

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-323

Decided March 2, 1989

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming in part and vacating in part Notice of Violation No. 85-03-006-036 and vacating Cessation Order No. 85-03-006-023. TU 5-91-R and TU 6-9-R.

Affirmed in part and reversed in part.

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

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining control and Reclamation Act of 1977: Evidence:
Generally -- Surface Mining Control and Reclamation Act of 1977:
Abatement: Generally

Timely performance of abatement activities required by a notice of violation cannot be considered as a stipulation by the permittee that the notice was validly issued.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant;
Angela F. O'Connell, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Turner Brothers, Inc. (TBI), has appealed a February 6, 1987, decision by Administrative Law Judge Frederick A. Miller affirming Notice of Violation (NOV) No. 85-03-006-036 as it pertained to ponds 02 and 03 at TBI's Welch No. 1 minesite (Permit No. 82/86-4049). Judge Miller concluded that TBI's abatement of the violation, as it related to those two ponds, "must be viewed as a stipulation that the notice of violation was valid" (Decision at 4). However, as to pond 06, he vacated the NOV, and corresponding failure

to abate Cessation Order (CO) No. 85-03-006-023, holding that the Office of Surface Mining Reclamation and Enforcement (OSMRE) had failed to present a prima facie case of a violation.

On June 4, 1985, OSMRE Inspector Joseph Funk inspected TBI's Welch No. 1 minesite, and as a result of that inspection, issued NOV No. 85-03-006-036 for violation of 30 CFR 936 and Oklahoma Permanent Regulatory Program Regulation (OPRPR) 816.46(s). 1/ The NOV applied to ponds 01, 2/ 02, 03, and 06 and required TBI to "resoil where necessary, seed, and mulch the barren areas." The remedial work was to be completed by July 16, 1985 (Exh. R-4).

Inspector Funk returned to the minesite following the abatement date and found that TBI had completed the necessary remedial action on ponds 02 and 03, but had done no work on pond 06 (Tr. 15). He extended the abatement date to September 24, 1985, for completing the work at pond 06 (Tr. 15, 26).

TBI filed a timely application for review of the NOV. On August 5, 1985, OSMRE filed a motion to modify the NOV by addition of OPRPR 816.49(c), which provides: "Excavations that will impound water during or after the mining operations shall have perimeter slopes that are stable and shall not be steeper than 1v:2h. Where surface runoff enters the impoundment area, the side slope shall be protected against erosion." TBI did not oppose the motion, and Judge Miller granted it. 3/

Upon reinspection of pond 06 on September 24, 1985, the inspector determined that the violation had not been abated and issued CO No. 85-03-006-023 (Tr. 15). TBI sought timely review of that order.

Judge Miller held a hearing on both applications in Tulsa, Oklahoma, on October 29, 1986. Following his February 6, 1987, decision, TBI timely appealed to this Board. OSMRE has not appealed Judge Miller's rulings regarding pond 06.

1/ OPRPR 816.46(s) provides as follows:

"(s) The entire embankment including the surrounding areas disturbed by construction shall be stabilized with respect to erosion by a vegetative cover or other means immediately after the embankment is completed. The active upstream face of the embankment where water will be impounded may be riprapped or otherwise stabilized. Areas in which the vegetation is not successful or where rills and gullies develop shall be repaired and revegetated in accordance with Section 816.106."

2/ Subsequently, OSMRE "elected not to pursue any enforcement action" concerning pond 01 (Tr. 3).

3/ Although in the motion OSMRE moved that the notice be modified by "adding to the provisions of the regulations violated OPRPR 816.49(c)," in support of the motion OSMRE stated that TBI "was not misled by the erroneous legal citation," implying that the inspector's citation of OPRPR 816.46(s) was incorrect. Nevertheless, at the hearing OSMRE took the position that both the regulations were involved (Tr. 17-18, 46).

[1] On appeal TBI challenges Judge Miller's ruling that OSMRE had jurisdiction to issue the NOV, charging that OSMRE did not provide adequate notice pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982), when it assumed primary enforcement of Oklahoma surface coal mining operations pursuant to 30 U.S.C. § 1271(b) (1982). OSMRE contends that the APA does not apply. We have previously rejected this argument by TBI on numerous occasions. Turner Brothers, Inc. v. OSMRE, 107 IBLA 174 (1989); Turner Brothers, Inc. v. OSMRE, 103 IBLA 10 (1988); Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988); Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (1987). Consequently, we affirm Judge Miller's dismissal of the jurisdictional challenge.

TBI argues, concerning ponds 02 and 03, that OSMRE failed to establish a prima facie case of a violation. It reasons that since Judge Miller correctly concluded that OSMRE failed to establish a prima facie case of a violation as to pond 06, OSMRE also failed to present a prima facie case of a violation concerning ponds 02 and 03, because all three ponds were identical in that they were excavated ponds with shale inslopes.

TBI disputes Judge Miller's rationale for affirming the issuance of the NOV as to ponds 02 and 03, arguing that he was completely wrong in equating abatement of a violation with an admission that a violation had taken place. In its brief, OSMRE, without elaboration, also expresses its disagreement with Judge Miller's conclusion as to the effect of abatement on the validity of a notice of violation. Thus, both parties are in agreement that Judge Miller erred in his conclusion regarding the NOV as it relates to ponds 02 and 03.

[2] We hold that Judge Miller's interpretation is erroneous. It is completely contrary to the intent of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), in that it would put permittees in the untenable position of having to choose between abatement and challenging alleged violations. By failing to abate timely, a permittee is assured of receiving a failure to abate cessation order which requires the mandatory assessment of civil penalties. Grays Knob Coal Co. v. OSMRE, 98 IBLA 171 (1987). One express intent of the statute is to "assure that surface coal mining operations are conducted as to protect the environment" (30 U.S.C. § 1202(d) (1982)), a goal which is not furthered by encouraging delays in abatement activities.

Moreover, section 525 of SMCRA, 30 U.S.C. § 1275 (1982), which provides for administrative review of enforcement actions, allows a person who is or may be adversely affected by a notice or order, or by any modification, vacation, or termination of such a notice or order, 30 days from receipt of such to apply for review. Nowhere in that section or in the applicable procedural regulations in 43 CFR Subpart L governing such review is there any indication that review is only available where abatement has not occurred. Consequently, we reject Judge Miller's conclusion that performance of required abatement activities by the NOV's deadline is tantamount to a stipulation of liability.

At the hearing, OSMRE stipulated that the ponds were excavated ponds; adequate vegetation in the areas surrounding the ponds was not disputed; and stabilization on the pond slopes was the only issue (Tr. 45-47). Judge Miller concluded that OPRPR 816.46(s) only related to embankment ponds, not excavated ponds; OPRPR 816.49(c) was the applicable regulation; failure to vegetate the inslopes of pond 06 was not a violation of that regulation, which only requires that pond slopes be "stable" and "protected against erosion"; and OSMRE failed to prove that the slopes of pond 06 were unstable or eroding. As noted above, there has been no challenge to Judge Miller's findings and conclusions regarding pond 06. Therefore, since all of the ponds are excavated ponds and there is no evidence in the record of erosion or instability of the slopes of pond 02 or pond 03, ^{4/} Judge Miller's findings and conclusions relating to pond 06 are, as argued by TBI, equally applicable to ponds 02 and 03. Judge Miller's decision, to the extent it affirmed the issuance of the NOV for ponds 02 and 03 must be reversed.

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.

Bruce R. Harris
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{4/} The only evidence regarding erosion or instability is the OSMRE inspector's testimony that certain areas depicted on a photograph of pond 06 "could be gullies" (Exh. R-3; Tr. 11). He had not measured them, but he doubted they were greater than 9 inches deep (Tr. 11). He did state, however, that there were no rills or gullies on the slopes of ponds 02 and 03 (Tr. 7-9).