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From: "Fleck, Ken" <Kenneth.Fleck@PacifiCorp.com>
To: "OGMCOAL OGMCOAL" <ogmcoal@utah.gov>
CC: "johnbaza@utah.gov" <johnbaza@utah.gov>
Date: 8/27/2008 4:11 PM
Subject: Letter Requesting Conference on Notice of Violation #10029, Permit #C0150018 Served to Energy West 8/14/08
Attachments: Deer Creek NOV Citation10029.pdf

Attached is a .pdf version of a hard-copy letter which has been sent by overnight mail to the Division. This letter requests a conference for the N.O.V. #10029, and is being submitted to the Division within the 15-day time limit for conference request letters.

Thank You,

Ken Fleck
Geology and Environmental Affairs Manager
Energy West Mining Company
P.O. Box 310
Huntington, Utah 84528

435 687-4712

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ENERGY WEST
MINING COMPANY
A SUBSIDIARY OF PACIFICORP

Energy West Mining Company
P. O. Box 310
15 No. Main Street
Huntington, UT 84528

Coal Regulatory Program
Utah Division of Oil, Gas and Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

Subject: Request for Conference Concerning Citation for Non-Compliance, Utah Coal Regulatory Program – Citation #10029, Permit #C0150018, 8/14/08

PacifiCorp, acting by and through Energy West Mining Company, respectfully requests a conference to appeal the fact of the violation for the above-mentioned Notice of Violation (NOV). Energy West believes that the circumstances of this case do not warrant the issuance of an NOV; that the NOV should be immediately vacated; and that an assessment should not be levied against Pacificorp.

Background Information and Timeline:

Energy West originally proposed to drill up to six holes located within the current Utah State Coal Lease ML-48258, in Section 11 and 12, Township 16 South, Range 6 East, Salt Lake Base and Meridian. The drilling will occur on lands in which the surface is administered by the U.S.D.A. Forest Service (USFS) and the subsurface by the State of Utah. The lands on which this exploration will be conducted, being a state coal lease issued to PacifiCorp, are not subject to 43 CFR Parts 3480-3487. Therefore, exploration plan ***review*** will be the responsibility of the Division.

The violation in question relates to the Notice of Intention to Conduct Minor Coal Exploration – Utah State Coal Lease ML-48258 pursuant to R645-201-200 for surface exploration drilling at Deer Creek Mine, submitted in November, 2007 for two holes, revised in March, 2007 to add 4 more holes, and conditionally approved by the Division on April 24, 2008. All the conditions were met with the concurrence of the U.S. Forest Service on June 17, 2008, and drilling activities commenced with two rigs on June 19, 2008.

Due to the urgent need for information for mine planning, the four revised locations were to be drilled first, and if time and funding remained after the first four, one or both of the original two (2008-1 and 2008-2) would be considered. The first two holes were finished on June 30 (2008-4) and July 1 (2008-6) respectively, and the rigs were moved onto 2008-3 and 2008-5. As results from the first two holes were being evaluated, the need for an additional hole just to the east of the group of 4 additional holes became apparent to

fill in a data gap. Rather than to add another hole to the program, Energy West decided to notify the appropriate agencies of its intent to move one of the original 2 holes to the location of the new proposed hole and drill it instead.

A package of information including a notice of the change and a new set of maps was submitted to DOGM on July 8, 2008, advising the Division for Hole 2008-2 to be relocated. This letter and accompanying maps was transmitted electronically to DOGM, the Forest Service, and SITLA. The letter indicated a need for approval by the 14th of July, the estimated date for the next rig move. Energy West received approval e-mail responses from the Forest Service and SITLA the same day, and forwarded these to DOGM on July 8, 2008.

As stated in the notification, the location chosen for the new hole was along the trace of an old reclaimed road, which was used in the 60's for fighting a fire on Mill Fork Ridge, and in the 80's for coal exploration drilling. The road was reclaimed by Beaver Creek Coal Company in the early 80's; reclamation is essentially complete. The intent was to place the drill location in an area that had already been disturbed. Thus, there would be no disturbance of the natural land surface. The proposed action would require no additional vegetation, wildlife, or archaeological surveys.

Upon issuing a decision approving the change by the Forest Service, the acting ranger indicated (by phone) that no archaeological survey would be required and that none was necessary in this previously disturbed area. Energy West, who had an archaeologist on call if necessary, cancelled any impending survey based on this information. In an e-mail accompanying the forwarded Forest Service approval, Energy West indicated that it would proceed with the hole location change unless any further information was required by DOGM. This message was sent to DOGM on July 8, at 4:17 p.m.

Energy West's Position:

In support of its position Energy West alleges as follows:

(1) The NOV should not have been issued and should be immediately vacated.

The applicable section of the Utah Code is Section 40-10-8. It states in relevant part:

> (1) Coal exploration operations which substantially disturb the natural land surface shall be conducted in accordance with exploration rules issued by the division. (Emphasis supplied.)

The actions described above clearly demonstrate that the activities of Energy West did

not substantially disturb the natural land surface. There is nothing in the NOV that alleges the activities of Energy West in drilling hole 2008-2 substantially disturbed the natural land surface. Notwithstanding Energy West's good faith effort to fully inform the Division of its activities and to keep current its Notice of Intent to Conduct Minor Coal Exploration, the Division has no jurisdiction over the activities that took place.

(2) The three sections of the Administrative Code cited in the N.O.V. are not relevant to a coal operator.

> R645-201.110. Coal exploration plan review on lands which are not subject to 43 CFR Parts 3480 -3487 will be the responsibility of the Division.

This regulation states only that the Division has responsibility to review Notices of Intention to Conduct Minor Coal Exploration applications. It does not impose any obligations on an operator/permittee and the word "approve" does not appear in these sections.

> R645-201.130. The Division will coordinate as appropriate its activities in reviewing coal exploration projects with other agencies with the objective of reducing duplication of agency and operator effort and at the same time, maximizing the effect of its protection of the state from the environmental effects of coal exploration activities.

This regulation, again, speaks to the responsibilities of the Division not the coal operator/permittee.

> R645-201.210. Notices of Intention to Conduct Minor Coal Exploration when 250 tons or less of coal will be removed will require Division review prior to conducting exploration except where exploration is planned to be conducted on lands designated unsuitable for surface coal mining operations under R645-103; exploration on these lands designated as unsuitable will be subject to the requirements of R645-201-300.

There are no lands within the area identified in the Notice of Intent to Conduct Minor Coal Exploration designated as unsuitable. Therefore, the role of the Division is only "review" without any "approval" responsibility.

The specific language of the NOV describing the "Nature of condition, practice, or violation" states that the violation was based on:

> Failure to allow Division review and approval before conducting exploration activities. The relocation area of drill hole 2008-02 was drilled without Division approval. (Emphasis supplied.)

If the regulations cited in the NOV do not apply to the operator/permittee; no other applicable regulation has been cited in the NOV; and the Division has cited no regulation that requires the "approval" of the Division, then the NOV fails to meet the requirement of UCA Section 40-10-22 that the NOV "shall set forth with reasonable specificity the nature of the violation" and should immediately be vacated.

(3) The statutory language regarding coal exploration is carried forward in the performance standard.

The performance standard that applies to an operator's activities during coal exploration is found at R645-202-200.210 and reads, in relevant part, as follows:

> 210. All coal exploration and reclamation operations which <u>substantially disturb the natural land surface</u> ...will be conducted in accordance with the coal exploration requirements of the state Program, and any conditions on approval for exploration and reclamation imposed by the Division. (Emphasis supplied.)

As indicated above, the provisions of this performance standard do not apply to the activities of Energy West in drilling drill hole 2008-02 because there was no substantial disturbance of the natural land surface. Also, since Division approval was not required there were no conditions that applied to the activities of Energy West.

Energy West has gone to great lengths to develop this type of coal exploration to minimize potential impacts to the land surface, wildlife and hydrology and to comply with stipulations set forth by the governmental agencies. As an example, the startup date of the 2008 program was cooperative effort between Energy West and the surface management agency concerning potential impacts to wildlife. The location of this particular drill hole was specifically selected to insure that there would be no substantial disturbance of the natural land surface.

Based on the stated facts and the applicable law and regulations, Energy West should not have been issued this Notice of Violation.

PacifiCorp and Energy West request that the NOV be immediately vacated and that no further enforcement action be taken with respect to the drilling activities associated with drill hole 2008-02.

Sincerely,

Kenneth S. Fleck

Kenneth S. Fleck

Geology and Environmental Affairs Manager

Cc:	Dennis Oakley	Energy West Mining Co.
	Earl Snow	Energy West Mining Co.
	Chuck Semborski	Interwest Mining Co.
	Scott Child	Interwest Mining Co.
	Carl Pollastro	Interwest Mining Co.
	Dave Smaldone	Interwest Mining Co.