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OMAR MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

OMAR MINING COMPANY, CONTESTANT	Contest of Citation
v.	Docket No. WEVA 81-284-R Citation No. 667436; 2/3/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Chesterfield Prep. Plant

DECISION

Appearances: Donald A. Lambert, Esq., Charleston, West Virginia, for the contestant; Leo J. McGinn, Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by the Contestant challenging the legality and propriety of a citation issued by MSHA charging the contestant with a violation of mandatory safety standard 30 C.F.R. 77.216-2(a)(18). Respondent filed a timely answer in the proceeding asserting that the citation was properly issued, and pursuant to notice duly served on the parties, a hearing was conducted in Charleston, West Virginia, on April 28, 1982, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq.

2. 30 CFR 77.216 and 77.216-2.

3. Commission Rules, 20 CFR 2700.1 et seq.

Issues

The critical issue presented is whether or not the contestant violated cited mandatory safety standard 30 CFR 77.216-2(a)(18), as charged in the modified citation issued in this case. Additional issues raised by the parties are discussed at the appropriate places in this decision.

Discussion

The original section 104(a) citation in this case No. 0667436, was issued on February 3, 1981, and it charged the contestant with a violation of mandatory safety standard 30 CFR 77.216-2(b). The condition or practice described by the inspector as a violation states as follows on the face of the citation (Exh. G-2):

> Company has not submitted the additional information for impoundment 1211 WV 40430-02 which was requested by the District Manager on October 30, 1980.

The citation was subsequently modified on March 10, 1981, for the purpose of amending the original citation to reflect the correct citation to the mandatory standard allegedly violated as 30 CFR 77.216-2(a)(18).

The October 30, 1980, letter referred to in the citation, is from MSHA District Manager Jim Krese (Exh. G-1), and it states as follows:

> It has recently come to our attention that the emergency spillway for the subject impoundment is not of adequate size to meet design criteria. We have evaluated the original design and our analysis indicates that the emergency spillway discharge data used in the flood routing was too high.
> It is requested that your company evaluate the emergency spillway design and submit a plan for corrective action.
>
> If you have any questions concerning this matter, or are not in agreement with our conclusion, please contact this office at the earliest possible date.

Mandatory standard 30 CFR 77.216, requires a mine operator to submit design, construction, and maintenance plans for structures which impound water, sediment, or slurry if such an existing or proposed structure can:

> (1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or
>
> (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or
>
> (3) As determined by the District Manager, present a hazard to coal miners.

Mandatory standard section 77.216-2, contains the minimum information required to be filed with MSHA by a mine operator once the initial plan

required by section 77.216 is filed, and included among the kinds of information which must be filed is a general "catch-all" stated in subsection (a)(18) of section 77.216-2, which states as follows:

> (18) Such other information pertaining to the stability of the impoundment and impounding structure which may be required by the District Manager.

The citation issued after the inspector determined that the contestant had not responded to the aforementioned letter from District Manager Krese.

Testimony and evidence adduced by MSHA

MSHA Inspector Stuart H. Shelton, testified that he is a graduate civil engineer, that he is familiar with Omar Mining Company's Robinson Creek Impoundment, and that as part of his MSHA inspection duties has "been looking at this site off and on for close to 10 years" (Tr. 12). Mr. Shelton identified exhibit G-1 as a copy of a letter dated October 30, 1980, signed by MSHA District Manager J. J. Krese, and which was sent to the contestant. He identified exhibit G-2 as copies of the initial citation which he issued on February 3, 1981, and which he subsequently modified on March 10, 1981, citing a violation of 30 CFR 77.216-2(a)(18). He confirmed that he issued the citation because of the failure by the contestant to provide the information requested by the district manager in his letter as required by the cited mandatory standard (Tr. 13-14).

Mr. Shelton stated that he spoke with Mine Superintendent Ray Holbrook and Mr. Karu Ison, the Chief Engineer, and they informed him that they had no intention of responding to the letter. Mr. Shelton believed that a reasonable time had gone by from the date of the letter and the time the citation was issued. He also indicated that the letter was issued after MSHA's engineering staff at the Mt. Hope office conducted a field survey of the impoundment spillway to determine whether it was adequate in terms of capacity. These studies indicated that the spillway capacity was inadequate to meet the design criteria. The instant case is the only one that he is aware of where additional information pursuant to the cited standard was requested from a mine operator (Tr. 14-17).

Mr. Shelton testified that during the time period from October 30, 1980, until February 3, 1981, no response was received by MSHA with regard to the district manager's letter. However, subsequently, on February 27, 1981, the contestant sent a letter to the district manager stating that MSHA had no basis for requesting any additional information concerning the spillway, and enclosing a legal paper explaining its position in the matter (Tr. 18-19; Exh. G-3).

On cross-examination, Inspector Shelton stated that during the past ten years he has inspected the impoundment in question approximately three or four times a year, for a total of some 30

or 40 inspections. During

this time he has issued citations concerning a fire on a slate dump near the impoundment, all of which were corrected. He has never issued any citations concerning the structural integrity of the impoundment until the citation in issue in this case was issued (Tr. 21, 23). He confirmed that he issued the citation because of the contestant's failure to respond to the district manager's letter of October 30, 1980 (Tr. 23).

Mr. Shelton stated that he is familiar with MSHA's annual report and certification requirements of 30 CFR 77.216-4, and the purpose of this requirement is to report any changes in the structure which might affect the stability of the impoundment. He identified copies of three letters dated June 13, 1979, July 23, 1980, and July 30, 1981, from MSHA's district manager to the contestant, all advising the contestant that the information submitted meets the requirements of section 77.216-4 (Tr. 24-27; Exh. C-1 through C-3).

Mr. Shelton stated that the "certification" requirements of section 77.216-4, requires the mine operator's registered engineer to certify that the impoundment was built according to a plan approved by MSHA's district manager, and "it doesn't say anywhere in there that it is safe" (Tr. 28).

With regard to any "approved MSHA plan" for the impoundment structure in question, Mr. Shelton testified in pertinent part as follows (Tr. 28-31):

> Q. All right.
>
> Can we not garner from the approval of the plan that the District Manager must necessarily feel it's a safe structure or he would not approve the plans?
>
> A. You are treading on a very gray area at the moment. Omar Mining Company is one of the sites that does not have a specific approved plan. They -- we accepted it. We did not actually, specifically accept it.
>
> Now, for practical purposes, we did accept it. But, if you are going to say "approved plan", technically, they've never had an approved plan.
>
> Q. Is that because MSHA wasn't in existence or didn't have jurisdiction of these structures when it was started?
>
> A. You want a conclusion?
>
> Q. No.

JUDGE KOUTRAS: Do the best you can with the question.

THE WITNESS: All right.

JUDGE KOUTRAS: If you don't understand the question, he can clarify it.

THE WITNESS: Well, as I understand it, his question is: why was no approved plan ever issued for this site?

When we first got started, we were as inexperienced in all of this as anybody else was and a number of sites slipped through under much the same condition as Omar. They, more or less, submitted information and we approved the plan, or we "accepted" the plan, or however you want to say it. There was no formal procedure for approving or disapproving a plan. That did not come until later.

BY MR. LAMBERT:

Q. In essence, or to sum up this line of questioning, Mr. Shelton, your letter of October 30th, 1980 came about, or was delivered -- let's see: July 23rd -- August, September --

* * *

A. Right.

Q. Ninety-three (93) days later, after we got a certification or our structure, they felt it necessary to ask for additional information.

JUDGE KOUTRAS: Mr. Krese did?

MR. LAMBERT: Mr. Krese did, right.

THE WITNESS: Well, this comes back to the question which was never really decided as to what 77.216.4 addresses. As I understand it, it basically addresses changes in the structure.

BY MR. LAMBERT:

Q. And any other aspect of the impounding structure affecting its stability -- I'm asking you: would the District Manager give us a -- I'm calling it a "certification" of our structure if he felt the structural integrity was in doubt?

A. The District Manager approved the plan as it came out at the time.

Q. And, even after you issued the citation notice, June 30, 1981, you again approved our plan without giving us any information as to any structural deficiency; is that correct?

A. As far as I see that I have anything to do with it, the two are not related. The two are different questions. They are different sections of the law.

Q. You, in response to a question by Mr. McGinn -- you said the basis of the letter, as far as you are concerned, was based on hearsay testimony.

A. I said that I don't know for a fact what happened, That's correct. I was not involved in it.

Q. And you were simply instructed to issue a notice; is that correct?

A. Issued it because the paper had not been -- the response had not been submitted by Omar Mining Company.

With regard to the specific impoundment design criteria information that the district manager sought to obtain from the contestant in this case, Mr. Shelton responded as follows (Tr. 31-33):

Q. Did you ever inform Mr. Ison or Mr. Holbrook or the company of what the standard criteria you wanted them to respond to -- in other words, were they to respond to a probable maximum floor or a hundred-year flood or to standard engineering practices, or what were they to respond to?

A. The company itself has admitted that the proper -- that there are structures that are downstream of the impoundment. That is beyond any dispute. The offices are below the impoundment. There are several communities below the impoundment and the currently accepted practice where loss of life is possible is to use the probable maximum precipitation as the criteria.

Q. Has the District Manager informed this company, or any other company of that change of criteria from what is contained in 77.216?

A. That is the criteria; so far as I'm aware, there is no dam in the sub-district that I work that has a lesser criteria than the PMP. This is the criteria that has always been accepted ever since about 1974 when we finally got organized.

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Q. Since when, Mr. Shelton?

A. It was about 1974 or thereabouts when we started using the probable maximum precipitation for any impoundment which has the possibility of loss of life if it failed.

Q. What is the PMP criteria?

A. The Probable Maximum Precipitation is a criteria that has evolved based on historical records and also assuming the worst possible set of conditions. If you ask me exactly how it is evolved, I would have to say: I do not know. It is figured by the U.S. Weather Bureau. They put out a publication called TP-4 which shows what it is for each area of the country. For this area of the country, it is 27 inches in a six-hour period. Excuse me, that's been corrected a year or so -- a couple of years ago -- go 28 inches. The previous was 27 but, about two years ago, they changed it to 28 inches in six hours.

Q. What was the design criteria on the storm in 1974 except the criterion on the enegineers -- hydrolics and so forth?

A. So far as I'm aware, it has always been the probable maximum precipitation, among experienced hydrologists, where loss of life is possible. We did not pick these figures out of a hat. It's what the Corps of Engineers uses. It's what the Bureau of Reclamation uses, and those are probably two of the biggest dam-building groups in the United States.

Q. They are the ones that built Teton?

A. Yes.

Q. Subsequent to the notice of the filing of the amendment and so forth, Mr. Shelton, have you had conversations with the District Manager as to what he feels is reasonable required of Omar in the way of design data?

A. No, I have not.

Contestant's testimony

Karu Ison, contestant's Chief engineer for the past eleven years, testified that he is acquainted with the impoundment in question and has been the Chief engineer beginning with its design and construction. The company hired a consulting engineering firm to do the initial dam design after a permit was obtained from the West Virginia Public Service Commission. Construction of the impoundment was completed sometime in 1974, and it was initially inspected by the Bureau of Land Management.

Correspondence with MSHA after the plans were filed began either
in 1973

or 1974, and MSHA inspected the site. In addition, "as-built" dam drawings and construction maps were submitted to MSHA, and they made certain recommendations concerning the emergency spillway. In his opinion, the spillway was designed and built according to MSHA's recommendations (Tr. 51-55).

Mr. Ison confirmed that during the period 1974 until 1980, the company has been required to submit to MSHA certifications from a registered professional engineer as to the physical integrity of the impoundment structure, and that MSHA has accepted these without making any recommendations for changes. The 1980 certification was submitted, and MSHA did not question the integrity of the structure or the emergency spillway, nor has MSHA ever told him what information was required after the district manager's letter in question (Tr. 55-56). He also indicated that he does not really know how to respond to the letter, but he understands that MSHA was asking the company to enlarge the spillway. However, he has no competent engineering advice from his consultants indicating that the spillway is inadequate. He confirmed that the response finally made by the company taking exception to the district manager's judgment was the only answer he could make. The company believes that since it hired competent engineers to design the impoundment, "it is way late in the game to try to make changes now" (Tr. 57).

