

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-190

Decided November 29, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire (Docket No. NX 6-86-R), denying an application for review of and an application for temporary relief from Notice of Violation No. 86-91-173-13.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSMRE fails to present evidence showing that rills and gullies found at a minesite are greater than 9 inches deep, it has not met its burden of establishing a prima facie case that the terms of 30 CFR 715.14(i) have been violated.

3. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

A failure to comply with 30 CFR 715.20(a)(1) (requiring establishment of a diverse, effective, and permanent vegetative cover on disturbed lands) will not be excused on the ground that the permittee took adequate steps to comply and would have achieved compliance but for drought conditions beyond his control, where the permittee did not show at the hearing that it would have achieved compliance but for the drought, where the record shows that previous efforts to reseed had been inadequate, and where the OSMRE inspector testifies that reseeding may have failed because of poor, acidic soil conditions at the site.

4. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

APPEARANCES: James Lowe, President, Coal Energy, Inc., for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE HUGHES

Coal Energy, Inc. (Coal Energy), has appealed a decision dated November 19, 1986, issued by Administrative Law Judge Joseph E. McGuire denying its applications for review of, and for temporary relief from, Notice of Violation (NOV) No. 86-91-173-13, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982).

On June 26, 1986, OSMRE Reclamation Specialist Barry Smith conducted an inspection of Coal Energy's surface mining operations known as Areas 3 and 3(a) (Permit No. 81-172), located in Overton County, Tennessee. Following this inspection, Smith issued the NOV, which cited Coal Energy for three violations of governing regulations concerning alleged failure to reclaim

the site: (1) failure to stabilize rills and gullies on all regraded areas; (2) failure to maintain a diversion ditch in such a manner as to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area; and (3) failure to establish a diverse, effective, and permanent vegetative cover on all areas which had been disturbed by Coal Energy's mining activities.

Coal Energy filed a timely application for review of this NOV along with an application for temporary relief from its terms. The matter was set for hearing before Judge McGuire on August 19, 1986, in Knoxville, Tennessee.

At the hearing, OSMRE presented into evidence the NOV (Exh. 7), the inspection report prepared by its inspector following his inspection of the minesite (Exh. 6), photographs of the site (Exhs. 1-4), Coal Energy's mining plan topographical map (Exh. 8), and limited testimony by the inspector concerning the three violations (Tr. 5-18). This evidence is summarized below in connection with our review of each alleged violation. Coal Energy was represented at the hearing by its president, James Lowe, who presented evidence and commented on conditions at the minesite (Tr. 18-40).

On November 19, 1986, Judge McGuire issued his decision denying Coal Energy's applications and ruling that the NOV was validly issued. In so doing, he ruled that OSMRE had met its burden of going forward to establish a prima facie case as to the validity of the NOV, and that Coal Energy had failed to offer contradictory evidence to establish that the NOV had been improperly issued. Coal Energy filed a timely notice of appeal to this Board. <sup>1/</sup>

In a related matter, on January 2, 1987, Coal Energy filed a petition for review of OSMRE's proposed assessment of a civil penalty of \$1,100 for NOV 86-91-173-13, docketed by the Hearings Division as NX 7-26-P. However, on January 12, 1987, Judge McGuire dismissed the petition because Coal Energy's petition was not accompanied by full payment of the amount of the proposed penalty, to be held in an escrow account, as required by 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b) and (c). On May 14, 1987, this Board denied Coal Energy's petition for discretionary review of Judge McGuire's order, confirming that Coal Energy's failure to prepay had deprived both the Hearings Division and this Board of jurisdiction to consider the matter. Coal Energy, Inc., IBLA 87-422 (Order denying petition for discretionary review, May 14, 1987); see Ben Collins v. OSMRE, 92 IBLA 371, 376 (1986).

[1] In a proceeding concerning an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. 43 CFR 4.1171(a); see Dean Trucking Co., 1 IBAMA 229, 237, 86 I.D. 437, 441 (1979). Although the ultimate burden of persuasion rests with the applicant for review, the NOV will be affirmed only where OSMRE meets its burden of establishing a prima

<sup>1/</sup> Coal Energy's brief does not address the question of whether temporary relief was properly denied. Accordingly, Judge McGuire's decision on this question is affirmed.

facie case. See Turner Brothers, Inc. v. OSMRE, 98 IBLA 395, 398 (1987); Calvert & Marsh Coal Co. v. OSMRE, 95 IBLA 182, 191 (1987). OSMRE makes a prima facie case when it presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. S & M Coal Co. v. OSMRE, 79 IBLA 350, 354; 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982). With these standards in mind, we shall address each alleged violation.

### Rills and Gullies

OSMRE's inspection report states: "The operator has failed to stabilize an area just above diversion ditch #004. Material from this area has drained down and blocked diversion ditch #004" (Exh. 6). The area in question was just above Diversion Ditch No. 4 (Exh. 8; Tr. 11). The inspector testified that soil from the rills and gullies washed down and blocked Diversion Ditch No. 4 (Tr. 11, 14), and a photograph of the area showing the rills and gullies and a ditch holding standing water was also presented into evidence (Exh. 2; Tr. 14).

[2] The NOV cited Coal Energy with a violation of 30 CFR 715.14(i):

Regrading or stabilizing rills and gullies. When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to | 715.20. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation. [Emphasis supplied in part.]

The testimony of OSMRE's inspector and the photographs placed into evidence by OSMRE show that there were rills and gullies at the minesite. However, OSMRE presented no testimony as to the depth of the rills and gullies, and we are unable to determine their depth from the photographs put into evidence. Compare Palmer Coking Coal Co. v. OSMRE, 96 IBLA 266, 268 (1987) (where OSMRE presented evidence as to the depth of the rills and gullies).

Therefore, we hold that OSMRE did not present a prima facie case of a violation of 30 CFR 715.14(i) and reverse the decision of the Administrative Law Judge insofar as it upheld this violation. 2/

2/ The second sentence of this regulation authorizes OSMRE to direct stabilization of rills or gullies of less than 9 inches if they will disrupt postmining land use or may result in additional erosion. An NOV of this provision would not be appropriate unless a permittee had been given such notice and failed to comply with it. There is no indication in the record that OSMRE did so here.

Failure to Meet Revegetation Requirements

OSMRE's inspection report simply noted that "[t]he last planting of vegetation on some areas was unsuccessful" (Exh. 6). The NOV was issued because there were several bare areas, especially those having steeper slopes and western and northwestern exposure (Exhs. 4 and 8; Tr. 12). The inspector testified that there was always a little problem getting vegetation to "hold" at this site, because the soil is toxic (Tr. 12). Due to the acidity of the soil, the inspector testified that it is always going to be "an extremely hard situation" (Tr. 17, 18). The inspector noted that Coal Energy had been trying to revegetate the site (Tr. 15) and that he thought that, in view of drought conditions in the area, the NOV was going to be modified to give more time to comply (Tr. 16). The NOV cited Coal Energy with a violation of 30 CFR 715.20(a)(2), and directed it to take soil samples from the locations where vegetation had not been successful and submit the results to OSMRE and then to reseed, lime, fertilize, and mulch all areas where vegetation had been unsuccessful (Exh. 7; Tr. 15).

[3] The regulation, 30 CFR 715.20(a)(1), establishes the requirement that a permittee shall establish on all land that has been disturbed a diverse, effective, and permanent vegetative cover. The evidence presented by OSMRE adequately shows that Coal Energy failed to meet this requirement, and this showing was unrebutted by Lowe, who testified that, despite reseeding the minesite repeatedly in years previous to 1986, there were areas that did not come up at all (Tr. 35).

However, Lowe argued at the hearing and on appeal that he made every effort to establish ground cover in the spring of 1986, but was thwarted by drought conditions prevalent in Tennessee at that time. Lowe testified that he had placed 200 pounds of patch seed, 2 tons of lime, and a ton of fertilizer in the spring of 1986, which was the driest spring in history, which is why the seed did not "take" (Tr. 20). Lowe placed into evidence an affidavit further reciting the details of his spring planting, along with receipts corroborating that he purchased reseeding materials in the spring of 1986 (Exh. A). He also presented copies of telephone messages suggesting that OSMRE recognized in August 1986 that drought conditions in Tennessee had rendered reseeding ineffective (Exh. A). <sup>3/</sup>

In effect, Lowe argues that its failure to comply with 30 CFR 715.20(a)(1) should be excused because he took adequate steps to comply and that, but for drought conditions beyond his control, would have achieved compliance. However, Coal Energy failed to establish, as a matter of fact, that it would have achieved compliance but for the drought. Coal Energy admitted that previous efforts to reseed had been inadequate, and the OSMRE inspector testified that he believed these efforts may have failed because of poor, acidic soil conditions at the site (Tr. 15-17).

<sup>3/</sup> It appears from this affidavit and Lowe's testimony that OSMRE extended the time for compliance for revegetation until Aug. 15, 1986, and that OSMRE had indicated that NOV's written for "seeding would probably be vacated due to the drought" (Exh. A; Tr. 34). The NOV was evidently not vacated.

In any event, the terms of 30 CFR 715.20(a)(1) are mandatory: the permittee is required to establish vegetative cover on disturbed areas. If proven, allegations that compliance was impossible may, in some circumstances, mitigate the amount of the civil penalty assessed for a violation or reduce the duration of a suspension of a mining permit. 30 CFR 722.17(c), 723.13(b)(3)(A). <sup>4/</sup> However, the fact that circumstances beyond the operator's control contributed to a failure to revegetate a site as required does not justify a finding that no violation occurred. Lone Star Steel Co. v. OSMRE, 98 IBLA 56, 62 (1987). An NOV may not be vacated because of the operator's inability to comply. 30 CFR 722.17(a); Coal Energy, Inc. v. OSMRE, 104 IBLA 24, 26 (1988).

#### Inadequate Sediment Control Measures

OSMRE's inspection report states: "Diversion ditch #004 has filled in with soil. The ditch has been blocked and run-off cannot reach sediment pond #002 on Area #3A" (Exh. 6). As noted above, the inspector testified that the ditch was filled with soil that washed in from the rills and gullies, adding that the blockage prevented drainage from entering Sediment Pond No. 2 (Tr. 11). He added that water was not running through the ditch into the pond on the day he made his inspection (Tr. 18). OSMRE also presented a photograph of the ditch showing it nearly full of sediment, with drainage water standing in it (Exh. 2).

[4] The NOV cited Coal Energy with a violation of 30 CFR 715.17(c)(3):

Diversions shall be designed, constructed, and maintained in a manner to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable State or Federal law. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins. [Emphasis supplied.]

In Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 305, 95 I.D. 75, 79 (1988), we dealt with a situation comparable to the present matter, where the OSMRE inspector cited the operator with a failure to pass all surface drainage from areas disturbed by mining through a sedimentation pond or a siltation structure before the drainage left the permit area. The regulation in question in that case was an Oklahoma State provision identical to 30 CFR 717.17(a)(1), which provides in part: "All surface drainage from the disturbed area \* \* \* shall be passed through a sedimentation pond or a series of sedimentation ponds prior to leaving the permit area." (Emphasis supplied.)

<sup>4/</sup> Lowe testified that he was concerned about the imposition of civil penalties for these violations (Tr. 36). However, Coal Energy lost its right to dispute the correctness of the civil penalty assessed for this violation by failing to prepay the amount of the proposed civil penalty.

In Turner Brothers, as in the instant case, one of the critical elements of the violation alleged was that any surface drainage must actually leave the permit area. We ruled in that case that the violation should be affirmed where unrebutted evidence established that there was a "reasonable likelihood" that, among other facts, surface drainage would leave the permit area.

In the present case, although OSMRE presented no testimony as to whether the blockage would allow additional contributions of suspended solids to streamflow or runoff outside the permit area, it adequately established its prima facie case on this point by documentary and photographic evidence establishing a "reasonable likelihood" that the blockage would allow contributions of solids to runoff outside the permit area.

It appears from the photograph of Diversion Ditch No. 4 that the ditch was clogged with sediment and that drainage water was standing in it (Exh. 2). Further, the mining plan topographical map shows that this ditch is situated on a steep slope and is located within 50 feet of the permit boundary (Exh. 8). James Lowe did not present convincing evidence at the hearing controverting OSMRE's evidence, and he actually corroborated this evidence with his testimony that it was necessary for him to cut one end of the ditch lower in order to get it to drain (Tr. 19).

OSMRE's evidence adequately establishes that there was water draining from the site and that this drainage contained solids, in the form of the sediment that was seen clogging the drainage ditch. Further, it shows that any drainage flowing down the steep slope would not have been caught by Diversion Ditch No. 4, since it was clogged nearly full with sediment. Finally, it establishes that, in view of the steep slope and short distance between the ditch and the permit border below it, it is reasonably likely that the drainage would leave the permit area, thus contributing solids to runoff outside the permit area.

Based on our review of the record, we conclude that OSMRE established a prima facie case that a violation of 30 CFR 715.17(c)(3) existed, and that Coal Energy failed to meet its burden of persuasion that the violation did not occur.

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 in part and reversed in part.

---

David L. Hughes  
Administrative Judge

I concur:

Will A. Irwin  
Administrative Judge