

130 IBLA 228

LOIS J. ARMSTRONG
ELIZABETH HILLMANN

IBLA 92-342

Decided August 5, 1994

Appeals from the decision of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, denying informal review in response to complaints concerning a surface mining operation.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

State primacy does not deprive OSM of enforcement jurisdiction because 30 U.S.C. § 1254(b) (1988) provides a separate and distinct basis for Federal inspection and enforcement authority against individual operations during state primacy in addition to that authority which OSM may exercise after asserting Federal primacy under sec. 1271(b).

2. Surface Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

OSM is required to consider citizens' complaints involving alleged violations arising from permitting improper recognition of valid existing rights or operations existing on Aug. 3, 1977. The exhaustion of state administrative remedies is not a prerequisite for the filing of a citizen complaint, and a citizen's failure to do so is not a valid reason for OSM to disregard a complaint.

3. Surface Mining Control and Reclamation Act of 1977: Administrative: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. § 1271(a)(1) (1988) concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S.C. § 1272(e) (1988) and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and capricious when at least one essential factor for a valid existing rights determination is unaddressed.

APPEARANCES: Lois J. Armstrong, pro se; Joseph W. Caldwell, Esq., Charleston, West Virginia, for Elizabeth Hillmann; Robert G. McLusky, Esq, Charleston, West Virginia, for the East Bank Dock Company Limited Partner- ship; Wayne A. Babcock, Esq, and Mary Lynn Taylor, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Lois J. Armstrong and Elizabeth Hillmann have filed separate appeals from January 16, 1992, decisions of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement (OSM), denying their requests for informal review pursuant to 30 CFR 842.15 of a determination by the Charleston, West Virginia, Field Office to take no further action in response to their complaints.

The complaints allege that the East Bank Dock Company Limited Partner- ship (Partnership) is operating a coal processing and loading facility in violation of West Virginia Code (WVC) § 22A-3-22(d), which provides that after August 3, 1977, and subject to valid existing rights, no surface mining operations, except those which exist on that date, shall be permitted which will adversely affect any publicly owned park or places included in the national register of historic sites, within 100 feet of a public road, or within 300 feet from any occupied dwelling, unless waived by the owner thereof, or within 100 feet of any public building, school, church, community or institutional building, public park, or within 100 feet of a cemetery . 1/

The complaints assert that the facility is within 300 feet of occu- pied dwellings, a historic church property, and near a cemetery, public

1/ By enacting this provision, West Virginia implemented the nearly identical provision of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e) (1988).

park, and East Bank High School. It is also asserted that access to Partnership's loading facility is along a narrow one-lane city street travelled by schoolchildren. In response to the complaints, the Assistant Deputy Director states in her January 16 decision that the coal loading facility began operations in the 1950's which continued until October 1984 when it was idled by a selective strike by the United Mine Workers. Because no final regulations requiring permits for offsite loading facilities were published until 1987, the West Virginia Division of Energy (WVDOE) first advised the company no permit was required so long as the facility was idle. A permit application was filed with WVDOE in 1988, and in January 1990, WVDOE issued Partnership permit 0-6006-89, having determined that the operation was not subject to the prohibitions of WVC § 22A-3-22(d) because the operation existed on August 3, 1977, and because the Partnership had a valid existing right (VER) to conduct it.

On appeal, appellants contend that it was improper for WVDOE to recognize a VER or existing operation exception because the existing operation ceased when idled by a strike in 1984 and was never resumed by the same operator who wrote a letter to the labor union in 1988 stating that it would no longer be conducting operations on the site. Appellants also make a number of specific allegations concerning operations now permitted on the site in support of their argument that the new operations differ so much in scope from those existing previously that they fall outside the scope of the "grandfather" provision.

Partnership has intervened in this appeal, arguing that the exemption was properly granted and that the 1988 letter cannot be construed as expressing an intent to abandon operations:

The facility was idled by East Bank Dock Company while negotiations continued with the [United Mine Workers of America]. The negotiations continued until 1988, when it became clear that the facility owners could not reach agreement with the UMWA. Instead, in 1988 the owner realized that it would have to sell lease or contract out the operation to another operator. Accordingly, East Bank Dock Company [EBDC] sold the facility to the current permittee, EBDC Partnership. EBDC Partnership, which did not have to deal with the UMWA selective strike, then immediately started preparing a surface mining permit application. It submitted the application to DOE in 1988.

(Partnership's Memorandum and Motion to Dismiss at 4).

[1] We first address Partnership's motion to dismiss this appeal on the basis of an argument that concludes as follows:

For OSM to entertain a citizen complaint regarding a state-issued permit subverts the specific administrative scheme established under the law and improperly attempts to create a basis for federal jurisdiction where none exists. Accordingly, EBDC Partnership contends that OSM's decision not to conduct federal inspections after it has previously determined that a state permitting decision was appropriate is not reviewable by citizens who have

failed to exhaust their available state administrative remedies. [Emphasis in original.]

(Partnership's Memorandum and Motion to Dismiss at 32).

Partnership's memorandum presents no valid basis for its conclusion that consideration of a citizen complaint can "create a basis for federal jurisdiction when none exists." The misconception that state primacy somehow deprives OSM of enforcement jurisdiction is a perennial argument raised in SMCRA litigation that we have repeatedly rejected. See Consolidation Coal Co. v. OSM, 127 IBLA 192 (1993), and cases cited therein. Recently, one court observed:

There is nothing in SMCRA placing such a limitation upon OSM's authority. * * * States that desire exclusive jurisdiction over the regulation of coal mining and reclamation operations may acquire it as provided in section 1253(a), subject however to sections 1271 and 1273. The fact that a mine is located in a primary state is irrelevant to OSM's duties under 1271. [Emphasis in original.]

Southern Ohio Coal Co. v. OSMRE, 20 F.3d 1418, 1424 (6th Cir. 1994); see also Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987). The court in Annaco specifically relied on 30 U.S.C. § 1271(a)(3) (1988) which refers to 30 U.S.C. § 1254(b) (1988) as a separate and distinct basis for Federal inspection and enforcement authority against individual mining operations during state primacy in addition to that which OSM may exercise after asserting Federal primacy under 30 U.S.C. § 1271(b) (1988).

Partnership attempts to characterize the matter raised in this appeal as a permitting decision by the State into which OSM's inspection and enforcement mandates were not intended to intrude, as distinguished from complaints about on-the-ground violations. Nothing in the applicable statutory provision, 30 U.S.C. § 1271(a) (1988), authorizes OSM to refrain from actions on the basis of this distinction, nor is this abstract distinction meaningful in the context of real cases such as the instant appeal where appellants allege an on-the-ground violation of statutory buffer zones. Moreover, OSM is required to consider citizens' complaints involving alleged violations arising from permitting errors by which a state has improperly excepted an operator from requirements that implement SMCRA. See Marion A. Taylor, 125 IBLA 271 (1993), and cases cited therein. Thus, Partnership's jurisdictional arguments based on state primacy provide no basis for dismissal of these appeals and are rejected.

[2] We also reject Partnership's argument that OSM's decision is not reviewable by citizens who have failed to exhaust their available state administrative remedies. The cases cited in the previous paragraph illustrate that the exhaustion of state remedies or the failure to do so in no way affects OSM's statutory mandate to ensure that provisions of SMCRA or state programs implementing SMCRA are enforced in individual cases in primacy states. Under 30 U.S.C. § 1271(a) (1988), OSM is required to take

certain actions when it has reason to believe that a violation exists, and SMCRA does not excuse OSM from taking required actions merely because those who have provided information have failed to exhaust their state remedies.

[3] When OSM received appellants' complaints, it issued a 10-day notice to WVDOE as required by 30 U.S.C. § 1271(a) (1988) and 30 CFR 842.11(b)(1)(ii)(B)(1). Upon receiving WVDOE's response, OSM was required to determine whether WVDOE had taken appropriate action to cause a violation to be corrected or whether it had shown good cause for failing to do so. Under 30 CFR 842.11(b)(1)(ii)(B)(2), WVDOE's determination not to take action on the grounds that Partnership was exempt from the prohibitions because it was an existing operation on August 3, 1977, and had VER may be considered "appropriate action" within the meaning of 30 U.S.C. § 1271(a) (1988) if it was not arbitrary, capricious, or an abuse of discretion. See Paul F. Kuhn, 120 IBLA 1, 98 I.D. 231 (1991).

The "arbitrary and capricious" standard of review by which OSM was required to measure WVDOE's response is one which the Board and the courts employ in various appeals of administrative actions. E.g., Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mutual Automobile Insurance, 463 U.S. 29, 43 (1983); Iriart v. BLM, 126 IBLA 111 (1993); Exodus Corp., 126 IBLA 1 (1993). Under this standard, a decision will be sustained if it shows proper consideration of the relevant factors. Id. OSM may not substitute its judgment for that of a state agency, but the determination subject to review must be adequately explained to allow for review of the relevant factors by OSM and this Board. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Dr. Pepper/Seven-Up Companies v. FTC, 991 F.2d 859 (D.C. Cir. 1993). If WVDOE did not consider an important aspect of the problem, its determination may not be sustained. See Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mutual Automobile Insurance, *supra*; Citizens to Preserve Overton Park v. Volpe, *supra*; Dr. Pepper/Seven-Up Companies v. FTC, *supra*. Under the arbitrary and capricious standard of review, OSM or other parties may not supply a basis for the action that WVDOE itself has not given. Id.

WVDOE's responses to the 10-day notices leading to this appeal refer to an April 9, 1991, letter from Stephen C. Keen, Director of WVDOE's Mines and Minerals Section, to John McFerrin of the Appalachian Research and Defense Fund, Inc. The letter basically states that Partnership conducted an operation on the site from the 1950's until 1984 when it was idled by the strike and that negotiations continued until a permit application was filed in 1988. The letter summarily concludes that the operation has VER as well as the right to operate under the existing operations exception, that the facility was never abandoned, and that it is the same as it was prior to the interruption of that use. Other than this bare recitation of a few facts that relate only to the issue of abandonment, the WVDOE's response shows no consideration whatsoever of any of the factual and legal factors relevant to its determination not to take action because Partnership has VER and rights as an existing operation.

Under the arbitrary and capricious standard, the VER determination cannot stand because WVDOE cited nothing more to support the determination

than the fact that an operation existed on the site in 1977. All parties to this case recognize that West Virginia has opted to employ a takings test for VER. See West Virginia Code of State Regulations 38-2-2.130. Generally, the application of a takings test avoids the use of any set formula, except where the property owner suffers a physical invasion of his property, a circumstance not at issue here, or where the effect of the prohibitions would deny all economically beneficial use of the land. Lucas v. South Carolina Coastal Commission, ___U.S. ___, 112 S. Ct. 2886, 2893 (1992), citing, inter alia, Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (where the participating Justices unanimously agreed that no taking occurred where a local law precluded an established quarry from continuing existing excavations beneath the water table). In this case, the response by the State cites no finding or evidence at the time of issuance of the permit that enforcement of the buffer zones would deny any other economically beneficial use of the land. Thus, because at least one essential factor for a VER determination is unaddressed, we find WVDOE's response to be arbitrary and capricious.

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss is denied, the decision appealed from is reversed, and the case is remanded for further action consistent with this opinion.

John H. Kelly,
Administrative Judge

I concur:

Franklin D. Arness,
Administrative Judge

