

OFFICIAL OPINION NO. 84-33, Permitting procedure for pilot plant operations concerned with small-scale and large-scale mining operations

August 2, 1984

Mr. Warren R. Neufeld  
Secretary  
Department of Water and Natural Resources  
Foss Building  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 84-33

Permitting procedure for pilot plant operations concerned with small-scale and large-scale mining operations

Dear Mr. Neufeld:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

An out-of-state corporation intends to develop and operate a pilot plant for the extraction of gold in South Dakota. The pilot plant operation will mine by surface cut less than five thousand (5,000) tons of ore which will be crushed and hauled approximately two thousand (2,000) feet to a cyanide heap leach test facility for gold extraction purposes. The entire mined area for the pilot plant operation will constitute less than one (1) acre.

Based on the above facts, you have asked the following questions:

QUESTIONS:

1. Should the above described pilot plant operation, designed to test the feasibility of a full scale or large scale operation, be classified as a mining operation under SDCL 45-6B or as an exploration operation under SDCL 45-6C?
2. Which permitting procedure applies to the pilot plant operation described above?

3. Which permitting procedure would apply to a pilot plant operation as described above if the pilot plant operation were to mine in excess of twenty-five thousand (25,000) tons of ore or were to affect more than ten (10) acres of land, excluding access roads, in its operation?

4. Where a pilot plant operation does not include a mill should it be permitted under SDCL 45-6B or SDCL 45-6C?

IN RE QUESTION NO. 1:

SDCL 45-6C-3(6) as found in SDCL 45-6C, defines an exploration operation as:

. . . the act of searching for or investigating a mineral deposit, including, but not limited to, sinking shafts, tunneling, drilling test holes, digging pits or cuts or other works for the purpose of extracting samples, including bulk samples, prior to commencement of development or extraction operations, and test facilities to prove the commercial grade of a mineralized deposit. The term does not include those activities which cause very little or no surface disturbance, such as airborne surveys and photographs, augered bentonite or augered construction aggregate test holes of less than fifty feet in depth when accomplished in conformance with § § 45-6C-28 and 45-6C-32, use of instruments or devices which are hand carried or otherwise transported over the surface to make magnetic, radioactive or other tests and measurements, boundary or claim surveying, location work, annual assessment work required to maintain the validity of a mineral claim or any other work which causes no greater land disturbance than is caused by ordinary lawful use of the land by persons not exploring for mineral deposits; (Emphasis supplied.)

SDCL 45-6B-3(9) as found in SDCL 45-6B defines a mining operation as:

. . . the development or extraction of a mineral from its natural occurrence on affected land. The term includes, but is not limited to, surface mining and surface operation, in situ mining, the reprocessing of tailings piles, the disposal of refuse from underground mining, and milling and processing located on the land described in the application for a mining permit. The term does not include extraction of sand, gravel or rock to be crushed and used in construction, exploration activities, bulk sampling, the exploration and extraction of natural petroleum in a liquid or gaseous state by means of wells or pipe, borrow excavation for embankments, or the extraction of geothermal resources; (Emphasis supplied.)

SDCL 45-6B-3(5) also found in SDCL 45-6B, provides South Dakota's definition of development as:

. . . the work performed in relation to a deposit, following the exploration required to prove minerals are in existence in commercial quantities but prior to production activities, aimed at, but not limited to, preparing the site for mining, defining further the ore deposit by drilling or other means, conducting pilot plant operations, constructing roads or ancillary facilities; (Emphasis supplied.)

The foregoing definitions indicate that:

1. An exploration operation does not include development as development is specifically excluded from an exploration operation by SDCL 45-6C-3(6).
2. Development is part of a mining operation as defined by SDCL 45-6B-3(9).
3. Development includes the conducting of pilot plant operations as is stated in SDCL 45-6B-3(5).

Since development (here a pilot plant) is included as part of a mining operation, SDCL 45-6B-3(9), and is not part of an exploration operation, SDCL 45-6C-3(6), the out-of-state corporation herein which desires to build and operate a pilot plant must obtain a mining permit pursuant to SDCL 45-6B, the South Dakota Mined Land Reclamation Act.

IN RE QUESTION NO. 2:

SDCL 45-6B-53 makes special provisions for mining operations seeking permits where those mining operations are considered small-scale operations. SDCL 45-6B-53 provides:

Any mining operation, other than an in situ mining operation, which affects less than ten acres, excluding access roads, and extracts less than twenty-five thousand tons of ore or overburden per calendar year shall be subject to the provisions of §§ 45-6B-54 to 45-6B-63, inclusive, and are not required to comply with the provisions of §§ 45-6B-5 to 45-6B-7, inclusive, § 45-6B-10, § 45-6B-14 or § 45-6B-36.

Since the out-of-state corporation you have described would be mining five thousand (5,000) tons of ore and would affect an area of one (1) acre, its pilot plant operation should

be permitted pursuant to the provisions of 45-6B- 54 through 63, inclusive, as a small-scale operation.

IN RE QUESTION NO. 3:

Where a mining operation mines more than twenty-five thousand (25,000) tons of ore in one (1) year or affects more than ten (10) acres it must comply with the requirements of 45-6B as to a large-scale operation. Therefore, a mining operation or pilot plan operation of this size would be required to obtain a large-scale permit pursuant to SDCL 45-6B.

IN RE QUESTION NO. 4:

As was discussed in Question No. 1 above, the operation of a pilot plant is part of the mining operation and is not part of the exploration operation. Therefore, a pilot plant operating without a mill is still a pilot plant for the purposes of development as defined in SDCL 45-6B-3(5) and (9) and must be permitted pursuant to SDCL 45-6B, the South Dakota Mined Land Reclamation Act.

The language of 45-6B indicates that on certain occasions mining operations may be permitted where they do not include on-site milling or where milling is not necessary. In setting out the information required in a permit application for a large-scale mine SDCL 45-6B-6(7) and (8) state:

The application form shall contain the following information:

- (7) The mineral or minerals to be extracted and, if applicable, milled;
- (8) A description of the method of mining and, if applicable, milling to be employed which shall include, if applicable;
  - (a) A contour basis for the mining operation;
  - (b) The depth to which and the direction in which the mining operations are proposed to be conducted;
  - (c) The proposed disposition of mine spoil and tailings; and
  - (d) The method of blasting and control thereof.

(Emphasis supplied.)

In using the words 'if applicable' SDCL 45-6B-6(7) and (8) implicitly recognizes that some mining operations will not have on-site milling or will not require milling at all. Although there is no comparable provision in SDCL 45-6B for the permitting of small-scale operations, the absence of provisions requiring the description of a milling operation 'if applicable' would appear to fit in with the relaxed standards SDCL 45-6B has set out for the permitting of small-scale operations.

A pilot plant operation which does not include a mill should be permitted according to SDCL 45-6B pursuant to the provisions set forth for the permitting of either small-scale or large-scale operations, once the scale of the operation has been determined according to SDCL 45-6B-53.

Respectfully submitted,

Mark V. Meierhenry  
Attorney General