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In Reply Refer To:

March 5, 1991

Dr. Dianne R. Nielson, Director
Division of Oil, Gas and Mining
Department of Natural Resources
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203

Dear Dr. Nielson:

The Office of Surface Mining Reclamation and Enforcement (OSM) has reviewed the Division of Oil, Gas and Mining (DOG M) November 8, 1990, draft policy for regulation of coal mining roads and has the following comments:

Background

Most of the coal mines in Utah have access and haul roads that are not permitted because DOGM has classified these roads as public roads. In July 1985, a Federal Court ruled that categorical exclusion of public roads from regulation was inconsistent with Section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On December 3, 1985, OSM disapproved a proposed State program amendment to the extent that it included such an exclusion. OSM has been working with DOGM since 1985 to get the appropriate roads permitted. However, no agreement has yet been reached. OSM has deferred action on the last amendment submitted by DOGM until such time when an acceptable policy is developed. A draft Federal Register notice announcing this decision is presently undergoing agency review.

Present Approved State Program Provisions

Those provisions of the approved Utah Coal Regulatory Program that specifically address access and haul roads are the following definitions in R614-100-200:

Affected area. This term "means any land or water surface which is used to facilitate, or is physically altered by, coal mining and reclamation operations." This area "includes all areas covered by new or existing roads used to gain access to or for hauling coal from coal mining and reclamation operations * * *;"

Coal mining and reclamation operations. This term "means (a) activities conducted on the surface of lands in connection with a surface coal mine * * * or surface impacts incident to an underground mine; * * * and (b) the areas upon which the activities described under part (a) of this definition occur or where such activities disturb the natural land surface. These areas * * * include * * * all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for the haulage and excavation * * *;" and

Roads. "The term includes access and haul roads constructed, used, reconstructed, improved, or maintained for use in coal mining and reclamation operations * * *."

Please note that Utah's regulations (R614-100-200), as promulgated and published by the State, contain the following statement regarding the definition of roads:

"The term does not include public roads when an evaluation of the extent of the mining-related uses of the road to the public uses of the road has been made by the Division * * *."

The Director of OSM, in the Federal Register notice of April 12, 1990, disapproved this exemption.

R614-300-112.400 requires that "all persons who engage in and carry out coal mining and reclamation operations will first obtain a permit." The permit area, as defined at R614-100-200, "means the area of land * * * which will include the area of land upon which the operator proposes to conduct coal mining and reclamation operations under the permit * * *." Therefore, the State program, as presently approved, not only provides the authority to regulate coal mining access and haul roads, it requires regulation of such roads.

To determine whether Utah has abused its discretion in its decision to regulate or not regulate a particular road, OSM must rely on the approved State program and: (1) The definition of surface coal mining operations in Section 701(28) of SMCRA; (2) the Federal regulations and guidance in the preambles to the Federal regulations; and (3) the guidance in any court decisions interpreting the Act and regulations.

Summary of Draft DOGM Policy

As stated on its first page, the draft policy provides

direction for Division staff in determining if an "access and/or haulage road" is a "public road" in the context of coal mining and reclamation operations under the Utah Coal Regulatory Program * * *. If such a road is determined to be a "public road," it will not be subject to permitting under the program.

Under proposed procedures summarized on the same page of the draft policy, roads associated with existing and proposed mining and reclamation plans would be evaluated on a case-by-case basis. DOGM would first

[i]dentify all roads, located within the boundary of the permit area and providing access to the permit area, which will be used in conjunction with operations under the Mining and Reclamation Plan. (Roads which are presumptively subject to permitting.)

For roads that meet this threshold criterion, DOGM would then

[c]onsider the status or use of the road with respect to [four other] criteria.

Current OSM Interpretation

Under Section 701(28) of SMCRA and a corresponding provision of the Federal regulations at 30 CFR 701.5, "surface coal mining operations" subject to the requirement for a permit include

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 * * *.

In its regulatory definition of the term "affected area" at 30 CFR 701.5, OSM originally interpreted Section 701(28) of SMCRA as excluding certain public roads. However, the definition of "affected area" was successfully challenged in In re: Permanent Surface Mining Regulation Litigation (In re: Permanent), 620 F. Supp. 1519, 1581-82 (D.D.C. 1985), modified sub nom., National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir.).

