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BEFORE THE HEARINGS DIVISION
OFFICE OF HEARINGS & APPEALS
UNITED STATES DEPARTMENT OF THE INTERIOR
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

Rec'd.
8-30-91
DOGM

GENWAL COAL CORPORATION, Petitioner, v. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT	APPLICATION FOR REVIEW OF PROPOSED PENALTY ASSESSMENT, NOTICE OF VIOLATION NO. 91-02-244-3; REQUEST FOR HEARING; MOTION TO CONSOLIDATE CRANDALL CANYON MINE, EMERY COUNTY, UTAH COAL MINING PERMIT NO. ACT/015/032

PETITION FOR REVIEW, REQUEST FOR HEARING AND MOTION TO CONSOLIDATE

Pursuant to 43 C.F.R. Part 4.1150 and 30 C.F.R. § 845.19, GENWAL COAL CORPORATION (referred to as "Genwal" or "Petitioner"), petitions for review of the proposed penalty assessment dated July 25, 1991 concerning Notice of Violation No. 91-02-244-1 ("NOV"). Proceedings to contest the fact of violation of the NOV are currently pending herein as Docket No. DV91-11-R and Petitioner requests consolidation of this application with those proceedings. Finally, Petitioner requests a hearing to review the proposed assessment in Salt Lake City, Utah to be consolidated with the hearing in Docket No. DV91-11-R currently set for 2:00 p.m. on December 9, 1991.

STATEMENT OF FACTS

1. On June 26, 1991, the NOV was issued by the federal Office of Surface Mining Reclamation & Enforcement ("OSM") to Genwal as permittee of the Crandall Canyon Mine, Emery County, Utah (the "Mine"). A true and correct copy of the NOV is attached hereto as Exhibit "A".

2. The NOV was issued by OSM for petitioner's alleged failure to first obtain a permit from the Utah Division of Oil, Gas & Mining ("DOGM") prior to engaging in and carrying out any coal mining and reclamation operations. This NOV applies to a portion of the Crandall Canyon Mine Forest Development Road 50248 (also referred to as Forest Road 50248) extending from the present permit boundary approximately 1.3 miles to State Highway 31.

3. The NOV requires the operator to reclaim Forest Road 50248 within eighty (80) days or submit to DOGM a complete and adequate plan to permit and bond the Forest Road 50248 within thirty (30) days of issuance of the NOV.

4. By letter dated March 22, 1991, the DOGM requested petitioner to secure a letter from the U.S. Forest Service concerning the public road status of Forest Road 50248. A true and correct copy of the March 22, 1991 letter is attached hereto as Exhibit "B".

5. By letter dated May 29, 1991, the Forest Service responded to Petitioner's request and confirmed that Forest Road 50248 is a forest development road under the jurisdiction of the

Manti-La Sal National Forest. A true and correct copy of the letter dated March 29, 1991 is attached as Exhibit "C".

6. On June 28, 1991, OSM modified the NOV to allow "road widening and paving activities reviewed and approved by the Forest Service." A true and correct copy of the modification is attached hereto as Exhibit "D".

7. Pursuant to 30 C.F.R. § 845.17 and by letter dated July 10, 1991, petitioner provided OSM with information concerning the NOV for consideration in proposing a penalty. A true and correct copy of the letter dated July 10, 1991 is attached hereto as Exhibit "E".

8. On July 25, 1991, OSM issued a Notice of Proposed Civil Penalty Assessment ("NOPA") concerning the NOV. The NOPA assesses petitioners a $1,200 penalty and 32 penalty points, including 30 points for "seriousness" and 2 points for "negligence". A true and correct copy of the NOPA is attached hereto as Exhibit "F".

10. On July 26, 1991, petitioner filed a petition for review and request for hearing concerning the fact of the NOV with the Office of Hearings & Appeals ("OHA") docketed as No. DV91-11-R.

11. By order and notice of hearing dated August 21, 1991, OHA Judge Ramon M. Child set a hearing for Docket No. DV91-11-R at 2:00 p.m. on December 9, 1991.

12. Full payment of the proposed assessment in the form of check no. 08100 from petitioner made payable to OSM,

accompanies this application and petitioner requests that this payment be held in escrow pending final determination of the assessment.

MOTION TO CONSOLIDATE

Petitioner requests that review of the proposed assessment be consolidated with the pending review of the fact of the violation of the NOV set for hearing on December 9, 1991. Such consolidation is in the interest of judicial economy in that the penalty assessment will be vacated if the fact of violation is vacated. In the event that the NOV is not vacated in proceedings concerning the fact of the violation, petitioners request the OHA judge to vacate or reduce the proposed assessment as set forth herein.

APPLICATION OF STATE LAW

The State of Utah has declined to find petitioners in violation of the Utah program for the alleged violations set forth in the NOV. OSM has proceeded under § 521 of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271 ("SMCRA") to issue the NOV, over the objection of the DOGM. OSM has cited petitioner under the Utah coal program for alleged violations of Utah state law and must apply the Utah Coal Mining and Reclamation Act, Utah Code Ann. § 40-10-1, et seq. and civil penalty regulations at Utah Administrative Code § 614-1L-845, et seq. to the proposed assessment. See Laurel Pipeline Co. v. Bethlehem Mines Corp., 624 F.Supp. 538 (W.D. Pa. 1986) (finding that

enforcement of the approved state program is vested in the state and, therefore, state law governs in determining federal jurisdiction over its citizen suit action). Similarly, the Office of Hearings & Appeals must apply Utah state law in reviewing the proposed assessment in this matter.

PROPOSED ASSESSMENT

I. SERIOUSNESS.

OSM is proposing to assess petitioner 15 penalty points for "probability of occurrence" and 15 penalty points for "extent of damage." This assessment is improper where, as in this case, the violation charged its mining without a permit. In such cases, the Interior Board of Land Appeals ("IBLA") has ruled that there should be no assessment for "extent of damage" points. West Virginia Energy Inc., 88 I.D. 831, 835 (1981). In that case, the IBLA vacated all penalty points for "extent of damage" where the violation charged was mining without a permit:

> There are two separate methods under 723.12(c)(2) for determining the proper number of extent of damage points to be assessed, each depending upon the geographical extent to which the damage or impact the violated standard is designed to prevent in fact occurs . . . When the violation charged is mining without a permit, there is no permit area against which to judge which of these provisions to apply, so their applicability, at all, is in doubt at the outset. Moreover, the language of these provisions, making the assignment dependent upon the location of the "damage or impact the violated standard is designed to prevent," suggests that they apply to violations of substantive performance standards and not to essentially procedural ones, like mining

> without a permit. Thus, in this case, no points for extent of damage are appropriate.

33 BD, page 111 at 113.

The NOPA indicates that it is no longer OSM's policy to follow West Virginia Energy, Inc., but cites no authority for this position. The IBLA's position of assessing no points for "extent of damage" as set forth in West Virginia Energy, Inc. has been consistently followed in administrative law judge rulings. JDG, Inc. JDG Shale & Clay, Inc. v. OSM, 515 A.L.J. 338, 339, Surface Mining Law Summary, (1987); King Coal Co. v. OSM, 166 A.L.J. 1253, 1256, Surface Mining Law Summary, (1983); Mountain Enterprises Coal Co. v. OSM, 62 A.L.J. 162, 165, Surface Mining Law Summary, (1981). The IBLA reconfirmed West Virginia Energy, Inc. in C & N Coal Co. Inc., 103 IBLA 48, 63-64 (1988), and followed the rationale of that decision in vacating "extent of damage" points assessed by OSM.

Therefore, petitioners respectfully request that the seriousness category be reduced to eliminate the extent of damage penalty and reduced to a total of 15 penalty points.

II. NEGLIGENCE.

No penalty points should be assigned for negligence due to the fact that this violation has occurred through no negligence of the petitioners.

OSM has recognized petitioners' lack of fault in this matter in the NOPA as follows:

> Information submitted by the operator, and other information documented in the enforcement actions, indicates that the operator had been informed by the State of

> Utah that the road need not be permitted; even OSM's interpretation on the point seems to have evolved over time; therefore the degree of fault must be low . . .

Under the circumstances of this case, the operator has been caught between differing regulatory interpretations of OSM and the State of Utah. As the record indicates, the operator has taken all action required by the State of Utah to determine the public road status of the subject road. See Exhibits B, C and D.

In addition, petitioner, with the assistance of the Forest Service, requested and obtained modification of the NOV to allow "road widening and paving activities reviewed and approved by the United States Forest Service." A copy of the modification is attached to Exhibit "D". Genwal's paving activities, completed July 27, 1991, stabilized Forest Road 50248 to prevent alleged contributions to stream flow. Although no environmental damage is alleged by the NOV, paving prevents any possible damage from the road to the adjacent stream. Therefore, the extent of damage and/or seriousness penalty should be reduced.

The violation occurred through no fault of the operator but rather occurred due to a dispute in interpretation between OSM and the State of Utah. Pursuant to R614-1L-845 (3)(A), violations involving no fault "shall be assigned <u>no penalty points</u> for degree of fault." (Emphasis added.) Therefore, petitioners respectfully request the OHA judge to vacate the two penalty points assessed by OSM for negligence.

III. GOOD FAITH.

OSM fails to assign petitioner any good faith points under the proposed assessment. Petitioners have demonstrated good faith by taking action at the request of the State of Utah to determine the public road status of Forest Service Road 50248. In response to this issue, the Forest Service has stated in a letter to OSM that,

> The Forest Service reserves its authority to manage and control Forest Service development roads as provided by statute and <u>will not consent</u> to their being incorporated into the permit area.

Exhibit "E", attached hereto.

It is clear from this the Forest Service's statement that the operator is without jurisdiction to proceed with the permitting and reclamation of a forest development road. Petitioner has taken all steps which it can to comply with the State regulatory authority and is prohibited by the Forest Service from taking further action as required by the NOV. In addition, the Petitioner has obtained a modification of the NOV to allow for paving of the forest road as required by the Forest Service. This paving was completed on July 27, 1991, and serves to stabilize the road. Under these circumstances, the operator should be accorded maximum good faith points.

IV. DETERMINATION OF AMOUNT OF PENALTY.

OSM has penalized petitioners $1,200 for a proposed assessment of 32 points. Pursuant to R614-1L-845.14, an assessment of 32 points under state law, equates to a fine of $440, not

$1,200. OSM has cited the operator for a violation of state law and should apply the State's point system for penalties. Therefore, the penalty should be reduced from $1,200 to $440 and, if the points are reduced, the determination of the new penalty should be made in accordance with the schedule set forth at R614-1L-845.14.

CONCLUSION

For the above-state reasons, petitioners request that the proposed assessment for the NOV be vacated or reduced. Petitioners request a refund of all or a portion of the assessment which it paid to OSM as a condition of review. Petitioners request that review of the proposed penalty assessment be consolidated with the pending proceedings concerning the fact of the violation. Finally, petitioners request a hearing on these consolidated matters in Salt Lake City, Utah, on December 9, 1991.

Respectfully submitted this 27th day of August, 1991.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Petition for Review, Request for Hearing and Motion to Consolidate to be mailed, via certified mail, return receipt request, this 27TH day of August, 1991, to:

Assistant Regional Solicitor for Surface Mining
United States Department of the Interior
P.O. Box 25007
Denver Federal Center
Denver, Colorado 80225-0007

DAD:082791b