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United States Department of the Interior

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MAR 25 2013

DIV. OF OIL, GAS & MINING

MAR 21 2013

John R. Baza
Division of Oil, Gas and Mining
1594 West North Temple
Salt Lake City, UT 84116

Subject: Ten Day Notice #X12-140-933-001 and Action Plan #UT-2012-001, Bond Held for the Crandall Canyon Mine

Mr. Baza:

Thank you for your letter dated January 30, 2013 in response to ten day notice (TDN) #X12-140-933-001. This was our office's second TDN identifying our belief that the performance bond held for the Crandall Canyon Mine may be insufficient to assure completion of the reclamation plan in the event of forfeiture. Our concern stems from the potential liability for long-term water treatment due to elevated iron concentrations.

We issued our first TDN (#X09-140-182-002) pertaining to this issue on November 6, 2009 and terminated it on October 17, 2011. That TDN identified a potential failure to maintain adequate bond coverage at all times. Our termination of that TDN was based upon Division Order 10A (DO-10A) constituting appropriate action to cause the potential violation to be corrected. We instituted Action Plan #UT-2012-001 on October 17, 2011 to monitor the implementation of DO-10A. The Utah Board of Oil, Gas & Mining (the "Board") subsequently reversed and modified DO-10A in its March 6, 2012 Order, most notably by deleting the long-term bonding requirement and determining that only three-years' of water treatment costs be added to the bond. We issued TDN #X12-140-933-001 for the potential failure to secure bond sufficient to assure completion of the reclamation plan on December 7, 2012. Prior to submitting your response to the second TDN, the Board revisited this issue. The Board met on January 23, 2013 and issued a written Order on January 28, 2013. The January 28, 2013 Order modified the Board's March 6, 2012 Order by requiring water quality monitoring data to be submitted on a recurring 6-month schedule for the purpose of reevaluating the bond's adequacy. Your January 30, 2013 response relied heavily upon the direction provided under the Board's March 6, 2012 and January 28, 2013 Orders.

After receiving a response to a TDN from the Division of Oil Gas and Mining (the Division), the Office of Surface Mining Reclamation and Enforcement (OSM) must determine whether the standards for appropriate action, or good cause for such failure, have been met in accordance with 30 CFR 842.11(b)(1)(ii)(B). An action or response from the Division that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate

action” if it causes a violation to be corrected or “good cause” if it shows valid reason for failure to take such action.

“Appropriate action” includes enforcement or other action authorized under the State program to cause a violation to be corrected. “Good cause” includes: (i) under the State program, the possible violation does not exist; (ii) the regulatory authority requires a reasonable and specified amount of additional time to determine whether a violation of the State program exists; (iii) the regulatory authority lacks jurisdiction from acting on the possible violation or operation; (iv) the regulatory authority is precluded by an administrative or judicial order from an administrative body of court of competent jurisdiction from acting on the possible violation where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 526(c) of the Act have been met; or (v) with regard to abandoned sites as defined in §840.11(g) of this chapter, the regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

In your response you state that you believe you have “good cause” for not taking action in response to the TDN because under your program a violation does not exist and because you are precluded by a Board Order from taking action on the possible violation. You also state that you have taken “appropriate action” to address the bonding issue based on a plan to monitor and reassess the need for bond adjustments on a six-month recurring schedule.

You state in your response that the alleged violation (inadequate bond) does not exist because you have secured a \$720,000 non-diminishing, rolling forward bond. This bond amount was determined by the Board’s March 6, 2012 Order based on certain evidence presented. We have reviewed the same evidence and determined that the evidence upon which the Board based its decision (the analysis of hydrologic data and hydrologic predictions) may not be scientifically valid. In addition, the hydrologic predictions may have been misrepresented in expert testimony before the Board leading the Board to reach an invalid conclusion that three years’ water treatment costs would be a sufficient amount of bond to guarantee the reclamation. Therefore, the Board’s decision and your response to TDN #X12-140-933-001 stating that the violation does not exist lacked a rational basis in fact after proper evaluation of relevant criteria. Because your response is based partially on scientifically invalid evidence, it could be argued that your response is arbitrary, capricious, and an abuse of discretion.

In your response you also state that you have good cause for not taking action on the possible violation because you are precluded from acting by the Board’s March 6, 2012 Order and that Order is based on the violation not existing. This statement misconstrues the “good cause” criteria of 30 CFR 842.12(b)(1)(ii)(B)(4)(iv), which states: *The State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 526(c) of the Act have been met;*(emphasis added). The Board’s March 6, 2012 Order recognized a violation of State bonding regulations by noting that “*the Utah Administrative Code R645-301-812.700 requires that the Division ensure adequate bond coverage be in effect at all times, that Utah Code § 40-10-15(1) requires that the bond amount account for hydrology as a consideration, and that Utah Code § 40-10-16(2) reflects that the bond is intended to cover, among other things, water pollution, including ongoing and / or future post-mining pollution*” and

subsequently requiring the bond amount to be increased. Although the terms of that Board Order attempted to correct the violation of bonding requirements, the Order itself was not based on the violation of bonding requirements not existing. Therefore, the Board's March 6, 2012 Order precluding you from taking additional action to cause the violation to be corrected fails to meet the good cause criteria of 30 CFR 842.12(b)(1)(ii)(B)(4)(iv). Additionally, the Board's March 6, 2012 Order failed to stipulate when the three years (within which water quality would become compliant) began or ended and allowed but did not compel reevaluation of the bond amount if the predictions upon which that Order was based were to break down.

However, the Board's January 28, 2013 Order modified the above referenced points by requiring hydrologic monitoring data to be submitted on a six-month recurring interval for the purpose of reassessing bond adequacy based on additional data as it becomes available. The first such submittal is to be filed with the Board thirty (30) days prior to the Board's regularly scheduled July 2013 hearing, with updates being filed by the same deadline prior to each of the Board's regularly scheduled January and July hearings thereafter. In doing so, the Board initiated a biannual review to examine the adequacy of the performance bond held for the Crandall Canyon Mine and to determine whether a bond adjustment is necessary based upon extended data. Your January 30, 2013 letter indicates your belief that the increased frequency of data submission should be considered appropriate action to address the water treatment bonding issue.

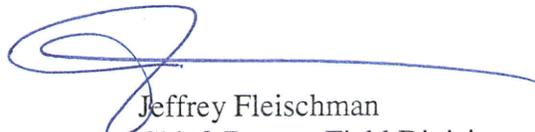
The State's decision to establish a recurring evaluation of water quality monitoring data to determine whether a bond adjustment is necessary is within the discretion of the State as provided under R645-301-830.410. In relevant part, this provision provides that the Division may specify periodic times or set a schedule for reevaluating and adjusting bond amounts. The authority to determine bond amounts and calculate adjustments as changing conditions require is expressly the burden of the Division. Any decision by the Division to adjust a bond would entitle the permittee to an informal conference pursuant to R645-301-830.422 and would carry appeal rights pursuant to R645-300-200. We recognize the Board's authority to require the submittal of water quality monitoring data and to set forth a schedule for reevaluating the adequacy of this bond due to the appeal process under which it was decided. We also note that the Division possesses the specialized expertise necessary for evaluating hydrologic monitoring data in a statistically valid manner and the programmatic authority to determine bond amounts.

Water treatment liability is associated with the Crandall Canyon Mine permit for as long as pollutional discharge persists, and UCA §40-10-15(5) requires the Division to adjust bond amounts from time to time where the cost of future reclamation changes. However, that requirement is currently confounded by inconclusive data regarding the potential duration of pollutional discharge. Currently available data shows a slight decreasing trend but is not sufficient to draw any statistically valid conclusions regarding the duration of pollutional discharge. The State is acting within its authority to determine a cost basis for any necessary bond adjustment. The six month recurring evaluation of the bond held for the Crandall Canyon Mine represents a valid interpretation of the discretion afforded to the State in ensuring bond amounts remain adequate at all times. The schedule for reassessing and ensuring the adequacy of the performance bond held for the Crandall Canyon Mine is in accordance with your approved program and mitigates our concerns regarding the adequacy of the bond.

For the reasons specified above, OSM has determined that the Division's scheduled biannual bond reviews, which will be based on the most current conditions and data available, constitute appropriate action authorized under Utah's approved program to cause this violation to be corrected. This determination of appropriate action affects the status of Action Plan #UT-2012-001. Under the Plan, Updated Action Sequence 8, we indicated that in the event the Division takes appropriate action to cause the violation to be corrected no further corrective action would be required (beyond Genwal's compliance with that Division action). Because the scheduled bond reviews and any necessary bond adjustments will be handled under the Division's authority, the Division will ensure Genwal's compliance with those actions. Ten Day Notice #X12-140-933-001 and Action Plan #UT-2012-001 are hereby resolved. We will continue to monitor this situation in an oversight capacity and stand ready to provide technical assistance pertaining to water quality issues at your request.

Please feel free to contact me at (307) 261-6550 or jfleischman@osmre.gov if you have any questions or require our assistance in this process.

Sincerely,



Jeffrey Fleischman
Chief, Denver Field Division

Cc: David Hibbs, UtahAmerican Energy