Pursuant to court order in that case, on November 20, 1986 (51 Federal Register 41953), OSM suspended the definition of "affected area" "to the extent that it excludes public roads which are included in the definition of 'surface coal mining operations.'" OSM said,

The suspension will have the effect of including in the "affected area" all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the regulated activities or for haulage.

Thus, in determining which mine-related roads potentially are subject to permitting, OSM currently relies on the applicable language of the definition of "surface coal mining operations" at Section 701(28) of SMCRA and the corresponding provision of the Federal regulations at 30 CFR 701.5. Consistent with the court's decision in In re: Permanent and OSM's November 20, 1986, suspension notice, this potentially includes certain public roads.

Threshold Criterion

For the following reasons, DOGM's threshold criterion is not in accordance with SMCRA or consistent with the Federal regulations or the approved State program.

First, the procedure to "[i]dentify all roads, located within the boundary of the permit area and providing access to the permit area" presumes that the boundaries of the permit area are known in advance. In fact, as the ultimate purpose of applying the threshold criterion is to determine the boundaries of the permit area as it relates to roads, it is not possible to specify this boundary in advance.

Second, DOGM's threshold criterion is directed only at road "use." It fails to account for road construction and improvement. This is not in accordance with the definition of "surface coal mining operations" at Section 701(28) of SMCRA, consistent with 30 CFR 701.5 of the Federal regulations, or consistent with the approved State program.

Third, DOGM's threshold criterion is directed only at those roads "providing access to the permit area," whereas SMCRA, the Federal regulations, and the State program encompass both "access" and "haulage."

Remaining Criteria

As discussed previously, OSM interprets the definition of "surface coal mining operations" at Section 701(28) of SMCRA as potentially including certain public roads. The remaining criteria of the draft policy, however, would exclude from the requirement for a permit any "public road." This approach is not in accordance with SMCRA or consistent with either the Federal regulations or the approved State program.

DOGM appears to base this deference to a road's "public" status on the decision of the United States District Court for the Western District of Virginia in Harman Mining Corp. v. OSMRE, 659 F. Supp. 806 (W.D. Va. 1987), and the related Interior Board of Land Appeals (IBLA) decision in Harman Mining Corp. v. OSMRE, 110 IBLA 98. In view of In re: Permanent, however, in which the United States District Court for the District of Columbia determined that OSM's definition of "affected area" improperly excluded from regulation some public roads which are included in the SMCRA definition of "surface coal mining operations," OSM cannot accept DOGM's narrow reading of either of these Harman decisions as dispositive of the issue. Instead, OSM is constrained to apply these decisions only to the limited factual context considered by the court and the IBLA.

Conclusion

Under DOGM's draft policy, it would appear that very few, if any, coal mining access and haul roads in the State would be subject to the requirement for a permit. For the above reasons, this exclusion of "public roads" is unacceptable to OSM.

It is not OSM's intention to extend regulatory jurisdiction into the existing public road network where the use of that road is only incidental to the coal mining operation, and the effect from the mining-related use is relatively minor. To be exempt, roads must be constructed for purposes other than mine access or coal haulage, be reconstructed or improved for purposes other than to upgrade the road so that it can be used for mine access or coal haulage, or be an existing road that is affected by only relatively minor impacts from the coal mining-related use.

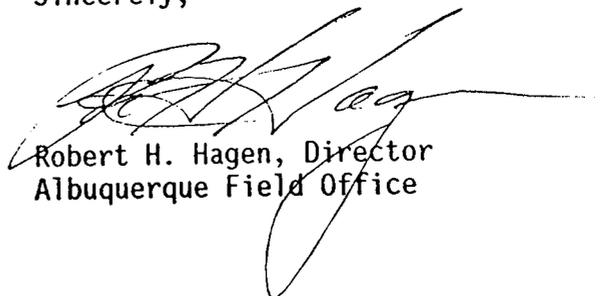
As stated earlier, OSM believes that there is adequate authority and a regulatory obligation for DOGM to proceed with permitting access and haul roads in accordance with the approved State program. While policy guidance would facilitate DOGM's regulatory activities, it is not a prerequisite to regulation. OSM will continue to work with DOGM on a

Dr. Dianne R. Nielson

6

policy; however, OSM will also, at the time of an inspection, notify the State whenever OSM has reason to believe that a violation of the approved State program regarding permitting of access and haul roads exists.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Hagen", with a long horizontal flourish extending to the right.

Robert H. Hagen, Director
Albuquerque Field Office