

WYOMING OUTDOOR COUNCIL

IBLA 96-10 Decided July 14, 1998

Appeal from a decision of an Assistant Director, Office of Surface Mining Reclamation and Enforcement, denying informal review of an Office of Surface Mining Reclamation and Enforcement determination not to inspect a coal gasification plant; Appellant requests payment of costs and attorney fees incurred in administrative proceedings. 95-15-WOC.

Reversed; costs and attorney fees allowed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally-
-Surface Mining Control and Reclamation Act of 1977; Citizen's Complaints:
Generally--Surface Mining Control and Reclamation Act of 1977: Federal Program:
Permits--Surface Mining Control and Reclamation Act of 1977: State Program:
Generally

A citizen's complaint that Wyoming failed to enforce a provision of the approved State surface mining program requiring a coal gasification plant to be permitted as a coal mining operation was rejected in error by OSM, when the complaint revealed a failure by Wyoming to properly apply W.S. § 35-11-426, forbidding issuance of a special license instead of a coal mining permit to an in situ coal gasification operation.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order--Surface Mining Control and Reclamation Act of 1977:
Attorney Fees/Costs and Expenses: Substantial Contribution

A citizen complainant who prevails on appeal to the Board of Land Appeals upon a showing of error in an OSM decision denying a requested Federal inspection is entitled to an award of costs and attorney fees under 43 C.F.R. § 1294 for representation before the Board and OSM.

APPEARANCES: Steve Jones, Esq., Jackson, Wyoming, for Appellant; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Wyoming Outdoor Council (WOC) has appealed from a March 30, 1995, Decision of an Assistant Director of the Office of Surface Mining Reclamation and Enforcement (OSM). The Decision denied informal review of a December 15, 1994, refusal by OSM's Casper Field Office to inspect a coal gasification plant operated near Rawlins, Wyoming, by Carbon County UCG, Inc. (UCG), under Wyoming research and development license No. 17 (R&D 17). The action taken by the Field Office was in response to a citizen's complaint filed by WOC on December 9, 1994, wherein it was reported that UCG was operating a surface mining operation without a permit, contrary to both State law and the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1256 and 1257 (1994).

The Wyoming Department of Environmental Quality, Land Quality Division (DEQ), issued license R&D 17 effective October 24, 1994, for in situ coal gasification testing at a site in Carbon County, Wyoming. Objecting to the State action, WOC filed a citizen's complaint requesting a Federal inspection for the reason that, in issuing the license, DEQ did not require UCG to provide public notification and opportunity for public comment and failed to meet other requirements established by State and Federal law for permitting surface mining operations.

On December 15, 1994, OSM's Casper Field Office denied WOC's request for a Federal inspection of the gasification project, finding that

the R&D permit requirements in Wyoming's approved program are not as stringent nor as effective as the requirements in [SMCRA]. [We] further advised the DEQ that we were recommending to our Headquarters office that Wyoming be required to amend its program to be no less effective than SMCRA as provided for in 30 CFR 732.17. OSM considers this a programmatic issue and is seeking resolution through the processes and procedures outlined in the SMCRA and the Federal regulations.

Following informal review of this determination, OSM issued the March 30, 1995, Decision now on appeal, concluding that DEQ acted in conformity to State law. In refusing to order Federal inspection of the gasification site, OSM found that DEQ issued R&D 17 "in accordance with existing Wyoming regulations and, therefore, the permit/license [is] valid under those regulations." (Decision at 2.)

By letter dated January 27, 1995, OSM required Wyoming to "revise its approved program to (1) require public notice for research and development testing of coal in situ processing activities and (2) clarify that the

underground mining performance standards apply to coal in situ research and development testing licenses." 61 Fed. Reg. 43967 (Aug. 27, 1996). Effective August 27, 1996, OSM found that Wyoming had satisfactorily altered its program to meet the specifications in this letter. Id.

On appeal to this Board, WOC concludes that OSM's Decision condones operation of a surface mining operation without a permit, contrary to SMCRA, 30 U.S.C. §§ 1256 and 1291 (1994). It is WOC's position that OSM should issue a cessation order to UCG to cease all operations until UCG obtains the surface coal mining permit which SMCRA requires of all surface coal mining operators. Citing 30 U.S.C § 1267(h) (1994) and 30 C.F.R. § 842.12(c), WOC requests a field inspection of the UCG site. In support of the stated position, WOC relies upon 30 U.S.C. §§ 1257, 1258, 1267, and 1271 (1994), and the state equivalent thereof in effect in October 1994 (the Wyoming Environmental Quality Act, Wyoming Statutes (W.S.), Title 35, Chapter 11), and upon 30 C.F.R. Part 772 and Wyoming DEQ 1994 Rules and Regulations, Chapter X. An award of costs and attorney fees incurred in these proceedings before the Department is also sought.

In response, OSM argues that issuance of a cessation order was not, given the facts of this case, a proper remedy; according to OSM, the only question on appeal is whether the Assistant Director erred when he refused to order a Federal inspection of the UCG site. This is so, OSM contends, because both the Casper Field Office and the Assistant Director were correct when they decided that a revision of the State regulation governing in situ processing plants was required in order to subject the UCG operation to permitting requirements applicable to surface coal mining operations. While admitting that WOC's complaint pointed out a permitting deficiency in the licensing action taken by the State, OSM argues that the only course of action open to OSM was the one taken: To require the State to amend its program to be no less effective than the Federal rules governing research and development sites, an action that has now been accomplished.

Further, OSM points out, the Federal coal exploration license for this site expired on August 25, 1996; operations under license R&D 17 have stopped and reclamation of the site is in progress. It is suggested that issuance of a Federal cessation order now would hinder completion of reclamation and could serve no useful purpose. Inasmuch as the purpose sought by WOC's complaint was accomplished by revision of the State rule, OSM argues, and operations at the UCG site have ended, this appeal should be dismissed and WOC's request for attorney fees should be denied.

Under 30 U.S.C. § 1253(a) (1994), a state can be granted primary responsibility (called "primacy") for regulation of surface coal mining. Wyoming obtained primacy on November 26, 1989. 30 C.F.R. § 950.10. When OSM approved the Wyoming program, the State assumed responsibility for issuing mining permits and enforcing the regulatory program. In Re Surface Mining Regulation Litigation, 653 F.2d 514, 519 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981); In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). Nonetheless, OSM retained jurisdiction to

enforce any part of the State program not enforced by Wyoming. See SMCRA, 30 U.S.C. § 1254(b) (1994), which provides for Federal enforcement of that part of a state program not being enforced by the state. Annaco v. OSM, 119 IBLA 158, 162 (1991).

When primacy was granted, OSM found there were no exceptions from permit requirements for in situ coal mining operations in the approved State program (conditional state program approval finding 14.118, 45 Fed. Reg. 78666 (Nov. 26, 1980)). Under W.S. § 35-11-401(d), "[n]o person shall engage in or carry out surface coal mining operations unless the person has first obtained a permit." This is equivalent to 30 U.S.C. § 1256(a) (1994), and the Federal regulations at 30 C.F.R. § 773.11(a). Further, W.S. § 35-11-103(e)(xx) defines surface coal mining operations to include "in situ distillation or retorting, leaching, or other chemical or physical processes." This is equivalent to 30 U.S.C. § 701(28)(A) (1994) and 30 C.F.R. § 701.5. Finally, like the regulations at 30 C.F.R. §§ 785.22 and 828.1 through 828.12, W.S. §§ 35-11-427 through 35-11-436 provide special requirements for in situ mining operations. The State program regulating in situ coal mining therefore provides an equivalent provision for every SMCRA provision governing that activity, as OSM found when the State program was approved (conditions to the approval of the program are not relevant to this appeal).

As WOC states, Wyoming's permitting statute includes provisions for public notification (W.S. § 35-11-406(g) and (j)) and comment (W.S. § 35-11-406(k)), as does SMCRA. To conclude, as OSM would have us do in this case, that the approved State program nonetheless failed to conform to SMCRA standards, would therefore require a finding that OSM erred in approving the Wyoming program in 1980. There has been no such showing here, however.

Under the Wyoming Environmental Quality Act, in order to conduct in situ coal mining operations in Wyoming, UCG was required to obtain a surface coal mining permit pursuant to W.S. §§ 35-11-405 and 406 and implementing regulations then in effect. The applicable statute governing in situ coal operations provided in 1994 as follows:

§ 35-11-426. In situ mineral mining permits and testing licenses.

Any person desiring to engage in in situ mineral mining or research and development testing is governed by this act. Any general provisions of the act which are more stringent than the particular requirements contained in W.S. 35-11-427 through 35-22-436 shall control for the purposes of the regulation of coal in situ processing activities.

To justify his conclusion that the UCG operation could lawfully avoid requirements imposed on coal permittees by obtaining a less demanding research license, notwithstanding the limitation imposed by W.S. § 35-11-426, the Assistant Director relies on a special provision of the State

law concerning a "research and development testing license" in the belief it can be applied to coal surface mining operations. This statute states: "A special license to conduct research and development testing may be issued by the administrator for a one (1) year period without a permit and may be renewed annually." Neither SMCRA nor Federal regulations implementing SMCRA contain a similar provision.

[1] Application of this special licensing provision to UCG's coal mining operation was in direct conflict with W.S. § 35-11-426, quoted above, which forbids use of the special licensing statute for any applications (such as coal mining) that require "more stringent" permitting requirements. The Assistant Director's Decision fails to analyze the effect of this statute on the action taken by the State regulators, but assumes, incorrectly, that they followed applicable State law when they licensed UCG; his Decision also ignores the record made by OSM when Wyoming's program was approved, which shows that it was required by OSM and understood by Wyoming lawmakers that in situ mining would be subjected to permitting requirements at least as stringent as those adopted by SMCRA.

In final rulemaking published on November 26, 1980, OSM concluded that:

Wyoming has two distinct sets of regulations governing in situ operations. One set pertains to all in situ operations (Rule XXI 2a) and the other pertains only to in situ coal operations (Rule V 3a(5)). Between the two, all requirements of 30 C.F.R. 785.22 and Part 828 are included in the Wyoming program.

45 Fed. Reg. 78637, 78655 (Nov. 26, 1980). The Federal rule cited by OSM provides that in situ coal mining is to be treated in the same fashion as underground coal mining. 30 C.F.R. § 785.13. This being the case, the permitting requirements for such mining, including public notice and participation, were required of in situ operations as well. Concerning this aspect of the permitting process contemplated by the State program, the final rulemaking commented that "35-11-406(j) identifies the notice to be provided, which is equivalent to that required by 30 CFR 786.11(a). All Federal requirements for the notice are outlined in the Wyoming statute." 45 Fed. Reg. 78665, 78666. The cited regulation provided for public notice of the permit application, to include the location and extent of the permitted area and the regulatory authority to whom comment should be addressed. The 1980 rulemaking both required and found that permitting practices for in situ coal operations in Wyoming were to be no less demanding than those described in the Federal regulations. There has been no showing that this finding was made in error.

Decisions of the Wyoming Supreme Court are consistent with this finding, that court having concluded that the Wyoming legislature intended to implement the policies of SMCRA. See Powder River Basin Resource Council v. Environmental Quality Council, 869 P.2d 435, 438 (Wyo. 1994); Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 548 (Wyo. 1988). Since

Wyoming has implemented SMCRA, and the State program is intended to be consistent with SMCRA, conflicts between Federal and Wyoming law should be resolved in favor of the Federal law. 30 U.S.C. § 1255 (1994). Nonetheless, the Assistant Director found that OSM's rulemaking had mistakenly approved a State program that did not impose such stringent permitting requirements on in situ operations in Wyoming as were contemplated by SMCRA and OSM's rulemaking. This finding is contradicted by the record supplied by OSM's rulemaking and the plain meaning of W.S. § 35-11-426. The State regulatory authority, by issuing R&D 17, upon conditions that did not meet permitting standards established by Federal and State law for coal operations, did so in error; as a result, UCG operated, as WOC alleges, without a permit that complied with necessary requirements established by the State program.

A number of arguments are raised by OSM on appeal in defense of the course of action taken in this case. It is suggested that the State licensing action was not arbitrary or capricious because the interpretation of State law given to W.S. § 35-11-426 was "plausible" in the view of OSM's staff. This approach, however, ignores the question whether the State law was intended to adopt and implement SMCRA's provisions governing in situ coal mining and whether State law should be interpreted so as to avoid conflict with controlling Federal law. It is also suggested that, by requiring and obtaining an amendment of the State law, OSM has effectively corrected the deficiency complained of by WOC and, given the present condition of the UCG project, the entire matter is now moot.

Assuming that operations have ceased and reclamation of UCG's project is either in progress or has been completed, it appears the relief that this Board can provide in response to WOC's request for a cessation order is limited. It is nonetheless clear that the Wyoming regulatory agency allowed UCG to operate an in situ coal mining operation without a valid coal mining permit in violation of the approved Wyoming program, and that OSM's refusal to order a Federal inspection in this case was unjustified. Accordingly, the Assistant Director's Decision is reversed.

[2] Even if the site has been satisfactorily reclaimed, this finding is not made academic by that fact, inasmuch as WOC's request for payment of costs and attorney fees for actions taken before this Board, the Director of OSM and the Casper Field Office still remains to be decided. Insofar as concerns the costs request, we find that 30 U.S.C. § 1275(e) (1994), authorizes an award of costs including attorney fees to any person "[w]hen an order is issued * * * as a result of any administrative proceeding * * * as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings." This is such an order. Implementing this provision, 43 C.F.R. § 4.1294(b) authorizes an award from OSM to anyone who "prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." We find WOC has prevailed so as to be entitled to a costs award in this case.

Not only did WOC successfully alert OSM and the Wyoming regulators to a discrepancy between their administration of the State program and the State law, the complaint made by WOC led to action by both the State and Federal regulators to correct the erroneous permitting procedures employed, albeit the corrective action taken was itself incorrect and unnecessary. The fact that OSM joined the State regulatory agency in perpetuating a series of errors cannot denigrate the contribution made by WOC in this case, whose efforts, we find, have now led to a successful resolution of this case with the issuance of this decision. The petition for costs and attorney fees presented is, however, incomplete, being without the detailed itemization described at 43 C.F.R. § 4.1292; it is also premature, inasmuch as a petition is required to be filed with this Board within 45 days of the receipt of our issuance of this order, under 43 C.F.R. § 4.1291. In conformity to the cited rule, WOC should file the required costs itemization with this Board, following which filing OSM may, if not in agreement with the itemization presented, file any objections thereto within 60 days following receipt of WOC's bill. Because of the conclusion stated herein, only the amount of the award to be made remains unresolved.

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 WOC shall, within 45 days following receipt of this order, submit an itemized bill for costs and attorney fees incurred in prosecuting this case before OSM and this Board.

Franklin D. Amess
Administrative Judge

I concur:

James L. Burski
Administrative Judge

