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United States Department of the Interior

FILE ACT/002/004
#7

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
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June 3, 1981

PRICE RIVER COAL COMPANY,	:	DOCKET NO. DV 0-9-P
	:	
Petitioner	:	Civil Penalty Proceeding
	:	
v.	:	Notices of Violation Nos.
	:	79-5-5-30, 79-5-5-31,
OFFICE OF SURFACE MINING	:	79-5-5-32, and 79-5-5-33
RECLAMATION AND ENFORCEMENT	:	
(OSM),	:	
	:	
Respondent	:	

DECISION

Appearances: S. V. Litizzette, Helper, Utah, for petitioner;

Lyle K. Rising, Office of the Solicitor, Department of the Interior, Denver, Colorado, for respondent.

Before: Administrative Law Judge Mesch.

This is a proceeding under Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268. The proceeding was initiated under 43 CFR 4.1150-4.1157 when Price River Coal Company filed a petition for review of proposed assessments of civil penalties levied by the Office of Surface Mining Reclamation and Enforcement (OSM). A hearing was held on February 10, 1981, at Price, Utah. The parties have filed posthearing briefs.

Section 518(a) of the Act provides that (1) "any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty" of not more than \$5,000 for each violation; and (2) in determining the amount of the penalty, consideration shall be given to (a) the permittee's history of previous violations, (b) the seriousness

of the violation, (c) whether the permittee was negligent, and (d) the demonstrated good faith of the permittee in attempting to achieve rapid compliance after notification of the violation.

Section 4.1157 of 43 CFR provides that if the administrative law judge finds that "[a] violation occurred or that the fact of violation is uncontested, he shall establish the amount of the penalty, but in so doing, he shall adhere [with one exception that is not relevant in this proceeding] to the point system and conversion table contained in 30 CFR 723.12 [now 723.13] and 723.13 [now 723.14]". Section 723.13 of 30 CFR sets out a point system for the assignment of points to the four criteria to be considered in determining the amount of the penalty and Section 723.14 contains a table for converting the total number of assigned points to a dollar amount.

The subject notices of violation were issued as a result of an inspection of the petitioner's mine on September 21, 1979, by a representative of OSM. The notices of violation charge 14 separate violations. Only 7 of the alleged violations are the subject of this proceeding.

Violation No. 1 of Notice of Violation No. 79-5-5-30 charges a violation of 30 CFR 717.17(a) in that the petitioner failed to pass surface drainage from disturbed areas around its preparation plant facilities through sedimentation ponds.

The petitioner does not contest the fact of violation, but only the amount of the penalty assessed by OSM, i.e., \$1,200.

There is no history of prior violations. Accordingly, no points are assigned under 30 CFR 723.13(b)(1) for this factor.

The evidence establishes that during periods of runoff, sediments might be carried from the affected areas into the Price River. The evidence does not establish that sediments had been carried from the affected areas into the Price River. The inspector observed a culvert discharging water into the Price River and coal fines and other material in a drainage between the culvert and the river. He did not, however, know the source of the water. It cannot be presumed that the water and the sediments it carried came from the affected areas. The probability of the occurrence of the event which the violated standard was designed to prevent was likely to occur. Accordingly, 12 points, the medium number specified by 30 CFR 723.13(b)(2)(i), are assigned for this factor.

The evidence establishes that the damage or impact which the violated standard was designed to prevent would extend outside the permit area. There is no evidence to support any reasonable conclusion as to the duration and extent of the damage or impact. Accordingly, 8 points, the minimum number specified by 30 CFR 723.13(b)(2)(ii)(B), are assigned for this factor.

The petitioner was negligent in not meeting the requirement of the regulation which was published in the Federal Register on December 13, 1977. 42 FR 62695. As a result, 6 points, the medium number specified by 30 CFR 723.13(b)(3)(i)(B), are assigned for this factor.

The evidence does not show rapid compliance to abate the violation as that term is defined in 30 CFR 723.13(b)(4)(ii)(A). Accordingly, negative points cannot be assigned for this factor.

The 26 points assigned above convert to a dollar amount of \$600 under 30 CFR 723.14. This amount is assessed as the penalty for this violation.

Violation No. 1 of Notice of Violation No. 79-5-5-31 charges a violation of 30 CFR 717.17(a) in that the petitioner failed to pass surface drainage from a disturbed area at its Hardscrabble Canyon facilities through a sedimentation pond.

The petitioner does not contest the fact of violation, but only the amount of the penalty assessed by OSM, i.e., \$1,200.

There is no history of prior violations. Accordingly, no points are assigned for this factor.

The evidence establishes that during periods of runoff, sediments had been carried from the affected area to Hardscrabble Canyon, which is an ephemeral drainage. Hardscrabble Canyon enters the Price River at a distance of about two miles from the affected area. The probability of the occurrence of the event which the violated standard was designed to prevent had occurred. Accordingly, 15 points must be assigned, as required by the point system, for this factor.

The evidence establishes that the damage or impact which the violated standard was designed to prevent would extend outside the permit area. There is no evidence to support any reasonable conclusion as to the duration and extent of the damage or impact. Accordingly, 8 points, the minimum number specified by the point system, are assigned for this factor.

Again, the petitioner was negligent in not meeting the requirement of the regulation. Accordingly, 6 points, the medium number specified by the point system, are assigned for this factor.

The evidence does not show rapid compliance to abate the violation as that term is defined in the point system. Negative points cannot be assigned for this factor.

The 29 points assigned convert to a dollar amount of \$900. This amount is assessed as the penalty for this violation.

During the course of the hearing, the petitioner sought to withdraw Violation No. 1 of Notice of Violation No. 79-5-5-32 from its petition for review. No penalty had been assessed for this violation by OSM. The respondent agreed to the withdrawal. This violation is dismissed from the proceeding nunc pro tunc.

Violation No. 2 of Notice of Violation No. 79-5-5-33 charges a violation of 30 CFR 717.20 in that the petitioner failed to remove, segregate, stockpile, and protect topsoil or selected overburden from a refuse disposal site in Schoolhouse Canyon.

The petitioner contests the fact of violation and the amount of the penalty assessed by OSM, i.e., \$1,400.

The evidence establishes that the petitioner did not remove, segregate, and save any topsoil or selected overburden material when it constructed the waste disposal site. The petitioner takes the position that the soil was contaminated with coal and other debris from previous operations and it elected to buy topsoil at a later date to distribute over and regrade the area rather than use the existing soil. The petitioner should have sought approval from OSM before electing to leave the topsoil in place and covering it with refuse and waste. I find that a violation did, in fact, occur.

There is no history of prior violations and no points are assigned for this factor.

The inspector testified that (1) no harm would result from the violated standard if the petitioner later obtained topsoil to distribute over the area after it was no longer required for the conduct of mining operations; and (2) if the petitioner did not, at the required time in the future, distribute topsoil over the area, then OSM would either cite it for a violation of the same regulation or refuse to release its bond on the permit area. Under the circumstances, no points are assessed for the probability of occurrence factor or the extent of potential or actual damage factor.

The fact that the petitioner did not attempt to seek approval from OSM for its election to cover the existing topsoil makes it impossible for OSM to enforce the pertinent portion of the regulation inasmuch as the evidence, i.e., the alleged contaminated topsoil, is covered by waste or refuse. Accordingly, 15 points, the maximum number specified in 30 CFR 723.13(b)(2)(iii) for seriousness, based upon the extent to which enforcement is obstructed by the violation, are assigned.

The petitioner was negligent in not meeting the requirement of the regulation. Accordingly, 6 points, the medium number specified by the point system, are assigned for this factor.

The rapid compliance factor is not applicable and negative points cannot be assigned.

The 21 points assigned convert to a dollar amount of \$420. This amount is assessed as the penalty for this violation.

Violation No. 3 of Notice of Violation No. 79-5-5-33 charges a violation of 30 CFR 717.17 in that the petitioner failed to have an approved ground water monitoring plan.

The petitioner contests the fact of violation and the amount of the penalty assessed by OSM, i.e., \$400.

The regulations published in the Federal Register on December 13, 1977, 42 FR 62695, provided, in 30 CFR 717.17(h)(2), that "ground water shall be monitored in a manner approved by the regulatory authority". As of the date of the inspection by OSM on September 21, 1979, the petitioner had not submitted a ground water monitoring plan to, and had not obtained approval of any such plan by, the appropriate regulatory authority. The fact that such a plan had been submitted to the United States Geological Survey in November of 1977 by the petitioner does not establish compliance with the OSM regulations. I find that a violation did, in fact, occur.

There is no history of prior violations and no points are assigned for this factor.

The probability of occurrence factor and the extent of potential or actual damage factor are not applicable. The factor relating to the extent to which enforcement was obstructed by the violation is applicable. A failure to submit a water monitoring plan makes it difficult to enforce the provisions of the law relating to the prevention of water pollution. Accordingly, 15 points, the maximum number specified by the point system, are assigned for this factor.

The petitioner was negligent in not meeting the plain requirement of the regulation. Accordingly, 6 points, the medium number specified by the point system, are assigned for this factor.

The evidence does not show rapid compliance to abate the violation as that term is defined in the point system. Negative points cannot be assigned for this factor.

The 21 points assigned convert to a dollar amount of \$420. This amount is assessed as the penalty for this violation.

Violation No. 4 of Notice of Violation No. 79-5-5-33 charges a violation of 30 CFR 717.17 in that the petitioner failed to have an approved surface water monitoring plan.

The petitioner contests the fact of violation and the amount of the penalty assessed by OSM, i.e., \$400.

The regulations published in the Federal Register on December 13, 1977, 42 FR 62695, provided, in 30 CFR 717.17(b), that the "permittee shall submit for approval by the regulatory authority a surface water monitoring program" meeting specified requirements. As of the date of the inspection by OSM on September 21, 1979, the petitioner had not submitted a surface water monitoring program to, and had not obtained approval of any such program by, the appropriate regulatory authority. The fact that such a plan had been submitted to the United States Geological Survey in November of 1977 by the petitioner does not establish compliance with the OSM regulations. I find that a violation did, in fact, occur.

The same findings are made and the same points are assigned as in the previous violation. The sum of \$420 is assessed as the penalty for this violation.

Violation No. 5 of Notice of Violation No. 79-5-5-33 charges a violation of 30 CFR 715.15 in that the petitioner failed to dispose of refuse in an area approved by the regulatory authority. The notice required the petitioner to submit plans for the refuse disposal showing that it was designed in accordance with the requirements of the cited regulation.

The petitioner contests the fact of violation and the amount of the penalty assessed by OSM, i.e., \$1,400.

The OSM inspector testified that he issued the citation because the petitioner was disposing of coal processing waste in an area that had not been approved by OSM and without any plans that had been approved by OSM. He recognized that the area and the method of disposal had been approved by the Mining Enforcement and Safety Administration (now the Mine Safety and Health Administration). He stated "they had MSHA approval at the time and they felt that that was adequate so I wrote a violation because it was not" (Tr. 108). He further testified:

Q What was objectionable about the pile?

* * * * *

A On the surface what appeared to me was that everything was all right. The company was putting the material in there in lifts. They were compacting it. Now, whether the compaction is up to design specifications or what are the design specifications, I have no idea. You can't do that physically. Mechanically you have to decide. The under-

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drain systems, it is impossible for me to decide that the underdrain system is adequate for them to continue to dump in this area. (Tr. 118)

I find that a violation did, in fact, occur because the petitioner was disposing of excess materials without any plan having been submitted to or approved by the regulatory authority.

There is no history of prior violations and no points are assigned for this factor.

The probability of occurrence factor and the extent of potential or actual damage factor cannot be assessed and are not applicable. The alternative factor relating to the extent to which enforcement was obstructed by the violation can be assessed; and 15 points, the maximum number specified by the point system, are assigned for this factor.

The petitioner was negligent in not meeting the requirement of the regulation. Accordingly, 6 points, the medium number specified by the point system, are assigned for this factor.

The evidence does not show rapid compliance to abate the violation as that term is defined in the point system. Negative points cannot be assigned for this factor.

The 21 points assigned convert to a dollar amount of \$420. This amount is assessed as the penalty for this violation.

If this decision becomes the final decision of the Department, OSM shall remit, within the 30-day time periods specified in 43 CFR 4.1157(c), the sum of \$2,820, with appropriate interest, to the petitioner.

Either party may petition the Board of Surface Mining and Reclamation Appeals to review this decision according to the procedure set forth in 43 CFR 4.1270.

Robert W. Mesch

Robert W. Mesch
Administrative Law Judge

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