United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

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Memorandum

To: Guy Padgett
Director, Casper Field Office

Through: Brent Wahlquist
Regional Director, Western Regional
Coordinating Center

From: Mary Josie Blanchard
Assistant Director, Program Support

Subject: Response to Request for Policy Guidance Concerning the Permitting of Railroads

This memorandum is in response to your October 1, 1998, request for general policy guidance regarding the permitting of railroad spurs, sidings, and loops. You also inquire whether the State regulatory authority must require a permit for, and regulate rail spurs which are single mine, single purpose private lines and not under the jurisdiction of the Surface Transportation Board, the successor to the Interstate Commerce Commission.

The following is a brief summary of pertinent legal, regulatory and judicial guidance germane to your request.

Section 701(28) of the Surface Mining Control and Reclamation Act (SMCRA) defines surface coal mining operations as:

> (A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 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, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: Provided, however, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals

removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act; and

(B) the areas upon which such 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****

Our authority to regulate railroads derives from the "resulting from or incident to" language in paragraph (B) of this definition.

The U.S. Court of Appeals for the Federal Circuit affirmed this authority in National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988). The court held that:

> The Secretary has also interpreted Sec. 701(28)(B) to authorize extending SMCRA requirements to a number of "support facilities" "resulting from or incident to" mining activities that are not specifically mentioned in the statute. 30 C.F.R. Sec. 701.5 (1984). Industry objects to the Secretary's inclusion of railroads as a support facility. The district court upheld the Secretary. Industry's argument is basically that (1) there is nothing specific in the statute about railroads, and (2) it is difficult for mine operators to control environmental impacts from railroads since they typically do not operate railroads. As for the first point, the broad language of Sec. 701(28)(B) clearly permits the Secretary to regulate railroads, provided, of course, that they are "resulting from or incident to" mining activities. The second point is an argument for Congress; the statute does not make "control" the operative test for regulation. We affirm the district court's rejection of Industry's challenge to the regulation of railroads.

Id. at 745, n. 80.

Further, the court interpreted "resulting from or incident to" in the following manner:

> The phrase 'resulting from or incident to' clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some type of limiting principle of proximate causation that is familiar to the courts in tort law. Otherwise, every support facility that could be considered a 'but for' result of a surface coal mining operation would be subject to SMCRA

> regulation. Since causation analysis is necessarily so heavily informed by explicit policy considerations, a statutory phrase such as the one at issue here is an obvious example of the sort of congressional delegation of policy choices to an agency that courts are bound to respect.

Id. at 745.

The court thus endorsed the use of causation analysis to determine whether a facility results from or is incident to a regulated surface coal mining activity (an activity listed in paragraph (A) of the definition) and whether it therefore falls within the scope of the definition and must be regulated as a surface coal mining operations. However, the court expressly rejected use of a "but for" analysis to determine whether support facilities must be regulated.

In the preamble to the 1988 rule concerning support facilities, the Office of Surface Mining Reclamation and Enforcement (OSM) identified three criteria (proximity, function and economic dependence) for use in determining whether a support facility is subject to regulation under SMCRA:

> OSMRE believes that the term "resulting from or incident to," in the context of the rest of the language of section 701(28) of SMCRA, provides adequate guidance to regulatory authorities in the identification of facilities that support surface coal mining operations. Having considered the court's decision, OSMRE will again recognize that the consideration of proximity, as well as function, is valid in determining whether facilities are "resulting from or incident to" regulated activities**** Economic independence is a valid consideration in determining whether a facility is a support facility. Indeed, OSMRE would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which the facility results from or is incident to a regulated mining activity.

53 FR 47381, November 22, 1988

In Citizen's Coal Council, 142 IBLA 33 (December 15, 1997), the Interior Board of Land Appeals (IBLA or the Board) questioned the legal validity of these criteria since they were never codified: "[T]he criteria outlined in the 1988 preamble [were] never formally adopted by the Department." 142 IBLA 38. Hence, we cannot require that States adhere to these criteria in evaluating whether a railroad spur or other support facility must be regulated as a surface coal mining operation. However, the Board did find that:

> in order to be considered to 'result from or [be] incident to' surface coal mining activities which are themselves subject to SMCRA regulation under section 701(28)(A) of SMCRA, within the meaning of 30 U.S.C. 1291(28)(B) (1994), facilities must be functionally and economically tied to regulated surface coal

mining activities, and thus be justifiably also subject to such regulation.

142 IBLA 38, emphasis added.

In addition, the Board expressly prohibits regulation of railroad spurs beyond the point at which coal is loaded for shipment to an end user or broker:

> We find nothing in section 701(28)(B) of SMCRA, or its legislative history, which expressly provides that transportation facilities, especially ones that carry processed coal to a remote point of sale/use, should generally be considered 'surface coal mining operations,' subject to regulation under SMCRA. Rather, the statute indicates that the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and associated transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B).

142 IBLA at 36.

In another case, the IBLA held that "issuance of a certificate of public convenience and necessity by the ICC [Interstate Commerce Commission, now the Surface Transportation Board] establishes no basis, by itself, for the decision not to investigate" whether the railroad spur required permitting under the definition of surface coal mining operations in section 701(28)(B) of SMCRA. John W. and Mary Nell White, 142 IBLA 150 (January 12, 1998). This decision means that Surface Transportation Board regulation of a facility, or regulation by any other agency, may not be a factor in deciding whether the facility is subject to regulation under SMCRA.

In view of the preceding discussion, we do not believe that more specific guidance is appropriate at this time. We are not aware of any evidence that significant environmental harm or other problems have resulted from determinations under the current rules and guidance. Further, establishing bright-line standards for railroads suggests that we should also adopt bright-line standards for all other categories of support facilities. Establishing bright-line standards for those facilities would contradict the 1988 rulemaking, in which we concluded that such standards are impractical and undesirable because of the prospect of under- or over-inclusion.

> OSMRE concluded that any definition that categorized property as always regulated, never regulated, or sometimes regulated would involve high potential for finding instances within each category in which the criteria of 'resulting from or incident to' would be applied either under- or over-inclusively.

(53 FR 47381)

Finally, the preamble to the 1988 rule emphasizes that the regulatory authority has considerable discretion in deciding whether a railroad or other support facility lies within the scope of the

definition of surface coal mining operations: "[I]t is imperative that OSMRE's regulations provide reasonable flexibility to implement the statute in a manner that considers the myriad site-specific situations that cannot be fully anticipated in a Federal regulation." 53 FR 47379, November 22, 1988. This position reflects the decision of the Court of Appeals for the Federal Circuit in discussion concerning the 1983 predecessor to the 1988 rule. NWF, 839 F.2d at 745.

In the 1987 outreach in prelude to the 1988 rulemaking, the participants expressed concern that having a definition of support facilities which would always require regulation, would limit the regulatory authorities from making case-by-case determinations. The 1988 rulemaking emphasized the need for regulatory authorities to have the flexibility to make these decisions without OSM second-guessing these decisions. Under NWF v. Hodel, railroads must result from or be incident to a regulated surface coal mining activity and be functionally and economically tied to the regulated activity. The only two absolutes in the interpretation of this standard are the principles established in the two IBLA decisions. First, under the Citizen's Coal Council decision, railroads are not subject to SMCRA regulation beyond that point of loadout after processing or preparation. Second, under the John W. and Mary Nell White decision, regulation by another agency may not be a factor in deciding whether a facility is subject to regulation under SMCRA.

Please contact me if you have further questions on this matter.

cc: Director
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