

PEABODY COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-651

Decided January 14, 1987

Petition for a discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming Notice of Violation No. 84-3-38-9 issued by the Office of Surface Mining Reclamation and Enforcement and reducing the amount of the proposed civil penalty from \$ 4,400 to \$ 2,600.

TU-4-12-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State -- Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the state in response to the 10-day notice were either vacated by the state, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by state law.

APPEARANCES: Michael A. Kafoury, Esq., St. Louis, Missouri, for petitioner; Angela F. O'Connell, Esq., and Harold P. Quinn, Jr., Esq., Office of the Solicitor, Washington, D.C., and Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Peabody Coal Company (petitioner) has petitioned for discretionary review of a decision rendered on May 2, 1985, by Administrative Law Judge Frederick A. Miller which affirmed Notice of Violation (NOV) No. 83-3-38-9 and reduced the proposed civil penalty assessment from \$ 4,400 to \$ 2,600. In March 1984, following a 10-day notice to the State of Arkansas, the Office of Surface Mining Reclamation and Enforcement (OSM) issued the NOV for (1) failure to properly design and construct a permanent impoundment, and (2) failure to provide an adequate spillway in compliance with applicable Arkansas regulations. Judge Miller concluded that OSM properly issued the NOV in accordance with section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982), and regulations promulgated thereunder. By order dated June 17, 1985, the Board granted the petition for discretionary review, and subsequently the parties filed briefs in support of their respective positions.

The substantive facts as outlined by Judge Miller in his decision are not in dispute and are set forth below:

Evidence introduced at the hearing included testimony and the introduction of documents by both parties. During a routine

oversight inspection, on December 1, 1983, OSM Reclamation Specialist Samuel M. Petitto found violative conditions on the petitioner's Ozark mine in Johnson County, Arkansas (state permit number P-270-M-CO). Inspector Petitto issued ten day notice (TDN) number 83-3-38-4 to the Arkansas Department of Pollution Control and Ecology (the State) on December 6, 1983. Violation No. 2 of TDN 83-3-38-4 cites petitioner for failure to properly design and construct an impoundment in violation of 30 CFR § 816.49. ^{1/} The state issued notice of violation FDS-014-83 citing the parallel section of the state permanent regulation on December 12, 1983. Violation No. 3 of TDN 83-3-38-4 cites petitioner for failure to provide a spillway adequate to discharge a one hundred year/24 hour event in violation of 30 CFR § 816.46(q). [See note 1, supra.] The state responded by issuing state notice of violation FDS-015-83 citing the parallel section of the state permanent regulations on December 12, 1983. The original abatement date was set for March 12, 1984. OSM sent the state a letter indicating that this initial response was appropriate.

However, as a result of the conference held on February 15, 1984, between the petitioner and the state, state notice of violation FDS-014-83 was vacated and the abatement date for state notice of violation FDS-015-83 was extended until May 14, 1984. On March 5, 1984, Inspector Petitto returned to the site for a follow-up inspection. He discussed the situation with state officials and determined that the violation had not been appropriately nor adequately addressed by the state because the first notice of violation was vacated without any remedial action and the abatement period for the second notice of violation was extended beyond the ninety day limitation of the state regulations. Inspector Petitto issued Notice of Violation No. 84-3-38-9 on March 12, 1984, citing the petitioner for (1) failure to provide a spillway adequate to discharge a 100 year/24 hour event and for (2) failure to properly design and construct an impoundment. An informal assessment conference was held on July 12, 1984, in Fort Smith, Arkansas and the assessment remained unchanged. Petitioner filed for review on August 3, 1984.

Decision at 1-2.

The sole issue presented for our review is whether Judge Miller's holding that OSM properly exercised its oversight jurisdiction under

^{1/} Judge Miller incorrectly referred to 30 CFR. The 10-day notice properly referenced the conditions as violations of Arkansas law.

section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), is correct. 2/ Petitioner's argument is as follows:

In the instant case, if the federal government is going to second guess or reverse state enforcement decisions, the result will be a barrier to State primacy. *
* *

The clear intent of Congress was that the states are to be the primary enforcer and that the federal role is to be limited to oversight. The OSM's oversight role was accomplished by issuing the ten (10) day notice pursuant to Section 521(a) of the Act. The State accepted and properly handled the ten (10) day notice by issuing the violations. The federal government overstepped its boundary when it wrote the NOV.

Brief on Review, at 7-8.

OSM argues, on the other hand, that Judge Miller's ruling was correct and should be affirmed, agreeing with the following analysis in his decision:

OSM asserts that the action by the State of Arkansas was inappropriate. Although OSM approved the initial [sic] response by the state in writing, the follow-up action was not appropriate. Congress did not say that the state regulatory authority could just take enforcement action. OSM correctly argues that the use of the word "appropriate" by Congress calls upon OSM to make a discretionary judgment concerning the quality of any action taken by the state. The mere issuance of a notice of violation does not insure follow through by the state regulatory authority. OSM states that in this case the state failed to take "appropriate" action even though it issued state notices of violation for the impoundment and the spillway. The enforcement action it took did not cause the violations to be corrected nor were the state's actions likely to lead to abatement of the violations within the ninety day period for abatement established by the Act and the state regulations. The state's actions had not resolved the design and construction problems of the impoundment, nor had they

2/ Although Peabody has sought review of Judge Miller's decision, it has not specifically challenged the civil penalty assessment which was reduced by Judge Miller from \$ 4,400 to \$ 2,600. Therefore, if we find that OSM properly issued the NOV, it follows that the \$ 2,600 civil penalty assessment must be affirmed.

provided for an adequate emergency spillway. OSM has properly argued that mere paper enforcement is not appropriate action and therefore OSM has properly exercised jurisdiction under Section 521(a)(1) of the Act.

Decision at 5.

[1] The focus of this appeal is upon how section 521(a) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), generally, and the term "appropriate action" specifically, should be interpreted and applied. That section provides in pertinent part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

30 U.S.C. § 1271(a)(1) (1982).

The phrase "appropriate action" also appears in the regulations promulgated by the Department to implement section 521. The relevant portion of 30 CFR 842.11(b)(1)(ii)(B) varies little from section 521, providing a Federal inspection shall be conducted when

[t]he authorized representative has notified the State regulatory authority of the possible violation and within 10 days after

notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction * * *.

30 CFR 842.11(b)(1)(ii)(B).

The regulation at 30 CFR 843.12(a)(2) governs the course of action to be pursued where the state regulatory authority fails to take "appropriate action":

When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that the appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter. [Emphasis added.]

Peabody's argument requires that we evaluate the response of the Arkansas Department of Pollution Control and Ecology (ADPCE) to OSM's 10-day notice in terms of whether that response amounted to "appropriate action" under section 521(a) of SMCRA and 30 CFR 843.12(a)(2). Under both the statute and the regulation, once OSM provides notice to the State that a violation exists, the State has 10 days "to take appropriate action to cause the violation to be corrected." If the State does not take such

action, or fails to show cause for such failure, OSM may reinspect. Section 521(a) does not explicitly grant OSM the authority to issue an NOV when the violation does not pose an imminent danger, but 30 CFR 843.12(a)(2) provides such authority.

The Board had considered three cases in which the appellant has challenged OSM's jurisdiction to issue an NOV in accordance with section 521(a)(1) of the Act in a state which has obtained primacy. In two of those cases, Shamrock Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 81 IBLA 374 (1984), ^{3/} and Bannock Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 93 IBLA 225 (1986), the respective State regulatory authorities responded to OSM's 10-day notices by concluding that no enforcement action was necessary as a matter of State law. In each case, OSM found the response of the State was inappropriate, and it issued its own NOV's upon reinspecting the sites of the violations. This Board upheld OSM's authority to issue Federal NOV's in both cases.

In a third case, Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 320 (1986), ^{4/} the Board likewise upheld OSM's authority to issue an NOV for a violation found as a result of an oversight inspection, even though the Oklahoma Department of Mines (ODOM) had, in fact, issued an NOV in response to OSM's 10-day notice that a violation existed. The Board noted in this decision that ODOM had issued an NOV for the same violation over a year earlier, and concluded that the

^{3/} Appeal filed, Shamrock Coal Co. v. Clark, No. 84-238 (E.D. Ky., July 27, 1984).

^{4/} Appeal filed, Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, No. 86-380-C (E.D. Okla., July 28, 1986).

mere issuance of a second State NOV did not amount to "appropriate action to ensure abatement of [the] violation in response to a 10-day notice." 92 IBLA at 326.

The appellants in Shamrock, Bannock, and Turner Brothers all argued, as does Peabody in the instant case, that OSM lacks authority to issue an NOV in a state which has achieved primary responsibility for enforcement of its surface mining program. Those previous Board decisions stand for the proposition that OSM may properly issue NOV's in such a circumstance. However, this case presents the more specific question of whether OSM's oversight authority extends to the issuance of an NOV in a primary State, when in response to OSM's 10-day notice that State has issued NOV's and either vacated them or extended the time for their abatement.

All these cases involve OSM's determination, upon reinspection, that the State involved had not taken "appropriate action to ensure abatement of the violation" under section 521(a) of SMCRA. We have previously noted that the meaning of the term "appropriate action" is neither defined in SMCRA nor in the regulations promulgated thereunder. Turner Brothers, 92 IBLA at 323. The Board's analysis of this issue rests in part upon the preamble to 30 CFR 843.12(a)(2), the regulation which confers upon OSM the authority to issue an NOV when the State fails to take "appropriate action" in response to a 10-day notice. OSM specifically rejected the suggestion that the term be "spelled out in detail," concluding rather that "[t]he crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982). Moreover, the Department issued

a "Statement of Policy" on this subject, signed by the Acting Assistant Secretary, Energy and Minerals, providing:

Statement of Policy

Upon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.

It is the Department's opinion, as set forth in the original preamble to 30 CFR 843.12, that "Congress did (not) intend OSM to sit idly by while * * * violations ripen into imminent hazards." 44 FR 15302, March 13, 1979. Rather as the preamble stated, the legislative history indicates that when "an OSM inspector discovered a violation at the mine, he must report the violation to the operator and the state and give the state 10 days to take appropriate action to require the operator to correct the violation. If the State takes such action, OSM does nothing further." 44 FR 15303. However, if the state fails to take adequate action or show good cause for such failure, OSM under 30 CFR 843.12 shall issue a notice [of] violation.

48 FR 9199 (Mar. 3, 1983). 5/

Section 521(a) of SMCRA, 30 CFR 843.12(a)(2), and even the above-quoted "Statement of Policy" all might be interpreted to restrict OSM's oversight authority to an examination of the State's action taken within the 10-day period, and an evaluation of that action in terms of whether it is "appropriate action." Thus, under such an interpretation, if the State

5/ In Clinchfield Coal Co. v. Hodel, No. 85-0113-A (W.D. Va. June 20, 1985), the district court ruled that 30 CFR 843.12(a)(2) expanded OSM's authority beyond that contemplated by the Act, and held that the Secretary had no authority to issue NOV's in states with approved programs, except where OSM found that a violation caused "imminent danger of environmental harm." However, in Clinchfield Coal Co. v. Department of the Interior, No. 85-2206 (Aug. 27, 1986), the Court of Appeals for the Fourth Circuit reversed and remanded the district court decision, stating the district court had no jurisdiction to consider the validity of the regulation. Challenges to surface mining regulations must be heard in the United States District Court for the District of Columbia.

issued an NOV requiring abatement of the violation within the period allowed by its law, OSM would have no further role, since, arguably, the State has taken appropriate action to require the operator to correct the violation. The problem with this interpretation, however, is brought to light by the instant appeal: the fact that the State issues an NOV does not necessarily result in the actual abatement of the violation. The conflict is inherent in the timeframe established in section 521(a), since the abatement period allowed under Arkansas law extends potentially 90 days beyond issuance of the State NOV. Often, then, while State action may initially be "appropriate" under section 521(a) of SMCRA and 30 CFR 843.12(a)(2), whether the operator actually corrects the violation is a matter which cannot be determined until weeks or even months after the State NOV has issued.

Peabody would have us believe that once the State issues an NOV in response to a 10-day notice, the matter is ended as far as OSM is concerned. We reject that position. While the State's issuance of an NOV might constitute "appropriate action" as an initial matter, the State must engage in the follow-up necessary to determine that the abatement indicated in the NOV has been effected. Clearly, OSM's oversight role encompasses ensuring that the State has secured abatement of the violation. One manner in which it may do so is by reinspection. Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 23, 29, 93 I.D. 199, 202 (1986). In the instant case, upon reinspection, OSM discovered that the violations persisted, and it learned about the State's actions in the case. The final question for our consideration is what options were open to OSM in such a circumstance.

Regulation 30 CFR 843.12(a)(2) answers that OSM shall issue an NOV or a cessation order, as appropriate. Further, that regulation states clearly that "[n]o additional notification to the State by the Office is required before the issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter." If the State has not secured the abatement, as specified in its NOV, then OSM shall issue its own NOV upon reinspection in accordance with 30 CFR 843.12(a)(2). To require OSM to repeat the ritual of issuing another 10-day notice, in response to which the State issues another NOV, which might or might not eventually result in abatement of the violation, would subject OSM to the sort of protracted efforts to secure abatement that were evident in Turner Brothers, 92 IBLA at 320.

In the present case, Inspector Petitto reinspected the Ozark Mine on March 5, 1984, and found that Peabody had taken no action to abate either of the violations, although he testified at the hearing that Peabody had complied with the State's requests (Tr. 31). On January 20, 1984, ADPCE vacated its NOV FDS-014-83 for failure to properly design and construct a permanent impoundment, on the grounds that Peabody had previously submitted a plan to ADPCE to correct deficiencies in the construction of the impoundment. OSM contends that Peabody's having submitted plans to the State for the correction of deficiencies in the construction of the impoundment is "irrelevant to the cited enforcement action which dealt only with the status of the impoundment at the time the enforcement action was cited" (Brief of OSM, at 5). OSM argues that Peabody's improper construction of the impoundment violated Arkansas law and that the State's vacating the NOV prior to the abatement of that violation was not "appropriate action." Moreover, on

February 15, 1984, ADPCE had extended the abatement time specified in its NOV FDS-015-83 for failure to provide a spillway to safely discharge the runoff resulting from a 100-year/24-hour precipitation event, to May 14, 1984. OSM argues that this extension was improper under Ark. Stat. Ann. § 843.12(c), 6/ which does not allow an abatement date to extend beyond 90 days from the date that the violation was discovered.

We agree with OSM that ADPCE failed to take appropriate action necessary to secure abatement of the violations noted in OSM's 10-day notices to ADPCE. Discovering those violations unabated upon reinspection, OSM, in issuing the NOV herein challenged, acted within the oversight authority conferred by Congress in section 521(a) and reflected in 30 CFR 843.12(a)(2).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

6/ Ark. Stat. Ann. § 843.12(c) provides:

"An authorized representative of the Director may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance."

