



COALEX STATE INQUIRY REPORT – 136
September 28, 1990*

William Gerlach, Esquire
Pennsylvania Department of Natural Resources
301 Chestnut Street
Harrisburg, Pennsylvania 17120-2702

TOPIC: DEFINITION OF "IN CONNECTION WITH" UNDER "SURFACE MINING OPERATIONS"

INQUIRY: Please locate any federal or state cases interpreting portions of the definition of "surface coal mine operations"; in particular, the phrases "in connection with" and "incident to [underground coal mining]". Is the physical processing of coal at the site of final use regulated under SMCRA?

SEARCH RESULTS: The COALEX Library and the publicly available materials in LEXIS were used to identify relevant materials. The retrieved materials are organized in chronological order, according to the date a particular set of rules were promulgated. Federal Register notices include proposed, interim and final rules and their accompanying preambles. Administrative, federal and state decisions are listed following the set of rules to which they relate. Copies of the items discussed below are attached.

*Research on this inquiry was conducted in September, 1989. This Report has been updated to include the 1990 Flannery decisions.

A. LEGISLATIVE HISTORY:

S Rep No 128, 95th Cong, 1st Sess 98 (1977).

"'Surface mining operations' is so defined to include not only traditionally regarded coal surface mining activities but also surface operations incident to underground coal mining, and exploration activities."

B. 1979 DEFINITION OF "SURFACE MINING OPERATIONS"

30 CFR 700.5, 44 FR 14902 (March 13, 1979)

"(a) Activities conducted on the surface of lands in connection with a surface coal mine....Such activities include...loading of coal for interstate commerce at or near the mine-site...."

TWO-PART TEST

In its earlier decisions, the Interior Board of Surface Mining Appeals (IBSMA) developed a two-part test to determine whether an off-site coal processing or loading facility fit the definition of a "surface coal mining operation". IBSMA held that an off-site facility must be operated "in connection with" a surface coal mine and must be located "at or near" the mine site. As stated in



the preamble to the permanent program regulations published in the Federal Register on March 13, 1979 (44 FR 14902), the phrase "at or near the mine site" modified only "the loading of coal for interstate commerce." [Excerpts of the preamble to the final rule are attached.]

WESTERN ENGINEERING, INC., 1 IBSMA 202, 86 I.D.336, IBSMA 79-14 (June, 1979).

The IBSMA held that Western, owner of a river terminal which prepared and loaded coal for river barge shipments and acted as a contract handler of coal, did not own, operate, or lease any coal mines and was not a surface mining operation.

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION (PSMRL I, ROUND II), 19 Env't Rep Cas 1477 (D DC May, 1980). [Note: Excerpts from this case are attached.]

The Court upheld the Secretary's rules, finding that SMCRA Section 701(28)(A) "clearly extends the regulatory directives...to include off-site processing and support facilities." Using a grammatical analysis of the structure of the subsection, the Court found that the phrase "at or near the mine site", "refers to activity following the preceding comma; namely, the loading of coal."

The language in Section 701(28)(B) "provides an independent basis for regulating off-site facilities and processing plants....The language expressly includes 'adjacent land...incidental to such activities,' 'processing areas,' and 'other areas' that contain sited structures and facilities 'resulting from or incident to such activities.'"

DRUMMOND COAL CO., 2 IBSMA 96, 87 I.D. 196, IBSMA 80-8 (June, 1980), rev'd, DRUMMOND COAL CO. v ANDRUS, CV 80-M-0829 (ND Ala 1981). [Note: The text of this latter case is not available through LEXIS.]

The IBSMA ruled that a coal processing facility that was owned by the same company that owned all the mines that supplied coal to it "may conduct activities 'in connection with' a surface coal mine within the meaning of 'surface mining operations'." In addition, a coal processing facility which was "functionally and economically integrated with several neighboring surface coal mines" but was "9 miles distant from the closest of those mines" was to be considered "near" a minesite.

VIRGINIA IRON, COAL AND COKE CO., 2 IBSMA 165, IBSMA 80-36 (July, 1980).

"A preparation plant which is located 1 mile from a deep mine that processes its coal through the plant and which is permitted to the same person as is the mine is both at or near the mine and operated in connection with the mine."

DRUMMOND COAL CO., 2 IBSMA 189-195, IBSMA Nos. 80-56 (August, 1980). DRUMMOND COAL CO. v OSM, Docket No. NX 0-21-P, NX 0-22-P (April, 1980). [See DRUMMOND COAL below.]

In reversing the ALJ, the Board ruled: "Where a coal processing facility is owned and operated by the same company that owns and operates the mine supplying most of the coal to the facility, that facility is operated 'in connection with' a surface coal mine...."



"Where a coal processing facility is found to be operated in connection with a surface coal mine and is located less than 15 miles from three active surface mining pits, that facility is 'near' the minesite...."

ROBERTS BROTHERS COAL CO. INC., 2 IBSMA 284, IBSMA 80-14 (September, 1980).

"A tipple located 200-300 feet from a minesite is a 'surface coal mining operation' within the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple."

SHAWNEE COAL CO. v ANDRUS, 661 F2d 1083, 11 ELR 21040 (6th Cir June, 1981).

Shawnee owned and operated the surface mine and the tipple, located at the same site, which processed its coal. The tipple continued in operation after coal removal at the Shawnee mine ceased, processing coal removed from non-adjacent mines. The Court ruled that Shawnee's tipping operation was connected to its coal mine, that it remained an "operator" as "that term is defined in Section 701(13)", and that "the Secretary retains jurisdiction over an operator who has ceased removing coal until the reclamation activities are completed."

REITZ COAL CO., 3 IBSMA 260, IBSMA 81-20 (August, 1981).

"Mere evidence that a coal processing facility receives some undisclosed percentage of the coal production of two mines operated in connection with the facility, and located distances of 8 and 11 miles from the facility, is not sufficient to establish that the facility is 'at or near' either of the mines...."

"[T]he lack of a prescribed distance or even a general definition of the term 'near,' in both the Act and regulations...supports a functional consideration of the term."

SUMBEAM COAL CORP. v OSM, Docket No. CH 0-229-P (October, 1983).

The ALJ ruled that Sunbeam's tipple was a "surface mining operation" subject to the regulations of SMCRA: Most of the coal processed at the tipple came from Sunbeam mines located 2 to 30 miles from the tipple; 55 to 60 percent of the output of these Sunbeam mines was process at that tipple. [Cites to SHAWNEE, above.]

MARY DEBORD et al. v DINCO COAL SALES, INC., Nos. 82-5617, 82-5725, slip op (6th Cir 1984). MARY DEBORD et al. v WATT, Civil Action No. 82-99, slip op (E D KY 1982). DINCO COAL SALES, INC., 4 IBSMA 35, IBSMA 82-3-1, 82-11 (1982). DINCO COAL SALES, INC. v OSM, Docket No. NX 1-120-R (1981).

The tipple owned by Dinco processed coal from a Dinco-owned mine, located 25 miles from the tipple, as well as coal from mines not owned by Dinco. The Court stated: "We agree with the District Court's construction of 30 USC Section 1291(28) [SMCRA Section 701(28)], and with the plain language and the legislative history of that provision, that 'processing' tipples, as distinguished from 'loading' facilities, need not be located 'at or near the mine site' in order to be subject to the jurisdiction of the Secretary."



C. 1983 FINAL RULE

48 FR 20392 (May 5, 1983). Support facilities and coal preparation plants.

The definition of "surface coal mining operations" was revised to remove the ambiguity in the interpretation of the phrase "at or near the mine site": "(a) Activities conducted....Such activities also include the loading of coal for interstate commerce at or near the mine site."

Facilities located "at the site of ultimate use" were excluded from regulation. OSM stated its interpretation of the meaning of "in connection with": "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. OSM will treat all facilities which handle coal as either 'in connection with' a mine or 'in connection with' an end user."

New definitions were provided for "'coal preparation' or 'coal processing'": coal processing included only those activities where coal was separated from its impurities. "Indeed, by its omission, OSM believes that Congress specifically excluded mere crushing and sizing."

The meaning of "incident to" was discussed in connection with the new definition of "support facilities". This definition clarified the types of facilities regulated and incorporated a proximity element: "When not at or near a mine, a coal loading facility will only be regulated if it is part of or results from or is incident to a regulated coal preparation plant or other regulated activity...."

ANN LORENTZ COAL CO., INC. v OSM, 79 IBLA 34, IBLA 83-613 (February, 1984).

The Board used the following analysis to determine that the tipple was not at or near the surface mine nor integrated with it: "[C]ourt decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, and that facility must be located at or near the minesite."

A "series of words of limitation" are used to "identify the narrow category of loading operations which would be included in the definition of 'surface coal mining operation'....[T]hese limitations reveal a concern for geographic proximity between the surface coal mine and the loading facility....'At or near the mine site,' then, 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."

