



COALEX STATE INQUIRY REPORT - 178

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TOPIC: PERMITTING OF A TEMPORARY PUBLIC ROAD

INQUIRY: An operator's permit includes mining through an existing public road. The operator is constructing a temporary road to reroute traffic while the public road is closed. Is the construction of the temporary public road subject to the state's road standards or is it required to be permitted as a "coal mining operation" and become subject to SMCRA performance standards? Are there any administrative decisions or state or federal case law which discuss this issue?

SEARCH RESULTS: Research was conducted using the COALEX Library and the other materials available in LEXIS. One decision was identified which included a relocated road as part of its fact situation, but not as an issue in the case; the temporary road had been included in the operator's permit [See *SNYDER v COMMONWEALTH OF PENN.*, below.]. A number of decisions were retrieved which discuss the general issue of when a road is subject to the regulations of SMCRA. Copies of the opinions listed below are attached.

TEMPORARY ROAD

SNYDER v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND ED MIKEL COAL CO., PERMITTEE, EHB Docket No. 88-277-F, 1989 Pa Envirn LEXIS 93 (1989).

Under Mikel's original permit, a road was temporarily relocated to facilitate Mikel's mining operations. At the Township Supervisors's request, Mikel applied for a revision to its permit requesting the permanent relocation of the road. Snyder, the landowner, appealed the permit revision request. The Environmental Hearing Board Mikel's motion for a summary judgment, stating:

"DER's authority over road relocation arises only because road relocation is sometimes necessary to facilitate the mining of coal.... Under these facts [the Supervisors's approval of the new location of the road], DER had no choice but to approve the permit revision to reflect the permanent relocation of the road. If we were to hold otherwise, we would be authorizing DER to usurp the Township's general authority over roads within its jurisdiction."



DECISIONS DEFINING "ROAD"

TRINITY COAL CORP. v OSM, Docket No. CH 1-127-R (1982).

During a United Mine Workers strike, Trinity was unable to use the permitted access and haul roads and used, instead, a road outside the permitted area. The NOV was issued to Trinity and Wellmore Coal Corp. (owners of the alternate road) for failing to maintain the alternate road. The Administrative Law Judge (ALJ) ruled:

"[T]here is nothing in 30 CFR 710.5 and 30 CFR 717.17(j)(3)(i) and (ii) to distinguish between the use of a road on a temporary or emergency basis and on a permanent basis wherein the work 'permanent' means used during the ordinary life of the surface mining operation. Use of this road, therefore, although on a temporary basis, subject the road to the requirements of the Act."

The NOV was affirmed against Wellmore. The ALJ found that the deeding of the alternate road by Wellmore to Buchanan County, Virginia was a "sham and a devise for attempting to defeat coverage under the Act."

ZAPATA COAL CORP., 2 IBSMA 9, IBSMA 79-20, 79-32 (1980).

Zapata upgraded an existing road to facilitate work at the face-up; while the road was under construction coal was removed from the face-up area. The Board, in reversing the ALJ's decision, determined that the road was "used" to facilitate mining operations and, therefore, was subject to the maintenance requirements of the interim regulations.

S.M.A. COAL CO. v OSM, Docket No. CH 1-34-R (1981).

S.M.A. did not have "any legal right to reconstruct or change the road" it used, therefore, the area covered by the road could not be included in its surface disturbed area "so as to exceed 2 acres." United Coal Co., who attempted to deed the road to Buchanan County, had primary jurisdiction for it.

"[S]uch a deed will not divest the road of coverage under the Act, but the mere use of the road by applicant with nothing more is insufficient to include in its disturbed area."

Other cases ruling on the deeding of a road to the county to avoid exceeding 2 acres or otherwise circumvent being subject to SMCRA are as follows:

PREECE, MCCLANAHAN & BELCHER COAL CO. v OSM, Docket No. CH 0-261-R (1980).

KNOX CREEK COAL CORP. v OSM, Docket Nos. CH 1-214-P, CH 0-329-R (1981).

SMITH COAL CORP. v OSM, Docket No. Ch 1-53 R (1984).



WAR FORK COAL CORP. v OSM, Docket No. CH 0-89-R (1984).

JEWELL SMOKELESS COAL CORP., 4 IBSMA 51, IBSMA 81-39, 81-47 (1982).

"To be exempt from regulation under the Act, in accordance with the exclusionary language of the definition of 'roads' in 30 CFR 710.5, a road must be shown to be maintained with public funds."

"Where an access and haul road's public status is conditioned on a coal operator's agreement to be primarily responsible for maintaining the road, it is not a road 'maintained with public funds' within the meaning of this phrase in the definition of 'roads' in 30 CFR 710.5."

