



COALEX STATE INQUIRY REPORT - 69
April 28, 1986

Barbara W. Roberts
Utah Attorney General's Office
124 State Capitol
Salt Lake City, Utah 84114

TOPIC: REGULATION OF COAL PROCESSING PLANTS

INQUIRY: What states have amended their regulations to comply with the July, 1985 revisions of the federal program?

SEARCH RESULTS: See below.

HISTORY

The Secretary's duty to regulate off-site coal mining support facilities was examined at *IN RE PERMANENT SURFACE MINING REGULATION LITIGATION II*, Civil Action No. 79-1144, slip op., at 15-25 (DDC July 6, 1984) [hereinafter the "July, 1984 opinion"]. At that time, the Secretary actively regulated "coal processing" facilities, regardless of location, if the facilities were operated in connection with a mine. (July, 1984 opinion at 16) However, the Secretary limited the definition of "coal processing" to processing which separates coal from its impurities. (Id.) Other types of coal preparation facilities, including coal loading, crushing, and sizing facilities, were regulated only if located "at or near" the mine site. (Id.) Also, certain types of "support facilities" were regulated only if they were "geographically proximate" to the mining areas. (Id. at 20)

In the July, 1984 opinion, the court held the regulations improperly narrowed the scope of the Secretary's jurisdiction over off-site facilities. The court stated that the regulations could not limit "the Secretary's jurisdiction over leaching, physical processing, or chemical processing when these operations do not involve the separation of coal from its impurities." (Id. at 20) Since the statute contemplated that those types of off-site facilities would be regulated, the Secretary's definitions of "coal preparation", "coal processing", and "coal preparation plant" were remanded. (Id. at 19-20) In a footnote, the court also indicated that the definition of "surface coal mining operations" should be amended to clearly reflect the court's holding with regard to off-site processing facilities. (Id. at n. 17) Moreover, the court determined that the definition of "support facilities" with its geographic proximity test, could not stand.

In response to the July, 1984 opinion, the Office of Surface Mining Reclamation and Enforcement (OSM) issued an "interim final rule". (50 FR 28180 (1985)) At the same time, OSM published the identical rule as a proposal. (Id.) The rule clarifies the regulation of facilities



which leach, or which chemically or physically process coal, or which result from or are incident to a regulated facility, and which do not have an element of proximity.

The interim final rule became effective on September 9, 1985. Under the interim rule, changes are made to regulatory definitions found in both 30 CFR 700.5 and 30 CFR 701.5. Also, amendments to 30 CFR 827 were made, allowing the use of interim performance standards for coal preparation plants until permanent program permits are issued for the plants. Finally, changes were made to 30 CFR 785.21, which deals with permitting coal preparation plants, to allow operators a reasonable time to secure permits for plants which have only recently become subject to regulation under the Act.

AMENDMENTS TO SURFACE COAL MINING-OPERATIONS DEFINITION

The language of the Secretary's 1983 definition of "surface coal mining operations" followed very closely the statutory definition of surface coal mining operation" found in Sec. 701(28)(A) of the Act. In pertinent part, the regulatory definition read as follows:

" [S]urface coal mining operations' means--

(A) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the uses of explosives and blasting; in situ distillation, retorting, leaching, or other chemical or 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...." ((30 CFR 700.5 (1983) - excerpt from 50 FR 28180 (1985))

In the interim final rule, OSM amended the definition as follows:

"This interim final rule revises the 1983 definition in accordance with the court's interpretation of the statutory definition Specifically, the comma between distillation and retorting will be replaced by an or' and a semicolon will be placed after the phrase in situ distillation or retorting'. This change will mean that leaching, chemical or physical processing' will no longer be limited by the phrase in situ'. Thus, these operations will be regulated wherever they occur." (50 FR 28180 (1985)).

