



COALEX STATE INQUIRY REPORT - 274

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TOPIC: PERMITTING OF THE "SHADOW AREA"

INQUIRY: Does OSM or the state have the authority to permit the area overlying underground coal mine workings (the "shadow area")? Is this area included in the definition of "surface effects" of underground mines? Please locate relevant material that discusses this issue.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. (1) In the preamble to the revision of the definition of "permit area", OSM discussed the relationship of the shadow area to the permit area. [See preambles to proposed rule (1982) and final rule (1983), below]; (2) Interior administrative cases were retrieved that discussed the inclusion of the shadow area as part of the "affected area" when calculating area for the 2-acre exemption; (3) surface effects of underground mine workings are addressed as part of discussions of subsidence.

REGULATORY HISTORY

44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -- Final rule.

Part 701. 701.5 Definitions.

"Regarding lands overlying underground mine workings, the Office notes that many commenters objected to the inclusion of those areas within the definition of affected area. The commenters argued that surface areas where facilities are built or actual excavation occurs should be the only places regulated by the Act. The Office did not accept these comments, finding that Congress intended that the Act's Title V regulatory program protect surface areas overlying underground workings. This congressional intention is evident from the express provisions of Sections 516(b)(1) and 516(c) of the Act, protecting the use of surface lands from subsidence. Therefore, the Office decided



to retain coverage of lands overlying underground mine workings in the definition of affected area, so the Subchapters G and K would clearly apply to those lands."

Part 783 Underground mine permit application.

"Congress specifically recognized that underground mining activities can cause serious disruption of surface areas that are not themselves direct objects of actual mining operations, through subsidence and disruption of water and fish and wildlife resources....

"Given that recognition, the regulatory authority needs to be provided with adequate information on areas overlying underground mine workings, the strata in which those workings will be located, and adjacent areas, to determine whether the proposed activities will be conducted in compliance with the Act."

47 FR 41 (JANUARY 4, 1982). Proposed rule. Definitions and terminology.

Affected area. "In attempting to apply the 'shadow area' concept during the past 3 years, OSM has found some inconsistencies in its application in relation to Congress' intent to regulate underground mine workings only to the extent that they have a surface impact. For this reason, OSM is proposing to revise the definition of 'affected area' to more clearly define the limits of the 'affected area' for underground mines.

"The proposed rule includes in the 'affected area' for an underground mine all surface areas where surface facilities are located, where excavation occurs, and where regulated roads are used; and for underground mines, in situ mines, and auger mines, the 'area of expected subsidence.' The area of expected subsidence would be defined to include the area where a vertical movement of the surface is expected to result from subsidence of underground excavations."

47 FR 33424 (AUGUST 2, 1982). Final rule. Two-acre exemption.

The regulations amended that portion of the definition of "affected area" pertaining to roads, which was closely related to the two-acre exemption.

48 FR 14814 (APRIL 5, 1983). Final rule. Definitions and terminology.

D. Permit Area.

...

"The comments suggesting that the term 'permit area' specifically include all areas overlying underground workings has been rejected. The Act requires that the 'permit area' include the land covered by the operator's bond. As stated above, this includes all areas upon which surface coal mining and reclamation operations are conducted. Those are the areas for which reclamation operations are planned and for which the performance bond can be accurately set. Although there is a potential for subsidence



causing material damage in areas overlying the underground workings, there is no reclamation work planned there (unless there will also be a surface coal mining operation on that area). Thus there is no need for a performance bond on those areas. Operator financial responsibility for areas outside the permit area is covered under the liability insurance covered under the liability insurance requirements of Section 507(f) of the Act. Accordingly, to the extent the definition of 'permit area' is tied to the bonding requirements of the Act, it is incorrect to include in the definition any reference to the 'areas overlying the underground workings' or to the 'affected area'.

"Under the revised definition of permit area, the performance standards of the Act will continue to apply to all surface coal mining and reclamation operations. Also, where informational requirements must apply to areas outside the redefined permit area, the provision enunciating these requirements will be revised if necessary to include information from adjacent areas or other locations."

51 FR 41952 (NOVEMBER 20, 1986). Notice of suspension.

This excerpt is included for background: The definition of "affected area" was suspended to the extent that it excluded public roads which were included in the definition of "surface coal mining operations".

53 FR 52374 (DECEMBER 27, 1988). Proposed rules. Surface impacts of underground coal mining.

"The terms 'surface impacts incident to an underground coal mine' and 'areas upon which such activities disturb the natural land surface' as they appear in section 701(28)(A) and (B), respectively, are not defined in SMCRA. In this proposal, OSMRE is suggesting two alternative options, each of which is based upon a slightly different statutory construction as to the degree of subsidence which is considered a surface coal mining operation. The first option treats subsidence as a surface coal mining operation only when it results in, or could reasonable be expected to result in, a functional impairment of the surface or surface features, facilities or structures. The second option treats as a surface coal mining operation any subsidence which affects, or could reasonable be expected to affect, the surface, or surface features, facilities, or structures."

[NOTE: The proposed rule was withdrawn on July 21, 1989 (54 FR 30557).]

57 FR 53670 (NOVEMBER 12, 1992). Petition to initiate rulemaking and request for comment.

This item is enclosed for background.

OSM DIRECTIVES



DIRECTIVE, Subject No. REG-20, Transmittal No. 390, "Affected Area Calculations for Underground Mines (Issued October 28, 1987).

Policy-Procedures: "All determinations of affected area for underground mine sites shall include the shadow area [the area located above underground workings] for both interim and permanent program sites."

