

MARION DOCKS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2003-349

Decided February 23, 2006

Interlocutory appeal from an order of Administrative Law Judge John C. Holmes denying appellant's motion for summary judgment.

Affirmed; case remanded to the Hearings Division.

1. Surface Mining Control and Reclamation Act of 1977--Generally

Pursuant to OSM's oversight authority in states with approved programs having primary enforcement jurisdiction, OSM is required to conduct an inspection when it has reason to believe that a violation of the state program exists, it has given the state regulatory authority notice of the possible violation, and the state has failed to take appropriate action within 10 days to cause the violation to be corrected or show good cause for such failure.

2. Surface Mining Control and Reclamation Act of 1977--Generally

On review of a state regulatory agency's response to a 10-day notice asserting that it has good cause under 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) in that it is precluded by a ruling of a state administrative body of competent jurisdiction from citing an asserted violation, the standard of review applied by OSM is whether that ruling is arbitrary, capricious, or an abuse of discretion.

APPEARANCES: Wayne A. Babcock, Esq., Field Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Steven C. Smith, Esq., Wheeling, West Virginia, and W. Henry Lawrence, Esq., Clarksburg, West Virginia, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case stems from an application for review of Notice of Violation (NOV) NOV-112-114-001 issued to Marion Docks, Inc., by the Office of Surface Mining Reclamation and Enforcement (OSM) on February 13, 2003. The NOV cited appellant with a violation of West Virginia law arising from the failure to eliminate a highwall at the Charity Fork Mine 1 (State Permit No. S-2008-92) in West Virginia. The proceeding before us is an interlocutory appeal to the Board from the order of Administrative Law Judge John C. Holmes denying appellant's motion for summary judgment^{1/} in the review proceeding. The interlocutory appeal was certified to the Board by order of Judge Holmes dated September 25, 2003, in accordance with 43 CFR 4.1124.

In its Motion for Summary Judgment (Motion) and supporting Memorandum of Law (Memorandum), appellant indicates that it applied to the West Virginia Department of Environmental Protection (WVDEP) for a Phase I bond release for its permit which was initially denied based on the presence of an exposed highwall. This decision was appealed to the West Virginia Surface Mine Board (SMB) which overturned the WVDEP decision in a September 18, 2002, order finding that appellant's reclamation activities achieved approximate original contour (AOC) despite the presence of the exposed highwall on the permit. Notwithstanding the SMB order, OSM issued a 10-day notice (TDN) X02-112-014-003 to WVDEP (Memorandum, Ex. D) citing the failure of the permittee to eliminate the highwall. In a response dated October 31, 2002, WVDEP indicated that it would not take any enforcement action because the SMB "found that the highwall at issue was acceptable for Phase I Release." In a letter dated January 23, 2003, OSM notified WVDEP that it found the response to the TDN to be arbitrary, capricious, or an abuse of discretion because WVDEP had not shown good cause for failure to cause the highwall violation to be corrected. (Memorandum, Ex. E at 1.) Citing the regulation at 30 CFR 842.11[(b)(1)(ii)](B)(4) and acknowledging that good cause may include situations where a state regulatory authority is precluded from enforcement action by an administrative order, OSM stated that in order to establish good cause the order must be based on the fact that a violation does not exist. (Ex. E at 2.) Noting that the SMB order recognized the continued existence of the exposed highwall, OSM found that good cause had not been shown. Id.

In its Motion, appellant contends that good cause existed for WVDEP not to take enforcement action in that it is precluded by order of SMB, "an administrative body of competent jurisdiction," which found that appellant's reclamation had

^{1/} The relevant regulation regarding evidentiary hearings in surface mining cases provides that the administrative law judge may, under certain circumstances, grant a motion by a party for "summary decision." 43 CFR 4.1125.

achieved AOC. In support, appellant cites Elk Run Coal Company v. Babbitt, 919 F. Supp. 225 (S.D.W. Va. 1996), motion for extension to file appeal denied, 930 F. Supp. 239 (S.D.W. Va. 1996).

In denying appellant's motion, Judge Holmes found that OSM is obligated to defer to a ruling by a state regulatory authority that no violation exists unless it determines the ruling is arbitrary, capricious, or an abuse of discretion under the state program. (Order at 5.) He also held that in making such a determination, OSM may review a state's administrative action and that OSM's oversight authority is not limited when the state agency has acted outside the scope of its authority in making its ruling. Id. Judge Holmes found that both Federal and State law requires complete elimination of highwalls. Id. at 6. Based on the facts of record, Judge Holmes found "OSM conducted its investigation in accordance with its oversight authority," citing Appolo Fuels v. Babbitt, 270 F.3d 333 (6th Cir. 2001). (Decision at 5.) He distinguished the Elk Run case, noting that in Elk Run the state regulatory agency found that no violation existed, whereas in appellant's case, SMB acknowledged that a highwall existed on the permit, but held that other factors relieved appellant of the duty to reclaim the highwall. Id.

