

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 Peabody School Creek Mining, LLC for an Informal Conference as provided in W.S. 35-11-902(d), 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 the violation and the associated civil penalties associated with Notice of Violation 100567, Docket No. 4884-11. This NOV was issued on August 11, 2011, by Stacy Page, designated representative of the Department of Environmental Quality, based on a review of the School Creek Mine Annual Report and a follow up inspection where unpermitted topsoil stockpiles, and stockpiles without approved sediment control were noted. The informal conference was conducted on September 28, 2011, at the offices of the Director of the Department of Environmental Quality.

Peabody School Creek Mining, LLC (Peabody) was represented by Phil Dinsmoor, Rose Haroian, and Adam Stephens. The Land Quality Division of the Department of Environmental Quality was represented by Nancy Nuttbrock, Stacy Page and Larry Barbula. All of the above named individuals participated in the conference. Also in attendance were LQD employees, Anna Krzyszowska-Waitkus and Lowell Spackman. 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. On August 3, 2011, a review of the 2011 Annual Report indicated the existence of three unpermitted topsoil stockpiles.
2. An August 4, 2011, inspection noted four topsoil stockpiles associated with four recently constructed reservoirs.
3. A subsequent review of the permit revealed that the seven topsoil stockpiles were not permitted, and that six of these did not have approved sediment control.
4. Peabody is cited for being in violation of Wyoming statutes, LQD rules and regulations, and permit requirements concerning reclamation plans:
 - a. W.S. § 35-11-406(b)(v), which states, in part, that the mining and reclamation plans must have; "One or more maps...showing location and

extent of the proposed affected lands...” “The map shall also show the location of alltopsoil conservation areas...”

- b. Land Quality Rules and Regulations Chapter 2, Section 6(b)(i), which states in part “...The reclamation plan shall include: A plan for topsoil... removal; storage, protection...” “This shall include a description with location maps...” The location...of each topsoil stockpile shall be described and shown on a map.”
 - c. Land Quality Rules and Regulations Chapter 2, Section 5(a)(i)(D)(I) and (IV), which states in part “In addition to that information required by W.S. 35-11-406(b), each application for a surface mining permit shall contain:
(i) A complete operations plan...including...(i)(D)(I) Location of proposed water treatment control and monitoring facilities;..(IV) Location of and typical design for surface water and groundwater hydrologic control methods including proposed temporary impoundments, sedimentation ponds...water collection and discharge facilities.”
5. Land Quality Rules and Regulations Chapter 4, Section 2 Sedimentation Ponds, subsection (i) states in part: “...All surface drainage from affected lands excluding sedimentation ponds, ...shall pass through a sedimentation pond(s) before leaving the permit area. The Administrator may grant exemptions to the user of sedimentation ponds where, by the use of alternative sediment control measures...”
 6. The School Creek Permit (The Permit), Section 5.1.1, Types of Surface Water Control states in part: “...Also, surface water control structures are needed to prevent water pollution and conserve topsoil. Alternatives include diversion ditches, pipelines, culverts, flood control reservoirs, detention berms, sediment ponds, sediment traps, and alternative sediment control measures. Generally, the most economical method that meets the requirements of the application will be used....In no case will any facility be constructed which has not been thoroughly evaluated and designed in accordance with applicable state and federal requirements. Construction will not begin until approval is received...”

7. The Permit, Section 5.1.5.7, Erosion Control Practices states in part that “ASCMS (alternative surface water control structures) which can be integrated into reclamation activities include...sediment basins...”
8. The Permit, Section 5.1.5.9, ASCM Regulatory Procedure states in part that “Prior to the construction of an ASCM, WDEQ/LQD will be notified in writing of the proposed ASCM....”
9. The Permit, Section 4.2.2, Topsoil Stockpiling states in part that “...As stockpiles are created, the actual stockpile numbers, locations and volumes will be provided in the Annual Report.” Sub paragraph 6 states that “Ditches, berms or ponds will be constructed to preserve topsoil and contain runoff.”

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(d) 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

A review of the annual report and the permit shows that the actual location and number of topsoil stockpiles is different from that shown in the permit. This can be expected as the actual mining progression is very likely to be different than that planned for in the permit application. However, a formal permit revision is required as a follow up to the annual report so that the as-constructed stockpiles and sediment control structures are recorded. Additionally, this brief review of the permit found a map denoting typical ASCMs, and berms were not noted. While berms can be a form of an ASCM, permit sections 5.1.1 and 5.1.5.9 describe what is needed in order for a berm to be allowed, and when it is allowed to be constructed.

I find that the portion of the NOV dealing with the construction of the topsoil stockpiles is in conflict with the apparent intent of the permit language in Permit Section 4.2.2. The operator may have made an incorrect assumption that reporting the actual locations of these stockpiles in a subsequent permit revision was sufficient. I order that

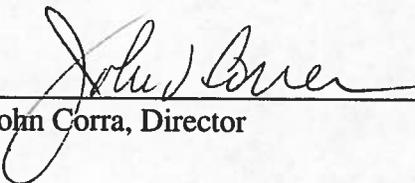
the LQD permit coordinator and representatives of Peabody School Creek Mine meet to agree upon an appropriate process to avoid this misunderstanding in the future..

Regarding the lack of prior approval for the creation of a berm and the use of same for sediment control, there was conflicting testimony at the conference that shows different interpretations between the operator and LQD of the statute, rules, and permit language. While the permit language at Section 4.4.4, allows for the use of berms to preserve topsoil and contain run-off, Section 5.1.1 is clear that detention berms will not be created without prior approval. Based on this, I uphold this portion of the NOV.

I find that the penalty assessment is correct.

ORDERED THIS 14TH DAY OF OCTOBER, 2011

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY



John 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