0035

cc: JWG
LPB
JCH
orig: File
5-1-95
7/11

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Washington, D.C. 20240

APR 27 1995

RECEIVED
MAY 1 1995
DIV. OF OIL, GAS & MINING

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

Dear Mr. Carter:

This is in response to your letter of January 4 requesting informal review of the Albuquerque Field Office (AFO) Director's determination that the Division of Oil, Gas and Mining's (DOGM) response to ten-day notice (TDN) number 94-020-179-005 was inappropriate (U.S. Fuel Company, Hiawatha Mine).

TDN 94-020-179-004 which preceded and is related to TDN 94-020-179-005 alleged that U.S. Fuel failed to design and certify drainage control structures around topsoil stockpiles [the structures are approximately 1 foot high earthen berms capable of impounding runoff]. In response to TDN 94-020-170-004 DOGM stated that "since the structures in question are not functioning as sediment control devices, but rather as topsoil protection measures, nor were they intended as sediment control in the mining and reclamation plan, the certification and design requirements cited in the TDN are not applicable."

The AFO found the response to TDN 94-020-179-004 to be "appropriate," and issued TDN 94-020-170-005 in its place on the basis that if the berms were not sediment control structures then the alleged violation is a failure to construct and certify drainage control for areas disturbed by mining operations (i.e. the various topsoil stockpiles throughout the permit).

In your request for informal review, you assert that the berms along the perimeter of the topsoil piles are not structures that need to be designed and certified as impoundments as the AFO seems to suggest. Rather, the berms function along with revegetation of the topsoil piles as topsoil protection measures and as devices intended to minimize additional contributions of

suspended solids to streamflow outside the permit area using the best technology currently available (BTCA).

The rules cited in the TDN in pertinent part read:

> R. 645-301-742.110 Appropriate sediment control measures will be designed, constructed and maintained using the best technology currently available to: 742.111 - Prevent to the extent possible, additional contributions of sediment to flow or to runoff outside the permit area; . . . .
>
> R. 645-301-742.120 . . . . Sediment control methods include, but are not limited to: 742.124 - Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other methods that reduce overland flow velocities, reduce runoff volumes or trap sediment; (emphasis added)
>
> R. 645-301-731.121 Surface water quality will be protected by handling earth materials . . . . and runoff in a manner that . . . . prevents, to the extent possible using the best technology currently available additional contributions of suspended solids to streamflow outside the permit area; and otherwise prevent water pollution. If drainage control, restabilization and vegetation of disturbed areas, diversion of runoff, mulching or other reclamation and remedial practices are not adequate to meet the requirements of . . . . the operator will use and maintain the necessary water treatment facilities or water quality controls . . . . (emphasis added)

In accordance with 30 CFR 701.5:

> *Best technology currently available* means equipment, devices, systems, methods, or techniques which will prevent to the extent possible additional contributions of suspended solids to stream flow or runoff outside the permit area . . . . Within the constraints of the permanent program, the regulatory authority shall have the discretion to determine the best technology currently available on a case-by-case basis . . . . (emphasis added)

For the following reasons we find that in this case your agency's response to the instant TDN was not arbitrary, capricious or an abuse of its discretion under the Utah program and therefore we are reversing the determination of the AFO Director.

- DOGM has required U.S. Fuel to amend its permit to include a provision requiring that all the BTCA berms along the perimeter of the topsoil piles be maintained at a minimum height of one foot. DOGM's hydrology experts have reviewed the berm designs and have approved them as BTCA devices;

- A technical analysis was completed for the drainage areas around the topsoil berms. Calculations showed that at a one foot height, the topsoil berms will have sufficient storage volume to contain a 100 year-6 hour storm event of 2.12 inches, thus sediment would be controlled and retained within the disturbed area;

- The berm structures have functioned as suitable drainage control for years and there has been no allegation of water pollution as a result of these existing berms; and

- While Utah rule R 645-301-742.213 requires that siltation structures which impound water be designed, constructed and maintained in accordance with a series of other Utah rules [that include certification], we will defer to your technical judgement that the berm structures are BTCA devices that do not rise to the level of impoundments that need to be designed and certified.

Sincerely,

Ed Kay
Deputy Director

cc: U.S. Fuel Company
P.O. Box 887
Price, Utah 84501

Acting Director, Albuquerque Field Office

Acting Regional Director, Mid-Continent Coordinating Center

Acting Assistant Director, Eastern Support Center

Acting Assistant Director, Western Support Center

Assistant Director, Field Operations

Assistant Solicitor, Regulatory Programs