



Public Service Commission

State of North Dakota

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October 4, 2007

Brian R. Bjella
Fleck, Mather & Strutz, Ltd.
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502

Re: Jurisdictional Determination of Permitting a Coal Beneficiation Facility
Case No. PU-07-686

Dear Mr. Bjella:

On August 22, 2007 you filed a request on behalf of The North American Coal Corporation ("NACCO") for a jurisdictional determination N.D.C.C. Chapter 38-14.1. regarding the need for a surface coal mining permit from the Commission for a coal beneficiation facility.

You advised that a joint venture between Great River Energy ("GRE") and NACCO, known as Great American Energy ("GAE") is proposing to construct and operate a coal beneficiation facility that is comprised of air dryers and air jigs. The GAE coal beneficiation facility will be located within the existing plant site of the Coal Creek Station owned by GRE. The coal beneficiation facility is physically connected to GRE's Coal Creek Station by coal conveyors and stream piping. The sole purpose of the GAE facility is to provide higher BTU value beneficiated coal to end users. NACCO's subsidiary, The Falkirk Mining Company ("Falkirk") sells lignite produced from its mine to GRE for use in its Coal Creek Station. GRE will provide lignite to the GAE coal beneficiation facility.

On September 28, 2007, Commission staff filed a memorandum regarding this matter. A copy of the staff memorandum is attached and is incorporated herein by reference.

The Commission discussed NACCO's request at its regular meeting on October 3, 2007. The Commission directed staff to send a letter advising that the GAE coal beneficiation facility is not a surface coal mining operation under N.D.C.C. Chapter 38-14.1 and therefore is not required to obtain a permit from the Commission.


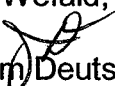
Sincerely,

A handwritten signature in black ink, appearing to read 'William W. Binek', written in a cursive style.

William W. Binek
Chief Counsel

Attachment

MEMORANDUM

TO: Commissioners Wefald, Cramer and Clark
FROM:  
Bill Binek and Jim Deutsch
DATE: September 28, 2007
RE: Jurisdictional Determination of Permitting of a Coal Beneficiation Facility,
Case No. RC-07-686

On August 23, 2007, the Commission received a request from North American Coal Corporation ("NACCO") for a jurisdictional determination regarding mine permitting jurisdiction under N.D.C.C. Chapter 38-14.1.

A joint venture between Great River Energy ("GRE") and NACCO, known as Great American Energy ("GAE") is proposing to construct and operate a coal beneficiation facility that is comprised of air dryers and air jigs. The GAE coal beneficiation facility will be located within the existing plant site of the Coal Creek Station owned by GRE. NACCO's subsidiary, The Falkirk Mining Company ("Falkirk") sells lignite produced from its mine to GRE for use in its Coal Creek Station. GRE will provide lignite to the GAE coal beneficiation facility.

The basic question that the Commission must determine is whether the GAE coal beneficiation facility constitutes a "surface coal mining operation" that must be permitted in accordance with the requirements of Chapter 38-14.1 of the North Dakota Century Code and Article 65-05.2 of the North Dakota Administrative Code.

"Surface coal mining operations" is defined under N.D.C.C. §38-14.1-02(33)(a) to mean "[a]ctivities affecting the surface of lands in connection with a surface coal mine. Such activities include . . . chemical or physical processing, and the cleaning, concentrating or other processing or preparation, and loading of coal at or near the mine site" "Surface coal mining operations" under N.D.C.C. §38-14.1-02(33)(b) also means "[t]he areas upon which such activities occur or where such activities disturb the natural land surface. Such areas include any adjacent land the use of which is incidental to such activities such as processing areas resulting from or adjacent to such activities" The federal Surface Mining Control and Reclamation Act ("SMCRA") contains virtually the same language at 30 U.S.C. §1291(28).

"Coal Preparation Plant" is defined under N.D. Admin. Code §69-05.2-01-02(11) as follows:

"Coal preparation plant" means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities, storage and stockpile facilities, sheds, shops and other buildings, water treatment and water storage facilities, settling basins and impoundments, and coal processing and other waste disposal areas.

"Coal preparation" under N.D. Admin. Code §69-05.2-01-02(10) "means chemical or physical processing and the cleaning, concentrating, or other processing of coal."

N.D. Admin. Code §69-05.2-13-13 requires that a person who operates a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine must obtain a permit in accordance with section 69-05.2-09-19.

