



COALEX STATE INQUIRY REPORT - 21

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TOPIC: DEFINITION OF OPERATOR/PERMIT

INQUIRY: Under the federal regulatory program, who is considered the "operator" on the permit application? In the case of two owners with only one responsible for the actual mine operation, are both owners required to be included on the permit or only the one responsible for operating the mine?

SEARCH RESULTS:

The definition of "operator" relative to the permit application is reasonably straight forward. Under the federal regulatory program, "operator" is defined as "any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location." (30 CFR Sec. 701.5; SMCRA Sec. 701(13)) On the permit application, owner(s), and operator, if different from the applicant, must be identified; thus indicating that the three entities may be different persons. (30 CFR 7778.13) In response to the question, it would appear that the names of both owners would be required. The person responsible for the mine operation would need to be designated as the "operator".

Who, however, may be considered the "operator" in terms of ultimate responsibility for the payment of Abandoned Mine Land (AML) fees is not as definitive. Under SMCRA, operators of coal mining operations subject to the terms of the Act are assessed a fee based on their coal production. The fee is deposited in the AML fund for the purpose of reclamation of abandoned mine lands. (SMCRA Sec. 402(a); 30 CFR Part 870)

Based on complexities of contractual mining, several commentators raised the question when the permanent regulations were originally promulgated concerning who was to be considered the "operator" in terms of AML fee responsibility. In response, the Office of Surface Mining (OSM), in the preamble to the December 13, 1977 regulations stated that:

"We believe that Congress intended the burden of fee payment to fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal. This intent will guide the Office in making decisions as to who is liable for the fee. The identification of operators will be made in light of the realities of the business world and will not turn solely on a literal interpretation of the word removes'." (42 FR 62713 (1977))

Subsequently, on November 30, 1983, OSM proposed a new section, 870.9, be added to the permanent regulatory program, delegating specific responsibility for the payment of the AML fee beyond the term "operator". Under the proposed section, the party responsible for payment of the fee would have been:



"the person or entity in whom is vested the ownership of the coal under State law immediately after the coal is severed, without regard to the existence of any contractual agreements for the sale or other disposition of the coal or the payment of any royalties between the producer and their parties...." (48 FR 54190 (1983))

The proposed section was not adopted. (49 FR 27493 (1984))

OSM is presently applying the guidelines of AML fee responsibility originally presented in the December 13, 1977 preamble, basing their interpretation on "business realities" rather than "solely on a literal interpretation of the work removes'." (48 FR 27494 (1984))

Mr. David Jones, Office of Surface Mining, in a recent telephone conversation, cited two pending cases of possible significance concerning the operator-AML fee responsibility: RAPOCA ENERGY (out of the Knoxville office) and U.S. v UNITED COAL CO., et al., Civ. No. 82-08309-A (SW Va).

Mr. Jones also forwarded a September 27, 1984, District Court decision involving AML fee responsibility. A copy of U.S. v BENJAMIN COAL CO., Civ. No. 84-2011, (WD Pa) is attached. Benjamin Coal Company had been denied the issuance of mining permits on the basis of disputed delinquent reclamation fees. At issue was the question of AML responsibility and contractually defined liability. The District Court granted a preliminary injunction against OSM, refraining them from preventing the issuance of the permits by Pennsylvania on the basis of the reclamation fees. The issue of AML responsibility was not addressed. The court decision was based on an argument of a "good faith appeal exception" as presented by Benjamin:

"Since neither the Act nor the OSM regulations provide an appeal process for Title IV fee assessments, Benjamin argues that its only means of asserting a good faith appeal is to defend a collection action brought by the OSM. Consequently, Benjamin argues that its specific denial and averments in its answer to the present collection action constitute a good faith appeal for purposes of this exception."

ATTACHMENTS:

- A. Excerpt from 42 FR 62713 (DECEMBER 13, 1977).
- B. 48 FR 54190-54194 (NOVEMBER 30, 1983).
- C. 49 FR 27493-27494 (JULY 5, 1984).
- D. U.S. v BENJAMIN COAL CO., Civ. No. 84-2011, (WD Pa).