PIPELINES AND SUBSIDENCE: OVERLOOKED IN SMCRA[1]

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Abstract: In the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), provision is made for certain surface improvements to be insulated from the risk of subsidence. These are identified in §1271(e) of the Act, 30 U.S.C. §1201 et seq. The Act identifies areas prohibited to mining, prompted by concern for public safety and welfare. There is no reference to pipelines which transport natural gas, petroleum products and chemicals. For many of these, rupture could be a catastrophe.

The absence of Federal regulation here results in presentation of antagonistic views in State regulation of SMCRA. In the field, State regulators are loath to add to the minimum requirements of Federal SMCRA, frustrating what pipeline operators view as required protection for pipeline safety. This conflict results in costly litigation and uneven administration of safety practices. Interstate pipelines are governed by the Office of Pipeline Safety, U.S. Department of Transportation. The safety regulations of this office would require pipeline operators to confront mine operators in the absence of direction from the Federal SMCRA. It is a costly and ineffective method of safety regulation.

Historical Perspective

The commercial coal industry is ancient. The Chinese mined coal from surface deposits about 300 A.D. Western coal mining dates its origins in England to the 13th century. Large scale mining in America began around 1900 driven by the engine of industrial development. Deep mining of coal dominated initially; large-scale strip mining gained a foothold in the late 1940's and was challenging deep mining for economic productivity by the early 1970's. In the late 1970's, underground longwall coal mining boosted productivity to rival that of strip mining again.

Drake's well struck oil in 1859 near Titusville, PA. Even though Drake was searching for brine and found oil (an irony), his discovery led to the realization of the potential of petroleum. Natural gas followed close behind. Soon, pipelines began to crisscross the country, carrying oil and gas from the fields to the urban and industrial areas. Conflicts in the use of the land were inevitable.

Strip mining peels the layers of earth away allowing for no other use of the land during active mining. Oil and gas wells and pipelines are either moved or strip mining near them does not occur.

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Deep mining of coal does not present as obvious an example of surface disruption. In years past, subsidence occurred in sporadic isolation, occasionally affecting pipelines. But with the increased frequency of longwall mining and other full-extraction techniques, planned subsidence impacts on pipelines now rival the impact of strip mining.

Regulatory Control of Subsidence Under SMCRA

In 1977 after decades of abuses, principally by strip mine coal operators, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) to preempt the regulatory field so poorly maintained by the coal producing States. A wonder of detailed statutory regulation, SMCRA does not address the looming conflict between coal mining and pipeline support as simultaneous land uses.

SMCRA addresses surface impacts of underground mining chiefly in sections 522 and 516; section 522 does not implicate pipelines. Subsidence is one of the surface impacts from underground mining Congress intended to regulate. Concerned about the unpredictable subsidence revealed in the historic record, Congress reported that-

> It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.[4]

SMCRA defines "surface coal mining operations" to include-

> (A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title...and surface impacts incident to an underground coal mine...
>
> (B) the areas upon which such activities occur or where such activities disturb the natural land surface.[5]

That Congress intended to regulate subsidence as a "surface impact incident to underground coal mining" cannot be seriously questioned, notwithstanding the previous administration's one-time contrary view.[6] In House Report No. 218 (95th Cong., 1st sess. (1977) p.125), Congress reported:

> SURFACE IMPACTS OF UNDERGROUND MINES
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> The environmental problems associated with underground mining for coal which are directly manifested on the land surface are addressed in section 212 and such other sections which may have application. These problems include surface subsidence, surface disposal of mine wastes, disposal of coal processing wastes, sealing of portals, entry ways or other mine openings, and the control of acid and other toxic mine drainage.

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[4] H.R. Rep. No. 218, 95th Cong., 1st sess. (1977) at 125-126. See also, S. Rep. No. 128, 95th Cong., 1st sess. (1977) at 84-85.

[5] 30 U.S.C. §1291(28) (1988).

[6] Solicitor's Opinion, U.S. Department of the Interior, July 10, 1991.

In 1984, the Office of Surface Mining (OSM) denied a permit to an underground mine in the Otter Creek Wilderness Area because "certain [prohibited] surface impacts to the wilderness could not be avoided, namely subsidence and hydrologic effects."[7]

SMCRA addresses the surface effects of underground coal mining mainly in section 516, SMCRA. That section requires underground coal operators to:

> (1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, That nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining...

Section 516(c) authorizes the regulatory agencies to

> [S]uspend underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if he finds imminent danger to inhabitants of urbanized areas, cities, towns, and communities.

Section 516(b) permits issued to underground coal operators require that offsite areas be protected from damage and that fire hazards and other conditions that constitute a hazard to the health and safety of the public be eliminated.

The current regulations under SMCRA that address or deal with subsidence and pipelines are found as follows:

30 C.F.R. 778.15	Right of Entry
30 C.F.R. 783.24(c)	Maps (showing pipelines passing over and through permit area)
30 C.F.R. 784.20	Subsidence Control Plan
30 C.F.R. 784.23	Maps (showing "utility corridors")
30 C.F.R. 817.180	Utility Installation (minimize damage, destruction, or disruption to installations that pass over, under, or through permit area unless approved by owner and agency)
30 C.F.R. 817.121	Subsidence Control (prevention and repair of damage and suspension of operations causing imminent danger)
30 C.F.R. 843.11	Cessation Orders (cessation of and correction of any imminent damages caused by condition or practice of coal mining)

[7] 24 Fed. Reg. 31228 (1984). In accord see, 44 Fed. Reg. 14990 (1979).

30 C.F.R. 817.122	Notice of Mining (6 months' prior notice to all owners and occupants of surface)

It is of particular importance to pipeline operators that the subsidence control plan must include detailed information showing the areas of planned subsidence, the measures to prevent, minimize, or repair subsidence damage, monitoring of the subsidence, and the expected effects of any subsidence.

On September 24, 1993, OSM published proposed changes to the subsidence regulations of 30 C.F.R. 784.20 and 30 C.F.R. 817.121 and defined the terms "material damage" and "structure or facilities." The breadth of the definition of structures or facilities arguably includes pipelines. The definition states-

> Structures or facilities means any building, constructed object or improvement whether installed on, above, or below the land surface, including, but not limited to, park facilities, roads, cemeteries, utilities; fences and other enclosures; retaining walls; and septic sewage treatment, irrigation and drainage systems.

When coupled with the material damage standard and the presumption of liability if within the 35° angle of draw, the proposed regulations offer pipelines a positive departure from prior practice. It remains to be seen if the proposed regulations will take effect.

State Regulations

Upon adoption of SMCRA by Congress in 1977, uniform State regulation of coal mining began. The debates evident in the adoption of SMCRA by Congress were heard again in the State legislatures as each State established mine regulation. In several States in which mining is a prominent activity, the adoption of regulatory controls was accompanied by restrictions on variations. State legislation imposing limitations can be found, for example, in the coal States of Kentucky, Illinois and Indiana.

In Kentucky, the legislation enabling SMCRA regulation is KRS 350.465. A section of that legislation which limits additions to State regulation states,

> The implementation of this section shall contain procedures similar to the Surface Mining Control and Reclamation Act of 1977 (PL 95-87 (sic)) and shall require surface coal mining operation standards no more stringent than provided for in that act.

Similarly, in Illinois, adoption of State controls, identified as Ill.Rev.Stat. ch-96 1/2, ¶ 7901.01 et seq. was accompanied by section 1.02(c) which provides-

> (c) It is also the purpose of this Act to establish requirements that are no more stringent than those required to meet the Federal Surface Mining Control and Reclamation Act of 1977 (PL 95-97)

In Indiana, adoption of State regulation of coal mining was codified as IC 13-4.1. The obstacle to amendment of controls was adopted in 1991 by the Indiana legislature in SEA 46, codified as IC 13-4.1-5:

> Neither the director nor the commission [of the state regulatory

agency] may enforce the following: (1) A rule adopted under this article that is more stringent than corresponding provisions under the Federal Surface Mining Control and Reclamation Act (30 U.S.C. 1201-1328).

That Indiana did not take kindly to the Federal imposition of regulation is evident in the legislative findings in the first passages of IC 13-4.1, in which the reluctance of the legislature is made plain.

> (4) The threat that the federal government will regulate the surface coal mining operations and reclamation procedures, including land use planning and control, if the state of Indiana does not enact the necessary legislation for a state program, is coercive. It makes the overriding consideration whether to prevent further federal encroachment upon and regulation and control of the state, its people and local industry, rather than what is in the best interest of the people of the state of Indiana.

When the State legislation was enacted, the pipeline industry did not show interest. The antisubsidence concerns were mostly to be generated in the future. The principal regulator of interstate pipelines is a Federal agency, the Office of Pipeline Safety, U.S. Department of Transportation. Pipeline operators are attentive to safety regulations of Federal rather than State agencies. The attention of pipeline operators would be drawn to the State SMCRA regulation soon, however, by the onrush of longwall mining, which requires planned subsidence.

The absence of antisubsidence protection for pipelines in SMCRA as adopted by Congress would appear in a court opinion, Shell Pipe Line v. Old Ben Coal Co. This opinion of the U.S. District Court for the Southern District of Illinois was announced in 1988.[8] Old Ben Coal, using longwall mining and the attendant planned subsidence, was mining toward Shell's 40-in petroleum products pipeline. After its requests to Old Ben for payment were denied, Shell spent $750,000 to support the pipeline as the Old Ben mine passed underneath. Shell sued for the preventive expenses to avoid catastrophic damage to the pipeline.

It lost.

The judge in his opinion sympathized with Shell, but citing the Illinois SMCRA regulations, concluded that the preventive costs could not be collected. Shell must first permit damages to occur and then sue Old Ben for the losses. The opinion suggested that the regulation should be changed.

> Perhaps the Illinois legislature will review the current legislation in light of the circumstances of this case. It would be a wise decision, for next time the company or individuals may not act as responsible as Shell and the results could be devastating. (677 F. Supp 572 at 575.)

The SMCRA regulations, adopted by Congress for assumption by each State, do not provide that a pipeline operator above a proposed mine must be given notice that a mine plan is being considered by a State agency. In Indiana, Midwestern Gas Transmission,[9] an operator of a 30-in natural gas pipeline supplying the metropolitan Chicago area, learned that its line lay above a proposed underground mine from a legal notice printed in a local paper. There

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[8] 677 F. Supp 572, (S.D. Ill, 1988).

[9] A member of the Tenneco corporate family.

would be no other notice of the mine to Midwestern Gas. When officials of Midwestern Gas met with representatives of the proposed mine and the controlling Indiana agency, they learned to their dismay that no one in either of the other groups had any idea of the extreme sensitivity of pipelines to subsidence. The coal mine operators were aware of the ruling in the Shell case and, initially, expressed little interest in Midwestern's fears.

Midwestern Gas then began a long struggle to amend the Indiana regulations to provide antisubsidence protection for pipelines. First, by itself, it prepared changes to the Indiana SMCRA and submitted them to the Indiana agency. Although there were several proposals, the added requirement for actual notice[10] was the most significant change.

The second effort by Midwestern Gas to make changes to protect against subsidence was more concentrated. Under the direction of the Tenneco offices, using legal and engineering experts, comprehensive proposals for amendments to the Indiana SMCRA were submitted to the Indiana regulatory agency. At the August 1991 meeting of the governing body of that agency, the proposals were considered. Present and speaking for the proposals were representatives of Tenneco, Amoco Pipeline, Panhandle Eastern, Midwestern Gas, Southern Indiana Gas and Electric, Citizen's Gas of Indianapolis, the Countrymark pipeline, and a public interest lawyer. The theme was public safety and national interest.

Representatives of the coal association were present and spoke against adoption, citing property and other legal rights.[11] The proposals were rejected by the Indiana agency without a dissenting vote. The rationale was Indiana's SEA 46, which would prohibit rules "more stringent" than SMCRA.

The Indiana director of the U.S. Office of Surface Mining then announced that his office would hold a public hearing on the propriety of SEA 46 to determine its compliance with SMCRA. An OSM hearing was held, and again the pipeline, private property owners and coal representatives were heard. The OSM found that SEA 46 was not in compliance with SMCRA,[12] citing the Midwestern Gas comments.

The coal industry association appealed the OSM ruling in the U.S. District Court.[13] Before the matter could be decided, a proposal was submitted to the Indiana legislature to supplant SEA 46 with a measure tailored to the OSM conditions. The measure, Senate Bill 374, passed easily and is Indiana law. The new law contains the "no more stringent" limitation.

SMCRA protects certain improvements, including public roads, occupied dwellings, schools, churches, parks, and cemeteries,[14] from subsidence by prohibiting mining underneath them. The reasons this protection exists may be apparent to the examiner, but the reasons do not include safety or the public interest in the fashion that protection to pipelines would provide.

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[10] 310 Indiana Administrative Code 12-3-106(f)(4) and 12-5-131.1.

[11] The comments were not without acrimony. A coal lawyer contended that the pipeline speakers were deceitful in the request for protection.

[12] 56 Fed. Reg. 64996 (1991).

[13] Indiana Coal Council, Inc. v. Manuel Lujan, Jr., Secretary of the Interior, et al., IP 92-84-C U. S. District Court, Southern District of Indiana, Indianapolis Division.

[14] 30 U.S.C. § 1272 (4),(5).

Presently, the burden is on the pipeline operators, at considerable expense to themselves and risk to the public, to find protection from subsidence. The success of meeting this burden must vary in each State, according to the response of the administrative agencies, courts and legislature of each State. It remains for the Federal Government to provide the uniform standards of antisubsidence protection essential to pipelines.

Regulations enforced by the Office of Pipeline Safety require that pipeline operators pursue the highest standards of safety in the public interest. Experience in Indiana shows that the most concerted efforts of pipeline operators to establish a code of regulated protection speak to an unresponsive audience. The omission of antisubsidence protection for pipelines in SMCRA results in frustration of Federal safety practices. This is a shortcoming that can be remedied only by amendment of SMCRA.

Deficiencies in Federal and State Programs

SMCRA was intended to set the minimum standards for the coal industry's deep-coal-mining activities. The principal goal of the comprehensive regulatory plan was either to prevent subsidence or to plan subsidence so that the value and reasonably foreseeable uses of the surface were maintained. The failure to establish uniform national standards for the conduct of underground mining where pipelines will be affected has resulted in different standards being applied from State to State. While the proposed subsidence regulations may address some of the concerns, other areas of concern remain unresolved. Examples follow:

1. Notice to pipeline owners of permit application, permit issuance, and commencement of mining near an affected pipeline.

2. Standards for the protection of pipelines.

3. Emergency procedures in case of accident.

4. Hazard zones and prohibited areas.

Conclusion

SMCRA serves to provide coal mining regulation uniformly throughout the United States. It serves at the same time to frustrate uniform protection from subsidence to pipelines by omission of specific terms. The result is expensive confrontation in the States between competing interests, resulting in uneven compliance with Federal safety standards governing pipelines. The solution is to address the issue through reconsideration of SMCRA.