BLACKFOX MINING & DEVELOPMENT CORP. v OSM, Docket No. CH 1-103-R (June, 1984).

ALJ applied the four part test from ANN LORENTZ COAL CO. to the facts of this case and determined that the mine and tipple were not part of the same operation: "First, the loading has to be of surface mined coal. Second, the loading facility has to be operated 'in connection with' a



surface coal mine. Third, the loading must be for the purpose of shipment in interstate commerce. Fourth, the loading facility must be 'at or near' the site of the mine with which it is connected."

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION (PSMRL II, ROUND I), 14 ELR 20617; 21 ERC 1193 (D DC July 6, 1984). [Note: Only excerpts from this case are attached.]

The Court, "once again" affirmed the Secretary's jurisdiction to regulate off-site facilities and processing plants under SMCRA Subsections 701(28)(A) or (B); however, it ruled that coal preparation or processing had to be defined to cover activities where coal was handled without being washed, cleaned or otherwise separated from its impurities.

Regarding support facilities, the Court ruled that the element of proximity was contrary to the Act; instead of using a geographic test, the Secretary should use a functional one.

REITZ COAL CO. v OSM, 83 IBLA 198, IBLA 84-184 (October, 1984). REITZ COAL CO. v OSM, Docket Nos. CH 0-292-P, CH 2-48-P (October, 1983).

"In order to be conducting surface coal mining operations, within the meaning of [SMCRA], a coal preparation and processing plant need only be operated in connection with a surface coal mine. A coal preparation and processing plant which is operated in connection with a number of surface coal mines, therefore, conducts surface coal mining operations within the meaning of [SMCRA], 30 USC Sec. 1291(28)(A) (1982).

DRUMMOND COAL CO. v OSM, Docket No. NX 0-21-P (January, 1985). [See DRUMMOND COAL, above.]

After examining "recent IBLA opinions, as well as [recent] regulatory changes," the ALJ reaffirmed the Board's earlier ruling that found that OSM "had jurisdiction over the preparation plant because it was operated 'in connection with a surface coal mine' and was 'near' the mine site within the meaning of 30 CFR Sec. 700.5 (1979)."

RACE FORK COAL CORP. v OSM, 84 IBLA 383, IBLA 83-618 [IBSMA 82-16] (January, 1985).

"Offsite processing facilities are operated 'in connection with' surface mines where the owner and operator of the facility is also the permittee and/or operator of a group of supplying mines."

IRONTON COAL CO. v DIVISION OF RECLAMATION, No. 1839, slip op (Ohio Ct App 1987).

Ironton Coal's facility, located 20 miles to 80 miles from the mines it serviced, was found not to be operated "in connection with" Addington mines: Although the officers of the two companies were the same, they were operated as "separated entities in all respects." The court held that the "activities conducted at the facility", the crushing of coal of coal at the river's edge for loading onto barges, did not constitute "physical processing"; therefore, the Ironton Coal facility was not a "coal mining operation" under the Revised Code of Ohio.



D. INTERIM AND FINAL RULES.

50 FR 28180 (JULY 10, 1985) Interim final rule and Proposed rule.

OSM redefined "coal preparation" and "coal preparation plant" to include "chemical or physical processing" and "cleaning, concentrating, or other processing or preparation." Deleted from the definition was the condition that coal preparation must include the separation of coal from its impurities.

In response to the July 6, 1984 District Court decision, the definition of "support facilities" was suspended: "OSM determined that no definition of support facilities is needed...that there is not need to amplify the language in the Act with respect to the meaning of the activities that are 'resulting from or incident to' a regulated activity. Furthermore...support facilities are subject to the same performance standards as the mines they support...."

52 FR 17724 (May 11, 1987). Final rule. Coal preparation plants.

Under these rules, facilities which "engage in physical or chemical processing (i.e., crushing, screening and sizing facilities)" will be regulated as coal preparation plants" when they are operated "in connection with " a coal mine. "Facilities which do not separate coal from its impurities will be included in this definition."

Reference was made to the May 5, 1983 Federal Register notice for discussion of the definition of "in connection with" a coal mine and "in connection with" an end user.

The definition of "support facility", suspended in the interim final rule, continued until a new definition was adopted.

OSM set out a timetable for coal preparation plants covered by SMCRA as a result of the July, 1984 District Court decision to obtain their required permits; however, OSM determined that the performance standards would be applied only to those preparation plants that operated after July 6, 1984 even though it had "jurisdiction to cover facilities operating prior to July 6, 1984."

NATIONAL WILDLIFE FEDERATION v HODEL, 839 F2d 694, 18 ELR 20646 (DC Cir January, 1988).

The Court affirmed the District Court's ruling on the Secretary's jurisdiction over off-site coal preparation plants but reversed the lower court's finding on the use of proximity to define a support facility: "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 that is familiar to the courts in tort law....Proximity is used as a guiding principle in a flexible implementation of the statute...."

E. PROPOSED AND FINAL RULES.

53 FR 23522 (JUNE 22, 1988). Proposed Rule. Support facilities.

OSM proposed to make final the removal of the definition of "support facilities". After various "outreach consultations", OSM concluded: "[H]aving 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'....[I]t 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....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."

53 FR 23526 (JUNE 22, 1988). Proposed rule. Coal preparation plants not located within the permit area of a mine.

OSM proposed to revise the language in the permitting requirements for off-site preparation plants in order to "clarify that the rule applies only to coal preparation plants operated in connection with a coal mine, and OSMRE believes that this limitation necessarily excludes facilities at the site of ultimate use...."

The corresponding language in the performance standards was proposed to be similarly revised.

"No definition of the term 'in connection with' is proposed. Regulatory authorities will find ample guidance for making determinations as to whether a coal preparation plant is being operated in connection with a mine in the language in the definitions of 'surface coal mining operations' in section 701(28) of SMCRA and 30 CFR 700.5, in case histories interpreting those definitions, and in preamble discussions in OSMRE's related 1979 and 1983 rules. Any attempt to further define this phrase in a regulation would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the applicability of the performance standards of SMCRA in individual cases. Categorical exclusions or inclusions would almost certainly result in inappropriate applications of the rule in some instances."

53 FR (NOVEMBER 22, 1988). Final rule. Support facilities.

OSM removed the definition of support facilities from its regulations because: "[A] definition is not needed in order to ensure that such facilities are regulated under [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)."

53 FR 47384 (NOVEMBER 22 1988). Final rule. Coal preparation plants not located within the permit area of a mine.

The first sentence of 30 CFR 785.21 (a) of the final permitting regulations for off-site preparation plants now reads: "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." The phrase "for a specific mine" was added to the proposed rule; the "redundant" phrase "other than such plants which are located at the site of ultimate coal use", which appeared in the earlier version of the rule was deleted.

Corresponding changes were made to the performance standards.



NATIONAL WILDLIFE FEDERATION v LUJAN, Civil Action Nos. 87-1051, 87-1814, 88-1788 (Consolidated) (D DC February 12, 1990).

The court agreed with NWF that the effective date of the definition of off-site processing was the "date SMCRA was enacted into law", not the date the "court struck down the definitions's predecessor [July 6, 1984]." The court found that its earlier decision dealt with the Secretary's jurisdiction as set by Congress and thus the Secretary had no authority to limit it. The court held as "wholly unpersuasive" the Secretary's arguments that exercising jurisdiction over these facilities was retroactive regulation and would be inequitable for some operators. The court stated:

"Given the statute's language and the Secretary's original permanent rules, reasonable operators should have been on notice that such off-site physical processing facilities might be regulated. Indeed, the reasonable operator should have been aware that such facilities likely would be regulated....Last, the court cannot agree that requiring regulatory authorities to take difficult steps to compel operators to reclaim is unwarranted when the operators had settled expectations otherwise."

NATIONAL WILDLIFE FEDERATION v LUJAN, Civil Action Nos. 88-2416, 88-3345, 88-3586, 88-3635, 89-0039, 89-0136, 89-0141 (Consolidated) (D DC August 30, 1990).

The court set aside regulations allowing the use of proximity as a factor in determining whether a plant is covered by SMCRA "insofar as it makes proximity to a mine site the limiting factor in deciding whether to regulate an off-site coal processing facility." The court ruled:

"[It] will remand this regulation to the Secretary for him to clarify that proximity may be the decisive factor in deciding to regulate an off-site processing plant. The Secretary may wish to find another limiting factor to define 'in connection with' a mine that is not based on proximity, or he may wish to use his former criteria and state that an off-site processing plant operated in connection with a mine but off the mine site will be regulated without regard to its proximity to the mine."

ATTACHMENTS

- A. S REP NO. 128, 95th Cong, 1st Sess 98 (1977).
- B. Excerpts from 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble - Final rule.
- C. WESTERN ENGINEERING, INC., 1 IBSMA 202, 86 I.D.336, IBSMA 79-14 (June, 1979).
- D. Excerpts from IN RE: PERMANENT SERFACE MINING REGULATION LITIGATION (PSMRL I, ROUND II), 19 Env't Rep Cas 1477 (D DC May, 1980).
- E. DRUMMOND COAL CO., 2 IBSMA 96, 87 I.D. 196, IBSMA 80-8 (June, 1980), rev'd, DRUMMOND COAL CO. v ANDRUS, CV 80-M-0829 (ND Ala 1981). [Note: The text of this later case is not available through LEXIS.]
- F. VIRGINIA IRON, COAL AND COKE CO., 2 IBSMA 165, IBSMA 80-36 (July, 1980).
- G. DRUMMOND COAL CO., 2 IBSMA 189-195, IBSMA Nos. 80-56 (August, 1980).
- H. DRUMMOND COAL CO. v OSM, Docket No. NX 0-21-P, NX 0-22-P (April, 1980).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- I. ROBERTS BROTHERS COAL CO. INC., 2 IBSMA 284, IBSMA 80-14 (September, 1980).
- J. SHAWNEE COAL CO. v Andrus, 661 F2d 1083, 11 ELR 21040 (6th Cir June, 1981).
- K. REITZ COAL CO., 3 IBSMA 260, IBSMA 81-20 (August, 1981).
- L. SUNBEAM COAL CORP. v OSM, Docket No. CH 0-229-P (October, 1983).
- M. MARY DEBORD et al. v DINCO COAL SALES, INC., Nos. 82-5617, 82-5725, slip op (6th Cir 1984).
- N. MARY DEBORD et al. v WATT, Civil Action No. 82-99, slip op (E D KY 1982).
- O. DINCO COAL SALES, INC., 4 IBSMA 35, IBSMA 82-3-1, 82-11 (1982).
- P. DINCO COAL SALES, INC. v OSM, Docket No. NX 1-120-R (1981).
- Q. 48 FR 20392 (MAY 5, 1983).
- R. ANN LORENTZ COAL CO., INC. v OSM, 79 IBLA 34, IBLA 83-613 (1984).
- S. BLACKFOX MINING & DEVELOPMENT CORP. v OSM, Docket No. CH 1-103-R (June, 1984).
- T. Excerpts from IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION (PSMRL II, ROUND I), 14 ELR 20617; 21 ERC 1193 (D DC July 6, 1984).
- U. REITZ COAL CO. v OSM, 83 IBLA 198, IBLA 84-184 (October, 1984).
- V. REITZ COAL CO. v OSM, Docket Nos. CH 0-292-P, CH 2-48-P (October, 1983).
- W. DRUMMOND COAL CO. v OSM, Docket No. NX 0-21-P (January, 1985).
- X. RACE FORK COAL CORP. v. OSM, 84 IBLA 383, IBLA 83-618 [IBSMA 82-16] (January, 1985).
- Y. IRONTON COAL CO v DIVISION OF RECLAMATION, No. 1839, slip op (Ohio Ct App 1987).
- Z. 50 FR 28180 (JULY 10, 1985). Interim final rule and Proposed rule.
- AA. 52 FR 17724 (MAY 11, 1987). Final rule. Coal preparation plants.
- BB. Excerpts from NATIONAL WILDLIFE FEDERATION v HODEL, 839 F2d 694, 18 ELR 20646 (DC Cir January, 1988).
- CC. 53 FR 23522 (JUNE 22, 1988). Proposed rule. Support facilities.
- DD. 53 FR 23526 (JUNE 22, 1988). Proposed rule. Coal preparation plants not located within the permit area of a mine.
- EE. 53 FR (NOVEMBER 22, 1988). Final rule. Support facilities.
- FF. 53 FR 47384 (NOVEMBER 22 1988). Final rule. Coal preparation plants not located within the permit area of a mine.
- GG. NATIONAL WILDLIFE FEDERATION v LUJAN, Civil Action Nos. 87-1051, 87-1814, 88-1788 (Consolidated) (D DC February 12, 1990).
- HH. NATIONAL WILDLIFE FEDERATION v LUJAN, Civil Action Nos. 88-2416, 88-3345, 88-3586, 88-3635, 89-0039, 89-0136, 89-0141 (Consolidated) (D DC August 30, 1990).