AMENDMENTS TO DEFINITIONS OF 30 CFR 701.5

OSM further responded to the July, 1984 opinion by deleting the definition of "coal processing or preparation" and adopting instead a definition of "coal preparation". OSM also made changes to the definition of "coal preparation plant" and suspended the definition of "support facilities". Although the July, 1984 opinion did not specifically remand the definition of "support facilities", the definition previously contained an element of proximity, which was contrary the holding of



the July, 1984 opinion. Since OSM decided that the definition of "support facilities" was not needed, the definition was suspended rather than amended. More specifically, OSM took the following actions in the interim rule:

"1. Coal preparation. This rule will replace the 1983 definition of the phrase coal preparation or coal processing' which was formulated on the basis of OSM's previous interpretation of Sec. 701(28)(A) of the Act. Under the 1983 rules, coal preparation or coal processing' meant the cleaning concentrating, or other processing or preparation of coal in order to separate coal from its impurities.' In accordance with the District Court's decision, this rule deletes the definition of coal processing or preparation'. In its place, the Department adopts a new definition of the term coal preparation'. Under the new definition, coal preparation' means the chemical or physical processing and the cleaning, concentrating or other processing or preparation of coal. Facilities which do not separate coal from its impurities will be included in this definition.

"2. Coal preparation plant. The Department is revising the definition of coal preparation plant' in order to track the revised definition of coal preparation discussed above.

"3. Support facilities. The Department is suspending the definition of support facilities for several reasons. First, this is being done to implement the July 6, 1984, District Court decision in IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II, No. 79-1144 (DDC 1984). There the Court ruled that the determination of whether a facility was subject to the Act cannot include an element of proximity. The definition of support facilities adopted in 1983 included an element of proximity. Accordingly, OSM is suspending the definition. OSM has determined that no definition of support facilities is needed. OSM had none from 1977 to 1983 . . . [A]fter careful reexamination, and in light of the Court's opinion, the department has determined that there is no need to amplify the language in the Act with respect to the meaning of activities that are resulting from or incident to' a regulated activity. Furthermore, since support facilities are subject to the same performance standards as the mine they support, deletion of the definition eliminates possible confusion over whether support facilities are subject to different performance standards." (50 FR 28180 (1985))

AMENDMENTS TO 30 CFR 785.21

OSM accomplished several objectives with the amendments to Sec. 785.21. First, coal preparation plants that were not subject to regulation prior to the July, 1984 opinion are given eight months from the effective date of the interim final rule in which to secure a permit. Second, states whose programs would preclude permitting and regulating these facilities were directed to notify OSM within 60 days from the rule's effective date. Third, within 90 days from the rule's effective date, states must submit a schedule of actions whereby the state program will undertake regulation and permitting for all coal preparation plants in the state's jurisdiction. Fourth, coal preparation plants in these states will be permitted in accordance with the state schedule rather than the Federal program's eight month scheme. Fifth, extension of the deadline is allowed where operators have timely applied for permits and are complying with performance standards found at Sec. 827.13, and the regulatory authority has not issued or denied permit. More detail on OSM's actions is provided as follows:



"New paragraph (d)(1) of section 785.21, requires any persons who plan to operate, after eight months from the effective date of this rule, a coal preparation plant which was not subject to the regulations of 30 CFR Chapter VII prior to July 6, 1984, to apply for a permit no later than two months after the effective date of the rule.

"New paragraph (d)(2) contains an important exception to the requirements of paragraph (d)(1). It provides that those States with State programs that have statutory or regulatory prohibitions precluding the issuance of permits to facilities covered by paragraph (d)(1) shall notify OSM within 60 days of the effective date of this rule that a program change is necessary. These States must then establish a timetable of this action to be taken in order to adopt appropriate measures and undertake permitting actions for all of the coal preparation plants located within their jurisdiction. The schedule is to be submitted to OSM for approval within 90 days of effective date of this rule. Operators must apply for permits in accordance with that schedule.

