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From: Angela Nance
To: efinley@efinley.com; pguyon@yahoo.com
CC: Dana Dean; John Baza
Date: 2/19/2009 5:04 PM
Subject: Bear Canyon Mine CO and Hearing
Attachments: BearCO&Hearing.pdf

Please see the attached letter regarding the Bear Canyon Mine Cessation Order and Hearing Request.

STATE OF UTAH

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February 19, 2009

Peter Guyon, Esq.
Attorney for Hiawatha Coal Company
614 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

Subject: Bear Canyon Mine Cessation Order and Hearing Request, C/015/0025

Dear Mr. Guyon:

At the Informal Assessment Conference held yesterday, it was noted that although the Division gave notice that the Informal Conference was being held under R645-401-700 with the purpose of reviewing the fact of the violation in advance of a penalty assessment, that your request had been for an informal conference under R645-400-350. I must confess that the failure to notice this difference was my fault. We routinely hold an Informal Assessment Conference as a result of a violation.

I have never been involved in an Informal Hearing under section R645-400-350 and must confess I find the language a little unclear. It appears to me that unless waived, an Informal Hearing under R645-400-350 is required if the cessation order is to remain in effect for more than 30 days. The request of the operator is only necessary to avoid waiving the right to such a hearing. There is not procedure set out for making a request to the Division or the Board. The notice requirements (R645-400-353) for this informal hearing are about the same as for the informal assessment conference except that publication is required "where practicable". The main difference between the informal assessment conference and an informal hearing is the requirement that the hearing officer be "a representative of the Board". This one requirement is at odds with the language of the next subsection requiring that within five days after the close of the hearing "the *Division* will affirm, modify or vacate the notice or order in writing". This is in the absence of any further reference to any authority of the board or board representative to make a decision. I have no doubt that the Board could designate Mr. Baza as representative of the Board for the informal hearing.

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More important is the fact that the rights of an operator to appeal a cessation order to the Board are not affected by the type of hearing. R645-400-357 indicates that the right under UCA §40-10-22(3) to have a formal board review of the Division's actions is not affected by holding or waiving an informal hearing under R645-400-350. R645-400-360 sets out the procedures for requesting such a board review hearing and does not require that an informal hearing be held prior to a board review of a cessation order. The Operator (and others) may file an application for review pursuant to the statute and the board's rules within 30 days. The nature of the board action provided for under UCA §40-10-22(3) is a little different than the usual hearing process. An "investigation" is to be conducted which is to provide an "opportunity for a public hearing" if requested by the applicant. It appears that this public hearing is optional and in addition to the formal hearing to review the cessation order. In addition, under the UCA §40-10-22(3) process, a hearing for injunctive relief is available with as little as five days notice.

A decision of the Division as the result of an informal assessment conference held pursuant to R645-401-700 is also subject to board review. In accordance with R645-401-800 an appeal may be filed with the Board after the penalty has been determined subject to payment of the amount of the penalty. Such a hearing is to be initiated by filing a petition with the board according to the Board's rules. The fact of the violation can be determined unless it has been previously adjudicated at hearing under R645-400-360.

Based on this view of the options available, it may be preferable to stipulate that although the hearing was noticed as a hearing under R645-401-700 that the Division and Hiawatha agree that it satisfied the request for a hearing under R645-400-350 and that a decision by Mr. Baza constitutes a decision for the purposes of the informal hearing and that Hiawatha is not precluded by the incomplete penalty determination under R645-401-700 from pursuing a board appeal of the cessation order under UCA §40-10-22(3) and R645-400-360. I believe that this is the case even without our agreeing, but such a written understanding may clarify the record. We should also clarify that the decision on the fact of the violation as a result of the hearing under R645-401-700 in addition to not preventing Hiawatha from seeking board review of the cessation order, does not preclude a later penalty determination by the Division and rights to informal hearing and appeal of that decision by Hiawatha, as may be appropriate if there is no appeal or if the board upholds the cessation order.

If you have any questions, please call me at (801) 538-5348.

Sincerely,

Steve

Steven F. Alder
Assistant Attorney General

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