

0073

2005 General

From: Mary Ann Wright
To: kthompson@headwaters.com
Date: 12/15/2005 3:48:33 PM
Subject: draft finding

Keith:

I am forwarding a draft finding (even though it is titled 'final', it is a 'final draft') which we will discuss on Tuesday. Remember, this is a draft, and as far as we know we may not have all the correct information. I will also fax this to you. Call if you have questions, 538-5306.

CC: Keli Beard; Pam Grubaugh-Littig; Priscilla Burton; Steve Alder; Steve Demczak

COVOL

TO: File

THRU: Pam Grubaugh-Littig, Permit Supervisor
Wayne Hedberg, Permit Supervisor

FROM: Mary Ann Wright, Associate Director, Mining

RE: DRAFT FINDING: Covol Engineered Fuels, LC, Wellington, Utah

Date: December 20, 2005

INTRODUCTION

Covol Engineered Fuels, L.C. ("Covol") plans to operate a coal processing plant in Carbon County, Utah. Covol will receive coal from various coalmines and send the coal through a dry air separation process to separate the coal from its impurities.¹ The beneficiated coal will be returned to the mine of origin or possibly sold into the stream of commerce. The Division of Oil, Gas & Mining ("Division") finds, based upon several inspections² of the Covol plant and information provided by Covol, that Covol is engaged in "coal mining and reclamation operations" and will therefore need to obtain a permit from the Division, in accordance with the Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1 et seq. ("Act") and the implementing regulations, Utah Administrative Code R645-100 et seq.

FACTS

On July 13, 2004, Covol sent the Division a proposal to install a 500,000 ton-per-year coal cleaning and blending facility in Carbon County, Utah.³ Covol plans to

utilize patented equipment to beneficiate out-of-specification run-of-mine coal by reducing ash, pyretic sulfur and mercury through a dry air separation process. . . . High ash, high sulfur coal will be delivered to a facility via truck from several sources, including mines, in Carbon and Emery counties. . . . The selected coal to be cleaned will be removed from the appropriate coal storage pile by front end loader and dumped into a receiving hopper. The coal will be conveyed to a vibrating screen and crusher unit. The screened and crushed coal is then conveyed to three (3) air jig cleaning units, according to size. The air jig units are complete with bag houses for particulate collection. This unit

¹ Letter from R. Keith Thompson, Vice President, Covol, to Lowell P. Braxton, Director, Division of Oil, Gas & Mining (July 13, 2004) (hereinafter "Thompson July 13, 2004 Letter").

² State of Utah, Dept. of Natural Resources, Div. of Oil, Gas & Mining, Inspection Report on Inspection of Covol Engineered Fuels, LC, June 15, 2005 ("June 15 Inspection"); State of Utah, Dept. of Natural Resources, Div. of Oil, Gas & Mining, Inspection Report on Inspection of Covol Engineered Fuels, LC, Sept. 28, 2005 ("September 28 Inspection").

³ Thompson July 13, 2004 Letter.

separates the ash and coal using pulsating air. The cleaned coal is then conveyed to a storage silo or several clean coal storage piles. This cleaned coal can be blended to meet specifications for ash, sulfur, mercury content and BTU values. The beneficiated coal is then loaded into trucks via the drive under silo or loading hopper feed by a front end loader.⁴

Covol will store the waste for future use as "road base or fill" or return it to the mine of origin waste stockpile.⁵

Currently Covol is storing 27,080 tons of coal from Pacificorp's Deer Creek Mine.⁶ Covol has contracted with Pacificorp to process approximately 25,000 tons of raw coal each month for a period of one year.⁷ Under this contract, Pacificorp will retain ownership of the coal and Covol will receive a tolling fee for the processing.⁸ Pacificorp retains the right to terminate the agreement based upon Pacificorp's sole judgment that the "process is no longer economically viable to Pacificorp."⁹ Pacificorp has also entered another tolling agreement with Commonwealth Coal Services, Inc. ("Commonwealth")¹⁰ with similar provisions to the Pacificorp Tolling Agreement.

To date, Covol has only contracted to process coal from Pacificorp and Commonwealth. It plans to expand its business to include tolling agreements with other mines, purchasing coal from various sources and selling the coal into the stream of commerce.¹¹

ANALYSIS

Covol operates a "surface coal mining operation" because it crushes, screens and separates the coal from its impurities, it is economically dependent upon the coalmines selling it out-of-specification coal, and because it is not located at the site of ultimate use. Therefore, COVOL must obtain a permit from the Division. It is unlawful in Utah to engage in "surface coal mining operations" without a permit from the Division.¹² "Surface coal mining operations" means:

- (a) Activities conducted on the surface of lands in connection with a surface coal mine These activities include . . . in situ distillation or retorting, leaching or other chemical or physical processing

⁴ Id.

