that "[a]ny provision of any State law in effect on August 3, 1977, or which may become effective thereafter, which 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," is inapplicable when a State does not have primacy. While acknowledging that its conclusion was not without doubt, the opinion noted that, under existing case law, section 505(b) had been applied to preserve more stringent state laws from preemption only when a state had obtained primacy under SMCRA by virtue of having a surface coal mining program authorized by OSM and implemented by the state.

In reconsidering Tenn. Op. Att'y Gen. No. 08-51, this Office has determined that OSM views section 505(b) as applicable even when OSM promulgates and implements a federal surface coal mining program in a State that does not have primacy. The relevant OSM regulations provide:

> (a) In promulgating or revising any Federal program for a State, the [OSM] Director shall —
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> . . .
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> (3) Include, if required pursuant to 30 C.F.R. 736.23, any performance standards for the regulation of coal exploration and surface coal mining and reclamation operations more stringent than those otherwise provided for by this chapter and the Act.

30 C.F.R. § 736.22(a)(3) (2007). Under 30 C.F.R. § 736.23(b) (2007), any state law that provides for "more stringent land use and environmental control and regulation of coal exploration or surface coal mining and reclamation operations . . . shall not be preempted and superseded by the [OSM] Director and shall be incorporated into the Federal program for the State." OSM has established a federal surface coal mining program for twelve non-primacy states, including Tennessee. In accordance with 30 C.F.R. §§ 736.22 and .23, in ten of those states OSM's program identifies and incorporates more stringent land use and environmental state laws. *See* 30 C.F.R. Parts 903, 905,

910, 912, 922, 933, 937, 939, 941, 947 (2007).

Congress addressed preemption in sections 504(g) and 505 of SMCRA. 30 U.S.C. §§ 1254(g) and 1255. Under section 504(g), in a state without primacy, OSM is required to "set forth any State law or regulation which is preempted and superseded by the Federal program." 30 U.S.C. § 1254(g). In section 505(a), Congress said that state laws that are "inconsistent" with SMCRA are "superseded." 30 U.S.C. § 1255(a). In section 505(b), Congress provided that state land use and environmental laws more stringent than SMCRA "shall not be construed to be inconsistent." 30 U.S.C. § 1255(b). Although no case has specifically addressed the issue, this Office's opinion is that a court could be "substantially informed" by OSM's interpretation of SMCRA's preemption provisions. That interpretation, as reflected in OSM's regulations, is that in a State without primacy, like Tennessee, more stringent state land use and environmental laws are not preempted by SMCRA.

The United States Supreme Court has considered the effect of federal agency regulations interpreting preemption statutes. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996), the Court had to decide whether common-law state tort claims against a pacemaker manufacturer were preempted by the Medical Device Amendments Act of 1976 (MDA). The MDA established general manufacturing and labeling requirements for almost all medical devices. Congress had addressed preemption in MDA section 360k, and the Food and Drug Administration (FDA) had promulgated a regulation construing this provision. In ruling that the state law claims were not preempted, the Supreme Court held that the "FDA regulations interpreting the scope of § 360k's pre-emptive effect support the Lohrs' view, and our interpretation of the pre-emption statute is *substantially informed* by those regulations." 518 U.S. at 495, 116 S.Ct. at 2255 (emphasis supplied).

Justice O'Connor's concurring and dissenting opinion in *Lohr* pointed out that the majority's treatment of the FDA's interpreting regulation differed from the deference usually given to agency interpretations of statutes under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'infor[m]' the Court's interpretation. . . . It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference." 518 U.S. at 512, 116 S.Ct. at 2265 (O'Connor, J., concurring in part and dissenting in part) (emphasis in original, citation omitted).

Most recently, the Court revisited the FDA preemption regulation considered in *Lohr*, but in a different context. The issue in *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008), was whether a state law tort action against a cardiac catheter manufacturer was preempted. The preemption issue in *Riegel*, unlike *Lohr*, involved state law claims challenging the safety and effectiveness of a medical device that had received specific premarket approval by the FDA under the MDA. 128 S.Ct. at 1002. The Court in *Riegel* recognized that in *Lohr* it had "interpreted the MDA's pre-emption provision in a manner 'substantially informed' by the FDA regulation." 128 S.Ct. at 1006. But in the different context of *Riegel*, the Court concluded that the FDA regulation "can add nothing to our analysis but confusion. Neither accepting nor rejecting the proposition that this regulation

can properly be consulted to determine the statute's meaning . . . the regulation fails to alter our interpretation of the text insofar as the outcome of this case is concerned." *Id*. at 1011. *See also Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1572, n.13 (2007) ("Because we hold that the [National Bank Act] itself - independent of [the Office of the Comptroller of the Currency's] regulation - preempts the application of the pertinent Michigan laws to national bank operating subsidiaries, we need not consider the dissent's lengthy discourse on the dangers of vesting preemptive authority in administrative agencies").

