

PUBLIC SERVICE COMMISSION
Reclamation Division

Memorandum

TO: Commissioners Wefald, Cramer and Clark
Darrell Nitschke
Illona Jeffcoat-Sacco

FROM: Jim Deutsch, Director – Reclamation Division

DATE: October 21, 2008

SUBJECT: Jurisdictional Determination for the GTL Energy Coal Beneficiation Facility,
Case No. RC-08-611

Summary of the Issue – On July 29, 2008, the Commission received a letter dated July 28, 2008 on behalf of GTL Energy (USA) Limited (GTL) requesting a jurisdictional determination under N.D.C.C. Chapter 38-14.1 for a proposed coal beneficiation facility (otherwise referred to as Dakota 1) west of South Heart. This request was very similar to the request for a jurisdiction determination submitted by The North American Coal Corporation (NACCO) in August 2007, for a coal beneficiation facility near the Coal Creek Station south of Underwood. The NACCO request and staff analysis and recommendation (see attached memo dated September 28, 2007 from retired General Counsel Bill Binek and myself) were reviewed and considered by the Commission as part of the administrative portion of the October 3, 2007 meeting. The Commission concurred with staff that the proposed coal beneficiation facility near Underwood was not jurisdiction under N.D.C.C. Chapter 38-14.1.

Since the GTL request was similar to the NACCO's August 2007 request, and with advice of the Commission's Legal Division, I responded on August 5th with a letter stating that the GTL facility proposed near South Heart is not a "surface coal mining operation" as defined under N.D.C.C. Chapter 38-14.1. The determination was in large part based on the analysis of the NACCO request that was carried out within the past year. The most important consideration in this determination was the finding that the GTL facility will not be operated "in connection with" the proposed mine near South Heart or any other coal mine. The phrase "in connection with" is part of the definition of "surface coal mining operations" and the preamble to final rules that OSM published in the November 22, 1988 Federal Register clarifies this phrase.

In addition to stating in that the GTL facility will not be operated "in connection with" a mine, my August 5th letter also stated that the GTL facility is not a "coal preparation plant". This statement was based on North Dakota tax law which deems a coal beneficiation facility to be a "coal conversion facility" for taxation purposes as discussed in the GTL and NACCO requests and in the September 28, 2007 staff memo.

On October 3rd, Plains Justice submitted a letter to OSM on the behalf of the Dakota Resource Council requesting immediate action by OSM to halt imminent construction of the GTL facility near South Heart. Last week we received an e-mail from the DRC requesting that the Commission also consider the letter to OSM as a request to review my October 5th letter with the jurisdictional determination for the GTL facility. In the letter to OSM, DRC alleges that the

findings in the August 5th letter are in error, both in regard to the facility not being “in connection with” the proposed coal mine near South Heart and that it is not a “coal preparation plant”. DRC also raises issues about not providing public notice or a hearing process before making the jurisdictional determination. This matter is set for an informal hearing on Wednesday, October 22. Also it should be noted that GTL started earth moving activities for the coal beneficiation facility last week.

Background Information – GTL has developed a proprietary process to upgrade low rank coal by removing a significant amount of moisture and has operated a pilot plant in Colorado to test this process. GTL is planning to construct its first commercial scale plant near, but not within, the area that South Heart Coal, LLC plans to permit. The plant will utilize about 45 tons per hour of raw coal to convert it into 30 tons per hour of briquetted product. GTL states that coal will initially be brought from around the United States and other countries to the beneficiation plant, but after the South Heart Mine is permitted and in operation, a majority of the coal will likely be supplied by that mine.

GTL states that its agreement with South Heart Coal will be nonexclusive and that it can process coal from any other source. The 40-acre site for the beneficiation plant is outside of the boundary of the proposed South Heart Mine. Also, there will be no physical connection between the beneficiation plant and either the coal mine or the gasification plant that Great Northern Power Development and Allied Syngas Corporation intends to build. GTL states that the operations of the beneficiation plant will not be dependent upon South Heart Coal and that all products from the plant will be provided to third party end users seeking a higher BTU coal. If GTL’s technology is successful at the commercial scale plant, they would license the technology to the developer of the gasification plant.

Based on the information that has been provided, the jurisdictional question is whether or not GTL will operate a coal preparation plant outside of a permit area of a mine that is operated “in connection with” a mine. If they do, N.D. Admin. Code Section 69-05.2-09-19 requires any person who operates a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine to obtain a permit and conduct operations in accordance with section 69-05.2-13-13. If GTL’s facility will not be operating “in connection with” a mine or if it is not determined to be a “coal preparation plant”, the facility does not have to be permitted.

“In Connection With” Issue – As noted above, the use of the phrase “in connection with” a surface coal mine is the most important issue related to this jurisdictional determination. While Commission and OSM rules do not define the term, the preamble to final rules for “Coal Preparation Plants Not Located Within the Permit Area of a Mine” published by OSM in the November 22, 1988 Federal Register provide guidance to regulatory authorities for making a determination as to whether such a coal preparation plant is being operated in connection with a coal mine. OSM was concerned that further attempts to define the phrase would unduly hamper regulatory authorities in making valid case-by-case determinations and would result in inappropriate applications of the rule.

Some key quotations from the preamble discussion on OSM’s November 22, 1988 Federal Register notice that relate to this issue include the following:

“OSMRE 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.”

“OSM 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.”

“Hence, OSMRE believes 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.”

“The 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.”

“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.”

“OSMRE believes that it is valid to consider whether a facility has a useful life independent of the specific mines or mines which it serves, in determining if the facility is operating in connection with a coal mine A facility lacking a useful life independent of the specific mine or mines which it currently serves would be operating in connection with a coal mine, while a facility having a useful independent life might not.”

“The level of economic reliance of a particular facility on a coal mine is a valid consideration in determining if the facility operates in connection with that mine.”

“However, because coal preparation facilities operated by retail sales dealers tend to be closely linked to end users, OSMRE does not expect that regulatory authorities, in making case-by-case determination, will likely find that such facilities are operating in connection with a coal mine.”

The following are statements in GTL’s July 28th request for the jurisdictional determination that pertain to the “in connection with” issue:

“Initially, coal will be brought from around the United States and other countries and to the beneficiation plant and processed on tolling bases. After the South Heart Mine has been permitted and is in operation, a majority of the coal will likely be supplied by that mine.”

“However, this agreement will be nonexclusive, such that the Dakota 1 can process coals from any other source, including other mines in the United States and from around the world. This beneficiation plant will be entirely separate from a gasification plant planned to be constructed later by GNPD and Allied.”

“The operations of the beneficiation plant will not be a dependent upon the coal mining requirements of SHC.”

“The beneficiation plant will process coal from around the United States and the world to facilitate marketing of the GTL Energy technology.”

"All products from the plant will be provided to third party end users seeking a higher BTU coal."

"South Heart Coal will not have control over the beneficiation facility, and no usable coal product will be returned to either the mine or the gasification plant. The operations of the Dakota 1 facility are not dependent upon South Heart Coal's requirements."

"South Heart Coal will not have control of the Dakota 1 coal beneficiation facility."

"The mine will exist separate from the Dakota 1 facility, and thus the mine has no functional relationship to the facility."

"The Dakota 1 coal beneficiation facility will have a useful life independent of coal from the South Heart Mine, as its purpose is to prove the beneficiation technology on a commercial scale."

"In many respects, the Dakota 1 facility will operate as a "retail sales dealer" as it has its own preparation facility, and its only contact with the South Heart Mine would be to purchase run of the mine coal."

"The Dakota 1 facility is closely linked to its ultimate end users, being those facilities which desire beneficiated coal to meet environmental requirements or improve plant efficiency."

"In this case the Dakota 1 facility is not economically dependent on the mine, but on its end users, who desire the higher value BTU coal."

It seems clear to me that the GTL facility will not be operated "in connection with" South Heart Mine based on OSM's preamble discussion in the November 22, 1988 Federal Register notice based on the following factors:

- a) The GTL facility and the South Heart Mine will not be physically connected,
- b) South Heart Coal will not control GTL's activities,
- c) GTL will have the ability to operate its facility independent of South Heart Coal, and
- d) All of the beneficiated coal will be sold to third party end users.

Therefore, the GTL facility should not be considered a surface coal mining operation that is regulated under N.D.C.C. Chapter 38-14.1.

Also, it should be noted that the Commission regulated the Schulte Coal retail coal sales outlet near BNI's Center Mine for a time in the late 1980's and early 1990's. Schulte crushed and sized run of the mine coal provided by BNI for retail sales. When Schulte initially began operations, the facility was not regulated since the definition of "coal preparation" was restricted to processing activities that separated coal from its impurities. OSM later dropped this provision from its definition of coal processing and Schulte was considered a coal preparation plant off the mine permit area that had to be permitted. However, after OSM revised its rules in November 1988, the Commission later terminated its jurisdiction of the facility since the Commission found it was not operated "in connection with" with BNI's Center Mine as it had the ability to receive and process coal from other mines as well. (The Schulte Coal Order on terminating the permit is also attached.)

Although the preamble discussion for the OSM rule frequently states that regulatory authorities will have to make jurisdictional determinations, neither the OSM rules nor the preamble discussion mention any specific procedures that a regulatory authority should follow when making a jurisdictional determination for coal processing plants outside a mine permit area. There is no suggestion that public notice should be given or that a hearing should be held for each case-by-case jurisdiction determination. However, when the Commission received the first request for a jurisdictional determination for a coal beneficiation facility last year, staff analyzed the request and brought the matter before the Commission during the administrative portion of a regularly scheduled meeting. The staff letter with the non-jurisdictional determination was sent to the company following that meeting.

