



WESTMORELAND RESOURCES, INC.

183 IBLA 77

Decided November 20, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WESTMORELAND RESOURCES, INC.

IBLA 2012-51

Decided November 20, 2012

Appeal from an order of Administrative Law Judge Harvey C. Sweitzer granting motions for summary decision and to modify notices of violation. DV 2011-1-P and -2-P.

Decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Construction--Regulations: Interpretation

Under 30 C.F.R. § 816.151(a), the Office of Surface Mining, Reclamation and Enforcement must receive a report from an engineer or land surveyor certifying that a primary road was constructed “as designed and in accordance with the approved plan.” Absent OSM’s receipt and approval of such a report, an unfinished and/or uncertified haul road is not a primary road and cannot be used to haul coal or spoil.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

An Administrative Law Judge may modify notices of violation after an administrative proceeding has commenced. Such modification is warranted where the notices of violation are vague as to the action that caused the violation, and the violator has not demonstrated that it was prejudiced by the modification.

APPEARANCES: Scot W. Anderson, Esq., R. Kirk Mueller, Esq., Denver, Colorado for appellant; John S. Retrum, Esq., Office of the Solicitor, Lakewood, Colorado, for the Office of Surface Mining, Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

By order dated April 5, 2012 (April Order), the Board granted a petition for discretionary review filed by Westmoreland Resources, Inc. (Westmoreland). Westmoreland sought review of an October 19, 2011, Order (October Order) of Administrative Law Judge (ALJ) Harvey C. Sweitzer, Departmental Hearings Division, Office of Hearings and Appeals, granting a motion to modify and renewed motion for summary judgment of the Office of Surface Mining, Reclamation and Enforcement (OSM) in a civil penalty proceeding. *See* 43 C.F.R. § 4.1270.

For the following reasons, we affirm the ALJ's October Order.

Background

The October Order succinctly describes this case's background, which is not in dispute. Westmoreland is the permittee of two OSM permits pertinent to Westmoreland's Absaloka Mine in Montana. October Order at 2. One permit covers a northern tract commonly referred to as the Ceded Strip;¹ one permit covers a southern tract within the Crow Indian Reservation. *Id.* Between June 2009 and September 2010, Westmoreland constructed the South Extension haul road (haul road), a road spanning both tracts and designed to haul coal from surface-mined pits to a train load out facility. *Id.* at 2-3. The haul road is properly classified as a primary road.²

On August 26, 2010, prior to completion of the haul road, OSM issued two notices of violation (NOVs), one for each tract,³ for failing to provide a report and

¹ The northern tract is subject to coincident permits issued by both OSM and the Montana Department of Environmental Quality, but only OSM actions are relevant to this appeal.

² According to the road classification system set out in the regulations, a primary road includes any road "[u]sed for transporting coal or spoil." 30 C.F.R. § 816.150(a)(2)(i).

³ OSM issued two NOVs (NOVs 10-010-108-001 and -002) because of the distinction between the northern and southern tracts, but they work in concert to cite a single violative activity upon the haul road. Therefore, the NOVs are very similar, with the
(continued...)

certification that the road was constructed as designed and in accordance with the approved plan under 30 C.F.R. §§ 816.150(b) and 816.151(a). *Id.* at 3-4; OSM Motion for Summary Decision, Exs. B-1 and B-2. OSM issued these NOV's based on reports prepared by an OSM inspector, who observed Westmoreland hauling coal from the mine pits over a haul road to a train load out facility using trucks with approximately 200 tons of haul load capacity. October Order at 3; OSM Motion for Summary Decision, Ex. B-7 at 3-4. Considering Westmoreland had not yet submitted a report and certification, OSM concluded that Westmoreland "failed to construct primary/haul road as designed and failed to certify" it as required by applicable regulations. OSM Motion for Summary Decision, Exs. B-1 and B-2. To remedy the violation, OSM required Westmoreland to construct the haul road as per the approved plan, certify it, and in the case of NOV 10-010-108-001, control or prevent erosion and siltation. *Id.*

Although Westmoreland did not appeal the NOV's, it later appealed OSM's Notices of Proposed Civil Penalty Assessments (NOPAs) which were based only on the fact of the NOV's. *See* October Order at 4; April Order at 2. The NOPAs recommended that no civil penalty be assessed.⁴ April Order at 2. ALJ Sweitzer ruled in favor of OSM in his October Order on the ground that allowing Westmoreland to begin coal haulage without requiring certification "would leave a gaping hole in the regulatory scheme for potential exploitation, placing no time limit on when road usage may begin." October Order at 7. ALJ Sweitzer also granted a motion by OSM to amend the NOV's, rejecting Westmoreland's assertion that doing so allowed OSM to issue new NOV's. *Id.* at 5-7. The NOV's and amendment of the NOV's are the bases of the instant appeal.

Analysis

Certification Must Precede Commercial Coal Haulage

Section 521 of the Surface Mining and Reclamation Act of 1977 (SMCRA),

³ (...continued)

exception of the "Portion of the Operation to Which Notice Applies" section.

⁴ A permittee may challenge the fact of an NOV either when the NOV is issued or when the NOPA is issued, even if the NOPA recommends no civil penalty. *See generally* April Order; Jan. 7, 2011, Order at 8; *Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement*, 114 IBLA 291, 300 (1990) ("We therefore hold that the fact of a violation set out in an NOV may be contested . . . in civil penalty proceedings"); *see Intersouth Mineral Co., Inc. v. Office of Surface Mining and Reclamation*, 118 IBLA 14, 17 (1991).

