THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
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May 15, 2015

Fred Wallis
Usibelli Coal Mine, Inc.
PO Box 1000
Healy, AK 99743

Subject: Decision to Affirm Notice of Violation N-S0603-05292014-1

Mr. Wallis:

This decision pertains to the subject Notice of Violation (NOV) issued June 5, 2014 (enclosed) and the subsequent Informal Conference held in the Large Conference Room February 24, 2015 at the Department of Natural Resources (DNR) offices located at 3700 Airport Way, Fairbanks, AK.

Background
The Two Bull Ridge Mine permit consists of a 2,252-acre mine site located approximately five miles northeast of Healy, Alaska. The DNR Division of Mining, Land and Water (DMLW) issued NOV (#N-S0603-05202014-1) to Usibelli Coal Mine, Inc. (UCM) for violations on the Two Bull Ridge Mine.

The nature of the violation is as follows.

> *During the May 29th inspection of the Two Bull Ridge mine, the Division noticed that equipment had crossed Hoseanna Creek at an unarmored low water crossing near ponds T-3 and T-4. During initial discussion with by Usibelli with Division staff, this crossing was to be used only when there was sufficient ice present to protect the stream bed and bank. This crossing during non-frozen conditions disturbed the riparian habitat, bank, and the bed of Hoseanna Creek causing minimal damage and erosion into Hoseanna Creek*
>
> *A review of the Two Bull Ridge Operation and Reclamation Plan found that no low water stream crossings to facilitate the maintenance of Ponds T-3 and T-4 were included in the approved plan. The only access to ponds T-3 and T-4 approved under the current operations and reclamation plan is across Hoseanna Creek at bridge 3 and then along an auxiliary road along the north side of the Hoseanna creek. 11 AAC 90.491 requires that a design/plan be submitted in the operations and reclamation plan for approval. This plan must show how the operation will prevent or minimize erosion, siltation;, minimize diminution or degradation of water quality or quantity; prevent or minimize damage to fish, wildlife, or their habitat and related environmental values and refrains from*

significantly altering the normal flow of water in streambeds or drainage channels. Additionally, a review of the Stream Buffer Zone waiver under the original Two Bull Ridge Final Findings shows that while crossing Hoseanna Creek (Lignite Creek) during construction was allowed the waiver did not extend to crossing for long term maintenance. A waiver request would have to have been submitted that showed how the requirement of 11 AAC 90.353 would be met at this crossing and how it was preferred over the constructed access road.

The NOV cited the violation of Alaska Statute 27.21.210 and regulations 11 AAC 90.353, 11 AAC 90.491(a), and 11 AAC 90.491(e). The NOV listed the following actions that were required to abate the violation: (1) Install sedimentation controls on the north and south sides of Hoseanna Creek, and (2) Cease all use of the low water crossing. The cover letter dated June 5, 2014 accompanying the NOV indicated that if Usibelli wishes to use this stream crossing it must provide to the Division a request under 11 AAC 90.129 that shows how the requirement of 11 AAC 353, 11 AAC 90.491 (a) and 11 AAC 90.491(e) will be met.

UCM responded to the NOV with a letter dated June 13, 2014. The letter acknowledged with respect to the violation of 11 AAC 90.491 that "*there was some vegetation damage and a slight potential of erosion, which was immediately addressed by UCM by installing sediment control and seeding the area.*"

With respect to the violation of 11 AAC 90.353 Stream Buffer Zones, the UCM letter asserted that UCM would have complied with any DNR request to correct this omission at any time within the last 12 years and asked DNR to reconsider issuance of an NOV as they feel a more appropriate response would be to notify UCM that a minor revision is required to formalize this crossing in the permit documents.

On June 23, 2014, UCM officially requested an Informal Conference to appeal the NOV and agreed to a time extension due to the additional work load anticipated during the summer.

The Informal Conference was held February 24, 2015 in Fairbanks. The conference was recorded and transcripts of the Informal Conference (enclosed) were provided May 11, 2015 to the DMLW Mining Section Chief.

Informal Conference Summary
Oral testimony was provided by three individuals: Fred Wallis, Alan Renshaw, and Richard Sivils, all employed by UCM. No written documents, photos, materials, or other evidence were submitted during or after the conference.

Mr. Wallis testified that UCM feels this is a paperwork issue that could have been dealt with as a minor revision. He further testified that they did do some creek crossings over the years, "*so we had in our mind that we originally permitted for crossing the creek there. The only thing [in] our mind really missing was a paperwork issue of not having the creek crossing in the permit which should have been covered, it was covered under implied because between the time that it was noted and brought to us, inspectors were on site approximately 150 times to inspect the mine site and that not once had this been brought up to change the wording in the permit to add the creek crossing at this location.*" He indicated that they felt it was an implied authorization and

that the NOV should be revoked and then implement a minor revision so that they would have the crossing in place.

Mr. Renshaw added that DNR approved the plans [for] the road built and it ended up on all of their maps so to get an NOV later does not seem fair and is the reason they are asking for reconsideration of the NOV. He indicated that an NOV is something where they knowingly violated the law, not where they thought they had everything covered and permits in place.

Mr. Sivils indicated they provided BMP (Best Management Practices) control and that it's always an ongoing effort to control the sediment.

Mr. Renshaw further indicated that they did the best they could and the BMPs were well within the high watermark and so constantly getting taken out by any high rain event. He indicated that the creek crossing was approved under their original permit as an ice road and that during the summer time the only thing required in the original submittal was to make sure they had a fish and game permit.

Discussion

According to the Two Bull Ridge Mine Inspection Report (enclosed) on Page 8, Figure 8 depicts a photograph of the tracks from vehicle equipment that had crossed over Hoseanna Creek at an unarmored low water crossing during ice free conditions. A review of the Two Bull Ridge Operation and Reclamation Plan and the approved permit found no low water crossing approved for that location, nor an approved Stream Buffer Zone waiver. The equipment disturbed the riparian habitat and the bed of Hoseanna Creek.

Moreover, the Mine Site Inspection report (enclosed) prepared by federal inspectors of the Office of Surface Mining Reclamation and Enforcement (OSMRE) for that time period further documents the Stream buffer zone violation on Page 3 wherein the report states:

> *Excavator tracks were observed in the Hoseanna Creek at an unapproved location near sediment ponds T-3 and T-4. The excavator was likely gaining quick access to clean out the ponds rather than driving along the access road. UCM indicated that it had a Fish and Wildlife permit to cross at this location during frozen conditions; however, DMLW had not made such an approval in the SMCRA permit and the stream was obviously not frozen at the time of the crossing. Because this activity violated the stream buffer zone, negatively affected the streambed / riparian habitat and contributed additional sediment to the stream (offsite impact), DMLW issued violation #NS0603-05292014-1 to UCM. DMLW instructed UCM to immediately install sediment control structures in the field. UCM hydro-seeded the area and placed silt fence and hay wattles within 24 hours (see Figure #4).*

The OSMRE report also provided a photograph (Figure #4) of excavator tracks observed crossing Hoseanna Creek and the subsequent sediment control structures placed by UCM at the NOV area. The report also stated on Page 8 that: *UCM must post SBZ signs along Hoseanna Creek, and any other stream, as required by the State regulations and the approved permit.*

UCM did not deny that a violation occurred. In UCM's written response, they indicated the crossing was permitted under a valid Alaska Fish and Game Fish Habitat Permit, but did not

provide any evidence that it was approved to use this crossing in the existing Two Bull Ridge Operation and Reclamation Plan. The written response from UCM declared the road is within 100 feet of the creek for most of its length and that UCM has always conducted the Hoseanna Creek crossing within that reach of creek. UCM also acknowledged some vegetation damage and a slight potential for erosion. These statements by UCM employees tend to support the NOV citations of 11AAC 90.491(a) and (e).