See also:

FETTEROLF MINING SALES, INC., 4 IBSMA 29, IBSMA 81-58 (1982).

M & J COAL CO., v OSM, Docket No. CH 1-39-P (1981).

RAYLE COAL CO., 3 IBSMA 111, IBSMA 80-88 (1981).

"Roads maintained with public funds. Under an agreement with the West Virginia Department of Highways whereby the right-of-way for a secondary road has been reopened and maintained by a coal company for its use and that of the general public, the resulting road is not one 'maintained with public funds' that is excluded from the definition of 'roads' in 30 CFR 710.5 and, thus, the road is subject to the construction standards in 30 CFR 715.17(1)(2)."

DECISIONS DEFINING "AFFECTED AREA" AND "PUBLIC ROAD"

RAPOCA ENERGY CO. v OSM, 89 IBLA 195, IBLA 85-61 (1985).

Rapoca claimed that the Neece Creek Road was a public road under the Virginia regulations. The Board ruled that in order for a public road to be exempt from regulation under SMCRA, it must meet all three criteria under the regulatory definition of "affected area":

"(1) the road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (2) the road is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is located; and (3) there is substantial (more than incidental) public use of the road."

The Board determined Neece Creek to be a public road, "receiving more than incidental public use, utilized as a coal haul and access road" and subject to the permitting and regulations under SMCRA because Dickenson County, Virginia's only allocation for road maintenance was made "at the behest of the coal operator in an attempt to avoid Federal regulation."

HARMAN MINING CORP. v OSM, 87 IBLA 369, IBLA 84-279 (1985).



The Board affirmed the ALJ's decision vacating the NOV's issued to Harman for conducting surface coal mining operations without a required permit - unpermitted roads were being utilized for access and haulage from three mines. The roads met all three criteria (see Rapoca, above.) for exemption from regulation under SMCRA.

See also related Harman Mining Corp. decisions: *HARMAN MINING CORP. v OSM*, 110 IBLA 98, IBLA 86-1505, 86-1544 (1989), *HARMAN MINING CORP. v OSM*, 659 F Supp 806 (WD Va 1987) and *HARMAN MINING CORP. v HODEL*, 662 F Supp 629 (WD Va 1987).

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (D DC July 15, 1985). [Excerpts]

The court remanded the Secretary's definition of "affected area" which excluded certain roads.

REGULATIONS

53 FR 45190 (NOVEMBER 8, 1988). Final rule. Roads.

The entire notice, discussing the road classification system, is included for background.

ATTACHMENTS

- A. *SNYDER v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES (DER) AND ED MIKEL COAL CO., PERMITTEE*, EHB Docket No. 88-277-F, 1989 Pa Envirn LEXIS 93 (1989).
- B. *TRINITY COAL CORP. v OSM*, Docket No. CH 1-127-R (1982).
- C. *ZAPATA COAL CORP.*, 2 IBSMA 9, IBSMA 79-20, 79-32 (1980).
- D. *S.M.A. COAL CO. v OSM*, Docket No. CH 1-34-R (1981).
- E. *PREECE, MCCLANAHAN & BELCHER COAL CO. v OSM*, Docket No. CH 0-261-R (1980).
- F. *KNOX CREEK COAL CORP. v OSM*, Docket Nos. CH 1-214-P, CH 0-329-R (1981).
- G. *SMITH COAL Corp. v OSM*, Docket No. CH 1-53 R (1984).
- H. *WAR FORK COAL CORP. v OSM*, Docket No. CH 0-89-R (1984).
- I. *JEWELL SMOKELESS COAL CORP.*, 4 IBSMA 51, IBSMA 81-39, 81-47 (1982).
- J. *FETTEROLF MINING SALES, INC.*, 4 IBSMA 29, IBSMA 81-58 (1982).
- K. *M & J COAL CO., v OSM*, Docket No. CH 1-39-P (1981).
- L. *RAYLE COAL CO.*, 3 IBSMA 111, IBSMA 80-88 (1981).
- M. *RAPOCA ENERGY CO. v OSM*, 89 IBLA 195, IBLA 85-61 (1985).
- N. *HARMAN MINING CORP. v OSM*, 87 IBLA 369, IBLA 84-279 (1985).
- O. *HARMAN MINING CORP. v OSM*, 110 IBLA 98, IBLA 86-1505, 86-1544 (1989).
- P. *HARMAN MINING CORP. v OSM*, 659 F Supp 806 (WD Va 1987).
- Q. *HARMAN MINING CORP. v HODEL*, 662 F Supp 629 (WD Va 1987).
- R. **IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 620 F Supp 1519 (D DC July 15, 1985). [Excerpts]**
- S. **53 FR 45190 (NOVEMBER 8, 1988). Final rule. Roads.**