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June 2, 2005

Via E-Mail and U.S. Mail

Pamela Grubaugh-Littig
Permit Supervisor
Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
Salt Lake City, Utah 84114-5801

**RE: UtahAmerican Energy, Inc., Lila Canyon Extension, Overland Conveyor,
Loadout and Rail Spur**

Dear Ms. Littig:

Thank you for meeting with Jay Marshall and me on Wednesday, May 25, 2005, to discuss a proposed conveyor, loadout and railroad spur to be located near UtahAmerican Energy Inc.'s ("UEI's") Lila Canyon Extension, Horse Canyon Mine in Emery County, Utah (Permit No. 007/0013). Construction on these facilities is anticipated to begin in April, 2006. As we discussed, it is UEI's position that these facilities do not fall within the definition of "surface coal mining operations" and will not need to be permitted under the federal Surface Mining Control and Reclamation Act ("SMCRA") or the Utah Coal Mining and Reclamation Act ("UCMRA"). Per the request of the Utah Division of Oil, Gas & Mining ("Division"), and on behalf of UEI, this letter sets forth the reasons why these facilities do not need to be permitted under SMCRA or UCMRA.

FACTUAL SUMMARY

UEI or one of its affiliates, American Coal Sales, Inc., or WyAmerican Energy, Inc., is proposing to construct a coal transportation system including: (1) an overland conveyor to transport coal some 3.25 miles from the Lila Canyon Extension, and possibly other mines, to a stockpile at new unit train loadout; (2) a new loadout located 3.25 miles from the Lila Canyon Extension and four miles from the main rail track where coal from the Lila Canyon Mine, and possibly other mines, will be loaded into train cars; and (3) a new railroad spur approximately 4 miles long from the loadout to the main rail track near U.S. Highway 6. UEI provided the Division with diagrams of these proposed facilities at our meeting with you on May 25, 2005.

Where possible, the conveyor right of way will be incorporated within the Emery County road right of way which crosses public land managed by the Bureau of Land Management ("BLM"). Use of the overland conveyor will greatly reduce truck traffic on the county road.

SALT LAKE CITY, UTAH
PHOENIX, ARIZONA
TUCSON, ARIZONA
IRVINE, CALIFORNIA
DENVER, COLORADO
LAS VEGAS, NEVADA

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DIV. OF OIL, GAS & MINING

The overland conveyor will require a right of way approximately 100 feet wide which will affect portions of some 40 acres of BLM lands. The conveyor will be 42 inches wide and will be covered. The overland conveyor could potentially become a commercial conveyor, transporting coal from additional nearby mines to the rail spur for transportation to market by Union Pacific Railroad or the Utah Railroad.

The proposed railroad spur will require a 100-foot right of way and a 24-foot wide bed, constructed to the specifications of the Union Pacific Railroad. A minimum of 4.5 million tons of crushed coal per year will be transported on the railroad spur, but no crushing, washing, or screening of the coal will be performed at the loadout. An average of 1.25 trains per day will travel on the spur once the mine is in full production. Additional trains are anticipated to use the spur if other mines in the area use these facilities. The proposed surface facilities will require rights of way grants from the BLM and an environmental analysis under the National Environmental Policy Act ("NEPA").

The Emery County road is a public road that will be constructed within a county right of way to be acquired from BLM. The Division has previously determined that the Emery County road is a public road and is not included in the Lila Canyon Extension, Permit No. 007/0013. Therefore, the focus of this analysis is on whether the overland conveyor, loadout facility and the railroad spur should be included in the permit for the Lila Canyon Extension.

ANALYSIS

The federal SMCRA defines "surface coal mining operations" as:

activities conducted on the surface of lands in connection with a surface or coal mine . . . the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, [and] loading, of coal for interstate commerce at or near the mine site.

Emphasis added. Section 701 SMCRA § 28(A); 30 U.S.C. § 1291(28)(A); *see* UCMRA § 40-10-3(20)(a). Furthermore, the areas upon which such activities occur include:

any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site or

such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

Emphasis added, SMCRA § 1291(28)(B); *see* UCMRA § 40-10-3(20)(b).

The federal regulations at 30 C.F.R. § 816.81 also require that “support facilities” be operated in accordance with the permit for the mine or preparation plant to which they are incident or from which their operation resulted. *See* Utah Admin. Code R645-301-526.220. The term “preparation plant” means a facility where coal is subjected to chemical or physical processing or cleaning, concentrating or other processing. 30 C.F.R. § 701.5; R645-100-200.

Notably, the definition of “support facilities” was suspended by the federal District Court for the District of Columbia *In re: Permanent Surface Mining Regulation Litigation II*, No. 79-114 (D.D.C. July 6, 1984). As a result, the definition of the term “support facilities” was removed from the federal regulations by the Office of Surface Mining Reclamation and Enforcement (“OSM”) at 53 Fed. Reg. 47378 (Nov. 22, 1988), enclosed. The Court found that OSM had no lawful basis for a geographic limitation in determining whether activities at surface facilities were “resulting from or incident to” a mine or preparation plant. OSM concluded that “determination as to whether an off-site area or facility is subject to regulation under Section 701(28)(A) of SMCRA would be made on a case-by-case basis.” *Id.* at 2. OSM suggested that “consideration of proximity, as well as function” are valid criteria but that these factors must be applied with “reasonable flexibility” to “the myriad site-specific situations.” *Id.* at 4. Economic independence is also recognized as valid consideration. *Id.* at 7. Environmental impacts were discounted as a factor by OSM, noting, “This Act [SMCRA] was not intended to regulate other industrial facilities not associated with mines even if the facilities involve some coal-related activity and even if they would have undesirable environmental impacts.” *Id.* at 8.

1. DIVISION PERMITTING OF SUPPORT FACILITIES

A review of support facilities that are permitted under the Utah Coal Program confirms that UEI’s conveyor, loadout and railroad spur do not need to be permitted under the UCMRA. Consistent with OSM’s policies and the Utah Coal Program, the Division has regulated support facilities under the UCMRA on a “case-by-case” basis. Generally, support facilities unrelated to mining operations which do not involve coal processing are not included in a permit. The overland conveyor at the Skyline Mine, C/007/0005, is permitted. However, this support facility, unlike UEI’s proposed overland conveyor, is integrated into the processing operations of the Skyline Mine. The overland conveyor and surface facilities at the Skyline Mine are constructed

on three different bench elevations. The conveyor processes coal through steel drop tubes between the various bench elevations to a feeder breaker which crushes and blends coal. *See* Skyline Mine MRP §§ 3.2.4; 4.20.2. Similarly, at the Co-op Bear Canyon Mine, C/015/0025, conveyor belts which are associated with coal processing are permitted as part of the Mine. *See* Bear Canyon MRP, § 3.3.4 Coal Handling, Storage and Loading, pp. 3-3, 3-29. Additionally, conveyors associated with Savage Coal Terminal processing and loadout facility are permitted as part of the process involving coal crushing, screening, washing and preparation. *See* MRP for Castle Valley Spur Processing and Loadout Facility Permit Application (now the Savage Coal Terminal), § 3.2.5.3 at p. 3-27 to 3-29. By contrast, UEI's overland conveyor moves coal to market by a loadout facility and rail spur and does not involve transportation to a preparation plant for coal crushing, screening or washing. The conveyor is simply a means of offsite coal transportation not associated with the mine or a preparation plant. Because UEI's overland conveyor is only used for transportation of coal and is not associated with coal processing, the conveyor does not need to be permitted.

In addition, loadout facilities are subject to permit under the UCMRA depending upon whether they are associated with a mine or processing plant or simply function as an industrial loadout facility transporting coal. *Compare* the permitted Wildcat Loadout facility associated with Andalex Centennial Project (Wildcat Loadout MRP, C/007/00033, at pp. 57-61) and the permitted Savage Coal Terminal (formerly C.V. Spur Coal Processing and Loadout Facility, § 3.3.4 at 3-36) with the unpermitted Ridge Road industrial loadout facilities. The UEI loadout facility is more similar to the Ridge Road loadout in that it is located offsite from a mine and has the potential for accepting coal from more than one mine site. In addition, no coal crushing, washing or screening operations will be conducted at the UEI loadout. Accordingly, the loadout facility does not require permitting.

Finally, the rail spur servicing UEI's loadout is the facility furthest removed from the mine site, is only used for transporting rather than processing coal and should not be permitted. In this regard, the UEI railroad spur is similar to Co-op's rail spur and loadout facility which is unpermitted. Both of these rail spurs are distinguishable from those which are located onsite at a processing facility or mine such as the railroad loop within the C.V. Spur, formerly owned by Beaver Creek Coal Company and now owned by Savage Services Corporation. *See* MRP, C.V. Spur Processing and Loadout Facility Permit Application at 3-27.

2. OSM PERMITTING OF SUPPORT FACILITIES

OSM and the Interior Board of Land Appeals ("IBLA") have applied the preamble policy set forth by OSM in the 1988 federal register discussion of the term "support facilities" on a case-by-case basis in considering whether support facilities need to be permitted under SMCRA.

In *Citizens Coal Council, et al.*, 142 IBLA 33 (1997), enclosed, the IBLA determined that the proper statutory standard in determining whether activities or facilities are "surface coal

mining operations” that require a permit is whether the activities or facilities are “resulting from or incident to” the surface coal mining activities. In that case, the IBLA was asked to determine whether a railroad and a pipeline that were used solely to transport coal from surface mines to electrical generating stations were “surface coal mining operations” that would require a permit in accordance with the provisions of SMCRA.

The IBLA referred to the preamble to OSM’s 1988 rulemaking, discussed above, as providing three factors that should be addressed in deciding whether a facility is properly considered to “result from or be incident” to surface coal mining activities: “(1) whether the facility is geographically proximate to the producing mine; (2) whether the facility is functionally tied to the particular mine in question; and (3) whether the facility is economically dependent upon that particular mine.” *Id.* The court then concluded that, based on these criteria, the railroad and pipeline did not constitute facilities “resulting from or incident to” regulated surface coal mining activities. *Id.*

First, the IBLA found that the railroad and pipeline both originated from and traversed a small portion of the permitted area, but a large portion of the railroad and pipeline (perhaps as much as 60 miles) was located away from the mines. Therefore, the facility was not geographically proximate to the producing mine. Second, the IBLA found that the railroad and pipeline were functionally tied to and economically dependent on the surface coal mining activities, but only in the sense that they transport all of the coal from the mine to the final point of use. However, neither the pipeline nor the railroad were functionally tied to the actual operation of coal mining activity; rather, they were only tied to transportation of the coal. Therefore, the IBLA found that neither the road nor the pipeline were functionally tied or economically dependent on the mine. As such, the railroad and the pipeline were not “surface coal mining operations” within the meaning of SMCRA and were not subject to the permitting requirements of the Act.

Also, in *PacifiCorp v. OSM*, 143 IBLA 237 (1998), the IBLA considered whether the Hunter Coal Preparation Plant must be permitted under SMCRA if operated in connection with a power plant instead of a mine. The Preparation Plant was located adjacent to the Hunter Power Plant and received coal from three mines: the Cottonwood/Wilberg Mine, the Deer Creek Mine and the Trail Mountain Mine which were located from 12 to 23 miles from the Preparation Plant. OSM and the Utah Division differed in their determination as to whether the preparation plant was a “surface coal mining operation” requiring a permit. The Division’s determination that the preparation plant did not need a permit was challenged in a citizen’s complaint resulting in a ten-day notice issued by OSM. The Division’s position that a permit was not needed at the Preparation Plant ultimately prevailed before the IBLA. Reviewing the legislative intent of SMCRA and following the 1988 preamble policy, the IBLA found convincing evidence that the intent of the statutory scheme was “not to require the permitting of a preparation plant located at the point of ultimate coal use unless the plant was located at the site of the mine.”

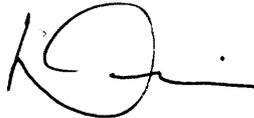
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Applying *Citizen's Coal* and the *PacifiCorp* precedent to UEI's facilities, whether the overland conveyor, loadout facility or rail spur will be considered to be "surface coal mining operations" depends on whether these facilities are geographically proximate to the producing mine, whether they are functionally tied to the Lila Canyon Extension, and whether they are economically dependent on the mine. First, it appears that the rail spur, loadout and overland conveyor are mostly located away from the mined area. A portion of the conveyor crosses the Lila Canyon Extension but the majority of the conveyor is located offsite. In addition, the overland conveyor solely functions to transport coal and is not part of the processing activities at a mine or processing facility. The rail spur and loadout are both located entirely offsite and away from the mine. The rail spur loadout and conveyor are tied to the mine only in the sense that they are used to transport the coal from the mine to the eventual point of end use. Coal is not processed at the conveyor or the loadout and neither is used in the actual coal mining activities. Coal is not crushed, washed or screened at the loadout facility and cannot, as such, be defined as an offsite coal preparation plant subject to R645-302-260. Thus, the overland conveyor, loadout facility and the rail spur do not have the functional tie to the mine to require permitting. Finally, the overland conveyor, loadout facility and rail spur may be used to transport coal from nearby mines. In such case, these facilities will be even further removed from economic dependency on any one mine or permit.

In reviewing these factors, it is clear that UEI's surface facilities are not "surface coal mining operations" subject to permitting requirements under SMCRA or UCMRA. Neither the rail spur, the loadout nor the conveyor have a functional tie to the mining operation, they are merely used to transport the coal away from the mine to market. The loadout does not chemically or physically process, clean or concentrate coal. Also, these facilities may have additional commercial uses that make them further financially independent from the mine. Therefore, we urge the Division not to include these facilities in the Lila Canyon Extension Permit.

Please give me a call if you have any questions regarding this matter.

Very truly yours,



Denise A. Dragoo

DAD:jmc:352048

Enclosures

cc: Michael McKown, Esq. (via e-mail and U.S. mail)
Michael Gardner, Esq. (via e-mail and U.S. mail)
Clyde Borrell (via e-mail and U.S. mail)
Jay Marshall (via e-mail and U.S. mail)

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Citation: **53 Fed Reg. 47379**

53 FR 47378

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

30 CFR Part 701

Permanent Regulatory Program; Definitions; Support Facilities

53 FR 47378

November 22, 1988

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is removing the definition of *support facilities* from its regulations because a definition is not needed in order to ensure that such facilities are regulated under the Surface Mining Control and Reclamation Act ("the Act" or SMCRA). OSMRE has determined that the identification of facilities that support surface coal mining operations has been conducted in a manner consistent with the intent of SMCRA during those periods when there has been no definition in Federal regulations (prior to the 1983 introduction of a definition and since the 1985 suspension of the definition).

EFFECTIVE DATE: December 22, 1988.

FOR FURTHER INFORMATION CONTACT: Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5950 (Commercial or FTS).

TEXT:

SUPPLEMENTARY INFORMATION:

I. Background

II. Discussion of Final Rule

III. Response to Comments

IV. Procedural Matters

I. Background

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq. ("the Act" or SMCRA), sets forth general regulatory requirements governing surface coal mining and the surface impacts of underground coal mining. Sections 701(28) (A) and (B) of the Act define *surface coal mining operations* subject to regulation under the Act to include (A) specific activities conducted in connection with a coal mine and:

(B) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities or other property or materials on the surface, resulting from or incident to such activities; * * *

OSMRE had initially proposed a definition of "resulting from or incident to" on September 18, 1978 (43 FR 41801). However, following review of comments on the proposed definition, OSMRE decided not to include it in the final regulations issued on March 13, 1979. In the preamble to those final regulations (44 FR 14915), OSMRE stated that "a meaningful definition which would cover all situations is not possible." Instead, the determination as to whether an off-site area or facility would be subject to regulation under section 701(28)(B) of SMCRA would be made on a case-by-case basis. Further guidance was provided in the discussion of permitting requirements for support facilities and coal processing plants at § 785.21 (44 FR 15095). In that discussion, OSMRE stated that regulatory authorities would be required to extend their permit requirements to include all facilities on the mine site and all facilities incident to the mine at or near the site.

On May 5, 1983, in an attempt to further clarify which facilities were subject to regulation under section 701(28)(B) of SMCRA, OSMRE defined the term *support facilities* (48 FR 20401). In the 1983 definition, OSMRE included in regulations an interpretation of the phrase in section 701(28)(B) of SMCRA, "resulting from or incident to," to connote an element of geographic proximity. Facilities regulated as support facilities were to be determined, in part, based upon their location relative to a regulated activity.

The 1983 definition was challenged in the U.S. District Court for the District of Columbia in *In Re: Permanent Surface Mining Regulation Litigation II*, No. 79-114 (D.D.C. July 6, 1984) (*In Re: Permanent II*). Plaintiffs maintained that there was no lawful basis for a geographic limitation in the definition, and that the statutory language, "resulting from or incident to," connotes a functional relationship. The court determined that there was no evidence to support OSMRE's conclusion that areas that result from or are incident to activities must be located near those activities. The court found that a limitation based solely on proximity could not stand. *In Re: Permanent (II)*, Slip op. at 20-23.

On July 10, 1985, in response to the court's finding, OSMRE published an interim final regulation (50 FR 28186) suspending the definition of *support facilities*. At the same time, OSMRE proposed the removal of the definition (50 FR 28180). OSMRE further stated in those rulemakings that it had determined that a definition of *support facilities* was not needed, and that there was no need to amplify the language of section 701(28)(B) of the Act with respect to the meaning of the phrase "resulting from or incident to" a regulated activity.

Nine comments were received from representatives of the coal industry, environmental organizations, and State regulatory authorities on the 1985 proposal to delete the definition of *support facilities*. All commenters favored retention of a definition to clarify which types of

facilities would be subject to regulation as support facilities. Because of the expressed interest in having a regulatory definition, OSMRE reconsidered possible definitions. On May 11, 1987, OSMRE stated in the preamble to a final regulation defining "coal preparation" (52 FR 17724) that it would propose a new definition of *support facilities*. However, for reasons discussed in the following section of this preamble, "Discussion of Final Rule," OSMRE did not propose a new definition.

In order to ensure full consideration of opinions on this issue, OSMRE undertook an extensive outreach effort involving the participation of interested parties from industry, environmental groups, State regulatory authorities and professional societies. This included holding facilitated outreach meetings to provide interested parties with an opportunity to comment on draft rule language and to fully discuss issues relative to this proposed rulemaking.

In addition to embarking on the outreach effort and reconsidering possible definitions, responsible officials in each of OSMRE's field offices were consulted to determine if support facilities have been adequately identified by States. The results of that consultation, as well as the outreach effort, are discussed in the following section of this preamble, "Discussion of Final Rule."

Finally, on January 29, 1988, the U.S. Court of Appeals issued a decision which overturned the decision in *In Re: Permanent (II)* concerning whether proximity could be considered in determining SMCRA's jurisdiction over off-site facilities. (*NWF v. Hodel*, 839 F.2d 694, 765-766 (D.C. Cir., 1988) ("*NWF*"). The court of appeals affirmed the Secretary's incorporation of a consideration of proximity in the 1983 definition of *support facilities*. Specifically, the court stated that the "phrase 'resulting from or incident to' clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some type of limiting principle of proximate causation * * *." (*NWF*, 839 F.2d at 745). The court of appeals reinstated the provision which stated that "resulting from or incident to an activity connotes an element of proximity to that activity." Based on this ruling, OSMRE reinstated the definition of *support facilities* on June 9, 1988 (53 FR 21767).

On June 22, 1988, OSMRE proposed to amend its permanent program regulations at 30 CFR 701.5 by removing the definition of *support facilities* (53 FR 23522). Removal was re-proposed rather than taking final action on the similar proposal of 1985 (50 FR 28180) because of the public expectation that a new definition would be forthcoming following OSMRE's statement to that effect in the final rulemaking defining "coal preparation" (52 FR 17724). This allowed all interested parties to consider again the proposed removal and comment on it prior to any final effect.

In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSMRE provided a 45-day public comment period. OSMRE received comments from three organizations: A State regulatory authority, a representative of a coalition of environmental groups, and a representative of the coal industry. No public meeting was requested and none was held.

II. Discussion of Final Rule

OSMRE is removing the definition of *support facilities* from 30 CFR 701.5. Although comments on the 1985 proposed removal of the definition of *support facilities* (50 FR 28180) favored having a definition, generally because it would help in interpreting which facilities should be subject to regulations, outreach discussions with commenting parties indicated that the interest in having a definition was not strong. The 1987 outreach consultations focused, in particular, on an effort to identify those categories of facilities which would always be considered support facilities and those which would never be support facilities. OSMRE was unable to develop a definition of *support facilities* based upon categories of facilities. Any

such definition would involve high potential for either under- or over-inclusive findings when applying the criteria of "resulting from or incident to."

In addition, the outreach participants expressed the concern that having a definition could be harmful in that it would limit the ability of regulatory authorities to make case-by-case determinations of what is "resulting from or incident to." Indeed, during the discussions there developed considerable support for making the proposed removal of the definition final.

