

DAVID HAGGERTY ET AL.

IBLA 92-439

Decided February 6, 1996

Appeal from a decision of the Acting Assistant Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement, denying, pursuant to an informal review, a protest that the Charleston, West Virginia, Field Office would not modify imminent harm cessation orders 92-112-017-03 and 92-112-017-04 to include responsible parties other than the permittee.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--
Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--
-Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:
Generally

OSM was not obligated to include any party other than the permittee in a cessation order that required abatement of imminent danger or significant environmental harm pursuant to sec. 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1988).

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., and Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for appellants; Steven C. Barclay, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On March 11, 1992, the Laurel Mountain/Fellowsville Area Clean Watershed Association, David Haggerty, Dave Houser, and Stan Jennings (petitioners), filed a citizen's complaint with the Charleston, West Virginia, Field Office of Surface Mining Reclamation and Enforcement (OSM), alleging that untreated effluent was improperly discharging from F & M Coal Company mining operations on Laurel Mountain, Preston County, West Virginia. On March 13 and 16, 1992, OSM Inspector David B. Funkhouser inspected those operations, conducted under permit numbers S-57-84 and S-1044-87, and found untreated discharges. He immediately issued Imminent Harm Cessation Orders (IHCO) 92-112-017-03 and 92-112-017-04, ordering F & M Coal Company to use

existing treatment facilities to treat the discharges to bring them into compliance with applicable effluent standards.

On April 3, 1992, petitioners requested informal review by the Assistant Deputy Director, Operations and Technical Services, OSM, advocating that the IHCO's be modified to include parties other than the permittee. They argued that adding other responsible parties to the citations was essential to ensure abatement because F & M Coal was in bankruptcy and its assets were exhausted. Petitioners claimed that authority to add these other parties lies within section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1988). On May 7, 1992, the Assistant Deputy Director denied their request, affirming the action taken by the Field Office. Citing United States v. Dix Fork Coal Co., 692 F.2d 436, 441 (6th Cir. 1982), the Assistant Deputy Director found "it is not necessary to name these entities in the cessation orders, for notice purposes, prior to bringing a section 521(a) action against them" (Decision at 2). She concluded that OSM would continue to investigate the relationships between F & M Coal and the parties identified by petitioners with a view to determining whether to seek injunctive relief against any or all of them pursuant to section 521(c) of SMCRA, 30 U.S.C. § 1271(c) (1988). On May 10, 1993, while this appeal was pending, OSM modified the IHCO's to name Donald F. Frazee, individually, as a responsible party.

On appeal to this Board, petitioners assert that OSM's decision not to amend the IHCO's as they requested is in error for two reasons. First, they contend that our decisions indicate that OSM should take direct enforcement action against general partners of a partnership or joint venture. They argue that the parties identified who are not in this category are also legally responsible for abating the environmental harm at issue, and that naming them in the citations would induce them to act without pursuing injunctive relief. Second, petitioners assert that OSM should not have denied their citizen's complaint before investigation of the case was complete. They argue that this point is significant because F & M Coal was in bankruptcy and the untreated discharges are a direct result of the operator's lack of resources.

Section 521(a)(2) of SMCRA, supra, provides that when a Federal inspection discloses a violation creating "an imminent danger to the health or safety of the public, or is causing * * * significant imminent environmental harm to land, air, or water resources," a cessation order should be issued immediately. If a cessation order alone will not completely abate an imminent danger, the Department shall "impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger." Id.; see also 30 CFR 843.11(a)(3) (authorized officer to "impose affirmative obligations on the permittee" in such cases). If the permittee or his agent fails to comply with such an order or decision, the Department "may request the Attorney General to institute a civil action for relief, including a permanent or temporary

injunction, restraining order, or other appropriate order." Section 521(c) of SMCRA, supra.

While SMCRA authorizes direct action against an operator or permittee to abate an imminent danger, there is no requirement that all responsible parties should be named in the cessation order. The Departmental regulation implementing section 521 provides, moreover, as to others than the operator or permittee who may ultimately be responsible for conditions endangering health or the environment, that: "[OSM] shall notify in writing any person who has been identified under §§ 773.17(i) and 778.13(c) and (d) of this chapter as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller." 30 CFR 843.11(g). Definition of the phrase "owns or controls" for SMCRA purposes includes a permittee or operator, a party owning at least 50 percent of the entity conducting the mining, or anyone with a relationship giving authority directly or indirectly over the mining operation. 30 CFR 773.5(a). Certain relationships are presumed to constitute ownership or control unless otherwise shown; they include the condition of being a general partner, owning 10 to 50 percent of the entity, or having the ability to commit the assets or resources of the entity. 30 CFR 773.5(b).

Petitioners want to add the names of Edward Frazee, Jno. McCall Coal Corporation (McCall Coal), and Interstate Lumber Company to the cessation order, as well as that of Donald Frazee, who was added to the IHCO on May 10, 1993, as noted above. According to documents in the file (see, e.g., McCall Coal v. F & M Coal, BK No. 90-10929, slip op. (Bankr. N.D. W. Va. Sept. 17, 1991)), the Frazee-McCall Joint Venture was established by Donald Frazee, Edward Frazee, and McCall Coal in 1981, with F & M Coal being created to do business for the venture. Interstate Lumber is a West Virginia corporation owned by the Frazees that may have commingled business and assets with F & M Coal. In November 1989, the venture arrangement was modified and thereafter F & M Coal was operated solely for the purpose of finding a buyer; nonetheless, the Frazees and McCall Coal remained the sole beneficiaries of F & M Coal operations. Under the circumstances described, OSM decided to investigate further to determine if the named parties owned or controlled F & M Coal so as to bring them under the purview of 30 CFR 843.11(g) as responsible parties.

[1] There is, however, no statutory or regulatory requirement that OSM name all or any of these parties in the cessation order, since none of them is an operator or permittee. The regulations require merely that notice be given to those owning or controlling the permittee or operator, as provided in section 521(a). Petitioners have stated plausible reasons for naming the four parties in question on the order, and one of them has now been named as requested by petitioners. Nonetheless, OSM must be allowed some discretion when implementing SMCRA section 521. 30 U.S.C. § 1211(c) (1988); United States v. Dix Fork Coal, supra at 441. In this case, the speed with which the cessation orders were issued apparently did

not permit a full and final resolution of the identity of all responsible parties before the orders were issued. Moreover, petitioners have provided no statutory or regulatory basis to justify the relief they seek; this is a significant omission in light of the fact that failure to abate at this stage of proceedings under section 521(a), may result in judicial proceedings under section 521(c), which could then include those persons identified by petitioners as additional responsible parties.

As was pointed out in Dix Fork Coal, *supra* at 441, establishment of a sham business entity to circumvent obligations imposed by SMCRA can be dealt with by OSM under the additional sanctions provided by section 521(c). In this case, moreover, petitioners have shown no error in the procedure used by OSM to enforce SMCRA section 521(a), wherein OSM used IHCO's directed to the permittee to deal with drainage at the Laurel Mountain operations. Because they have not established that the procedure they urge on appeal is necessary to implement SMCRA, the relief sought by petitioners must be denied.

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.

Franklin D. Arness
Administrative Judge

I concur in the result:

R. W. Mullen
Administrative Judge

