

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

*Outgoing  
0070045*

Keith:

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

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

COVOL

TO: File

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

FROM: Mary Ann Wright, Associate Director, Mining

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

Date: December 20, 2005

### INTRODUCTION

Covol Engineered Fuels, L.C. ("Covol") plans to operate a coal processing plant in Carbon County, Utah. Covol will receive coal from various coalmines and send the coal through a dry air separation process to separate the coal from its impurities.<sup>1</sup> The beneficiated coal will be returned to the mine of origin or possibly sold into the stream of commerce. The Division of Oil, Gas & Mining ("Division") finds, based upon several inspections<sup>2</sup> of the Covol plant and information provided by Covol, that Covol is engaged in "coal mining and reclamation operations" and will therefore need to obtain a permit from the Division, in accordance with the Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1 et seq. ("Act") and the implementing regulations, Utah Administrative Code R645-100 et seq.

### FACTS

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

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

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

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

<sup>3</sup> Thompson July 13, 2004 Letter.

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

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

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

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

### ANALYSIS

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

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

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<sup>4</sup> Id.

<sup>5</sup> June 15 Inspection.

<sup>6</sup> Id.

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

<sup>8</sup> Id. ¶ 3-5.

<sup>9</sup> Id. ¶ 10.

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

<sup>11</sup> Thompson July 13, 2004 Letter; September 28 Inspection.

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

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

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

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

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

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

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<sup>13</sup> Id. § 40-10-3(20).

<sup>14</sup> Id.

<sup>15</sup> 30 U.S.C.A. § 1201 et seq.

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

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

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