Concurrent with the outreach effort, responsible officials in each of OSMRE's field offices were consulted to determine if support facilities have been adequately identified by States. While only two approved State programs contain a definition of *support facilities*, rarely have objections been raised to OSMRE concerning the administration of State programs on this issue. In fact, there have been only two instances where OSMRE has issued a ten-day notice to a State with an approved program questioning whether or not particular facilities should be regulated as support facilities.

In consideration of OSMRE's experience with this issue, it appears that regulatory authorities are capable of identifying off-site facilities that should be subject to the provisions of SMCRA without having a definition of *support facilities* in Federal regulations. In fact, there appears to be no significant difference in the administration of State programs with or without a Federal definition. OSMRE believes that the term "resulting from or incident to," in the context of the rest of the language of section 701(28) of SMCRA, provides adequate guidance to regulatory authorities in the identification of facilities that support surface coal mining operations. Having considered the court's decision, OSMRE will again recognize that the consideration of proximity, as well as function, is valid in determining whether facilities are "resulting from or incident to" regulated activities. The agency is dealing with industrial practices of great complexity (*NWF*, 839 F.2d at 745). It is imperative that OSMRE's regulations provide reasonable flexibility to implement the statute in a manner that considers the myriad site-specific situations that cannot be fully anticipated in a Federal regulation.

OSMRE will continue to monitor, through existing oversight and annual evaluation mechanisms, the interpretation by regulatory authorities of the term "resulting from or incident to." If, as a result of this monitoring, it is determined that there has developed a need for additional guidance or regulatory action, OSMRE will take appropriate action.

III. Response to Comments

Two commenters supported the proposed removal. One commenter suggested that, because the definition merely gives examples of facilities which may be regulated, and the definition of *surface coal mining operations* provides sufficient guidance to enable regulatory authorities to identify such facilities, a definition of *support facilities* is not needed. The second commenter expressed support for the court of appeals finding that the consideration of an element of proximity is a reasonable approach to determining when the facilities in section 701(28)(B) of the Act are "resulting from or incident to" the activities in (A). This commenter also endorsed the court's finding that interpreting the scope of such a statutory phrase is, as the court stated, "an obvious example of the sort of congressional delegation of policy choices to an agency the courts are bound to respect."

One of these supporting commenters went on to suggest that OSMRE should also remove the performance standards for support facilities in 30 CFR 816.181. Because such facilities must be operated in accordance with the permit issued for the mine which they support and must comply with all other performance standards, the commenter maintained, special performance standards are not needed.

OSMRE has noted this suggestion. However, the performance standards of 30 CFR 816.181

are beyond the scope of this rulemaking.

The commenter opposing the removal of the definition of *support facilities* suggested that the June 9, 1988, reinstatement of the definition had the effect of classifying certain coal preparation activities (e.g. crushing, sizing, screening) as activities of support facilities rather than as surface coal mining operations. This, the commenter maintained, conflicts with the express direction given the Secretary in *In Re: Permanent II* and warrants the promulgation of a final definition that conforms to the decision in *In Re: Permanent II*.

OSMRE recognizes that an argument can be made that the coal preparation facilities of concern to the commenter could be considered to be support facilities under the reinstated definition but does not agree that this is a problem or that it warrants redefining *support facilities*. The reinstatement was made in response to the direction of the court of appeals. Thus, regardless of whether or not it conflicts with the direction given in *In Re: Permanent II*, it was necessary to comply with the higher court's decision. The Office is taking actions, in this rulemaking and in another final rule, fully consistent with the decision of the court of appeals reversing the finding of the lower court relative to the scope of regulation of coal processing. (see separate final rule for Coal Preparation Plants Not Located Within the Permit Area of a Mine in this issue of the Federal Register, proposed June 22, 1988; 53 FR 23526).

This same commenter suggested the need to redefine *support facilities* to assure uniform regulation among all states. Lack of a definition, the commenter maintained, would result in having no minimum national standards for identifying such facilities and would leave the States, the public, and the industry with no guidance on the scope of regulated support facilities. Industry would be subject to more after-the-fact liabilities and the public would be deprived of intended statutory protection, the commenter asserted. In addition, the commenter suggested, States will inevitably diverge widely in their decisions on the scope of regulation of facilities, and OSMRE will have no basis upon which to exercise Federal jurisdiction where States fail to act. One result, the commenter maintained, will be "forum shopping," particularly in the Kentucky-Ohio-West Virginia border area, for the least restrictive State policy on support facilities, a result which Congress intended be avoided.

OSMRE believes that adequate guidance exists to regulatory authorities in the statutory definition of *surface coal mining operations*. This belief is reinforced by OSMRE's and the State's experience in identifying support facilities as discussed elsewhere in this preamble. OSMRE is concerned that any attempt to be too prescriptive in regulation covering the broad spectrum of possible facilities would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the jurisdiction of SMCRA in individual cases. Categorical exclusions or inclusions would almost certainly result in inappropriate applications of the rule in some instances. Further, the court of appeals explicitly acknowledged the legal defensibility of OSMRE's "flexible implementation of the statute that allows regulatory authorities to 'consider the myriad site specific situations that cannot be fully anticipated in writing a Federal regulation.' 48 FR 20397 (1983)." NWF, 839 F.2d at 745.

As noted in this preamble, OSMRE had initially proposed a definition of "resulting from or incident to" on September 18, 1978 (43 FR 41801). However, based on comments received and following further consideration, OSMRE excluded the definition from the 1979 final regulations and chose, instead, to take a case-by-case approach to identifying support facilities. The history of the program shows that there has not been a compelling need to have such a definition.

Concerning the commenter's assertion about "forum shopping," this simply has not been OSMRE's experience. OSMRE has verified that only two States, Ohio and Virginia, define *support facilities* in their program rules. These definitions, which have been approved by OSMRE as "no less effective" than Federal requirements, will not have to be removed as a result of the removal of the definition of *support facilities* at 30 CFR 701.5. To the extent

operators wish to take into account any aspect of a State's regulatory program and its implementation in determining the location of facilities, they are free to do so. However, OSMRE has seen no evidence that such considerations are likely to override other more significant economic factors, such as transportation availability and costs and ease of access and communications, when an operator is deciding on the location of support facilities.

In addition to maintaining that a definition of *support facilities* is necessary, this same commenter provided an interpretation of section 701(28)(B) of the Act upon which to base the definition. The commenter suggested that there are six discernable subcategories of section 701(28)(B): (1) The areas upon which section 701(28)(A) activities occur; (2) the areas where section 701(28)(A) activities disturb the land surface; (3) adjacent lands the use of which is incidental to section 701(28)(A) activities; (4) all lands affected by new roads or improvements of existing roads for haulage or access; (5) excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, and shipping areas; and (6) other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities. Those specific areas enumerated by Congress, the commenter maintained, such as roads, excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas and shipping areas, etc., because of their enumeration by Congress, are "resulting from or incident to" activities in section 701(28)(A).

The commenter quoted Senate Report 95-128: " 'Surface coal mining operations' also includes all areas upon which occur surface mining activities and surface activities incident to underground mining. It also includes all roads, facilities[,] structures, property, and materials on the surface resulting from or incident to such activities, *such as* refuse banks, dumps, culm banks, impoundments and processing wastes.' " (Emphasis added by commenter). The areas identified in (B), the commenter maintained, were thus listed as specific examples of areas which Congress determined to be resulting from or incident to activities in (A). The phrase "and other areas * * *" the commenter continued, was included to cover any other areas which Congress did not delineate. It is only for this latter unidentified "other areas upon which are sited structures, facilities or other property or materials on the surface" that OSMRE must create a criterion for determining which facilities are "resulting from or incident to" activities in (A), the commenter concluded.

OSMRE disagrees with the commenter's interpretation of section 701(28)(B) and cites the court of appeals: "At issue in the interpretation of § 701(28)(B) is the scope of 'processing areas * * * and other areas upon which are sited structures, facilities or other property or materials on the surface resulting from or incident to such activities.' " Later in the same paragraph, the court refers to "processing areas * * * resulting from or incident to such activities." Clearly, the court of appeals decision provides a basis for OSMRE's interpretation that the phrase "resulting from or incident to" modifies "processing."

In addition, contrary to the commenter's assertion, the phrase "resulting from or incident to" clearly does modify all those other areas specified in section 701(28)(B) of the Act. OSMRE does not believe that the enumeration by Congress of examples in section 701(28)(B) was intended to reach any such facilities which are not resulting from or incident to a mine. If the enumeration were intended to reach such facilities, then all impoundments and dams nationwide would be subject to SMCRA regardless of whether or not they had anything to do with a coal mine. Certainly Congress did not intend OSMRE to regulate cattle-watering agricultural impoundments or major water project impounding structures without any coal mining association. Congress did not intend that "shipping areas" regardless of their association with mines be regulated under SMCRA. It is unreasonable to assume that Congress intended to regulate all coal processing at industrial facilities nationwide, absent

any relationship to a mine. Rather than enumerating the examples in section 701(28)(B) as always-regulated types of facilities, irrespective of whether or not they are associated with coal mines, OSMRE believes that Congress identified them as examples of facilities that will be regulated if they are "resulting from or incident to" activities in connection with a mine.

This commenter suggested an approach to defining *support facilities* involving the identification of specific classes of facilities which would categorically fall within or outside of the regulatory ambit of SMCRA, coupled with the identification of those in the gray area where more site-specific analyses would be applied. In addition, the commenter provided some examples of how case-by-case decisions could be made for those facilities that would be covered explicitly in the definition. A coal transfer operation (e.g. from truck to rail) dedicated solely to coal transfer would clearly be dependent on and resulting from coal extraction activities, the commenter asserted. The commenter suggested that a transfer operation, which also transferred some other commodity, like grain or rock, where coal was not a significant factor in the economic viability of the enterprise, would not likely be found to be resulting from coal extraction activities.

In 1987, in consultation with regulatory authorities and representatives of the coal industry and environmental organizations, OSMRE developed for consideration a three-tiered approach to defining *support facilities*. As mentioned already in this preamble, OSMRE concluded that any definition that categorized property as always regulated, never regulated, or sometimes regulated would involve high potential for finding instances within each category in which the criteria of "resulting from or incident to" would be applied either under- or over-inclusively.

Thus, not only must OSMRE reject the commenter's particular categorization of facilities based on the interpretation of section 701(28)(B) of the Act, but the Office reaffirms its long-held belief that any attempt to categorize such facilities in the context of a definition of *support facilities* would lead to the inappropriate application of SMCRA.

On the question of what factors should be considered in determining whether or not a facility is "resulting from or incident to" an activity in section 701(28)(A) of the Act, the commenter suggested that the determination should hinge on whether or not the facility is resulting from or incident to the types of activities included in the definition, rather than be based on an integration of ownership or control with a specific regulated mining activity. The commenter further maintained that Congress was concerned with regulating these facilities wherever impacts occurred regardless of whether the facility was independently operated or was part of an integrated mining operation. The basis for the determination, the commenter asserted, should be the economic viability of the facility independent of the mining activity.

