



Suzanne Steab <suzannesteab@utah.gov>

Fwd: Legal Determination regarding the SR-10 Loadout

Karl Houskeeper <karlhouskeeper@utah.gov>

Thu, Dec 18, 2014 at 7:38 AM

To: OGMCOAL DNR <OGMCOAL@utah.gov>, Daron Haddock <DARONHADDOCK@utah.gov>, Steve Christensen <stevechristensen@utah.gov>, Suzanne Steab <suzannesteab@utah.gov>

Cc: Dana Dean <DANADEAN@utah.gov>

FYI.

Information on load out near SR10 and SR24 Junction. May want to pass it on to Division Attorney for review.

Karl

----- Forwarded message -----

From: **Chris Hansen** <chansen@bowieresources.com>

Date: Wed, Dec 17, 2014 at 8:38 PM

Subject: Legal Determination regarding the SR-10 Loadout

To: "Karlhuskeeper@utah.gov" <Karlhuskeeper@utah.gov>

Cc: Vicky Miller <vmiller@bowieresources.com>, Amanda Richard <arichard@bowieresources.com>, John Byars <jbyars@bowieresources.com>, Chris Hansen <chansen@bowieresources.com>, Wyatt Shakespear <WShakespear@bowieresources.com>

Karl:

Please find attached to this email a copy of a letter I received from Wells Parker, an attorney with Dorsey and Whitney, LLP, that researched the issue of why permitting the SR-10 Loadout under SMCRA is not necessary. We were not able to come up with the original legal decision documents that would have been prepared while we were designing the site and still owned by Arch Coal. If you have any questions, please let us know.

I did have this document with me at Sufco today but just missed catching up to you. We'll see you on the 23rd of December.

Thanks,

Chris D. Hansen

Director of Regulatory Compliance and Government Relations

Bowie Resource Partners, LLC

Work: (435) 448-2669

Cell: [\(970\) 261-1425](tel:(970)261-1425)

—

Karl R. Houskeeper

Environmental Scientist III

Division of Oil, Gas and Mining

319 North Carbonville Road, Suite C

Price, Utah 84501

Phone: [\(435\) 613-3730](tel:(435)613-3730)

Fax: [\(435\) 613-3739](tel:(435)613-3739)

Email: karlhouskeeper@utah.gov



SR-10 Loadout.pdf

580K

December 16, 2014

VIA ELECTRONIC MAIL

Canyon Fuel Company, LLC
Sufco Mine
Attn: Chris Hansen
5976 SR24
Salina, UT 84654
chansen@bowieresources.com

Re: SR-10 Loading Facility – SMCRA Regulation

Chris:

At your request we have conducted research into whether the SR-10 Loading Facility (the “SR-10 Facility”) owned and operated by Canyon Fuel Company LLC (“CFC”) is required to be permitted under the Surface Mining Control and Reclamation Act¹, its implementing regulations (“SMCRA”) and parallel state statutes in Utah. Currently, coal is transported to the SR-10 Facility, where it is centralized for eventual transportation to power plants and other coal purchasers, principally located in Utah. No coal processing or preparation takes place at the SR-10 Facility; the coal is off-loaded at the yard and subsequently loaded for transportation with no physical or chemical processing or other beneficiation performed at any time. Currently, the SR-10 Facility is not covered by a permit under SMCRA or its state counterpart.

Surface Mining Control and Reclamation Act and Related Law

SMCRA requires that “no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program....”² Loading facilities can fall within the regulatory scope of SMCRA (i) under the general provisions regulating “surface coal mining operations”, which includes loading facilities located at or near the mine site, or (ii) as a “coal preparation plant,” which covers sites where coal is processed away from a mine site.

Under SMCRA, states may assume exclusive jurisdiction from the federal government over the regulation of surface coal mining and reclamation operations.³ Utah has assumed such responsibility for surface coal mining regulation.⁴ Utah’s statutes and rules regarding off-site coal processing plants, promulgated under SMCRA, attempt to follow SMCRA’s implementing statutes and regulations.

Utah has codified its coal mining statutes at U.C.A. Title 40, Chapter 10. The provisions of the relevant Utah statutes are implemented through rules promulgated by the Utah Division of Oil, Gas, and Mining (the “Division”).⁵ These rules are located in the Utah Administrative Code (“U.A.C.”) under U.A.C. Title R645.

Surface Coal Mining Operations

SMCRA defines the term “surface coal mining operations” as “activities conducted on the surface of lands in connection with a surface coal mine.... Such activities include...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....”⁶ A similar definition for “surface coal mining operations” is contained in Federal regulations implementing SMCRA.⁷

The definition of “surface coal mining operations,” for the purposes of Utah’s statute is substantially the same as the statutory language of SMCRA.⁸ Under the Division’s rules, the definition of “coal mining and reclamation operations” parallels the definition of “surface coal mining operations” found in the Federal regulations, and identifies the following as being within the meaning of the term: “physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site.”⁹

In interpreting the application of SMCRA and its implementing state statutes and regulations under a delegated state program, regulators often look to the interpretation of the Office of Surface Mining Reclamation and Enforcement (“OSM”), the Interior Board of Land Appeals (“IBLA”) and Federal courts.

A determination of whether a loading facility is subject to regulation under SMCRA and related state statutes must satisfy the test of whether the facility is located “at or near the mine site” as provided under SMCRA. The IBLA has addressed this issue in the case of *Ann Lorentz Coal Co., Inc. v. Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 34 (1984). Therein, the IBLA considered the appropriateness of a SMCRA notice of violation issued to a tipple facility in West Virginia. After determining that the loading activities carried out at the tipple facility were not “surface coal mining operations” subject to regulation under SMCRA, the IBLA next considered whether the loading facility was “located at or near the mine site.” The IBLA acknowledged the relative nature of the word “near,” but determined that “at or near” expressed “a concern for geographic proximity between the surface coal mine and the loading facility.” The IBLA then concluded that the phrase “at or near the mine site”:

should be construed to include a loading facility which operates on the same permit area as the minesite or a loading facility which is physically integrated with the minesite to the extent that any potential or actual environmental damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation. In other words, the loading facility would be perceived as part and parcel of the minesite operations.

The IBLA determined that the tipple facility was not “at or near the mine site.” In reaching this conclusion, the IBLA found particularly persuasive the “road distance from the extraction activities to the tipple itself,” which was approximately 2.5 miles (even though the tipple facility was located only 600 yards from the mine permit area). The path from the mine site to the tipple was largely over public roads, leading the IBLA to hold that the tipple facility and the mine site were “not physically integrated” and “not part of the same operation.”

Coal Preparation Plants

Even if a loading facility is not located “at or near a mine site” it may still be subject to SMCRA regulation if it is considered a coal preparation plant. One of the facilities regulated under SMCRA by the regulations at 30 C.F.R. Chapter 7 are coal preparation plants. 30 C.F.R. § 785.21 provides 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.”

30 C.F.R. Chapter 7 defines a “coal preparation plant” to mean “a facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation.”¹⁰ It includes facilities associated with coal preparation activities, and may include loading facilities where coal preparation activities occur. “Coal preparation” is defined to mean “chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.”¹¹

State regulations applicable to the delegated Utah state program under SMCRA contain similar definitions for coal preparation and coal preparation plants. The U.A.C. defines “Coal Preparation or Coal Processing” as “the chemical and physical processing and the cleaning, concentrating, or other processing or preparation of coal.”¹² The same section defines “Coal Processing Plant” to mean “a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. Like the federal regulations, the U.A.C. includes a section addressing coal processing plants located outside of a mine permit area.¹³ Such plants need a permit to operate, and such permits must be obtained in accordance with the requirements of the U.A.C.¹⁴

On the Federal level, rules regarding the regulation of coal processing and coal processing plants under SMCRA are promulgated by the OSM and published in the Federal Register. When OSM publishes proposed regulations in the Federal Register, the public is provided an opportunity to submit comments and questions relating to the proposed regulations, and OSM is provided with the opportunity to respond to the questions and comments. OSM’s responses to such comments provide useful interpretations of SMCRA and its implementing regulations that are often closely followed by state regulators under delegated state programs.