“Coal Preparation Plant” Issue – As mentioned above, my August 5th letter included a statement that the GTL facility is not a “coal preparation plant”. This statement was based on the treatment of coal beneficiation facilities in the North Dakota tax law as explained in the GTL and NACCO requests for a jurisdictional determination and the September 28, 2007 staff memo. A coal beneficiation facility is deemed for taxation purposes under N.D.C.C. Section 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. Section 57-60-02(6).

While a coal beneficiation facility is considered a coal conversion facility for tax purposes, the statement in my August 5th letter may be questionable based on the definition of “coal preparation plant” in N.D.A.C. Section 69-05.2-01-02(11).

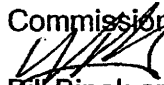

As defined under N.D. Admin. Code Section 69-05.2-01-02(11), “Coal preparation plant” means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, 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.” Also, as defined under N.D. Admin. Code Section 69-05.2-01-02(10), “Coal preparation means chemical or physical processing and the cleaning, concentrating, or other processing of coal.”

Since the definitions of these two terms is quite broad, there may be some strong arguments for finding that GTL’s coal beneficiation facility meets the definitions. However, the new process proposed by GTL to improve the heating value of lignite and other coals is not the more conventional coal preparation plant that separate impurities from the coal or otherwise crush and size coal. Also, it should be noted that Royal Oak Enterprises, formerly Husky Industries, mined lignite for its charcoal briquetting facility near Dickinson for many years and that facility was never permitted under N.D.C.C. Chapter 38-14.1. Also there was never any indication by OSM or any other party that this facility should have been permitted.

However, setting aside the “coal preparation plant” issue, GTL’s coal beneficiation facility would not be regulated under N.D.C.C. Chapter 38-14.1 if it is not operated “in connection with” the South Heart Mine.

Attachments

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:

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by Public Service Commission by B. Binek and J. Deutsch
09/28/2007 CC: Comm Legal Jim

"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.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Schulte Coal, Inc.
Termination of Permit
SLTC-8703
Approval

Case No. RC-1070-92-936

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

November 10, 1992

Preliminary Statement

On August 24, 1992, Schulte Coal, Inc. (Schulte) filed a request with the Commission to terminate Surface Coal Mining Permit No. SLTC-8703. Schulte also requested that the performance bond for this permit be cancelled. Permit SLTC-8703 allows Schulte to conduct coal processing activities at its coal preparation plant near Center, North Dakota. They buy run-of-the-mine coal from the Center Mine owned and operated by BNI Coal, Ltd (BNI). As a result of changes to North Dakota Administrative Code Chapter 69-05.2 effective May 1, 1992, Schulte believes their coal preparation plant no longer comes under the Commission's jurisdiction because their coal processing activities are not in connection with mining operations at the Center Mine. Schulte's 14.7 acre permit area is located in a portion of Section 32, T142N, R83W, Oliver County. On October 1, 1992, the Commission published a Notice of Opportunity for Hearing in the Bismarck Tribune and Center Republican. No comments, objections, or requests for hearing were filed following publication of the notice on the request for termination of jurisdiction and cancellation of

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Termination of Permit SLTC-8703
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performance bond.

Findings of Fact

1. Schulte Coal, Inc. operates a coal preparation plant near Center, North Dakota.
2. Schulte was issued Surface Coal Mining Permit No. SLTC-8703 on August 24, 1988 and filed the required performance bond.
3. Schulte currently buys run of the mine coal from BNI's Center Mine located near Center, North Dakota. Schulte's activities are limited to coal crushing, screening, and sizing for retail sales. The amount of coal that Schulte buys from BNI represents only a very small percentage of the total coal mined at the Center Mine.
4. BNI does not have a shareholder interest in Schulte.
5. Schulte has the ability to purchase run of the mine coal for processing from mines other than the Center Mine.
6. North Dakota Administrative Code Sections 69-05.2-09-19 and 69-05.2-13-13, permitting requirements and performance standards for coal preparation plants, as revised May 1, 1992, apply to any person who operates a coal preparation plant in connection with a coal mine.
7. The Commission published a Notice of Opportunity for Hearing in the Bismarck Tribune and Center Republican and no comments, objections, or requests for hearing on Schulte's request for termination of jurisdiction and cancellation of the performance bond.
8. Schulte provided the Commission with information showing that their coal preparation plant is not operated in connection with BNI's Center Mine or any other surface coal mine.

From the foregoing findings of fact, the Commission now makes its:

Conclusions of Law

1. The Public Service Commission has jurisdiction of this matter.
2. Schulte does not operate its coal preparation plant in connection with a surface coal mine.

From the foregoing Findings of Fact and Conclusions of Law, the Commission issues its:

Order

The Commission orders:

1. Surface Coal Mining Permit No. SLTC-8703 held by Schulte Coal is terminated.
2. The performance bond for Surface Coal Mining Permit No. SLTC-8703 be cancelled.

PUBLIC SERVICE COMMISSION

Leo M. Reinbold
Commissioner

Bruce Hagen
President

Dave V. Sandstrom
Commissioner