OSMRE agrees. Economic independence is a valid consideration in determining whether a facility is a support facility. Indeed, OSMRE would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which the facility results from or is incident to a regulated mining activity.

An additional consideration in identifying support facilities, the commenter suggested, would be whether the environmental and public health and safety impacts of the support area are regulated by other agencies for water discharges or other environmental impacts. This would not mean, the commenter continued, that areas should be excluded from regulation based on the magnitude of impact or on the basis that OSMRE's regulations would not fully mitigate the impacts. Instead, the commenter urged, it should be a consideration of whether there are, in close cases, unaddressed coal-related environmental impacts of the sort that Congress sought to remedy, such as toxic runoff, proximity to dwellings, surface or groundwater contamination. For example, the commenter suggested, as a practical matter, extended storage of coal would likely cause impacts on both the subsurface hydrology and surface water quality from runoff. Absent the application of SMCRA, the commenter

continued, such impacts would be classified as "non-point" pollution under the Clean Water Act and subject to no regulatory controls. The commenter reminded OSMRE that the Office has previously acknowledged that if not regulated, support areas can cause acid and toxic drainage and will be left unreclaimed when they are no longer needed, creating a safety and environmental hazard.

OSMRE does not agree that the consideration of environmental effects in this context is relevant to the determination of whether a "resulting from or incident to" relationship exists. In fact, OSMRE considered this concept during its 1987 outreach activities on this rule but was convinced by the negative comments received, and by further review of the definition of *surface coal mining operations* at section 701(28) of the Act, that such a consideration is irrelevant to determining "resulting from or incident to," and therefore inappropriate. Congress passed this Act to require environmental protection and reclamation at coal mines and for activities and areas associated with coal mines. This Act was not intended to regulate other industrial facilities not associated with mines even if the facilities involve some coal-related activity and even if they would have undesirable environmental impacts. Therefore, whether there is jurisdiction to regulate a particular facility under some other environmental statute must be irrelevant to a determination of whether there is jurisdiction to regulate the facility under SMCRA. The facility either is or is not properly subject to jurisdiction under SMCRA. Also, the reach of any other statute concerning the facility cannot be affected by whether or not there is jurisdiction under SMCRA.

Effect in Federal Program States and on Indian Lands

The proposed rule would apply through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 respectively. The proposed rule also would apply through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

IV. Procedural Matters

Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

Executive Order 12291

The Department of the Interior has determined, in accordance with the criteria of Executive Order 12291 (February 17, 1981), that this rule is not major and does not require a regulatory impact analysis because it will not affect existing costs to the coal industry and coal consumers, and will not adversely affect competition, employment, investment, productivity, or innovation.

Regulatory Flexibility Act

The Department of the Interior has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., that this rule will not have a significant economic effect on a substantial number of small entities.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA), and has made a finding that this rule will not significantly affect the quality of the human environment under section 102(2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The EA is on file in the OSMRE Administrative Record in Room 5131, 1100 L St., NW., Washington, DC.

Author

The principal author of this rule is Stephen M. Sheffield, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-5950 (Commercial or FTS).

List of Subjects in 30 CFR Part 701

Coal mining, Surface mining, Underground mining.

Accordingly, 30 CFR Part 701 is amended as set forth below.

Dated: October 7, 1988.

J. Steven Griles,

Assistant Secretary -- Land and Minerals Management.

PART 701 -- PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 is revised to read as follows:

Authority: 30 U.S.C. 1201 et seq., and Pub. L. 100-34.

§ 701.5 [Amended]

2. Section 701.5 is amended by removing the definition of *support facilities*.
[FR Doc. 88-26916 Filed 11-21-88; 8:45 am]

BILLING CODE 4310-05-M

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View: Full
Date/Time: Wednesday, May 25, 2005 - 4:24 PM EDT

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LEXSEE 142 IBLA 33

CITIZENS COAL COUNCIL, ET AL.

IBLA 94-366

Interior Board of Land Appeals

142 IBLA 33; 1997 IBLA LEXIS 223

December 15, 1997, Decided

ACTION:

[**1]

[*33] Appeal from Decisions of the Acting Director, Office of Surface Mining Reclamation and Enforcement, finding that a railroad and a pipeline, used to transport coal from surface mines, are not regulated by the Federal surface coal mining act. 94-16-Johnson/Bird.

Affirmed.

HEADNOTES:

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

The OSM properly concluded that a railroad and a pipeline, used solely to transport coal from surface mines to remote electrical generating stations, are not "surface coal mining operations," within the meaning of section 701(28)(B) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(B) (1994), and are therefore not subject to the requirements of that Act.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Appellants; James R. Bird, Esq., and Benjamin J. Vernia, Esq., Washington, DC, for the Peabody Western Coal Company; Jack D. Palma, II, P.C., Esq., Cheyenne, Wyoming, and Donald B. Atkins, Esq., Tulsa, Oklahoma, for Black Mesa Pipeline, Inc.; John B. Weldon, Jr., Esq., and Stephen E. Crofton, Esq., Phoenix, Arizona, for the Salt River Project Agricultural Improvement and [*2] Power District; Jon K. Johnson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINIONBY: KELLY

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Citizens Coal Council, the Water Information Network, and the Dineh-Hopi Alliance (collectively, Appellants) have appealed from two identical Decisions of the Acting Director, Office of Surface Mining Reclamation and Enforcement (OSM), dated February 25, 1994. Responding to Appellants' citizens complaints, OSM found that two transportation facilities associated with the Black Mesa/Kayenta Mines are not "surface coal mining operations" governed by the Surface Mining Control and Reclamation [*34] Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1994), and are therefore not subject to the permitting and other requirements of SMCRA.

The two mines are owned and operated by the Peabody Western Coal Company (PWCC), and are located in northeastern Arizona within the Navajo/Hopi Indian Reservations. The transportation facilities are a railroad, known as the Black Mesa and Lake Powell (BM&LP) Railroad, which [*3] is owned (along with others) and operated by the Salt River Project Agricultural Improvement and Power District (SRP), and a coal slurry pipeline, which is owned and operated by Black Mesa Pipeline, Inc. (BMP). The PWCC, BMP, and SRP have all filed answers to Appellants' Statement of Reasons for Appeal (SOR) and all are joined as proper parties to this appeal.

The pipeline at issue is 273 miles long and is buried for most of its length. It carries coal from the Black Mesa Mine

Conveyor is permitted

to the Mohave Generating Station, in Laughlin, Nevada. Coal extracted at the mine is crushed by PWCC and placed on a conveyor system, which is owned by PWCC, BMP, and the Mohave Generating Station, and operated by PWCC. That system carries the coal to a preparation plant, which is owned and operated by BMP, where it is further crushed and water is added to create a coal slurry. The conveyor system and preparation plant are all within the area proposed by PWCC for permitting under SMCRA as part of the Black Mesa Mine. The proposed mine permit would cover the conveyor system. The BMP has applied for a separate permit for the plant. Following preparation, the coal slurry leaves the plant by way of BMP's pipeline, [**4] traversing a portion of the proposed mine permit area and continuing on to the electrical generating station in Laughlin, Nevada, where it is used for fuel.

The railroad at issue is 83 miles long, and carries coal from the Kayenta Mine to the Navajo Generating Station, in Page, Arizona. Coal extracted at the mine is crushed by PWCC and placed on a conveyor system, which is owned and operated by PWCC. That system carries the coal to silos and a loadout facility, which are also owned by PWCC. The conveyor system, silos, and loadout facility are all within the permit area for the Kayenta Mine and covered by the mine permit. At the loadout facility, the coal is loaded into cars and transported by SRP's railroad to the electrical generating station in Page, Arizona, where it is used for fuel.

Title *

Title to the coal passes from PWCC to the electrical generating station either at the station (Black Mesa Mine) or at the loadout facility (Kayenta Mine). Further, the railroad and the pipeline are operated for the sole purpose of transporting all of the coal produced by PWCC at each mine to the respective electrical generating station. Throughout the 17-year operation of the mines from the enactment [**5] of SMCRA in 1977 to the 1994 Decisions at issue here, neither transportation facility has ever been permitted or otherwise authorized to operate under that Act.

Standard

①

In her Decisions, the Acting Director concluded that the railroad and pipeline are not "surface coal mining operations" regulated by SMCRA. She [**35] concluded that the applicable statutory standard is whether they can be considered facilities "resulting from or incident to" PWCC's surface coal mining activities at the Black Mesa/Kayenta Mines, under section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1994), as that standard is explicated in the preamble to 1988 final rulemaking, 53 Fed. Reg. 47377 (Nov. 22, 1988). (Decision at 1-2, 3.) Applying this standard, the Acting Director held that neither the railroad nor the pipeline can be considered to result from or be incident to PWCC's mining activities since a substantial portion of each facility is located well beyond the minesite, the primary function of the facility is to supply coal to a power plant, and because the facility is not owned or operated by PWCC, it is more economically dependent on the generating station than on the [**6] mine. (Decision at 3; see id. at 4, 5.) The Acting Director also noted that weighing against SMCRA regulation is the fact that neither the statute nor the regulations explicitly cover either facility and that regulating them at this point would "reverse longstanding decisions by [OSM] which have been relied upon" by the operator of the facility. Id. at 3, 5.

Common carrier

In their SOR, Appellants contend that the railroad and pipeline should be considered "surface coal mining operations," within the meaning of section 701(28)(B) of SMCRA, 30 U.S.C. § 1291(28)(B) (1994), because they are "facilities 'resulting from or incident to' surface coal mines that [PWCC] operates on Navajo lands." (SOR at 2 (quoting from 30 U.S.C. § 1291(28)(B) (1994)).) They argue that this is so because each facility is "functionally integrated with the mine it serves because it provides the sole means of transporting coal from the mine site directly to the mine's only customer" and serves no other mine, and each is "economically dependent upon the mine they serve because the mine is their sole source of cargo, and thus presumably their sole [**7] source of revenue." (SOR at 29, 30.) Appellants distinguish this situation from that of a common carrier, noting that each transportation facility and its respective mine and power plant are a "closed, unified industrial operation." Id. at 14, 16. They argue that to find that the facilities at issue here do not result from or are not incident to the mines, would exclude all such facilities from SMCRA jurisdiction. Since the railroad and pipeline are section 701(28)(B) facilities, Appellants assert that OSM must require PWCC to either amend its existing or proposed mine permits to encompass them or obtain separate permits for them. Failing such amendment or permit, OSM must preclude any further operation of these facilities.

