

PLUM CREEK MINING CO., INC.

IBLA 95-466

Decided February 5, 1998

Appeal from a decision of the Assistant Director, Office of Surface Mining Reclamation and Enforcement, upholding a determination by the Harrisburg Field Office that the Pennsylvania Department of Environmental Resources acted appropriately in responding to a 10-day notice issued as a result of a citizen's complaint. 95-13-BLACK; TDN No. 94-121-273-02.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: State Program:
10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State
Regulation: Generally

An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for failure to take appropriate action to cause a violation to be corrected will be reversed on appeal where the complainant shows that the state's action was arbitrary, capricious, or an abuse of discretion. An OSM decision accepting a state agency's finding, in response to a 10-day notice citing the discharge of water into an underground mine without state and Federal mine safety agency approvals, that such approvals were unnecessary because the affected mines were inactive will be reversed and remanded where evidence in the record suggests that one of the affected mines was not idle.

APPEARANCES: Robert K. Black, President, Plum Creek Mining Co., Inc., Verona, Pennsylvania, pro se; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Plum Creek Mining Co., Inc. (Plum Creek), has appealed from a March 23, 1995, Decision of the Assistant Director, Office of Surface

Mining Reclamation and Enforcement (OSM), upholding the January 5, 1995, Decision of the Harrisburg Field Office (Field Office), OSM, finding that the Pennsylvania Department of Environmental Resources (DER) had acted appropriately in responding to a 10-day notice (TDN) issued as a result of a citizen's complaint submitted by Plum Creek. Plum Creek's complaint alleged that Consolidated Coal Company's (Consol) diversion of surface runoff into the closed Renton mine violated applicable regulations and created safety hazards forcing the cessation of Plum Creek's mining operations at the adjoining Newfield mine.

The relevant factual background can be briefly summarized. Between the mid 1930's and 1952, Pittsburgh Coal Company operated both the Newfield and the Renton mines which were physically connected. In 1952, Republic Steel Company (Republic) leased the Newfield mine, and bulkheads were built to separate the two mines. LTV Steel (LTV) assumed the lease from Republic and operated the Newfield mine until 1985. Consol succeeded Pittsburgh Coal in approximately 1966 and was the owner, operator, and permittee of the Renton mine until 1985. Consol was also the permittee of a 188-acre coal refuse disposal site adjacent to the Renton mine.

In accordance with a December 21, 1983, Consent Order, Consol sought DER approval of the diversion of surface runoff from the refuse disposal site into the operating Renton mine for treatment with other mine water discharge. The DER approved the permit amendment authorizing this water handling plan on November 9, 1984.

Consol sold the Renton mine to Villa Coal Company (Villa) in 1985 but remained the permittee until Villa obtained a permit in January 1987. Villa abandoned the mine in June 1987, ceased treatment of the water discharged from the mine, and subsequently filed for bankruptcy. On June 1 and August 17, 1987, DER issued orders directing Consol and Villa to recommence water treatment operations. In order to resolve Consol's appeals of DER's abatement orders, Consol and DER entered into a Consent Order, approved on December 11, 1987, which required Consol, *inter alia*, to submit a plan to pump, treat, and maintain the Renton mine pool and discharge, as well as seal and close the mine and reclaim the refuse pile.

Consol submitted its mine closure and mine drainage treatment plan on December 14, 1987, proposing a 675-foot mean sea level (M.S.L.) final mine pool elevation. In a memorandum dated January 11, 1988, the McMurray District Office, DER, advised the Greensburg District Manager, DER, that the State Bureau of Deep Mine Safety (DMS) should be contacted concerning the potential for the adjacent Newfield mine remaining active during the flooding of the Renton mine. By speed letter dated January 19, 1988, the Greensburg District Office requested DMS's input regarding the Renton mine closure plan, citing the active status of the Newfield mine. Although the record does not contain any response from DMS, the closure plan was approved, and Consol finally sealed the Renton mine on June 8, 1989. The DER, however, reserved the right to modify or rescind its approval of the mine drainage treatment plan and the 675-foot M.S.L. mine pool maintenance level if public health or safety concerns so required. See June 20, 1988, letter from DER to Consol at 2.