30 U.S.C. § 1271 (2006), provides that when a Federal inspector determines that a permittee is in violation of SMCRA, but the violation does not pose an imminent danger to the public or environment, the inspector shall issue an NOV providing a reasonable time for remedying the violation. 30 U.S.C. § 1271(a)(3) (2006). In this case, OSM issued NOVs because its inspector determined that Westmoreland violated 30 C.F.R. § 816.151(a) by failing to provide OSM with a report from an engineer or land surveyor certifying that the haul road was constructed “as designed and in accordance with the approved plan.” Westmoreland does not dispute that it submitted no report, but asserts that (1) no certification could be made when the NOVs were issued because “[w]ithout dispute, construction of the [haul road] . . . was on-going . . . in August 2010,” and (2) Westmoreland’s use of the incomplete, uncertified haul road was not restricted or limited by the regulations. Westmoreland Opening Brief (Opening Brief) at 7, 11.

The fundamental issue here is whether an operator can indefinitely conduct commercial coal hauling on a road it claims is still “under construction” without violating the certification requirement. See Opening Brief at 8 (asserting that it is a speculative “leap to conclude that by requiring an engineer’s certification . . . Congress or the agency meant to prohibit use of the road until after such certification”). Westmoreland’s logic suggests that since the plain language of the regulation does not expressly forbid commercial coal haulage prior to certification, it therefore tacitly permits it.

Construction must be complete to allow for certification. See 30 C.F.R. § 816.151(a);⁵ Reply at 2-3. Westmoreland asserts that coal haulage was necessary to pack down and “complete” the haul road as a prerequisite to certification. Opening Brief at 11. Westmoreland’s assertion raises a dilemma. If the road was not yet complete and could not be certified, then use of the unfinished haul road by regular haul truck traffic could have posed a safety and environmental risk. On the other hand, if the road was complete and compliant with all design specifications, ensuring its safety and environmental compliance, then certification should have taken place.

[1] We concur with the ALJ’s conclusion that the rational purpose behind § 816.151(a) is to ensure that a road is certified before it is put into commercial use.

⁵ “The report shall indicate that the road *has been constructed or reconstructed* as designed and in accordance with the approved plan” (emphasis added); see also 53 Fed. Reg. 45190, 45193 (Nov. 8, 1988) (“The *completed* primary or ancillary road is subject to the remaining applicable performance standards [including § 816.151]” (emphasis added)).

The certification requirement *is* intended to ensure environmental protection,⁶ notwithstanding Westmoreland's curious contention that the regulation's purpose cannot clearly be ascertained. *See* Opening Brief at 8. And, any purpose, be it environmental protection or safety, could be subverted if a project proponent implemented commercial hauling on a road that was not yet suitable for certification. Under Westmoreland's interpretation of the regulation, any "evil which the regulation is intended to suppress . . . is less likely to be actually suppressed." October Order at 7. The regulations provide an even more direct and simple explanation. Any road that is used to haul coal and spoil is a primary road, 30 C.F.R. § 816.150(a)(2)(i), and a primary road "shall meet" the certification requirement, *id.* § 816.151. In the absence of the required certification, a road cannot be classified as a primary road and, therefore, cannot be used to haul coal and spoil. Therefore, we hold that enforcement of the certification requirement is triggered by completion of the road and that certification is required prior to initiating use of the haul road to haul coal and spoil. Even if OSM personnel had previously observed such use and failed to promptly issue NOVs, that fact would not bar OSM from future enforcement of the applicable regulation. 43 C.F.R. § 1810.3(a).

An NOV May Be Amended Even After the Filing of a Petition for Review

Prior to issuance of the October Order, OSM moved to amend the NOVs to clarify that Westmoreland violated 30 C.F.R. § 816.151(a) by commencing coal haulage on the haul road prior to certification. October Order at 6. Westmoreland argued that such modification should be prohibited because it would constitute the issuance of entirely new NOVs. *Id.*

[2] Because OSM loses jurisdiction over NOVs when they are at issue in a hearing proceeding, ALJs are vested with authority to approve proposed modifications. *P & K Coal Co., Ltd. v. OSMRE*, 98 IBLA 26, 33 (1987). ALJ Sweitzer found that OSM's NOVs were vague in the instant case, but also found that Westmoreland was not prejudiced by this vagueness, as it apparently understood the actions necessary to abate the NOVs (and, indeed, abated them). ALJ Sweitzer Order dated July 20, 2011, at 9-10; October Order at 4 ("On September 24, 2010 . . . [Westmoreland] submitted to OSM the certifying reports."). Westmoreland makes no showing that it was prejudiced by this clarification. Although the NOVs were admittedly vague, we agree with ALJ Sweitzer that a reasonable person would have understood that the violation for failure to certify was due to commercial use of the

⁶ "The requirement for professional certification [under § 816.151(a)] is intended to assure that the road is properly constructed to meet the environmental protection standards of the Act." 53 Fed. Reg. at 45205.

road prior to certification. See October Order at 6. We hold that ALJ Sweitzer did not err by allowing OSM to clarify its NOV's prior to his reaching a final decision.

Conclusion

An unfinished and uncertified haul road cannot be a primary road and cannot, therefore, be used for hauling coal or spoil without violating 30 C.F.R. § 816.151. NOV's issued as a result of such a violation are not insufficient for vagueness if they cite that regulation and indicate that the violator failed to construct the road "as designed and failed to certify that the primary road has been constructed as designed and in accordance with the approved plan." OSM Motion for Summary Decision, Exs. B-1 and B-2. Finally, NOV's may be modified with the approval of an ALJ even after review by the Hearings Division has commenced.

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 is affirmed.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge