

BARWICK COAL CO., INC.

IBLA 91-180

Decided July 23, 1993

Appeal from a decision of Administrative Law Judge David Torbett, affirming issuance of Cessation Order Nos. 88-84-136-001 and 88-84-136-003. Hearings Division Docket Nos. NX 89-16-R and NX 89-25-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. Where OSM issues cessation orders for two mine sites on the basis of relatedness, but during the review proceeding it is admitted that each site is more than 2 acres, the necessity to make a relatedness determination in order to sustain the enforcement action is negated.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for an OSM inspector issuing a notice of violation or a cessation order to name all parties who may be responsible. If a party challenges the notice or order on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

Where OSM's abatement requirement for a cessation order includes elimination of a highwall, but the evidence at a review hearing shows that the highwall predated the surface coal mining operation and OSM fails to show that the mining operation resulted in any adverse physical impact on that pre-existing highwall, elimination of that highwall may not be required.

APPEARANCES: Marcia A. Smith, Esq., Corbin, Kentucky, for Barwick Coal Company, Inc.; Charles P. Gault, Esq., U.S. Department of the Interior, Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Barwick Coal Company, Inc. (Barwick), has appealed from a decision of Administrative Law Judge David Torbett, dated December 21, 1990, sustaining the issuance of Cessation Order (CO) Nos. 88-84-136-001 and 88-84-136-003. Office of Surface Mining Reclamation and Enforcement (OSM) inspector, Sharon Hall, issued the first CO to John Maggard, as permittee, and Barwick, as operator, on December 8, 1988, for conducting surface coal mining operations without a valid permit in violation of 30 CFR 843.11(a)(2) (Exh. G-23). On the same day, Inspector Hall issued the second CO to Arthur Francis, as permittee, and Barwick, as operator, citing a violation of the same regulation. Both CO's noted that the "[e]ntire permit area has exceeded two acres due to relatedness." Neither Francis nor Maggard challenged the CO's; however, Barwick sought review of both. Judge Torbett consolidated the cases for a hearing, which was held on August 22, 1990, in Hazard, Kentucky, and for purposes of decision.

#### Factual Background

Inspector Hall, a member of OSM's Kentucky 2-Acre Task Force, testified that during her review of Kentucky 2-acre permits she found that Ron Deaton d.b.a. Barwick held State mining licenses, signed for by Deaton, for several mining sites, including the Maggard permit (897-0158) and the Francis permit (813-0056). Hall inspected the Maggard site on August 22, 1988, and determined that an unreclaimed highwall approximately 20 feet high and 401 feet long existed on the property (Tr. 25; Exh. G-18). On that date, she and another OSM inspector measured the site as 1.40 acres (Exh. G-18). She inspected the Francis property on October 3, 1988, and determined that an unreclaimed highwall approximately 20 feet high and 700 feet long existed

on that site, which measured 2.47 acres (Tr. 28; Exh. G-19). Hall also testified that her review of inspection reports for 2-acre sites prepared by the Kentucky Natural Resources Environmental Protection Cabinet (Cabinet) and inspection reports from the Kentucky Department of Mines and Minerals showed Deaton, doing business as Barwick, to be the operator on both sites or the person considered responsible for the operations (Tr. 22-23; Exhs. G-5 through G-17). Hall determined that the Francis and Maggard operations were related by time, distance, and control. Given her relatedness findings, Hall concluded that the sites must be reclaimed to permanent program standards, including elimination of the highwalls and restoration of each site to its approximate original contour. Therefore, she issued the CO's at issue here (Tr. 28).

The land involved in CO No. 88-84-136-003 is owned by Francis (Tr. 60; Exh. A-2). The record shows that the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE) issued a 2-acre permit for this site to Francis on September 1, 1984 (Exh. G-2). Francis entered into a contract mining agreement with Barwick on September 10, 1984, to mine the site (Exh. G-31). OSM presented Cabinet inspection reports showing that Francis, as permittee, and Deaton, as operator, were repeatedly cited in 1987 and 1988 for an overacreage violation at this site (Exhs. G-5 through G-8). Each of those reports indicated that the site had been measured by an inspector to be 3.12 acres in April 1985.

The other site, which is the subject of CO No. 88-84-136-001, was owned by Jimmy Maggard at the time mining took place (Tr. 63, Exh. A-1). DSMRE issued a 2-acre permit for this site to John Maggard, Jimmy's son, on November 19, 1984 (Exh. G-1). John Maggard entered into a contract mining agreement with Barwick on November 26, 1984 (Exh. G-30). OSM presented Cabinet inspection reports for 1987-88 showing that this site was also the subject of State enforcement for an overacreage violation on numerous occasions (Exhs. G-14 through G-17). Each report lists John Maggard as permittee and Deaton as operator and indicates the site as having been measured as being approximately 3 acres in 1985.

At the hearing, OSM called three witnesses, in addition to Hall. Dale Noble, a Magistrate in Perry County, testified about an old county road and a new county road crossing the Maggard site. John Maggard recounted his involvement in signing the permit and the mining operation on the Maggard site. Finally, Francis testified about his contract with Barwick and the mining operation on his site. For Barwick, Jimmy Maggard testified about his decision to mine his property, the rationale for putting the permit in his son's name, and his relationship with Deaton and Barwick. He also testified about the county road at this site. Deaton was the final witness and he testified about both contract relationships and his control over the operations.

In his decision, Judge Torbett framed the issues to be resolved as follows:

The principle issue for resolution is whether Barwick Coal Company aka Ronald Deaton is an "operator" or "person" who can be held responsible for coal mining operations on the Maggard and Francis site. A subsidiary issue is whether the presence of a county road on portions of the Maggard mine site exempts any of that site from the remedial actions required by OSM's enforcement action.

(Decision at 6). After discussing the law relating to responsible parties, Judge Torbett held "that Barwick Coal was undoubtedly an operator under the terms of the Act [Surface Mining Control and Reclamation Act of 1977 (SMCRA)] and regulations" (Decision at 7). He concluded that Barwick was responsible for both sites. He also stated that "[t]he parties stipulated that both sites were over two acres and that consequently their Kentucky two acre permit was void, and neither were entitled to the two acre exemption under the Act (Decision at 7). Judge Torbett found it "unnecessary to make a determination as to whether the sites were 'related'" (Decision at 8). Finally, Judge Torbett concluded that while the Maggard's property may have been entitled to an exemption for the old county road had it been reclaimed in 1984 under the permanent program standards, no exemption was available in 1989 at the time the violation was cited by OSM (Decision at 8). Based on his findings, Judge Torbett sustained both CO's.

### Discussion

Barwick's principal argument on appeal is that Judge Torbett misconstrued the parties' stipulations in ruling that relatedness was not an issue to be resolved. It contends that it never stipulated that the sites were related and therefore OSM was required to prove relatedness, which, it argues, OSM did not do because it failed to show that Barwick, as a contract operator, controlled both sites. Barwick further alleges that Judge Torbett erred in concluding that Barwick was responsible as operator for any violations because of a failure by OSM to show that Barwick controlled the operations as required by 30 CFR 700.11(b).

In a review proceeding involving a CO, OSM has the burden of going forward to establish a prima facie case as to the validity of the order while the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171. OSM's initial burden is limited to a prima facie showing that the party or parties named in the CO were "engaged in a surface coal mining operation and failed to meet Federal performance standards." W. D. Martin v. OSM, 120 IBLA 279, 287 (1991), appeal filed W. D. Martin d/b/a Martin Coal Co. v. OSM, No. 91-01-63-B (W.D. Va. Sept. 30, 1991), quoting from Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982).

At the time of OSM's enforcement action in this case, section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1982), provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." By Act of May 7, 1987, P.L. 100-34, 100 Stat. 300, Congress eliminated that 2-acre exemption because it had "turned out to be the most misused and abused provision of SMCRA" (H.R. Rep. No. 59, 100th Cong. 1st Sess. 3 (1987)).

[1] Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or more acres. 1/ 30 CFR 700.11(b)(2) provided a test for determining if surface coal mining operations were related. Thus, operations were to be deemed "related" if (1) they occurred within 12 months of each other; (2) they were "physically related"; and (3) they were under "common ownership and control." J & M Coal Co. v. OSM, 122 IBLA 90, 99 (1992). In this case, OSM relied upon a determination that the sites were "related" in issuing the CO's in question. 2/ In his decision, however, Judge Torbett stated that it was not necessary to reach the question whether the two sites were related because "[t]he parties stipulated that both sites were over two acres and that consequently their Kentucky two acre permit was void, and neither were entitled to the two acre exemption under the Act" (Decision at 7).

Barwick argues on appeal, through present counsel, that there was no such stipulation and that OSM was required to show relatedness, which it failed to do, because Barwick was not in control of either site. The language relied upon by Barwick on appeal is the statement of its counsel at the hearing that "[w]e have stipulated that if the two sites are taken together, in an aggregate, that they would exceed two acres in area" (Tr. 5). Ignored by present counsel, however, are the statements and admissions of counsel before Judge Torbett, who stated in a prehearing memorandum filed at the hearing on August 22, 1990, that

it is clear that the Commonwealth of Kentucky revoked the two- acre exemption on each of the sites involved in this case. As was previously noted, the Kentucky NREPC [Cabinet] made a finding that both of these sites exceeded two acres prior to the issuance of the COs by OSM and took appropriate enforcement action. Thus, the primary regulatory authority has previously determined that neither site is eligible for the two-acre exemption of 30 C.F.R. §700.11(b). Since neither of these falls within the two-acre exemption, the relatedness provisions of 700.11(b)(2) are not applicable.

(Prehearing Memorandum at 4). In a posthearing memorandum, counsel made the same assertions, admitting that neither site was entitled to the 2-acre exemption and that relatedness was not an issue (Posthearing Memorandum at 12-13).

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1/ Following the elimination of the 2-acre exemption, OSM suspended 30 CFR 700.11(b) insofar as it exempts any surface coal mining operations commencing on or after June 6, 1987, and any such operations conducted on or after Nov. 8, 1987 (52 FR 21229 (June 4, 1987)).

2/ The record indicates that OSM estimated the Maggard site to be only 1.40 acres (Exhs. G-18, G-21, G-25, G-28), and, thus, found it necessary to aggregate that site with the Francis site, measured to be 2.47 acres (Exh. G-19), in order to pursue enforcement.

Rather than attempting to establish that an exemption was proper for each site, counsel admitted that the exemption was not applicable to either site. <sup>3/</sup> Judge Torbett's conclusion that "it is unnecessary to make a determination as to whether the sites were 'related' under the Act" was clearly correct in light of that admission. Present counsel is in no position to deny the admission. Thus, 30 CFR 700.11(b)(2) is not applicable in this case, and appellant's attempts on appeal to show that it did not exercise "control" over these two sites, as that term is defined in 30 CFR 700.11(b)(2)(iii), have no merit. The issue here is not whether the surface coal mining operations at the Maggard and Francis sites are related; it is whether Barwick is a party responsible for violations at those sites. See W. P. Corp. v. OSM, 119 IBLA 130, 134-35 n.7 (1991)

[2] If a question arises concerning who is responsible for compliance with the Act and regulations at the site of a surface coal mining operation, it is proper for the OSM inspector issuing a notice of violation (NOV) or CO to name all parties who may be responsible. If a party challenges the NOV or CO on the basis that it is not a responsible party, OSM bears the burden of going forward to establish that the challenging party is responsible. The challenging party then bears the ultimate burden of persuasion by a preponderance of the evidence that it is not responsible for the cited violation. W. P. Corp. v. OSM, *supra* at 133-34.

The evidence presented at the hearing supports a conclusion that Barwick was a responsible party and that Barwick failed to establish otherwise. Jimmy Maggard owned the Maggard site at the time he asked his son John to sign the 2-acre permit (Tr. 47). Francis owned the Francis site, and he signed the 2-acre permit for that site (Tr. 53). John Maggard and Francis each signed a contract mining agreement provided by Deaton (Tr. 48, 55; Exhs. G-30 and G-31). Under those agreements, Barwick agreed to "perform all mining operations" at the sites (Exhs. G-30 and G-31). Deaton obtained licenses for each site from the Commonwealth (Tr. 20-21, 80-81; Exhs. G-3 and G-4). Deaton negotiated with a tippie for the sale of the coal from both sites. He received the checks for the coal, paid Francis and Jimmy Maggard \$2 per ton, and paid all other fees and expenses (Tr. 49, 56-57, 76; Exhs. G-30 and G-31). The State inspection reports introduced as evidence at the hearing listed Deaton as the operator of the sites or showed his signature as having signed for receipt of the reports (Exhs. G-5 through G-18).

After reviewing the evidence presented at the hearing, appellant made the following statement on page 12 of its brief on appeal: "[I]t is clear from the above facts of this case that Barwick Coal Company, Inc., by and through its employees and/or equipment did physically mine and remove coal from the property owned by Jimmy Maggard and Arthur Francis."

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<sup>3/</sup> One seeking an exemption from the regulatory program must plead and prove the basis for that claim as an affirmative defense. Harry Smith Construction Co., 78 IBLA 27, 29 (1983).

The record clearly shows that Barwick was a party responsible for the violations cited in the COs.

[3] Appellant next contends that even if the validity of CO No. 88-84-136-001 relating to the Maggard site is sustained, it should be modified to exempt from reclamation the highwall adjacent to the original county road and the road itself. Appellant's contention is based on its position that OSM failed to prove that Barwick redisturbed the highwall and that the county road located on the site is exempt from regulation.

In response, OSM asserts that "[a]t the hearing and later in its post-hearing Memorandum, Barwick did not contest the status of the highwall" (Brief at 9). OSM cites the hearing transcript at pages 25-26 in support of that statement. The relevant language therein is:

MR. GAULT: Your Honor, I believe that there is not much about the physical aspects of these sites that is actually controverted. I think there may be one issue on one site, concerning a road.

THE COURT: Let's go off the record.  
(Off-the-record discussion.)

THE COURT: In talking about it off the record, it is not disputed that there is still a highwall on these properties. So the only thing --

Mr. Gault, it's up to you, if you want to put any proof in. I don't see any necessity for putting proof in. It's up to you though.

MR. GAULT: Your Honor, the only proof that we'll put in about the physical conditions of the sites, then, will be relative to this one issue about the location of the county road on the [Maggard] site.

While this exchange may be an example that "Barwick did not contest the status of the highwall," reference to appellant's posthearing memorandum indicates that, although it obviously agreed that a highwall existed on the Maggard site, it clearly had a different perception regarding its "status."

Barwick's position on appeal is that the highwall was pre-existing at the time of the mining operation and that, as such, it was not required to be reclaimed unless the highwall was "adversely affected," citing Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979). Barwick stated in its posthearing memorandum at page 14: "A review of the transcript of these proceedings reveals not one shred of evidence presented by OSM which indicates that Barwick adversely affected the preexisting highwall." Thus, while Barwick raised the issue of the pre-existing highwall in its posthearing memorandum, Judge Torbett did not address that issue in his decision.

At the hearing, Noble testified that the road at the base of the highwall depicted on Exhibit G-32 had been officially designated by the Perry County Fiscal Court as a county road in the "early eighties" (Tr. 42). Accordingly, since the road existed in the "early eighties" and the road is located at the base of the highwall, it must be concluded that the highwall existed prior to commencement of mining in 1985. OSM presented no evidence regarding the location of the mining operation on this site or the effect such mining may have had on the pre-existing highwall. <sup>4/</sup> In Cedar Coal Co., 1 IBSMA at 155, 86 I.D. at 255-56, the Board of Surface Mining Control and Reclamation Appeals held that in the absence of a showing that a surface coal mining operation resulted in an adverse physical impact on a pre-existing highwall, there was no obligation to eliminate that highwall. <sup>5/</sup> Since no such showing was made by OSM in this case, we must conclude that OSM may not require the reclamation of that highwall. <sup>6/</sup> See Cherry Hill Development v. OSM, 110 IBLA 185, 198 (1989).

Under the definition of "affected area" set forth in 30 CFR 701.5, a road is exempt from regulation only if it:

- (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use.

In this case, the road running along the base of the highwall on the Maggard site was officially designated as a county road in the early 1980's (Tr. 41-42). Noble testified that sometime about 1986 when he took office as a county magistrate, the county began maintaining another road on the Maggard site that runs in front of a mobile home, as shown on Exhibit G-32 (Tr. 39, 43-44). That road has never been officially designated as a county road (Tr. 42-43). Jimmy Maggard stated that the road running behind the mobile home was the county road and that it was used by the public to visit a "great big" cemetery (Tr. 67-69). To the best of his recollection, the road in front of the mobile home was completed sometime after his brother moved that home onto the site, probably in 1988 (Tr. 72).

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<sup>4/</sup> In response to a question from counsel for Barwick regarding the location of coal extraction on the site, Jimmy Maggard indicated that coal was extracted from underneath the county road running along the base of the highwall (Tr. 67) There is no indication, however, that there was any adverse physical impact on that highwall from the coal mining operation.

<sup>5/</sup> Under the permanent program regulations at 30 CFR 816.106(b), a pre-existing highwall must be completely eliminated unless there is insufficient reasonably available spoil to completely backfill the area. Josephine Coal Co. v. OSM, 111 IBLA 316, 322 (1989).

<sup>6/</sup> In the absence of any evidence regarding what portion of the highwall was not pre-existing, we must assume for purposes of this decision that it was all pre-existing.

The record indicates that at the time of the mining operation on the Maggard site the road satisfied the test for exemption set forth in 30 CFR 701.5. It had been officially designated as a county road. It was maintained by the county, and the road received substantial public use as access to a cemetery. Thereafter, in 1986 or 1988, apparently after the completion of mining, a new road was constructed and the county began to maintain that road to the exclusion of the original county road. Fairness dictates that if appellant was entitled to an exemption from reclaiming the road when it completed its mining operation, the passage of time and a change in circumstances, over which it had no control, should not result in the imposition of a requirement that did not previously exist. Therefore, in the absence of any evidence that the exemption to which the original county road was entitled was lost prior to the completion of the mining operation on the Maggard site, we conclude that OSM cannot require the reclamation of that road under the facts of record.

Accordingly, while we sustain the issuance of CO No. 88-84-136-001, we modify Judge Torbett's decision to eliminate from the abatement requirement of that CO the necessity to eliminate the pre-existing highwall and reclaim the original county road.

Appellant raises two other arguments. First, it argues that the civil penalties assessed for the CO must be vacated. We need not address that argument except to point out that the Board has no jurisdiction over any issue involving civil penalties in this case because the case comes to us as an appeal from Judge Torbett's decision in a review proceeding under 43 CFR 4.1160, rather than as a petition for discretionary review in a civil penalty proceeding under 43 CFR 4.1150.

Second, appellant claims that OSM has no jurisdiction to cite violations in a state with an approved permanent regulatory program unless there is an imminent danger to the public or a significant imminent environmental harm and that OSM failed to show any such danger or harm in this case. We recently rejected this same argument in Ron Deaton\Barwick Coal Co. v. OSM, 126 IBLA 320, 326 (1993), in which we stated:

Although petitioner claims a lack of imminent danger to the health or safety of the public and no significant imminent environmental harm, the regulations specifically provide that mining without a valid surface coal mining permit itself constitutes a practice which causes or can reasonably be expected to cause significant imminent environmental harm. 30 CFR 843.11(a)(2); R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 146 n.5 (1991); Slone v. OSM, 114 IBLA 353, 357 (1990); Firchau Mining, Inc. v. OSM, 101 IBLA 144 (1988). [Footnote omitted.]

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 is affirmed as modified. We affirm Judge Torbett's decision sustaining the issuance of CO No. 88-84-136-001 and CO No. 88-84-136-003, but modify the

abatement required by CO No. 88-84-136-001 to eliminate the requirement to reclaim the pre-existing highwall and the original county road.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge