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To Lowell Braxton	From BOB HAGEN
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	T. GAY		
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3	S. RATHBUN		
4	B. FREEMAN		

MESSAGE

Mr. Lowell P. Braxton
Acting Director
Department of Natural Resources
Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

Dear Mr. Braxton:

This is in response to your March 19, 1993, letter requesting informal review of the Albuquerque Field Office (AFO) Director's determination that your agency did not take appropriate action with respect to ten-day notice (TDN) number X93-02-250-001 (Sunnyside Coal Company (SCC), Sunnyside Mine). The TDN alleges a failure to require that adequate bond coverage be in effect at all times contrary to Section 301-812.700 of the Utah regulations.

In your request for review, you explain that on February 18, 1993, your Division notified SCC that on the basis of two recently acquired property appraisals, the Sunnyside Mine was under-collateralized. Your Division gave SCC 60 days from the letter date to demonstrate adequacy of the bond.

You further explain that the collateral bond agreement for the Sunnyside Mine encumbers additional property not the subject of the above noted appraisal that may, upon evaluation by the Division, substantiate adequacy of bond amount. Your Division is evaluating the adequacy of the bond based upon information submitted by SCC during the week of March 15, 1993, and other data. At the conclusion of this evaluation, the Division will prepare a Findings and Conclusions document to resolve the question of adequacy of bond for SCC. Based upon the information on hand at the signing of the Findings and Conclusions, you will then undertake action in this matter appropriate to the Utah program. Accordingly, you request that the Office of Surface Mining Reclamation and Enforcement stay any action on the subject TDN pending a review of the Findings and Conclusions.

You base your authority for the action you have taken on Section R614-301-840.520 of the Utah regulations, which provides that an operator who is without bond coverage due to the incapacity of a bank or surety company or suspension or revocation of a charter

Mr. Lowell P. Braxton

or license, will be notified in writing and be given a period of up to 90 days to replace bond coverage.

Since there is no dispute that there is reason to believe that there may be a collateral bond shortfall, the issue is whether or not the procedures used by your agency to address the possible problem is consistent with the approved Utah program.

The regulation cited in the TDN, Section R645-301-812.700, provides that "the Division will require in the permit that adequate bond coverage be in effect at all times. Except as provided in R645-301-840.520, operating without a bond is a violation of a condition upon which the permit is issued."

I am not persuaded that this language necessarily triggers mandatory enforcement action because, while the current collateral bond may be insufficient, the permittee nevertheless, is not operating without a performance bond. I am also not persuaded that authority for the action you have taken is properly based in R645-301-840.520, because the issue in this case involves the possible decrease in the value of the collateral underlying a bond, which is unrelated to the failure of a bank or surety.

In any event, with respect to collateral bonds, Section at R645-301-860.252 of the Utah regulations provides that "the bond value of collateral may be evaluated at any time, but it will be evaluated as part of the permit renewal, and if necessary, the performance bond amount increased or decreased." From my understanding of the record, this is exactly what your agency on its own initiative is doing. I find that notifying the permittee by letter and specifying a prescribed time for action to resolve the collateral bond issue is a reasonable approach consistent with this provision and therefore, is not an abuse of discretion under the Utah program. However, if at the end of the time prescribed, the permittee has failed to either demonstrate adequate bond coverage or increase the value of the collateral bond, I will expect your agency to take appropriate enforcement action to bring this matter to closure. In this regard, I am asking the AFO Director to monitor the outcome.

Based on the foregoing, the determination of the AFO Director is hereby reversed.

Sincerely,

Michael Ross Stafford

Deputy Director