"New Paragraph (e) of section 785.21 provides that any person operating a coal preparation plant made subject to regulation by the July 6, 1984, decision and not subject to prohibition by 30 CFR 761.11 will be allowed to continue to operate without a permit until eight months from the effective date of this rule. Such persons will be allowed to operate past the eighth month deadline if (1) they have timely filed a permit application pursuant to paragraph (d)(1) or pursuant to a State imposed schedule specified in paragraph (d)(2); (2) the regulatory authority has yet to issue or deny the permit, and (3) the person complies with the applicable performance standards of section 827.13 of 30 CFR Chapter VII.

"OSM has determined not to employ the ordinary State program review and notification process of 30 CFR 732.17 to ensure that the changes to the definition of the term surface coal mining operations' and the permitting schedule in Section 785.21(d)(2) will be most effectively implemented. This is being done because of the ease of notifying all States at once in this notice and to allow States the first opportunity to determine whether their programs already allow for implementation of these rules.

"Under the approach adopted, States are required to review their own programs and advise OSM if they need to make program amendments to implement these rules. Because the States are in a better position to interpret their own programs, this will avoid possible misunderstandings and unnecessary interpretative problems." (50 FR 28180 (1985))

AMENDMENTS TO PART 827

Finally, OSM set forth an amendment to establish interim performance standards under Part 827 of the regulations. The rationale for the amendment was given as follows:

"Part 827 of 30 CFR sets forth the permanent program performance standards for coal preparation plants not within the permit area for a specific mine. Rather than make the permanent program standards immediately applicable to the coal preparation plants made subject to regulation by the District Court's decision, OSM is amending Part 827 so that interim performance standards will apply to such plants until the permanent program permit for such



plant is issued. Such a provision is reasonable because the permanent program performance standards are tied to the issuance of a permit. The interim program performance standards are keyed to direct enforcement not based upon the existence of a permit." (50 FR 28180 (1985))

STATE RESPONSES

VIRGINIA

On August 19, 1985 Virginia notified OSM that it could not legally regulate and permit facilities which leach, chemically process, or physically process coal but do not separate coal from its impurities. (50 FR 47388 (1985)) On September 4, 1985, Virginia submitted a proposed amendment to its state program which would add definitions, identical to the definitions of 30 CFR 701.5 as amended on July 10, 1985, for "coal preparation' or coal processing'" and "coal preparation plant." (Id.) The Virginia amendments did not require that mere loading facilities, not engaged in physical processing of coal and not located at or near the mine site, be regulated. (Id.)

Receipt of the proposed amendments was announced on September 20, 1985. (50 FR 38137-38139 (1985)) The public comment period closed on October 21, 1985, and OSM gave final approval to the Virginia amendments on November 18, 1985. (50 FR 47388 (1985))

OKLAHOMA

On September 11, 1985, Oklahoma submitted a proposed amendment to its state program which would add definitions, identical to the definitions of 30 CFR 700.5 and 30 CFR 701.5 as amended July 10, 1985, for "surface coal mining operations", "coal preparation" and "coal preparation plant". OSM announced receipt of the amendments and invited public comment on November 29, 1985. (50 FR 49072 (1985)) The public comment period closed on December 30, 1985, and OSM gave final approval to the Oklahoma amendments on January 16, 1986. (51 FR 2360 (1986))

KENTUCKY

On March 31, 1986, OSM reopened the comments period on amendments pertaining to Kentucky's regulation of coal processing plants. (51 FR 10886 (1986)) The Kentucky amendments have extensive background because they were originally submitted before the July, 1984 opinion.

On May 26, 1982, Kentucky submitted its first amendment proposals. These amendments would have confined "coal processing operations" to operations where coal is separated from its impurities and wastes are generated. On September 17, 1985, OSM disapproved these amendments to the Kentucky program. (50 FR 37656 (1985)) On the same date, OSM published a proposed rule, seeking comment on the announced intention to preempt and supersede Kentucky Revised Statute (KRS) 350.060(22). (50 FR 37299 (1985)) The proposal to supersede



KRS 350.060(22) was finalized on November 20, 1985, to be effective December 1, 1985. (50 FR 47728 (1985))

On December 3, 1985, Kentucky submitted emergency amendments to modify requirements pertaining to coal processing plants. These amendments became applicable as of December 1, 1985 and accomplished the following:

1. " Kentucky is amending its definition of coal processing plant' to reflect recent Federal rulemakings which respond to a District Court decision. The court ruled that the Federal rules excluded from regulations facilities that are required to be regulated under SMCRA. Kentucky's amended definition includes facilities where coal is subjected to chemical or physical processing, or cleaning, crushing, sizing or other processing or proportion." (405 KAR 7:0203(18))
2. " Kentucky is making substantial modifications to its permitting requirements for coal processing plants not located within the permit area of a specific mine. Requirements for applicability are changed and new requirements are established for previously exempted facilities. New application requirements are added, and an applicability date of December 1, 1985, is established." (405 KAR 8:050E)
3. " Kentucky is deleting existing performance standards for offsite coal processing plants and replacing them with new standards. The revised rules establish applicability of the rules. Performance standards are established by referencing other Kentucky requirements that shall or shall not apply. Requirements for protection of nearby underground mining activities and replacement of water supply are provided. Special standards are established for previously exempted areas." (405 KAR 20.070) (51 FR 1517 (1985))

These amendments are currently the subject of a comments period which was noticed on March 31, 1986. (51 FR 10886 (1986))

WEST VIRGINIA

While West Virginia did not act to amend its regulations with regard to coal preparation facilities, OSM did act to preempt and supersede certain portions of the West Virginia program. On May 3, 1985, the Governor of West Virginia signed into law a bill known as the West Virginia Energy Act (WVEA). This Act repealed the West Virginia Surface Coal Mining and Reclamation Act and incorporated it into the WVEA, albeit in a somewhat altered fashion. On July 11, 1985, OSM approved the WVEA as an amendment to the West Virginia program, with certain exceptions. (50 FR 28316-28324 (1985)) One of the areas of exception was the definition of "surface-mining operations" under the WVEA. (50 FR 28343 (1985))

On August 29, 1985, OSM issued a final rule, preempting and superseding several sections of the WVEA, including the section defining "surface mining operations". (50 FR 35082 (1985)) The definition and changes made to the definition are as follows:



"The areas upon which the above activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities; 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; and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities: Provided, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds percent of the tonnage of minerals removed for purposes of commercial use of sale, or coal prospecting subject to section seven of this article: Provided, however, That permanent facilities not within the area being mined and not directly involved in the excavation, loading, storage, or processing of the coal shall not be subject to the provisions of this article. Such facilities include, but are not limited to, offices, garages, bathhouses, parking areas, and maintenance and supply areas.

"The specific wording being preempted and superseded is:

"Provided, however, That permanent facilities not within the area being mined and not directly involved in the excavation, loading, storage, or processing of the coal shall not be subject to the provisions of this article. Such facilities include, but are not limited to, offices, garages, bathhouses, parking areas, and maintenance and supply areas. (50 FR 35082 (1985))

ATTACHMENTS

- A. 50 FR 28189 (1985)(proposed rule).
- B. 50 FR 28180 (1985)(interim final rule).
- C. 50 FR 47388 (1985).
- D. 51 FR 2360 (1986).
- E. 50 FR 37656 (1985).
- F. 50 FR 37699 (1985).
- G. 50 FR 47728 (1985).
- H. 51 FR 1517 (1986).
- I. 51 FR 10886 (1986).
- J. 50 FR 28316 (1985).
- K. 50 FR 28343 (1985).
- L. 50 FR 35082 (1985).

Note: Oversight document not included due to bulk.