COALEX STATE INQUIRY REPORT - 172

March 22, 1991

Jim Ellerhof
Division of Soil Conservation
Wallace Building
Des Moines, Iowa 50319

TOPIC: I N ABILITY TO COMPLY (30 CFR 843.18) (Includes COALEX State Inquiry Report - 141)

INQUIRY: A coal company, mining a landfill, claimed it was unable to comply with Iowa's SMCRA regulations because the county changed its zoning laws. As a result of the zoning change, the coal company was unable to operate and went out of business. The state court found that the county had acted improperly in re-zoning the area in question. Can the court's ruling in favor of the coal company be considered as a reason to vacate the state issued NOV and CO or only as a circumstance to mitigate the amount of civil penalties [30 CFR 843.18]?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. All of the materials retrieved indicate that no matter how legitimate the cause, NOVs and COs cannot be vacated because of an operator's inability to comply. The reason for the inability to comply may be taken into consideration as a mitigating factor in computing civil penalties. Reasons given for failure to comply include: insolvency, market conditions, landlord interference and such events beyond the control of the operator as excessive rainfall and drought.

The Federal Register preambles, state and federal cases, Pennsylvania and Interior administrative decisions, and an existing COALEX Report retrieved as a result of the research are listed below. Copies are attached.

FEDERAL REGISTER PREAMBLES

1. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 843 Federal Enforcement. [Excerpts.

A commenter criticized Section 843.18 as being "an arbitrary and capricious construction of Section 521(a)(3) of the Act", stating that "the coal industry had historically been exposed to labor disputes, unavailability of equipment and adverse weather conditions." OSM believed that these occurrences "should not necessarily bar enforcement actions for failure to comply with the law.... Congress believed that the only alternative that operators have is to comply or not conduct operations. This interpretation was upheld by the United States District Court for the District of Columbia on August 24, 1978."

2. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 843 Federal Enforcement. Section 843.18 Inability to comply. [Excerpts.]

"[W]hen a citation is 'vacated,' it is treated as though it has never been issued and no penalty is assessed. A notice or order is 'terminated' when all required remedial actions and affirmative obligations have been accomplished. If an operator has caused damage which cannot be undone and for which no remedial action or affirmative obligation can be prescribed, the citation must be terminated (not vacated). However, a penalty will be imposed in such a situation and the violation will remain in the operator's file."

3. 46 FR 58464 (DECEMBER 1, 1981). Proposed rules. Inspection, Enforcement and Civil Penalty Assessments. [Excerpts.]

In discussing the revisions to Section 843.11, OSM stated that limitations on a permittee's resources, like the inability to comply language of 843.18, was no defense to the issuance of an NOV or CO.

4. 47 FR 35620 (AUGUST 16, 1982). Final rules. Inspection and Enforcement; Civil Penalty Assessments. [Excerpts.]

All provisions of Part 843 were repromulgated, even those not revised. This item is included for background.

GENERAL DECISIONS

5. SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978).

In denying a challenge that the interim regulations were invalid because of "the Secretary's failure to provide adequate exemption and variance procedures", the court cited to the legislative history of the Act:

"The [Senate] Committee was adamant that there should be no broad exceptions to the vital mining and reclamation standards of this bill. To provide for unlimited exceptions would render the rule meaningless, since it would then be likely that the exceptions would become the rule. On the other hand, the Committee did recognize that there are some valid and important reasons for allowing limited variances to the prescribed standards of the bill where such variances provide equal or better protection to the environment, and result in a higher postmining land use."

"Throughout the Act, Congress made it clear that the only alternative that the operators had was to comply or not conduct operations."

6. VERNON R. PAUL v COMMONWEALTH OF PENN., DEPT. OF ENVIRON. RESOURCES (DER), Docket No. 84-290-G, 1985 EHB 791 (1985).

The Board ruled that the applicant's violation history was sufficient to determine that he lacks the ability or intention to comply with the mining laws.

"[I]t is apparent that the Pennsylvania legislature has allowed DER, and by implication this Board, to find an inability to comply even though there is no demonstrated willful disregard of the law. Moreover, the language of [the Coal Refuse Disposal Control Act], taken together with the language in the other mining statutes...indicates a legislative intent to place the risk of noncompliance squarely on the shoulders of the operator; the public is not expected to undertake the risk that the operator again will be unable to fulfill his obligations."

ECONOMIC AND FINANCIAL DIFFICULTIES

7. DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 2-12-P, IN 1-13-P (1983).

The ALJ ruled that OSM proved that the appellant failed to backfill and grade to eliminate highwalls and depressions, "especially since David's claimed financial inability to comply is not a defense under the Act."

8. MARTIN MINING CORP. v OSM, Docket No. IN 1-9-R (1983).

Martin Mining used the company's insolvency as its defense for failure to complete grading within the required time period. The ALJ ruled that "financial inability to comply is not a defense under the provisions of the Act."

9. GLENN COAL CO. v OSM, Docket No. CH 0-279-R (1984).

Glenn Coal defended its failure to restore all areas disturbed by surface mining operations in a timely manner by stating that they had not completed surface mining activities "owing to unfavorable coal marketing conditions". And that "compliance had been rendered impossible by the Commonwealth of Pennsylvania's refusal to allow heavy equipment to be transported" over a state road. The ALJ ruled that "the implementing regulations...with a limited exception applicable to the mitigation of civil penalty amounts, rule out the vacation of a permittee's inability to comply."

10. GARLAND COAL AND MINING CO. v OSM, Docket Nos. TU 4-43-R, IBLA 85-106 (1986).

Garland appealed the denial of an extension of time to abate the NOVs which had been issued because of rills and gullies greater than nine inches and for lack of established vegetative cover. "The only reason for the requested extension was Garland's lack of funds to abate the cited violations." The ALJ upheld the denial of the extension, stating that "an inability to comply is not a basis to vacate a notice of violation or cessation order...nor should it be a reason to extend the abatement time."

11. CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988). CLEAR CREEK COAL CO. v OSM, Docket Nos. NX 1-49-R, NX 1-59-R (1985).

In a footnote to this case which involved the issue of timely reclamation, the Board wrote:

"While we hold that appellant's economic difficulties in disposing of the coal stockpile are not germane to the question of whether it operated in compliance with SMCRA, they may be relevant insofar as the assessment of a civil penalty is concerned."

LANDOWNER INTERFERENCE

13. CARBON FUEL COMPANY, INC. v OSM, Docket No. NX 9-116-R (1980).

Carbon Fuel did not rebut the existence of or failure to abate the violations. Their evidence "consisted solely of mitigating circumstances. The Applicant having difficulty gaining access to the mine area because the landowner had threatened the Applicant's employees with bodily harm. Proof showed, however, that the Applicant was ultimately able to abate each of the violations contained in the notice of violation."

14. W.E. AND JONAH WARREN COAL CO., INC. v OSM, Docket No. NX 0-246-R (1984).

The applicant, cited for failure to establish permanent vegetative cover, alleged that the lessor/landlord's interference prevented it from achieving satisfactory reclamation. After citing to the regulations which provide that neither NOVs nor COs may be vacated because of "alleged inability to comply", the ALJ concluded that the "applicant's lack of diligence" cause "the volatile conditions."

15. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).

"OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of civil penalty assessed under 30 CFR Part 723."

EVENTS BEYOND OPERATOR'S CONTROL

16. THE OHIO VALLEY COMPANY CONSTRUCTION DIV., INC. v OSM, Docket No. IN 9-13-R (1979).

Ohio Valley claimed that it could not correct one of its violations, to repair the sedimentation pond, because the large amount of rainfall made it impossible to bring in necessary equipment. To have done so would have resulted in the destruction of vegetation, violating another performance standard. The ALJ ruled:

"Impossibility of compliance is no excuse for failing to meet the environmental standards required by [SMCRA].... If weather conditions made timely compliance with the required remedial action impossible then an extension of time could have been arranged."

For "impossibility of compliance" see also: DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979), attached.

17. GREATER PARDEE, INC. v OSM, Docket No. CH 0-284-R (1981).

The existence of a wildcat strike did not exempt the permittee from compliance with SMCRA when the strike prevented operation of the permittee's mine and all related work. The ALJ did rule, however, that the inspector should have taken the strike into consideration in extending the time for abatement of the violations. One violation and the CO were vacated.

18. SHAWNEE COAL CO. v OSM, Docket No. IN 2-2-R (1981).

Shawnee contended that it was unable to construct the required sedimentation ponds and treatment facilities "owing to the presence of an underlying main water line in that area." The ALJ ruled that such an inability to comply would not "serve as a basis to vacate a notice of violation or a cessation order."

19. COAL ENERGY, INC. v OSM, 105 IBLA 385, IBLA 87-190 (1988).

"A failure to comply [to establish diverse, effective, and permanent vegetative cover] will not be excused on the ground that the permittee took adequate steps to comply and would have achieved compliance but for drought conditions beyond his control, where the permittee did not show at the hearing that it would have achieved compliance but for the drought, where the record shows that previous efforts to reseed had been inadequate, and where the OSMRE inspector testifies that reseeding may have failed because of poor, acidic soil conditions at the site."

20. MARTIN v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 120 Pa Commw 269, 549 A 2d 675 (Pa Commw Ct 1988).

Martin failed to comply with the provisions of a consent order which required him to develop and submit for DER approval an erosion and sedimentation control plan (Plan). Martin contended that his failure to implement the Plan was due to events beyond his control. The court affirmed the Environmental Hearing Board's finding that Martin "failed to establish that the events which led to his non-performance were beyond his control or that he used due diligence in attempting to perform his obligations under the 1983 consent order.... The record further indicates that Martin never requested an extension of time from DER."

BEST TECHNOLOGY CURRENTLY AVAILABLE

21. ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (April 27, 1990). ALPINE CONSTRUCTION CO. v OSM, Docket No. TU 7-55-R (1988).

Citing to IN RE: SURFACE MINING REGULATION LITIGATION, above, the Board found that Alpine had failed to maintain sedimentation pond inlets and to stabilize rills and gullies. The operator sought "to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance". OSM stated in its brief that "compliance with the Act is not a one-time effort but may be a continuing process that could take a long period of time and may require several different technologies before the right one is found to stabilize the area."

CIVIL PENALTY: MANDATORY PENALTY & MITIGATING CIRCUMSTANCES

22. TURNER BROS., INC. v OSM, Docket Nos. TU 6-20-R, TU 6-52-R, TU 6-81-R (1987).

The ALJ found that the CO "was validly issued, as TBI had not completed the required remedial work [on the sedimentation pond] and had not obtained an extension of time within which to abate the violation." Testimony "as to the topography of the area, which could be a mitigating factor in the context of a civil penalty review" was "not relevant in this context".

23. TURNER BROS., INC. (TBI) v OSM, Docket Nos. TU 4-7-R, TU 4-11-R (1985). TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).

The ALJ upheld the issuance of the NOV for failure to restore all the disturbed areas in a timely manner. TBI had introduced testimony and documents supporting "its argument that it had valid reasons for not complying with the law. These arguments may have some relevance in a civil penalty proceeding by establishing mitigating circumstances but they are not relevant to the issue involved here." The IBLA affirmed the ALJ decision.

24. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty" (May, 1990).

This report included decisions that found that the imposition of the mandatory civil penalty was non-discretionary when NOVs and COs were not abated within the abatement period. The civil penalty formula, which affords the ability to waive or reduce civil penalties, does not apply to mandatory failure-to-abate civil penalties. (See ATTACHMENTS for the list of decisions included with this report.)

ATTACHMENTS

A. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. Part 843 Federal Enforcement. [Excerpts.]
B. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. Part 843 Federal Enforcement. Section 843.18 Inability to comply. [Excerpts.]
C. 46 FR 58464 (DECEMBER 1, 1981). Proposed rules. Inspection, Enforcement and Civil Penalty Assessments. [Excerpts.]
D. 47 FR 35620 (AUGUST 16, 1982). Final rules. Inspection and Enforcement; Civil Penalty Assessments. [Excerpts.]

E. SURFACE MINING REGULATION LITIGATION, 452 F Supp 327 (D DC May 3, 1978).
F. VERNON R. PAUL v COMMONWEALTH OF PENN., DEPT. OF ENVIRON. RESOURCES (DER), Docket No. 84-290-G, 1985 EHB 791 (1985).
G. DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 2-12-P, IN 1-13-P (1983).
H. MARTIN MINING CORP. v OSM, Docket No. IN 1-9-R (1983).
I. GLENN COAL CO. v OSM, Docket No. CH 0-279-R (1984).
J. GARLAND COAL AND MINING CO. v OSM, Docket Nos. TU 4-43-R, IBLA 85-106 (1986).
K. CLEAR CREEK COAL CO. v OSM, 101 IBLA 6, IBLA 85-406 (1988).
L. CLEAR CREEK COAL CO. v OSM, Docket Nos. NX 1-49-R, NX 1-59-R (1985).
M. CARBON FUEL COMPANY, INC. v OSM, Docket No. NX 9-116-R (1980).
N. W.E. AND JONAH WARREN COAL CO., INC. v OSM, Docket No. NX 0-246-R (1984).
O. LONE STAR STEEL CO. v OSM, 98 IBLA 56, IBLA 86-101 (1987).
P. THE OHIO VALLEY COMPANY CONSTRUCTION DIV., INC. v OSM, Docket No. IN 9-13-R (1979).
Q. DAL-TEX COAL CORP. v OSM, Docket No. CH 9-87-R (1979).
R. GREATER PARDEE, INC. v OSM, Docket No. CH 0-284-R (1981).
S. SHAWNEE COAL CO. v OSM, Docket No. IN 2-2-R (1981).
T. COAL ENERGY, INC. v OSM, 105 IBLA 385, IBLA 87-190 (1988).
U. MARTIN v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 120 Pa Commw 269, 549 A 2d 675 (Pa Commw Ct 1988).
V. ALPINE CONSTRUCTION CO. v OSM, 114 IBLA 232, IBLA 88-527 (April 27, 1990).
W. ALPINE CONSTRUCTION CO. v OSM, Docket No. TU 7-55-R (1988).
X. TURNER BROS., INC. v OSM, Docket Nos. TU 6-20-R, TU 6-52-R, TU 6-81-R (1987).
Y. TURNER BROS., INC. (TBI) v OSM, Docket Nos. TU 4-7-R, TU 4-11-R (1985).
Z. TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).
AA. COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty" (May, 1990).
    A. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM) v WATT, 550 F Supp 979 (DDC 1982).
    B. SAVE OUR CUMBERLAND MOUNTAINS, INC. v CLARK, 725 F2d 1434 (DC Cir 1984).
    C. Subsequent history: Auto-Cite and Shepard's Citations.
    D. PEABODY COAL CO. v OSM, 90 IBLA 186, IBLA 84-766 (1986).
    E. GRAYS KNOB COAL CO. v OSM, 98 IBLA 171, IBLA 85-364 (1987).
    F. L.W. OVERLY COAL CO. v OSM, 103 IBLA 356, IBLA 88-39 (1988).
    G. APEX CO., INC., 4 IBSMA 19, IBSMA 81-53 (1982).
    H. GRAHAM BROTHERS COAL CO. v OSM, Docket No. CH 3-14-R (1984).
    I. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).