Interpreting its regulations in the Federal Register, OSM states in that “loading” is not a form of “processing.”¹⁵ Specifically, “OSM[] interprets ‘loading’ and ‘processing’ to be distinct and different activities. Coal loading is not processing, and therefore off-site loading facilities that do not process coal are not subject to the performance standards of 30 CFR Part 827. OSM[] agrees...that loading facilities that do not process coal are not regulated unless located at or near the mine site. OSM[] construes the specific language limiting the regulation of loading facilities to those at or near the mine site to limit proximity considerations concerning off-site loading facilities.”¹⁶

The decisions of the IBLA have been consistent with OSM’s interpretation that off-site loading facilities that do not perform coal processing or coal preparation activities are not subject to regulation under SMCRA as coal preparation plants.¹⁷

Analysis

As described above, a facility such as the SR-10 Facility, may become subject to the permitting requirements under SMCRA by either (i) falling within the scope of “surface coal mining operations”, which includes coal loading facilities located at or near the mine site or (ii) being treated as a “coal processing plant” subject to SMCRA regulation.

The SR-10 Facility does not appear to be a coal loading facility located at or near the mine site. As noted above, a determination of whether a facility is “at or near the mine site” has been interpreted by OSM and the IBLA as requiring that the loading facility be “physically integrated with the minesite to the extent that any potential or actual environmental damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation.” The IBLA has held that a loading facility located 2.5 miles from a mine site largely over public roads does not satisfy the requirement that the facility be located at or near the mine site.

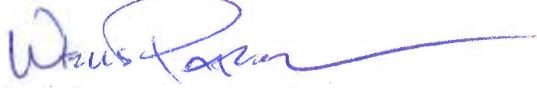
The SR-10 Facility is not located at or near the Sufco Mine site. The SR-10 Facility is located approximately 11 miles from the Sufco Mine and is accessed via the Quitchupah Creek Road, a public road owned by Sevier County. Activities at the SR-10 Facility are not physically integrated with operations at the Sufco Mine site and the potential environmental impacts of the Sufco Mine and the SR-10 Facility are not physically connected in any manner. Therefore, the SR-10 Facility does not appear to be “at or near the mine site” as provided for under the SMCRA regulations addressing loading facilities and would likely not be subject to SMCRA permitting requirements under Federal or Utah statutes and regulations.

Furthermore the SR-10 Facility does not appear to be a “coal processing plant” or include “coal preparation or coal processing” as defined under SMCRA and Utah law. Activities conducted at the SR-10 Facility involve neither separation of coal from its impurities nor physical or chemical preparation or cleaning of coal. Furthermore, OSM has clearly stated that “[c]oal loading is not processing, and therefore off-site loading facilities that do not process coal are not subject to the performance standards of 30 CFR Part 827....” Therefore, the SR-10 Facility does not appear to be subject to SMCRA permitting requirements under Federal or Utah law as a coal processing plant.

Because the SR-10 Facility does not appear to be located “at or near the mine site,” and does not appear to be a coal processing plant, the SR-10 Facility should not be required to obtain a SMCRA permit.

Please let me know if you have any questions about the SMCRA regulatory and permitting requirements and their application to the SR-10 Facility.

Very truly yours,



Wells S. Parker

cc: Brian Settles
Mike Drysdale
Bill Prince

¹ 30 U.S.C. §§ 1201-1328.

² 30 U.S.C. § 1256(a).

³ 30 U.S.C. § 1253(a).

⁴ See 30 C.F.R. § 944.10; cooperative agreement between Utah and the Department of the Interior located at 30 C.F.R. § 944.30.

⁵ U.C.A. § 40-10-6.5.

⁶ 30 U.S.C. § 1291(28)(A).

⁷ 30 C.F.R. § 700.5.

⁸ U.C.A. § 40-10-3(20).

⁹ U.A.C. R645-100-200.

¹⁰ 30 C.F.R. § 701.5.

¹¹ 30 C.F.R. § 701.5.

¹² U.A.C. R645-100-200.

¹³ U.A.C. R645-302-260.

¹⁴ U.A.C. R645-302-260.

¹⁵ 53 Fed. Reg. 47,384.

¹⁶ 53 Fed. Reg. 47,384.

¹⁷ See, e.g., *Ann Lorentz Coal Co., Inc. v. Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 34 (1984) ("if a facility engages only in the loading of coal for interstate commerce, it is a surface coal mining operation only if loading is conducted on the surface of lands in connection with a surface coal mine, and the facility is located at or near the minesite"); *Tommy Carpenter et al.*, 88 IBLA 286 (1985) (acknowledging that a facility performing solely loading activities not at or near a mine site would be outside the jurisdiction of OSM); *Reitz Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 83 IBLA 198 (1984) (noting the effect of the holding in *Ann Lorentz Coal Co., Inc.*, but distinguishing based on facts that Reitz was "processing" coal within the meaning of SMCRA).