[1] Section 701(28)(A) of SMCRA provides that "surface mining operations" are "activities conducted on the surface of lands in connection with a surface coal mine," including "excavation * * *, and * * * chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, [and] loading of coal for interstate commerce at or near the mine site." 30 U.S.C. § 1291(28)(A) (1994). Subsection B [**8] further provides that such operations include the "areas upon which such activities occur or where such activities disturb the natural land surface." It also states that

[**36] such areas shall also include any adjacent land the use of which is incidental to any such activities, all

lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

30 U.S.C. § 1291(28)(B) (1994) (emphasis added). In enacting SMCRA, Congress stated that "surface coal mining operations" thus include "all roads, facilities[,], structures, property, and materials on the surface resulting from or incident to [surface coal mining] activities, such as refuse banks, [**9] dumps, culm banks, impoundments and processing wastes." S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977) (emphasis added).

We find nothing in section 701(28)(B) of SMCRA, or its legislative history, which expressly provides that transportation facilities, especially ones that carry processed coal to a remote point of sale/use, should generally be considered "surface coal mining operations," subject to regulation under SMCRA. Rather, the statute indicates that the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and associated transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B). See *Ann Lorentz Coal Co. v. OSM*, 79 IBLA 34, 43, 91 Interior Dec. 108, 113 (1984). Congress made no specific provision for regulating the transportation of processed coal, even though that activity is itself a "major industrial sector," which encompasses railroads, barges, trucks, and pipelines "that collectively stretch over thousands of miles throughout the nation." (PWCC Answer at 2, 9.) The fact that it did not, strongly [**10] indicates that Congress did not intend to regulate the transportation of processed coal under SMCRA, presumably leaving it to regulation pursuant to other Federal and state laws.

We turn to SMCRA's implementing regulations. When the Department first promulgated regulations in 1979 designed to permanently govern surface coal mining activities, it established general standards for constructing and maintaining transportation facilities other than roads, which were said to include "railroad loops, spurs, sidings, surface conveyor systems, chutes, aerial tramways, or other transportation facilities." 30 C.F.R. § 816.180 (1979). The Department explained in the preamble to the final rulemaking that the regulation was intended to cover transportation facilities "incident to coal mining operations," which are required for the "movement of coal, equipment and personnel within the mine plan area." 44 Fed. Reg. 15260, 15261 (Mar. 13, 1979) (emphasis added).

[*37] In 1983, the Department defined what constitutes facilities resulting from or incident to surface coal mining activities, termed "support facilities," requiring that they be operated "in accordance with a permit issued for the [*11] mine or coal preparation [plant] to which [they are] incident or from which [their] operation results." 30 C.F.R. §§ 701.5 and 816.181 (1983). It said that such facilities "may" include "railroads, surface conveyor systems, chutes, aerial tramways, or other transportation facilities." *Id.* However, the Department also stated, at the end of the regulation, that "'resulting from or incident to' a [surface coal mining] activity connotes an element of proximity to that activity." *Id.* Further, in the preamble to the final rulemaking, the Department indicated that whether the enumerated transportation facilities could be considered support facilities hinged on whether they did, in fact, result from or were incident to such activities. See 48 Fed. Reg. 20396 (May 5, 1983) ("To be regulated under Section 701(28)(B) a facility must result from or be incident to an activity regulated under Section 701(28)(A)"); *National Wildlife Federation (NWF) v. Hodel*, 839 F.2d 694, 746 n.80 (D.C. Cir. 1988).

Moreover, the Department particularly stated that it would interpret the regulation "to include all facilities located up to the point of loadout of coal [**12] for interstate transport." 48 Fed. Reg. 20397 (May 5, 1983) (emphasis added). Thus, where coal was transported by rail, the regulation "would extend to the loadout facility located at or near the mine site from which run of mine coal is conveyed or trucked to the rail line and loaded," and this same principle would also apply in the case of other modes of transportation, such as trucks, barges, and pipelines. *Id.* This regulation would have clearly excluded that portion of the railroad and pipeline at issue here, which are located beyond the loadout point.

In 1988, the Department dropped that regulatory definition, leaving the requirement in 30 C.F.R. § 816.181 that "support facilities" be operated under the permit for the individual mine or coal preparation plant to which they were incident or from which their operation resulted. It rejected any categorical exclusion or inclusion in favor of a case-by-case determination of what facilities can properly be regulated under SMCRA, and declined to define what facilities result from or are incident to mining activities. See 53 Fed. Reg. 47380, 47382 (Nov. 22, 1988).

However, in the preamble which accompanied its 1988 rulemaking, [**13] the Department provided that OSM would address three factors when deciding whether a facility is properly considered to result from or be incident to surface coal mining activities: (1) Whether the facility is geographically proximate to the producing mine; (2) whether the facility is functionally tied to the particular mine in question; and (3) whether the facility is economically dependent upon that particular mine. *53 Fed. Reg. 47379, 47381* (Nov. 22, 1988). The Department noted that the factors of geographic proximity and function had been endorsed by the circuit court in NWF, when it reviewed the propriety of the prior "support facilities" definition in 30 C.F.R. § 701.5 (1983). See *839 F.2d at 765-66*.

[*38] Appellants assert that this case should be decided by applying the above three factors. (SOR at 8.) The other parties to the case likewise utilize those criteria. See Decision at 1, 3; OSM Answer at 9-10; PWCC Answer at 18; SRP Answer at 14; BMP Answer at 10.

We conclude that, even applying the criteria outlined in the 1988 preamble but never formally adopted by the Department, the railroad and pipeline at issue here do not constitute [**14] facilities "resulting from or incident to" regulated surface coal mining activities, within the meaning of section 701(28)(B) of SMCRA.

We agree with OSM that both the railroad and pipeline are not geographically proximate to the surface coal mining activities at issue here, since most of those transportation facilities are located many miles from the Black Mesa/Kayenta Mines. Indeed, 80 percent of the pipeline and railroad is located more than 54 and 16 miles, respectively, from the 2 mines. These facilities do not become geographically proximate because they originate at and traverse a small portion of the mine area that is currently permitted or proposed for permitting. (SOR at 11, 18.) To so hold would render all transportation facilities proximate unless the coal is first transported outside the mine area by other means and then placed into the facility. We do not think this is what the Department intended. Nor is geographic proximity affected by the particular use made of the facilities or, generally, the functional and economic concerns that animate the other criteria. Id.

Next, we conclude that, in order to be considered to "result[] from or [be] incident to" surface [**15] coal mining activities which are themselves subject to SMCRA regulation under section 701(28)(A) of SMCRA, within the meaning of *30 U.S.C. § 1291(28)(B)* (1994), facilities must be functionally and economically tied to regulated surface coal mining activities, and thus be justifiably also subject to such regulation. This does not mean that the facilities must be actually "involved in excavation, processing or loading coal," i.e., section 701(28)(A) activity. (SRP Answer at 16.) Rather, there must be a direct and meaningful connection to such activity. See *United States v. Devil's Hole, Inc.*, *747 F.2d 895, 897-98 (3d Cir. 1984)* (mining waste piles used to recover anthracite silt - "incidental facility"); *Paul F. Kuhn*, *120 IBLA 1, 30-32, 98 Interior Dec. 231, 246-47 (1991)* (natural gas pipeline section relocated from mine area - "incidental facility"). We think that is the clear intent of Congress in expanding the definition of "surface coal mining operations" to include "incidental facilities" and also of the Department when it adopted the relevant criteria. See *NWF*, *839 F.2d at 743, 744*; [**16] *53 Fed. Reg. 47379* (Nov. 22, 1988); *48 Fed. Reg. 20393* (May 5, 1983). Indeed, to hold otherwise would bring facilities within the ambit of SMCRA regulation that are not somehow functionally and/or economically tied to regulated surface coal mining activity. We find nothing to indicate that Congress and the Department intended to do so.

[*39] At the present time, the railroad and pipeline are functionally tied to and economically dependent on the surface coal mining activities at issue here in the limited sense that they currently serve only to transport all of the coal from the Black Mesa/Kayenta Mines to the final point of use and derive all of their revenues from that service. However, there is no evidence that the two facilities are otherwise functionally tied, in any way, to the actual operation of or the conducting of any particular surface coal mining activity regulated by SMCRA.

As the circuit court instructed in *NWF*, *839 F.2d at 745*, the phrase "resulting from or incident to" requires some type of proximate causation, "otherwise, every support facility that could be considered a 'but for' result of a surface coal mining operation would be [**17] subject to SMCRA regulation." We conclude that the railroad and pipeline are not functionally tied to any regulated surface coal mining activity, other than by the mere fact that they transport the final product derived from such activity to market. That fact alone does not render the facilities subject to SMCRA regulation, since it would encompass any and all transportation facilities. There is simply no evidence that Congress and the Department intended to apply the "incidental facilities" definition of "surface coal mining operations" in such a broad fashion.

Therefore, we conclude that the Acting Director, OSM, properly held that the BM&LP Railroad and BMP's coal slurry pipeline are not "surface coal mining operations," within the meaning of section 701(28)(B) of SMCRA, and are not subject to the permitting and other requirements of the Act.

To the extent Appellants have raised other arguments not specifically addressed herein, they have been considered and

rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

John H. Kelly, Administrative Judge

[**18]

I concur: R.W. Mullen, Administrative Judge

FOCUS - 2 of 12 DOCUMENTS

PACIFICORP v. OFFICE OF SURFACE MINING RECLAMATION AND
ENFORCEMENT; STATE OF UTAH, DIVISION OF OIL, GAS AND MINING,
INTERVENOR

IBLA 95-175

Interior Board of Land Appeals

143 IBLA 237; 1998 IBLA LEXIS 79

April 1, 1998, Decided

ACTION:

[**1]

[*237] Appeal from a decision of Administrative Law Judge Ramon M. Child, affirming Cessation Order No. 94-020-370-002, charging PacifiCorp with failure to obtain a permit for a coal preparation plant. Hearings Division Docket No. DV 94-15-R.

Reversed; Cessation Order No. 94-020-370-002 vacated.

