BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY

STATE OF WYOMING

IN THE MATTER OF NOTICE OF VIOLATION	)
ISSUED TO WESTERN FUELS-WYOMING INC.	)
AND AMES CONSTRUCTION INC.	)
PO Box 1809, Gillette, WY 82717-1809	)
PERMIT NO.599-T4, NOV #100199	)
DOCKET NO. #4412-09	)

DIRECTOR'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

This matter came before the Director of the Department of Environmental Quality (DEQ) pursuant to a request by Western Fuels–Wyoming Inc. for an Informal Conference as provided in W.S. 35-11-901(c), W.S. 35-11-437(c)(i) and Chapter VI of the Wyoming Department of Environmental Quality Rules of Practice and Procedure.

This matter was fully heard by the Director at an Informal Conference held March 20, 2009 in response to a timely request for an Informal Conference as to the appropriateness of the Notice of Violation 100199. The violation cited is a failure to follow the approved mine plan. The operator remediated the problem immediately and no penalty was assessed.

Western Fuels–Wyoming Inc. (WFW) was represented by Beth Goodnough. She was accompanied by Ken Isenberger of Ames Construction Inc. (Ames), Tom Stalcup and Lyle Witham of Basin Electric, and Frank Ferris of Intertech. The Land Quality Division of the DEQ was represented by Don McKenzie and Jon Sweet. All of the above named individuals participated in the conference.

At issue is Notice of Violation No. 100199 (Docket No. 4412-09) written to Western Fuels-Wyoming Inc. and Ames Construction Inc. concerning the Dry Fork Mine, Permit No. 599-T4. This NOV was originally written to Ames construction Inc. and Western Fuels-Wyoming Inc. on January 8, 2009 for failure to follow the approved mine plan. Excavated materials from outside of the permit area were hauled and dumped inside the permit area. On January 23, 2009 this NOV was modified by removing Western Fuels-Wyoming Inc. from the violation. On February 6, 2009, the NOV was again modified, adding Western Fuels-Wyoming Inc. back on the violation.

An additional issue was raised over whether the violation could be considered a minor violation under Chapter 16, Section 2(f) of the Coal Rules and Regulations.

After reviewing the record and being fully advised of the premises, the Director hereby makes his Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

1. Approximately 150 truckloads of carbonaceous earthen material were excavated at a site north of the mine permit issued to Western Fuels-Wyoming, Inc. (WFW)
2. This material was hauled to a site within lands that are regulated under a mine permit issued to WFW.
3. The entity that excavated and hauled this material is Ames Construction, Inc. (Ames)
4. Nothing heard at the Informal Conference would suggest any prior communication between WFW and Ames concerning the disposition of this material.
5. The activity took place over a day and a half, and as soon as WFW became aware, the activity ceased and appropriate remediation work was initiated.
6. WFW is the responsible party of record for following the approved mine and reclamation plans that control surface disturbance, placement of overburden, and other duties as specified in the mining permit. Despite the sale of the land to Basin Electric for possible use as a landfill, the actual landfill permit and corresponding reclamation liability had not been assigned by the DEQ to Basin Electric at the time of the activity in question, and responsibility for care of the area in question remained with WFW.
7. Ames has a license to mine, issued in March, 2008.
8. Ames had previously moved similar excavated materials from construction sites on the permit area to this same site.
9. In a letter dated January 9, 2009, WFW claims that extensive communications about compliance requirements had taken place with Ames.
10. The mine and reclamation plan does not address the importation of materials such as this.
11. There was minimal potential for environmental harm, and any potential threat was taken care of as soon as practicable.

CONCLUSIONS OF LAW

The Director has jurisdiction over the subject matter and of the parties to this proceeding pursuant to W.S. 35-11-902(c) and W.S.35-11-437(b)(i) of the Wyoming Environmental Quality Act and the Rules of Practice and Procedure, Chapter VI of the Wyoming Department of Environmental Quality.

DECISION

Although the mine plan does not address the importation of materials such as this, the mining and reclamation plans do not anticipate importation of any material. Had this type of activity been contemplated at the time of permit application review, DEQ would have demanded that it be accounted for in the plans. The fact that an activity is not addressed in the plan does not constitute approval for that activity.

It is expected that the mine operator exercise due care and maintain an adequate level of awareness about activities occurring on permitted lands for which the operator is responsible. The activity in question occurred over a day and a half and the operator evidently did not notice 150 truckloads until notified by a DEQ employee. When this was called to their attention, the activity was stopped.

A License to Mine covers operations on the specific permit area for which the applicant intends to work. See W.S. 35-11-410(a) and (b). Ames obtained a license in March of 2008, at the request of

WFW. It is expected that the applicant for a License to Mine take the necessary time to know the scope and responsibilities that accompany a license. Construction work on lands that are outside of the area for which the license was granted are not covered by the license.

WFW provided a list of meetings at which they state that they fully communicated with Ames about the requirements of compliance with DEQ rules and regulations. Since the material in question was similar to that which had been properly disposed of previously, Ames assumed that they could dispose of the material in question in the same manner.

Although I expect WFW to take care of permitted lands under their control, I can find no indication that they are directly responsible for this violation, and therefore direct the Land Quality Division to rescind the third modification to the NOV.

At the informal conference, it was noted that the material in question was not usable at the construction site where it was excavated and had to be disposed of elsewhere. While it is unclear whether Ames made the decision to dispose of the material on WFW's permit, or they were ordered to do so by another contractor or even Basin Electric itself, Ames should have had enough knowledge to at least get permission from WFW management beforehand and address regulatory requirements. I cannot find any reason to reverse the decision to cite Ames in the NOV.

As to the request at the informal conference to consider this to be a minor violation, I am unable to do so. The language in Chapter 16, Section 2(f) of the Coal Rules and Regulations cites the specific examples of minor violations that have been approved by the Office of Surface Mining. The violation cited in the NOV does not fall within any of these examples and therefore, the request is denied.

ORDERED THIS 15th DAY OF APRIL, 2009.

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY

John V. Corra, Director

This decision may be appealed to the Environmental Council for a period of 15 days after the date the parties receive the decision. Appeals shall be directed to:

Chairman
Environmental Quality Council
122 W. 25th Street, Room 1714
Cheyenne, WY 82002