TENNESSEE CONSOLIDATED COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-81 Decided November 3, 1997

Appeal from a decision by Administrative Law Judge David Torbett, vacating Notice of Violation No. 93-91-011-003. NX-93-7-R.

Affirmed.

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 involving an application for review of an NOV, OSM must make a prima facie case showing that the party cited in the notice is engaged in a surface coal mining operation and has violated SMCRA, the regulations, or a permit condition. A presentation of this evidence will justify a finding of violation if it is not contradicted and overcome by a preponderance of the evidence.

2. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Review--Office of Hearings and Appeals--Rules of Practice: Appeals--Secretary of the Interior

   An administrative law judge is an authorized representative of the Secretary for the purpose of hearing, considering, and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department.

3. 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: Water Quality Standards and Effluent Limitations: Disturbed Areas--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

   The statement "best technology currently available" in 30 C.F.R. § 816.45(a) does not impose strict liability upon an operator. An operator is not required to protect against all conceivable events which might cause surface drainage to leave a permit area, but is required to protect against a reasonably foreseeable range of events which are defined in the regulations as construction standards. The reasonably foreseeable standard for design intended to protect against flooding and resultant damage to life and property has been clearly stated in 30 C.F.R. § 816.43(c)(3).

4. 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

   When OSM presents a prima facie case for the existence of a violation of an applicable regulation, the mining operator seeking to rebut OSM's prima facie case need only prove, by the preponderance of the evidence, either that the violation cited in the NOV did not occur or that the violation was not caused by its operations.

APPEARANCES: Patrick McKinney, Esq. and Patricia A. Woods, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Michael W. Boehm, Esq., Chattanooga, Tennessee, for Tennessee Consolidated Coal Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a September 13, 1994, Decision by Administrative Law Judge David Torbett vacating Notice of Violation No. 93-91-011-003 (NOV) issued to Tennessee Consolidated Coal Company (Tennessee Consolidated).

Tennessee Consolidated holds permit No. 2887 for disposal of waste rock from its deep mines at the Woodcock Disposal Area, Sequatchie County, Tennessee. A series of diversion ditches in the permitted area are used to direct drainage from the disposal area to sediment control basins. The water in a ditch identified as Diversion Ditch #3 flows through an inlet control structure immediately before entering the settlement pond. 1/ This inlet control structure is also described as an energy dissipator on sediment pond drawings submitted during the course of permitting. 2/ (Ex. G-25.) In the late afternoon of March 24, 1993, OSM Reclamation Specialist Robert McPheeters inspected the Woodcock Disposal Area and served Tennessee Consolidated with the NOV, pursuant to 30 C.F.R. § 816.45. The basis for issuance of the NOV was McPheeters' observation during his previous inspection, on February 4, 1993, that the inlet control structure for Diversion Ditch #3 was silt free, and his observation on March 24 that the structure was filled with silt, causing water to flow away from the structure without going through the settlement pond. The NOV identified the violation as follows: "The operator failed to maintain appropriate sediment control measures. (Diversion ditch #3 has breached near the silt trap check dam above the silt basin, which let the drainage bypass the silt basin.) Also the silt trap check dam has filled with silt." (Ex. G-1, at 2.)

The NOV stated that, to abate the NOV, Tennessee Consolidated must "[c]omplete the required remedial actions by 8:00 AM on April 1, 1993." (Ex. G-1.) On March 31, OSM issued a Modification of Notice of Violation or Cessation providing that

> [t]he abatement date is extended until April 7, 1993 at 8:00 a.m. at the request of Bill Penley, due to 5.25 inches of rain occurring at the mine site. Mr. Penley stated hand repairs had been

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1/ The Notice of Violation and Tennessee Consolidated's Brief identify the diversion ditch that was breached as "diversion ditch #3." (Respondent's Ex. G-1, at 2; Applicant's brief filed June 13, 1994, at 2.) At the hearing, Penley sometimes refers to the ditch as "D5." (Tr. 47; Tr. 53.) Exhibit G-25 also refers to the ditch as D5. We are satisfied that "diversion ditch #3" and ditch "D5" both refer to the diversion ditch that was examined by McPheeters on Mar. 24, 1993.

2/ The inlet control structure consists of an energy dissipator at the point on a drainage ditch where the water flows into a settling pond. It is used to decrease the velocity of the water entering the pond, distribute the water flow across the pond, and act as a porous check dam. The permit requirements called for the energy dissipator to be constructed of 12-inch to 20-inch machine placed sandstone or limestone at the inlet of the pond. (Ex. G-26.) It was also described as "* * * a small dam * * * constructed of limestone or sandstone * * * and measuring four feet high and fifteen feet long." (Tr. 9-10; Decision at 2.)

