



STATE OF
COLORADO

Simmons - DNR, Leigh <leigh.simmons@state.co.us>

West Elk Mine: Conservation Groups Response to MCC's Request to Modify Cessation Order 2020-001

1 message

Robin Cooley <rcooley@earthjustice.org>

Thu, Aug 27, 2020 at 10:12 PM

To: ginny.brannon@state.co.us

Cc: jim.stark@state.co.us, jason.musick@state.co.us, leigh.simmons@state.co.us, jeff.fugate@coag.gov, dtimmons@wildearthguardians.org

Director Brannon,

I'm attaching information Conservation Groups would like you to consider in response to Mountain Coal's request to modify Cessation Order 2020-001, including a recent Compliance Advisory the Water Quality Control Division issued based on the lack of a storm water discharge permit for the illegal construction in the Sunset Roadless Area. Thank you for your consideration of this information. Please contact me or Daniel Timmons, cc'd here, if you have any questions.

Sincerely,

Robin Cooley

Robin Cooley (she/her)

Staff Attorney

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2 attachments



Response to MCC request to modify Cessation Order.pdf
52K



2020-08-06-Mountain Coal - Compliance Advisory.pdf
8328K

August 27, 2020

BY ELECTRONIC MAIL

Ginny Brannon
Director
Colorado Division of Reclamation, Mining and Safety
1313 Sherman St., Rm. 215
Denver, CO 80203
Ginny.brannon@state.co.us

**Re: Response to Mountain Coal Company's Request to Partially Lift Cessation Order
CO-2020-001 Regarding the West Elk Mine**

Dear Ms. Brannon:

High Country Conservation Advocates, WildEarth Guardians, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively, "Conservation Groups") provide the following information in opposition to Mountain Coal Company's ("Mountain Coal's") request to modify Cessation Order CO-2020-001 to withdraw all restrictions imposed by the Order on Mountain Coal's activities at the West Elk Mine on LW-SS2. Mountain Coal has provided no information that would justify modifying the Cessation Order.

Specifically, Mountain Coal asks the Colorado Division of Reclamation, Mining and Safety ("DRMS") to authorize Mountain Coal to (1) "travel on, maintain, and otherwise use the temporary road and already completed drill pads for LW-SS2," (2) "construct the remaining drill pads approved in PR-15 and MR-441," including related tree-cutting, and (3) "drill the [Methane Vent Boreholes] approved in PR-15 and MR-441." To support its request, Mountain Coal provided letters the company solicited from Forest Service and Bureau of Land Management ("BLM") officials that purport to confirm that the vacatur of the Colorado Roadless Rule ("CRR") does not affect Mountain Coal's legal right of entry to conduct these activities within the Sunset Roadless Area.

However, neither Mountain Coal nor these federal agencies have addressed the critical issue in this matter—Mountain Coal's unlawful decision to build a new road in the Sunset Roadless Area in direct contravention of the Tenth Circuit's decision ordering vacatur of the North Fork Exception to the Colorado Roadless Rule. Mountain Coal's decision to bulldoze a new road and construct drill pads before the district court, during a pandemic, was able to issue a formal order

vacating the North Fork Exception, its continued construction of drilling pads after the district court entered the vacatur order, and its plans to construct more drill pads are all illegal under the Tenth Circuit's ruling. Accordingly, Conservation Groups respectfully request that DRMS uphold the Cessation Order.

The Colorado Roadless Rule generally prohibits road construction and tree removal in Colorado Roadless Areas unless a specific exception applies. 36 C.F.R. §§ 294.42(a), .43(a); *see also id.* § 294.40 (noting exceptions are "narrowly focused"). Here, the only exception that would have authorized Mountain Coal's June 2020 road and drill pad construction was the North Fork Exception, which the Tenth Circuit ordered vacated on March 2, 2020. U.S. Ct. App. Op. at 22, ECF No. 69.1; *see also* 36 C.F.R. § 294.43(c)(1)(ix). The Tenth Circuit issued its mandate on April 24, 2020. This mandate eliminated the North Fork Exception from the Colorado Roadless Rule, and therefore there was no lawful basis for Mountain Coal's road construction, drill pad construction, or any activities using the illegal road.

In its August 19, 2020 letter, the Forest Service confirmed that "[d]ue to the vacatur of the North Fork Exception, and under the terms of the 2017 lease modification all coal-related surface operations within the lease modification area are currently subject to the CRR's prohibitions on road construction and reconstruction contained in 36 C.F.R. § 294.42, unless other exceptions under the CRR apply." Neither the Forest Service nor any federal court has indicated that any other exception to the CRR's general road-building prohibition is applicable. Instead, the Forest Service has simply turned a blind eye to Mountain Coal's unlawful attempt to circumvent the Tenth Circuit's mandate by rushing ahead to bulldoze the new road before the district court's formal vacatur order issued.

The Forest Service's representation that Mountain Coal maintains any rights to conduct surface coal-related activities within the Sunset Roadless Area rests entirely on the agencies' disingenuous characterization of the illegally-built road as an "existing road." Forest Service Letter at 4. This approach, however, ignores Mountain Coal's deliberate evasion of the Tenth Circuit mandate and decision to hastily construct the new road before the district court entered the vacatur order. Because the new road was constructed *after* the Tenth Circuit ordered vacatur of the North Fork Exception, it cannot be deemed an "existing road" onto which Mountain Coal can bootstrap activities that would otherwise be unlawful within the Sunset Roadless Area. To agree to the Forest Service's interpretation would reward Mountain Coal's illegal actions and to encourage even more.

As previously explained in Conservation Groups' June 11, 2020 Request for Inspection and July 15 request for Party Admission into MLRB Hearing on Cessation Order No. CO-2020-001 (and federal court briefing attached to same), the Tenth Circuit's March 2, 2020 mandate ordering vacatur of the North Fork Exception was not meaningless prior to the district court's June 15, 2020 ministerial order vacating the Exception. To the contrary, the Tenth Circuit's mandate was

“effective when issued.” Fed. R. App. P. 41(c). Once the appellate mandate issues, “the parties’ obligations become fixed”—the “[mandate’s] effectiveness is not delayed until . . . the trial court or agency . . . acts upon it.” Fed. R. App. P. 41(c) advisory committee’s note. The Tenth Circuit’s holding had immediate and retroactive legal effect. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (recognizing that the principle that “judicial decisions operate retrospectively, is familiar to every law student”). An appellate court order must be given effect “as to all events, regardless of whether such events predate or postdate [the court’s] announcement of the rule.” *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993). Accordingly, Mountain Coal could not ignore the Tenth Circuit’s order and take matters into their own hands simply because the district court had not taken the non-discretionary task of entering the vacatur order. See *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992) (“The Rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court.”). Indeed, such an interpretation of the law would encourage parties to rush to conduct illegal actions after losing in court.

The Forest Service also attempts to justify additional drill pad construction by claiming that it is incidental to “not otherwise prohibited management activities.” Forest Service letter at 4 (citing 36 C.F.R. § 294.42(c)(5)). But this is circular. The “management activities” at issue here are Mountain Coal’s operations in the Roadless Area, which were authorized solely pursuant to 36 C.F.R. § 294.43(c)(ix). This exception has been vacated. Accordingly, DRMS should maintain the Cessation Order as written.

In the event that DRMS decides to modify the Cessation Order in any manner, it should also require Mountain Coal to obtain a stormwater discharge permit required under the federal Clean Water Act and Colorado Water Quality Control Act as an additional remedial action necessary for abatement. In its haste to bulldoze in the Sunset Roadless Area before the district court entered its vacatur order, Mountain Coal failed to apply for a required stormwater discharge permit. This failure is inexplicable given that Mountain Coal previously obtained a water quality permit for similar activities at the West Elk Mine. (Permit No. CO0038776).

As a result of Mountain Coal’s failure to apply for the required permit, the Water Quality Control Division (“WQCD”) of the Colorado Department of Public Health and Environment issued a Compliance Advisory on August 6, 2020, advising the company of alleged violations of the Colorado Water Quality Control Act and its implementing regulations (attached). While we understand that Mountain Coal may have submitted an application for the required stormwater discharge permit *after* receiving the Compliance Advisory, no permit has yet been issued and so the company remains in apparent violation of the Water Quality Control Act. In light of Mountain Coal’s failure to obtain the necessary stormwater discharge permits required for its June 2020 illegal road-building and well pad construction activities, should DRMS modify the Cessation Order to allow any use of the unlawfully-constructed roads, it should also require the company to obtain all necessary permits, including a valid stormwater discharge permit.

Thank you for this opportunity to provide additional information for your consideration in conjunction with Mountain Coal's request to modify the Cessation Order. We urge DRMS not to do so, and instead to maintain the status quo.

Sincerely,

Daniel Timmons
WildEarth Guardians

Robin Cooley
Earthjustice

*Attorneys for High Country Conservation
Advocates, WildEarth Guardians, Center for
Biological Diversity, Sierra Club, and
Wilderness Workshop*

Enclosure

cc: Jim Stark, DRMS
Jason Musick, DRMS
Leigh Simmons, DRMS
Jeff Fugate, Asst. Attorney General



August 6, 2020

CERTIFIED MAIL: 7018 0360 0000 1227 5868

Weston Norris, GM
Mountain Coal Company, LLC
5174 Highway 133
Somerset, Colorado 81434
wnorris@archcoal.com

Re: Permit Requirements for Stormwater Outfalls - **Compliance Advisory**
Mountain Coal Company, LLC — West Elk Mine
Gunnison County

Mr. Norris:

It has come to the Water Quality Control Division's attention that the above listed entity may be engaged in activity that is subject to the stormwater permitting regulations and the coal mining effluent limitation guidelines, as described in this correspondence. Note that activities subject to permitting include areas of previous activity that have not been finally stabilized.

According to Colorado Division of Reclamation, Mining and Safety records an inspection of the above referenced facility was conducted on June 10, 2020. During that inspection it was identified that recent surface disturbance had occurred on land within the boundary of the Sunset Roadless area; specifically roads and pads associated with mine vent boreholes. It was identified that the amount of disturbance observed was approximately 3,960 linear feet of road and a total of 0.72 acres between two mine vent borehole pads, pad #SS2-3 and #SS2-5. In addition, a google earth satellite photo dated October 2, 2019 shows additional disturbed areas apparently associated with mining activity located north of these borehole pads but outside of the area addressed by outfalls in the facility's CO0038776 individual permit.

The division has no record that a permit has been applied for or obtained for discharges to surface waters of the State from the above referenced activities conducted at the site. The facility's individual permit, CO0038776, does not authorize discharges from the above referenced locations. This correspondence provides notification of potential violations of the Colorado Water Quality Control Act; a background on the stormwater regulations; and directions for obtaining the required discharge permit coverage, as applicable to the site.

Consistent with SB89-181, the Water Quality Control Division is solely responsible for the issuance and enforcement of permits for point source discharges into state surface waters [C.R.S. § 25-8-207(7)(b)(I)]. Stormwater discharges are point sources subject to the Clean Water Act and Water Quality Control Act. Nothing in this Compliance Advisory shall be construed to preempt or alter the statutory and regulatory responsibilities and authorities of any other regulatory agency. Additionally, in accordance with the Colorado Water Quality Control Act and the Colorado Discharge Permit System Regulations 5-CCR 1002-61, CDPS discharge permit coverage is required for stormwater discharges from the above reference activities to surface waters of the State since they are considered point source discharges. If permit coverage is required it must be maintained until the site is finally stabilized.



Since activities have already begun at the West Elk Mine, it is the division's expectation that Mountain Coal Company, LLC will submit the required application or permit modification form as soon as possible, but no later than **August 20, 2020**. Note that permit coverage for discharges subject to the coal mining effluent limitation guidelines, as discussed in the C00038776 individual permit and fact sheet, must be under that permit, or an alternative permit with effluent limits implementing those effluent limitation guidelines.

Failure to obtain the required discharge permit coverage constitutes a violation of the Colorado Water Quality Control Act, (25-8-101 et seq., C.R.S. 1973 as amended) and can result in enforcement action including civil penalties of up to \$54,833 per day per violation. If the required discharge permit coverage is not obtained and stormwater discharges from the site once the regulated activity has started, the owner(s) and operator(s) of the site are in violation of the Colorado Water Quality Control Act and may be subject to enforcement action by the division. The Colorado Water Quality Control Act authorizes both civil and criminal penalties.

This Compliance Advisory is intended to advise the above listed entity of alleged violations of the Colorado Water Quality Control Act, its implementing regulations and permits, so that appropriate steps can be taken to avoid or mitigate formal enforcement action or to correct our records (if applicable). This Compliance Advisory does not constitute a Notice of Violation or Cease and Desist Order and is not subject to appeal. The issuance of this Compliance Advisory does not limit or preclude the division from pursuing its enforcement options concerning the above violation(s). The division will evaluate the facts associated with the above-described violation(s) and if a formal enforcement action is deemed necessary, the owner(s) and operator(s) may be issued a Notice of Violation / Cease and Desist Order that may include the assessment of penalties.

If you have any questions, please contact me at 303-692-2356 or by email at joseph.campbell@state.co.us. In addition, if you would like to discuss the permitting option for these discharges, please contact Kathy Rosow at 303-692-3521 or by email at kathleen.rosow@state.co.us.

Regards,



Joe Campbell
Work Group Lead
Compliance Unit
WATER QUALITY CONTROL DIVISION

Attachments: DRMS 06-22-2020 Inspection Report


EC: File Copy (COUT file: COUT00161)
Kathleen G Welt, kwelt@archcoal.com



PERMIT INFORMATION

Permit Number: C-1980-007 Mine Name: West Elk Mine Operator: Mountain Coal Company, LLC Operator Address: Ms Kathleen G Welt 5174 Highway 133 Somerset, CO 81434	County: Delta, Gunnison Operation Type: Underground Permit Status: Active Ownership: Private
	Operator Representative Present: John Poulos, Bob Munz
Operator Representative Signature: (Field Issuance Only) 	

INSPECTION INFORMATION

Inspection Start Date: June 18, 2020 Inspection Start Time: 10:30 Inspection End Date: June 18, 2020 Inspection End Time: 12:30		Inspection Type: Coal Partial Inspection Inspection Reason: Citizen Complaint Weather: Clear	
Joint Inspection Agency: Citizen		Joint Inspection Contacts: 	
Post Inspection Agency: None		Post Inspection Contacts: 	
Inspector(s): Leigh Simmons Jason Musick, Jim Stark	Inspector's Signature: 		Signature Date: June 19, 2020

Inspection Topic Summary

NOTE: Y=Inspected N=Not Inspected R=Comments Noted V=Violation Issued NA=Not Applicable

N - Air Resource Protection

N - Roads

N - Availability of Records

N - Reclamation Success

N - Backfill & Grading

N - Revegetation

N - Excess Spoil and Dev. Waste

N - Subsidence

N - Explosives

N - Slides and Other Damage

N - Fish & Wildlife

R - Support Facilities On-site

N - Hydrologic Balance

N - Signs and Markers

R - Gen. Compliance With Mine Plan

N - Support Facilities Not On-site

N - Other

N - Special Categories Of Mining

N - Processing Waste

N - Topsoil

COMMENTS

This was a partial inspection made in response to a citizen's complaint and request for inspection, dated June 11, 2020, that was received by the Division of Reclamation, Mining and Safety (Division) on June 16, 2020.

The inspection was conducted by Leigh Simmons, Jason Musick and Jim Stark of the Division. John Poulos and Bob Munz of Mountain Coal Company (MCC), Matt Reed of High Country Conservation Advocates (HCCA), and Julie Slivka of Wilderness Workshop (WW) were in attendance.

The focus of the inspection was on recent surface disturbance that had occurred on land within the boundary of the Colorado Roadless Area; specifically roads and pads associated with Mine Ventilation Boreholes (MVBs) for the SS2 panel in the Sunset Roadless Area.

GENERAL MINE PLAN COMPLIANCE:

The pads and roads that were inspected had been constructed in accordance with the approved mine plan.

A cessation order (CO-2020-001) was issued to MCC on the same day that the inspection took place, requiring the immediate cessation of all surface disturbing activities in the Sunset Roadless Area until the cessation order is abated. No surface disturbing activities were in progress at the time of the inspection, and no heavy equipment was observed during the inspection.

SUPPORT FACILITIES - Rule 4.04:

The recently constructed road, built to access MVBs SS2-1 through -5, was inspected. The existence and location of the road was documented in the inspection report of June 11, 2020. No new road had been constructed since that inspection. Two pads (SS2-3 and SS2-5) had been constructed. Survey stakes with pink flagging tape had been placed at the locations where the MVBs were to be drilled, although no drilling had taken place at the time of the inspection.

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4

The locations of all disturbances were field verified using the internal GPS receiver of a Samsung Galaxy S9+ cell phone and the Esri Collector app. Features collected in the field are shown in figure 1, overlain on an aerial image. Figure 2 shows the same features overlain on a copy of the map showing the approved layout of pads and roads (the map was added to Exhibit 80 of the Permit Application Packet (PAP) with the approval of Minor Revision 441, and was georeferenced using projected section lines). The length of the road was measured at 1,207m (3,960ft). The area of the SS2-3 pad was measured at 1,521m² (0.38acres), and that of SS2-5 was 1,373m² (0.34acres).

Topsoil had been scraped from the road surface and pushed to the downslope side of the road, together with the fallen tree trunks, where it could be readily accessed for future reclamation.

The two pads that had been constructed had firm level surfaces. Topsoil had been salvaged, stockpiled, seeded, mulched with straw, and marked with a sign-post. Straw wattles had been staked around the base of topsoil stockpiles in order to control sediment runoff. Vegetation cleared from the pad surface had been placed around the bottom of the pad outslope so as to control sediment runoff from the disturbance. Mud-pits had been dug on both pads in anticipation of well drilling, and were protected by barbed wire fences.

DOCUMENTS RECEIVED

N/A

OTHER (SPECIFY)

N/A

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4

ENFORCEMENT ACTIONS/COMPLIANCE**Infraction Number:** CO2020001

Inspection Date: June 10, 2020

Date Issued: June 18, 2020

Primary Topic: Right of Entry

Secondary Topic: other

Tertiary Topic:

Description: On April 24, 2020 the United States Court of Appeals for the Tenth Circuit issued a mandate ordering the United States District Court for the District of Colorado to vacate the North Fork Exception to the Colorado Roadless Rule. On June 15, 2020 the United States District Court for the District of Colorado entered an order vacating the North Fork Exception to the Colorado Roadless Rule, 81 Fed. Reg. 91,811 (Dec. 19, 2016). Notwithstanding BLM coal leases C-1362 and COC-67232, after reviewing the relevant facts and Orders from the 10th Circuit and the United State District Court, the Division has determined that Mountain Coal has failed to maintain its legal right to enter the Sunset Roadless area at the West Elk Mine. Mountain Coal must immediately cease all surface disturbing activities in longwall panels LWSS-1, LWSS-2, LWSS-3, and LWSS-4 at the West Elk Mine. If Mountain Coal is currently conducting any surface disturbing activities, it must immediately stop and stabilize the area(s) to prevent any off-site impacts pursuant to the Colorado Surface Coal Mining Reclamation Act. The Division further determines that a condition of significant imminent environmental harm exists.

Abatement #: 1

Abatement Due Date: 9/14/2020

Abatement Due Extended Date:

Abatement Date:

Abatement Description: Notwithstanding BLM leases C-1362 and COC-67232, Mountain Coal must provide the Division with detailed information regarding its assertion that it maintains legal right of entry to the Sunset Roadless area and why it is not in direct conflict with the District Court order vacating the North Fork Exception to the Colorado Roadless Rule.

Number of Partial Inspection this Fiscal Year: 9Number of Complete Inspections this Fiscal Year: 4

PHOTOGRAPHS AND FIGURES



Figure 1: Features collected in the field using handheld GPS, showing locations of constructed road and pads, overlain on aerial image (credit: Esri)

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4

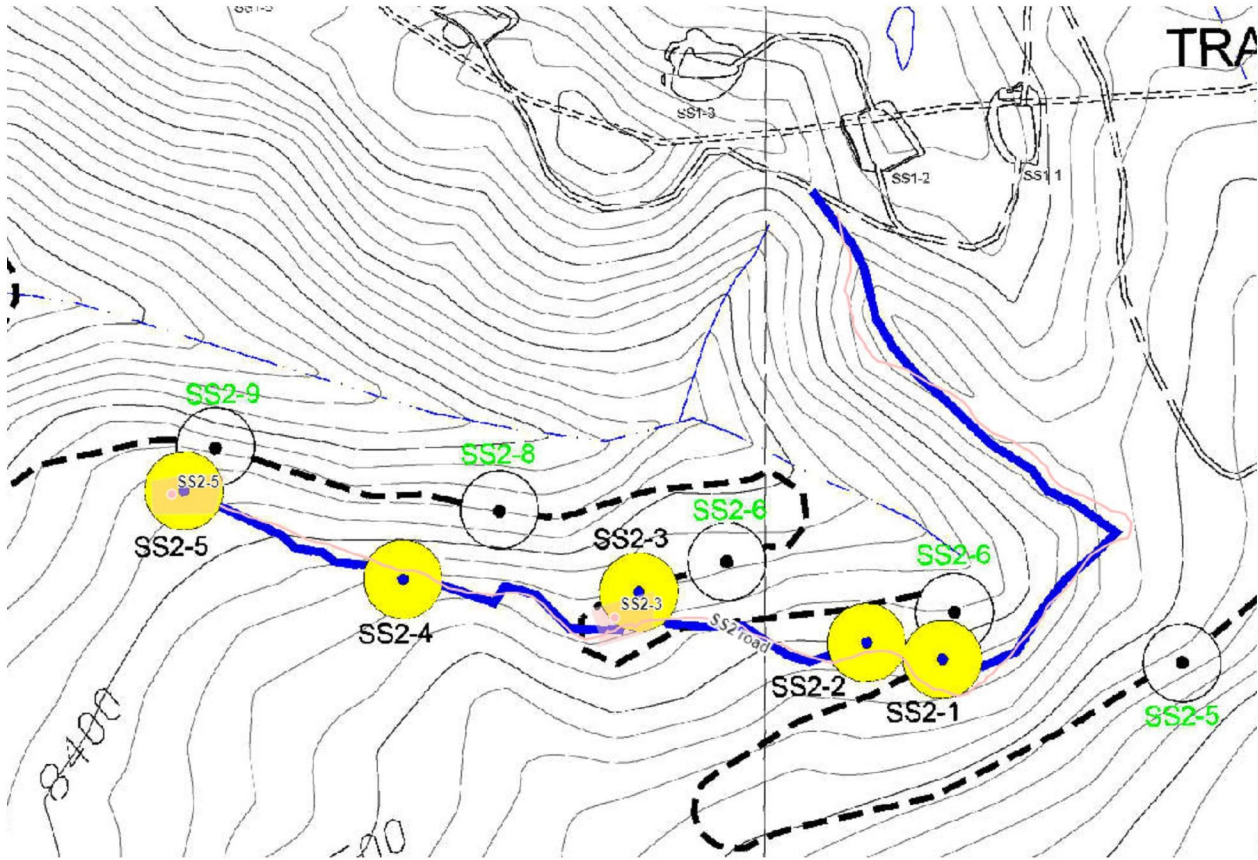


Figure 2: Features collected in the field using handheld GPS, showing locations of constructed road and pads, overlain on georeferenced copy of map showing approved layout of pads and roads

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4



Figure 3: SS2-3 pad from the west



Figure 4: Topsoil stockpiled on SS2-3 pad

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4



Figure 5: Outslope of SS2-3 pad



Figure 6: Topsoil stockpiled on SS2-5 pad

Number of Partial Inspection this Fiscal Year: 9

Number of Complete Inspections this Fiscal Year: 4