While still not without doubt, it is the opinion of this Office that a court interpreting SMCRA's preemption provisions could follow *Lohr* instead of *Riegel*, and be "substantially informed" by OSM's regulations. OSM's regulations posit a permissible interpretation of SMCRA's preemption provisions. SMCRA's legislative history reflects Congress' concern about the adverse land use and environmental harm that had resulted from inadequate regulation of surface coal mining prior to SMCRA. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 278-81, 101 S.Ct. 2352, 2361-62, 69 L.Ed.2d 1 (1981). Given that the congressional focus was on establishing a regulatory scheme that would be more protective of land uses and the environment, a court could conclude, as OSM has, that Congress in section 505(b) did not intend to preempt any more stringent land use and environmental controls adopted by a state, regardless of whether that state has primacy.

Thus, this Office's opinion is that section 505(b) could be held applicable to the analysis of the proposed amendment to House Bill 3348/Senate Bill 3822.[*] The preamble to the amended bill reflects a legislative determination that "surface coal mining operations must be restricted to limit impact on water and scenic vistas." Preamble, House Bill 3348/Senate Bill 3822, as amended. The amended bill does this by denying TWQCA permits for such mining within 100 feet of a state water, or at elevations above 2000 feet that would alter or disturb a ridgeline. These provisions are similar to the more stringent state law land use and environmental provisions identified and incorporated into OSM's SMCRA programs for South Dakota and North Carolina. South Dakota enacted a law prohibiting permits for mining operations if the land to be affected includes land that is "special" or "exceptional," which it defined as having, among other things, scenic, historic, cultural, or recreational significance. S.D. Codified Laws, Ann. Chs. 45-6B-33 and 45-6B-33.3. North Carolina passed a law authorizing its state agency to deny a permit for a mining operation that will either violate standards of water quality or will have a significant adverse effect on a publicly owned park, forest, or recreation area. N.C. Gen, Stat. § 74-51(d)(3) and (5).

If House Bill 3348/Senate Bill 3822, as amended, becomes law, then this Office would expect OSM to issue a revised SMCRA program for Tennessee that identifies and incorporates into

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[*]This Office is of the opinion that the provision in the original House Bill 3348/Senate Bill 3822 withholding TWQCA permits until OSM completes a new EIS would not be construed under SMCRA section 505(b) to be a state law providing for more stringent land use and environmental regulation of surface coal mining. Instead of directly imposing state land use and environmental controls on surface coal mining, this provision attempts to leverage OSM into developing a more stringent federal EIS. The opinion of this Office that this provision would likely be held preempted by SMCRA is unchanged.

the federal program this more stringent state law. It is the opinion of this Office that OSM's regulations providing that more stringent state laws are not preempted in states without SMCRA primacy could "substantially inform" a court addressing the issue of whether the amended bill is preempted by SMCRA. Under SMCRA section 505(b), the provisions of the amended bill could be construed by a court as state law providing for more stringent land use and environmental controls and regulations of surface coal mining than does federal law. Accordingly, it is the opinion of this Office that a court could conclude that the amended bill is not preempted by SMCRA.

2. You have inquired whether the enforcement of House Bill 3348/Senate Bill 3822, as amended, would constitute a compensable taking of any land subject to the provision. As discussed, the amended bill would prohibit the issuance or renewal of TWQCA permits for surface coal mining operations within 100 feet of a state water, or that would alter or disturb any ridgeline more than 2000 feet above sea level.