⁵ June 15 Inspection.

⁶ Id.

⁷ Tolling Agreement between Covol and Pacificorp to Process High Ash Waste Coal into Low Ash Clean Coal, ¶ 2 (January 25, 2005) (hereinafter "Pacificorp Tolling Agreement").

⁸ Id. ¶ 3-5.

⁹ Id. ¶ 10.

¹⁰ Tolling Agreement between Covol and Commonwealth to Process High Ash High Waste Coal into Low Ash Clean Coal (July 19, 2005) (hereinafter "Commonwealth Tolling Agreement").

¹¹ Thompson July 13, 2004 Letter; September 28 Inspection.

¹² Utah Code Ann. § 40-10-9(1) (2004 & Supp. 2005).

(b) The area upon which the activities occur or where the activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to the activities, . . . or other property or materials on the surface from or incident to the activities.¹³

Based upon this definition, a person engages in “surface coal mining operations” if (A) the activity falls within one of the listed activities, and (B) the facility operates “in connection with a surface coal mine.”

A. Covol’s Activity Falls Within the Definition of “Surface Coal Mining Operation” Because it Engages in a “Chemical or Physical Processing” of Coal.

“Surface coal mining operations” includes “in situ distillation or retorting, leaching or other chemical or physical processing” of coal.¹⁴ Neither the Act, nor the implementing rules define “chemical or physical processing.” Because the Utah Act closely patterns the federal Surface Mining Control and Reclamation Act (“SMCRA”),¹⁵ the Division looks to federal law, regulations, and interpretations to decipher the meaning of “chemical or physical processing.”¹⁶ SMCRA does not provide a definition for “chemical or physical processing.” However, the Office of Surface Mining Reclamation and Enforcement (“OSM”), the federal regulatory agency, has interpreted “chemical or physical processing” to include both those activities which separate coal from its impurities, and those activities “which do not separate coal from its impurities but which otherwise engage in physical or chemical processing (i.e.: crushing, screening, and sizing facilities).”¹⁷

Covol crushes, screens, and then uses a dry air separation process to separate the coal

¹³ Id. § 40-10-3(20).

¹⁴ Id.

¹⁵ 30 U.S.C.A. § 1201 et seq.

¹⁶ The Utah Coal Mining and Reclamation Act is based upon its federal counterpart, the Surface Mining Control and Reclamation Act, 30 U.S.C.A. § 1201 et seq. (“SMCRA”). SMCRA provides that states may regulate surface mining, so long as the restrictions under state law are no less stringent than those under SMCRA. Id. § 1255. Because Utah is required to implement provisions of SMCRA through state law and the Utah law uses similar, if not identical language to that in SMCRA, the Division relies upon interpretation of SMCRA from the federal regulatory agency, Office of Surface Mining Reclamation and Enforcement (“OSM”), and federal administrative and judicial court decisions in interpreting its own statute.

In interpreting “chemical or physical processing” under SMCRA, 30 U.S.C.A. § 1291(28), OSM originally concluded that only those facilities that separated coal from its impurities needed to be permitted because OSM interpreted “other chemical or physical processing” as being limited by “in situ distillation.” Because “in situ distillation” refers to a process where coal is separated from its impurities, OSM concluded that “other chemical or physical processing” referred to only those processes which separated coal from its impurities. Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Support Facilities and Coal Preparation Plants, 48 Fed. Reg. 20,392, 20,394 (May 5, 1983). OSM changed its interpreting rule to include processing plants that did not separate coal from its impurities after the original rule was struck down by a court as too narrow. Permanent Regulatory Programs; Definitions; Requirements for Permits for Special Categories of Mining; Coal Preparation Plants: Performance Standards, 52 Fed. Reg. at 17,725.

¹⁷ Permanent Regulatory Programs; Definitions; Requirements for Permits for Special Categories of Mining; Coal Preparation Plants: Performance Standards, 52 Fed. Reg. 17,724, 17,725 (May 11, 1987).

from its impurities to increase the Btu of the coal.¹⁸ This activity falls within the definition of “chemical or physical processing” of coal, and therefore, Covol must obtain a permit if it also operates “in connection with” a coalmine.

B. Covol Operates “In Connection with a Surface Coal Mine.”

Neither the Coal Mining and Reclamation Act nor the Utah Administrative Code defines “in connection with a surface coal mine.” As noted above, the Utah Act closely follows SMCRA, and therefore, the Division looks to the federal law for the meaning of “in connection with” a coalmine.¹⁹ Neither Congress nor the OSM have defined “in connection with” a coalmine. However, the phrase has generated extensive discussion from the mining community because the phrase does not clarify that off-site facilities are “in connection with” a coalmine.

To reach off-site facilities, OSM and the Utah Board of Oil, Gas & Mining (“Board”) have adopted regulations requiring “any person who operates a coal preparation plant²⁰ in connection with a coal mine but outside the permit area for a specific mine” to obtain a permit.²¹ OSM refused to define “in connection with” because it believed that “[a]ny attempt to further define this phrase in a regulation would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the applicability of the performance standards of SMCRA in individual cases.”²² Instead, OSM provided a non-exhaustive list of factors that would be appropriate to consider in making a determination of “in connection with” a coalmine. Those factors²³ are:

1. Whether the facility receives a significant portion of its coal from a mine.
2. The economic relationship between the facility and a mine.
3. The functional relationship between the facility and the mine it services. Does the facility have a useful life independent of a mine?
4. Geographic proximity to a mine, although geographic proximity is not a determinative factor.²⁴

¹⁸ See Supra Facts Section.

¹⁹ See Supra note 16.

²⁰ A “coal preparation plant” is “a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation.” Utah Admin. Code R645-100-200. As discussed above, Covol subjects its coal to “chemical or physical processing” and therefore is a “coal preparation plant” under the regulations.

²¹ 30 C.F.R. § 785.21. See Utah Admin. Code R645-302-260.

²² Permanent Regulatory Program; Coal Preparation Plants Not Located Within the Permit Area of a Mine, 53 Fed. Reg. 47,384, 47,385 (Nov. 22, 1988).

²³ The factors come from both the 1983 and 1988 Federal Register. Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Support Facilities and Coal Preparation Plants, 48 Fed. Reg. at 20,393; Permanent Regulatory Program; Coal Preparation Plants Not Located Within the Permit Area of a Mine, 53 Fed. Reg. at 47,385-89.

²⁴ Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Definitions; Requirements for Permits and Permit Processing, 58 Fed. Reg. 3466, 3468 (Jan. 8, 1993) (regulators “may consider geographic

5. The degree of control a mine has over the processing operations.
6. Any other type of integration that exists between a facility and a mine.

Also, a facility will not be considered "in connection with" a coalmine if such facility is located at the "site of ultimate coal use," unless the facility is also located at the site of the mine.²⁵ While the statute and the regulations refer to "mine" singularly, neither OSM nor the Division interprets the language to limit application to activities in connection with only one mine.²⁶

Upon reviewing Covol's operations, the Division finds:

1. Covol's plant is located outside the permit area of any specific mine.
2. Covol is not an end user. At this time, Covol has contracted only to process coal for ultimate end use by Pacificorp and Commonwealth. *(broken)*
3. Covol states that it intends to buy and sell coal on the open market in the future. There is no evidence of Covol entering into that type of arrangement.
3. Covol is not located at the site of an end user.
- 4. At this point in time, Covol will receive all of its coal from either the Deer Creek Mine and the Hidden Splendor Mine (the mine Commonwealth purchases its coal from).
- 5. Covol serves a necessary function of the coalmine operations by processing out-of-specification coal that might otherwise be treated as waste. Covol has no other purpose than to serve a coalmine's need for higher quality coal.
6. Covol is economically dependent upon its contracts with the coalmines.
7. Covol appears to have control over the "chemical or physical processing" of the coal.
8. Under the Pacificorp and Commonwealth Tolling Agreements, Covol does not have the authority to sell the processed coal on the open market. Covol is contractually obligated to return the coal to the mine of origin.

Based upon the above facts, the Division finds that Covol operates "in connection with" a coalmine. While the fact that Covol intends to buy and sell coal on the open market might weigh against permitting, the fact that Covol is currently contractually obligated to serve as a mere processing plant for two coalmines weighs in favor of permitting. Currently, Covol is economically and functionally dependent upon two coalmines. There is no evidence that Covol's

proximity as a factor in determining whether off-site coal processing facilities operate in connection with a mine as long as proximity is not the decisive factor.").

²⁵ Utah Admin. Code R645-302-260. See also Pacificorp v. Office of Surface Mining Reclamation and Enforcement, 143 IBLA 237, 252 (1998) (holding coal processing plant located adjacent to power plant and delivering coal to power plant via conveyor belt did not operate "in connection with" coalmine because it was located at site of ultimate coal use and not located at site of mine).

²⁶ Permanent Regulatory Program; Coal Preparation Plants Not Located Within the Permit Area of a Mine, 53 Fed. Reg. at 47,388.

plans to buy and sell coal on the open market will be realized. The Division makes its decision with the facts before it as of now and finds that Covol operates "in connection with" a coalmine.

CONCLUSION

Covol is engaged in "coal mining and reclamation operations" because (1) by crushing, screening, and running the coal through an air separation devise, Covol will be engaging in the "physical processing" of coal; and (2) Covol operates "in connection with" a coalmine because it is functionally and economically dependent upon coalmines and because it is not located at the "site of ultimate coal use." Therefore, Covol must obtain a permit from the Division.