UCM mentioned a 2002 inspection report in which DNR requested that UCM construct a road to the ponds from the main haul road, but UCM did not provide the inspection report or show how it is relevant to the existing permit or this NOV. Testimony from UCM asserts it was evident in subsequent inspection reports that DNR approved a stream buffer zone waiver for the entire reach of Hoseanna Creek from Bridge 3 to the ponds. UCM failed to provide any supporting evidence or copies of inspection reports in support of the assertion. It is unclear how the previous inspection reports alluded to by UCM apply to the current version of the approved permit. UCM maintains that since DNR has never requested UCM to add additional language to the ASCMCRA permit documents at any time during the last 12 years, DNR should reconsider the issuance of the NOV. However, UCM also states it feels the more appropriate response would be to notify UCM that a minor revision is required to formalize this crossing in the permit documents.

The NOV did notify UCM that a violation was observed because the crossing is not described as a stream crossing in the approved operation and reclamation plan. Moreover, the June 5, 2014 cover letter for the NOV provided clear notification that *if Usibelli wishes to use the crossing it must provide to the Division a revision request under 11 AAC 90.129 that shows how the requirements of 11 AAC 90.353, 11 AAC 90.491(a) and 11 AAC 90.491(e)* are met.

A revision request for this crossing would likely be considered minor, as UCM suggests, per 11 AAC 90.129 (5). To date, UCM has not submitted a complete application for a minor revision to formalize this crossing in the permit documents that shows how the requirements of 11 AAC 90.353, 11 AAC 90.491(a) and 11 AAC 90.491(e) are met. DNR will process a complete application if one is received.

The testimony of Mr. Wallis repeatedly asserted that UCM believes that this is a paperwork issue that could be dealt with as a minor revision. DNR agrees that it is a paperwork issue in the sense that the stream crossing activity is not adequately described in the permit (paperwork) and therefore the crossing was a violation of the permit. As stated above DNR notified UCM that if UCM wishes to uses this crossing the matter can be addressed as a minor revision, if UCM submits a complete application consistent with 11 AAC 90.129 (5).

Mr. Renshaw indicated that the NOV was not fair and should be reconsidered. I have reconsidered the NOV and conclude the NOV as written is consistent with 11 AAC 90.615. 11 AAC 90.615 (a) provides in part that a notice of violation will be issued if, on the basis of an inspection, a violation of Chapter 90 is found.

Mr. Sivils testified that it's always an ongoing effort on UCM's part to control the sediment and that the BMP control they provided to address the crossing, after receiving the NOV, was unsuccessful and washed way a couple of times during the summer. He provided no testimony to dispute the violations described in the NOV. Furthermore, UCM should have informed

DMLW of its concerns about the placement of BMPs and worked with the division to implement alternate BMPs

Decision
The request by UCM to revoke the NOV is denied and the Notice of Violation N-S0603-05292014-1 is hereby affirmed.

A person affected by this decision may appeal it in accordance with 11 AAC 02. An appeal must be received within 20 calendar days after the "date of issuance" of this decision. An appeal may be mailed or delivered to the Commissioner, Department of Natural Resources, 550 West 7th Avenue, Suite 1400, Anchorage, AK 99501; or faxed to (907)269-8918; or sent by electronic mail to dnr.appeals@alaska.gov. If no appeal is filed within 20 calendar days this letter becomes a final order.

If you have any questions concerning the items identified above please contact Russell Kirkham at russell.kirkham@alaska.gov or by phone at 907-269-8650.

Sincerely,

Scott Pexton

Scott Pexton, Mining Section Chief
Division of Mining, Land & Water
Alaska Department of Natural Resources

Enclosures:
1. Copy of letter dated June 5, 2014 and Notice of Violation
2. Copy of Transcripts of Informal Conference of Notice of Violation (N-S0603-05292014-1), prepared by Russell Kirkham

cc via email with enclosures:
Alan Renshaw, UCM
Brent Goodrum, DMLW
Russell Kirkham, DMLW
Robert Postal, OSMRE