



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

COALEX STATE COMPARISON REPORT - 229

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TOPICS:

- I. ATTORNEYS' FEES;
- II. DEFINITION OF "IN CONNECTION WITH"

INQUIRY:

- I. The Department of Mines, Minerals and Energy (DMME) has attorneys on staff; however, for an upcoming lawsuit against an operator DMME may have to use attorneys from the Attorney General's (AG) office. According to Virginia state law, fees for use of the AG's lawyers must be billed back to DMME. Can these types of fees, or fees paid to counsel hired from private law firms, be charged to the OSM regulatory grant (on a 50/50 basis)?
- II. On November 22, 1988, OSM removed the definition of "support facilities". The phrase "in connection with" a mine was added to describe those coal preparation plants which require regulation under SMCRA. Does any state have regulations that establish criteria to determine when an offsite plant is "in connection with" a mine or mines?

SEARCH RESULTS: A telephone survey of nine IMCC member states was conducted using the two inquiries described above. The results of survey appear in summary and narrative form below.

I. CHARGE OF ATTORNEYS' FEES TO THE OSM GRANT

SURVEY SUMMARY

1. States that charge legal fees to the OSM grant:
 - a. Alabama
 - b. Kentucky
 - c. Illinois
 - d. Maryland
 - e. Ohio
 - f. Pennsylvania



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- g. Texas
 - h. West Virginia
2. State that does not charge legal fees to the OSM grant:
- a. Indiana
3. States with in-house attorneys [NOTE: These attorneys perform administrative case work only; state and federal cases are handled by attorneys from the AG's office. None of the states surveyed had in-house staff that perform all of the required legal work.]:
- a. Illinois
 - b. Indiana
4. States that use attorneys from other sections within the same agency:
- a. Kentucky
 - b. Texas
5. States whose legal work is performed by attorneys from the AG's office:
- a. Alabama
 - b. Maryland
 - c. Ohio
 - d. Pennsylvania
 - e. West Virginia
6. States that have used outside private counsel:
- a. Illinois: Billed fees to Grant - Yes and No (See below)
 - b. Kentucky: Billed fees to Grant - No (See below)
 - c. West Virginia: Billed fees to Grant - Yes

NARRATIVE OF RESPONSES

ALABAMA

The attorneys who work for the Alabama Surface Mining Commission are commissioned by the state AG's office. Their salaries are charged against the OSM grant. Alabama has not had the need to hire outside counsel from a private law firm.



ILLINOIS

Attorneys on the staff of the Department of Mines and Minerals (DMM) handle administrative matters only. By statute, cases that go to state or federal court must use attorneys from the AG's office. Certain expenses, such as the cost of depositions, are billed back to DMM. These expenses are charged to the OSM grant. Private outside counsel are used by the state to collect delinquent civil penalties. These attorneys' fees are charged to the OSM grant. In the early days of the regulatory program, the state had a private attorney on staff to assist with program development; this attorney also assisted in an Illinois suit against OSM. These fees were not paid out of the OSM grant.

INDIANA

Staff attorneys in the Department of Natural Resources (DNR) handle the administrative cases. State and federal court cases are referred to the AG's office. This statutory arrangement was established recently due to the increased caseload of the DNR attorneys. The AG's office does not bill any fees back to DNR.

KENTUCKY

Attorneys in the Department of Law are the lawyers for all Departments under the Natural Resources Cabinet. Work performed by these attorneys for the Department for Surface Mining and Reclamation Enforcement is charged against the OSM grant. Fees for the outside attorneys used in the Settlement Agreement with the National Wildlife Federation were not charged against the grant. If outside counsel were necessary for other casework, their fees would be billed back to Surface Mining Department for charge against the OSM grant.

MARYLAND

The Maryland Bureau of Mines has no attorneys on staff. Required legal work is performed by the AG's counsel. The salary and support of one attorney are charged to the OSM grant.

OHIO

The Division of Reclamation under the Department of Natural Resources is represented by the state AG's office. The AG bills the Division; these fees are paid out of the grant.

PENNSYLVANIA

The attorneys who work in the Department of Environmental Resources are part of the AG's office. Their salaries are paid out of the OSM grant.

TEXAS



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The Legal Division of the Railroad Commission performs all work for the Surface Mining and Reclamation Division . These fees are billed to the SMCRA Division which, in turn, charges these fees against the grant.

WEST VIRGINIA

The AG's office represents the Division of Energy on a contract basis. The contract fees are charged to the OSM grant. They have used outside counsel on the recommendation of the AG; these fees have also been charged to the grant.

II. CRITERIA FOR "IN CONNECTION WITH"

SURVEY SUMMARY

Eight of the nine states contacted use the preamble to the Federal Register notice of November 22, 1988 as their guide in determining which facilities are subject to regulation under SMCRA. Pennsylvania received approval of their proposed rule and is awaiting approval of their final rule which uses "ultimate end use" language, not "in connection with" criteria.

NARRATIVE OF RESPONSES

ALABAMA

The preamble to the current regulations is used as the guide to determine when a preparation plant is considered "in connection with" a mine.

ILLINOIS

There are no regulations or policies which define the criteria for when a preparation plant is "in connection with" a mine or mines. Illinois has had little problem with this issue: the connections between a mine or mines and preparation plants have been easy to establish.

INDIANA

These is no formal definition of "in connection with". There not many offsite plants and those found in the state are clearly "in connection with" a mine or mines. The state statute had to be revised in order for DNR to have jurisdiction over regulation of offsite plants. DNR jurisdiction began 12/1/89 and cannot be made retroactive to the beginning of SMCRA.

KENTUCKY

There are no "codified" criteria used to determine which offsite plants require regulation under SMCRA.

MARYLAND



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There are no "codified" criteria used to determine which offsite plants require regulation under SMCRA. There are few plants in the state.

OHIO

Ohio recently submitted a program amendment to OSM which added "in connection with" to their rules; however, no interpretation of the phrase was provided as part of that proposed rulemaking.

PENNSYLVANIA

Pennsylvania is awaiting OSM approval of their final rule regarding offsite plants. This rule uses "ultimate end use" language not "in connection with" criteria and is described in the attached Rulemaking Package as follows:

"As the rule now stands, the Department will regulate all off-site operations where coal is subjected to chemical or physical processing or cleaning, concentrating or other processing or preparation, unless that operation is located at the site of ultimate coal use. To be eligible for the ultimate use exemption a preparation activity operator must also be the operator of the activity which burns, liquefies or otherwise makes final use of the coal."

TEXAS

Texas uses the guidelines from the Federal Register preamble to determine whether an offsite preparation plant requires regulation under SMCRA. There are few plants in Texas.

WEST VIRGINIA

There is no regulatory definition of "in connection with"; the need to regulate a facility is determined on a case-by-case basis. Both the functional and physical connections are weighed to determine if a facility must be regulated.

ATTACHMENTS

Pennsylvania Rulemaking Package, consisting of:

1. Subchapter H. COAL PREPARATION ACTIVITIES. Sections 89.171, 89.172 and 89.173.
2. Excerpt from 56 FR 24708 (May 31, 1991).
3. Memorandum from the Director of the Bureau of Mining and Reclamation describing the final rulemaking package.