

PACIFICORP
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

STATE OF UTAH, DIVISION OF OIL, GAS AND MINING,
INTERVENOR

IBLA 95-175

Decided April 1, 1998

Appeal from a decision of Administrative Law Judge Ramon M. Child, affirming Cessation Order No. 94-020-370-002, charging PacifiCorp with failure to obtain a permit for a coal preparation plant. Hearings Division Docket No. DV 94-15-R.

Reversed; Cessation Order No. 94-020-370-002 vacated.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints:
Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

The OSM is not required to follow the 10-day notice procedures of 30 C.F.R. § 842.11(b)(1)(ii)(B), when it receives a citizen's complaint which supplies adequate proof that an imminent danger to public health and safety or a significant, imminent environmental harm to land, air, or water resources exists and that the State regulatory authority has failed to take appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints:
Generally--Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: Generally

When OSM receives a citizen's complaint alleging that a coal preparation plant is an unpermitted surface coal mining operation, but OSM is aware that the operator of the plant has received an exemption from the state

regulatory authority and, upon inspection, finds no evidence of a significant, imminent environmental harm, it is error for OSM to issue a cessation order to the operator until it has resolved the jurisdictional dispute with the state.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders:
Generally—Surface Mining Control and Reclamation Act of 1977: Exemptions:
Generally—Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: Generally

Under the Utah State program regulations, any person who operates or intends to operate a coal processing plant outside the permit area of any coal mining and reclamation operation must obtain a permit from the regulatory authority, unless the plant is located at the site of ultimate coal use. When the State regulatory authority has exempted a coal preparation plant from regulation because it is located at the site of ultimate coal use, a cessation order issued by OSM to the plant operator for failure to obtain a permit from the State regulatory authority will be vacated.

APPEARANCES: John S. Kirkham, Esq., David J. Jordan, Esq., Salt Lake City, Utah, for PacifiCorp; DeAnn L. Owen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Thomas A. Mitchell, Assistant Attorney General, State of Utah, for State of Utah, Division of Oil, Gas and Mining, Intervenor.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

PacifiCorp has appealed a December 12, 1994, Decision issued by Administrative Law Judge Ramon M. Child, affirming Cessation Order (CO) No. 94-020-370-002 (Ex. A-1), issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to PacifiCorp based on OSM's determination that PacifiCorp's Hunter Coal Preparation Plant (Preparation Plant), a coal crushing and washing facility located in Emery County, Utah, was a "surface coal mining operation" operating without a permit in violation of the approved Utah State program. The CO directed PacifiCorp, which operates the Preparation Plant through its wholly owned subsidiary, Energy Western Mining Company (EWM), to cease receiving and processing coal at the Preparation Plant and to obtain a permit. By Order dated February 8, 1995, this Board granted the State of Utah, Division of Oil, Gas and Mining (DOGGM), leave to intervene in this appeal.

Background

On September 7, 1994, Citizens Coal Council (CCC) filed a citizen's complaint with the Albuquerque Field Office, OSM, requesting an inspection of PacifiCorp's Preparation Plant. The CCC alleged that PacifiCorp

had built the Preparation Plant in 1990 and used it "since 1991 without ever getting a mining and reclamation permit * * * although the plant it replaced was permitted." (Ex. R-5.) It also alleged that the State, while aware of the situation, had failed to take action to permit the plant. Finally, CCC asserted that the failure to obtain a permit was "causing imminent harm of significant environmental damage." Id.

The OSM conducted an inspection of the Preparation Plant and on September 15, 1994, issued CO No. 94-020-370-002. (Ex. R-6.) On September 19, 1994, PacifiCorp filed an Application for Review and Petition for Temporary Relief of the CO with the Office of Hearings and Appeals. PacifiCorp also filed a Motion for a Temporary Restraining Order and Preliminary Injunction in the U.S. District Court, Utah. On September 19, 1994, that court issued an Order restraining the Department from enforcing the CO pending a decision on the matter.

On September 23, 1994, Administrative Law Judge Ramon M. Child conducted a hearing in the case in Salt Lake City, Utah. Only two witnesses testified at the hearing, Mitchell Scott Rollings, the OSM Reclamation Specialist who issued the CO, and James Blake Webster, the permitting administrator for Interwest Mining Company, a management subsidiary for coal mines owned by PacifiCorp. (Tr. 34, 84.)

Webster testified that PacifiCorp began construction of the Preparation Plant in the fall of 1989 on the same site where the Hunter Power Plant (Power Plant) was already located and that the Preparation Plant began to process significant amounts of coal in 1991. 1/ (Tr. 88.) The Preparation Plant facilities are separated from the Power Plant facilities by a fence line. (Tr. 124.) The two plants are connected by a conveyor belt for conveying processed coal to either the Power Plant or the Power Plant stockpile. (Tr. 86-87, 124, 129-30.) Webster testified that he was unaware of any environmental harm caused by the Preparation Plant. (Tr. 89-90.)

PacifiCorp owns three mines, each operated by EWM, that deliver coal to the Preparation Plant: the Cottonwood/Wilberg Mine, the Deer Creek Mine, and the Trail Mountain Mine. The mines are located from 12 to 23 miles from the Preparation Plant. (Tr. 126; Exs. R-6, at 3, R-10.) All the coal processed by the Preparation Plant is used by the adjacent Power Plant. (Tr. 66.) In January 1991, the State regulatory authority, DOGM, determined that the Preparation Plant did not need a surface coal mining permit because the plant was located at the site of ultimate coal use. (Ex. A-3.)

1/ Exhibit A-2, an oversized aerial photograph of the Power Plant site taken on July 13, 1994, was forwarded to the Board by Judge Child under separate cover from the remainder of the case record. The Board has no record of receipt of that exhibit. Nevertheless, we find that visual reference to that exhibit is not necessary for our adjudication of this appeal.

Rollings testified that, upon receipt of the citizen's complaint letter from CCC, he conducted an inspection of the Preparation Plant on September 8 and 9, 1994. (Tr. 106-107.) He stated that he offered DOGM officials the opportunity to accompany him, but that they declined. (Tr. 112.) He further testified:

On September 15[, 1994], when I came back to issue the cessation order, I again stopped in at the DOGM offices, talked with Mr. Braxton. The permit application had not been received. They had not addressed the issue of whether or not the plant had to be permitted and they again declined to go on with the inspection.

(Tr. 113.)

Rollings stated that in the course of his inspection he interviewed "a number of people that are listed in the inspection report" and "gather[ed] information about who owns what, who operates what, where the coal comes from and so on." (Tr. 116.) He also determined how much coal each of the three mines shipped to the Preparation Plant, and the union representation of the Power Plant and Preparation Plant employees. (Tr. 117-19.) Rollings stated that he looked at ownership factors, economic factors, and control factors in determining that the Preparation Plant operated in "connection with the mines" and was therefore subject to regulation. (Tr. 122.)

Although Rollings' inspections disclosed no imminent harm, he issued the CO pursuant to 30 C.F.R. § 843.11(a)(2) which provides that surface coal mining operations conducted without a valid permit constitute "a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm * * *." (Tr. 38-39.)

The CO charged PacifiCorp with "[f]ailure to obtain a permit [for the Preparation Plant] in accordance with all applicable requirements of the approved Utah program as found in the State of Utah, R645 Coal Mining Rules," specifically the following provisions: Utah Administrative Code (U.A.C.) R645-300-112.400 (1994) and U.A.C. R645-302-261 (1994). (Ex. A-1). The U.A.C. R645-300-112.400 (1994) requires all persons engaging in coal mining and reclamation operations to first obtain a permit from DOGM. The U.A.C. R645-302-261 provides:

R645-302-260 applies to any person who operates or intends to operate a coal processing plant outside the permit area of any coal mining and reclamation operation, other than such plants which are located at the site of ultimate coal use. Any person who operates such a processing plant will obtain a permit from [DOGM] in accordance with the requirements of R645-302-260.

Rollings opined that "one of the main reasons" coal preparation plants "have to be permitted is because of the environmental effects," such as the impact on ground water hydrology, associated with refuse piles which may remain in place for 30 years. (Tr. 134-35.)