DIRECTIVE, Subject No. REG-31 [Incorporates REG-31-1 (February 4, 1991)], Transmittal No. 584, "Preparation of Mining Plan Decision Documents" (October 24, 1989).

Policy-Procedures: "The mining plan approval area for an underground mine may extend outside the permit area in States where the underground workings do not need to be included in the permit area."

STATE DECISION

USA v E & C COAL CO., INC., 846 F 2d 247 (4th Cir 1988).

The court found that despite the "clarifying regulation" of January, 1981 and its subsequent withdrawal, the definition of "affected area" included the area above underground mine workings in calculating acreage for the 2-acre exemption from the original March 13, 1979 definition. Thus, E & C was not entitled to a 2-acre exemption and was required to pay reclamation fees prior and subsequent to August, 1982.

INTERIOR ADMINISTRATIVE DECISIONS - INTERIM PROGRAM

OSM v C-ANN COAL CO., 94 IBLA 14, IBLA 85-75 (1986).

Note 2:"We note that, although not raised in this appeal, the issue of whether the affected area includes areas above underground mine workings was raised by the parties at the hearing and briefed before Judge Torbett. Based on this Board's decision in S & M Coal Co. v OSM, 79 IBLA 350, 91 I.D. 159 (1984), Judge Torbett ruled that the areas could not be included in the calculation of the affected acreage because no evidence of actual disturbance above the underground workings had been introduced at the hearing. This ruling was correct. In denying a motion for reconsideration of our S & M decision, we reviewed the controlling regulatory provisions for the interim program and noted that '[t]here is nothing in these provisions to indicate that areas above underground workings are meant to be included in the calculation of the surface area affected by underground mining when such areas are not affected by surface operations associated with the underground coal mining.' S & M Coal Co. v OSM (On Reconsideration)(unpublished order, July 16, 1984). This rule, however, only applies to the interim program, as here, and not to acreage computations under the permanent program. See S & S Coal Co., 87 IBLA 350, 354 (1985)."



Also see these attached decisions: S & M COAL CO. AND JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620 & 82-20 (1984) and C-ANN COAL CO. v OSM, Docket No. NX O-218-R (1984).

INTERIOR ADMINISTRATIVE DECISIONS - PERMANENT PROGRAM

S & S COAL CO. v OSM, Docket No. NX 4-65-R (1984).

"This question of first impression, whether that definitional language [of "affected area", 30 CFR 701.5] allows OSM to include the so-called 'shadow area,' or that portion of the earth's workings, in the 2-acre calculation for jurisdictional enforcement purposes, must be resolved in favor of OSM. And owing to the certainty of subsidence occasioned by applicant's underground mining, this would be the case even in the absence of any observable or definable surface disturbances involving that area."

This decision was affirmed by the IBLA. See S & S COAL CO. v OSM, 87 IBLA 350, IBLA 85-48 (1985), attached. See also, R & W COAL CO. v OSM, Docket No. NX 4-73-R (1984).

SILICA MINING CORP. v OSM, 126 IBLA 191, IBLA 90-60 (1993). SILICA MINING CORP. v OSM, Docket No. NX 7-174-R (1989).

The Board affirmed the ALJ decisions, finding that more than 2 acres were affected by Silica's operations. The fact that the inspector had "made an error in failing to include the shadow area in the exempt status calculations" did not relieve Silica's responsibility for knowing that law.

Also see CHRISTINE COAL CO. v OSM, Docket No. NX 90-23-R (1991).

ATTACHMENTS

1. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble -- Final rule.
 - a. Part 701. 701.5 Definitions.
 - b. Part 783 Underground mine permit application.
2. 47 FR 41 (JANUARY 4, 1982). Proposed rule. Definitions and terminology.
3. 47 FR 33424 (AUGUST 2, 1982). Final rule. Two-acre exemption.
4. 48 FR 14814 (APRIL 5, 1983). Final rule. Definitions and terminology.
5. 51 FR 41952 (NOVEMBER 20, 1986). Notice of suspension.
6. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules. Surface impacts of underground coal mining.
7. 57 FR 53670 (NOVEMBER 12, 1992). Petition to initiate rulemaking and request for comment.
8. OSM DIRECTIVE, Subject No. REG-20, Transmittal No. 390, "Affected Area Calculations for Underground Mines (Issued October 28, 1987).



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

9. OSM DIRECTIVE, Subject No. REG-31 [Incorporates REG-31-1 (February 4, 1991)], Transmittal No. 584, "Preparation of Mining Plan Decision Documents" (October 24, 1989).
10. USA v E & C COAL CO., INC., 846 F 2d 247 (4th Cir 1988).
11. OSM v C-ANN COAL CO., 94 IBLA 14, IBLA 85-75 (1986).
12. S & M COAL CO. AND JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620 & 82-20 (1984).
13. C-ANN COAL CO. v OSM, Docket No. NX O-218-R (1984).
14. S & S COAL CO. v OSM, Docket No. NX 4-65-R (1984).
15. S & S COAL CO. v OSM, 87 IBLA 350, IBLA 85-48 (1985).
16. R & W COAL CO. v OSM, Docket No. NX 4-73-R (1984).
17. SILICA MINING CORP. v OSM, 126 IBLA 191, IBLA 90-60 (1993).
18. SILICA MINING CORP. v OSM, Docket No. NX 7-174-R (1989).
19. CHRISTINE COAL CO. v OSM, Docket No. NX 90-23-R (1991).