BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF RAG SHOSHONE (f/k/a)	)	
CYPRUS SHOSHONE COAL CORPORATION,	)	DOCKET NO. 99-4601
MINING PERMIT NO. 477-T4	)	
DEQ Docket No. 3073-99	)	

ORDER

On November 16, 2000, the Environmental Quality Council (Council) held a public hearing on reconsideration of an objection to the Department of Environmental Quality (DEQ), Land Quality Division's (LQD) denial of a revision to the RAG Shoshone Coal Corp. Permit 477-T4. RAG Shoshone Coal Corp. was represented by Edward W. Harris of Holland and Hart and DEQ was represented by John Burbridge, Assistant Attorney General. Council members present at the hearing were John N. Morris, Hearing Examiner, Thomas Dunn, Steve E. Williams, Nick Bettas (via telephone), Robert Rawlings and Wendy Hutchinson. Also present for the Council were Terri A Lorenzon, attorney for the Council, and Joe Girardin, paralegal for the Council.

At a public meeting held on February 8, 2000, the Council, by a vote of a majority of the Council members, reached a decision in this matter. The Council hereby issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. RAG Shoshone Coal Corporation (Shoshone) owns and operates the Shoshone No. 1 coal mine in Carbon County, near Hanna, Wyoming. The first mining permit for this operation was issued to Shoshone's predecessor in interest, Carbon County Coal Company, by the DEQ, Land Quality Division in 1978.

2. The Wyoming program for regulating surface coal mines is comparable to the federal Surface Mining Control and Reclamation Act (SMCRA) at 42 U.S.C. §1291 (28), and regulations promulgated under the federal statute. Pursuant to an agreement between Wyoming and the federal Office of Surface Mining (OSM), Wyoming implements the surface coal program. Section 701(28)(A) provides that SMCRA requirements are applicable to facilities that are "resulting from or incident to" a surface coal mining operation. The OSM has oversight responsibilities where states operate the surface coal mining program.

3. Carbon County Coal Company was a Colorado partnership between Dravo Coal Company, a subsidiary of Dravo Natural Resources Company, and Rocky Mountain Energy Company, a subsidiary of the Union Pacific Railroad Company (UPRR). Union Pacific Land Resources (UPLR) another subsidiary of UPRR was one of the surface owners with lands included in the mine permit area and it owned property where the rail loop is located. Carbon County Coal did not obtain surface owner consent for those lands owned by the UPLR although surface owner consent was required for all lands within the permit area. When Shoshone purchased the mine, the mine permit did not contain surface owner consent from the UPRR or a UPRR subsidiary.

4. The rail facilities at issue in this matter serve the Shoshone mine and consist of a rail loop connected to a rail spur which is connected to the main line of the UPRR, approximately six miles from the Shoshone mine. The rail facilities are located in the far southern portion of Shoshone's permit area, and are generally separate from the mine operations except that the load-out facility for the Shoshone mine is located at a point along the rail loop.

5. RAG's ownership of the coal load-out facility and its responsibility for reclamation of the load-out are not issues in this proceeding.

6. When Shoshone's annual report was reviewed in 1998, LQD found that Shoshone's reclamation bond included most, but not all, of the rail facilities located within the permit area. All of the rail facilities were included within the permit area, but approximately 1000 feet of rail spur had not been covered by the mine's reclamation bond. LQD asked RAG to increase its reclamation bond to include the costs of reclaiming the last 1000 feet of rail line.

7. RAG responded to the LQD request for an increase in its bond with a proposal to revise the mine permit by completely removing the commitment to reclaim the rail facilities from the permit and the reclamation bond. This request was made on October 20, 1998 and DEQ denied the revision on April 7, 1999.

8. Shoshone filed a petition for review with the EQC on April 16, 1999.

9. The EQC held a hearing on February 18, 2000 and, on May 2, 2000, the EQC met and voted to deny RAG's permit revision. The order was issued on October 23, 2000.

10. RAG filed a petition for rehearing on June 23, 2000. On October 23, 2000 the EQC heard arguments on the petition and granted the rehearing.

11. On November 16, 2000 the EQC heard new arguments on the case: neither party to the case sought presentation of new evidence in the rehearing.

12. Public notice of the proposed permit revision had not been issued at the time of the rehearing. On November 22, 2000 the Council ordered the State and RAG to proceed with issuance of public notice in accordance with DEQ Land Quality

Coal Rules and Regulations, Chapter 13. The Council further ordered that individual notice be given to those surface owners whose land lies under the rail facilities at Shoshone Mine.-

13. Notice was published by RAG and the surface land owners were notified in accordance with the Council's order. No objections to the proposed permit revision were received during the public comment period.

14. After public notice, the EQC considered the RAG permit revision at a public meeting on February 8, 2001

15. Evidence produced at the hearings revealed that the UPRR owns the tracks and the equipment used for the rail loop, and the UPRR obtained the rights of way for the rail loop.

16. The rail facilities were surveyed, engineered, and constructed by the UPRR. The UPRR and Carbon County Coal Company entered into a financial arrangement where the coal company advanced money to the UPRR to construct the rail facilities, and the UPRR repaid the mine company.

17. After coal from the Shoshone mine is prepared for shipment it is sent to the load-out facility. Title to the coal changes when the coal is loaded into rail cars, and at that point, a customer owns the coal. The customer and the railroad enter into an agreement on the cost of and payment for the transportation.

18. Pursuant to a contract between the Union Pacific and Shoshone's predecessor, the UPRR operates the rail facilities as a common carrier in interstate commerce and it may haul cargo other than Shoshone coal on the rail facilities.

19. Rail lines that are used as common carriers in interstate commerce are governed by regulations of the United States Department of Transportation. These regulations provide the exclusive means to abandon common carrier rail lines.

20. Shoshone does not control the operation or use of the rail facilities.

21. Shoshone has obtained agreements with the UPRR in order to construct the load-out facility, power lines that travel over the rail line, and a crossing over the rail line.

22. The UPRR currently uses the rail loop to turn trains around before the trains travel to neighboring coal mines for loading. The Seminoe II mine is owned and operated by a company unrelated to the UPRR or Shoshone, and trains bound for the load-out facility at Seminoe II use the rail loop that is within the Shoshone permit area.

23. The Shoshone rail loop is the only loop currently available for turning trains that are bound for the load-out facility at Seminoe II. A loop at a neighboring mine that was used at an earlier time has been removed.

24. Reclamation of the rail facilities at Shoshone, with the exception of the 1000 feet of rail spur that was identified by DEQ, has always been covered by the reclamation bond for this mine. Permits for coal mines are renewed every five years and the reclamation bonds for the mine are reviewed annually. RAG was aware of these commitments at the time the mine was purchased.

25. Carbon County Coal Company negotiated the agreements with the Union Pacific for the construction and operation of the rail facilities, and these rail facilities were built for the Shoshone mine. The agreements were completed at the time Shoshone's predecessor was in the process of permitting the mine, and that permit includes the rail facilities in the permit area and under the coverage of the reclamation bond.

26. The rail facilities were located and constructed to provide service to Shoshone Mine. Once constructed, the rail facilities also provided service to an adjacent mine operation.

CONCLUSIONS OF LAW

1. The Environmental Quality Council has jurisdiction over the parties to and the subject matter of this proceeding. Wyo. Stat. §35-11-112.

2. The Wyoming Environmental Quality Act (the Act) requires surface coal mines to obtain permits from DEQ. Wyo. Stat. §35-11-402-1(d).

3. Surface coal mine permits include reclamation plans and bonds to cover the costs of reclamation in the event the operator cannot fulfill the reclamation responsibilities. Wyo. Stat. §35-11-406(b), 417.

4. The Act requires surface coal mine operations to obtain surface owner consent for the mining permit and reclamation plan. Wyo. Stat. §35-11-406(b)(xi)-(xii).

5. Shoshone Mine did not and has not acquired surface owner consent for the rail loop as required by the Act.

6. Surface coal mine operations include those "areas upon which are sited structures, facilities or other property or materials on the surface, resulting from or incident to these activities." Wyo. Stat. §35-11-103(e)(xx).

7. The LQD regulations for surface coal mines provide that "constructed or upgraded roads and railroad spurs shall be included within the permit area from that point that they provide exclusive service." LQD Coal Rules and Regulations, Chapter 4, Section 2(j)(i)(A).

8. Federal case law has addressed whether particular facilities are "resulting from or incident to" surface coal mining operations. *National Wildlife Federation v. Hodel,* 839 F.2d 694, 745 (D.C.Cir. 1988). The Court in *Hodel* stated that the test for "resulting from or incident to" allows regulatory authorities to "consider the myriad site specific situations".

9. In *Citizens Coal Council, et al.* 142 IBLA 33 (1997) the Interior Board of Land Appeals (IBLA) reviewed a pipeline, and a rail line to determine if either of these facilities were appropriately regulated as part of the mine operation or if they should be regulated as transportation under other statutes. The IBLA conducted an extensive review of the facts pertaining to the rail line prior to reaching a decision. Applying a three part analysis, the IBLA concluded that rail facilities must be functionally and economically tied to the mine facility to be considered as resulting from or incident to surface coal mining activities that are subject to SMCRA regulation. The determination of the level of economic and functional ties to the mine that are necessary to trigger regulation under the coal mining program is left to a state where it has the authority to implement the coal program.

10. After conducting an exhaustive review of the facts and law during the contested case hearing and during the reconsideration of the original decision in this matter, it is concluded that these rail facilities are, and always have been, functionally and economically tied to the Shoshone mine and the rail facilities are therefore properly included in Permit 477-T4. The reclamation bond should continue to cover the obligation to reclaim the rail facilities.

ORDER

The decision of the Department of Environmental Quality denying the application for a permit revision to Mine Permit 477-T4 is affirmed.

IT IS SO ORDERED THIS 11th DAY OF JULY 2001.
FILED JULY 11, 2001.

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