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State of Utah

DEPARTMENT OF NATURAL RESOURCES

BRIAN C. STEED
Executive Director

Division of Oil, Gas and Mining
JOHN R. BAZA
Division Director

January 9, 2020

Robert Nead, Manager
Coal Energy Group 2, LLC
6602 Ilex Circle
Naples, FL 34109

Subject: Findings of Fact and Conclusions of Law for Notices of Violation 21222 and 21223, Wildcat Loadout, C/007/0033

Dear Mr. Nead:

On January 8, 2020 an Informal Assessment Conference was held at the Division of Oil, Gas and Mining regarding a violation issued to Coal Energy Group 2, LLC (CEG2) at the Wildcat Loadout on October 17, 2019. As a result of the facts given at the conference, I have not adjusted the fine because the degree of fault falls within the definitions in the rules as explained in the attached document.

Within thirty (30) days of your receipt of this finding, you or your agent may make a written appeal to the Board of Oil, Gas and Mining. To do so, you must escrow the assessed civil penalties with the Division within thirty (30) days of receipt of this letter, but in all cases prior to the Board Hearing. Failure to comply with this requirement will result in a waiver of your right of further recourse.

If no timely appeal is made, this assessed civil penalty of $1100.00 must be tendered within thirty (30) days of your receipt of this letter. Please remit payment to the Division of Oil, Gas and Mining, c/o Vickie Southwick at 1594 West North Temple, Suite 1210, Salt Lake City, UT 84116

Sincerely,

Dana Dean, P.E.
Deputy Director - Mining
Assessment Conference Officer

CC ogmcoal@utah.gov
Steve Christensen
John Webster
Amanda Daniels

BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE INFORMAL ASSESSMENT CONFERENCE for NOTICE OF VIOLATION AND PROPOSED ASSESSMENT; VIOLATION Nos. 21222 and 21223, COAL ENERGY GROUP 2, LLC; WILDCAT LOADOUT, C/07/0033, CARBON COUNTY, UTAH	:	**FINDINGS of FACT, CONCLUSIONS OF LAW AND ORDER**
		CAUSE NO. C/007/0033

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On January 8, 2020, the Division of Oil, Gas and Mining ("Division") held an Informal Assessment Conference as provided for in Utah Admin. Code R645-401-700. The Informal Conference was held in response to the request by Coal Energy Group 2, LLC ("CEG2") to review the fact of violation and amount of assessment for Notice of Violation Nos. 21222 and 21223 (collectively the "NOVs") issued to it on October 17, 2019, for the failure to collect and report water monitoring data during the second and third quarters of 2019 at the Wildcat Loadout, C/007/0033, Carbon County, Utah, as required by the Mine and Reclamation Plan ("MRP" or "Permit") on file with the Division.

ISSUES

The Division in its NOVs found that Utah Admin. Code R645-301-731.200 and Special Permit Condition Attachment A had been violated because CEG2 had failed to collect and report the required water monitoring data. The Division assessed a fine of $550.00 per violation, a total of $1,100.00.

CEG2 requested an informal assessment conference to contest the amount of the penalty only. CEG2 asserts that upon transferring operations from Intermountain Power Agency ("IPA") to CEG2, there had been a miscommunication about what monitoring tasks were required to be performed, and therefore its degree of fault was less than the points assessed.

PARTIES

Dana Dean, Deputy Director for the Division of Oil, Gas and Mining served as the hearing officer. The hearing was conducted as an informal adjudicative proceeding. Amanda Daniels, Hydrologist, was present to testify about the fact of the violations, John Webster, the assessment officer, provided testimony regarding the assessment. Larry Johnson, the permittee

representative, presented the position and arguments on behalf of CEG2. During the hearing, Dana Dean was assisted by her counsel, Thomas Kessinger, Assistant Attorney General.

No recording or transcript of the conference was made.

* * *

Having reviewed the information provided at the conference, the statements presented by those speaking, and the information in the files of the Division, the Hearing Officer makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Wildcat Loadout was previously operated by the IPA.

2. The Division approved the transfer of the Permit for the Wildcat Loadout from IPA to CEG2 on November 9, 2018.

3. CEG2 is the current operator of the Wildcat Loadout, C/007/0033.

4. The NOVs were issued to CEG2 on October 17, 2019.

5. John Webster issued a proposed assessment for each of the NOVs on November 22, 2019.

6. CEG2 requested an Informal Assessment Conference on or around December 4, 2019.

7. Notice of the Informal Assessment Conference was provided as required on December 11, 2019.

8. At approximately 9:00 a.m. on January 8, 2020, an informal conference was held in Conference Room A inside the Division's Salt Lake City Offices.

9. Mr. Larry Johnson represented the interests of CEG2.

10. Mr. Johnson did not contest the facts of the violations giving rise to the NOVs.

11. During the first and second quarters of 2019, CEG2 did not sample and report the water monitoring data from WCW-1, WCW-2, WCW-3, and WCW-4 (as identified at p. 5-10 in the MRP; collectively the "surface water sampling locations") to the Division.

12. On September 30, 2019, Mr. Johnson performed the required sampling and monitoring for the third quarter of 2019.

13. Mr. Johnson had not previously consulted the MRP and had to consult the MRP to determine the surface water sampling locations.

14. Mr. Johnson testified that he relied on the representations of IPA regarding what regulatory compliance work needed to be performed and that IPA did not explain that surface water monitoring needed to be performed at each of the surface water sampling locations.

15. Indeed, Mr. Johnson did not know that the MRP required CEG2 to perform the surface water sampling until contacted by Amanda Daniels.

16. John Webster presented testimony on how the penalty was calculated for each NOV:

a. No points were assigned for history as CEG2 had not committed a violation within the past year.

b. The violations were potential hinderances to the Division's enforcement and assigned 13 out of 25 points.

c. Degree of fault was set at 12 out of 15 points because the violation could have been prevented by exercising reasonable care and due diligence.

d. A total of 25 points were assessed for each NOV, resulting in a $550.00 penalty per NOV.

CONCLUSIONS OF LAW

1. The Coal Act, Utah Code § 40-10-1 *et seq.*, regulates activities that constitute coal mining operations to "the full reach of state constitutional powers to insure the protection of the public interests through effective control of surface coal mining operations...." Utah Code § 40-10-2.

2. No person shall engage in or carry out surface coal mining operations within the state unless that person has first obtained a permit issued by the division pursuant to an approved mining and reclamation program. *See* Utah Code § 40-10-9(1).

3. Each permit must meet minimum performance standards which includes "[m]inimiz[ing] the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and groundwater systems both during and after surface coal mining operations...." Utah Code § 40-10-17.

4. The rules adopted under the Coal Act, set forth the requirements that must be met for a permit application to be approved, and include provisions regarding surface water monitoring.

5. Utah Admin. Code R645-301-431.200 *et seq*. requires, inter alia, surface water monitoring to be conducted according to an approved surface water monitoring plan. *See* Utah Admin. Code R645-301-731.220.

6. Special Permit Condition Attachment A requires CEG2 to "submit water quality data for the Wildcat Loadout Facility in an electronic format through the Electronic Data Input Website, http://linux1.ogm.utah.gov/cgi-bin/appx-ogm.cgi.

7. Pursuant to the MRP, CEG2 was required to collect and submit data from the surface water monitoring locations at least quarterly. *See* MRP at p. 5-10,11.

8. Further, "[s]amples [must] be collected during or shortly after precipitation events to establish baseline parameters." MRP at 5-11.

9. Even if there has been no flow through a given drainage, a report is still required.

10. The violations were appropriately assessed as administrative hindrances.

11. An administrative hindrance occurs where "enforcement is hindered by the violation." Utah Admin. Code R645-401-322.300.

12. Failing to collect and report water sampling data from the surface water monitoring locations is an administrative hindrance because the Division cannot determine what effect the operation is having on the drainage overall.

13. The assessment officer assigned a permissible number of points for an administrative hindrance. *See* Utah Admin. Code R645-401-322.300 (allowing for assignment of "up to 25 points[.]"

14. Utah Admin. Code R645-401-323 allows for an assessment of up to 30 points for the degree of fault.

15. Degree of fault is split into three categories: (1) no fault, (2) fault, and (3) greater degree of fault, *i.e.*, reckless, knowing and intentional. *See* Utah Admin. Code R645-401-323.

16. A no-fault violation occurs as the result of "inadvertence which was unavoidable by the exercise of reasonable care[.]" *Id.* at 323.110.

17. In comparison, a fault-based violation occurs as the result of "the failure of a permittee to prevent the occurrence of any violation of [its] permit or any requirement of the State Program due to indifference, lack of diligence, or lack of reasonable care[.]" *Id.* at 323.120.

18. At a minimum, reasonable care means that a permittee has read and understood its permit and its obligations.

19. Diligence means careful and persistent work or effort, *i.e.*, confirming representations made by previous operators and continually satisfying ongoing reporting requirements.

20. Here, CEG2 failed to exercise reasonable care because it did not read and understand the requirements found in the Permit when operations were transferred from IPA to CEG2. CEG2 would have known that it was required to report the results of its surface water monitoring to the Division had the Permit been read.

21. Mere reliance on the representations made by previous operator demonstrates a lack of due diligence because CEG2 should have confirmed the representations made by IPA regarding water sampling data.

22. Therefore, the assessment officer correctly determined the NOVs were fault-based violations.

23. A "fault" violation allows for an assessment of up to 15 points. *Id.*

24. Accordingly, the assessment officer assessed a permissible amount of points for the degree of fault.

25. In total, a 25-point violation results in a penalty amount of $550.00, therefore the penalty amount for each NOV is permissible. *See id.* at -300.330

ORDER

NOW THEREFORE, it is ordered that the NOVs are upheld and the penalty amount of $550.00 per NOV (totaling $1100.00) is affirmed.

RIGHT TO APPEAL

CEG2, or any person having an interest which is or may be adversely affected by the issuance of this Order, is advised that it has the right, pursuant to Utah Code §40-10-22(3) and R645-400-360 Utah Admin. Code, to appeal of the issuance of this Order by filing a request for agency action in accordance with the Rules of Practice and Procedure Before the Board of Oil, Gas and Mining within 30 days of the issuance of this Order.

SO DETERMINED AND ORDERED this 9th day of January 2020.

Dana Dean, Deputy Director – Mining
Division of Oil, Gas and Mining