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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 No. N10029, ENERGY WEST MINING CO. DEER CREEK MINE, C/015/0018, EMERY COUNTY, UTAH	: : : :	FINDINGS of FACT, CONCLUSIONS OF LAW AND ORDER CAUSE NO. C/015/0018
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On October 14, 2008, the Division of Oil, Gas and Mining (Division) held an Informal Assessment Conference as provided for by R645-401-700 Utah Administrative Code (2008) in response to the written request by Energy West Mining Company (Energy West) to review the fact of violation and amount of assessment for Notice of Violation 10029 (NOV) issued to it on August 13, 2008 for operations at the Deer Creek Mine, C/015/0018, Emery County, Utah.

ISSUES

The Division in its Notice of Violation found that rules R645-201.110, R645-201.130, and R645-201.210 had been violated. These rules require, respectively, that: the Division review coal exploration plans; the Division coordinate as appropriate its activities in reviewing the coal exploration projects with other agencies in order to protect the environment and minimize duplication; and a Notice of Intention to Conduct Minor Coal Exploration must be reviewed by the Division prior to the operator conducting exploration operations. The Division argues that pursuant to R645-200.220 the Division should have been allowed 15 days to review changes in the Notice of Intention to Conduct Minor Exploration before Energy West commenced operations. The Division assessed a fine of \$3,300.00.

Energy West, in its written request for an Informal Assessment Conference requested that the Notice of Violation be vacated. They made the following objections to the NOV: (1) the exploratory activities of Energy West did not require a permit because they did not "substantially disturb the natural land surface" as required by Utah Code §40-10 8(1)(2008); (2) the Division is not authorized or required to "approve" a Notice of Intention for Minor Exploration activities and therefore Energy West was free to proceed after filing its amended Notice of Intention; and (3) the activities were coordinated with the Forest Service and were conducted in accordance of the applicable performance standards.

PARTIES

John Baza, Director Division of Oil, Gas and Mining served as the hearing officer. The hearing was conducted as an informal adjudicative proceeding. Karl R. Housekeeper, Division Inspector, presented the facts and arguments in support of the Notice of Violation, Daron Haddock, Division Permit Supervisor, presented the arguments concerning the determination of the assessment amount. Dana Dean, Division Associate Director was in attendance and participated for the Division. Ken Fleck, permittee representative, and John Kirkham, counsel for the permittee, presented the position and arguments on behalf of Energy West.

No recording or transcript of the conference was made.

FINDINGS OF FACT

Based on the information provided at the conference, the statements presented by those speaking, and on information in the files of the Division the following Findings and Conclusions were made.

1. The Request for an informal assessment conference was delivered to the Division on August 27, 2008.
2. Notice of the Informal Assessment Conference was provided as required.
3. A Notice of Intention to Conduct Minor Exploration (Notice) consisting of 16 pages and 6 maps was filed by Energy West Mining Company, as mine operator, on November 27, 2007. Energy West proposed to drill two exploratory holes in Crandall Canyon according to plans submitted with the Notice. The wells were to be drilled by helicopter supported drilling as had been done for twelve prior years.
4. In response to receiving a copy of the Notice, a letter was sent by the School and Institutional Trust Lands Administration to Energy West on November 29, 2008 which advised it that prior to commencing the proposed exploratory drilling it was necessary to contact the National Forest Office to obtain a surface entry permit, notify the Price field office of the BLM at least 24 hours prior to drilling, and "contact the Utah Division of Oil Gas and Mining and obtain a coal exploration permit as may be required by SMCRA."
5. On January 10, 2008 the Division advised Energy West that it had reviewed the Notice and that there were deficiencies "that need to be adequately addressed prior to approval." The deficiencies included the need to obtain a Archeological Class I literature search and a Class III ground survey for the proposed sites, and a map of surveys for Threatened and Endangered Species (TES surveys) for the sites.
6. On January 23, 2008 Energy West submitted its deficiency responses with the required responses pertaining to the cultural resource surveys and the TES surveys.

7. On March 7, 2008 the Division received a Plan Revision to the Notice that added four (4) additional proposed drill holes to the original plan.
8. On March 27, 2008 the Plan Revision was "conditionally approved" subject to receipt within 30 days of revised copies of the Plan Revision and obtaining a Forest Service Special Road Use Permit, the concurrence of the U.S. Forest Service, and proof of water rights as necessary for the drilling. The review included analysis of the cultural resource surveys and TES surveys for the additional sites.
9. On April 24, 2008 after receiving the revised copies, the Division again advised Energy West of the conditional approval of the plan subject to the same three conditions.
10. On July 8, 2008 Energy West submitted a new Notice of Intention and Request to Relocate Drill Hole 2008-2 to a new location. The Request to Relocate consisted of three page letter of explanation, two additional pages and 6 maps. Energy West claimed the drilling would be on an existing right of way that had been reclaimed, would follow the practices in the prior approved plan, and was urgently needed to provide vital information. The Notice of the Request to Relocate indicated that the intention was for drilling to commence July 14, 2008.
11. The Division did not immediately respond and contacted the State Historic Preservation Officer (SHPO) on August 11, 2008 to determine if the cultural resources clearance had been obtained. At that time the Division was advised that the clearance had been given on July 28, 2008 after receiving a request from Energy West on July 22, 2008.
12. On August 11, 2008 the Division inspector visited the site and determined that the hole had been drilled. On August 14, 2008 the operator was sent notice that the request for a NOI was conditionally approved and was sent the Notice of Violation for proceeding to drill the relocated hole without Division approval.
13. According to the statements from the company the drill hole was commenced and completed on Monday, July 14, 2008 and that verbal approval had been received from SITLA and the Forest Service prior to drilling. The relocated drill hole was placed in a road right-of-way that had been used for exploration and then reclaimed in the early 1980's.
14. The Notice of Intention for the drilling of the six 3" diameter drill holes proposed to establish locations on a level area and cut some vegetation but not clear-away all vegetation. A 6-foot by 8-foot drill pad was to be placed on a level area. A 1-inch diameter hose was to be extended to the drill hole from a remote pump location. About 20 lbs. of coal were to be removed per hole and all cuttings were to be removed by the helicopter. All drilling equipment was to be transported to and from the site by helicopter.

CONCLUSIONS OF LAW

1. Drilling 3-inch diameter exploration holes to substantial depths on previously undisturbed natural land or on fully reclaimed natural lands is a coal exploration operation that substantially disturbs the natural land surface as provided for in Utah Code §40-10-8(1), and is required to be conducted in accordance with exploration rules at R645-200 *et seq.*, Utah Administrative Code (2008) and in accordance with the performance standards of Utah Code §40-10-17 (2008).
2. Energy West as a person seeking to conduct Minor Coal Exploration operations must comply with the all of requirements pertaining to conducting Minor Coal exploration operations at the R645-200 through 203. (R645-200-210, Utah Administrative Code)
3. Energy West as a person seeking to conduct Minor Coal Exploration operations, must submit a Notice of Intention complying with the requirements of R645-201-220 through 225. (R645-201-200, Utah Administrative Code)
4. The information to be included in a notices of intention to Conduct Minor Coal Exploration include information about the applicant, the location for the exploration, the time period for the exploration, and a description of the methods to be used, the amount of coal to be removed, the practices that will be followed to protect the area from adverse impacts if the exploration activities, and to practices to be followed to reclaim the area in accordance with and R645-202. (R645-201-210 to 225, Utah Administrative Code)
5. The practices identified at R645-202 that are to be followed by Energy West while conducting Minor Coal Exploration operations include :
 - a. Not disturbing habitats of unique or unusually high value for fish wildlife, and other related environmental values and critical habitats of threatened or endangered species as identified by the Endangered Species Act;
 - b. Separating and storing topsoil to assure successful revegetation, properly disposing of acid or toxic-forming materials, constructing roads and diversions, and protecting the hydrologic balance in accordance with the requirements of the Act;
 - c. Reclamation and revegetation of all disturbed areas as required by the Act.
6. Prior to conducting Minor Coal Exploration operations the Notice of Intention to Conduct Minor Coal Exploration must be reviewed by the Division. (R645-201-210 Utah Administrative Code)

7. The Division is responsible to:
 - a. Receive and review notices of intention to Conduct Minor Coal Exploration;
 - b. Enforce the terms of each notice;
 - c. Respond to notices of intention to Conduct Minor Coal Exploration within 15 days of receipt; and
 - d. Coordinate review of Notices of Intention to conduct Minor Coal Exploration with other government entities. (R645-200-220 and 230, Utah Administrative Code)
8. The plan for its operations as proposed by Energy West in the Notice of Intention for conducting exploration drilling operations are part of the required means of satisfying the exploration performance and reclamation standards and although they minimize the disturbance to the natural surface of the site, they plan cannot not be used as a *post hoc* justification to avoid complying with the requirement to prepare a notice of intention to conduct Minor Coal Exploration operations.
9. The plan as proposed by Energy West is in response to the requirement of the Act that minor coal Exploration operations protect the natural land surface including avoiding clearing of the land, identifying and protecting any cultural resources, avoiding impacts to wildlife (including threatened and endangered species), providing for removal of coal and drill cuttings, and reclamation and revegetation of the site as necessary.
10. The Division is required to review the notice of intention to assure compliance with these requirements, and to coordinate with the other government agencies that also have oversight.
11. The Minor Coal Exploration operations proposed by Energy West required Division review prior to commencing exploration operations, and the rules allow the Division up to 15 days to conduct the review.
12. Energy West commenced exploration operations at the relocated drill site prior to the expiration of 15 days from the date the notice of intention for the relocated drill site was submitted, and without being advised by the Division that the review was done.
13. Energy West's actions in coordinating the communications with the Forest Service and SITLA did not satisfy the responsibility of the Division to coordinate the communications and to review the Notice.
14. The failure of Energy West to confirm that the Division had reviewed the notice of intention or to allow time for review prior to commencing operations at the

revised location was technically a violation of the rule R645-201-210 requiring that a notice of intention to conduct Minor Coal Exploration operations be reviewed by the division prior to commencing operations.

15. Although the Energy West was required to obtain a review, the violation was mitigated by the following circumstances: (a) there had been a prior review of the minor coal exploration project for other locations with the same methods of operation that had been planned to conform to the requirements of the regulations; (b) a notice of intention had been submitted to the Division for review; (c) the only difference in the plan from the reviewed plan was the change in location for one drill hole to a location on a reclaimed right of way; (d) the Notice indicated that the operation was urgent and that work needed to start on a date certain; (e) the Division did not respond to advise the operator that more time was needed (which was a reasonable expectation under the circumstances); (f) the operator had obtained the consent of other government entities; (g), Energy West's long history of conducting helicopter drilling in the area and obtaining the approval of the various parties justified its good faith conclusion that drilling in a prior right of way would not affect cultural resources and that all other concerns were addressed by the plan and the consents that had been obtained; and the lack of prior problems by Energy West in allowing for review of notices of intention.

16. The acts by Energy West under the totality of the circumstances were *de minimus*, do not rise to the level justifying finding a violation, and do not violate the purposes or intent of the Act.

ORDER

NOW THEREFORE, it is ordered that the Notice of Violation is vacated.

SO DETERMINED AND ORDERED this 12th day of November, 2008



John Baza, Director
Division of Oil, Gas and Mining