

WEST VIRGINIA HIGHLANDS CONSERVANCY
NATIONAL WILDLIFE FEDERATION

IBLA 94-822

Decided October 6, 1997

Appeal from a Decision of the Office of Surface Mining Reclamation and Enforcement refusing to order Federal enforcement action against Olga Coal Company. West Virginia Permit No. UO-694; 10-day Notice X 93-110-015-012.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Citizen Complaints: Generally

A citizen's complaint urging that a party other than the permittee should be charged with violations of SMCRA in addition to the permittee is properly remanded by OSM for further investigation by its field office where the record was insufficient to demonstrate that the party could properly be charged under the Act. The fact that there is an ownership and control "link" between that party and the permittee under the applicant/violator system does not, by itself, establish that the party is subject to enforcement action.

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Appellants; Sandra M. Lieberman, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

West Virginia Highlands Conservancy and National Wildlife Federation (Appellants) have appealed from the July 8, 1994, Decision of the Assistant Director for Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), responding to Appellants' request for informal review of a February 28, 1994, determination by OSM's Charleston Field Office. The Field Office held that the West Virginia Division of Environmental Protection (WVDEP) appropriately took no enforcement action in response to a 10-day notice (TDN) issued on Appellants' Citizen's Complaint (Complaint).

On November 17, 1993, Appellants filed with the Field Office a Citizen's Complaint under section 521 of the Surface Mining Control and

Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1994), and 30 C.F.R. § 842.12. The Complaint requested OSM to conduct an inspection of coal mining permits held by Olga Coal Company (Olga). The Complaint was based on the allegation that Olga owned or controlled operations conducted under West Virginia Permit No. UO-694 issued to Barrenshe Coal, Inc. (Barrenshe), which had been revoked and the bond forfeited due to outstanding violations. See Complaint at 1-2. The Complaint contained statements of fact supporting its allegation that there was an ownership and control "link" between Olga and Barrenshe. It noted that the State of West Virginia (State) was currently failing to block issuance of new permits to Olga. 1/ The Complaint also alleged that Olga had failed to disclose its relationship to Barrenshe, assertedly a violation of governing law. The Complaint requested that OSM conduct an investigation and immediately block all regulatory authorities from issuing any new permits to Olga and that OSM rescind (or direct to be rescinded) all permits improvidently granted or transferred to Olga. Appellants requested that OSM or state regulators issue appropriate NOV's or CO's and assess civil penalties under SMCRA and governing regulations. See Complaint at 6.

On November 19, 1993, OSM issued TDN No. X 93-110-015-012 to the State asserting that Olga Coal Company was "an owner or controller of Barrenshe, permit UO-694, which has unabated violations, delinquent civil penalties and a bond forfeiture and is therefore prohibited from receiving permits to conduct surface coal mining operations." The TDN charged that "nature of the violation" was that Olga "has failed to disclose its ownership or control relationship to Barrenshe in permit applications submitted to" WVDEP in violation of CSR 38-2-3.

1/ The Complaint alleged that Carl Muncey, the President of Barrenshe, holder of Permit No. UO-694, was also the president, vice-president, secretary, and treasurer of Olga; that Olga owned the surface and the coal to be mined; that Barrenshe's right to extract coal was based on a contract with Olga; that mined coal was transported to and processed in Olga's preparation plant; and that the haulage road used on permit UO-694 was bonded by Olga. See Complaint at 3-5.

Further, the Complaint listed various notices of violation (NOV's) that had been issued to Barrenshe by WVDEP. These NOV's concerned failure to timely initiate reclamation operations, failure to timely obtain permit renewal, and failure to maintain effluent limitations. Barrenshe was also issued a cessation order (CO) for failure to abate an NOV concerning effluent limitations and required to show cause why its permit should not be terminated. The Complaint alleged that, "according to the State of West Virginia," Barrenshe was liable for \$26,202 in unpaid civil penalties and that the violations remain uncorrected. It alleged further that, "[d]espite Olga's control of Permit No. UO-694, West Virginia has failed to link Olga to the site or to the uncorrected violations and unpaid civil penalties there." See Complaint at 5.

On December 29, 1993, WVDEP responded to the TDN, stating that Appellants' allegation that "Olga had control of the Barrenshe Coal operation has some merit." It acknowledged the incidents of control cited in the Complaint, stating that its investigation into the matter was ongoing, but that sufficient information was on hand "to proceed with placing Olga Coal Company on the West Virginia Forfeiture list and [initiate] an AVS [Applicant/Violator System] block of the company." See WVDEP Response at 2. 2/

On January 20, 1994, OSM's AVS Office advised the Field Office: "We agree that the documentation available indicates that a presumption of control exists between [Olga and Barrenshe] on permit No. UO-694. On January 14, 1994, a check of the AVS found that this relationship had been entered into the AVS."

On February 28, 1994, the Field Office notified WVDEP that it had determined that WVDEP's actions in response to the TDN were appropriate. The Field Office noted that WVDEP's investigation had found that Appellants' allegation that Olga had control of the Barrenshe permit had merit and that the "relationship between Olga and Barrenshe has been entered into the AVS thereby blocking Olga and its affiliates" from receiving permits in the future. The Field Office also noted that neither Olga nor its affiliate had "initiated any permitting actions requiring disclosure of ownership and control information since the June 1, 1990, revision of the West Virginia regulations clarifying that mineral ownership coupled with the right to receive the coal is a presumed ownership and control relationship." Further, "neither company has received a new permit or significant modification since the first of the unabated violations was cited

2/ As to improvidently issued permits, WVDEP stated:

"Olga no longer holds any West Virginia permits, having transferred all of them to West Virginia Properties on July 23, 1993. Since this was prior to the Barrenshe forfeiture, no enforcement action will be taken against them. According to our records, Olga has one sister company * * * that holds West Virginia permits, but no permits have been issued to that company since March 18, 1995. None of Olga's parent companies hold mining permits in West Virginia."

A Jan. 6, 1994, memorandum from the OSM Field Office to its AVS Field Investigations Branch stated:

"In the case of the complaint regarding the link between [Olga and Barrenshe], we have verified * * * that the Olga permits were transferred to West Virginia Properties, Inc. on July 23, 1993, and that a permit has not been issued to [Olga's] affiliate * * * since March 18, 1985. When we prepare our response to WVDEP regarding this [TDN], we will inform them of the need to update the information in AVS and change the bond status of the Olga permits to "R" indicating the bond has been released due to transfer. However, we believe that companies exist in other states that are affiliated with Olga and should be reviewed due to the link between Olga and Barrenshe."

on April 13, 1992, at Barrenshe permit UO-694. Therefore, none of the permits issued to either company would meet the criteria for being considered improvidently issued."

A copy of the Field Office's February 28, 1994, response to WVDEP was provided to Appellants, and on April 14, 1994, they sought informal review of the Field Office's determination with the OSM Directorate under 30 C.F.R. § 842.15. Appellants agreed with the imposition of a permit block against Olga, but charged that the Field Office had erred in approving WVDEP's failure "to evaluate its authority to take direct enforcement action against Olga to compel correction of on-the-ground violations." See Informal Review Request at 3 (emphasis supplied). It is this issue that is involved in the present appeal. 3/ Appellants cited S&M Coal Company v. OSM, 79 IBLA 350, 91 Interior Dec. 159 (1984), in support of their position that Olga had the capacity to control, and therefore did control, Barrenshe within the meaning of section 521(a) of the SMCRA. See Informal Review Request at 4. Appellants requested a Federal inspection of the Barrenshe site with Federal enforcement against Olga and any other successors.

In the July 8, 1994, Decision under appeal, OSM's Assistant Director for Field Operations found as follows:

A presumed ownership or control relationship[,] while being a basis to permit block[,] may not, in itself, be a basis for direct enforcement against an owner or controller of a violator. Where the facts indicate that the owner or controller is the substantive operator of the site, then direct enforcement is appropriate. * * * Neither the West Virginia response nor the [Field Office] determination indicates whether any direct control or involvement existed between Olga and Barrenshe or whether Olga was a substantive operator of the site. This aspect of the complaint is being remanded to the Field Office to conduct a Federal inspection to investigate Olga's involvement in the site and whether Olga was a substantive operator of the site. If such involvement is determined, enforcement shall be taken against all responsible parties, including Olga.