A closure plan for the Newfield mine was submitted to DER on June 16, 1987, but that closure was not pursued, apparently because LTV was negotiating with Newfield Energy, Inc., for the purchase of the Newfield mine lease. Although that transaction was not consummated, Penn Hills Energy, Inc., acquired the lease for the mine from LTV on March 17, 1989, and re-permitted the mine. One of the permit conditions required the company to build bulkheads between the old portion of the Newfield mine next to the Renton mine and the new portion of the mine. Penn Hills Energy apparently went bankrupt before constructing the mandated bulkheads.

In 1991, Plum Creek leased the Newfield mine from Consol. Plum Creek's permit, which was approved on June 29, 1993, directed the company to construct bulkheads between the old and new portions of the mine and to monitor the Renton mine pool elevation. On January 6, 1994, Plum Creek began mining a small block of coal parallel to the site for the bulkheads. On November 1, 1994, Plum Creek employees noticed increased water flow into the mine and notified the Mine Safety and Health Administration (MSHA) and DMS. After an inspection, MSHA ultimately required the evacuation of all personnel from the mine due to the high water level.

By letter dated November 10, 1994, Plum Creek complained to OSM that the idling of its underground mining operation at the Newfield mine due to high water had been caused by Consol's pumping of runoff surface water into the sealed Renton mine, which had artificially increased pool elevations and threatened public safety in violation of 30 C.F.R. §§ 817.41(h)(1) and 817.43(a). Plum Creek faulted DER for improperly allowing Consol to pump excessive water into the pool.

On November 17, 1994, the Johnstown Area Office, OSM, issued TDN No. 94-121-273-02 to DER advising that, based on a citizen's complaint, OSM had reason to believe that Consol was discharging water from a surface refuse facility into an underground mine without the approval of MSHA and DMS in violation of 25 PA Code §§ 89.60(7) and 89.83(d). In its December 2, 1994, response, DER stated that no violation of Pennsylvania's surface mining regulatory program had occurred. Specifically, DER found no violation of 25 PA Code § 89.83(d), which requires approval of an alternative water handling procedure prior to closure of an underground mine receiving water from a coal mining activity, because DER's November 9, 1984, issuance of Consol's permit amendment authorizing the diversion of surface runoff from the refuse disposal site into the Renton mine occurred long before the June 8, 1989, final sealing of the mine. The provisions of 25 PA Code § 89.60(7) mandating DMS and MSHA approval for diversion of surface water into an underground mine were inapplicable, DER concluded, since both the Renton and Newfield mines were idle, thus eliminating any safety issues. The DER added that both DMS and MSHA knew that water was being discharged into the Renton mine when they approved Penn Hills Energy's and Plum Creek's permits for the Newfield mine.

Although OSM's Johnstown Area Office recommended that DER's response be deemed inappropriate on the ground that, under the regulations, the status of the mine has no bearing on the necessity for MSHA

and DMS approval of the diversion of surface water into an underground mine, on January 5, 1995, the Harrisburg Field Office advised Plum Creek that DER's response to the alleged violations was appropriate, and that OSM would take no further action at that time. In so doing, OSM accepted DER's conclusion that no violations of the approved State program existed because Consol's alternative water handling procedure had been approved prior to mine closure in accordance with the applicable regulations and because the inactive condition of both mines at the time the Renton closure plan was approved rendered MSHA safety provisions irrelevant and MSHA approval unnecessary.

Plum Creek sought informal review of the Field Office determination pursuant to 30 C.F.R. § 842.15. Plum Creek argued that the analogous applicable Federal regulations, 30 C.F.R. §§ 817.41(h)(1) and 817.43(a), do not differentiate among active, idle, or abandoned mines. Plum Creek averred that the Newfield mine was active, with employees working underground and a sale pending, thus requiring MSHA and DMS approval for the discharge of water into the underground mine. Although closure plans for the Newfield mine had been submitted, Plum Creek asserted that closure had not been pursued due to the sale of the mine and the resumption of production. Plum Creek further claimed that the surface water diverted into the Renton mine had increased the pressure on the old internal seals and had prevented the company from constructing the bulkheads required by its mining permit to insure the safety of the miners and the integrity of the mine. Plum Creek also noted that DER had reserved the right to modify or rescind its approval of the Renton mine drainage treatment plan and mine pool maintenance level if public health or safety concerns so warranted.

In his March 23, 1995, Decision, the Assistant Director upheld the Field Office determination that DER had acted appropriately in concluding that Consol's discharge of water from the refuse disposal site into the Renton mine complied with State regulations. He agreed that DER's issuance of the November 9, 1984, permit amendment to Consol before the June 8, 1989, final sealing of the mine satisfied the requirement of 25 PA Code § 89.83(d) that DER approve an alternative water handling plan prior to closure of a mine receiving water from a coal mining activity. Thus, he affirmed the Field Office's acceptance of that portion of DER's response to the TDN.

Regarding the need for MSHA approval for the discharge of runoff from the refuse site into the Renton mine, the Assistant Director noted that both 25 PA Code § 89.60(7) and its Federal counterpart, 30 C.F.R. § 817.41(h), allowed water discharges into underground mines with regulatory authority approval after a demonstration that, among other things, the discharge would meet with the approval of MSHA. Although he concluded that the Federal rule required MSHA approval for all discharges into underground mines whether active or not, the Assistant Director observed that the standard for judging the appropriateness of the State response to a TDN was the State, not the Federal, program. He found that DER had articulated a reasonable basis for determining that MSHA would have had no reason to withhold approval for a discharge into an abandoned mine where

safety issues were nonexistent. Because DER's interpretation of 25 PA Code § 89.60(7) was reasonable, the Assistant Director upheld the Field Office's determination that DER had acted appropriately.

However, since the Assistant Director also considered DER's interpretation to be inconsistent with OSM's construction of the Federal regulations, he directed the Field Office to notify the State that the approved State program no longer met the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994), and its implementing regulations and might need to be amended. Noting that the Newfield mine was now active, he also instructed the Field Office to ask DER to obtain MSHA approval for the closure plan for the Renton mine and to reevaluate the mine drainage treatment plan and the 675-foot mine pool maintenance level established pursuant to the 1987 Consent Order.

On appeal, Plum Creek argues that Consol's discharge of water from the surface refuse site into the underground Renton mine violated the applicable regulations because MSHA did not approve the discharge plan. Plum Creek denies that the Newfield mine was idle or abandoned, asserting, to the contrary, that it was an active mine permitted by LTV. According to Plum Creek, Newfield Energy began negotiating with LTV for the purchase of the mine on March 30, 1987, and DER received documents regarding the permit transfer in September 1987. Although that transaction was not completed, Plum Creek notes that Penn Hills Energy acquired the mine from LTV on March 17, 1989. Plum Creek avers that between March 30 and November 15, 1987, the Newfield mine was actively examined three times daily and inspected by State and Federal inspectors, and that from November 15, 1987, until March 17, 1989, LTV maintained the underground ventilation system and had full-time employees to attend the facility pending approval of the Penn Hills Energy permit.

Plum Creek contends that, because the Renton and Newfield mines are physically connected, the discharge of surface water into the Renton mine created a safety hazard to the operations and employees at the Newfield mine. Plum Creek maintains that DER not only knew that the Newfield mine was either operating or the subject of negotiations for sale as a producing mine, but also had been informed in 1988 of the safety risks associated with the water discharge into the Renton mine. Plum Creek submits that DER's authorization, without MSHA approval, of both the alternative water handling procedure and the discharge of surface water into the closed Renton mine violates the applicable regulations, and asks that the water level be reduced to an elevation of 552 feet to insure safe conditions for the Newfield mine.

In its Answer, OSM contends that it properly applied the citizen's complaint and TDN procedural rules governing this case when it found DER's response to the TDN to be appropriate. Deference to DER's interpretation of its regulatory program was required, OSM argues, because the State's determination that the status of the potentially affected mines as idle and scheduled to be closed negated any safety concerns and justified waiving the requirement for MSHA approval. That determination was not irrational, inconsistent with applicable law, procedurally defective, or derelict in

evaluating relevant criteria. According to OSM, its disagreement with DER's interpretation does not change this result given that the OSM construction is based on the preamble clarifying the regulatory language and is not sufficiently obvious or apparent on the face of the regulation so as to preclude all other interpretations.

The OSM asserts that its divergence with DER reflects a programmatic difference which OSM properly addressed by advising the State of the possible inconsistency and affording it the opportunity to reevaluate the situation. In any event, OSM speculates that only a technical violation of the regulations may have occurred in this case and that MSHA approval for the diversion of surface runoff into the underground mine may be readily obtainable. The OSM also questions whether DER has the authority to impose the remedy Plum Creek seeks. Because of these unresolved issues, OSM maintains that it acted properly in requesting that DER reexamine the case in light of OSM's contrary interpretation of the regulatory requirement. Plum Creek's appeal is thus premature, OSM submits, and will remain so while OSM pursues the matter with DER until OSM renders a determination finally addressing the merits of the complaint.

[1] When, based on available information (including information obtained from any person), OSM has reason to believe that a permittee is violating a state regulatory program provision, it must issue a TDN to the state. See 30 U.S.C. § 1271(a) (1994); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1). Unless the state, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. § 1271(a) (1994); 30 C.F.R. § 842.11(b)(1). Under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), OSM evaluates both "appropriate action" and "good cause" according to whether the state regulatory authority's action or response to a TDN is "arbitrary, capricious, or an abuse of discretion under the state program." 1/ See Ernest Black, 135 IBLA 246, 248 (1996); Ambleside, Ltd., 135 IBLA 51, 58 (1996).

The regulations provide that "good cause" includes a finding that "[u]nder the State program, the possible violation does not exist." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i). Since the state program forms the standard for judging the appropriateness of a state's response, the Department generally defers to the state's determination that no violation exists and will not substitute its judgment for that of the state regulatory authority unless OSM concludes that the response is arbitrary,

1/ In the preamble to the final 1988 rulemaking establishing the Department's policy on evaluating state responses to TDN's, the Department endorsed the language in the preamble to the proposed rulemaking describing an arbitrary or capricious response or a response that would be an abuse of discretion under the state program as "one in which the state regulatory authority has acted irrationally, or without adherence to correct procedures, or inconsistently with applicable law, or without proper evaluation of relevant criteria." 53 Fed. Reg. 26732, 26733 (July 14, 1988).

capricious, or an abuse of discretion. See Ronald Maynard, 130 IBLA 260, 265-66 (1994); see also 53 Fed. Reg. 26732, 26735 (July 14, 1988). If a state's interpretation of its own program is inconsistent with SMCRA or the Federal regulations, OSM must notify the state that its program needs to be modified. See 53 Fed. Reg. 26732 (July 14, 1988). However, an operator complying with the state program will not be subject to enforcement action for violating Federal standards when he had no notice of those standards. 53 Fed. Reg. 26732, 26736 (July 14, 1988).

When OSM issues a decision on informal review affirming a determination that the state regulatory authority had good cause for not taking enforcement action in response to a TDN, the party challenging that decision has the burden of establishing that the state regulatory authority's decision was arbitrary, capricious, or an abuse of discretion. See Betty L. & Moses Tennant, 135 IBLA 217, 227 (1996); Ronald Maynard, *supra*. We find that Plum Creek has made the requisite showing in this case.

The State construes its regulations as requiring MSHA approval of discharges of surface water into underground mines only if potentially affected mines are active. Although OSM interprets the comparable Federal regulations as mandating MSHA approval for all such discharges regardless of the condition of the involved mines, it evaluated DER's response in accordance with the State's construction of the state program requirements. The OSM, therefore, accepted DER's finding that no violation under the state program had occurred because both the Renton and Newfield mines were inactive at the time Consol's 1987 Renton mine closure water diversion plan was submitted and approved.

Plum Creek maintains, however, that the Newfield mine was not idle and was the subject of negotiations for sale as a producing mine, and that DER was aware of these facts. The DER has not disputed Plum Creek's allegations, and the record contains various DER documents generated in response to Consol's Renton mine closure and refuse site discharge treatment plans alluding to either the current activity in or the potential reactivation of the Newfield mine. See, e.g., June 20, 1988, letter from DER to Consol; Jan. 19, 1988, speed letter from DER to DMS; Jan. 11, 1988, memorandum from McMurray District Office, DER, to Greensburg District Office, DER. Since the record contradicts DER's underlying conclusion that the affected mines were inactive at the time the plan to discharge water into the underground Renton mine was approved, OSM erred in finding that DER's response to the TDN established good cause for failing to take appropriate action to cause the violation to be corrected. We, therefore, reverse OSM's Decision and remand the case for further action on Plum Creek's complaint. ^{2/}

^{2/} Plum Creek also appears to be arguing that DER improperly approved Consol's 1984 permit amendment authorizing the diversion of runoff from the refuse disposal site into the Renton mine for treatment with the mine water discharge because MSHA approval was not obtained for that diversion. On remand, OSM should explore this issue as well.

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 appealed from is reversed, and the case is remanded to OSM for further action.

David L. Hughes
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