HEADNOTES:

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

The OSM is not required to follow the 10-day notice procedures of 30 C.F.R. § 842.11(b)(1)(ii)(B), when it receives a citizen's complaint which supplies adequate proof that an imminent danger to public health and safety or a significant, imminent environmental harm to land, air, or water resources exists and that the State regulatory authority has failed to take appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Tipples and Processing [****2**] Plants: Generally

When OSM receives a citizen's complaint alleging that a coal preparation plant is an unpermitted surface coal mining operation, but OSM is aware that the operator of the plant has received an exemption from the state regulatory authority and, upon inspection, finds no evidence of a significant, imminent environmental harm, it is error for OSM to issue a cessation order to the operator until it has resolved the jurisdictional dispute with the state.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: Generally--Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: Generally

Under the Utah State program regulations, any person who operates or intends to operate a coal process plant outside the permit area of any coal and reclamation operation must obtain a permit from the regulatory authority, unless the plant is located at the site of ultimate coal use. When the State regulatory authority has exempted a coal preparation

plant from regulation because it is located at the site of ultimate coal use, a cessation order issued by OSM to the **[**3]** plant operator for failure to obtain a permit from the State regulatory authority will be vacated.

APPEARANCES: John S. Kirkham, Esq., David J. Jordan, Esq., Salt Lake City, Utah, for PacifiCorp; DeAnn L. Owen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Thomas A. Mitchell, Assistant Attorney General, State of Utah, for State of Utah, Division of Oil, Gas and Mining, Intervenor.

OPINIONBY: HARRIS

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

PacifiCorp has appealed a December 12, 1994, Decision issued by Administrative Law Judge Ramon M. Child, affirming Cessation Order (CO) No. 94-020-370-002 (Ex. A-1), issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to PacifiCorp based on OSM's determination that PacifiCorp's Hunter Coal Preparation Plant (Preparation Plant), a coal crushing and washing facility located in Emery County, Utah, was a "surface coal mining operation" operating without a permit in violation of the approved Utah State program. The CO directed PacifiCorp, which operates the Preparation Plant through its wholly owned subsidiary, Energy Western Mining **[**4]** Company (EWM), to cease receiving and processing coal at the Preparation Plant and to obtain a permit. By Order dated February 8, 1995, this Board granted the State of Utah, Division of Oil, Gas and Mining (DOGM), leave to intervene in this appeal.

Background

On September 7, 1994, Citizens Coal Council (CCC) filed a citizen's complaint with the Albuquerque Field Office, OSM, requesting an inspection of PacifiCorp's Preparation Plant. The CCC alleged that PacifiCorp had built the Preparation Plant in 1990 and used it "since 1991 without ever getting a mining and reclamation permit * * * although the plant it replaced was permitted." (Ex. R-5.) It also alleged that the State, while aware of the situation, had failed to take action to permit the plant. Finally, CCC asserted that the failure to obtain a permit was "causing imminent harm of significant environmental damage." Id.

The OSM conducted an inspection of the Preparation Plant and on September 15, 1994, issued CO No. 94-020-370-002. (Ex. R-6.) On September 19, 1994, PacifiCorp filed an Application for Review and Petition for Temporary Relief of the CO with the Office of Hearings and Appeals. PacifiCorp also filed a Motion **[**5]** for a Temporary Restraining Order and Preliminary Injunction in the U.S. District Court, Utah. On September 19, 1994, that court issued an Order restraining the Depart-merit from enforcing the CO pending a decision on the matter.

On September 23, 1994, Administrative Law Judge Ramon M. Child conducted a hearing in the case in Salt Lake City, Utah. Only two witnesses testified at the hearing, Mill Scott Rollings, the OSM Reclamation Specialist who issued the GO, and James Blake Webster, the permitting administrator for Interwest Mining Company, a management subsidiary for coal mines owned by PacifiCorp. (Tr. 34, 84.)

Webster testified that PacifiCorp began construction of the Preparation Plant in the fall of 1989 on the same site where the Hunter Power Plant (Power Plant) was already located and that the Preparation Plant began to process significant amounts of coal in 1991. n1 (Tr. 88.) The Preparation Plant facilities are separated from the Power Plant facilities by a fence line. (Tr. 124.) The two plants are connected by a conveyor belt for conveying processed coal to either the Power Plant or the Power Plant stockpile. (Tr. 86-87, 124, 129-30.) Webster testified that he was unaware **[**6]** of any environmental harm caused by the Preparation Plant. (Tr. 89-90.)

n1 Exhibit A-2, an oversized aerial photograph of the Power Plant site taken on July 13, 1994, was forwarded to the Board by Judge Child under separate cover from the remainder of the case record. The Board has no record of receipt of that exhibit. Nevertheless, find that visual reference to that exhibit is not necessary for our adjudication of this appeal.

PacifiCorp owns three mines, each operated by EWM, that deliver coal to the Preparation Plant: the Cottonwood/Wilberg Mine, the Deer Creek Mine, and the Trail Mountain Mine. The mines are located from 12 to 23

miles from the Preparation Plant. (Tr. 126; Exs. R-6, at 3, R-10.) All the coal processed by the Preparation Plant is used by the adjacent Power Plant. (Tr. 66.) In January 1991, the State regulatory authority, DOGM, determined that the Preparation Plant did not need a surface coal mining permit because the plant was located at the site of ultimate coal use. (Ex. A-3.)

Rollings testified that, upon receipt of the citizen's complaint letter from CCC, he conducted [**7] an inspection of the Preparation Plant on September 8 and 9, 1994. (Tr. 106-107.) He stated that he offered DOGM officials the opportunity to accompany him, but that they declined. (Tr. 112.) He further testified:

On September 15[, 1994], when I came back to issue the cessation order, I again stopped in at the DOGM offices, talked with Mr. Braxton. The permit application had not been received. They had not addressed the issue of whether or not the plant had to be permitted and they again declined to go on with the inspection.

(Tr. 113.)

Rollings stated that in the course of his inspection he interviewed "a number of people that are listed in the inspection report" and "gathered information about who owns what, who operates what, where the coal comes from and so on." (Tr. 116.) He also determined how much coal each of the three mines shipped to the Preparation Plant, and the union representation of the Power Plant and Preparation Plant employees. (Tr. 117-19.) Rollings stated that he looked at ownership factors, economic factors, and control factors in determining that the Preparation Plant operated in "connection with the mines" and was therefore subject to regulation. (Tr. 122.) [**8]

Although Rollings' inspections disclosed no imminent harm, he issued the CO pursuant to 30 C.F.R. § 843.11(a)(2) which provides that surface coal mining operations conducted without a valid permit constitute "a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm * * *." (Tr. 38-39.)

The CO charged PacifiCorp with "failure to obtain a permit [for the Preparation Plant] in accordance with all applicable of the approved Utah program as found in the State of Utah, R645 Coal Mining Rules," specifically the following provisions: Utah Administrative Code (U.A.C.) R645-300-112.400 (1994) and U.A.C. R645-302-261 (1994). (Ex. A-1). The U.A.C. R645-300-112.400 (1994) requires all persons engaging in coal mining and reclamation operations to first obtain a permit from DOGM. The U.A.C. R645-302-261 provides:

R645-302-260 applies to any person who operates or intends to operate a coal processing plant outside the permit area of any coal mining and reclamation operation, other than such plants which are located at the site of ultimate coal use. Any person who operates such a process plant will obtain a permit from [DOGM] in accordance [**9] with the requirements of R645-302-260.

Rollings opined that "one of the main reasons" coal preparation plants "have to be permitted is because of the environmental effects," such as the impact on ground water hydrology, associated with refuse piles which may remain in place for 30 years. (Tr. 134-35.)

Rollings testified that he understood the "whole purpose of the preparation plant [was] to get the coal ready to meet specs for the power plant." (Tr. 139.) He stated that he had "a problem" with "that term exemption" of end-user preparation plants as provided for in the DOGM regulations. (Tr. 136.) However, he admitted that OSM had determined that the DOGM regulations were no less effective than the Federal regulations and that DOGM regulations required a determination to be whether a facility was located at the site of ultimate use. (Tr. 73-76.) According to Rollings there was a conflict: "OSM has determined that the prep plant needs a permit under the regulations and DOGM has that they do not." (Tr. 76.) He expressed his belief that DOGM was "not effectively interpreting their regulations." Id.

Judge Child's Decision

In his December 12, 1994, Decision, Judge Child affirmed [**10] issuance of the CO based on several conclusions of law. n2 First, he determined that OSM established a prima facie case that it had authority to issue the CO based on 30 C.F.R. § 843.11(a)(2), which provides that surface coal mining operations conducted without a valid surface mining permit constitute a condition or practice which causes or can reasonably be expect to cause significant, imminent environmental harm to land, air, or water resources.

n2 In his Decision, Judge Child makes a finding of fact, in reliance on CCC's representation in its citizen's complaint, that the Preparation Plant replaced another such plant in Emery County, Utah, operated by PacifiCorp, which had been permitted by the DOGM. PacifiCorp vehemently denies that there is any factual basis for such a finding, stating that the Preparation Plant did not replace a previously permitted plant. It also provides the Mar. 2, 1995, Affidavit of Webster, wherein he states that the "Hunter Coal Preparation Plant" did not replace any off-site coal preparation plant. (PacifiCorp Brief, Ex. C.) There is no evidence in the record to support Judge Child's finding.

[**11]

Next, he concluded that "PacifiCorp's operation of the Preparation Plant constitutes 'coal mining and reclamation operation' which must be permitted under the Utah program." (Decision at 11.) He based his conclusion on an analysis of relevant Federal and State regulations. He cited 30 C.F.R. § 785.21(a), under which any preparation plant "operated in connection with a coal mine but outside the permit area for a specific mine" must be permitted. The Judge found that under the Federal program, as well as the Utah program, activities conducted on the surface of lands in connection with a surface mine, such as the processing and preparation of coal constituted surface coal mining operations requiring a permit.

The Judge then posed the question whether PacifiCorp's preparation plant was a coal mining or reclamation operation required under the Utah program to be permitted. He found that the issue turned upon the meaning to be given the phrases "in connection with a surface coal mine" and "located at the site of ultimate coal use." (Decision at 6.)

The Judge summarized the regulatory history of 30 C.F.R. § 785.21, the 1988 revision of which provides that any person operating a coal preparation [**12] plant "in connection with a coal mine but outside the permit area for a specific mine" was required to obtain a permit from the regulatory authority. (Decision at 7.)

Reviewing the regulatory history, the Judge note that the preamble to the 1988 rulemaking focuses not upon physical proximity of a preparation plant to a coal mining operation but rather on "the economic, functional, and other types of connections or integrations with the mine operator or end user." (Decision at 7.) The Judge cited examples listed in the preamble for determining whether a facility operated "in connection with" a coal mine. Finally, the Judge quoted the 1988 preamble as stating, at 53 Fed. Reg. 47388 (Nov. 22, 1988), that "coal preparation facilities which are being operated only in connection with an end user are not operations in connection with a coal mine." n3 Id.

n3 The correct text of this excerpt from OSM's response to a commenter is stated in the section of this opinion styled Federal Regulatory History.

The Judge concluded:

In sum, OSM has modified the Federal regulations [**13] on several occasions in an ate to make clear its unchanging intent that preparation plants outside the permit area of a specific mine must be permitted if they are operated "in connection" with a surface coal mine and will not be permitted only if they are operated solely "in connection with" the end user. It also consistently indicated that proximity to the mine is not a controlling factor.

Because the language of U.A.C. R645-302-261 of the Utah program is identical to one version of these Federal regulations, and because the intent of these Federal regulations has remained the same despite several modifications, R645-302-261 should be interpreted consistent with that intent. Thus, U.A.C. R645-302-261 must be interpreted as requiring a permit for all coal preparation plants operated in connection with a coal mine, leaving unregulated only coal preparation plants operated solely in connection with an end user or operated without connection to a mine or end user.

(Decision at 8.)

The Judge then found that PacifiCorp's preparation plant

receives all of its coal from the Mines; most of the coal from the Mines is processed at the Preparation Plant; and it is integrated with [**14] the Mines to the extent that their operators and owners are

identical and the [Cottonwood/Wilberg] mine manager supervises the Preparation Plant supervisor and is in charge of health and safety at the Preparation Plant.

(Decision at 8.) Thus, he concluded that the Preparation Plant was "clearly being operated 'in connection with' the Mines rather than being operated solely in connection with the Power Plant" and that the Preparation Plant was a "coal mining and reclamation operation" required to be permitted under the Utah program. (Decision at 9.)

Next, Judge Child concluded that "OSM was not required to follow the [10-day notice (TDN)] procedures at 30 C.F.R. § 842.11(b)(1)(ii)(B)(1) and 30 C.F.R. § 843.12(a)(2) prior to inspecting the Preparation Plant site and issuing the CO." (Decision at 11.) Finally, despite the fact that he concluded that the TEN procedures were not applicable, he applied them in concluding that "DOGM's interpretation of U.A.C. R645-302-261 was not 'appropriate action' [within the meaning of 30 C.F.R. § 843.11(b)(1)(ii)(B)(2)] because it was an abuse of discretion." *Id.*

For the reasons set forth below, we reverse Judge Child's Decision and vacate **[**15]** the CO.

Federal Regulatory History

Under section 701(27) of the Surface Coal Mining and Reclamation Act (SMCRA), 30 U.S.C. § 1291(27) (1994), the term "surface coal mining and reclamation operations" is defined to include "surface coal mining operations," which is in turn defined as:

(A) activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include * * * the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site * * *; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas also shall include any adjacent land the use of which is incidental to any such activities, * * * and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

30 U.S.C. § 1291(28) (1994) (emphasis added).

In attempting to address the question of the permitting of coal processing plants in the regulations developed for the permanent regulatory **[**16]** program, OSM promulgated regulations in 1979, which included the following provision:

This Section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing coal processing plants or support facilities not within a permit area of a specific mine. Any person who operates such a processing plant or support facility shall have obtained a permit from the regulatory authority under the regulatory program in accordance with the requirements of this section.

30 C.F.R. § 785.21(a) (1979), 44 *Fed. Reg.* 15377 (Mar. 13, 1979).

The State of Utah received conditional approval for its State regulatory program effective January 21, 1981.

Thereafter, in 1983 OSM published rulemaking to amend its regulations applicable to support facilities and coal preparation plants, stating that the "rule changes are necessary in order to clarify OSM's jurisdiction and to establish a clear set of regulatory requirements." 48 *Fed. Reg.* 20392 (May 5, 1983). In that rulemaking, OSM defined "Coal preparation plant" as "a facility where coal is subjected to cleaning, concentrating, or other processing **[**17]** or preparation in order to separate coal from its impurities." 30 C.F.R. § 701.5, 48 *Fed. Reg.* 20400 (May 5, 1983).

In the preamble to that rulemaking, OSM stated its belief that the phrase "in connection with," used in section 701(28)(A) of SMCRA should be "interpreted broadly," and it provided examples of that relationship: "facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine." 48 *Fed. Reg.* 20393 (May 5, 1983). Nevertheless, it further stated:

OSM does not believe that its jurisdiction extends to facilities which are operated solely in connection with the end user of the coal product. A facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine.

Id. (emphasis added).

It also amended 30 C.F.R. § 785.21(a) to read: "This section applies to any person who operates or intends to operate [**18] a coal preparation plant outside the permit area of any mine, other than such plants which are located at the site of ultimate coal use." *Id. at 20400* (emphasis added). It explained that amendment as follows:

Several commenters indicated that OSM's proposed language [for 30 C.F.R. § 785.21(a)] "directly associated with the ultimate user" presented a confusing test. Commenters pointed out that a more appropriate and more useful test would be whether the plants were at the point of ultimate use. OSM agrees and has adopted language to indicate that only plants situated at the point of ultimate coal use will be deemed to be not "in connection with" a mine.

Id. at 20398 (emphasis added).

In 1985, in response to litigation, OSM published an interim final rule amending, inter alia, 30 C.F.R. § 785.21, but not the language of subsection (a) relating to ultimate end use. *50 Fed. Reg. 28189* (July 10, 1985). At the same time, OSM proposed the same language to allow public comment on the rule. *Id. at 28180*. The final rule published in 1987 did not alter 30 C.F.R. § 785.21(a). However, [**19] in the preamble OSM stated:

Some commenters felt that the definition of surface coal mining operations should include an explanation of when "power plant" processing operations were "surface coal mining operations." Treatment of facilities located at the point of coal use was discussed in the preamble of the May 5, 1983 rulemaking (*48 FR 20392*). That discussion is entirely relevant and contains the following paragraph * * *.

52 Fed. Reg. 17726 (May 11, 1987).

The "following paragraph" included the sentence, quoted above, stating that a facility located at the point of ultimate coal use would not be deemed to be operating in connection with a mine "unless it is also located at the site of the mine." *Id.*

In 1988, OSM again amended its regulations "to clarify the circumstances under which coal preparation plants located outside the permit area of a mine are subject to the performance standards and permitting requirements" of SMCRA. *53 Fed. Reg. 47384* (Nov. 22, 1988). In that rulemaking, OSM amended 30 C.F.R. § 785.21(a) to eliminate the phrase "other than such plants which are located at the site [**20] of ultimate coal use." Amended 30 C.F.R. § 785.21(a) read, as follows:

This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section.

Id. at 47391.

The basis for OSM's amendment is explained in the regulatory preamble:

[The OSM] continues to believe that regulation of facilities operated by or for the end user of coal at the point of such use is not required under SMCRA because, by virtue of their association with the end user of the coal, such facilities are not operated "in connection with" a coal mine.

The first sentence of § 785.21(a), which specifies the requirements for permits for coal preparation plants not located within the permit area of a mine, previously read, "This section applies to any person who operates or intends to operate a coal preparation plant outside the permit area, other than such plants which are located at the site of ultimate coal use." Under this final [**21] rule, this sentence is replaced with, "This section applies only to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine." Further, this language differs from the proposed rule in that it includes the clarifying phrase, "for a specific mine." The second sentence of paragraph (a) remains the same. Because the purpose of this rulemaking is to clarify that the rule applies only to coal preparation plants operated in connection with a coal mine, and [OSM] believes

that this limitation necessarily excludes facilities at the site of ultimate coal use, the redundant phrase "other than such plants which are located at the site of ultimate coal use," is deleted in this final rule.

Id. at 47384-85.

Responding to a comment regarding a preparation plant used in connection with an end user, OSM stated:

Another commenter was concerned about the effect of the rule on a specific preparation plant that operates in connection with an end user, a power plant burning coal from a mine located about a mile away. Such plants were not subject to regulation under [OSM's] previous [**22] rules at 30 CFR Parts 785 and 827 because those rules explicitly excluded from jurisdiction "such plants which are located at the site of ultimate coal use."

As stated above, [OSM] has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine. Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commenter, do not operate in connection with a coal mine and are not subject to the rule.

Id. at 47388 (emphasis added).

Discussion

[1] We first address the contention of Intervenor DOGM that the CO in this case was issued in violation of the TDN procedures. The OSM disagrees, contending that it was required to issue the CO in this case because proof of the existence of environmental harm is not a prerequisite for SMCRA jurisdiction. It asserts that a CO must be immediately issued upon inspection following the filing of a citizen's complaint alleging unpermitted surface mining operations. (Reply Brief at 23.) The OSM argues that Federal policy to avoid placing the operator into a dispute [**23] between a primacy state and OSM applies to TDN procedures and not to cases such as that before us here, involving alleged imminent environmental harm. (Reply Brief at 25-26.)

The Department promulgated the regulations found at 30 C.F.R. § 842.11 to implement OSM's oversight enforcement authority over state programs as set forth in section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994). The regulation at 30 C.F.R. § 842.11(b)(1)(ii)(B)(1), which Intervenor asserts should have been applied, provides, in pertinent part, that an authorized representative of the Secretary shall immediately conduct a Federal inspection when that representative has reason to believe, on the basis of information available to him or her, that (1) a violation exists; (2) the authorized representative has notified the state regulatory authority of the possible violation; (3) more than 10 days have passed since notification; and (4) the state regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response.

In *PacifiCorp v. OSM*, 131 IBLA 17, 24 (1994), [**24] we explained:

The purpose of a TDN is to afford a primacy state with an opportunity to respond to notice from OSM that there is a possible violation before OSM takes action. A TDN is not an enforcement action; it is a "communication device" between OSM and the states. 53 FR 26742 (July 14, 1988).

However, OSM is not required to follow the TDN procedures of 30 C.F.R. § 842.11(b)(1)(ii)(B), when the person supply the information supplies adequate proof that an danger to public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action." 30 C.F.R. § 842.11(b)(1)(ii)(C). Pursuant to regulation, 30 C.F.R. § 843.11(a)(2), the Secretary has determined that surface coal mining operations conducted without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *." In *Robert L. Clewell*, 123 IBLA 253, 276 (1992), the Board ruled that a signed citizen's complaint alleging [**25] mining without a permit and the failure of the State regulatory authority to take appropriate action was sufficient to meet the requirements of 30 C.F.R. § 842.11(b)(1)(ii)(C).

In the citizen's complaint filed in this case, CCC alleged that PacifiCorp was conducting surface coal mining operations without a permit and that DOGM had failed to take appropriate action to require a permit. Thus, the complaint in this case was sufficient to satisfy the requirements of 30 C.F.R. § 842.11(B)(1)(ii)(C). Accordingly, we must reject Intervenor's assertion that OSM was required to follow the TDN procedures of the regulations.