While there is no set formula for determining when a government's regulation of land use becomes a compensable taking, and no specific facts have been provided in the instant request, a "categorical" or per se taking may be found in the following instances: (1) a property owner is forced to suffer a permanent physical occupation of his property, regardless of the minimal economic impact on the property, *see Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); and (2) a property owner is deprived of all economically viable use of his property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

In establishing regulatory takings doctrine, the United States Supreme Court has applied several factors or tests to determine the constitutionality of government action that effectively denies or limits certain property uses. On the one hand, a statute that substantially furthers important public policies such as health, safety, and the general welfare may so frustrate distinct investment-backed expectations that it amounts to a taking. Beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the United States Supreme Court explicitly recognized that a police power regulation of private property could be so onerous that it was tantamount to an unconstitutional taking. There, the plaintiff coal company had sold the surface rights to particular parcels of property, expressly reserving the right to mine the coal thereunder. The regulation in question, enacted after these transactions, was a statute prohibiting coal mining that would cause subsidence damage to surface structures. The Court, rejecting the nuisance paradigm established in earlier takings cases, held that the act amounted to an uncompensated taking, primarily due to the magnitude of the loss suffered by the owner of the mining rights. 260 U.S. at 415, 43 S.Ct. at 160. The Court concluded that the statute made it commercially impracticable to mine coal and essentially left the mining company with no economic value in the mineral estate. In subsequent cases, however, the Court has allowed certain percentage losses to be tolerated in the name of state police power.

Most regulatory takings challenges today are governed by the three-part test outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In *Penn Central*, the owners of Grand Central Terminal, a designated landmark, were denied

approval to build a fifty-five story tower above the terminal, because the alteration would destroy the aesthetic qualities of the building. The Court considered, first, the character of the government's action, *i.e.*, the type of intrusion, the economic impact of the regulation on the property owner, and, finally, the degree to which the regulation interfered with the owner's reasonable investment-backed expectations. 488 U.S. at 124, 98 S.Ct. at 2659.

As to the nature of the regulation, the Court observed that the government may enact land use laws that adversely affect economic values without resulting in a taking, where, as with zoning laws, the intended purpose is to "enhance the quality of life by preserving the character and desirable aesthetic features" of an area. *Id*. at 129, 98 S.Ct. at 2661. The Court then concluded that, while the law prevented the plaintiff from using certain features of the airspace above the building for expansion, it in no way interfered with the plaintiff's present use of the terminal itself; nor did it prevent Penn Central from realizing a reasonable return on its investment. *Id*. at 136-37, 98 S.Ct. at 2665-66. This case and later cases applying an economic viability test seem to stand for the proposition that diminished value should be measured in reference to the property "as a whole" and not simply to the portion affected by the regulation.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the Court was presented with facts almost identical to those it addressed sixty years earlier in *Pennsylvania Coal Co. v. Mahon*: an act prohibiting all coal mining in areas where subsidence damage could occur. But this time, the Court held that the act did not constitute a taking and distinguished *Pennsylvania Coal* on the grounds that the statute at issue there appeared to have been enacted solely for the benefit of private parties, while the law in *Keystone* was intended to regulate a public nuisance and was in the best interests of the general welfare. 480 U.S. at 485, 107 S.Ct. at 1242. Invoking the *Penn Central* test, the majority also noted that the regulation did not completely prevent the plaintiff from mining coal on any parcel of land. In fact, the percentage loss in economic terms was minimal. As the Court stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 497, 107 S.Ct. at 1248 (quoting *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 326-327, 62 L.Ed.2d 210 (1979)).

Not long after the *Keystone* decision, the Supreme Court established its threshold categorical formulation in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in which it determined that two categories of regulatory action would be compensable without reference to the three-part *Penn Central* type inquiry. But the Court acknowledged that, with respect to the second category, *i.e.*, the deprivation of all economically viable use, it had not clarified the "'property interest' against which the loss of value is to be measured." 505 U.S. at 1016, n.7, 112 S.Ct. at 2894, n.7. The Court went on to suggest that the answer might require an examination of how the property owner's reasonable expectations had been shaped by the state's laws affecting land use. *Id.* at 1016, 112 S.Ct. at 2894.

Applying all of this jurisprudence to the pending legislation that is the subject of this request, it is the opinion of this Office that the provisions of House Bill 3348/Senate Bill 3822, as amended, prohibiting the permitting of surface coal mining operations within 100 feet of state waters, or above

a certain elevation when a ridgeline would be altered or disturbed are, on their face, constitutionally permissible. Any takings analysis of the enforcement of those provisions will be fact-dependent and must rely upon application of the case law and criteria listed above to the specific facts involved.

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