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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
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Salt Lake City, Utah 84138
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June 6, 1994

CO-OP MINING COMPANY,	:	Docket No. DV 94-4-R
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	
	:	Notice of Violation
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE),	:	No. 93-020-190-03
	:	
Respondent	:	Trail Canyon Mine

DECISION

Appearances: Carl Kingston, Esq., Salt Lake City, Utah, for applicant;

John S. Retrum, Esq., U.S. Department of the Interior, Denver, Colorado, for respondent;

F. Mark Hansen, Esq., Salt Lake City, Utah, for intervenor.

Before: Administrative Law Judge Child

Co-Op Mining (Co-Op) filed an Application for Review and an Application for Temporary Relief regarding Notice of Violation (NOV) No. 93-020-190-03 issued to Co-Op by the Office of Surface Mining Reclamation and Enforcement (OSM) in October 1993. The NOV charges Co-Op, the permittee of the Trail Canyon mine, Emery County, Utah, with "[f]ailure to restore the approximate original contour on all areas disturbed by mining by using all available material" in alleged violation of R645-301-553.300 and R645-301-553.110 of the Utah Division of Administrative Rules (Utah program). As abatement action, the NOV requires Co Op to "[u]se all available materials to eliminate highwalls and cuts to the extent possible."

People have resided at the bottom of the canyon since 1920. The number of residences grew from 4 in 1947, to 8 in 1961, to 20 in 1993 with over 100 residents. (Tr-I. 7-9, 61; Tr-II. 183-184, 295; Tr-III. 15, 42-43, 48-50; Ex. R-6)

In 1947, the mine had three portals accessible by wooden stairs attached to a coal chute. In 1951 and 1962, Co-Op constructed a nearly mile long access road from the public road at the base of the canyon, past the three portals, to a point approximately 300 feet beyond the portals. For the most part the road followed a series of natural ledges, with some levelling and cutting required. Four cuts, totalling approximately 800 feet in length and from 0 to 5 feet in width, were made into the slope of the mountain. The road is only 9 feet wide at its narrowest point. (Tr-II. 295, 298, 300-312; Tr-III. 7, 11-16, 46)

In 1970, at the insistence of the Federal Mine Safety and Health Administration (MSHA), Co Op constructed a safety berm on the outer edge of the access road. Except for a narrow portion of the road, the berm paralleled the entire length of the road. The berm, up to the portal area, was constructed from sloughage taken from the inside of the road; while the berm, from the portal area to the end of the road, was created primarily by digging the road deeper and cutting 3 feet into the mountain on the inside edge, thus leaving a band of material in place on the outer edge to serve as a berm. In most places, the berm was no more than 30 inches high. (Tr-III. 18-21, 45-48, 122-123; Ex. R-9)

In 1971 or 1972, Co-Op extended the access road further beyond the portals to a site to be used for an electrical substation to supply power to the mine. This site became known as the "transformer pad." Co-Op cut into the mountain as much as 6 feet in extending the road to the transformer pad. Co-Op also dug downward, leaving material in place on the outer edge to serve as a berm for the road extension. While the transformer pad was quite level prior to disturbance, Co-Op further leveled it by digging down 2 feet at the inner portion of the pad and moving the 2 feet of material to the outer edge of the pad. (Tr-I. 50, Tr-III. 15-18, 21)

In 1972 or 1973, the residents of Trail Canyon altered somewhat the configuration of an area later known as the "lower pad." This area, prior to the alterations, was exceptionally level and was used by the residents for recreation, including softball and basketball. To enhance access to the area, the residents installed culverts to channel a stream cutting a gully. The residents then covered the culverts with soil taken from the base of a natural cliff face at the eastern end of the lower pad. About 2 years later, Co-Op began using the lower pad as a coal stockpile and loadout area. (Tr-III. 21-24)

