

ALPINE CONSTRUCTION CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-527

Decided April 27, 1990

Appeal from a decision of Chief Administrative Law Judge Parlen L. McKenna, affirming the issuance of Notice of Violation No. 87-03-141-001. TU 7-55-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program Regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face

of severe weather conditions which assertedly prevented compliance, an NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that an NOV may not be vacated because of an operator's inability to comply.

3. Board of Land Appeals--Regulations: Binding on the Secretary--Regulations: Validity--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

APPEARANCES: John H. T. Sheridan, Esq., Tulsa, Oklahoma, for appellant; Ralph O. Canaday, Esq., Office of the Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Alpine Construction Company (Alpine) has appealed the decision of Chief Administrative Law Judge Parlen McKenna, dated June 9, 1988, Docket No. TU 7-55-R, affirming the issuance of Notice of Violation (NOV) No. 87-03-141-001 for having failed to maintain sedimentation pond inlets and for having failed to have stabilized rills and gullies in its Alpine No. 7 mine, located in Haskell County, Oklahoma, in violation of the Oklahoma Permanent Regulatory Program Regulations (OPRPR) 816.49(e) and 816.106.

Alpine filed an application for review of the NOV on September 25, 1987. Although a hearing was originally set for March 28, 1988, at Tulsa, Oklahoma, the parties agreed to submit the case on briefs in lieu of having a hearing. Accordingly, the basic facts leading to the NOV are not in dispute as both Alpine and the Office of Surface Mining Reclamation and Enforcement (OSMRE) stipulated as to the facts of the violation and the attendant circumstances as set forth in the summary of evidence in Judge McKenna's decision as follows:

On June 2, 1987, NOV No. 87-3-110-7 was issued to applicant for allegedly having failed to maintain sedimentation pond inlets and for having allegedly failed to have stabilized rills and gullies in its Alpine No. 7 mine, located in Haskell County, Oklahoma. On or about August 4, 1987, as a result of a followup inspection, both parts of this NOV were terminated.

On August 26, 1987, OSMRE Inspector Dan Trout and Oklahoma Department of Mines inspector Harlan Dozier again inspected Alpine No. 7 and according to the pertinent Mine Site Evaluation Inspection Report Narrative, knee deep gullies and badly eroded sedimentation pond inlets were noted. Although the operator worked to repair the violations during the course of that inspection, adequate repairs were not completed. Consequently, NOV No. 87-3-141-1 was issued for the same alleged violations that had been cited earlier in NOV No. 87-3-110-7.

The parties stipulated as to the facts of the violations set forth in NOV No. 87-3-141-1 and also that the rainfall in the vicinity of the minesite during August 1987 was 5.99 inches. Briefs were submitted on the issue of whether the operator had complied with the law solely by having used the best available technology in its attempts to prevent the violations.

Judge McKenna denied Alpine's application for review of NOV No. 87-3-141-001, finding that OSMRE had established a prima facie case that Alpine had violated the cited OPRPR and that Alpine had failed to establish an adequate defense and had not shown that the NOV was not properly issued.

In its statement of reasons (SOR) Alpine asserts that an operator may only be held responsible for an NOV where the performance standards of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) have been breached. It argues that in this case the Act (30 U.S.C. §§ 1265(b)(10)(B)(1) and 1265(b)(24) (1982)) provides that the applicable enforcement standard to be met is the use of the best technology currently available. It states "In this case, the use of the best technology failed to prevent additional erosions and, therefore, this NOV must be vacated" (SOR at 3). 1/

Alpine points out that it had originally corrected the same violations involving rills and gullies and diversion erosion cited in a previous NOV (NOV 87-03-110-07) which was terminated on August 4, 1987. Just 22 days later the Federal inspector again entered the mine site and found the same violations because of heavy rainfall, and which could not have been prevented by the application of the best available technology. Alpine asserts that it used a great deal of manpower and equipment in attempting to remedy these violations, but these attempts fell short due to the extreme amounts of rainfall in this area. Therefore, it asserts that by using the best available technology it has complied with the performance standards set by the Act and the NOV should not have issued (SOR at 5).

Alpine argues that the Judge's opinion is in error because it "effectively holds that the Surface Mining [Control] and Reclamation Act of 1977 requires the operator to do impossible tasks." It also asserts the Judge

1/ Appellant mistakenly referred to these sections as 30 U.S.C. §§ 1265(10)(d)(1) and 1265(24) (1982).

overlooked the fact that his reliance upon 30 CFR 722.17(a) is in direct conflict with 30 U.S.C. §§ 1265(b)(10)(B)(1) and 1265(b)(24) (1982). It concludes the Judge's opinion "effectively renders 30 U.S.C. Section 1265 [1982] meaningless," and therefore should not be upheld (SOR at 6).

OSMRE has responded that Alpine's use of the best technology currently available to abate prior violations does not relieve it of the continuing responsibility to maintain the site. OSMRE maintains Alpine's argument that it is unable to comply with the NOV because its one-time effort at correcting the violation did not result in permanent abatement is contrary to the Secretary's regulations in 30 CFR 722.17 (Answer at 4).

Citing In re Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978), for support of the application of the regulation that there may be no exception from the abatement requirement of an NOV or cessation order, OSMRE points out that the District Court in an analysis of the legislative history of the Act, specifically stated that "throughout the Act, Congress made it clear that the only alternative that the operators had was to comply or not conduct operations" (Answer at 5).

OSMRE emphasizes that compliance with the Act is not a one-time effort but may be a continuing process that could take a long period of time and may require several different technologies before the right one is found to stabilize the area. It asserts that Alpine's attempt at a temporary solution hindered by weather conditions does not release Alpine from its liability under the Act (Answer at 6).

Lastly, it asserts that Alpine is in the wrong forum to challenge the Secretary's regulations governing inability to comply. It points out the Board has no jurisdiction to consider the question of the asserted conflict of the regulations with the statute and suggests that type of question can only be heard in the U.S. District Court for the District of Columbia (Answer at 6-7).

[1] In a proceeding concerning an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. 43 CFR 4.1171(a); see Dean Trucking Co., 1 IBSMA 229, 237, 86 I.D. 437, 441 (1979). Although the ultimate burden of persuasion rests with the applicant for review, the NOV will be affirmed only where OSMRE meets its burden of establishing a prima facie case. See Turner Brothers, Inc. v. OSMRE, 98 IBLA 395, 398 (1987); Calvert & Marsh Coal Co. v. OSMRE, 95 IBLA 182, 191 (1987). OSMRE makes a prima facie case when it presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. S & M Coal Co. v. OSMRE, 79 IBLA 350, 354; 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982).

[2] NOV No. 87-3-141-1 which is the focal point of this appeal was issued by the OSMRE inspector after a follow-up inspection of Alpine's

facilities at the Alpine No. 7 mine in August of 1987. The inspection revealed that the company had failed to maintain sedimentation pond inlets and to stabilize rills and gullies at the mine site. These deteriorating conditions were verified by the inspectors and were far from being properly corrected at that time even though the operator worked extensively throughout the day of the inspection making repairs. 2/ The fact that these conditions existed and had not been corrected as of the date of the inspection clearly amounted to a violation of sections 816.49(e) and 816.106, OPRPR, requiring control of erosion and sedimentation. 3/ The evidence of record confirms OSMRE's finding on its inspection. Appellant has not rebutted this showing, admitting that it was unable to correct these conditions prior to the inspection.

Instead, appellant argues that it should not be charged with a violation. In effect, appellant asks that it be excused from its failure to comply with the regulatory requirements because of the unusual severity of

2/ The Mine Site Evaluation Inspection Report of Aug. 26, 1987, states:

"The operator was on the site doing erosion repair work throughout the day. During most of the morning there was one front end loader, a dozer, and a crew of about three men doing seeding and mulching. The loader was taken off site for the afternoon to load coal at another mine site. The vegetation over much of the permit consists of last years dead wheat and ragweeds. When the affirmative demonstration areas are located the areas outside of them that have not had an adequate stand of permanent species established need to be seeded this fall per approved revegetation plan. Although the operator worked all through the inspection repairing pond inlets, emergency spillways, and ditches, the erosion was too extensive to repair before the inspection was concluded."

3/ These sections of the Oklahoma Coal Reclamation Act Permanent Regulations specifically set forth the following requirements.

Section 816.106 "Regarding or stabilizing rills and gullies" provides:

"When rills or gullies deeper than 9 inches form in areas that have been regraded and topsoiled, the rills and gullies shall be filled, graded, or otherwise stabilized and the area reseeded or replanted according to Sections 816.111 - 816.117. The Department shall specify that rills and gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation."

Section 816.49(e) provides:

"All embankments of temporary and permanent impoundments, and the surrounding areas and diversion ditches disturbed or created by construction, shall be graded, fertilized, seeded, and mulched to comply with the requirement of Section 816.111 - 816.117 immediately after the embankment is completed, provided where water will be impounded may be riprapped or other-wise stabilized. Areas in which the vegetation is not successful or where rills and gullies develop shall be repaired and revegetated to comply with the requirement of Sections 816.106 and 816.111 - 816.117."

the rainfall during this period which detracted from its previous efforts to correct the cited conditions. Appellant relies on its asserted use of the best available technology currently available in its attempt to correct the violation as a complete defense to the assessment of a further violation. Appellant indicates that it did all that it could by the use of this technology within the short timeframe, even working the day of the inspection, to correct the violation. It asserts the unusual circumstances beyond its control prevented compliance. This approach is of no avail and will not sustain its burden of persuasion to overcome OSMRE's presentation.

The cited Oklahoma regulatory requirements specifically provide for the operator's duty to maintain stabilization of rills and gullies, prevention of erosion, and to maintain sedimentation control. We note that Alpine may have made a good faith effort to correct the cited violation and also note that heavy rainfall during the critical period could have hindered further timely corrective actions. However, the fact still remains that conditions had deteriorated after the first NOV. Alpine's limited corrective action was not enough to eliminate the need for further repair and maintenance to prevent continued deterioration and erosion at the minesite. Alpine does not deny these conditions nor that further work was necessary to correct the situation. Nor does Alpine contend that continued application of the best available technology would wholly fail to correct the violations. Indeed, the history of the previously issued NOV's indicates that the appellant has the ability to correct these violations by using technology readily available to it.

Circumstances beyond the operator's control contributing to noncompliance do not justify a finding that no violation occurred. See Coal Energy, Inc. v. OSMRE, 105 IBLA 385, 390 (1988), and cases cited therein. Alpine's efforts to abate the violation, no matter what technology was used, were not enough to correct the cited conditions and did not relieve the company of its continuing responsibility under SMCRA to minimize disturbances to the prevailing hydrologic balance.

As OSMRE has correctly pointed out, the Department's regulations make it clear that there may be no exception from the abatement requirement of an NOV based on an operator's inability to comply. The regulations at 30 CFR 722.17 specifically provide "neither a notice of violation nor a cessation order issued under this part may be vacated because of inability to comply." Accordingly, this Board has previously considered and rejected the same line of argument raised by appellant in this case and held that an NOV may not be vacated because of the operator's inability to comply. Coal Energy, Inc. v. OSMRE, *supra* at 385; Coal Energy, Inc. v. OSMRE, 104 IBLA 24, 26 (1988).

[3] Appellant challenges the application of 30 CFR 722.17 to the facts of this case asserting it conflicts with certain provisions of SMCRA relating to the use of the best technology currently available. We agree with OSMRE that this Board is not the proper forum to challenge the Secretary's regulations. This Board has repeatedly noted that we do not have jurisdiction to entertain a challenge to the validity of regulations under SMCRA. Such a challenge must be brought to the U.S. District Court for the

District of Columbia. Alternate Fuel, Inc. v. OSMRE, 103 IBLA 187 (1988);
Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 116 (1988);
OSMRE v. Calvert & Marsh Coal Co., 95 IBLA 182, 190-91 (1987).

The regulation in question herein was duly promulgated and has the force and effect of law. It is therefore binding on the Board and we are not authorized to declare it invalid. Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987); Robert R. Perry, 87 IBLA 380, 388 (1985).

Therefore, based on our review of the record, we conclude that OSMRE established a prima facie case that a violation of OPRPR existed, and that Alpine failed to meet its burden of persuasion that the violation did not occur.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge