

0002

RALPH H. MILLER
BRYCE E. ROE
GEORGE D. MELLING, JR.
WARREN PATTEN
M. BYRON FISHER
STANFORD B. OWEN
WILLIAM H. ADAMS
ANTHONY L. RAMPTON
PETER W. BILLINGS, JR.
THOMAS CHRISTENSEN, JR.
LAWRENCE J. LEIGH
DENISE A. DRAGOO
JAY B. BELL
DANIEL W. ANDERSON
GARY E. JUBBER
ROSEMARY J. BELESS
W. CULLEN BATTLE
KEVIN N. ANDERSON
RANDY K. JOHNSON

FABIAN & CLENDENIN

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

TWELFTH FLOOR
215 SOUTH STATE STREET
P. O. BOX 510210
SALT LAKE CITY, UTAH 84151
TELEPHONE (801) 531-8900
FACSIMILE (801) 596-2814

big mine file
cc: L. Max, J. ...
PC ...
Tom ...
R. Daniels

NORMAN J. YOUNKER
MICHELE MITCHELL
JOHN E. S. ROBSON
DOUGLAS B. CANNON
DOUGLAS J. PAYNE

ROBERT PALMER REES
DIANE H. BANKS
R. BRUCE BADGER
JOHN (JACK) D. RAY
KATHLEEN H. SWITZER
CRAIG T. JACOBSEN
ROBERT K. HEINEMAN
SANDRA K. ALLEN
BRUCE D. REEMSNYDER
LAURA L. MOSER
GEOFFREY P. GRIFFIN

OF COUNSEL
PETER W. BILLINGS
Shelton
DR
Mitchell

HAND DELIVERED

December 31, 1991

Dr. Dianne R. Nielson
Utah Division of Oil, Gas & Mining
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-2303

RECEIVED

DEC 31 1991

DIVISION OF
OIL GAS & MINING

RE: Hidden Valley Coal Company
Memorandum of Points and Authorities Concerning
Notice of Violation N91-26-8-2

Dear Dianne:

Enclosed for your reference is a copy of the March 12, 1979 Federal Register cited in our Memorandum of Points and Authorities in the above-entitled matter. As you will note at page 14916, OSM applies the requirement from removal of 250 tons of coal as a general exemption from regulation of surface coal mining and reclamation operations.

Please give me a call if you have further questions concerning this matter.

Very truly yours,

Denise A. Dragoo

DAD:jmc

cc: Lee Edmonson (with enclosure)

RULES AND REGULATIONS

14915

areas without persuasive justification should not be adopted. (See also the discussion of the definition of "adjacent area" in the preamble to Section 701.5 below.)

3. Changes have been made in the permit and performance standard provisions of the rules to reflect the Office's interpretation that the phrase "at or near the mine site," used in the statutory definition of "surface coal mining operations," modifies only "loading of coal." The Office interprets the Act as setting no territorial limitation on its jurisdiction over other facilities identified in the statutory definition preceding "loading of coal."

Resulting from or incident to. The Office received comments which recommended changing the proposed definition of "resulting from or incident to."

1. A suggestion that the term be defined as "the reaction or outcome which would naturally or logically follow an action" appears to make no major change in the proposed definition.

2. Another commenter recommended the term be defined as "any documented cause and effect relationship."

OSM has decided not to define this term believing that a meaningful definition which would cover all situations is not possible. The causal relationship between the activities included in the definition of surface coal mining operations and the enumerated structures and facilities referred to as "resulting from or incident to such activities" cannot be accurately stated in a definition. Instead, the concept will have to be developed by application to case-by-case situations.

Other minerals. (proposed definition). OSM received two comments recommending the addition of a definition of "other minerals" in order to prevent operators, who are in fact mining coal, from using the loophole of "other minerals" when coal does not exceed 10% percent of the other mineral. The commenters cited an enforcement action arising under initial program regulations in which an operator alleged he was exempt from the Act because he was removing overburden as fill for a commercial construction project and that the coal being removed as an incidental matter was less than 10% percent of the tonnage of the overburden.

OSM believes that situations such as this can be taken care of by case-by-case inspection and enforcement actions. The Act defines "other mineral" in Section 701(14). Application of this definition to the phrase as it appears in the definition of surface coal mining operations should prevent abuse. For dirt or earth to be included within the definition, an operator

would have to show that the dirt or earth had commercial value and that coal was only an incidental byproduct of the extraction operation that amounted to less than 10% percent of the tonnage of the earth. Moreover, ambiguous cases would be governed by enforcement consistent with the remedial purposes of the Act.

§700.11 Applicability.

Authority for this Section is Sections 520, 701 and 710 of the Act.

This Section repeats the exemption for these surface coal mining and reclamation operations which are exempted from regulation by the statute. Paragraphs (A) and (B) of this Section repeat the language of the statutory exemptions in Section 520 of the Act. Language is added to Paragraph (a) to limit the concept of noncommercial use based upon applicable legislative history. (S. Rep. 98-120, No. 98th Cong., 1st Sess. 97-98 (1977)).

1. Several commenters suggested revisions in the exemptions of Section 700.11. It was argued that the specific exemption of "landowner" in subsection (d) implies that "nonlandowners" do not share the exemption. Subsection (a) follows the language of Section 520(1) of the Act in this respect. Lacking clear congressional direction in the language of Section 520(1) of the Act or its legislative history, OSM is not prepared at this time to depart from the statutory language as suggested by the commenter.

2. A number of comments were received on Section 701.11(b). That section as proposed added language to that which appears in Section 520(2) of the Act for the purpose of eliminating interpretations of the statutory exemption which OSM felt would be contrary to congressional intent (see 43 FR 41666, September 18, 1978). Some commenters approved of the proposed language saying that without it, the 3-acre exemption "constitutes a tremendous loophole which would be continuously abused." Without some limitation commenters were concerned about unpermitted operators circumventing the law by skipping from one less than 3-acre site to another without reclamation. Other commenters felt the language was too restrictive. Specifically, commenters suggested (1) deleting the words "or intends to affect," (2) adding the phrase "at a single site or combination of sites," (3) adding a time limitation on the phrase "or intends to affect" and (4) substituting 250 tons as the basis for the exemption rather than 3 acres. OSM has rejected the suggested deletion of the words "or intends to affect." The language is in the regulation to clarify that the first 3 acres of a larger operation or a series of less than 3-acre operations that are actual-

ly one mine are not excluded. This is felt to be the proper interpretation of congressional intent.

OSM has responded to other comments by changing the proposed language in Paragraph (b) to clarify that the Act and the regulations do not exempt operations conducted by the same operator at several sites that together exceed 3 acres regardless of whether they are situated so as to be considered one mine. However, OSM agrees in part with commenters who suggested that a time period should apply to operators intending to affect less than 3 acres. OSM believes that the time period should apply only to operations at physically unrelated sites such that an operator would be exempt from the Act and regulations if he or she affected a total of less than 3 acres at physically unrelated sites within 1 year. If the operator affected a total of more than 3 acres at physically unrelated sites within 1 year, he or she would not be exempt from the Act or regulations.

If a time period were not adopted, an operator would only be exempt from the Act and regulations for one 3-acre surface coal mining operation during his or her lifetime. Lacking a clear indication that this is what Congress intended, OSM does not believe such a limitation would be fair or is necessary to fulfill the intent of this section of the Act. Adding the 1-year time limitation is also responsive to the comment that the phrase "or intends to affect" might cover operations planned years in the future and miles away.

The time limitation should not apply to physically related sites, however, or else the mining of what is in reality a larger nonexempt mine may fall within the exemption. Should the 1-year period apply to physically related sites, an operator could phase the operation so as to affect less than 3 acres per year and qualify for the exemption.

OSM has rejected a suggestion to substitute 250 tons as the standard for exemption instead of 3 acres, as 250 tons is a limitation on the Act's coverage in the definition of "operator" in Section 701(13) of the Act. It is in addition to, not a substitute for, Section 520 of the Act and OSM cannot change an explicit standard in the Act such as the 3-acre standard.

3. Commenters suggested that proposed Paragraph (c), which has been redesignated as Paragraph (d), should be stricken or changed. That paragraph refers to the exemption based on Section 520(1) of the Act and is explained in Part 707 of the regulations. It governs coal extraction which is an incidental part of Federal, State, or local government-financed highway or other construction. The thrust of the

14916

RULES AND REGULATIONS

comment was considered and rejected in Part 707 and therefore cannot lead to a change in Section 700.11. For further discussion see the preamble to Part 707.

4. The Office has added a new Paragraph (c) and relettered the Paragraphs that follow. Paragraph (c) sets forth the exemption provided by Section 701(13) of the Act in the definition of the word "operator" for persons who remove 250 tons of coal or less. The word "operator" is not used in the Act in all places at which responsibilities are imposed on those who mine coal. However, there appears to be no rational scheme for the use of the word "operator" and the use of words such as "persons" or "permittees." This unystematic usage not only tends to support a broad exemption from Federal regulations for removing 250 tons or less of coal during a surface coal mining operation but also ensures that, if the exemption were limited to those sections of the Act where the word "operator" is used, the results would be an irrational and confusing regulatory scheme. Thus, the Office has adopted 250 tons of coal or less as a general exemption from regulation of surface coal mining and reclamation operations.

This exemption does not apply to coal exploration. Section 512 of the Act regulates coal exploration without regard to how much coal is removed in the process, although Section 512(d) hinges a requirement of prior approval on removal of more than 250 tons. The exemption of mining 250 tons or less, and the regulation of exploration that removes 250 tons or less, is consistent and rational. Explorations can have substantial adverse impacts over a relatively large area with the removal of only insignificant amounts of coal. Moreover, the regulatory burden on coal exploration is considerably lighter than that on a surface coal mining and reclamation operations.

5. Proposed Paragraph (d), which has been redesignated as Paragraph (e), provides the exemption for coal extracted incidental to the extraction of other minerals, an exemption which appears in the definition of surface coal mining operations in Section 701(28) of the Act.

6. One commenter suggested that mining on Indian lands should not be exempted from Paragraph (e) of the proposed Section, which has been redesignated as Paragraph (f). Regulations implementing Section 710 of the Act for the mining of coal on Indian lands are located in 25 CFR Part 177. Therefore, it is appropriate to exclude that category of mining from regulations in 30 CFR Chapter VII.

7. It was suggested that proposed Paragraph (f), which has been redesignated as Paragraph (g), be deleted in

order that coal exploration on Federal lands outside the permit area be included under the coverage of the Chapter. This proposal was rejected. Section 512(e) of the Act provides that exploration on Federal lands is to be regulated under Section 4 of the Federal Coal Leasing Amendments Act of 1975, and not under SMCRA. However, Section 4 applies only to coal exploration on unleased lands. Because of this, OSM believes the Act does not prevent OSM from regulating coal exploration within permit areas on Federal lands. See the preamble to Part 740 for more discussion.

8. Finally, it was suggested that the exemptions be expanded to exclude all small operators from coverage by the Act until the law and regulations can be changed. OSM has declined to follow this suggestion. OSM cannot create new exemptions not authorized in the Act where it is clear that Congress considered the Act's application to small operators and specified certain exemptions in Sections 502(c) and 507(c), and the definition of operator in Section 701.

§ 700.12 Petitions to initiate rulemaking.

Authority for this Section is found in Section 301(g) of the Act which provides a petitioning process for initiation of a proceeding to issue, amend, or repeal rules issued under the Act. This process is set forth in Section 700.12 of the regulations and is basically the same as that of the initial regulatory program.

A change from the initial program regulation on petitions places a burden upon the petitioner to present facts, technical justification, and legal arguments which support the petition. If the petition concerns an existing rule, it must present justifications and arguments not considered in the previous rulemaking. The Director has authority to reject a petition which does not provide this information and create a reasonable basis for further consideration of the need to issue, amend or repeal a rule. This is also intended to eliminate the need for further consideration of petitions which are frivolous and do not provide a minimum threshold of information meriting the initiation of the administrative process.

The Director's decision on a petition is a final decision for the Department. This has the effect of opening the opportunity for judicial review of the decision without further appeals within the Department.

1. In response to a comment on Section 700.12, OSM has eliminated "State or local government" from Paragraph (a). The reference is not required because State and local governments are included in the definition of

"person," thereby entitling them to petition.

2. OSM has rejected comments which suggested that Paragraph (c) be changed to provide for direct notification to the petitioner rather than publication in the FEDERAL REGISTER. OSM feels notification in the FEDERAL REGISTER is the better course because it notifies the broadest possible group who may be interested in the petition.

3. It was also suggested that Paragraph (c) be changed to require a public hearing. OSM believes that a public hearing may not be necessary in all cases. It is sufficient, therefore, to provide for discretionary hearings. If hearings on the petition would be helpful, OSM anticipates holding them. Hearings will be conducted as part of the rulemaking process if one is initiated.

4. Some commenters recommended revising the Section to provide for judicial review pursuant to Section 526 of the Act if a petition is denied. By making the Director's decision final for the Department, the decision will be subject to judicial review. Specifying that judicial review is pursuant to Section 526 of the Act is unnecessary. Section 526 is applicable according to its terms. Adding language to the regulation could not serve to confer jurisdiction under Section 526 if Section 526 did not confer jurisdiction by its own terms.

5. A commenter suggested adding "practical reasons for the change, . . . if any" to 700.12(b) saying this is one of the most important things to consider when deciding whether to amend a rule. OSM agrees that practical reasons are important factors to consider but believes these will be reflected through "facts" which merit issuing or amending a rule. Therefore, because "facts" are included in 700.12(b), OSM found no reason to add the suggested language.

6. Commenters recommended deleting from 700.12(c) the sentence "facts, technical justification, or law previously considered in a petition on rulemaking on the same issue shall not be found to provide a reasonable basis." The commenters felt that situations, ideas and experience with a rule over time may change and make previously rejected facts, technical justification or law relevant. OSM agrees with this rationale but once again feels that the commenters' concern is addressed by the final language. In essence, the commenters are saying that over time facts concerning the implementation or experience with a regulation may change. Therefore, new facts would be relevant to a decision whether to issue or amend a rule and would be considered. For this reason, OSM has not adopted the commenters' suggestion.