

CONSOLIDATION COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

IBLA 90-461

Decided September 14, 1993

Appeal from a consolidated decision by Administrative Law Judge Joseph E. McGuire denying petitions for review of a notice of violation and a cessation order and approving civil penalty assessments. CH 89-1-P and CH 89-2-P.

Affirmed.

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

OSM properly issued a notice of violation to a surface coal mine operator in a state where the principal authority to regulate such mining was exercised by state authorities when a Federal inspection established a continuing violation of SMCRA and applicable state law and state authorities refused to take corrective action after notice was given to them of the violation of the state program.

APPEARANCES: Daniel E. Rogers, Esq., Pittsburgh, Pennsylvania, for appellant; Wayne A. Babcock, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Consolidation Coal Company (Consol) has appealed from a June 14, 1990, decision by Administrative Law Judge Joseph E. McGuire denying petitions for review of notice of violation (NOV) No. 88-011-017-01 and cessation order (CO) No. 89-011-107-02, and affirming civil penalty assessments made in each case by the Office of Surface Mining Reclamation and Enforcement (OSM). The NOV was issued in October 1988 for failure to reclaim a refuse pile at Williams Mine No. 98 in Harrison County, West Virginia; it was followed 90 days later by the CO for failure to abate the NOV. Civil penalties were subsequently assessed for both the NOV and the CO.

The case was submitted to Judge McGuire on an agreed statement of fact (stipulation) filed by counsel for the parties on November 9, 1989, establishing that Consol was the owner and operator of the Williams Mine and

coal refuse area from 1965 until July 30, 1982. Consol sold the mine and refuse area to Peora Coal Company in 1982, and Peora agreed to reclaim the refuse pile as part of the purchase agreement. Nonetheless, Peora failed to reclaim the pile.

Following a Federal inspection on December 4, 1984, OSM issued two 10-day notices pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), sec. 521(a)(1), 30 U.S.C. § 1271(A)(1) (1988), to the West Virginia Department of Natural Resources alleging "failure to appropriately backfill and reclaim the [Williams Mine site]." See exhibit C to Stipulation. In response to this notice, a letter was sent to Peora's president by the State Department of Natural Resources threatening enforcement action. On April 17, 1987, OSM again issued a 10-day notice to the West Virginia Department of Energy (DOE) alleging that an oversight inspection of the Williams Mine had revealed the refuse area was not reclaimed. DOE took no enforcement action following receipt of this notice. On August 11, 1988, OSM issued another 10-day notice to DOE, again stating that the Williams Mine refuse pile remained unreclaimed and that Consol should be cited for failure to reclaim. DOE refused to do so, citing a State permit issued to Peora for abandonment of the mine area as justification for state inaction. On September 12, 1988, OSM gave notice that this response was "inappropriate." See Exhibit H, Stipulation at 1. The refuse pile remains unreclaimed, and a breach in the refuse dam now permits the discharge of contaminated water from the site (Stipulation at 4).

On October 19, 1988, OSM issued the NOV at issue to Consol for failure to reclaim. On January 17, 1989, OSM issued the CO at issue here for failure to abate the NOV. During the entire time that these transactions were taking place, the State of West Virginia exercised primary jurisdiction over surface coal mining and reclamation operations within the State (a circumstance referred to as "primacy" or "primacy state" by the parties). On November 3, 1988, OSM issued notice of proposed assessment for the NOV in the amount of \$1,500. Consol was also assessed a penalty of \$22,500 on account of the CO (Stipulation at 5).

Consol contends that the NOV and CO should be vacated because the NOV was not properly issued pursuant to 30 CFR 843.12(a)(2). Alternatively, Consol argues that the NOV and CO should be vacated because OSM lacked authority under the SMCRA to issue an NOV to Consol while West Virginia exercised primary responsibility to regulate surface mining activity within the State. Consol argues that SMCRA sec. 521(a)(3) limits Federal inspections to four enumerated types, none of which includes a Federal oversight inspection in a primacy state of a specific alleged violation such as the inspection that revealed the existence of the unreclaimed refuse pile at the Williams Mine, and that OSM lacked authority to issue the October 1988 NOV. Assuming that the 1988 Federal inspection was made in conformity to Departmental regulation 30 CFR 843.12(a)(2), Consol contends that it was not an "appropriate" enforcement action, because inspection was not specifically authorized by SMCRA sec. 521(a)(3). Assuming that the Departmental regulation at issue exceeds limits established by the statute it purports to

implement, Consol concludes that the NOV was invalid as a result. In this connection, Consol also assumes that SMCRA does not limit review of SMCRA regulations to judicial review in the United States District Court for the District of Columbia, but that this Board may, in the course of considering an appeal, conduct whatever review is necessary. We reject the arguments by Consol and therefore affirm the decision here under review.

[1] Consol's arguments assume that OSM lacks authority to take enforcement action concerning individual violations alleged to exist in a primacy state; the Consol appeal rests principally on the notion that OSM lacked authority to issue an NOV in this case and that therefore the NOV (and all subsequent actions taken as a consequence of the NOV) were invalid. There is no denying, however, that the unreclaimed refuse pile at the Williams Mine was a violation of state surface mining law (and therefore of SMCRA). Consequently, the only issue before us concerns whether OSM had authority to inspect the surface mining operation at the Williams Mine in a "primacy" state.

We have often held that discovery by Federal inspection of a violation of a state surface mining program empowers OSM, acting pursuant to 30 CFR 843.12(a)(2), to issue an NOV to a surface mine operator when, following issuance of a 10-day notice of violation to the proper state authority "appropriate action" to enforce SMCRA and state law is not taken by the State. See, e.g., Paul F. Kuhn, 120 IBLA 1, 25, 32, 98 I.D. 231, 243, 247 (1991); W.E. Carter, 116 IBLA 262, 267 (1990). As we found in W.E. Carter, supra, "[o]nly in cases where it has been shown that there has been no violation of SMCRA can a state regulatory agency be said to have shown good cause for failure to take action in response to a [10-day notice]." Id. at 267.

The record before us establishes the fact of violation, which is admitted by Consol when it states that "Consol was the owner and operator of the Williams mine and coal refuse area on and after May 3, 1978, making Consol responsible for the eventual reclamation of the refuse pile." See Appellant's Brief at 2. The contention that West Virginia's primacy some-how ousted OSM from authority in this case is without legal foundation; OSM was bound by SMCRA sec. 521(a)(1) to oversee enforcement of the state program, which required reclamation of refuse piles pursuant to West Virginia Code of State Regulations secs. 38-2A-4.7.f. and g. See W.E. Carter, supra. When DOE failed to take action to enforce those regulations following receipt of a 10-day notice that reclamation was required, OSM was obliged to issue the NOV and subsequent CO and to thereafter assess penalties as appropriate. Because Consol has not shown that the failure to reclaim the Williams Mine refuse area was proper, the NOV was properly issued by OSM and issuance of the NOV must be affirmed. See Id. at 268. Further, because Consol has made no showing of error concerning issuance of the CO or assessment of penalties, (all of which, of course, depended upon the validity of the NOV), they also must be affirmed.

Consol also argues that a challenge to Departmental regulation 30 CFR 843.12(a)(2) may properly be raised now, before this Board, as an issue on

appeal. This argument, too, has previously been rejected by the courts and this Board: exclusive jurisdiction over challenges to regulations promulgated to implement SMCRA rests with the United States District Court for the District of Columbia. See Clinchfield Coal Co. v. Department of the Interior, 802 F.2d 102, 103 (4th Cir. 1986); Alabama By-Products Corp. v. OSM, 103 IBLA 264, 270 (1988). This Board is therefore not the proper forum for such a regulatory challenge; nor is it a likely place to question the validity of a rule that we have regularly applied to require enforcement action of the sort taken by OSM in this case. See W.E. Carter, supra, and cases cited therein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the consolidated decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Law Judge