

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL
QUALITY**

STATE OF WYOMING

**IN THE MATTER OF A NOTICE OF VIOLATION)
ISSUED TO THUNDER BASIN COAL COMPANY)
Black Thunder Mine: Permit No. 233-T7)
P.O. Box 406, Wright, Wyoming 82732-0406)
NOV No. 100561)**



DOCKET NO. 4519-09

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

This matter came before the Director of the Department of Environmental Quality pursuant to a request by Thunder Basin Coal Company 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.

At issue is NOV # 100561, issued by Don Crecelius on July 2, 2009, for two violations. The first violation cited is a failure to follow the approved mine plan pursuant to W.S. 35-11-415 (b)(ii). The Black Thunder Mine (BTM) constructed a crossing of the Little Thunder Diversion II Channel. The crossing was not approved by the LQD nor was it built according to provisions required by Mine Plan Section MP-3.5.3.2.1. The second violation cited a failure to follow LQD Rules and Regulations Chapter 4, Section 2(f)(i) and Chapter 4, Section 2(f)(vii) pertaining to sedimentation control devices.

An Informal Conference was held by the Director on September 9, 2009. Thunder Basin Coal Company was represented by Bob Stowe, Jamie Torske, Lecia Craft, and Wendy Hutchinson. The Land Quality Division of DEQ was represented by Don McKenzie, Don Crecelius, and Larry Barbula. After reviewing the record and being fully advised of the premises, the Director hereby makes the following Findings of Fact, Conclusions of Law, and Decision.



FINDINGS OF FACT

1. No sedimentation pond exists below the disturbed area of the diversion channel.
2. There was an advance communication with LQD, but the specific subjects of the crossing and sedimentation control were not discussed.
3. A crossing of the Little Thunder Diversion II Channel was planned, constructed, and reclaimed during the month of June, 2009.
4. The length of time that construction of the crossing took place was approximately 24 hours, and the diversion was completely blocked off for about 6 hours.
5. There were no rain events during this time period and, therefore, no sediment problems occurred.
6. The area of disturbance is small.
7. The crossing was temporary.
8. In 2004, verbal discussions between BTM and LQD personnel for the purpose of developing an amenable method to install crossings resulted in permit revisions dated December 21, 2004.
9. BTM has installed "approximately" 4 crossings since that time.
10. There is disagreement over the intent and meaning of the 2004 discussions and subsequent permit revision, and there is no distinction made between temporary and permanent crossings nor is there any attempt to clarify whether and when a crossing is also a road.

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. During the Informal Conference the following statutes, rules, and permit conditions were referred to:

1. W.S. 35-11-415 (b) states; 'The operator, pursuant to an approved surface mining permit and mining plan and reclamation plan, or any approved revisions thereto,

shall: (ii) Conduct all surface mining and reclamation activities within the permit area in conformity with his approved plan;”



2. Mine Plan Section MP-3.5.3.2.1 titled, “Diversion Channels”, deals with design criteria for diversion channels. The last paragraph states; “Crossing structures may be needed for diversions. See MP-3.5.3.2.3 for design considerations”.
3. Mine Plan Section MP-3.5.3.2.3 titled, “Culverts”, deals with selection and design of all culverts. The last paragraph states in part; “Culverts will also be used in road crossings on diversions.”
4. LQD Rule and Regulations Chapter 4, Section 2(f)(i) states; “All surface drainage from affected lands excluding sedimentation ponds, diversion ditches, and road disturbances, shall pass through a sedimentation pond(s) before leaving the permit area. Sedimentation control devices shall be constructed prior to disturbance. The Administrator may grant exemptions to the use of sedimentation ponds where, by the use of alternative sediment control measures, the drainage will meet effluent limitation standards or will not degrade receiving waters.”
5. LQD Rules and Regulations Chapter 4, Section 2(f)(vii) states; “Sediment control measures for affected lands. Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to prevent additional contributions of sediment to stream flow or to runoff outside the affected land. Such measures may consist of limiting the extent of disturbed land and stabilizing, diverting, treating or otherwise controlling runoff.”
6. LQD Rules and Regulations Chapter 4, Section 2(j)(i)(C) defines ancillary roads as any road that is not classified as a primary road. The definition of ancillary roads is further narrowed by MP-2.2.5. Section 2(j)(vii)(C)(II) refers to the prohibition of fords on primary roads, but allows the administrator to approve fords for temporary routes during road construction.
7. Mine Plan Section MP-2.2.1 provides general discussion of roads, approval requirements for roads outside of the pit, and how stream crossings can be made.

DECISION

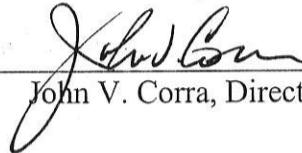


1. BTM depends on a statement in part 2 of the NOV where LQD states that the disturbance is not a road to make a claim that the permit language dealing with culverts for "road crossings" does not apply. Although the phrase "road crossing" invites some interesting debate over interpretation, the disturbance was the type considered when BTM and LQD agreed to permit language dealing with the need to cross diversion channels from time to time. It is clear that when a crossing is created, such as that constructed by BTM in this instance, a culvert is required.
2. Part 2 of the NOV cites Chapter 4, Section 2(f)(vii) of the LQD Rules and Regulations, which requires sediment control measures for affected lands. There is no debate that lands were affected.
3. BTM refers to Section 2(f)(i) and contends that the exclusion of diversion ditches from the requirement that the drainage pass through a sedimentation pond exempted them from installing sediment control for the crossing. The diversion channel does not pass through a sedimentation pond below the disturbance. Disturbance did take place within the diversion channel and a sedimentation control device should have been in place prior to the disturbance.
4. The activity in question presents an area where clarification and modification of the permit language is necessary. The ability of the operator to comply in this instance, as well as future instances, will depend on clear instructions in the permit pertaining to road crossings of diversions. Despite previous attempts by both parties to deal with situations of this nature, this violation still occurred.
5. All and/or parts of all of the items listed under conclusions at law were referred to during the informal conference and afterwards in written statements submitted by both parties. Although excerpts from these can be used to support arguments on both sides, when read in their entirety I find that they do not provide enough clarity to adequately describe how the activity noted in the NOV should be interpreted.
6. The NOV is upheld.
7. Given the low level of seriousness, the diligence on the part of the operator to minimize disturbance and the vagueness of the permit language, I will reduce the penalty to zero upon a satisfactory modification to the permit language that will

clarify the terms and conditions for disturbances to the diversion structures at Black Thunder Mine. The proposed changes must be reviewed by me and are to be submitted by December 31, 2009. At that time, an appropriate schedule for permit modification, if necessary, will be developed by the LQD and BTM.

ORDERED THIS 14th DAY OF OCTOBER, 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

