

OPINION NO. 79-046**Syllabus:**

Contracts to reclaim strip mined lands, entered into by the Chief of the Division of Reclamation pursuant to R.C. 1513.18, must contain the prevailing rates of wages clause set forth in R.C. Chapter 4115.

To: Robert W. Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio

By: William J. Brown, Attorney General, July 31, 1979

I have before me your request for my opinion in which you ask whether contracts to reclaim strip mined lands, entered into by the Chief of the Division of Reclamation upon the approval of the Director of Natural Resources pursuant to R.C. 1513.18, must contain the prevailing rates of wages clause set forth in R.C. Chapter 4115.

Under R.C. 1513.18, the Chief of the Division of Reclamation is authorized to expend monies from the Strip Mining Reclamation Fund for the sole purpose of reclaiming areas of land affected by strip mining on which an operator has defaulted. The chief, upon approval of the Director of the Department of Natural Resources, may carry out a reclamation plan using the employees and equipment of any division of the Department of Natural Resources. In the alternative, he may enter into a contract with any person, partnership, corporation, association, other

legal entity, or any political subdivision, instrumentality, or agency of the state for the purpose of acquiring such materials, equipment, or labor.

R.C. 4115.04, which provides for a determination of the prevailing rate of wages on public improvements, provides in part as follows:

Every public authority authorized to contract for or construct with its own forces: a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the Department of Industrial Relations determine the prevailing rates of wages of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. (Emphasis added.)

R.C. 4115.03, which sets forth the definitions of various terms used in R.C. Chapter 4115, provides in part as follows:

(B) "Construction" means . . . any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

R.C. 4115.03(C) defines "public improvement," in part, as including ". . . all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works . . ."

Thus, the question becomes whether a reclamation project conducted under R.C. 1513.18 constitutes "construction" of a "public improvement" within the meaning of R.C. Chapter 4115.

The term "construction" has been the subject of several opinions by the Attorney General, and has been defined to include the following activities: the erection of street signs, 1938 Op. Att'y Gen. No. 2161, p. 643; the restoration of highways to their original state after having been damaged by wear or deterioration, 1939 Op. Att'y Gen. No. 1494, p. 2208; the trimming and removal of trees along the streets and highways of a city, 1971 Op. Att'y Gen. No. 71-054; the removal of turbo-generators and related equipment from a municipal building, 1976 Op. Att'y Gen. No. 76-041; and the installation of computers, security systems, and similar equipment, 1977 Op. Att'y Gen. No. 77-076. In 1939 Op. Att'y Gen. No. 1494, p. 2210, my predecessor held that the term "construction" included the restoration of a street to its original condition.

The term "reclamation" has been defined as the ". . . backfilling, grading, resoiling, planting, and other work which has the effect of restoring an area of land affected by strip mining so that it may be used for forest growth, grazing, agricultural, recreational, or wildlife purpose, or some other useful purpose of equal or greater value." R.C. 1513.01(M). Hence, reclamation would seem to fall within those categories of activities that have been held to fall within the definition of construction.

The test generally employed in determining whether a public activity involves "construction," is whether the work contracted for involves a major change in form of or physical change in the public improvement. Clearly, the act of reclamation involves both a major change in the form of and a physical change in the land. Land once mined is restored to its original use, or is brought to a condition supporting an alternative use. Thus, reclamation constitutes "construction" as that term is employed in R.C. Chapter 4115.

There remains to be determined, however, whether reclamation of unreclaimed lands constitutes construction of a "public improvement." It is not at

all apparent whether reclaimed lands come within the statutory definition of "public improvement" set forth in R.C. 415.03(C). That section specifically lists buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, and water works as public improvements, and also includes the general categories of "all other structures or works" within the definition.

You have advised me that in a typical reclamation project, the contractor will, at the very least, be required to reduce existing slopes on the project site, drain and neutralize all waters contained in pools located on the mined site, relocate toxic materials to pit areas and cover them with a minimum depth of non-toxic materials, and level, grade, resoil, fertilize, and seed the surface area. On occasion, the contractor may be required to clear the trees and brush from areas where resoiling material is to be excavated, construct drainage ditches with broken limestone or other stabilizing material, build sediment ponds with associated spillways, or construct haul roads.

Although it is clear that ditches, drainageways, sediment ponds, and haul roads fall within the statutory definition of a public improvement, it is not clear whether the various other aspects of reclamation such as grading, resoiling, and seeding are included as well. Specifically, the question arises whether these activities are included in the phrase ". . . and all other structures or works" contained in R.C. 415.03(C).

There is certainly no basis in the language of the statute that would warrant a restrictive interpretation of the term. To the contrary, the phrase "all other . . . works" is so sweeping in its scope that it would seem to include every conceivable type of project.

Moreover the apparent intent of the General Assembly in enacting legislation of this type supports an expansive interpretation of the term. In 1977 Op. Atty Gen. No. 77-076, I noted that:

The apparent purpose of [the prevailing rates of wages scheme] is to ensure that those individuals participating in public construction are paid the same wages as individuals of the same trade or occupation who are paid pursuant to the terms of a collective bargaining agreement or similar understanding.

In discussing New York's version of the statute, that state's highest court observed: "We are here required to give effect to a unique statutory scheme, one that has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate from a public employer." Bucci v. Village of Port Chester, 22 N.Y.2d 195, 201, 239N.E.2d 335, 338 (1968). As stated by Chief Justice Cardozo in Austin v. City of New York, 258 N.Y. 113, 117, 179 N.E. 313, 314 (1932):

The present statute [the prevailing rates of wages statute] is an attempt by the state to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen, and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view.

In light of the purpose of the prevailing rates of wages statute, the general phrase "and all other structures or works" should be liberally construed to include all aspects of reclamation. To construe the definition otherwise would lead to the anomalous result of protecting those workers on reclamation projects, which require the construction of ponds, drainageways, and haul roads, while excluding those workers on projects which do not require such construction. Such results should, if possible, be avoided.

Thus, it is my opinion, and you are so advised, that contracts to reclaim strip mined lands, entered into by the Chief of the Division of Reclamation pursuant to R.C. 1513.18, must contain the prevailing rates of wages clause set forth in R.C. Chapter 415.