On cross-examination, Mr. Ison confirmed that if the regulations concerning the approval of dams went into effect on September 9, 1972, all correspondence between the company and MSHA would have taken place prior to that date (Tr. 57). He also confirmed that he disagreed with the contents of the district manager's letter of October 30, 1980, and did not express his disagreement in response to that letter, but did so later after the citation was issued (Tr. 58).

In response to further questions, Mr. Ison stated that the consulting firm of L. Robert Kimble Associates was selected by the company from a list of such firms recommended either by MSHA or another Federal agency. After the initial plans were submitted, MSHA and the Bureau of Land Management conducted a field inspection at the site and issued a report and recommendations. After the spillway was enlarged and relocated according to these recommendations, it was approved by MSHA as the "as-built structure" (Tr. 60-61). This approval was sometime in 1974 after the dam was built (Tr. 62).

Contestant's arguments

In its post-hearing "statement of facts", contestant states that the impoundment in question (#1211Wv40430-02), was constructed during 1973 and 1974, was essentially completed in 1974, and is used as an alternate slurry disposal area. Contestant asserts that at the time of the design-construction phase of this structure, such dams were under the jurisdiction of the West Virginia Public Service Commission. Subsequently the United States Bureau of Land Management and three other

agencies became involved in the permitting of such structures. In 1973 MSHA became involved, requiring submission of data as set out in 77.216, 30 C.F.R. At this stage, the structure was, for all practical purposes, a completed structure, and that under 77.216 a plan for the continued use of an existing structure would be required before May 1, 1976. Prior to this date, MSHA was supplied "as built" drawings and these were evaluated by the "Denver Technical Support Group" of MSHA. After a review of the "as built" drawings MSHA required an alteration to the spillway design and after a review by the company's engineering consultants, a revised plan was submitted for MSHA review.

Contestant maintains that after MSHA review, the spillway was altered in that this portion of the structure was relocated and expanded according to the ostensibly approved plans. This necessitated the expenditure of a considerable amount of time and money but the result was a wider, deeper and more stable structure. The structure is equipped with a under-flow drain of 48" x 48" totaling 1700 feet in length. A Decant system, to allow water to flow out of the impoundment into the underflow system, is in place and apparently is functioning as designed. The spillway, in place for approximately 7 years, has never received water and remains "as built" after the required MSHA alterations referred to above.

Contestant submits that all of the plans required by section 77.216-2, have been submitted to MSHA and are on file at the District Manager's Office in Mount Hope, West Virginia. In addition, contestant states that the required annual certifications, as required by section 77.216-2(17), have been filed by the contestant. I take note of the fact that the annual certifications for the past three years are a matter of record in this proceeding (Exhs. C-1, C-2, and C-3). In addition, by agreement of the parties, additional exchanges of correspondence during the time period November 14, 1973, through April 24, 1979, concerning the structure in question are a part of the record by way of "background", and the parties have been furnished copies of these documents.

With regard to the October 30, 1980, letter in question, contestant's Notice of Contest filed March 2, 1981, asserts that the letter was based on receipt by MSHA of a report compiled by the State of West Virginia Department of Natural Resources, Coal Refuse and Dam Control Section, which report was prepared under a contract with the U.S. Corps of Engineers under the National Dam Inspection Act. Contestant points out that the letter lacks any reference to a specific "design criteria" relied on by the district manager to support the "presumptive" conclusion that the energency spillway "is not of adequate size", and that "corrective action" is necessary. Contestant states that upon receipt of the letter, it informed Inspector Sheltom that it took exception to the district manager's conclusion, and that contestant was of the opinion that the structure was safe and that its design was in accordance with current prudent engineering practices as required by section 77.216-2(17).

Contestant views the critical issue in this case to be as follows:

> Does the citation, including the District Manager's letter of October 30, 1980, contain sufficient specificity to adequately inform the Contestant of the nature of the supposed violation?
>
> - Phrased in another fashion -
>
> Is it a violation of the law on the part of the company to fail to answer or reply to a request for additional information made by the District Manager when the request for such information is made in presumptive, pre-judgment terms applying an unknown standard or criteria?

Citing the case of Secretary of Labor v. Walker Stone Company, 1 MSHC 2262, decided by Judge Michels on December 10, 1979, contestant argues that the instant citation should be vacated because it is vague and ambiguous, and does not give sufficient notice as to the exact nature of the violation. In Walker Stone, the inspector cited a violation of 30 CFR 56.12-35, which requires that all metal enclosing or encasing electrical circuits be grounded or provided with adequate protection. In vacating the citation, Judge Michels ruled that "If the citation is based on an improper grounding, it should specify what standards set out in the Code was violated so that the company will know exactly what it is being charged with" (emphasis added).

Comparing the Walker Stone decision with the case at hand, contestant asserts that the citation issued by Inspector Shelton would not stand the test of specificity in that contestant was not informed by the district manager, the inspector, nor through the citation issued as to the standard or criteria that has been supposedly violated. Further, contestant states that to require the contestant to speculate or guess as to the standard or design criteria of impoundments used by the district manager to determine that the impoundment spillway "is not of adequate size to meet design criteria", is unthinkable in any due process sense, and that the attendant expenditure of resources by the contestant and the likelihood of nonacceptance of the conclusions by the district manager creates an impossible predicament for this Contestant.

Another point made by the contestant as to whether the inspector was justified in issuing the citation is the fact that no time or deadline was set out in the district manager's letter, nor does 77-216(2)(a)(18), place a time limit on a response date by contestant. Even assuming that the citation is justified under any conceivable set of existing conditions, contestant concludes that it was premature.

Concluding its arguments, contestant suggests that MSHA's district manager should be required to inform the contestant as

to the "design criteria" he used to make the stated determination enunciated in his letter.

At this point, the contestant could then evaluate its plan and design, and either take exception to the district manager's findings, or challenge the criteria used as being outside of or repugnant to "prudent engineering practice". Contestant concludes further that it would appear that the district manager, after reading or being informed of the contents of what, for purposes of this case, amounts to a "phantom report" from an agency not a party to these proceedings, adopted a design criteria that is outside the laws, regulations and standards that he is charged to uphold and administer. Should this be the case, contestant strongly suggests that the district manager be required to state and publish that he has, in fact, adopted such criteria, thus allowing the contestant an opportunity to either accept such design criteria and to properly evaluate its impounding structure in this light, or to take exception to the criteria and offer evidence of what it considers the criteria to be, consistant with prudent engineering practices.

Respondent MSHA's position

MSHA did not file any post-hearing arguments in this case. However, during the course of the hearing, its position is that the citation in this case was validly issued because of the contestant's noncompliance with the reporting requirements of the cited standard. In short, MSHA's position is that by failing to respond to the district manager's letter, contestant violated the cited standard, and the citation was warranted (Tr. 70). In addition, MSHA's counsel indicated that notwithstanding the merits of its arguments concerning the design of the spillway in question, the fact is that the contestant opted not to respond to the district manager's letter, even to record its disagreement, and under these circumstances, a violation of the cited standard has occurred (Tr. 73);. MSHA's counsel concedes that the citation has presented the district manager with an available vehicle to initiate further enforcement action to correct certain conditions concerning the impoundment in question (Tr. 75). Since the citation remains unabated, I assume that what counsel has in mind is that MSHA can issue a withdrawal order for contestant's failure to abate the cited violation.

MSHA's counsel also indicated that pursuant to section 77.216, the mine operator initially formulates a plan and design for the construction and maintenance of an impoundment and submits it to MSHA for evaluation (Tr. 65). However, prior to the promulgation of this section, another mandatory standard required that all impoundment structures which can impound water, sediment, or slurry shall be of "substantial construction". The submission of "as-built" plans were required separately under this general "substantial construction" standard, but subsequently, detailed submissions for such impoundments were required to be filed with MSHA pursuant to section 77.216 (Tr. 65-66).

Inspector Shelton indicated that pursuant to the present impoundment criteria considered by MSHA, the impoundment in question must adequately control any designed storm. The mine

operator has discretion whether

to do this by a "de-cap pipe" which permits water to flow automatically, or by means of a spillway to control the maximum water level. Another alternative is to simply store the water and drain it out during a "ten-day draw-down period" (Tr. 66-67).

Mr. Ison indicated that the impoundment in question has never used the emergency spillway, and that it has a 48-inch pipe under the entire structure to carry away the normal water stream, as well as a "decant" system to drain any water away. He also indicated that there has never been a need to release any water through the emergency spillway, and that the 1700 feet of 48-inch pipe was designed as part of the emergency spillway (Tr. 68). Mr. Ison did not believe that anything has occurred since October 30, 1980, that would cause the district manager to change his position with regard to the spillway design (Tr. 69).

Findings and Conclusions

Fact of violation

In this case the contestant is charged with a violation of mandatory standard section 77.216-2(a)(18), because of an asserted failure to respond to a letter of October 30, 1980, from MSHA's District Manager Krese. In that letter, the district manager informed the contestant that the emergency spillway for the impoundment in question was not of adequate size to meet certain design criteria. The letter does not inform the contestant where the information supporting the "inadequate size" statement came from, but based on an "evaluation" and "analysis", apparently conducted by the district manager's office, he concluded that corrective action was necessary, and he requested the contestant to evaluate the spillway design and to submit a plan for corrective action.

The general regulatory scheme found under section 77.216, requires a mine operator to submit certain plans for the design, construction, and maintenance of impoundments if such impoundments impound water, sediment, or slurry under the conditions stated under section 77.216(a)(1) or (2), or the impoundment presents a hazard to miners as determined by the District Manger. Section 77.216-2(a) provides guidelines for the minimum information required to be filed by an operator when he submits the plan specified in section 77.216, and the cited subsection, 77.216-2(a)(18) requires an operator to submit "/s/uch other information pertaining to the stability of the impoundment and impounding structure which may be required by the District Manager". The citation issued when the inspector discovered that the contestant had not responded to the letter of October 30, 1980.

Contestant's defense is based on an argument that the District Manager has already made a judgment that the impoundment spillway in question is of inadequate design, that it poses a hazard to miners, and that corrective action is necessary. Since the contestant obviously disagrees with these conclusions, contestant maintains that before it can be charged with a

violation, it must first be informed of the specific

design criteria which the District Manager has in mind, and must be given an opportunity to refute the contention that the spillway is unsafe. Citing the inspector's testimony that there are no published regulatory standards for the design and construction of impoundments, contestant concludes that it is placed in the untenable position of accepting the District Manager's unchallenged judgment that the spillway needs to be redesigned to correct certain uncommunicated defects which he (the manager) believes makes the spillway unsafe.

The record in this case reflects that since the original construction of the impoundment sometime in 1973 or 1974, several State and Federal agencies were involved in policing the construction and maintenance of the impoundment in question. Subsequent to this time, from 1973 to the present, MSHA and the contestant have exchanged correspondence concerning the impoundment, and contestant has filed its annual reports and certifications as required, and until this controversy arose, the impoundment apparently met all of MSHA's requirements.

During the course of the hearing in this case, MSHA's counsel asserted that the contestant chose not to file any response to the letter of October 30, 1980, even to record its disagreement with the District Manager's conclusions. I venture a guess that had contestant simply voiced its objections, it would still be cited because the letter specifically requests the filing of a plan for corrective action. In any event, the inspector testified that contestant advised him that it did not intend to respond to the letter, and it seems clear to me that the letter, on its face, concludes that the spillway is unsafe and that something must be done to correct this condition. I find that the method used to achieve compliance in this case to be somewhat arbitrary, and I agree with the contestant's arguments in support of its position in this matter. As a matter of fact, the inspector indicated that this is the first case that he is aware of where the standard in question was used to elicit information from an operator.

I conclude and find that the letter of October 30, 1980, fails to advise the contestant of the specific inadequacies in its spillway design, that it fails to adequately inform the contestant as to the basis for the District Manager's unsupported conclusion that the spillway presents a hazard, and that it fails to support any conclusion that corrective action needs to be taken. Further, it seems to me that if MSHA believes the spillway in question is unsafe and fails to meet design criteria (whatever they may be), then MSHA should address this question head-on rather than relying on some vague and rather obscure regulatory requirement for the filing of "such other information * * which may be required". This is particularly true in a case such as this where the citation remains unabated. Only in this way will the contestant have a fair and open opportunity to chellenge and rebut the conclusions that its spillway design is anadequate and presents a hazard.

In view of the foregoing findings and conclusions, the citation, as modified, IS VACATED, and this case IS DISMISSED.

George A. Koutras
Administrative Law Judge