NACCO does not believe the coal beneficiation facility constitutes a "surface coal mining operation." They state that the GAE facility is not located within Falkirk's surface coal mining operation and will not be owned or operated by Falkirk. The coal from Falkirk is not sold to GAE, but rather is sold to GRE. The coal beneficiation facility is physically connected to GRE's Coal Creek Station by coal conveyors and stream piping. The sole purpose of the GAE facility is to provide higher BTU value beneficiated coal to end users.

NACCO states that in determining what facilities are deemed "in connection with" a surface coal mining operation, the courts, and state and federal agencies charged with such a determination refer to the Office of Surface Mining Reclamation and Enforcement ("OSM") final rules as set forth in the Federal Register at 53 FR 47378 and 53 FR 47384 (November 22, 1988) ("Final Rule"). The purpose of the final rule was to clarify circumstances under which coal preparation plants and support facilities located outside of a permit area of a mine are subject to the permitting requirements of SMCRA.

The Final Rule excludes facilities at the site of the ultimate use. *Id.* NACCO states that a critical and important statement by OSM regarding the Final Rule is that OSM "continues to believe that the ability of the mine operators, or coal handlers directly servicing such operators, to have control of the processing operations is essential in establishing that a processing plant is being operated in connection with a coal mine." *Id.* NACCO states that this statement has the effect of exempting the GAE facility from the definition of a coal preparation plant because Falkirk does not have control over the GAE facility, and the operations of the GAE facility do not depend on Falkirk's requirements. OSM further stated that it is "only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which the mine operators and the coal handlers who directly serve them, such as coal processors, have or could have control of operations." *Id.*

In the Final Rule OSM also stated "that geographic proximity, as well as the functional relationship between the mines and coal preparation plants, are proper factors to be considered by regulatory authorities when identifying off-site preparation plants which operate in connection with a coal mine and therefore are subject to regulation under SMCRA." *Id.* at 47386. NACCO states that the GAE facility is separated from the Falkirk Mine by approximately two miles, and that the mine has no functional relationship to the GAE facility because the mine has existed for over thirty years without the facility.

OSM stated that "[t]he purpose of this rule is to recognize that there are processing facilities other than those at the point of ultimate use that are not in connection with a coal mine, and to ensure that jurisdiction is extended only to preparation plants operating in connection with a coal mine." *Id.* at 47387. In addressing a commentator regarding the effect of the rule on a specific preparation plant that operates in conjunction with an end user power plant, OSM stated that it "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.

NACCO cited the Interior Board of Land Appeal's decision in *Pacificorp v. Office of Surface Mining Reclamation and Enforcement*, IBLA 95-175, 143 IBLA 237 (1998) in support of its position in the matter. In that case the mine operator also operated a preparation plant through a wholly owned subsidiary. The preparation plant was located on the site of an adjacent power plant, and coal processed at the plant was used in the power plant. The Board stated that OSM "has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine." The Board concluded that the preparation plant was exempt from obtaining a permit.

NACCO pointed out that although the coal processing plant should not be regulated under SMCRA, it would still be regulated by the North Dakota Department of Health. The plant will require an air quality permit as issued by that agency and will also require from the same agency a solid waste disposal permit for the reject material from the jigging and air drying operations.

Another matter addressed by NACCO regards taxation. NACCO states that the coal produced from mines in North Dakota is subject to the coal severance tax. Falkirk pays severance taxes on a tonnage basis. Coal is severed when removed from the ground. A coal beneficiation facility is deemed for taxation purposes under N.D.C.C. §57-60-01(3) to be a coal conversion facility and is taxed at the rate of 20 cents on each ton of 2000 pounds of beneficiated coal produced for the purpose of sale, or 11/4% of the gross receipts derived from such facility for the preceding month, whichever is greater. N.D.C.C. §57-60-02(6).

NACCO states that the Coal Creek Station as operated by GRE is regulated by the federal Occupational Safety and Health Administration ("OSHA") with respect to plant health and safety. If a determination is made that the GAE facility constitutes a "surface coal mining operation", it may be subject to health and safety regulation by the federal Mine Safety and Health Administration resulting in bifurcated health and safety jurisdiction over inter-connected facilities.

Staff agrees with NACCO's position and recommends that the Commission determine that the GAE coal beneficiation facility is not a "surface coal mining operation" under N.D.C.C. Chapter 38-14.1.