

DORA MINING CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-723

Decided December 23, 1987,

Appeal from a decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 83-10-84-05. NX 4-1-R.

Affirmed.

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

The Secretary of the Interior through OSMRE has jurisdiction to issue a notice of violation in states with approved programs, where OSMRE, acting pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issues a 10-day notice and the state fails to take appropriate action to ensure abatement of the violation or show good cause for its failure.

2. 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: Inspections: Generally

OSMRE may properly issue a notice of violation when, following a 10-day notice to the state regulatory authority, the state declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

APPEARANCES: Edward R. Jackson, Esq., Jasper, Alabama, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, and Susan K. Hoven, Esq., Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

## OPINION BY ADMINISTRATIVE JUDGE ARNESS

Dora Mining Company, Inc., has appealed from a decision of Administrative Law Judge David Torbett, dated June 14, 1985, which held that the Office of Surface Mining Reclamation and Enforcement (OSMRE) had properly issued Notice of Violation (NOV) No. 83-10-84-05 citing appellant for failure to establish a diverse, effective, and permanent vegetative cover at its Mine No. 1. The NOV was issued pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1982).

Dora mined coal at Mine No. 1 pursuant to Alabama State Permit No. P-2213. All mining conducted by Dora under the permit was completed by April 30, 1980, prior to the State assuming primacy over the regulation of surface coal mining and reclamation operations within its boundaries. 1/ On March 31, 1983, Dora requested complete release of its \$38,400 performance bond from the Alabama Surface Mining Commission (ASMC). Following an inspection by ASMC Inspector Rebecca Wright-Hyde, ASMC on May 30, 1983, approved release of Dora's performance bond.

On August 9, 1983, OSMRE Reclamation Specialist Robert W. Prebeck conducted an oversight inspection of the minesite and determined that Dora had not established sufficient vegetative cover on the disturbed areas. As a result, Inspector Prebeck on August 25, 1983, issued a 10-day notice, No. X-83-10-84-20, to the State of Alabama citing Dora's failure to establish a diverse, effective, and permanent vegetative cover on all disturbed lands. ASMC responded to the 10-day notice on September 1, 1983, stating that it had no further jurisdiction to regulate Dora's minesite because ASMC Inspector Wright-Hyde had granted a 100-percent bond release on April 18, 1983. 2/ On September 7, 1983, Inspector Prebeck issued NOV No. 83-10-84-05 to Dora for its failure to establish on all lands disturbed a diverse, effective, and permanent vegetative cover. The NOV required abatement of the violation by December 7, 1983.

In accordance with section 525 of SMCRA, 30 U.S.C. § 1275 (1982), Dora applied for review of NOV No. 83-10-84-05 and after proper notice to the parties, a hearing was held in Birmingham, Alabama, on March 8, 1985. Dora presented no witnesses at the hearing, but instead submitted various documents as exhibits for the record. Respondent, OSMRE, presented the testimony of its Inspector Prebeck. The Administrative Law Judge issued his decision on June 14, 1985, sustaining the NOV, and concluding that the mining operation was not in compliance with all applicable revegetation standards.

Dora timely appealed Judge Torbett's decision to the Board and raised three grounds for appeal. Appellant first argues that OSMRE lacked jurisdiction under the facts of this case to issue an NOV, asserting that OSMRE

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1/ The Alabama Surface Mining Commission (ASMC) was designated the regulatory authority in Alabama on May 20, 1982, the day on which the Alabama State program was conditionally approved. 30 CFR 901.10; 47 FR 22057 (May 20, 1982), as amended at 49 FR 7805 (Mar. 2, 1984).

2/ Appellant's exhibit A-6 reveals that the Inspector recommended 100-percent bond release on this date; approval of this recommendation occurred, as stated above, on May 30, 1983.

cannot issue an NOV in a state which has acquired primacy over its permanent regulatory program. Appellant next maintains that the State of Alabama took appropriate action in responding to OSMRE's 10-day notice. Implicit in the State's response, Dora asserts, is the finding that all of appellant's reclamation responsibilities had been met. Finally, appellant contends that the point frequency method used by OSMRE in inspecting Dora's minesite is not authorized by the regulations, has not been shown to be superior to the visual inspection method employed by the State, and was not correctly carried out according to OSMRE's stated procedure.

[1] Similar arguments regarding OSMRE's authority to act in states with primacy have been addressed by this Board in prior appeals. In Office of Surface Mining Reclamation and Enforcement v. Calvert and Marsh Coal Co., 95 IBLA 182, 189 (1987), the Board held that OSMRE retains direct enforcement authority over surface mining even though a state, like Alabama, is exercising the primary regulatory authority. As support for this holding, the Board cited section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982), which states in part:

(a)(1) Whenever, on the basis of any information available to him, \* \* \* the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, 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 \* \* \*

Upon finding that a state has failed to take appropriate action to cause a violation to be corrected, or to show good cause for such failure, OSMRE is directed by 30 CFR 843.12(a)(2) <sup>3/</sup> to issue a notice of violation or cessation order. Bannock Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 93 IBLA 225, 234 (1986). Review of this regulation is proper only in the United States District Court for the District of Columbia Circuit. 30 U.S.C. § 1276(a)(1) (1982); Calvert and Marsh, supra at 191. We hold the Secretary's authority to issue an NOV in this case is clearly set forth in case law and regulations, and appellant's argument to the contrary must be rejected.

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<sup>3/</sup> This regulation states in part:

"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."

Reinspection was performed by Prebeck using the visual inspection method (Tr. 38).

Both the Calvert and Marsh and Bannock decisions are instructive in determining whether the State took appropriate action following OSMRE's 10-day notice. In Calvert and Marsh, the State of Alabama, upon receiving OSMRE's 10-day notice, took no enforcement action that would cause the violation to be corrected. 95 IBLA at 189. In Bannock, the State of Ohio revoked its approval of a bond release affecting prime farmland, but upon a subsequent reversal of this action took no affirmative steps to correct the violation for which OSMRE gave it notice. In each case, the Board found that the State had failed to take appropriate action to correct the violations charged.

A similar conclusion was reached in Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 320 (1986). In that case, the State of Oklahoma did, in fact, issue an NOV in response to OSMRE's 10-day notice. The Board found this action by the State to be not "appropriate action," however, because the State had issued an NOV for the same violation over a year earlier. Mere issuance of a second State NOV did not amount to "appropriate action" as would ensure abatement of the violation, the Board concluded. See also Peabody Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 95 IBLA 204, 94 I.D. 12 (1987).

[2] Key to each of these decisions is a determination whether the State took such action as would cause the violation to be corrected. No definition of the phrase "appropriate action" has been spelled out by OSMRE because, as explained in the preamble to 30 CFR 843.12, "[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). Alabama's response, as noted above, was to decline to act because, in its view, release of appellant's bond precluded further jurisdiction. This inaction did nothing to correct the vegetation violation identified by OSMRE. Nor did the State demonstrate good cause in declining to act to correct this violation. Implicit in its bond release was a finding by the State that appellant satisfied relevant revegetation standards. Thus, the State's response to the 10-day notice amounted to a denial that a violation, in fact, existed. Lacking as it was in facts that might persuade OSMRE otherwise, OSMRE could properly conclude that the State's response failed to demonstrate good cause for State inaction. Our review of the case law discussed above indicates that OSMRE properly determined that Alabama failed to take appropriate action to correct the violation, or show good cause for its failure to do so, as is required by section 521(a)(1) of the Act. Appellant's contrary contentions are rejected.

Appellant's final argument challenges the validity of the "point frequency" method used by OSMRE to determine whether appellant satisfied the appropriate vegetation standard. That standard is set forth at regulation No. 3, sec. 3(C) and (D), of the Alabama Surface Mining Reclamation Commission (ASMRC), which states:

C. Permanent vegetation shall be deemed adequate vegetative cover if the vegetation has survived two growing seasons, and if the following standards are observed:

1. Legumes and perennial grass must cover at least 80% of the affected soil surface. Areas of less than 80% cover shall not exceed one-fourth acre in size nor total more than 20% of the area planted.

2. Tree and shrub species shall be at such a density to provide a minimum of 435 established seedlings per acre of mine soil. A minimum of 200 seedlings per acre will be allowed on one-half (1/2) acre within each five (5) acres of planting. Additional seeding or planting must be performed to make up any deficiency.

3. Where this provision relative to vegetation would be inconsistent with the proposed use, the reclamation plan shall be reviewed and acted upon in accordance with the approved use. In any event, the reclamation plan must provide for expeditious stabilization of the area.

D. Upon the achieving of the adequate vegetative cover in accordance with the satisfactory reclamation plan the portion of the operator's bond held pending revegetation of the affected area shall be released.

At the hearing, OSMRE's Inspector Prebeck stated that he used the point frequency method in determining that appellant had achieved only 60-percent vegetative coverage of the affected lands. This method requires the inspector to examine randomly selected areas of the minesite by means of a tube-like device containing cross-hairs. Prebeck further stated that he also examined the minesite by giving a simple visual inspection of the affected lands. This latter test caused Prebeck to independently conclude that appellant had not satisfied the 80-percent coverage required by ASMRC regulation No. 3 (Hearing Tr. at 18).

In Calvert and Marsh, supra, this Board found that the ultimate burden of proof in cases arising under 30 U.S.C. § 1271 (1982) rests with the appellant for review in accordance with 43 CFR 4.1171. This regulation provides, however, that OSMRE must first come forward with evidence which, if not contested, would establish that the violation as charged had occurred, i.e., the agency must make out a prima facie case of violation. Because OSMRE had failed to explain the point frequency method of examination in Calvert and Marsh, the Board questioned whether OSMRE succeeded there in establishing its prima facie case.

In the present hearing, the agency again failed to explain the basis for its point frequency examination. It did, however, offer evidence that Inspector Prebeck examined the minesite by a second method also, the visual inspection method, and independently concluded that a violation had occurred. This visual inspection method was in use by the State (Tr. 25). The hearing also adduced that Inspector Prebeck had been employed by OSMRE for 6 years and served as a reclamation specialist (Tr. 8). Prebeck had graduated from

Berea College in Kentucky with a degree in agriculture (Tr. 19). Such evidence, we hold, established a prima facie case for the agency.

Appellant produced no witnesses at the hearing but submitted a number of exhibits in support of its position. Among these, exhibit A-2, is a September 1, 1983, response by ASMC Inspector Wright-Hyde to the 10-day notice. Therein she writes: "Inspector Rebecca Wright-Hyde inspected the area on April 18, 1983. Her opinion, at that time, was that the vegetative cover was diverse, effective & permanent. She signed a 100% release request on that date and lacking further jurisdiction has not returned." This exhibit reveals, however, that a single line has been drawn through the abovequoted language as if to delete it from the State's response. Above this line appear the following words: "ASMC Inspector

Wright-Hyde granted 100% release on April 18, 1983. ASMC has no further jurisdiction in this matter. No further action will be taken." As to revegetation requirements, appellant's exhibit A-7, an inspection checklist completed by Wright-Hyde on April 18, 1983, notes only that certain "[o]uter spoil banks [were] revegetated" and "[s]oil [was] stabilized against erosion."

The record contains no evidence of Inspector Wright-Hyde's qualifications or experience. Nor does the record reveal what inspection method she used in reaching her conclusion that revegetation had been achieved, despite appellant's claim that the State employs the visual inspection method. Appellant's exhibits offer little more than the conclusions of the inspector. Such conclusions, we hold, do not establish by a preponderance of the evidence that revegetation had been achieved in accordance with the relevant Alabama regulation.

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 the Administrative Law Judge is affirmed.

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Franklin D. Arness  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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John H. Kelly  
Administrative Judge