Rollings testified that he understood the "whole purpose of the preparation plant [was] to get the coal ready to meet specs for the power plant." (Tr. 139.) He stated that he had "a problem" with "that term exemption" of end-user preparation plants as provided for in the DOGM regulations. (Tr. 136.) However, he admitted that OSM had determined that the DOGM regulations were no less effective than the Federal regulations and that DOGM regulations required a determination to be made whether a facility was located at the site of ultimate use. (Tr. 73-76.) According to Rollings there was a conflict: "OSM has determined that the prep plant needs a permit under the regulations and DOGM has determined that they do not." (Tr. 76.) He expressed his belief that DOGM was "not effectively interpreting their regulations." Id.

Judge Child's Decision

In his December 12, 1994, Decision, Judge Child affirmed issuance of the CO based on several conclusions of law.^{2/} First, he determined that OSM established a prima facie case that it had authority to issue the CO based on 30 C.F.R. § 843.11(a)(2), which provides that surface coal mining operations conducted without a valid surface mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Next, he concluded that "PacifiCorp's operation of the Preparation Plant constitutes 'coal mining and reclamation operation' which must be permitted under the Utah program." (Decision at 11.) He based his conclusion on an analysis of relevant Federal and State regulations. He cited 30 C.F.R. § 785.21(a), under which any preparation plant "operated in connection with a coal mine but outside the permit area for a specific mine" must be permitted. The Judge found that under the Federal program, as well as the Utah program, activities conducted on the surface of lands in connection with a surface mine, such as the processing and preparation of coal constituted surface coal mining operations requiring a permit.

The Judge then posed the question whether PacifiCorp's preparation plant was a coal mining or reclamation operation required under the Utah program to be permitted. He found that the issue turned upon the meaning to be given the phrases "in connection with a surface coal mine" and "located at the site of ultimate coal use." (Decision at 6.)

^{2/} In his Decision, Judge Child makes a finding of fact, in reliance on CCC's representation in its citizen's complaint, that the Preparation Plant replaced another such plant in Emery County, Utah, operated by PacifiCorp, which had been permitted by the DOGM. PacifiCorp vehemently denies that there is any factual basis for such a finding, stating that the Preparation Plant did not replace a previously permitted plant. It also provides the Mar. 2, 1995, Affidavit of Webster, wherein he states that the "Hunter Coal Preparation Plant" did not replace any off-site coal preparation plant. (PacifiCorp Brief, Ex. C.) There is no evidence in the record to support Judge Child's finding.

The Judge summarized the regulatory history of 30 C.F.R. § 785.21, the 1988 revision of which provides that any person operating a coal preparation plant "in connection with a coal mine but outside the permit area for a specific mine" was required to obtain a permit from the regulatory authority. (Decision at 7.)

Reviewing the regulatory history, the Judge noted that the preamble to the 1988 rulemaking focuses not upon physical proximity of a preparation plant to a coal mining operation but rather on "the economic, functional, and other types of connections or integrations with the mine operator or end user." (Decision at 7.) The Judge cited examples listed in the preamble for determining whether a facility operated "in connection with" a coal mine. Finally, the Judge quoted the 1988 preamble as stating, at 53 Fed. Reg. 47388 (Nov. 22, 1988), that "[c]oal preparation facilities which are being operated only in connection with an end user are not operations in connection with a coal mine." ^{3/} Id.

The Judge concluded:

In sum, OSM has modified the Federal regulations on several occasions in an attempt to make clear its unchanging intent that preparation plants outside the permit area of a specific mine must be permitted if they are operated "in connection" with a surface coal mine and will not be permitted only if they are operated solely "in connection with" the end user. It also consistently indicated that proximity to the mine is not a controlling factor.

Because the language of U.A.C. R645-302-261 of the Utah program is identical to one version of these Federal regulations, and because the intent of these Federal regulations has remained the same despite several modifications, R645-302-261 should be interpreted consistent with that intent. Thus, U.A.C. R645-302-261 must be interpreted as requiring a permit for all coal preparation plants operated in connection with a coal mine, leaving unregulated only coal preparation plants operated solely in connection with an end user or operated without connection to a mine or end user.

(Decision at 8.)

The Judge then found that PacifiCorp's preparation plant

receives all of its coal from the Mines; most of the coal from the Mines is processed at the Preparation Plant; and it is integrated with the Mines to the extent that their operators and

^{3/} The correct text of this excerpt from OSM's response to a commenter is stated in the section of this opinion styled Federal Regulatory History.

owners are identical and the [Cottonwood/Wilberg] mine manager supervises the Preparation Plant supervisor and is in charge of health and safety at the Preparation Plant.

(Decision at 8.) Thus, he concluded that the Preparation Plant was "clearly being operated 'in connection with' the Mines rather than being operated solely in connection with the Power Plant" and that the Preparation Plant was a "coal mining and reclamation operation" required to be permitted under the Utah program. (Decision at 9.)

Next, Judge Child concluded that "OSM was not required to follow the [10-day notice (TDN)] procedures at 30 C.F.R. § 842.11(b)(1)(ii)(B)(1) and 30 C.F.R. § 843.12(a)(2) prior to inspecting the Preparation Plant site and issuing the CO." (Decision at 11.) Finally, despite the fact that he concluded that the TDN procedures were not applicable, he applied them in concluding that "DOGM's interpretation of U.A.C. R645-302-261 was not 'appropriate action' [within the meaning of 30 C.F.R. § 843.11(b)(1)(ii)(B)(2)] because it was an abuse of discretion." Id.

For the reasons set forth below, we reverse Judge Child's Decision and vacate the CO.

Federal Regulatory History

Under section 701(27) of the Surface Coal Mining and Reclamation Act (SMCRA), 30 U.S.C. § 1291(27) (1994), the term "surface coal mining and reclamation operations" is defined to include "surface coal mining operations," which is in turn defined as:

(A) activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include * * * the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site * * *; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas also shall include any adjacent land the use of which is incidental to any such activities, * * * and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

30 U.S.C. § 1291(28) (1994) (emphasis added).

In attempting to address the question of the permitting of coal processing plants in the regulations developed for the permanent regulatory program, OSM promulgated regulations in 1979, which included the following provision:

This Section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing coal processing plants or support facilities not within a

permit area of a specific mine. Any person who operates such a processing plant or support facility shall have obtained a permit from the regulatory authority under the regulatory program in accordance with the requirements of this section.

30 C.F.R. § 785.21(a) (1979), 44 Fed. Reg. 15377 (Mar. 13, 1979).

The State of Utah received conditional approval for its State regulatory program effective January 21, 1981.

Thereafter, in 1983 OSM published rulemaking to amend its regulations applicable to support facilities and coal preparation plants, stating that the "rule changes are necessary in order to clarify OSM's jurisdiction and to establish a clear set of regulatory requirements." 48 Fed. Reg. 20392 (May 5, 1983). In that rulemaking, OSM defined "Coal preparation plant" as "a facility where coal is subjected to cleaning, concentrating, or other processing or preparation in order to separate coal from its impurities." 30 C.F.R. § 701.5, 48 Fed. Reg. 20400 (May 5, 1983).

In the preamble to that rulemaking, OSM stated its belief that the phrase "in connection with," used in section 701(28)(A) of SMCRA should be "interpreted broadly," and it provided examples of that relationship: "facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine." 48 Fed. Reg. 20393 (May 5, 1983). Nevertheless, it further stated:

OSM does not believe that its jurisdiction extends to facilities which are operated solely in connection with the end user of the coal product. A facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine.

Id. (emphasis added).

It also amended 30 C.F.R. § 785.21(a) to read: "This section applies to any person who operates or intends to operate a coal preparation plant outside the permit area of any mine, other than such plants which are located at the site of ultimate coal use." Id. at 20400 (emphasis added). It explained that amendment as follows:

Several commenters indicated that OSM's proposed language [for 30 C.F.R. § 785.21(a)] "directly associated with the ultimate user" presented a confusing test. Commenters pointed out that a more appropriate and more useful test would be whether the plants were at the point of ultimate use. OSM agrees and

has adopted language to indicate that only plants situated at the point of ultimate coal use will be deemed to be not "in connection with" a mine.

Id. at 20398 (emphasis added).

In 1985, in response to litigation, OSM published an interim final rule amending, inter alia, 30 C.F.R. § 785.21, but not the language of subsection (a) relating to ultimate end use. 50 Fed. Reg. 28189 (July 10, 1985). At the same time, OSM proposed the same language to allow public comment on the rule. Id. at 28180. The final rule published in 1987 did not alter 30 C.F.R. § 785.21(a). However, in the preamble OSM stated:

Some commenters felt that the definition of surface coal mining operations should include an explanation of when "power plant" processing operations were "surface coal mining operations." Treatment of facilities located at the point of coal use was discussed in the preamble of the May 5, 1983 rulemaking (48 FR 20392). That discussion is entirely relevant and contains the following paragraph * * *.

52 Fed. Reg. 17726 (May 11, 1987).

The "following paragraph" included the sentence, quoted above, stating that a facility located at the point of ultimate coal use would not be deemed to be operating in connection with a mine "unless it is also located at the site of the mine." Id.

In 1988, OSM again amended its regulations "to clarify the circumstances under which coal preparation plants located outside the permit area of a mine are subject to the performance standards and permitting requirements" of SMCRA. 53 Fed. Reg. 47384 (Nov. 22, 1988). In that rulemaking, OSM amended 30 C.F.R. § 785.21(a) to eliminate the phrase "other than such plants which are located at the site of ultimate coal use." Amended 30 C.F.R. § 785.21(a) read, as follows:

This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section.

Id. at 47391.

The basis for OSM's amendment is explained in the regulatory preamble:

[The OSM] continues to believe that regulation of facilities operated by or for the end user of coal at the point of such use

is not required under SMCRA because, by virtue of their association with the end user of the coal, such facilities are not operated "in connection with" a coal mine.

* * * * *

The first sentence of § 785.21(a), which specifies the requirements for permits for coal preparation plants not located within the permit area of a mine, previously read, "This section applies to any person who operates or intends to operate a coal preparation plant outside the permit area, other than such plants which are located at the site of ultimate coal use." Under this final rule, this sentence is replaced with, "This section applies only to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine." Further, this language differs from the proposed rule in that it includes the clarifying phrase, "for a specific mine." The second sentence of paragraph (a) remains the same. Because the purpose of this rulemaking is to clarify that the rule applies only to coal preparation plants operated in connection with a coal mine, and [OSM] believes that this limitation necessarily excludes facilities at the site of ultimate coal use, the redundant phrase "other than such plants which are located at the site of ultimate coal use," is deleted in this final rule.

Id. at 47384-85.

Responding to a comment regarding a preparation plant used in connection with an end user, OSM stated:

Another commenter was concerned about the effect of the rule on a specific preparation plant that operates in connection with an end user, a power plant burning coal from a mine located about a mile away. Such plants were not subject to regulation under [OSM's] previous rules at 30 CFR Parts 785 and 827 because those rules explicitly excluded from jurisdiction "such plants which are located at the site of ultimate coal use."

As stated above, [OSM] has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine. Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commenter, do not operate in connection with a coal mine and are not subject to the rule.

Id. at 47388 (emphasis added).

Discussion

[1] We first address the contention of Intervenor DOGM that the CO in this case was issued in violation of the TDN procedures. The OSM disagrees, contending that it was required to issue the CO in this case because proof of the existence of environmental harm is not a prerequisite for SMCRA jurisdiction. It asserts that a CO must be immediately issued upon inspection following the filing of a citizen's complaint alleging unpermitted surface mining operations. (Reply Brief at 23.) The OSM argues that Federal policy to avoid placing the operator into a dispute between a primacy state and OSM applies to TDN procedures and not to cases such as that before us here, involving alleged imminent environmental harm. (Reply Brief at 25-26.)

The Department promulgated the regulations found at 30 C.F.R. § 842.11 to implement OSM's oversight enforcement authority over state programs as set forth in section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994). The regulation at 30 C.F.R. § 842.11(b)(1)(ii)(B)(1), which Intervenor asserts should have been applied, provides, in pertinent part, that an authorized representative of the Secretary shall immediately conduct a Federal inspection when that representative has reason to believe, on the basis of information available to him or her, that (1) a violation exists; (2) the authorized representative has notified the state regulatory authority of the possible violation; (3) more than 10 days have passed since notification; and (4) the state regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response.

In PacifiCorp v. OSM, 131 IBLA 17, 24 (1994), we explained:

The purpose of a TDN is to afford a primacy state with an opportunity to respond to notice from OSM that there is a possible violation before OSM takes action. A TDN is not an enforcement action; it is a "communication device" between OSM and the states. 53 FR 26742 (July 14, 1988).

However, OSM is not required to follow the TDN procedures of 30 C.F.R. § 842.11(b)(1)(ii)(B), when "[t]he person supplying the information supplies adequate proof that an imminent danger to public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action." 30 C.F.R. § 842.11(b)(1)(ii)(C). Pursuant to regulation, 30 C.F.R. § 843.11(a)(2), the Secretary has determined that "[s]urface coal mining operations conducted without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *." In Robert L. Clewell, 123 IBLA 253, 276 (1992), the Board ruled that a signed citizen's complaint alleging mining without a

permit and the failure of the State regulatory authority to take appropriate action was sufficient to meet the requirements of 30 C.F.R. § 842.11(b)(1)(ii)(C).

In the citizen's complaint filed in this case, CCC alleged that PacifiCorp was conducting surface coal mining operations without a permit and that DOGM had failed to take appropriate action to require a permit. Thus, the complaint in this case was sufficient to satisfy the requirements of 30 C.F.R. § 842.11(B)(1)(ii)(C). Accordingly, we must reject Intervenor's assertion that OSM was required to follow the TDN procedures of the regulations.

Nevertheless, the circumstances of this case dictate that OSM's action in issuing the CO was unquestionably premature. The record shows that on February 27 and 28, 1991, OSM conducted a complete, random sample oversight inspection of PacifiCorp's Cottonwood/Wilberg Mine. (Ex. A-4, Narrative at 1.) Prior to that inspection, OSM reviewed the records in the DOGM's office in Salt Lake City. In his inspection report, the OSM inspector noted that at the time of the records review he examined the DOGM memorandum granting PacifiCorp a permit exemption for the Preparation Plant in accordance with U.A.C. R614-302-261. ^{4/} Id. He further stated: "The rule cited is less effective than it's [sic] Federal counterpart found at 30 CFR, Sec. 785.21. This has been noted to AFO [Albuquerque Field Office] program specialists for possible 732 letter notification to DOGM." He further noted that "[t]his situation has been discussed with inspection participants and also with Blake Webster * * *." Id.

At the hearing, Rollings testified as follows in response to questions from counsel for PacifiCorp:

Q. And a 732 letter is a letter that the Office of Surface Mining sends to a state enforcement agency if they think the state agency's regs are less stringent than the federal regs?

A. That's correct.

Q. All right. Now it is a fact, isn't it, sir, that no 732 letter has ever been sent from OSM to the Utah Division of Oil, Gas and Mining?

A. About this specific issue or ever?

Q. About this issue. About this issue.

A. It was deemed not necessary.

^{4/} In its Intervenor's Brief, Intervenor explains that between 1991 and 1994 there was a numbering change for the U.A.C. and U.A.C. R614-302-261 became U.A.C. R645-302-261 without any substantive change.

Q. The answer then is no?

A. That's correct.

Q. You've never told them, by virtue of a 732 letter, we think your regulation is less stringent, you need to change it?

A. No, because it is not interpreted as being less stringent. The--after the--this--I don't recall which exhibit this was, the November 22nd, 1988 preamble, one of the requirements on page 47390, effect on state programs on the third column near the bottom, and that states that OSM--

* * * * *

THE WITNESS: OSM/RE will evaluate permanent state regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the director determines that certain state program provisions should be amended in order to be made no less effective than the revised Federal Rules, the individual states will be notified in accordance with the provisions of 30 CFR 732.17.

* * * * *

Q. Whoever the director [OSM] was in 1988, he specifically determined that the Utah reg was fine?

A. That's correct.

* * * * *

Q. That's the same regulation you and I have been talking about [U.A.C. R645-302-261] that says facilities at the site of ultimate use are exempt?

A. With--

Q. Same reg, right?

A. Depending on whose interpretation of that, yes. Yes.

Q. Well, do you think the State of Utah has not been effectively enforcing its regulations?

A. In this instance and given the memo that exists, the January 1991, OSM has determined that the prep plant needs a permit under the regulations and DOGM has determined that they do not.

Q. So you think that Utah is not effectively enforcing its regulations?

A. They're not effectively interpreting their regulations. I would say it's a matter of interpretation and it's a result of that enforcement.

(Tr. 73-76.)

It is apparent from the record in this case, as highlighted in the quoted exchange, that even before receipt of CCC's citizen's complaint, OSM was well aware of DOGM's interpretation of its regulation U.A.C. R645-302-261, as it related to the Preparation Plant. In 1991, an OSM inspector noted that OSM might have to invoke the procedures in 30 C.F.R. § 732.17 because he believed the State regulation in question to be less stringent than its Federal counterpart.

Under the procedures in 30 C.F.R. § 732.17(c) and (e), whenever the OSM Director becomes aware that "the approved State program no longer meets the requirements of the Act[, SMCRA,] or this chapter," he is required to "determine whether a State program amendment is required and notify the State regulatory authority of the decision." Rollings represented at the hearing that the OSM Director determined at some point that DOGM did not need to make any change to U.A.C. R645-302-261. Thus, we must assume that the OSM Director determined that U.A.C. R645-302-261 was no less stringent than its Federal counterpart 30 C.F.R. § 785.21(a).

[2] PacifiCorp argues that it is caught in the middle of a dispute between DOGM and OSM and that, by placing it in that position, OSM has acted contrary to the policy to avoid conflicts between the states and the Federal Government. The OSM responds by asserting that PacifiCorp

fails to point out that the SMCRA principles of 'primacy safeguards' and 'minimizing placing operators in the middle of a dispute between a primacy State and OSM,' specifically apply to the TDN rule and OSM policy to avoid the unnecessary issuance of a Federal NOV, not to cases, such as this, which involve alleged imminent environmental harm.

(Agency Response at 26.)

That assertion by OSM ignores its regulatory policy, as expressed in the rulemaking adopting 30 C.F.R. § 843.11(a)(2). Therein, in response to a comment that the presumption of environmental harm in 30 C.F.R. § 843.11(a)(2) violated due process because it sanctioned issuance of a cessation order without any hearing to determine whether a permit was required, OSM stated: "It will be the Office's policy in implementing these regulations to refrain from issuing a cessation order until it resolves any question concerning its jurisdiction over a given operation." 47 Fed. Reg. 18557 (Apr. 29, 1982) (emphasis added).

The policy goal of resolving jurisdictional issues prior to Federal enforcement was again expressed in a 1988 rulemaking adopting TDN procedures. In its discussion and response to comments, OSM voiced the hope that

[d]isagreements over the jurisdictional reach of State Programs and the Federal Act and regulations should be few and far between. * * * Under the previous ten-day-notice rules * * * operators could be given conflicting directions from two different governing entities. By this final rulemaking, [OSM] intends to allow a consistent and rational process to resolve disagreements and to avoid unnecessary issuance of a federal NOV to an operator merely because [OSM] and the state cannot resolve the disagreement between them on the eleventh day.

53 Fed. Reg. 26737 (July 14, 1988). See National Coal Association v. Interior Department, 39 ERC 1624, 1633 (D.D.C. 1994).

The OSM noted that

until jurisdictional deficiencies are resolved, the state program governs state and operator actions. Congress clearly intended operators to be responsible for complying with only one set of regulations — either state or federal, but not both. As a result, in primacy states the Act is implemented through the approved states program rather than directly.

53 Fed. Reg. 26737 (July 14, 1988). While that rationale was expressed in the context of discussions of the TDN procedures, it is arguably even more important to resolve jurisdictional disputes in cases such as this because of the impact of a cessation order on an operator. Moreover, as set forth above, in 1982, OSM announced that it was its policy to resolve permitting disputes with the state before it issued a CO.

It is clear that OSM's policy is to alleviate and encourage the settlement of jurisdictional disputes arising in connection with its enforcement responsibilities. Such a policy is supported by considerations of fairness to operators. Insofar as we can discover, this policy has not been modified or rescinded by subsequent rulemaking and it should have been followed in this case. It is especially compelling here, where the inspector determined prior to issuing the CO, that no imminent danger existed, and that the Preparation Plant had been exempted from regulation under DOGM rules.

Nevertheless, because OSM did not resolve the jurisdictional dispute prior to issuance of the CO, we must now determine whether OSM properly interpreted U.A.C. R645-302-261 to require a permit for the Preparation Plant. We conclude that Judge Child erred in holding that it did.

[3] The OSM contends that it is mandatory under the Utah program and under Federal regulation that DOGM apply the "in connection with test"

to the Preparation Plant. (Reply Brief at 7.) It argues that DOGM must broadly interpret the phrases "in connection with" and "resulting from or incident to" in order to include relationships between the Preparation Plant and the coal mines which are based on geographic proximity, economic, or functional factors, "or any other type of integration." Id. at 9. It further asserts that it "conducted an independent review of all factors of integration between the Preparation Plant and the Mines and concluded that the Mines are functionally and economically tied so as to constitute 'surface coal mining operations' which must be permitted under the Utah Program." Id. at 10.

The OSM contends that it has been its "unchanging intention" since 1982 that an off-site coal preparation plant must be permitted if it is operated in connection with a surface coal mine and is exempt from permitting only if it is operated solely in connection with the ultimate coal user. (Reply Brief at 12.) In support of this argument, OSM points to the preamble of the 1983 rulemaking, when the language contained in U.A.C. R645-302-261, "other than such plants located at the site of ultimate use," was added to the Federal regulations and states that "in interpreting this language OSM pointedly stated that, 'OSM does not believe that its jurisdiction extends to facilities which are operated solely in connection with the end user [ultimate user] of the coal product. 48 Fed. Reg. 20392, 20393 (May 5, 1983) (emphasis added)." Id. at 13.

Both Judge Child and OSM focused on that language to support their interpretation of the regulations. However, each ignored the sentence that follows the one quoted above. That sentence, as set forth above in our section Federal Regulatory History, is: "A facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine." 48 Fed. Reg. 20393 (May 5, 1983) (emphasis added). Thus, even though OSM affirmed a policy of examining economic and functional relationships between preparation plants and mines to determine if the plants were operated "in connection with" a mine, it expressly stated in that rulemaking that facilities located at the point of ultimate coal use would not be required to obtain a permit unless the plant was located at the site of the mine.

The language of 30 C.F.R. § 785.21(a) adopted in 1983 was repeated in U.A.C. R645-302-261. Although OSM subsequently amended 30 C.F.R. § 785.21(a) in 1988, it made clear in the preamble to that rulemaking that it had no intention to disturb its prior interpretation regarding preparation plants located at the point of ultimate coal use. The OSM stated in the 1988 rulemaking that the purpose of the rulemaking was to clarify that 30 C.F.R. § 785.21 applied only to coal preparation plants operated in connection with a coal mine and that such a limitation "necessarily excludes facilities at the site of ultimate coal use." 53 Fed. Reg. 47384 (Nov. 22, 1988). Accordingly, it dropped the phrase "other than such plants which are located at the site of ultimate coal use" from the rule as "redundant." Id. In fact, in response to a comment concerning a specific

preparation plant that operated in connection with an end user, a power plant burning coal from a mine located about a mile away, OSM stated that "[s]uch plants were not subject to regulation under [OSM's] previous rules," and OSM "has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine." Id. at 47388. Thus, we must conclude the OSM's "unchanging intent," was not as argued by OSM in this case, but as expressed in its regulatory pronouncements beginning in 1983, i.e., not to require the permitting of a preparation plant located at the point of ultimate coal use unless the plant was located at the site of the mine.

The Preparation Plant is located at the point of ultimate coal use, but it is not located at the site of any mine. The DOGM properly interpreted U.A.C. R645-302-261, in accordance with OSM's regulatory preamble policy statements, to exempt the Preparation Plant from obtaining a permit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed, and CO No. 94-020-370-002 is vacated.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

John H. Kelly
Administrative Judge

