AMERIKOHL MINING, INC.	)	CH-2014-3-R
	)	
Applicant	)	Application for Review
	)	
v.	)	Cessation Order No.
	)	C14-120-411-001
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSM),	)	Curry Mine
	)	
Respondent	)	

DECISION

Appearances: Kevin J. Garber, Esq., and Jean M. Mosites, Esq., Pittsburgh, Pennsylvania, for Applicant

Wayne A. Babcock, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Administrative Law Judge Harvey C. Sweitzer

I. Introduction

The State of Pennsylvania regulates certain surface coal mining activities in the State through the Pennsylvania Department of Environmental Protection ("PADEP"). PADEP's regulatory authority is subject to Federal oversight by the Office of Surface Mining Reclamation and Enforcement ("OSM"). PADEP chose not to regulate logging at the Curry Mine because the agency concluded that the logging was independent of any mining activity.

OSM disagreed with PADEP's conclusion and issued Ten-Day Notice Letters to PADEP asking PADEP to take appropriate action to remedy potential violations or explain why no remedy was necessary. PADEP did not change its position so OSM exercised its oversight authority by issuing notices of violation and a cessation order to Amerikohl Mining Inc. ("Amerikohl"), the Curry Mine permittee.

Amerikohl filed applications for review, arguing that PADEP correctly concluded that the logging activity was independent of surface coal mining and thus not subject to regulation. Because OSM is correct that the logging was connected to surface coal mining and thus subject to its regulatory jurisdiction, and because

PADEP's response to OSM's second Ten-Day Notice Letter ("STDNL") was arbitrary and capricious, the notices of violation and the cessation order must be affirmed.

II. Background

On October 6, 2006, Amerikohl entered into an option and lease agreement ("Lease") with the Curry Lumber Company ("Curry") for the removal of coal from property owned by Curry. The Lease contained terms that required Amerikohl to notify Curry 90 days before commencing any mining operation and requiring Amerikohl to mark the area in the field that the mining operation would include.

On December 19, 2006, after test-drilling and confirming the presence of coal, Amerikohl exercised its option to lease the Curry property (hereinafter the "Curry Mine"). In September of 2009, Amerikohl applied to PADEP for a surface coal mining permit, and on November 17, 2011, PADEP issued Mine Permit No. 26080106 ("Mining Permit") to Amerikohl for the Curry Mine.

One of the terms and conditions of the mining permit was designed to help protect the Indiana bat. The condition only allowed removal of trees from the permit area between November 15 and March 31 because the Indiana bat does not nest in trees during that period of time.

On March 15, 2011, Curry entered into a timber sale agreement ("Timber Agreement") with the Keslar Lumber Company ("Keslar") to remove timber within the northern portion of the designated Curry Mine area. The Timber Agreement required Keslar to fell all trees 3 inches in diameter or greater. Ex. J at 2.

On February 1, 2013, Charles Curry, a Curry partner, sent Amerikohl's President David Maxwell an email asking Mr. Maxwell to designate the area that Amerikohl would need for coal mining. Mr. Curry explained: "I'm certainly not trying to put any restrictions on the area you need to remove the coal, I just don't want any more area clear cut than is necessary." Ex. 36. Mr. Maxwell responded with an email and a map attached to that email identifying an approximate 55-acre area. The email stated that "[it] would be nice if [the area] was cut by March 31st." Ex. 37.

On February 26, 2013, Curry contracted with Appalachian Timber Products, Inc., to cut and sell the timber within the 55-acres designated by Amerikohl for its coal mining operation. Timber harvesting occurred on the site in late March of 2013. To date, Amerikohl has not begun to extract coal from the Curry Mine.

On July 25, 2013, a member of Youghiogheny Riverkeeper Mountain Watershed Association ("YRMWA") sent an email to OSM advising the agency that she filed a complaint with PADEP regarding excessive sediment escaping from the Curry Mine. She indicated that PADEP told her that the sediment was a logging issue and not a mining issue because the Curry Mine was not operating.

Based on the email from the YRMWA member and additional documentation she provided, OSM prepared its first Ten-Day Notice Letter ("FTDNL") to PADEP identifying potential SMCRA violations at the Curry Mine, including a failure to control sediment run off and logging outside of the period prescribed by the permit for the protection of the Indiana bat. *See* Ex. 1. OSM's FTDNL asked PADEP to take appropriate action to remedy any violations or explain why no remedy was necessary. *Id.* at 1.

In a letter dated August 8, 2013, PADEP responded to OSM's FTDNL by explaining that it issued a compliance order requiring Amerikohl to construct and maintain sediment control devices and that PADEP determined that all logging activity had occurred within the approved regulatory time period. *See* Ex. 2. By letter dated August 19, 2013, OSM informed PADEP that it was satisfied with PADEP's response to the FTDNL and that the matter was effectively closed. *See* Ex. 3.

However, on August 21, 2013, PADEP sent OSM a second letter indicating that upon further consideration the agency determined that the logging which occurred at the Curry Mine was not a mining activity. Accordingly, explained PADEP, it vacated the compliance order it had issued to Amerikohl.

By letter dated August 29, 2013, OSM informed PADEP that it considered PADEP's new conclusion to be "arbitrary, capricious or an abuse of discretion." Ex. 5 at 3. In accordance with 30 C.F.R. § 842.11(b)(1)(iii)(A), OSM informed PADEP that it had five days to request informal review of its arbitrary and capricious determination.

PADEP did not request an informal review of OSM's arbitrary and capricious determination. On September 11, 2013, OSM inspected the Curry Mine. The OSM inspector determined that no enforcement action was necessary at that time but OSM instructed PADEP to closely monitor the Curry Mine for any changes that would require the construction of sediment control devices.

On November 26, 2013, the same member of YRMWA informed OSM and PADEP by email that excessive sediment was escaping from the Curry Mine. The email included attached photos depicting turbid runoff which allegedly emanated from the Curry Mine.

On November 27, 2013, OSM sent PADEP a second Ten Day Notice Letter ("STDNL") alleging two unabated violations at the Curry Mine. One violation for failure to have surface drainage pass through sediment control devices and another violation for failure to construct and maintain sediment and erosion control devices.

By letter dated December 3, 2013, PADEP responded to the STDNL explaining its position that the timber harvesting which occurred on the Curry Mine was independent from any mining activity conducted by Amerikohl and was therefore not subject to PADEP's regulatory authority. *See* Ex. 8.

On December 23, 2013, OSM issued its finding that PADEP's response to the STDNL was arbitrary and capricious. *See* Ex. 9. On December 31, 2013, PADEP filed a request for informal review of OSM's December 3, 2013, finding that PADEP's response to STDNL was arbitrary and capricious.

On February 28, 2014, OSM affirmed its finding that PADEP's response to the STDNL was arbitrary and capricious. Because of that finding, and under 30 C.F.R. § 842.11, OSM ordered a Federal inspection of the Curry Mine. *See* Ex. 11.

On March 12, 2014, OSM conducted an inspection of the Curry Mine. It was raining during that inspection. Tr. 79-80. OSM's inspector observed turbid runoff leaving the Curry Mine. Tr. 80, 82-85. The inspector collected samples of turbid runoff water at several locations within the Curry Mine boundary and at its border.

On March 13, 2014, OSM issued Notice of Violation No. N14-120-411-001 ("Notice of Violation 1"). Notice of Violation 1 cites Amerikohl for failing to design, construct, and maintain sediment control devices for the Curry Mine in accordance with 25 Pa. Code § 87.106 (1)-(4) (construction and maintenance of erosion and sedimentation control measures).

On March 19, 2014, tests results on the water samples taken during the March 12, 2014, inspection were reported to OSM. Each of the samples exceeded effluent limitations for total suspended solids and iron parameters. Tr. 92, Ex. 26 at 4. On April 1, 2014, OSM issued Notice of Violation No. N14-120-411-002 ("Notice of Violation 2"). Notice of Violation 2 cites Amerikohl for discharging water from the

Curry Mine with excessive suspended solids and iron in violation of 25 Pa. Code § 87.102 (a) (group effluent standards for total suspended solids and total iron).

On April 18, 2014, OSM conducted another inspection of the Curry Mine to determine if Amerikohl had abated the violations cited in Notices of Violation 1 and 2. It determined that Amerikohl had not. Therefore, on April 21, 2014, OSM issued Cessation Order No. C14-120-411-001.

Amerikohl filed timely requests for review of both Notices of Violation and the Cessation Order. A consolidated hearing for all three matters was held in Pittsburgh, Pennsylvania, on June 23 and 24, 2014. The parties have all filed post hearing briefing and this matter is now ripe for decision.

III. Analysis

1. Prima Facie Case, Burden of Persuasion, Standard of Review

OSM must establish a prima facie case by submitting evidence sufficient, if unrebutted, to support a finding in its favor. *See Rohada Coal CO.*, 4 IBSMA 128, 89 I.D. 460 (1982). Once a prima facie case has been made, the burden shifts to the applicant (Amerikohl) to overcome OSM's prima facie case.

The State of Pennsylvania's conclusion that logging on the Curry Mine was not a surface mining activity must be upheld unless it is inconsistent with the law or plainly erroneous. *Sierra Club V. Kemprthrone*, 589 F. Supp. 2d 720, 730 (W.D. Va. 2008). Relatedly, PADEP's response to OSM's STDNL is adequate if PADEP had good cause justifying its position. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(*i*)—(*v*). If good cause existed for PADEP's response to the STDNL, then OSM erred in exercising Federal oversight. However, if PADEP's response was arbitrary, capricious, or an abuse of discretion, Federal oversight was appropriate. *See* 30 C.F.R. § 842.11(b)(1)(ii)(B)(2).

2. Regulatory Background for Primacy States

The following brief overview of SMCRA's regulatory framework provides context for the legal analysis in this this Decision. In 1982, the State of Pennsylvania assumed control of coal surface mining and reclamation on non-Federal and non-Indian lands within its borders pursuant to section 503 of SMCRA, 30 U.S.C. § 1253 (2006). *See* 30 C.F.R. part 938; 47 Fed. Reg. 33,079 (July 31, 1982). States such as Pennsylvania that have implemented their own surface coal mining programs under

SMCRA enjoy regulatory authority subject to Federal oversight. The Interior Board of Land Appeals ("IBLA" or "Board") has explained that Federal oversight as follows:

> Section 503 (a) of SMCRA provides that state jurisdiction is expressly subject to the oversight jurisdiction of OSM under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2000), which authorizes the Federal inspection of surface coal mining operations if, within 10 days after notice that a violation is believed to exist, the state regulatory agency fails to take appropriate action to cause the violation to be corrected or show good cause for such failure. The oversight inspection provisions of section 521 (a)(1), 30 U.S.C. § 1271 (a)(1) (2006), are implemented by regulations found at 30 C.F.R. § 842.11.
>
> The regulations provide that an authorized representative of the Department (OSM) shall conduct a Federal inspection when OSM has reason to believe on the basis of information available to it that a violation of SMCRA, the applicable state program, or any condition of a permit exits and
>
> > [t]he authorized representative has notified the state regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met.

30 C.F.R. § 842.11(b)(1)(ii)(B)(1). "Good cause" is defined in the regulations to mean several things, including that "under the State program, the possible violation does not exist" and that "the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing." 30 C.F.R. 842.11(b)(1)(ii)(B)(4)(*i*) and (*iv*).

> Under the regulations, the standard for determining both "appropriate action" and "good cause" is whether the state agency's action or response to the [ten day notice] is arbitrary, capricious, or an abuse of discretion under the state program. 30 C.F.R. 842.11(b)(1)(ii)(B)(2); *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 74, 102 I.D. 1, 9 (1995).

Marion Docks, Inc. v. OSM, 168 IBLA 47, 50-51 (2006).

3. Pennsylvania Law Governs

Because Pennsylvania is a primacy state, Pennsylvania law controls the determination of whether logging on the Curry Mine constituted a surface coal mining activity. 30 U.S.C. §§ 1252, 1253 (2006); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288-289 (4th Cir. 2001). Under Pennsylvania law, surface activities that are **"connected"** to surface coal mining are themselves surface coal mining activities.

> Pennsylvania law defines surface mining activities as follows:
>
> ***Surface mining activities***—Activities whereby coal is extracted from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between the coal or otherwise exposing and retrieving the coal from the surface, including, but not limited to, strip and auger mining, dredging, quarrying and leaching, and surface activity **connected** with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, slope, shaft, drift and borehole drilling and construction and activities related thereto.

25 Pa. Code § 87.1 (emphasis added). The SMCRA regulations contain a similar definition for surface coal mining operations subject to SMCRA:

> *Surface coal mining operations* mean (a) **Activities conducted on the surface of lands in connection with a surface coal mine** or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal . . . . *Provided further*, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse

> piles; and (b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface.

30 C.F.R. §§ 700.5 (a) and (b) (emphasis added).

While Pennsylvania law governs this proceeding, there are no substantive distinctions between Federal law and Pennsylvania law that would result in a different outcome if SMCRA was applied in the absence of Pennsylvania law. Thus, Federal law provides useful guidance.

During promulgation of the Federal regulations, several people asked that the definition of surface coal mining be changed to explicitly address activities such as logging. OSM declined but recognized that logging in anticipation of mining is clearly subject to SMCRA regulation:

> Several commenters suggested the definition be changed to cover more clearly site preparation activities by adding to the activities listed in Paragraph (a) such things as "timbering and land clearing operations" and "removal of vegetation in anticipation of excavation of the coal." **OSM believes that logging and site preparation in anticipation of mining clearly fall within the definition [of surface coal mining operations].** However, the line between site preparation in anticipation of mining coal and independent work is sometimes difficult to draw, and can only be accurately drawn after experience with specified factual situations.

44 Fed. Reg. 14902, 14914 (March 13, 1979) (emphasis added).

4. The Parties' Arguments

Amerikohl argues that the logging was not a surface mining activity because Amerikohl neither conducted nor benefited from the logging and because the logging occurred before the Curry Mine was "activated." According to PADEP, mine activation occurs when a mining company moves equipment to a mine site and causes disturbances. *See* Ex 8 at 1. OSM essentially argues that logging activity at the Curry Mine must be considered mining activity because it occurred after issuance of the mining permit. However, the bright line rules the parties propose are not supported by statute, regulation, or precedent.

Amerikohl cites *Kerry Coal Co. v DER*, 1984 EHB 161, in support of its position. However, *Kerry* is inapposite. The most significant factor distinguishing *Kerry* is that the critical events occurred prior to the issuance of a mining permit. In *Kerry* a coal mining company entered into a lease agreement with a church to mine coal from church property. Under the terms of the lease, the mining company agreed to expand the church's parking lot, construct a ball field, and construct an amphitheater for the church.

Prior to the issuance of any coal mining permit, the mining company began construction on the parking lot it agreed to build. Using light blasting materials that were not suitable for coal mining purposes, the mining company broke up fill material for the parking lot. The Pennsylvania Environmental Hearing Board ("PEHB") concluded that work on the parking lot was not surface mining activity. Because the facts in *Kerry* are so dissimilar to the facts here, and because *Kerry* addresses pre-permit activities, *Kerry* does not provide useful precedent for this proceeding.

Amerikohl also cites *Keck v. DEP*, 2007 EHB 343, as support for its position. In that case, Mr. Keck began exploratory coal mining activities without a mining permit but never removed coal from the ground. PEHB concluded that Mr. Keck had not engaged in mining without a permit because he had not removed coal from the ground. Again, the unique facts in that case coupled with the fact that the events occurred prior to issuance of a mining permit give it little or no precedential value here.