Nevertheless, the circumstances of this case dictate that OSM's action in issuing the CO was unquestionably premature. The record shows that on February 27 and 28, 1991, OSM conducted a complete, random sample oversight inspection of PacifiCorp's Cottonwood/Wilberg Mine. (Ex. A-4, Narrative at 1.) Prior to that inspection, OSM reviewed the records in the DOGM's office in Salt Lake City. In his inspection report, the OSM inspector noted that at the time of the records review he examined the DOGM memorandum granting PacifiCorp a permit exemption for the Preparation Plant in [**26] accordance with U.A.C. R614-302-261. n4 Id. He further stated: "The rule cited is less effective than it's [sic] Federal counterpart found at 30 CFR, Sec. 785.21. This has been noted to AFO [Albuquerque Field Office] program specialist for possible 732 letter notification to DO." He further noted that this situation has been discussed with inspection participants and also with Blake Webster * * *." Id.

n4 In its Intervenor's Brief, Intervenor explains that between 1991 and 1994 there was a numbering change for the U.A.C. and U.A.C. R614-302-261 became U.A.C. R645-302-261 without any substantive change.

At the hearing, Rollings testified as follows in response to questions from counsel for PacifiCorp:

Q. And a 732 letter is a letter that the Office of Surface Mining sends to a state enforcement agency if they think the state agency's regs are less stringent than the federal regs?

A. That's correct.

Q. All right. Now it is a fact, isn't it, sir, that no 732 letter has ever been sent from OSM to the Utah Division of Oil, Gas and Mining?

A. About this specific issue or ever?

Q. About this [**27] issue. About this issue.

A. It was deemed not necessary.

Q. The answer then is no?

A. That's correct.

Q. You've never told them, by virtue of a 732 letter, we think your regulation is less stringent, you need to change it?

A. No, because it is not interpreted as being less stringent. The--after the--this--I don't recall which exhibit this was, the November 22nd, 1988 preamble, one of the requirements on page 47390, effect on state programs on the third column near the bottom, and that states that OSM--

THE WITNESS: OSM/RE will evaluate permanent state regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the director determines that certain state program provisions should be amended in order to be made no less effective than the revised Federal Rules, the individual states will be notified in accordance with the provisions of 30 CFR 732.17.

Q. Whoever the director [OSM] was in 1988, he specifically determined that the Utah re was fine?

A. That's correct.

Q. That's the same regulation you and I have been talking about [U.A.C. R645-302-261] that says facilities at the site of ultimate use are exempt?

A. With-- [**28]

Q. Same reg; right?

A. Depending on whose interpretation of that, yes. Yes.

Q. Well, do you think the State of Utah has not been effectively enforcing its regulations?

A. In this instance and given the memo that exists, the January 1991, OSM has determined that the prep plant needs a permit under the regulations and DOGM has determined that they do not.

Q. So you think that Utah is not effectively enforcing its regulations?

A. They're not effectively interpreting their regulations. I would say it's a matter of interpretation and it's a result of that enforcement.

(Tr. 73-76.)

It is apparent from the record in this case, as highlighted in the quoted exchange, that even before receipt of CCC's citizen's complaint, OSM was well aware of DOGM's interpretation of its regulation U.A.C. R645-302-261, as it related to the Preparation Plant. In 1991, an OSM inspector noted that OSM might have to invoke the procedures in 30 C.F.R. § 732.17 because he believed the State regulation in question to be less stringent than its Federal counterpart.

Under the procedures in 30 C.F.R. § 732.17(c) and (e), whenever the OSM Director becomes aware that "the approved State program no longer meets the requirements [**29] of the Act [, SMCRA,] or this chapter," he is required to "determine whether a State program amendment is required and notify the State regulatory authority of the decision." Rollings represented at the hearing that the OSM Director determined at some point that DOGM did not need to make any change to U.A.C. R645-302-261. Thus, we must assume that the OSM Director determined that U.A.C. R645-302-261 was no less stringent than its Federal counterpart 30 C.F.R. § 785.21(a).

[2] PacifiCorp argues that it is caught in the middle of a dispute between DOGM and OSM and that, by placing it in that position, OSM has acted contrary to the policy to avoid conflicts between the states and the Federal Government. The OSM responds by asserting that PacifiCorp

fails to point out that the SMCRA principles of 'primacy safeguards' and 'minimizing placing operators in the middle of a dispute between a primacy State and OSM,' specifically apply to the TDN rule and OSM policy to avoid the unnecessary issuance of a Federal NOV, not to cases, such as this, which involve alleged imminent environmental harm.

(Agency Response at 26.)

That assertion by OSM ignores its regulatory policy, as expressed [**30] in the rulemaking adopting 30 C.F.R. § 843.11(a)(2). Therein, in response to a comment that the presumption of environmental harm in 30 C.F.R. § 843.11(a)(2) violated due process because it sanctioned issuance of a cessation order without any hearing to determine whether a permit was required, OSM stated: "It will be the Office's policy in implementing these regulations to refrain from issuing a cessation order until it resolves any question concerning its jurisdiction over a given operation." *47 Fed. Reg. 18557* (Apr. 29, 1982) (emphasis added).

The policy goal of resolving jurisdictional issues prior to Federal enforcement was again expressed in a 1988 rulemaking adopting TDN procedures. In its discussion and response to comments, OSM voiced the hope that

disagreements over the jurisdictional reach of State Programs and the Federal Act and regulations should be few and far between. * * * Under the previous ten-day-notice rules * * * operators could be given conflicting directions from two different governing entities. By this final rulemaking, [OSM] to allow a consistent and rational process to resolve disagreements and to avoid unnecessary issuance [**31] of a federal NOV to an operator merely because [OHM] and the state cannot resolve the disagreement between them on the eleventh day.

53 Fed. Reg. 26737 (July 14, 1988). See *National Coal Association v. Interior Department*, 39 ERC 1624, 1633 (D.D.C. 1994).

The OSM noted that

until jurisdictional deficiencies are resolved, the state program governs state and operator actions. Congress clearly intended operators to be responsible for complying with only one set of regulations-- either state or federal, but not both. As a result, in primacy states the Act is implemented through the approved states program rather than directly.

53 Fed. Reg. 26737 (July 14, 1988). While that rationale was expressed in the context of discussions of the TDN procedures, it is arguably even more important to resolve jurisdictional disputes in cases such as this because of the

impact of a cessation order on an operator. Moreover, as set forth above, in 1982, OSM announced that it was its policy to resolve permitting disputes with the state before it issued a CO.

It is clear that OSM's policy is to alleviate and [**32] encourage the settlement of jurisdictional disputes arising in connection with its enforcement responsibilities. Such a policy is supported by considerations of fairness to operators. Insofar as can discover, this policy has not been modified or rescinded by rulemaking and it should have been followed in this case. It is especially compelling here, where the inspector determined prior to issuing the CO, that no imminent danger existed, and that the Preparation Plant had been exempted from regulation under DOGM rules.

Nevertheless, because OSM did not resolve the jurisdictional dispute prior to issuance of the CO, we must now determine whether OSM properly interpreted U.A.C. R645-302-261 to require a permit for the Preparation Plant. We conclude that Judge Child erred in holding that it did.

[3] The OSM contends that it is mandatory under the Utah program and under Federal regulation that apply the "in connection with test" to the Preparation Plant. (Reply Brief at 7.) It argues that DOGM must broadly interpret the phrases "in connection with" and "resulting from, or incident to" in order to include relationships between the Preparation Plant and the coal mines which are based on geographic [**33] proximity, economic, or functional factors, "or any other type of integration." *Id.* at 9. It further asserts that it "conducted an independent review of all factors of integration between the Preparation Plant and the Mines and concluded that the Mines are functionally and economically tied so as to constitute 'surface coal mining operations' which must be permitted under the Utah Program." *Id.* at 10.

The OSM contends that it has been its "unchanging intention" since 1982 that an off-site coal preparation plant must be permitted if it is operated in connection with a surface coal mine and is exempt from permitting only if it is operated solely in connection with the ultimate coal user. (Reply Brief at 12.) In support of this argument, OSM points to the preamble of the 1983 rulemaking, when the language contained in U.A.C. R645-302-261, "other than such plants located at the site of ultimate use," was added to the Federal regulations and states that "in interpreting this language OSM pointedly stated that, 'OSM does not believe that its jurisdiction extends to facilities which are operated solely in connection with the end user [ultimate user] of the coal [**34] product. 48 Fed. Reg. 20392, 20393 (May 5, 1983) (Emphasis added).'" *Id.* at 13.

Both Judge Child and OSM focused on that language to support their interpretation of the regulations. However, each ignored the sentence that follows the one quoted above. That sentence, as set forth above in our section Federal Regulatory History, is: "A facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine." 48 Fed. Reg. 20393 (May 5, 1983) (emphasis added). Thus, even though OSM affirmed a policy of examining economic and functional relationships between preparation plants and mines to determine if the plants were operated "in connection with" a mine, it expressly stated in that rulemaking that facilities located at the point of ultimate coal use would not be required to obtain a permit unless the plant was located at the site of the mine.

The language of 30 C.F.R. § 785.21(a) adopted in 1983 was repeated in U.A.C. R645-302-261. Although OSM subsequently amended 30 C.F.R. § 785.21(a) in 1988, it made clear in the preamble [**35] to that rulemaking that it had no intention to disturb its prior interpretation re preparation plants located at the point of ultimate coal use. The OSM stated in the 1988 rulemaking that the purpose of the rulemaking was to clarify that 30 C.F.R. § 785.21 applied only to coal preparation plants operated in connection with a coal mine and that such a limitation "necessarily excludes facilities at the site of ultimate coal use." 53 Fed. Reg. 47384 (Nov. 22, 1988). Accordingly, it dropped the phrase "other than such plants which are located at the site of ultimate coal use" from the rule as "redundant." *Id.* In fact, in response to a comment concerning a specific preparation plant that operated in connection with an end user, a power plant burning coal from a mine located about a mile away, OSM stated that "such plants are not subject to regulation under [OSM's] previous rules," and OSM "has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine." *Id.* at 47388. Thus, we must conclude the OSM's "unchanging intent," was not as argued by OSM in this case, [**36] but as expressed in its regulatory pronouncements beginning in 1983, i.e., not to require the permitting of a preparation plant located at the point of ultimate coal use unless the plant was located at the site of the mine.

The Preparation Plant is located at the point of ultimate coal use, but it is not located at the site of any mine. The DOGM properly interpreted U.A.C. R645-302-261, in accordance with OSM's regulatory preamble policy statements, to exempt the Preparation Plant from obtaining a permit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed, and CO No. 94-020-370-002 is vacated.

Bruce R. Harris, Deputy Chief Administrative Judge

I concur: John H. Kelly, Administrative Judge