

SPURLOCK MINING CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 93-140

Decided June 12, 1996

Appeal from a decision of Administrative Law Judge David Torbett sustaining Cessation Order No. 91-83-135-01. NX 92-13-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Imminence--Surface Mining Control and Reclamation Act of 1977: Permits: Modifications--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Permits: Transfer, Assignment, or Sale of Rights--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

30 CFR 843.11(a)(2) does not authorize issuance of a cessation order to the unapproved operator of a surface coal mining operation that has been issued a permit. If such an unapproved operator is responsible for a condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, a cessation order would be appropriate under 30 CFR 843.11(a)(1).

APPEARANCES: Daniel King, III, Esq., Ashland, Kentucky, for appellant; Patrick L. McKinney, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Spurlock Mining Company, Inc. (Spurlock), appeals Administrative Law Judge David Torbett's December 7, 1992, decision that sustained issuance of Cessation Order (CO) No. 91-83-135-01 by the Office of Surface Mining Reclamation and Enforcement (OSM) because "Spurlock * * * [was] not an approved operator for this permit" (CO at 2).

Kentucky's Department of Surface Mining Reclamation and Enforcement (DSMRE) issued Permit No. 836-5189 to Mentor Mining, Inc. (Mentor), for 11.62 acres of surface disturbance and 195 acres overlying underground or auger workings on May 19, 1989 (Exh. R-2).

On October 1, 1990, Spurlock submitted an application to transfer Mentor's permit to Spurlock. In response to this application, the Department of Law of Kentucky's Natural Resources and Environmental Protection Cabinet (Kentucky Cabinet) sent a November 2, 1990, Memorandum of Understanding (MOU) to Spurlock listing four sets of violations that had been abated by Spurlock and one set for which a permit revision or amendment would be required to complete abatement (Exh. R-3). ^{1/} The MOU stated that Spurlock intended to pursue a transfer of Mentor's permit and to produce coal as the operator for Mentor until the transfer permit was issued. The MOU also stated Spurlock intended to obtain the required revision by February 28, 1991, and that Mentor would file a Notification of Operator Change form naming Spurlock as operator. ^{2/} The MOU directed Spurlock and Mentor to acknowledge the statements set out in the letter and concluded that nothing stated in the letter would obligate the Kentucky Cabinet to issue the transfer and revision or amendment until all applicable requirements were met.

The Notification of Operator Change form was filed on November 5, 1990. It stated that Spurlock's 1st day of activities on the permit site would be November 7 (Exhs. R-4, A-1).

On April 1, 1991, Kentucky's DSMRE notified Spurlock that

an extension of the abatement date is granted to provide you time to pursue issuance of your pending revision and time for the transfer of Mentor Mining to Spurlock Mining. The new abatement date for remedial action outlined on this permit will be

^{1/} Title 405, Kentucky Administrative Regulations (KAR), Chapter 8:010, Section 22, entitled "Transfer, Assignment, or Sale of Permit Rights," provides that an application must include the "legal, financial, compliance, and related information required by 405 KAR 8:030[,] Sections 2 through 10 and 405 KAR 8:040[,] Sections 2 through 10." 405 KAR 8:010, Section 22(2)(a) 3. 405 KAR 8:030 and 8:040 apply respectively to surface coal mining permits and to underground coal mining permits. Section 3 of each requires that an application include the applicant's violation information. Presumably, the violations listed in the Nov. 2, 1990, letter occurred on permits previously held by Spurlock or affiliated companies. See Exh. R-4 at 3.

^{2/} The MOU between the Kentucky Cabinet, Spurlock, and Mentor concerning Permit No. 836-5189 states that Spurlock "recognizes its responsibility for the performance of all reclamation work on any violation regardless of the date of its occurrence," and "acknowledges that it may be named as a party Defendant [in] any enforcement actions arising subsequent to" Nov. 2, 1990.

April 29, 1991. This extension is granted for the sole purpose of completing the remedial measures for which the extension was requested. However, all performance standards * * * must be met during this period of extension.

(Exh. R-3).

On April 22, 1991, OSM Reclamation Specialist Keith Clemons conducted an oversight inspection of the Permit No. 836-5189 site jointly with a Kentucky DSMRE inspector. His mine inspection report identified Spurlock as the operator, noted the pending application to transfer the permit from Mentor, and stated that he had referred this information to the Lexington Field Office for its action (Exh. R-1).

By letter dated May 13, 1991, Kentucky's DSMRE notified Mentor that it had conducted the required violation checks on the operator information submitted in connection with Permit No. 836-5189 and found that Spurlock had outstanding CO's and delinquent civil penalties that made Spurlock ineligible to conduct surface coal mining operations under Kentucky Revised Statutes (KRS) § 350.130(3) (Exh. R-5). The letter provided Mentor 60 days either to demonstrate that Spurlock was eligible or to terminate Spurlock's activities as operator on the permit.

Mentor's Permit No. 836-5189 was again selected for an oversight inspection by OSM. Keith Clemons conducted a joint inspection with a Kentucky DSMRE inspector on November 1, 1991, after reviewing the Kentucky permit file (Tr. 15-16). Clemons concluded, based on the dates in the November 2, 1990, letter to Spurlock, that the Department of Law's MOU had terminated and, based on the DSMRE's May 13, 1991, letter to Mentor, that Spurlock was ineligible to be an operator (Tr. 17-18). OSM's Applicant Violator System office in Lexington determined that Spurlock had not paid reclamation fees for the fourth quarter of 1990 or for the first quarter of 1991 and Spurlock was therefore listed on the "block list," *i.e.*, the list of companies currently ineligible to be a permittee or an operator (Tr. 20). On November 8, Clemons issued Ten-Day Notice No. 91-83-135-02 to DSMRE, stating that Mentor had an unapproved and ineligible operator on the site. *See* Exh. R-7. DSMRE's November 12, 1991, response stated: "Based upon information furnished in a[n] inter-agency memo dated November 1, 1991 which is closed information from the Division of Permits, the approved operator on the permit is Spurlock Mining Company, Inc. Therefore, no violation exist[s] and no enforcement action will be taken" (Exh. A-2). After OSM's Lexington Field Office reviewed the information he had provided, Clemons was instructed to issue a CO to Spurlock, which he did on November 22, 1991 (Exh. R-7; Tr. 21). As noted above, the CO was issued because Spurlock was "not an approved operator for this permit." It cited 30 U.S.C. § 1271(a) (1994), 30 CFR 773.17(b), and 405 KAR 8:010 and 8:040 as the provisions violated and stated that Spurlock must immediately cease all coal removal activities on the site (Exh. R-7). Four days later, Clemons terminated the CO because Spurlock had ceased (Exh. R-8).

Under 30 U.S.C. § 1271(a)(2) (1994), a CO must be issued immediately if OSM finds that

any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Under 30 CFR 843.11(a)(2), surface coal mining operations conducted without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm. Clemons' report concerning the CO states that "Imminent Harm Cessation Order No. 91-83-135-01 was issued to Spurlock * * * for conducting mining activities on Mentor * * * Permit No. 836-5189, without proper authorization. * * * The SRA [state regulatory authority] declined to take proper enforcement action against the unapproved and ineligible operator * * *" (Exh. R-7). See 30 CFR 842.11(b)(1)(iii)(B).

Stating that the issue was whether the CO was properly issued, Judge Torbett found OSM had presented a prima facie case of violations of the Surface Mining Control and Reclamation Act of 1977 (the Act) under section 1271(a)(2), supra – noting DSMRE's May 13, 1991, letter that stated Spurlock had outstanding violations and was therefore ineligible for a permit under KRS 350.130(3) – that DSMRE's November 12, 1991, "conclusory" response to OSM's 10-day notice did not rebut. In addition, Judge Torbett found Spurlock had violated state and Federal law by conducting operations without DSMRE written advance approval of the change of operator (Decision at 5). "By definition, operating without a permit threatens imminent harm," Judge Torbett stated. 3/ Noting that 30 CFR 843.11(a)(2) "does not specifically address cases, as here, where there exists a valid permit, but the operator, who is ineligible under state law, is conducting operations anyway," he applied the regulation "by analogy . . . since this situation is extremely similar" and upheld issuance of the CO (Decision at 6).

Under Kentucky's permanent program, the transfer of permit rights may be approved if the successor is eligible to receive a permit under 405 KAR 8:010, Section 14. 4/ A transfer of a permit may not be approved to any person who would be ineligible to receive a new permit under KRS 350.130(3). 5/ 405 KAR 8:010, Section 14 provides that no application for

3/ We note Judge Torbett mistakenly cited the initial program regulation in 30 CFR 722.11(c), rather than 30 CFR 843.11(a)(2), supra, but the error is harmless since the provisions are identical.

4/ 405 KAR 8:010, Section 22(4)(a). Cf. 30 CFR 774.17(d)(1).

5/ 405 KAR 8:010, Section 22(7).

a permit shall be approved unless the application demonstrates that the applicant has paid all reclamation fees from previous and existing operations as required by 30 CFR Part 870 or has entered into a payment schedule approved by OSM. 6/ The Kentucky Cabinet is to notify the original permittee, the successor, any commenters or objectors, and the OSM field office director of its decision on an application for transfer, assignment or sale of permit rights. 7/

The Kentucky program also authorizes permit revisions for operator changes that do not constitute a transfer, sale, or assignment of permit rights. 8/ An application for a change of operator may be approved if the Kentucky Cabinet finds, in writing, that the proposed operator is eligible to act as an operator under 405 KAR 8:010, Section 13(4). 9/ 405 KAR 8:010, Section 13(4) provides that the Kentucky Cabinet shall not approve an application for a permit if, based on available information concerning (among other things) delinquent reclamation fees, the applicant is currently in violation of Federal regulations enacted pursuant to the Act. The Kentucky Cabinet is to notify, in writing, the permittee and the proposed operator and anyone commenting on the application of its decision to approve or deny the application within 15 working days after the close of a public comment period. 10/

These provisions of the Kentucky permanent program make clear that both Spurlock and Mentor should have received a written decision from the Kentucky Cabinet on the application to change operators or the application to transfer the permit. 11/ No decision appears in the record examined by OSM, none was submitted by Spurlock, and there is nothing in the record that would allow us to conclude that Spurlock was an approved operator. 12/

[1] Provisions that disqualify a person with unabated violations or unpaid abandoned mine reclamation fees or civil penalties from obtaining a permit or being an approved operator, e.g., 30 U.S.C. § 1260(c) (1994)

6/ 405 KAR 8:010, Section 14(8).

7/ 405 KAR 8:010, Section 22(5). Written approval is required, and the permit is reissued to the successor. 405 KAR 8:010, Sections 22(1), 22(6).

8/ 405 KAR 8:010, Section 20(6).

9/ 405 KAR 8:010, Section 20(6)(g).

10/ 405 KAR 8:010, Section 20(6)(h).

11/ *Id.* and note 7, *supra*.

12/ Because of its unpaid reclamation fees Spurlock could not have been approved as an operator for Permit No. 836-5189 under 405 KAR 8:010(20)(6) on Nov. 1, 1991. For the same reason it could not have been an approved transferee of that permit. Spurlock acknowledges that it did not pay its fourth quarter 1990/first quarter 1991 reclamation fees until February 1992, several months after OSM issued the CO (SOR at 8). It is not clear on what basis DSMRE could write its Nov. 1, 1991, internal memorandum or its Nov. 12, 1991, response to OSM's 10-ten day notice. Perhaps it had not checked the information in the Applicant Violator System and was unaware the reclamation fees had not been paid. *See* Tr. 37-38.

and 405 KAR 8:010, Sections 13(4) and 14, are critical to the enforcement of the Surface Mining Act. However, being an unapproved operator of a surface coal mining operation that has received a permit is not analogous to conducting a surface mining operation without a valid permit. When it proposed 30 CFR 843.11(a)(2), OSM stated its belief "that the permitting process is central to the health, safety and environmental protection provisions of the Act." 46 FR 58467 (Dec. 1, 1981). In adopting the final regulation, OSM explained:

OSM's experience in administering the Act demonstrates that the failure to plan mining operations in advance and obtain the necessary authorization to conduct surface coal mining operations constitutes an imminent threat of significant environmental harm, and therefore falls within the ambit of Section 521(a)(2) of the Act. The requirements of the Act and regulations and the general permitting requirements in most State laws (especially the requirements for pre-operational planning as to hydrology, reclamation potential of an area and bonding) demonstrate the critical role that the permit plays in an environmentally acceptable surface mine operation. * * * The failure to obtain such a permit under most circumstances means that the operator knows little, if anything, about the actual environmental consequences that can be expected from mining. OSM's experience is that the continuation of such operations leads quickly to significant environmental harm.

Permit and pre-plan requirements allow the operator and the regulatory authority to determine those conditions that might potentially cause significant environmental harm and to make adequate provision for their control. Such conditions, particularly those involving sub-surface hydrology and geology and unidentified prior deep mining, often cannot be uncovered solely by an inspection. Moreover, once the conditions are actually encountered in mining – once an aquifer is disturbed, or toxic water is released from old deep mines, or a landslide occurs – the environmental damage may be irreparable. Only the operator, through thorough pre-mining studies, and the permitting authority, through review of those studies, have the opportunity to discover such conditions. Moreover, only if such conditions are revealed in the permit application process can the regulatory authority ensure that significant environmental harm will not occur.

47 FR 18557 (Apr. 29, 1982).

In this case, the concerns that led OSM to adopt the regulation are not applicable. Mentor had obtained a permit for its mining operation, and Spurlock's initial operations were authorized under the MOU. Later, Spurlock was not an approved operator on Mentor's permit, but that change of status did not itself cause significant imminent environmental harm. If the situation in this case is analogous to 30 CFR 843.11(a)(2), it is to the second exception of the regulation that applies to underground

mines which had been operating lawfully under the interim program regulations in certain states that did not require permits for such operations. In adopting that provision, OSM explained:

At the time of passage of the Act, some States * * * did not require permits for underground mines, since such mines generally cause fewer environmental problems than surface mines. In recognition of this, the Act did not require permits during the interim regulatory program for those operations which were otherwise not subject to the State permitting requirements.

By the same reasoning, the continuation of these previously lawful operations after implementation of the permanent regulatory program (when a permit is required) would not reasonably be expected in every case to constitute an imminent threat of significant environmental harm. While the failure to obtain a permit under such circumstances would violate the regulations, a notice of violation (or the State equivalent) would be the appropriate remedy unless specific environmental harm in fact exists.

47 FR 18557 (Apr. 29, 1982). The record in this case does not indicate any specific environmental harm from Spurlock's operating under Mentor's permit that constitutes a condition, practice, or violation that creates an imminent danger to the health or safety of the public or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. If there were such a condition or practice, then a CO would be appropriate under 30 CFR 843.11(a)(1).

In our view, when OSM received DSMRE's November 12, 1991, response, it should have followed the procedures set forth in 30 CFR 842.11(b)(1)(iii)(A).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Torbett's December 7, 1992, decision is reversed.

Will A. Irwin
Administrative Judge

I concur.

R. W. Mullen
Administrative Judge