See Decision Letter at 2-3 (citation omitted). Thus, the Assistant Director found that there was insufficient information to conclude that Olga

3/ Appellants also charged that the search for improvidently issued permits for Olga or its affiliates should be nationwide, not just limited to West Virginia; that Olga and its affiliates were required to disclose their ownership or control prior to June 1, 1990; that the purchaser of Olga's West Virginia operations was liable for correction of Barrenshe's violations; and that the Field Office failed to timely evaluate West Virginia's response to the TDN. Those issues are not presented on appeal.

was subject to direct enforcement for unabated violations at the site, but remanded the matter for consideration of whether such control existed. 4/

Appellants assert on appeal that it is incumbent on OSM and state regulatory authorities to further evaluate the relationship between Olga and Barrenshe to determine whether enforcement action is warranted against Olga. Although OSM did remand the matter for such evaluation, Appellants charge that a more thorough analysis of "documents and other evidence" produced by Appellants in this case would have revealed "ample basis for taking direct enforcement action against Olga" immediately. See SOR at 5. Appellants cite S&M Coal Co. v. OSM, supra, in support of their position that, based on "the undisputed facts set forth in the [citizens'] complaint and in West Virginia's response" to the TDN, Olga controlled Barrenshe's operations within the meaning of sections 510(c) and 521(a) of SMCRA, 30 U.S.C. §§ 1260(c) and 1271(a) (1994). See SOR at 5-7. Accordingly, Appellants assert, OSM erred in remanding the matter for further investigation of Olga's involvement at the site. Appellants urge that OSM's further investigation of this issue is a vain exercise. They request the Board to find that Olga did in fact exercise substantive control of the site and to order OSM to conduct an immediate Federal inspection with attendant enforcement action against Olga. See SOR at 8. 5/

4/ The Assistant Director also ruled on other questions not raised in the present appeal. He found that the responsibility to check for potentially improvidently issued permits (PIIP's) lay with OSM, but since both WVDEP and the Field Office had investigated and found that no PIIP's existed, he affirmed the Field Office on this item.

The Assistant Director also found that the Field Office had correctly held that a permit applicant did not have to list controlled entities in West Virginia prior to June 1990, because regulations prior to that date did not require it. He affirmed the Field Office's determination on this item of the appeal.

The Assistant Director found that West Virginia's response did not include sufficient information to determine if Olga transferred its lease and control arrangements with Barrenshe to West Virginia Properties. As the timing of that transfer had implications for whether Olga was linked to Barrenshe, he remanded this aspect of the appeal to the Field Office to conduct a Federal inspection in order to review the details of the transfer.

Finally, the Assistant Director found that the Complaint was well taken with respect to lack of timeliness. He noted that the Field Office and OSM had received numerous similar complaints from both Appellants, and that OSM was working hard to improve its promptness in responding to citizens' complaints.

Those questions have not arisen on appeal.

5/ According to OSM, Appellants' sole ground of appeal (its charge that OSM improperly failed to take enforcement action against Olga) is beyond the scope of Appellants' initial Complaint and was not raised until Appellants filed for informal review. See Answer at 3. We disagree. Appellants did request that OSM or state regulators issue appropriate NOV's or CO's and assess civil penalties under SMCRA and governing regulations. See Complaint at 6.

Appellants assert that OSM improperly remanded the matter for further investigation, having "found merit in [Appellants'] request for direct enforcement action against Olga." See SOR at 4. In response, OSM correctly points out that its Decision did not indicate that there was merit in Appellants' request to cite Olga directly for violations on the Barrenshe site. Instead, OSM's ruling was to remand "[t]his aspect of the complaint" to determine "whether Olga was a substantive operator of the site," and to direct that enforcement actions be taken against all responsible parties, including Olga, only "[i]f such involvement is determined." See Decision at 2-3.

In further response, OSM states that the facts alleged by Appellants provide an insufficient basis for citing Olga for violations at the Barrenshe site. It accepts the factors of the relationship between Olga and Barrenshe as that relationship is documented in permit records and agreements between the parties, namely Olga's ownership of the surface and mineral rights, its right of first refusal on coal mined by Barrenshe, and the fact that Olga bonded the haulroad used by Barrenshe and processed coal mined by Barrenshe. However, it submits that those facts are insufficient to hold Olga directly responsible for Barrenshe's violations. Olga would be responsible, OSM asserts, "only if evidence of direct control or actual involvement in Barrenshe's mining and reclamation operations were present." Because evidence of such control or involvement was absent, OSM asserts, it correctly remanded the matter. 6/ See Response at 4.

There is a difference, OSM argues, between "control" of an operation for purposes of 30 C.F.R. § 773.5(b)(6), which has been established, and "control" as provided in section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1994), which has not. Under the regulation, an "ownership or control" relationship sufficient to establish an AVS link may be characterized by "[o]wning or control ling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation." 30 C.F.R. § 773.5(b)(6). By contrast, under section 521(a)(3) of SMCRA, NOV's may be issued only to a "permittee or his agent." As no showing has been made in this case that Olga was Barrenshe's agent, OSM submits that it has not been established that Olga is subject to enforcement action under this provision. We agree.

[1] Under section 521(a)(3) of SMCRA, a permittee of a minesite "or his agent" is the proper party to be cited for a violation of the Act. It has been held that an "agent" is "that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface coal mining operation and particularly charged

6/ We offer no comment on whether OSM is correct that evidence of direct control or actual involvement in Barrenshe's mining and reclamation operations would justify taking enforcement action against Olga, in the absence of a showing that Olga is the permittee's (Barrenshe's) agent. That question would be justiciable only in the context of administrative review of any OSM action citing Olga for noncompliance.

with effectuating compliance with performance standards during the course of a permittee's mining operations." United States v. Dix Fork Coal Co., 692 F.2d 436, 440 (6th Cir. 1982). In this case, there is no showing that Olga is either the permittee or Barrenshe's agent as that term is described above. The record before us indicates, rather, that Barrenshe was Olga's agent, i.e., the party extracting coal and charged with the responsibility to protect the environment from the adverse effects of surface coal mining, and therefore properly charged with violations.

Our decision in S&M Coal Co. v. OSM, supra, cited by Appellants, held that both the party extracting the coal and the lessor could properly be considered "permittees," and therefore chargeable with violations of SMCRA, under the initial regulatory program, where there was no valid permit in existence. Significantly, we also observed in that opinion that the issuance of a permit raises the presumption that the party obtaining the permit is conducting the coal mining operation and thus is the party responsible for compliance with the standards. S&M Coal Co. v. OSM, 79 IBLA at 356 n.1; 91 Interior Dec. at 162 n.1, citing Wilson Farms Coal Co., 2 IBSMA 118, 87 Interior Dec. 245 (1980). Unlike the present case, in S&M there was no permit, and the parties could be found to be jointly and severally liable for compliance with any applicable performance standards unless and until it could be demonstrated that one party was solely responsible for such compliance. The presence of the permit here in Barrenshe's hands appears to squarely limit OSM's enforcement authority to Barrenshe or its agent, as expressly provided in section 521(a)(3) of SMCRA.

We hold that the facts as developed by WVDEP and OSM, showing only ownership and control sufficient to establish an AVS "link," are insufficient to justify a determination that Olga was Barrenshe's agent and therefore subject to enforcement activity under SMCRA. However, we find no basis to disturb OSM's decision to remand the matter to consider whether other facts or legal analysis exist that might justify a different conclusion. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

7/ We wish to compliment OSM on the excellent case record that it has transmitted in this matter. The materials contained are evidently complete, with original documentation wherever possible, and official file copies of other documents. The materials contain conversation records, cover letters, etc., allowing the Board to easily determine the routing of the matter through OSM and the State agency.