



## COALEX SIGNIFICANT ISSUE REPORT - 46

May 31, 1985

### TOPIC: ACCESS AND HAUL ROADS

**BACKGROUND:** Secs. 515(b)(17) and (18) of the Surface Mining Control and Reclamation Act (SMCRA) requires all surface coal mining operations to ensure that all access roads be constructed, maintained and reclaimed to prevent or control environmental damage. Given these statutory requirements, many questions have arisen as to the applicability and meaning of these sections.

A COALEX search was conducted of the legislative history, federal regulations and case law to determine (1) what federal standards apply to access and haul roads and (2) which roads are to be included in the mining area acreage.

### I. GENERAL

The possible adverse effects of improperly maintained roads were of concern to Congress, and the problem was addressed in every version of SMCRA. One committee noted that access and haul roads were a continual and major source of siltation, and that then-current mining practice was to abandon roads which had little or no economic or social value after mining. However, the committee also recognized that in some circumstances, the roads could continue to serve a useful purpose= . (H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 128 (1977))

The road requirements in earlier bills were basically the same as those found in Sec. 515(b)(17), (18) of SMCRA, with two minor exceptions identified. The 1975 House version and the 1977 Senate version contained a specific provision for the retention after mining of certain access roads and for an exception from approximate original contour provisions for this purpose. (H.R. Rep. No. 94-45, 94th Cong., 1st Sess. 28 (1975). S. Rep. No. 95-128, 95th Cong., 1st Sess. 26 (1977))

This language was removed from the final version, but with the stipulation that access roads could be left as part of reclamation to approximate original contour. (H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 67 (1979))

### II. CLASSIFICATION

#### A. GENERAL

The federal regulations governing road classification have been promulgated twice by OSM, but have been struck down both times by the courts. In 1979, OSM issued its first set of rules pertaining to access and haul roads. The 1979 classification system divided roads into three classes based on the purpose and on the amount of time the road would be in existence. Thus, a Class I road was defined as "a road used for the transportation of coal." (30 CFR Sec. 701.5 (1979)) A road not used for coal transportation was defined as a Class



II road if used for more than six months, and as a Class III road if used for less than six months. (Id.) Various performance standards applied to each class.

The 1979 federal regulations governing road classification and design were challenged in *IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II*, No. 79-1144, slip op. (DDC May 16, 1980). Several groups challenged the classification of roads into three categories. They contended that the final regulations differed in scope and substance from the proposed regulations, which had contained standards that applied equally to all roads. Judge Flannery agreed with the challenges and remanded the road classification regulations, noting that the Secretary had given inadequate opportunity to comment on the classification system before issuing final regulations. (Id. at 34) While Judge Flannery upheld other challenges to the final road regulations, (Id. at 36) the final result was that OSM suspended and revised all regulations pertaining to roads. (45 FR 51549 (1980))

Thus, in 1982 and 1983, new road regulations were proposed and finalized. These regulations abandoned the three part road classification system of the 1979 regulations and instead adopted a two part classification based on the frequency of use and the length of time in use. All roads must meet specified performance standards, while additional standards are imposed for those which are frequently used.

OSM's 1983 rules break mining roads into two classes: primary and ancillary. A primary road is defined as any road which is used for transporting coal or spoil, is frequently used for access or other purposes for more than six months, or is to be retained for an approved postmining use. An ancillary road is any other road: one that is (1) not used for transporting coal or spoil; (2) not to be retained following mining and reclamation; and (3) either used infrequently for any length of time or used at any level of frequency for periods of less than six months. (30 CFR Sec. 816.150(a); 48 FR 22110, 22116 (1983))

OSM's revised classification system was successfully challenged for a second time in 1984. The new classification system found at 30 CFR Sec. 816.150(a) was remanded by Judge Flannery for failure to provide adequate notice and opportunity for comment. Judge Flannery determined that the 1982 proposed regulations retained the old classification system based on frequency of use, while the final version adopted a classification system based on the purpose for which the roads are used. (*IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II*, No. 79-1144 (consolidated), slip op. (DDC October 1, 1984) at 26-28). As a result, OSM has again suspended its road classification system pending revision. (50 FR 7274 (1985))

## B. PERFORMANCE STANDARDS

All roads are required to meet the standards found at 30 CFR Sec. 816.150(b)-(e). These standards call for stabilizing exposed surfaces to control or prevent erosion, siltation, and air pollution attendant to erosion; prohibiting the use of acidic or toxic substances on road surfaces; and applying a minimum static safety factor of 1.3 for all embankments. Adverse effects on water are to be minimized by controlling or preventing damage to fish, wildlife or their habitat; controlling or preventing additional contributions of suspended solids to stream flow or runoff outside the permit area; neither causing nor contributing to violation of applicable state or federal water standards; not altering the normal flow of water in



streambeds or drainage channels; and minimizing downstream sedimentation and flooding. In addition, the regulations set out minimum design criteria which may be supplemented by the local authority. (30 CFR Sec. 816.150 (1983)) Other rules govern the maintenance and reclamation of all roads. (Id.)

Primary roads are required to meet the additional standards found at Sec. 816.151. These criteria include: (1) certification of design plans by a registered engineer; (2) location on the most stable available surfaces; and (3) the prohibition of stream fords unless specifically approved by the regulatory authority as temporary routes during construction. In addition, stringent standards for drainage control surfacing, and maintenance are specified. (30 CFR Sec. 816.151(a)-(e) (1983))

Although challenges were made to the performance standards in the October, 1984, IN RE: litigation, Judge Flannery deferred a ruling on them. Flannery noted that "the Secretary's defense to the challenges is, in large part, based on the specific requirements for the different classifications of roads." Since the road classification system was remanded, the court chose to defer consideration of the performance standards challenges until there was a full set of regulations available. (IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No. 79-1144 (consolidated), slip op. at Footnote 17 (DDC October 1, 1984)) However, in an amended Order filed December 10, 1984, the court remanded Secs. 816.150 and 816.151, including the performance standards. Consequently, OSM has suspended all road regulations, including the definition of roads found at Sec. 701.5. Thus, at this time, OSM intends to propose new regulations which define the term "road" and which address the design, construction, use and maintenance of roads used in surface coal mining operations. (50 FR 7274 (1985))

### III. INCLUSION OR EXEMPTION OF ROADS

#### A. ROADS WITHIN THE "AFFECTED AREA" FOR PURPOSES OF THE TWO-ACRE EXEMPTION.

One issue recently addressed by the federal regulations concerns the method of treating access or haul roads for the purposes of the two-acre exemption. OSM's revised regulations provide that if a segment of a road is used by more than one operation, the entire area of the segment will be included in the "affected area" of each of those operations. This attribution is only to determine whether the affected area of the operation exceeds two acres; it does not require double bonding or double permitting. (47 FR 33424, 33425 (1982)) However, the operator will only be attributed the portion of the road he actually uses; thus, if he uses 500 feet of a 2,000 foot road, only that 500 feet will be included in the acreage affected.

Several cases have dealt with the question of whether access and haul roads must be included in the area deemed "affected" for purposes of the two-acre exemption. Cases which have held that roads must be counted include:

RHONDA COAL CO., 4 IBSMA 124 (1982) (affirming as modified RHONDA COAL CO. v OSM, Docket No. CH 1-1-R (April 17, 1981)).



The Board held that at least part (1/3) of a 1.2 acre road, used by Rhonda and two other operations, should be charged to the company's 1.67 acre site, thus bringing the total area affected to over two acres.

GLOBEL BARTLEY, 4 IBSMA 219 (1982) (affirming Docket No. NX 1-64-R (April 16, 1981)). The Board held that an abandoned access road which was restored and graded was properly included in calculating the area affected. It also noted that, although the operator owned both the surface and minerals, he was still subject to the requirements of the Act.

Conversely, one ALJ decision held that an access road which serviced two coal companies and six dwellings could not be included in the calculation of the affected area. In NUWAY COAL CO. v OSM, Docket No. CH 0-282-R (March 11, 1981), an OSM inspector issued cessation orders to Nuway Coal and Ashley Lane Coal for failure to maintain an 8,800 foot long road and for disturbing more than two acres. ALJ Allen noted that at least 2,000 feet of the road serviced six dwellings, while the rest was used by the two coal companies and two timber crews. Additionally, OSM presented no evidence that Nuway had reconstructed or disturbed in any manner the road which had been existence for 4 or 5 years prior to the mining operation.

## B. "PUBLIC" ROADS

The revised definition of "affected area" found at 30 CFR Sec. 701.5 established criteria designed to alleviate confusion over when a road is considered a "public" road. The affected area includes "all areas covered by new or existing roads used to gain access to, or for hauling coal to or from surface coal mining and reclamation operations." (30 CFR Sec. 701.5 (1983)) In order for a road to be excluded from the affected area, it must (1) be designated as a public road pursuant to the laws of the jurisdiction in which it is located; (2) be maintained with public funds and constructed in a manner similar to other public roads= of the same classification within the jurisdiction, and (3) have substantial (more than incidental) public use. (Id.) In order to prevent abuse of the exemption through local ordinances to accept any coal road as a public road, OSM adopted this definition with the stipulation that states with the majority of two-acre operations have laws to limit this type of abuse. (47 FR 33424, 33430 (1982))

A proposed version of the public road exemption included a requirement that road construction standards be as stringent as those found in the applicable state program. OSM rejected this proposal, noting that many local roads do not meet the standards of the state mining program. Additionally, a paving requirement was rejected because many legitimate town and county roads are not paved.

OSM's definition of "affected area" was successfully challenged in the third round of IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No. 79-1144 (consolidated), slip op. (DDC July 15, 1985). Judge Flannery remanded the definition. noting:

"When hauling or access are among many uses made of a road, such as an interstate highway, the effect from the mining use is de minimus, or relatively minor, and thus the road need not be included . . . [b]ut the Secretary's rule goes far beyond what is called for by Sec. 701(28) in exempting essentially all public road where public use is more than incidental.



Thus definition does not square with the statutory language and thus this aspect of the definition must be remanded as inconsistent with law." (Id.)

Thus, the question of what constitutes a "public" road remains unanswered.

A number of cases involved operations where the access and haul roads were deeded to the town or county in which the mine is located. A majority of the cases involving this situation have ruled that regardless of the deed, the responsibility for these roads lies with the operators. These decisions include:

FETTEROLF MINING SALES v OSM, Docket No. CH 1-95-R (March 31, 1981).

A NOV was issued to Fetterolf for failure to properly surface a preparation plant road. The road had been deeded to Somerset Township, but no public funds had been used for maintenance since 1976. ALJ Shepherd ruled that while the Township had not technically vacated the road, it was not maintained with public funds and was therefore within OSM's jurisdiction.

JEWELL SMOKELESS COAL CORP., 4 IBSMA 51 (1982).

Jewell Smokeless was cited for a number of violations pertaining to its access and haul roads. The company contended that they were not responsible for maintenance of the roads, which had been deeded to the county. The Board noted that while the roads were public in name, the financial and operational responsibilities for maintaining the road rested with Jewell: "The exemption is based on two conditions: that the road be public and that it be maintained by public funds." (Id. at 63) Thus, the roads were deemed part of the mining operation.

MUD FORK COAL CORP., 5 IBSMA 44 (1983).

The operator had deeded a 5-6 mile haul road to the county. Approximately \$5000 of public funds had been spent on the road; however, the Board ruled the road was properly included as part of the area affected by the mining operation. "5,000 worth of gravel could not go far in maintaining a haul road of such length . . . and regular maintenance of the road was substantially lacking." (Id. at 54-55)

TENNESSEE RESOURCES DEVELOPMENT v OSM, Docket No. NX 0-123-P (August 15, 1983).

The operator was cited for failure to surface access and haul roads with durable material. The road was in existence before mining began, but was permitted and bonded. ALJ Torbett rejected the operator's contention that the road was public, citing inadequate evidence of maintenance with public funds. Judge Torbett noted that the public road defense was not available to this operation.

"This defense even if proven is not available where the road in question is permitted and bonded . . . not only has the [operator] failed to show that the road in question is a public road that is maintained with public funds, but further that as the road is permitted and bonded, the [operator] cannot escape the requirement that is [sic] maintain the road as part of the permitted area." Id.



**RAPOCA ENERGY, 89 IBLA 195 (1985).**

The Board noted that while a road may be "public" for other purposes, it must meet all the requirements of the Sec. 701.5 definition in order to be exempt under SMCRA. In the instant case, the road in question had been established as a public road by the county, but the only county maintenance provided consisted of one truckload of gravel. While other county roads received similar sporadic maintenance, the Board upheld ALJ Torbett's finding that the road in question was maintained by the mining company and was therefore not exempt.

**C. PIT AND CONSTRUCTION ROADS**

Under the Sec. 701.5 definition of roads, pioneer or construction roadways used for part of the road construction procedure and roads within the immediate mining pit area are specifically excluded. Thus, these roads are not subject to the performance standards applicable to primary or ancillary roads. However, since these roads are still considered as part of the permit area, they are subject to the other performance standards of Part 816, such as the topsoil, backfilling and grading, and revegetation rules. (48 FR 22110, 22117 (1983))

**IV. STATE REGULATIONS**

The various state regulations concerning road design, construction and maintenance are discussed in COMPARISON REPORT- 48.

**ATTACHMENTS:**

- A. Excerpt, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977).
- B. Excerpt, H.R. Rep. No. 94-45, 94th Cong., 1st Sess. (1975).
- C. Excerpt, S. Rep. No. 95-128, 95th Cong., 1st Sess. (1977).
- D. 48 FR 22110 (1983).
- E. Excerpt, IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II, No. 79-1144, slip op. (DDC May 16, 1980).
- F. 50 FR 7274 (1985).
- G. Excerpt, IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II, No. 79-1144, slip op. (DDC October 1, 1984).
- H. 47 FR 33424 (1982).
- I. RHONDA COAL CO., 4 IBSMA 124 (1982).
- J. GOBEL BARTLEY, 4 IBSMA 219 (1982).
- K. NUWAY COAL CO. v OSM, Docket No. CH 0-282-R (March 11, 1981).
- L. Excerpt, IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II, II, No. 79-1144, slip op. (DDC July 15, 1985).
- M. FETTEROLF MINING SALES v OSM, Docket No. CH 1-95-R, (March 31, 1981).
- N. JEWELL SMOKELESS COAL CORP., 4 IBSMA 51 (1982).
- O. MUD FORK COAL CORP., 5 IBSMA 44 (1983).
- P. TENNESSEE RESOURCES DEV. v OSM, Docket No. NX 0-123-P (August 15, 1983).
- Q. RAPOCA ENERGY, 89 IBLA 195 (1985).