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Big mine file



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In Reply Refer To:
L. P. Jackson



United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
SUITE 310
625 SILVER AVENUE, S.W.
ALBUQUERQUE, NEW MEXICO 87102

August 31, 1990

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DIVISION OF
OIL, GAS & MINING

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED
P 965 799 137

Act 10/15/09
#5

Dr. Dianne R. Nielson, Director
Division of Oil, Gas and Mining
Department of Natural Resources
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203

Re: Trail Mountain, TDN 90-02-107-11(1-3)

Dear Dr. Nielson:

The following is a written finding, in accordance with 30 CFR 842.11, regarding the Division of Oil, Gas and Mining's (DOGM) response to the above-referenced Ten-Day Notice (TDN).

On July 31, 1990, the Albuquerque Field Office (AFO) conducted a random sample inspection (RSI) of the Beaver Creek Coal Company, Trail Mountain Mine. The inspection resulted in the issuance of the three-part TDN referenced above. DOGM received the TDN via certified mail on August 9, 1990, thereby setting the response due date at August 20, 1990. AFO received DOGM's August 22, 1990, written response to the TDN on August 28, 1990. AFO also received an August 30, 1990, faxed copy of an August 17, 1990, letter to the operator approving permit revisions relative to the TDN.

Part 1 of the TDN was issued for the operator's failure to conduct coal mining and reclamation operations as described in the approved plan. The TDN references the concrete diversion between the sediment pond and the gate.

DOGM's response describes the operator's failure to conduct operations in accordance with the approved plan as a permit defect for which a permit revision has been approved.

AFO does not consider failure to conduct operations in accordance with the approved plan a permit defect. However, the fact that a permit revision has been approved indicates the violation no longer exists.

Part 2 of the TDN was issued for the operator's failure to certify the sedimentation pond to be constructed as designed. The TDN references the inlet culvert, inlet diversion, and cross-section detail for the spillways not matching the minesite situation.

DOGM's response references the violation as a permit defect for which a revision to the permit has been approved.

AFO does not consider an operator's failure to construct a sedimentation pond in accordance with an approved plan and then certifying the structure according to the approved plan as a permit defect. However, DOGM has provided information that indicates the violation has been corrected.

Part 3 of the TDN was issued for the operator's failure to meet the requirements for primary roads. The TDN references the haul road between the north and south gates.

DOGM's response references the operator's failure to meet the requirements for primary roads as a permit defect for which a revision to the permit has been approved.

AFO does not consider an operator's failure to obtain approval to construct a primary road a permit defect. The RSI indicated that the road was constructed prior to the operator applying for and obtaining an approved revision to the permit allowing the road's construction. However, DOGM has provided information which indicates a revision to the permit has been approved and, therefore, the violation no longer exists.

On August 17, 1990, a DOGM representative contacted a representative of AFO to request an extension of time to respond to the TDN. An extension of time may be granted when an interim response has been proposed by the State Regulatory Authority (RA). The interim response may be accepted as "good cause," in accordance with 30 CFR 842.11, where the RA requires a reasonable and specified period of time to perform technical analysis to make a finding to support a permit revision or to otherwise determine whether a violation of the State program exists. The information provided by the DOGM representative on August 17, 1990, did not establish an interim response or justifiable reason for an extension. Curiously, the August 30, 1990, fax provided to AFO indicates the violations alleged in the TDN were approved as revisions to the permit by DOGM on August 17, 1990. AFO, therefore, questions if a revision was actually approved on August 17, 1990, why a request for an extension of time was posed by DOGM on that same date.

Dr. Dianne R. Nielson

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The TDN response due date was August 20, 1990. AFO did not receive any form of response until DOGM's August 22, 1990, letter arrived on August 28, 1990.

In accordance with 30 CFR 842.11(B)(1), AFO hereby makes a written finding of inappropriate in relation to TDN 90-02-107-11(1-3). AFO's finding is based on DOGM's failure to respond within the TDN response period. DOGM's failure to respond within the 10-day response period also constitutes a waiver of the Division's rights to request an informal review of the inappropriate finding to the Deputy Director's office.

Accordingly, when the State RA fails to respond to a TDN within the response period, a Federal inspection is required pursuant to 30 CFR 842.11. In this case, AFO has, subsequent to the TDN response period, been provided with information which indicates the violations no longer exist. Therefore, a Federal inspection is not required in this case.

As a final note, DOGM, in its response, considered all three alleged violations to be permit defects. A permittee's failure to conduct operations in accordance with its approved permit or its failure to obtain approval prior to conducting practices not currently allowed in the permit, do not constitute permit defects for which the permit revision process can be utilized in lieu of enforcement procedures. The Office of Surface Mining Reclamation and Enforcement's (OSM) position on what would constitute "appropriate action" regarding a RA response to a TDN is clearly outlined in the preamble to the TDN rule as found in the Federal Register notice, Volume 53, No. 135, dated July 14, 1988, page 26744. It is recommended that DOGM review the TDN rule, and its preamble, to gain a better understanding for the standard of review under which OSM must evaluate TDN responses.

If you wish to discuss the matter further, please telephone John C. Kathmann or me at (505) 766-1486.

Sincerely,



Robert H. Hagen, Director
Albuquerque Field Office

Acting

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Dr. Dianne R. Nielson, Director
Division of Oil, Gas and Mining
355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203

4. Article Number
P 965 799 137

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