After construction of the access road berm, a large rock broke loose from a ledge several hundred feet up the mountainside. The rock rolled down the mountain and hit the access road, where it broke into several pieces. Most of the rock remained on the access road, but one large piece continued down to the residential area, where it hit and rolled through one of the homes, killing a girl inside the home. (Tr-III. 36-37, 61-63; Ex. R-31, A-33)

Co-Op also took 2 to 3 feet of material from the transformer pad to reclaim the portals, lowering its original contour by 2 to 3 feet. After bulldozers struck rock at the transformer pad, Co-Op realized it could not meet the requirement of reclaiming the pad with 2 feet of topsoil. Thus, some soil was brought back to the transformer pad. (Tr-III. 30, 76, 97-98, 104-105, 120-122)

Co-Op's reclamation work, which was performed in 1988 and 1989, also included hauling away from the lower pad portions of the topsoil containing high concentrations of coal. Co-Op then pushed the remaining topsoil of the lower pad area into a big pile, removed underlying fill material, and used that material to reclaim the lower pad's vertical slope at the eastern end. Co-Op pushed the material up the vertical slope as steep as Co-Op's equipment would go. It also used some of the lower pad material to reclaim other parts of the mine. Co-Op then pushed back the topsoil. As a result, the lower pad is 4 to 5 feet lower than the original contour and the public road traversing the lower pad. (Tr-III. 25-29, 76, 131-133, 145, 149, 152-153)

The access road was also reclaimed. Co-Op first smoothed the road by blading the road, pushing rocks and debris against the upslope of the road. Then the road was scarified and ripped to a depth of 30 inches. The lowest portion of the road was completely obliterated. Finally, the road, pad areas, and portal area were seeded and planted with trees. (Tr-III. 126-129, 134-136)

By June of 1993, vegetation had been growing and was growing well upon the access road area, including the berm and downslope, lower pad, and transformer pad for approximately 4 years. This vegetation would have to be scraped off to access the material which OSM contends is reasonably available to reclaim the vertical cuts. Also, no fill material exists for revegetating the downslope of the reclaimed access road if the vegetation is removed. (Tr-I. 144-145; Tr-II. 62, 117-118, 256-260; Tr-III. 136-137, 160-161, 164)

On June 23, 1993, DOGM conducted an inspection at the mine to determine whether Co-Op was eligible for Phase I reclamation bond release. The inspection was attended by, among others, OSM Inspectors Thomas W. Wright and Edzel Pugh. (Tr-I. 87, 189-190)

Neither Inspector Wright nor Inspector Pugh had any knowledge of the premining contour of the land, whether from personal visits, photographs, or maps. They determined, based upon the appearance of the slopes, that man-made vertical cuts existed along the access road and at the lower pad and transformer pad. Those cuts included cuts referred to as "highwalls" in Co-Op's approved reclamation plan and permit.

They also observed two areas along the access road where the vertical face had collapsed. Mr. Wright opined that at least one of the slides originated from a cut slope.

One or both of the OSM inspectors observed dark bands of material, presumed to be coal, visible in vertical faces near the northern most portal, in another area along the access road,

Based upon Wright's observations, OSM issued the Federal NOV, alleging that Co-Op violated R645-301-553.300 and R645-301-553.110 of the Utah program by "[f]ail[ing] to restore the approximate original contour on all areas disturbed by mining by using all available material." (Ex. R-25) The areas of concern were identified as "[a]ll areas where highwalls and vertical cut remain" and OSM ordered Co-Op to "[u]se all available material to eliminate highwalls and cuts to the extent possible." (Ex. R-25)

On December 8, 1993, Michael J. Superfesky, an OSM civil engineer, with over 15 years of experience in reclamation work, inspected the mine to determine the amount of reasonably available material for AOC work. Without taking any measurements, he determined that approximately 2,000 cubic yards, 3,700 cubic yards, and 900 cubic yards of available material existed at the lower pad, the berm of the access road, and the transformer pad, respectively. He concluded that Co-Op had not restored the land to AOC to the extent possible, although he had no knowledge of the original contour of the land. (Tr-II. 83, 91-95, 102-104, 116-117, 121, 144, 150-151, 156, 172-174)

Mr. Superfesky based his conclusion, in part, upon his opinion that moving the access road berm material up against the vertical cuts on the upslope would improve the safety and stability of the area. He stated that one of the purposes of the AOC requirement is to restabilize disturbed areas and prevent the collapse of artificially created cut-slopes. He also stated that the berm's location along the outer edge of the road reduced the safety or stability of the downslope because the berm placed a surcharge load on the natural underlying material. He opined that the berm material should be placed against the vertical cuts to eliminate these instability factors and improve the stability of the upslope. The berm material would provide some support for the vertical cut faces and protect them against weathering. He worried that if the material exposed by the cuts was softer than the overlying material, the forces of nature would wear away the softer material, resulting in the overlying material falling down to fill the void. However, he did not know whether such softer material exists. (Tr-II. 99-101, 111-113, 142-143)

He believed the remains of the road could be made passable and the purportedly available material retrieved using a backhoe with a 1/2- or 3/4-quarter yard bucket and a track of 8 to 10 feet wide. He did not know the exact width of the road, however, and acknowledged the danger of operating heavy equipment near the outer edge of the road. (Tr-II. 163-166, 169-170)

Nor did Mr. Superfesky know that the access road berm served as a drainage control structure. No doubt his lack of awareness of many facts was attributable to the fact that he visited the mine only once. At no time, either during the visit or otherwise, did he familiarize himself with the Utah program. (Tr-II. 120, 171, 173)

Through numerous witnesses with greater familiarity with the mine area, including the only witness, Bill Stoddard, with knowledge of the original contour of the mine area, Co-Op refuted much of the evidence presented by OSM. Co-Op showed that the dark bands of material in

built mostly on rock ledges. If the material were moved against the upslope, it would have little or no effect on upslope stability because there is no underlying soft material requiring protection from weathering. Slides and sloughing off would occur just as predictably in the disturbed areas as in the undisturbed areas. Given these facts as well as the dangers to the residents and equipment operators from attempting to move and removing the berm, it is safer to leave the berm at the outer edge of the road rather than moving it against the upslope. (Tr-III. 94, 96-97, 99-101)

Finally, Co-Op showed that the transformer pad, bermed terrace (reclaimed access road), and lower pad all blend in with and complement the surrounding area. For instance, as previously noted, the bermed terrace largely follows preexisting natural benches with steep upslopes. In fact, at least two OSM witnesses had trouble distinguishing between the vertical cuts and the naturally steep cliff faces on the upslope. Moreover, the bermed terrace compliments the surrounding area by protecting the residents against falling rocks and providing a necessary water barrier to prevent runoff over the downslope. (Tr-I. 160-161; Tr-II. 103-104, 107-108, 221-227, 229, 254; Tr-III. 300-312)

Discussion

I.

Is the specificity of the Federal NOV at issue, and if so, should the Federal NOV be declared invalid for lack of specificity?

Co-Op contends that the Federal NOV fails to sufficiently describe the nature of the alleged violation, the remedial action required, and the portion of the mine to which it applies. Intervenor raise a similar contention. OSM correctly points out that neither Co-Op nor intervenors raised this specificity issue in their pleadings, and therefore argues that they are barred from now raising the issue. However, the issue was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 195-196) Under these circumstances, the specificity of the Federal NOV is at issue in this proceeding.

In order to sustain a claim that an NOV is invalid for lack of specificity, the applicant for review must show that it was prejudiced by the lack of specificity. Renfro Construction Co., Inc., 87 I.D. 584, 587 (1980). Neither Co-Op nor intervenors have shown any prejudice to Co-Op and therefore the Federal NOV is not invalid for lack of specificity.

being a naturally exposed band of material. In sum, the preponderance of the evidence shows that Co-Op did not expose a coal seam or other combustible matter and then fail to cover it, and thus that Co-Op did not violate R645-301-553.300.

B.

Did Co-Op violate R645-301-553.110 of the Utah program?

Co-Op is also charged with violating R645-301-553.110 of the Utah program. R645-301-553.110 requires Co-Op to backfill and grade disturbed areas to "[a]chieve the approximate original contour, except as provided in R645-301-553.600 through R64-301-553.642." R645-100-200 defines "approximate original contour" as follows:

that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls, spoil piles, and coal refuse piles having a design approved under the R645 Rules and prepared for abandonment. . . .

Exceptions to the AOC requirements are found at R645-301-600 through R645-301-553.642. None of those exceptions apply in this case. R645-301-553.610 does not apply because there is no evidence that Co-Op obtained from DOGM the necessary approval for a variance from AOC. (Tr-II. 46-49) R645-301-55.620 does not apply because no highwalls exist at the mine, as discussed below. R645-301-55.630 has no application because DOGM has not approved a variance for mountaintop removal and the mining operation did not constitute mountaintop removal. (Tr-II. 51-52) R645-301-55.640 to R645-301-55.642 are not applicable because they pertain only to surface, and not underground, coal mining. (Tr-II. 52-53)

Much discussion has focused upon the "highwalls" at the mine and the Utah program requirement to eliminate highwalls. See R645-553.120. However, Co-Op has not been charged with a violation of the requirement that highwalls be eliminated. The concern in this case is whether Co-Op met the AOC requirement, which includes a mandate that all highwalls have a design approved under the Utah program.

Confusion has arisen in this case because the map prepared by Mr. Reynolds refers to all purported vertical cuts as "retained highwalls." The preponderance of the evidence shows that there are no highwalls, as that term is defined in the Utah program, i.e., there is no "face of exposed overburden and/or coal in an open cut . . . for entry to underground coal mining activities." R645-100-200.

Using the term "highwall" loosely to refer to any vertical cuts, DOGM ordered Co-Op to demonstrate in writing that the volume of reasonably available spoil was insufficient to

"'Embankment' means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes." R645-100-200 (emphasis added). R645-301-553.140 provides that "[d]isturbed areas will be backfilled and graded to . . . [m]inimize erosion and water pollution both on and off the site" (Emphasis added) R645-301-553.410 provides that cut and fill terraces may be allowed by DOGM where "[n]eeded to conserve soil moisture, ensure stability, and control erosion on final-graded slopes" OSM's well-qualified expert, Michael Superfesky, did not consider the berm's drainage control utility and these regulatory provisions in recommending transfer of the berm against the access road upslope.

Mr. Superfesky recommended the transfer because the berm material would protect against erosion of the upslope. While Superfesky's impressive credentials cannot be ignored, his testimony regarding erosion and the added safety of moving the berm was, to a great extent, theoretical and not adequately tied to the particular conditions of the mine site.

For instance, he expressed concern for the possible erosion of softer materials exposed by the vertical cuts, causing harder material from above to fall toward the void, but he had only visited the mine site once and did not know whether such soft materials exist. Mr. Mangum, who visited the mine site regularly from 1987 onward, testified that no such soft materials are present. In light of the particular conditions of the mine, Mr. Mangum reasonably concluded that, without moving the berm, slides and sloughing would occur just as predictably in the disturbed areas as in the undisturbed areas.

Similarly, in assessing the instability likely to be caused by the weight of the berm on the outer edge of the road, Mr. Superfesky did not consider certain factors. One such factor, as detailed by Mr. Grubaugh-Littig and Mr. Mangum, is that the underlying material appears stable and is largely solid rock. Considering the relevant factors, Mr. Mangum reasonably concluded that the minimal weight of the berm was immaterial and insignificant in determining the stability of the access road downslope.

Nor did Mr. Superfesky adequately consider the danger to the residents of dislodging rocks if the berm were moved. His bare assertion that the move could be done safely evidenced no thoughtful consideration of the danger. Convincing evidence was presented in contradiction of his assertion.

The foundation of Mr. Superfesky's recommendation to move the berm suffers from additional defects. He overestimated the amount of material in the berm, which did not average 4 feet in height as he asserted but did not measure. Also, there is no indication he was aware that much of the berm consists of original contour material left in place. These facts are relevant to the assessment of the berm material's effect on the stability of the downslope if the material is left on the outer edge of the road, and to the assessment of the berm material's effect on the stability of the upslope if the material is moved.

mention the downslope as an area with available material. Also, Mr. Mangum testified that the downslope contained no available material.

Without any indication as to the amount of material available, if any, and with little or no demonstrated benefit to placing small amounts of material against the vertical cuts, there is little, if any benefit, to be gained by moving this material. The evidence does not illuminate whether moving this undetermined amount of material will move the mine closer to its original contour in any material way. Moreover, moving the material is nearly certain to cause harm in that both downslope and road vegetation will be destroyed, likely causing erosion. Also, the testimony regarding movement of the berm raises questions as to whether the downslope material can be retrieved and retrieved safely. These factors must be taken into account in assessing whether AOC has been achieved.

In sum, the evidence preponderates in favor of a finding that the AOC requirement has been met for all areas of the mine, taking into account all relevant facts and factors. The photographs and video received as evidence demonstrate that the lower pad, transformer pad, and access road blend into and complement the drainage pattern of the surrounding terrain and closely resemble the general surface configuration of the land prior to mining, as recounted by Mr. Stoddard. No highwalls exist on the mine and the Utah program, considered as a whole, dictates that no further reclamation of the vertical cuts is warranted.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. The issue of the specificity of the Federal NOV was raised at trial, without objection, both through testimony and an oral motion to dismiss made by Co-Op. (Tr-I. 130-131; Tr-II. 196-196)
3. Co-Op was not prejudiced by any lack of specificity in the Federal NOV.
4. The natural and premining terrain at Trail Canyon is largely steep and rocky, with numerous intermittent natural cliffs and ledges and exposed bands of coal and carbonaceous shale. (Tr-II. 223, 226-228, 253-255, 260, 286; Tr-III. 158-160, 168-170, 199-202)

(b) removal of the material in the culvert area would jeopardize the stability of the public road, and (c) removal of such material would cause siltation of the stream. (Tr-III. 29, 211, 214-215)

13. In recommending movement of lower pad material from over the culvert to the eastern cliff face, OSM's witnesses failed to adequately consider: (a) that the eastern cliff face is a natural feature, (b) that the lower pad is several feet lower than the original contour of the land, (c) that the enlargement of the eastern cliff face was accomplished by the residents of Trail Canyon and not Co-op, (d) that Co-op hauled off much coal material from the lower pad and used lower pad soils or materials to reclaim various other areas, including the cliff face to the extent feasible by pushing the material up the face with a bulldozer, (e) that removal of the material in the culvert area would jeopardize the stability of the public road, and (f) that removal of such material would cause siltation of the stream. (Tr-III. 21-29, 76, 131-133, 145, 149, 152-153, 211, 214-215)

14. There is no reasonably available material at the downslope of the transformer pad and reclaimed access road for further reclamation of vertical cuts because: (1) there is insufficient evidence of the amount of material purportedly available, (2) movement of this material, if any, will destroy vegetation and likely cause erosion of the downslope, and (3) it is questionable whether this material can be retrieved or retrieved safely. (Tr-II. 117-118; Tr-III. 98-99, 160-161; see also Finding 8)

15. The transformer pad, including the downslope, the reclaimed access road (bermed terrace), including the upslope and downslope, and the lower pad closely resemble the general surface configuration of the land prior to mining and blend into and complement the drainage pattern of the surrounding terrain. (Tr-II. 221-227, 229, 254)

16. DOGM's response to the TDN was not arbitrary, capricious, or an abuse of discretion.

Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.

2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. The specificity of the Federal NOV is at issue in this proceeding because the issue was raised at trial without objection from OSM.

4. The Federal NOV is not invalid for lack of specificity because Co-Op was not prejudiced by the lack of specificity, if any.

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