In its Statement of Reasons (SOR) for appeal, appellant again asserts that the Elk Run precedent is controlling. Appellant takes issue with the distinction drawn by Judge Holmes, pointing out that SMB found that appellant's reclamation had achieved AOC and was entitled to a Phase I bond release. (SOR at 5.) Appellant quotes the relevant regulations clarifying that all or part of a bond may be released only if no violations exist with respect to the permitted site. Id. Thus, appellant contends SMB necessarily found as a matter of law that no violation existed and this constituted good cause for WVDEP not to take further enforcement action. Id.

Counsel for OSM has filed an Answer arguing that this case is properly distinguished from Elk Run on the ground that the SMB ruling in appellant's case regarding bond release made no finding that a violation did not exist. Rather, it acknowledged that all highwalls had not been eliminated, but did not require elimination of the highwalls on equitable considerations. (Answer at 4.) Elimination of highwalls is required under West Virginia State law and failure to implement the law as SMB did is arbitrary, capricious, and/or an abuse of discretion, OSM contends. Id. at 5. OSM notes that this is the standard under the regulations for determining whether the state regulatory agency provided good cause for inaction, citing 30 CFR 842.11(b)(1)(ii)(B)(1) and (2). (Answer at 4-5.) To the extent that Elk Run is understood to stand for the principle that every ruling of a state administrative review agency that fails to enforce the state program is insulated from the OSM oversight review, OSM urges the Board to address the issue in light of the conflict with other precedent. Id. at 5. In the exercise of its oversight authority, OSM contends that it is not bound to accept a state administrative agency's finding that no

violation exists regardless of whether that finding is arbitrary, capricious, or an abuse of discretion, asserting this would be inconsistent with the statute. Id. at 7-9.

In a reply brief, appellant disputes the assertion that the Elk Run case is distinguishable because SMB in that case made no ruling that a violation did not exist. Appellant asserts that the finding by SMB that AOC was achieved necessarily constitutes a holding that the highwall was eliminated. (Reply at 3.) Counsel for OSM has filed a reply brief contending that the acknowledged presence of an unreclaimed highwall from appellant's mining and the SMB finding that spoil which should have been used to reclaim the highwall was used instead to "reclaim old pre-law highwalls" establishes the existence of the violation and distinguishes this case from Elk Run. (OSM Reply at 2-3.)

Pursuant to section 503 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1253 (2000), the State of West Virginia assumed primary jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands in the State upon approval of the State program for regulation of those operations in accordance with the provisions of SMCRA. 30 CFR 948.10. Section 503(a) of SMCRA provides that this jurisdiction is expressly subject to the oversight jurisdiction of OSM under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2000), which authorizes the Federal inspection of surface coal mining operations if, within 10 days after notice that a violation is believed to exist, the state regulatory agency fails to take appropriate action to cause the violation to be corrected or show good cause for such failure. The oversight inspection provisions of section 521(a)(1), 30 U.S.C. § 1271(a)(1) (2000), are implemented by regulations found at 30 CFR 842.11.

[1] The regulations provide that an authorized representative of the Department (OSM) shall conduct a Federal inspection when OSM has reason to believe on the basis of information available to it that a violation of SMCRA, the applicable state program, or any condition of a permit exists and

[t]he authorized representative has notified the state regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met.

30 CFR 842.11(b)(1)(ii)(B)(1). “Good cause” is defined in the regulations to mean several things, including that “[u]nder the State program, the possible violation does not exist” and that “the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing.” 30 CFR 842.11(b)(1)(ii)(B)(4)(i) and (iv). Under the regulations, the standard for determining both “appropriate action” and “good cause” is whether the state agency’s action or response to the TDN is arbitrary, capricious, or an abuse of discretion under the state program. 30 CFR 842.11(b)(1)(ii)(B)(2); Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 74, 102 I.D. 1, 9 (1995).

[2] In Pittsburg & Midway the Board rejected appellant’s contention that each of the conditions listed in 30 CFR 842.11(b)(1)(ii)(B)(4) constitutes good cause per se, without further inquiry, for failure to have a violation corrected. 132 IBLA at 75-77, 102 I.D. at 10-11. We noted the discussion in the preamble to the rulemaking to the effect that “[a]fter issuing a ten-day notice, [OSM] independently determines whether a state has taken appropriate action or shown good cause for such failure, based on the state response.” 53 FR 26736 (July 14, 1988). The preamble also states that “[i]n cases where a state concludes that no violation exists, [OSM] will defer to the state’s decision unless it determines that the state conclusion was arbitrary, capricious, or an abuse of discretion.” 53 FR 26735 (July 14, 1988). This latter explanation was cited by the court in upholding the regulation at 30 CFR 842.11 in a suit challenging its validity. National Coal Association v. Uram, 39 Env’t Rep. Cas. (BNA) 1624, 1636 (D.D.C. 1994).^{2/} In reviewing the OSM’s role under subsection (b)(1)(ii)(B)(4)(iv) when the state regulatory agency is precluded from taking enforcement action by an order from a state administrative body, we noted in Pittsburg & Midway, 132 IBLA at 79, 102 I.D. at 11-12, that the preamble to this regulation explains that “a state regulatory authority has good cause for not taking action when it is enjoined from doing so by a state administrative or judicial body acting within the scope of its authority under the state program” and “where the order has a proper basis.” 53 FR 26739 (July 14, 1988). We held that the “standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failure to correct a violation is the arbitrary, capricious, or abuse of discretion standard, the

^{2/} The court found that “the Secretary’s decision to promulgate the rule to review a state’s response to a TDN under the arbitrary and capricious, abuse of discretion standard is a permissible interpretation of SMCRA.” Id. at 1634. The court noted that under this regulation, in primacy states the state must make the first ruling on a potential violation of the state program by an operator, but “if the state interpretation of its own program is arbitrary, capricious, or constitutes an abuse of discretion, the Secretary will show no deference to the state regulatory authority.” Id.

same standard applicable to OSM review of state regulatory authority actions or responses. Pittsburg & Midway, 132 IBLA at 80, 102 I.D. at 12.

The decision of SMB in this case quotes the relevant provision of the West Virginia surface mining law defining AOC to include “backfilling and grading of the mined areas so that the reclaimed area * * * closely resembles the surface configuration of the land prior to mining * * *, with all highwalls and spoil piles eliminated.” West Virginia Code § 22-3-3(e), quoted in Memorandum, Ex. C at 5. This is required by the statutory standards under section 515(b)(3) of SMCRA and implementing regulations. 30 U.S.C. § 1265(b)(3) (2000); 30 CFR 816.102(a)(1). In its findings of fact, SMB found that appellant was unable to cover the top section of the highwall 245 feet long and up to 17 feet high due to a shortage of remaining spoil and that it used a portion of the spoil to reclaim pre-Act highwalls causing a shortage of spoil. (Memorandum, Ex. C; at 3-4.) Despite the remaining highwall, SMB granted Phase I release for the permit for the reason that appellant used overburden from the operation “to reclaim old pre-law highwalls.” Id. at 6. On its face, the SMB decision did not find that the unreclaimed highwall from appellant’s mining operation did not exist. This fact distinguishes the present case from the Elk Run decision. In the latter case WVDEP issued NOV’s and a Cessation Order (CO) because the operator damaged residential buildings in the course of its blasting operations. After a hearing, SMB concluded on the basis of the evidence presented that the operator had not damaged the structures and vacated the NOV’s and CO’s involved. The court in Elk Run held that the State’s response to the TDN was not arbitrary and capricious because the SMB found, after an evidentiary hearing, that the violation did not exist, thus establishing good cause under 30 CFR 842.11(b)(1)(ii)(B)(4)(iv). 919 F. Supp. at 229-30. Thus, the Elk Run case is distinguishable.

The present case is similar to the Appolo Fuels case where the Board addressed a situation in which the state hearing officer held the operator was not required, “as a matter of fairness, to eliminate highwalls” resulting from the settling of graded backfill, and thus failed to enforce the state and Federal requirement for elimination of highwalls. We held that, because the decision failed to enforce the state rule requiring elimination of highwalls, the ruling did not provide good cause to explain the state’s failure to cite the violation and cannot act as a bar to enforcement by OSM. Appolo Fuels, Inc. v. OSM, 144 IBLA 142, 145 (1998), aff’d, Appolo Fuels, Inc. v. Babbitt, 270 F.3d at 333. We find this precedent controlling. Accordingly, we hold that the SMB decision in the present case does not establish good cause for not citing appellant for a failure to reclaim the highwall created by its mining operation.

Appellant also argues that the SMB finding that it had achieved AOC, is predicated, as a matter of law, on a finding that the highwall had been eliminated. While this contention makes some sense, the fact is that the existence of the

unreclaimed highwall was acknowledged in the SMB decision. In this context, any implied finding by SMB that the highwall had been eliminated would be arbitrary and capricious and, thus, would not support a finding of good cause.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is affirmed and the case is remanded to the Hearings Division.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge