



United States Department of the Interior

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

In Reply Refer To:

June 1, 1989

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JUN 05 1989

DIVISION OF
OIL, GAS & MINING

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Lowell P. Braxton, Administrator
Mineral Resources Development and Reclamation Program
Division of Oil, Gas and Mining
3 Triad Center, Suite 350
355 West North Temple
Salt Lake City, UT 84180-1203

Re: Ten-Day Notice 89-02-107-3(1-3)/Emery Deep Mine

Dear Mr. Braxton:

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 April 19, 1989, the Albuquerque Field Office (AFO) conducted a random sample inspection of the Emery Deep Mine. The inspection resulted in the issuance of the TDN referenced above for alleged violations of Utah's regulations. DOGM received the TDN via certified mail on May 2, 1989, thereby setting the response due date at May 12, 1989. OSMRE Reclamation Specialist Rade Orell contacted Susan Linner from DOGM on May 15, 1989, to determine the status of the response. Ms. Linner indicated the response was mailed on May 10, 1989, and orally relayed the same. AFO received the written response on May 15, 1989.

Part 1 of the TDN was issued for failure to pass drainage from the disturbed area through a sedimentation pond before leaving the permit area in accordance with the requirements of UMC 817.42(a).

The DOGM response indicates the areas cited in the TDN are sites of recent construction for which the operator requested small area exemption status.

Orig. Mine File
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AFO reviewed Emery Deep Mine's Mining and Reclamation Plan (MRP) toward confirming DOGM's response. The review indicates Section 3.2.9.3, Alternate Sediment Control for Small Areas, was revised and inserted in the MRP in December 1988. The revised information includes a table entitled, "Summary of Sites, Alternate Sediment Control for Small Areas." While the table includes a description of the pad at Borehole Pump 4B3, it does not discuss the areas referenced in the TDN (outslope of the pad and pipeline corridor). In addition, the soil stockpiles at the site of pond 6 which are also included in the TDN are not described by the table. However, the Mine Facilities - Outlying Structures, Map - B, Revised 4-18-88, depicts the areas referenced in the TDN.

Because the areas were included on the map but omitted from the MRP text, the deficiency can be construed to be permit defect. DOGM has indicated that small area exemptions will be included as part of the as-built plans that the operator must submit by June 12, 1989. This is consistent with DOGM's February 14, 1989, Reasonable Time Policy. AFO expects that the Division will ultimately approve the small area exemption plans within the timeframes specified by the policy.

The DOGM response alleges that the TDN is inappropriate based on OSMRE Directive INE 35, Section 4b.

The referenced part of the directive specifically states, "Ten-Day Notices shall not be issued where alleged omissions or other defects are identified during the course of administrative reviews of permits issued by regulatory authorities," The directive goes on to state, "However, where omissions are identified as a result of individual field inspections, a ten-day notice should be issued." The random sample inspection of the Emery Deep Mine, in particular the areas referenced in the TDN, resulted in the issuance of the notice. The TDN did not result from an administrative review of the permit.

The DOGM response questions the regulation cited in the TDN. DOGM indicates the regulation cite should have been UMC 817.42(a) rather than 817.43(a). AFO agrees the regulation cited should have been UMC 817.42(a).

In regard to part 1 of the TDN, AFO finds that, as provided under 30 CFR 842.11(b)(1)(ii)(B)(3), DOGM took appropriate action to cause the violation to be corrected.

Part 2 of the TDN was issued for the operator's failure to maintain records in accordance with the requirements of UMC 840.40(b). Specifically, the as-built certifications for ponds 2 and 3 could not be located at the time of the random sample inspection.

The response from DOGM indicates that the operator informed the Division via telephone on May 8, 1989, that the certifications for ponds 2 and 3 are now available on site.

AFO accepts DOGM's response as constituting good cause in accordance with 842.11(b)(1)(ii)(B)(4)(ii). However, DOGM is reminded that violations alleged in Ten-Day Notices which have been corrected or no longer exist should be confirmed via a follow-up inspection by the Division.

Part 3 of the TDN was issued for the operator's alleged failure to certify haul roads. The TDN cites UMC 700.5, UMC 784.24, and UMC 817.150 as regulations believed to have been violated.

The DOGM response confirms that the operator has not provided haul road certifications. DOGM considers this to be a permit defect which was previously overlooked. The response further states that the operator has been notified to provide the necessary certifications by June 12, 1989.

Utah regulations at UMC 700.5 state that, "* * * (a) Class I Road means a road that is utilized for transportation of coal. * * *". Utah regulations at UMC 784.24 describe in part, the requirements to submit, as a part of the permit application, a detailed description of each road to be used, constructed, or maintained within the proposed permit boundary. Certification of their design and construction is not addressed under this permitting regulation, but under the Utah performance standard regulations at UMC 817.150(d)(1), which specifically state that, "The design and construction or reconstruction of Class I Roads shall be certified by a registered qualified professional engineer in accordance with UMC 816.151 - 816.154, * * *". Therefore, the operator's failure to certify that the construction of the road was in accordance with the cited Utah standards is a violation of the Utah performance standards and not a permit defect as contended. Because Utah's regulations do not require road certifications to be part of the permit, the absence of the certifications in the permit cannot be a permit defect. AFO further asserts that construction or reconstruction certification of any structure cannot be construed as a permit defect because at the time of the permits issuance, the structure would not have been constructed and, therefore, cannot be certified as built in accordance with the submitted designs.

In accordance with Utah regulations and OSMRE Directive INE-35, "Ten-Day Notices," dated March 29, 1989, Section 4.c(2)(c), the appropriate State response should be the issuance of a Notice of Violation rather than requesting by letter that the operator submit the certification as a permit modification.

Section 843.12(a)(1) of the Utah program states, "The Director, Division, or their authorized representative shall issue a notice of violation, if on the basis of a State inspection carried out during the enforcement of a State inspection carried out during the enforcement of a State program he or she finds a violation of the Act, this chapter, the State program, or any condition of the permit . . .".

Mr. Lowell P. Braxton

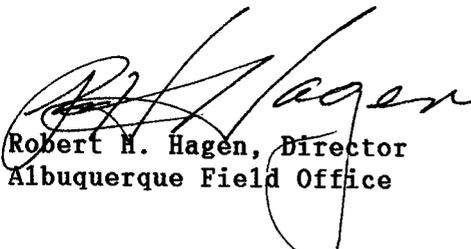
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Therefore, in regard to part 3 of the TDN and in consideration of the above, OSMRE finds that DOGM has failed to take appropriate action to cause the violation to be corrected or failed to show good cause for such failure. The State's response is deemed to be an abuse of State discretion in that DOGM has acted inconsistently with its own regulations at UMC 843.12(a)(1).

If you disagree with this finding, you may request an informal review in accordance with 30 CFR 842.11(b)(1)(iii)(A).

If you wish to discuss the matter further, please contact Stephen Rathbun or me at (505) 766-1486.

Sincerely,



Robert H. Hagen, Director
Albuquerque Field Office