> made as necessary to make the ditch function, but field conditions were too wet to allow equipment to complete work as necessary to abate the violation.

(Ex. G-18.)

Tennessee Consolidated filed an Application for Review, pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275 (1994), and the case was docketed in the Hearings Division as case No. NX-93-7-R. Judge Torbett held a hearing in Chattanooga, Tennessee, on March 22, 1994. At the hearing, OSM introduced 26 exhibits and called one witness, Robert McPheeters, the OSM employee who had issued the NOV. Tennessee Consolidated introduced three exhibits and called one witness, William Penley, an engineering technician and permit coordinator employed by Tennessee Consolidated.

McPheeters explained that he had issued the NOV after finding that Tennessee Consolidated had failed to properly maintain the diversion ditch that directed drainage to a sediment pond. He stated that the ditch had filled with silt at the inlet control structure, which he called a silt trap. McPheeters estimated that at the time of his March 24 inspection, approximately 1 gallon of water per minute was overflowing the ditch at the inlet control structure, bypassing the settling pond, and flowing down the face of the settlement pond dam. McPheeters saw no evidence that sediment or drainage had left the permitted area site. (Tr. 10; Tr. 41.)

McPheeters took a water sample from the drainage ditch, from the drainage bypassing the inlet control structure, and from the trickle tube from the silt basin. (Tr. 16.) The laboratory analysis showed that water that had breached the drainage ditch was acidic. Water from the silt basin and water from the trickle tube meet compliance levels. (Tr. 20; Tr. 40-41.) McPheeters testified that he saw no flaw in the construction of the ditch or inlet control structure, but that the structure had not been properly maintained. (Tr. 12.) He also stated that on the day before the inspection, the area near Tennessee Consolidated's Woodcock Disposal Area experienced a "moderate rain." (Tr. 23.)

Tennessee Consolidated's witness, Penley, testified that Diversion Ditch #3 was designed and permitted to handle a 10-year, 6-hour precipitation event of 3.7 inches of rain. (Tr. 46.) After describing the calculations he made to confirm the adequacy of the design and construction, he stated that Tennessee Consolidated maintained a rain gauge approximately 10 miles from the Woodcock Disposal Area and that it had measured 5.25 inches of rain fall during the 22-hour period between 9 p.m., March 22, 1993, and 7 p.m., March 23, 1993. (Applicant's Ex. A-1; Tr. 46.) Penley stated that this rainfall, which exceeded a 10-year, 24-hour precipitation event, occurred the day before the NOV was issued, and caused runoff volumes which exceeded the design parameters of the

diversion ditch, causing it to silt up at the inlet control structure. 3/ He explained that this silting caused a split streamflow, with a portion of the water overflowing the ditch and flowing away from the ponds. (Tr. 47.)

Penley stated that Tennessee Consolidated was responsible for approximately 40 sites in the area affected by the rainstorm of March 22 and 23, 1993, and

> we had a number of ditches which had failed which [we] had to go back and * * * [work] and [rework]. We had several culverts [that] had to be worked on. We had water flowing over roads, and most anything concerning drainage control at any of the sites that we had could have been impacted. Not all of them were, but we had a substantial number of problems.

(Tr. 48-49.)

Penley testified that the sediment pond was designed to "control sediment or suspended solids" and, secondarily, it functioned as a water treatment facility. 4/ Penley described the function of an inlet control structure, stating that it was constructed to slow the movement and distribute the flow of the water entering the pond. (Tr. 52.) 5/ He also testified that after the February 4, 1993, OSM inspection, on at least seven occasions the structure had been examined by a Tennessee Consolidated employee charged with reporting possible problems to him and that there were no reports of silting in the Diversion Ditch #3 inlet control structure. (Tr. 50-51.)

[1] Following the hearing, Judge Torbett directed the parties to submit briefs addressing the evidence and issues. He noted that pursuant to 43 C.F.R. § 4.1171 (1993), OSM was required to establish a prima facie

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3/ A primary function of the inlet control structure is to dissipate the energy of the water as it flows from the ditch to the pond. Simply stated, it is designed to slow the flow of the water. When rapidly flowing water containing silt slows, the silt is deposited. A natural result of a very heavy flow of silt laden water will be the deposition of silt in the inlet control structure.
4/ According to Penley, the poor water quality in the area of the rock disposal site was caused by an abandoned surface mine which had been operated by another party. Tennessee Consolidated undertook reclamation activities in conjunction with the development of its disposal site, and constructed the sediment pond in a manner that would allow it to treat the water, thereby improving the quality of the water flowing from the site. (Tr. 50.)
5/ His description was the same as that found in the permitting documents. Compare Ex. G-26 and Tr. 52.

case as to the validity of the NOV, and the ultimate burden rested with Tennessee Consolidated. 43 C.F.R. § 4.1171(b). Alpine Construction Co., 114 IBLA 232 (1990); see also Rith Energy, Inc., 119 IBLA 83 (1991). In its posthearing briefs, OSM argues that it established a prima facie case of the violation of the requirements set out in 30 C.F.R. § 816.45(a) when it presented evidence that the inlet control structure had filled with sediment, blocking the flow of drainage water, and caused the drainage water to overflow or breach the diversion ditch. We agree with OSM that this evidence was sufficient to establish a prima facie case.

On September 13, 1994, Judge Torbett issued his Decision. After stating that the "sole issue in this case is whether NOV No. 93-91-11-003 was properly issued," (Decision at 1), he outlined what he deemed to be the pertinent evidence, and set out his findings, discussion, and conclusion, stating that "[g]iven the unusual amount of rainfall which exceeded the design parameters of the ditch and the fact that sediment did not contribute to the streamflow or run outside the permit, no violation of 30 C.F.R. § 816.45 is found." (Decision at 4.) He then vacated the NOV. Counsel for OSM then appealed the decision on behalf of OSM.

When OSM appeals from an administrative law judge's decision, OSM has the burden of showing that the administrative law judge has erred. Roblee Coal Co., 130 IBLA 268, 276 (1994). See also Peabody Coal Co. v. OSM, 123 IBLA 195, 217 (1992); Yankee Gulch Joint Venture v. Bureau of Land Management (BLM), 113 IBLA 106, 129 (1990); Mallon Oil Co., 107 IBLA 150 (1989). An administrative law judge decision will be upheld on appeal if the findings of fact upon which the decision is based are supported by substantial evidence in the record and the conclusions of law are not in error. Yankee Gulch Joint Venture v. BLM, supra, at 136.

In its Statement of Reasons (SOR), OSM argues that when Judge Torbett ruled that the NOV was improperly issued he exceeded the authority delegated to him by the Secretary of the Interior. (SOR at 5.) It also alleges that Judge Torbett acted outside of the scope of his authority by imputing a reasonableness standard in 30 C.F.R. § 816.45(a)(3) and subsequently applying the principles of equity to vacate the NOV. (SOR at 5-6.) Citing discussions in proposed rules, published at 43 Fed. Reg. 41747-41749 (Sept. 18, 1978), OSM argues that "to the extent possible," 30 C.F.R. § 816.45(a)(3) "refers to using the best technology currently available." (SOR at 4.) Counsel for OSM further asserts that duties of an administrative law judge, enumerated in the Administrative Procedure Act, 5 U.S.C. § 556 (1994) and the regulation at 43 C.F.R. § 4.1121 do not include "the power to decide that a provision of [SMCRA] has been violated, and then hold for the operator by applying the principles of equity." (SOR at 5-6.)

In response, Tennessee Consolidated argues that OSM has failed to understand the issue of the case and the basis for Judge Torbett's Decision. It states that Tennessee Consolidated has always denied that any

violation existed because Diversion Ditch #3 was breached as a result of a storm event which exceeded the required design parameters of the ditch.

[2] Administrative judges and administrative law judges, acting in their official capacities as employees of the Office of Hearings and Appeals are designated representatives of the Secretary of the Interior and are authorized to act in his stead for the purpose of hearing, considering, and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department. National Wildlife Federation, 140 IBLA 85, 102-03 (1997). Additionally, an administrative law judge is not limited to deciding issues of fact under 43 C.F.R. § 4.1286 but is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. James Spur, 133 IBLA 123, 102 Interior Dec. 32 (1995). We find nothing in Judge Torbett's Decision of September 13, 1994, to indicate that he failed to address legal and factual issues necessary to resolve the dispute between the parties or that he erred by acting outside the authority delegated to the Office of Hearings and Appeals.

The two regulatory provisions applicable to the issues in this case are 30 C.F.R. § 816.43 and 30 C.F.R. § 816.45(a). The regulations at 30 C.F.R. § 816.43, state, in pertinent part:

> (a) General Requirements. (1) With the approval of the regulatory authority, any flow * * * may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to * * * prevent material damage outside the permit area and to assure the safety of the public.
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> (2) the diversion and its appurtenant structures shall be designed, located, constructed, maintained and used to –
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> (ii) Provide protection against flooding and resultant damage to life and property[.]
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> (c) Diversion of miscellaneous flows. (1) Miscellaneous flows, which constitute all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the regulatory authority.
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> (3) The requirements of paragraph (a)(2)(ii) shall be met when the temporary and permanent diversions for perennial and

> intermittent streams are designed so that the combination of channel, bank and floodplain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

The regulation at 30 C.F.R. § 816.45(a) provides:

> (a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:
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> (1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area,
>
> (2) Meet the more stringent applicable State or Federal effluent limitations,
>
> (3) Minimize erosion to the extent possible.

[3] The statement "best technology currently available" in 30 C.F.R. § 816.45(a) does not impose strict liability upon an operator, and a reasonableness standard is clear from the language of the regulation. In Turner Brothers, Inc., 103 IBLA 124 (1988), we said: "An operator is not required to protect against all conceivable events which might cause surface drainage to leave a permit area, but is required to protect against a reasonably foreseeable range of events which are defined in the regulations as construction standards." Id. at 133-34 n.4. The reasonably foreseeable standard for design intended to protect against flooding and resultant damage to life and property has been clearly stated in 30 C.F.R. § 816.43(c)(3). The combination of channel, bank, and floodplain configuration must be adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion. The testimony that the ditch, and its appurtenant inlet control structure met this design standard was unrebutted, and the witness for OSM testified that he believed that the structure had been properly designed and constructed. (Tr. 12.)

Additionally, the policy discussion for the proposed rule at 30 C.F.R. § 816.43, published at 43 Fed. Reg. 41746 (Sept. 18, 1978), states in pertinent part:

> Proposed Section 816.43 provides for protection of the hydrologic balance of the mining area by proposing standards for the diversion and conveyance of a surface flow and shallow-ground water flow. Diversions represent an important environmental tool. Diversions may not be required in all cases--they will be required where necessary to prevent or minimize water pollution.
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> * * * * * * *

> * * * The permittee would not be expected to divert flows which exceed the design storm.

43 Fed. Reg. 41746 (Sept. 18, 1978).

Tennessee Consolidated's witness, Penley, testified that the inlet control structure was examined at least once a week, and that no silting problems had been reported after the latest inspection, which was less than a week prior to the day the NOV was issued. (Tr. 50-51.) He testified further that the March 22-23 storm caused substantial damage to other structures it maintained in the vicinity of the Woodcock Disposal Area. (Tr. 48-49.) There is clearly a sufficient basis for Judge Torbett's conclusion that the storm was the cause of the silt deposit in the inlet control structure and breach of Diversion Ditch #3.

The only remaining question is whether, following the storm, the ditch had been maintained in a manner designated to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area, meet the more stringent applicable State or Federal effluent limitations, and minimize erosion to the extent possible. The inspector who issued the NOV stated that the effluent overflow was being absorbed by the dam's soil. (Tr. 17.) There were no additional contributions of sediment to streamflow or to runoff outside the permit area. Similarly there was no evidence that the effluent flowing from the breached ditch when the NOV was issued was likely to have flowed from the permit area. Turner Brothers, Inc. v. OSM, 103 IBLA 10 (1988); Turner Brothers, Inc. v. OSM, 102 IBLA 299, 306 (1988). The photographs submitted at the hearing indicate the existence of erosion. However, it is also apparent from the same photographs that the erosion was caused by the rain that fell on March 22 and 23, and not by the 1 gallon per minute flowing at the time the NOV was issued. Further, we note that hand repairs had been made to return the entire flow into the pond prior to March 31, but field conditions were too wet to allow removal of silt and replacement of the rock filtration system. (Ex. G-18.)

[4] In an important respect, this case is similar to Roblee Coal Co. v. OSM, supra, at 284. In that case, we observed that if OSM presents a prima facie case, the mining operator seeking to rebut OSM's prima facie case "need only prove, by the preponderance of the evidence, either that the violation cited in the NOV did not occur, or that the violation was not caused by its operations."

Tennessee Consolidated was charged with failure to properly maintain its diversion ditch by allowing its appurtenant inlet control structure to fill with silt. The evidence shows that during a 22-hour period beginning on March 22 and ending on March 23, rainfall amounting to 5.25 inches fell in the area. This rainfall exceeded the designed capacity of the diversion ditch, causing the inlet control structure to fill with silt and the ditch to overflow. The breach was the result of an unusually heavy rainfall,

not Tennessee Consolidated's failure to properly maintain its ditch. Judge Torbett's Decision to vacate Notice of Violation No. 93-91-11-003 is well-reasoned and supported by the record.

Accordingly, 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 of Administrative Law Judge Torbett vacating the NOV is affirmed.

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R.W. Mullen
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge