

No. 28478 - DK Excavating, Inc. v. Michael Miano, Director, West Virginia Division of Environmental Protection

**FILED**

**July 6, 2001**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**July 9, 2001**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Maynard, Justice, dissenting:

I would affirm the circuit court's order which ruled that DK Excavating is not required to obtain a surface mining permit under the facts of this case.

The circuit court was correct in holding that DK's proposal to excavate, remove, and sell coal from its two-acre site does not come within the definition of "surface mining," based upon the express exemption in W.Va. Code § 22-3-3(u)(2)(ii) (1997), of "[c]oal extraction authorized as an incidental part of development of land for commercial, residential, industrial, or civic use[.]" Unlike the majority, I am not convinced that this provision is automatically preempted by SMCRA.

The removal of the coal in question is *de minimis*. It concerns a small area and is incidental to the construction of an equipment shop. In light of these facts, I see no reason to make this a federal question.

Accordingly, I respectfully dissent.