Amerikohl also argues that it should not be held accountable for logging at the Curry Mine because it had not "activated" the Curry Mine (i.e., moved heavy equipment to the mine location). No persuasive precedent or argument supports this position. If "activation" were required before SMCRA's protections attach, third party land owners could conduct mine preparation activities in an attempt to win favor for their potential surface mining projects while escaping the strictures of SMCRA. Therefore, Amerikohl's proposed mine activation standard is rejected.

Applicant and Respondent both cite *Sierra Club v. Kempthrone*, 589 F. Supp. 2d 720 (2008), in support of their positions. In that case, the court upheld OSM's conclusion that logging which occurred within a portion of a pending SMCRA permit site was not surface mining activity because, among other things, it did not benefit the mining company and was part of a larger logging operation that only included a portion of the area subject to a pending SMCRA permit. However, *Sierra Club*, like *Kerry* and *Keck*, is distinguishable because no mining permit had been

issued. Nonetheless, *Sierra Club* does demonstrate that the question of whether any particular logging activity is also surface mining activity is a fact specific question that must be answered on a case-by-case basis. *Id.*at 729-732.

5. Accountability under SMCRA

Before turning to that fact specific analysis, it is helpful to consider some general principles that have been applied in SMCRA cases over the years. For example, courts have considered the question of whether SMCRA permit holders should be held accountable for the acts of third parties. In *Wilson Farms Coal CO.*, 2 IBSMA 118, 87 I.D. 245 (1980), *appeal dismissed*, Civ. No. 80-150 (E.D. Ky. July 15, 1981), *aff'd*, No. 81-5694 (6th Cir. Aug. 6, 1982), the Interior Board of Surface Mining Appeals ("IBSMA") held that the permittee is the correct recipient of a notice of violation even if the violations identified in the notice were caused by the acts of a third party. 2 IBSMA at 122, 87 I.D. at 247.

The Virginia Court of Appeals addressed the question in *Brown v. Red River Coal Co.*, 373 S.E.2d 609 (Va. App. 1988). In that case, the court explained:

> The laudatory goal of deterring future violations is best served by a rule preventing the vacation or expungement of NOV's, even in circumstances where the mine operator is not at fault. If Red River is allowed to invalidate the NOV because a third party disturbed its inactive mine, it may have no incentive to police the mine site in the future. . . . The regulations impose an affirmative duty upon the permittee to keep the site in compliance with the terms of the permit . . . .

Id. at 610.

Finally, although *Keck* is not directly on point, a general observation made by PEHB in that case provides some useful guidance.

> Mining activities are defined very broadly to make it clear that it is not merely the actual removal of coal that must be permitted. To the extent that an operation involves coal removal, virtually everything that occurs before, during and after that removal that is in any way "connected with" that removal must also be permitted.

Keck v. DEP, 2007 EHB 343, 348.

6. Fact Specific Analysis

The factor in this case that most strongly supports Amerikohl's position is that Amerikohl did not receive direct economic benefit from the logging conducted at the Curry Mine. Curry removed some timber but left behind stumps, smaller trees, and other vegetation that Amerikohl will still need to remove before commencing any mining operation. However, economic benefit is just one factor discussed in *Sierra Club*. Economic benefit is not an independently dispositive factor for purposes of this analysis. Under 25 Pa. Code § 87.1, activities that are connected to surface mining are subject to regulation; nothing in the statute requires that such activities benefit surface mining operations financially.

It should be noted that Amerikohl's Lease with Curry and its Mining Permit for the Curry Mine caused the subject logging to occur. Timber on the Curry Mine may have been harvested at some point in the future regardless of whether the underlying coal was extracted. However, there is no question that logging at the Curry Mine occurred where and when it did because of Amerikohl's Mining Permit and its Lease with Curry.[1] In this way, the logging is obviously connected to surface mining.

That connection is evidenced by the cooperation and coordination between Curry and Amerikohl for the purpose of facilitating mining. Mr. Curry did virtually everything he could to facilitate mining through his logging practices including: 1) asking Mr. Maxwell which contractor he should select to conduct the logging operation, 2) making sure that logging operations would not interfere with any staging area for mining operations, 3) asking Mr. Maxwell or his staff to delineate the specific area Amerikohl wanted cut, 4) removing more trees than is prudent from a forest management perspective, 5) cutting logs at the locations designated for Amerikohl's sediment ponds first so Amerikohl could begin work on those ponds as soon as possible, 6) harvesting trees consistent with restrictions in Amerikohl's mining permit to assure that Amerikohl would not come under scrutiny for violating its permit, and 7) harvesting trees under a timetable requested by Amerikohl.

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[1] Amerikohl points out that it never issued the required 90-day notice to Curry indicating that it would commence mining operations. Nonetheless, Mr. Curry's testimony (discussed further below) indicates that the logging was conducted in anticipation of mining operations. For example, Amerikohl asked Curry to complete logging on the Curry Mine by March 31, 2013, and Curry complied. Ex. 37, Tr. 265.

Where, as here, a mining company is significantly involved in these logging decisions and where, as here, the logging company is clearly trying to confer benefit on the mining company, that logging activity is "connected with surface or underground mining" within the meaning of 25 Pa. Code § 87.1. OSM established a prima facie case and proved this connectivity by a preponderance of the evidence.

At hearing, Mr. Curry explained his motivation for logging the Curry Mine site and removing more trees than is prudent from a forest management perspective. Mr. Curry testified as follows:

> Q: And again, the same question: Why cut the trees there, as opposed to anywhere else on your 1,125 acres?
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> A: Well, same answer I gave before. Actually, you know this, this was exceeding what we would like to, the areas we would like to cut, have the amount of acreage we would like to cut, okay? But, once again, it was imperative that we, we remove the timber from those areas that might be used for surface mining and, in the near future. So, that's the reason we went in there, as opposed to just having it pushed over.

Tr. 267-68.

At hearing, Mr. Curry testified that he was aware of some of Amerikohl's permit restrictions regarding logging and discussed those restrictions with Amerikohl. Tr. 272-73. Mr. Curry further testified that he logged the timber on the Curry Mine consistently with the Indiana bat protection program because: "... I was afraid to cut the timber outside of the parameter of the Indiana bat restriction because I was afraid that my actions might come back and jeopardize Amerikohl's possibility of removing the coal, which was very important to me." Tr. 274.

As discussed above, Mr. Curry even asked Mr. Maxwell which contractor he should select to execute the logging operation. On February 1, 2013, Mr. Curry wrote the following email to Mr. Maxwell:

> Send me the information regarding the area you need the trees removed and I'll get to work on getting them cut ASAP. It will probably have to be like the last time. Because of the difficult area to access in the winter and the time restraints, they cut the trees first, then

skidded them to a landing and then removed them when they could get their trucks in and out. Is the cut off date for cutting trees April 15?

So we will have to have some information from you. Obviously the area to be cut and where to skid the logs that will not interfere with your preparation work until the logs can be removed. I was satisfied with the Job Kassler did the last time, so I could do too two things. First, simply contact him or contact the forester I worked with last time and let him handle the job. Do you have any preference? The forester lined up Kassler the last time and made sure he did the job in a timely manner. Regardless, one of the two will have to meet with you rep to designate the area to be cut and determine acreage. I would want your rep to mark the area, determine the acreage and take some GPS readings. I very well could be wrong, however, it looked as if they cut a larger area last time then I thought they were going to cut. I just want to make sure the timber cutters don't take more area than they should or are supposed to cut. If the forester simply flags an area, it is impossible to determine where the cutting area was after the timber is cut. If they are aware there is a predetermined area that can be checked after cutting with GPS readings, there is less likelihood of any mistakes taking place and easy recourse if a problem arises. I don't need exact surveys or anything like that Dave, just enough documentation to keep them honest!! I'm sure you understand. I'm certainly not trying to put any restrictions on the area you need to remove the coal, I just don't want any more area cut than necessary.

I hope I am making myself clear Dave. Believe me, I'm very appreciative of all you have done on our behalf and will co-operate with you to the fullest extent in any way possible. Feel free to call me any time if there are any questions on your part or if there is something I can do to help you.

Ex. 36

In his February 12, 2013, response to Mr. Curry's email, Mr. Maxwell wrote:

I have attached a copy of our operations map showing the area that was cut last year, and the area that would be nice if it was cut by this March 31st. The area marked cut last year was taken off Google Earth. The new area is approximately 55 acres. If you do not want to

> cut the entire piece, I split the area in two, and the piece to the north being the most important. As soon as you give me the ok, I will have Joe Lechnar have his people mark it in the field. I have copied Joe on this email.

Ex. 37.

When asked at hearing to explain why he gave Amerikohl the opportunity to select a logging contractor, Mr. Curry explained: "I'd work with them any way I could." Tr. 280. Mr. Curry explained at hearing that he asked Mr. Maxwell where Curry should run its log skidding operation to make sure that it did not conflict with any area Amerikohl needed for its mining operations. Tr. 279. Finally at hearing, Mr. Curry also testified that he worked with Amerikohl to ensure that Amerikohl's future sediment pond sites were logged first so that fallen logs would not interfere with the construction of those ponds. Tr. 282-283.

Mr. Curry's willingness to work with Amerikohl is not surprising. Mr. Curry testified that he hoped to receive $1 million if Amerikohl commenced operations at the Curry Mine. Tr. 282. Mr. Curry's willingness and efforts to facilitate mining are not inappropriate; they are good business practices. However, the coordination and cooperation between Curry and Amerikohl connected Curry's logging activity to surface mining and therefore caused that logging to be a surface mining activity under Pennsylvania law.

In its response to OSM's STDNL, PADEP concluded that timber activity on the Curry Mine was not surface mining activity because Amerikohl had not moved any equipment to the Curry Mine site or moved any material on the site itself. In the response PADEP wrote:

> The site has not been activated by Amerikohl meaning that they have not moved in equipment, moved any earth, or caused any disturbance. Because the permit has not yet been activated, there can be no violation . . . . The effects of timbering activities reported by Inspector Montrella stem from timbering performed at the site by the landowner, who hired a third party to conduct the logging activity. Amerikohl, the permittee, was not involved in this activity.

Ex 8 at 1.

OSM established a prima facie case and proved by a preponderance of the evidence that PADEP's response to the STDNL is arbitrary and capricious for at least two reasons. First, PADEP's conclusion that Amerikohl was not involved in the timbering activity is factually incorrect. As discussed above, Amerikohl was significantly involved in timbering at the Curry Mine. Additionally, because Curry was doing many things to facilitate mining operations through its timbering activities, the timbering itself was a surface mining activity subject to PADEP's regulatory authority.

Second, even though PADEP was unaware of some of these facts when it issued its response to OSM's STDNL, PADEP was at least aware of the fact that the logging activity fell within the boundaries of Amerikohl's mining permit and complied with the Indiana bat protection provisions of that permit. *See* Ex. 2. These facts alone warranted more investigation and analysis of Curry's logging operation than PADEP conducted. Therefore, PADEP's decision not to request additional time to investigate under 30 C.F.R. § 842.11(B)(4)(*ii*) to determine if a violation of the State program had occurred was an arbitrary and capricious decision that resulted in an arbitrary and capricious response to the OSM's STDNL.

III. Conclusion

For the foregoing reasons, **OSM's Notice of Violation No. N14-120-411-001, Notice of Violation No. N14-120-411-002, and Cessation Order No. C14-120-411-001 are hereby affirmed.**

Harvey C. Sweitzer
Supervisory Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 C.F.R. Part 4, Subparts B and E (see enclosed information pertaining to appeals procedures).

See page 17 for distribution.

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