



United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement
1027 Virginia Street, East
Charleston, West Virginia 25301

JUN 08 2012

Certified Mail – Return Receipt Requested

Thomas Clarke, Director
Division of Mining and Reclamation
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304

Dear Mr. Clarke:

This is in response to your letter of April 18, 2012, in which you provided the Office of Surface Mining Reclamation and Enforcement (OSM) supplemental information in response to our Ten Day Notice (TDN) No. X12-111-391-002 regarding a citizen complaint alleging Marfork Coal Company's failure to initiate mining operations within three (3) years of permit issuance at its Eagle No. 2 Surface Mine (Permit No. S-3028-05) in Raleigh County, West Virginia. We have reviewed your agency's initial response dated February 27, 2012, and your supplemental information to our TDN regarding Marfork Coal Company's alleged violation and as outlined below must inform you that OSM has determined that, pursuant to 30 CFR 842.11(b)(1)(ii)(B), the West Virginia Department of Environmental Protection (WVDEP) has failed to take appropriate action to cause this violation to be corrected and we find your responses to be arbitrary, capricious, and an abuse of discretion under West Virginia's approved permanent regulatory program.

Overview of the TDN Process

A TDN is used to notify a State regulatory authority when OSM has reason to believe that there is a violation of the State's approved regulatory program. Upon receipt of the TDN, the regulatory authority has 10 days to take "appropriate action" to assure that the violation is corrected or to show "good cause" for failing to do so. *See* 30 CFR §§842.11(b)(1) and 843.12(a)(2). "Appropriate action" includes enforcement or other action to correct the violation. *See* 30 CFR §842.11(b)(1)(ii)(B)(3). Circumstances constituting "good cause" for not taking appropriate action are set forth in 30 CFR §842.11(b)(1)(ii)(B)(4). OSM will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *See* 30 CFR §842.11(b)(1)(ii)(B)(2). If the regulatory authority disagrees with OSM's determination, the

regulatory authority may request, in writing, an informal review of the decision. *See* 30 CFR §842.11(b)(1)(iii). If OSM's final determination is that the regulatory authority has failed to take appropriate action or demonstrate good cause, OSM will conduct a Federal inspection. *See* 30 CFR §842.11(b)(1). If the Federal inspection reveals that a violation exists, OSM must take enforcement action, including issuance of a notice of violation or cessation order, as appropriate. *See* CFR §843.12(a)(2).

Applicable State Program Requirements

West Virginia Code §22-3-8(a)(3) provides that "a permit terminates if the permittee has not commenced the surface mining operations covered by such permit within three years of the date the permit was issued: Provided, that the Director may grant reasonable extensions of time upon a timely showing that such extensions are necessary by reason of litigation precluding such commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: . . ."

Code of State Regulations (CSR) 38-2-3.27.e. provides that extensions of time for a permit as provided in subsection 3, section 8 of the Act shall be specifically set forth in a written approval and made part of the permit. Such extensions shall be made public by the Secretary.

Chronological History of Citizen Complaint and Corresponding State Actions

On January 9, 2012, WVDEP received a citizen complaint from Rob Goodwin, Coal River Mountain Watch, alleging that Marfork Coal Company's Eagle No. 2 Surface Mine Permit No. S-3028-05 had not started within three years of permit issuance and by law had terminated. State records indicate that the original permit was approved by WVDEP on June 6, 2008. The company was required by law to submit a request for a permit extension prior to June 6, 2011.

On January 10, 2012, Grant Connard, WVDEP Inspector, acknowledged receipt of the complaint and notified Mr. Goodwin that WVDEP would consider the information and decide how to proceed.

On January 17, 2012, Grant Connard notified Rob Goodwin that after reviewing the situation, it was determined that WVDEP had not notified Marfork Coal Company in accordance with Section 4.A of the State policy dated January 1993, regarding the termination of not-started permits that are three years old. The policy provides that the State inspector or clerk must notify the permittee that the permit will expire on the three-year anniversary date. The notification should be sent at least 90 days before the three-year anniversary date, but no more than 180 days before the mid-term date. Since the WVDEP had not properly notified the company, Mr. Connard acknowledged that WVDEP would follow Section 4.E of the policy and notify Marfork Coal Company. Section 4.E provides that there should not be any not-started permits which have exceeded more than three years since issuance or the most recent renewal date. However, if any of these are discovered that have not been notified in accordance with the procedure given above, you should proceed in accordance with the guidelines listed above.

Keith Porterfield, WVDEP, notified the company on January 12, 2012, that it had to submit a request for a permit extension; submit a statement if operations are expected to commence before the three-year anniversary date of permit issuance; or submit a statement acknowledging receipt of the letter and advising that the company wished to terminate the permit and obtain bond release.

On January 31, 2012, Marfork Coal Company submitted a request for an extension to WVDEP pursuant to WV Code §§22-3-8(a)(1) and 8(a)(3). The company stated that litigation involving its Clean Water Act (CWA) 404 permit has complicated and delayed mining for the past several years. In addition, due to the purchase of Massey Energy by Alpha Natural Resources, several permit transfer applications are still pending with the State. The company acknowledged that there had been changes in the regulations since permit issuance, and it would address any deficiencies prior to beginning operations on this permit or with the next required permit renewal.

On February 9, 2012, Keith Porterfield notified Marfork Coal Company that Permit No. S-3028-05 has been extended to June 6, 2013. The Company was advised to update the permit to current regulatory requirements prior to activation or the next renewal. In addition, Mr. Porterfield notified the Company that further extensions will be considered and granted only if a timely and adequate request is submitted. He cautioned that WVDEP bears no responsibility for providing the company any additional notice.

On February 13, 2012, OSM received a citizen complaint alleging that Marfork Coal Company's Eagle No. 2 Surface Mine, Permit No. S-3028-05, had terminated due to the company's failure to initiate surface mining operations within three years of permit issuance.

On February 15, 2012, OSM issued TDN X12-111-391-002 to WVDEP transmitting the citizen complaint.

On February 27, 2012, WVDEP responded to the TDN and provided OSM correspondence concerning actions it had taken earlier regarding the TDN. WVDEP acknowledged that the permit had been extended to June 6, 2013.

On April 3, 2012, OSM sought addition clarification from WVDEP regarding WVDEP's policy for the granting of permit extensions to not-started permits within three years of issuance; potential changes to Marfork Coal Company's permit if submitted as a new application; and Marfork Coal Company's eligibility to receive a permit, given that the company appeared to be linked to 20 violations that are part of settlement agreements in Kentucky and West Virginia.

On April 18, 2012, WVDEP acknowledged that, by law, WVDEP had authority to grant reasonable extensions, and WVDEP developed a policy clarifying the requirements and establishing procedures for the extension or termination of not-started permits. According to WVDEP, Section 4.E of its 1993 Policy allows a "retroactive" granting of an extension, if, and only if, WVDEP fails to follow its own policy of notifying a permittee of the upcoming three-

year anniversary. According to WVDEP, the State must abide by the notions of fair play and due process when WVDEP has made it known to permittees that it will notify them of the three-year anniversary for not-started permits. WVDEP acknowledged that it foresees no significant change if the permit were submitted as a new application. However, when the NPDES permit is up for renewal in 2013, required changes to the NPDES permit will generate a revision to the permit. WVDEP acknowledged that the transfer of this permit from Massey Energy to Alpha Natural Resources was still pending, and the permit was not initially conditioned at the time of issuance because Marfork Coal Company was not associated with the Pittston entities involved in the settlement agreements. In addition, WVDEP stated that, given that these violations have been or are in the process of being corrected to the satisfaction of the regulatory authorities, Marfork Coal Company is eligible to receive a surface mining permit.

Analysis of WVDEP's Response to the TDN

- All parties agree that Marfork Coal Company's Permit No. S-3028-05 had not started mining operations within three years of permit issuance, and the company had failed to submit a timely application for a permit extension to the WVDEP within the required time period. WVDEP acknowledged that the burden is still upon the permittee to provide a timely showing that an extension is necessary.
- State law, like §506(c) of the Surface Mining Control and Reclamation Act (SMCRA), provides that a permit terminates if the permittee has not commenced the surface mining operations covered by such permit within three years of the date the permit was issued. Documents provided by WVDEP in response to the TDN show that Marfork Coal Company's Permit No. S-3028-05 had expired on June 6, 2011, when the company failed to commence mining by that date.
- State law, like §506(c) of SMCRA, also provides that the WVDEP may grant reasonable extensions of time upon a timely showing that such extensions are necessary (1) by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or (2) by reason of conditions beyond the control and without the fault or negligence of the permittee. In its letter dated January 12, 2012, notifying Marfork Coal Company of its need to submit a request for a permit extension, WVDEP advised the company that its request must state the reasons for requesting an extension pursuant to West Virginia Code §22-3-8(a)(3). However, in its approval letter dated February 9, 2012, WVDEP does not acknowledge the reasons for granting Marfork Coal Company's permit extension or how Marfork Coal Company's request dated January 31, 2012, satisfies the requirements for extending the permit pursuant to West Virginia Code §22-3-8(a)(3). Further, WVDEP's determination that it lawfully granted an extension of Marfork Coal Company's permit on February 9, 2012, is not supported by the facts or West Virginia law and is, accordingly, arbitrary, capricious, and an abuse of discretion.
- In its January 31, 2012, letter, Marfork Coal Company stated that litigation involving its CWA 404 Permit had complicated and delayed mining and the purchase of Massey

Energy by Alpha Natural Resources has resulted in several pending transfer applications with the State. According to the company, a five-year extension of the permit is requested and valid pursuant to the following: §22-3-8(a)(3) – conditions beyond the control and without the fault or negligence of the permittee existed with regard to the CWA 404 process; and §22-3-8(a)(1)(c) Alpha is a successor in interest and has provided the necessary documentation required by this section of the Code. Marfork Coal Company states that CWA 404 litigation has delayed mining at its Eagle No. 2 Surface Mine. A discussion with U.S. Army Corps of Engineers (USACE) personnel confirmed on May 1 and again on May 30, 2012, that Marfork Coal Company had not submitted a CWA 404 permit application for its Eagle No. 2 Surface Mine or any mining operation with the name or permit number in Raleigh County. Also, Marfork Coal Company's Permit No. S-3028-05 was not on the USACE's Enhanced Coordination Procedures (ECP) list dated June 2009 pending a CWA 404 permit or part of the ECP discussions that resulted thereafter with State, Federal, and industry officials. Although Marfork indicated to WVDEP that it had finalized its jurisdictional determination (JD) request that reflects the changes that have taken place since its initial stream delineation in 2008 and it was to be submitted in February 2012, the USACE has no record that a JD request for this permit has ever been submitted by Marfork Coal Company. Several permit transfer applications were pending with WVDEP for Marfork Coal Company at the time the not-started permit expired, but this did not relieve the company of its obligation to submit a timely request for a permit extension with the WVDEP. Furthermore, any permit transfers issued by the WVDEP to Alpha Natural Resources for Marfork Coal Company should be conditioned upon compliance with the settlement agreements involving 20 violations that are still being corrected in West Virginia and Kentucky. Given this information, Marfork Coal Company has not satisfied the State's statutory provisional requirements for obtaining a permit extension. Even if Marfork Coal Company had applied in a timely manner, its application fails to meet any of the statutory or regulatory criteria for obtaining a permit extension.

- WVDEP relied on a policy dated January 1993 in approving Marfork Coal Company's permit extension. Section 4.E of that policy provides that there should not be any not-started permits which have exceeded more than three years since issuance (or the most recent renewal date). However, if any of these are discovered, that have not been notified in accordance with the procedures given above, the WVDEP should proceed in accordance with the guidelines listed above. This policy is part of the State's Inspection and Enforcement Handbook that is posted on the WVDEP webpage under Section 3, Permit Application Requirements. The State's inspection staff, not the permitting staff, is responsible for processing applications for permit extensions. However, this policy has not been submitted to OSM and approved as part of the approved State program. In addition, there is nothing in the approved program that allows for the retroactive approval of permit extensions. The retroactive approval of a permit extension is inconsistent with both State law and regulations at West Virginia Code §22-3-8(a)(3) and CSR 38-2-3.27.e., respectively.

- Although WVDEP's policy provides that the permittee is to be notified within 90 days of the three-year anniversary of the permit issuance date, nothing in the approved State program requires the WVDEP to provide such notification. When approving Marfork Coal Company's permit extension, WVDEP acknowledged that further extensions will be considered and granted only if a timely and adequate request is submitted, and the WVDEP bears no responsibility for providing the company any additional notice. Under the approved State program, responsibility for submitting a timely application for a permit extension rests solely with the permittee. Further, granting untimely requests for permit extensions solely because WVDEP failed to provide a pre-expiration notice is inconsistent with the approved State program.
- CSR 38-2-3.27.e. provides that permit extensions must be made public by the WVDEP. Nothing in the permit file indicates that the public was ever given any notice of this permit extension. Only Marfork Coal Company and personnel with WVDEP were notified of the permit extension when it was granted by WVDEP on February 9, 2012. WVDEP's failure to provide the public notice of Marfork Coal Company's permit extension dated February 9, 2012, is not in accordance with the approved State program.

Conclusion

For the reasons set forth above, we must find that WVDEP's initial and supplemental responses to TDN X-12-111-391-002 involving Marfork Coal Company Permit No. S-3028-05 are arbitrary, capricious, and an abuse of discretion pursuant to 30 CFR §842.11(b)(1)(ii)(B)(2).

While the phrase "arbitrary, capricious, and an abuse of discretion" is used in 30 CFR Part §842, it is not defined in 30 CFR Part §700 to End. We must look elsewhere for a definition. Under the arbitrary and capricious standard, an agency's determination cannot be reversed unless it has no reasonable basis or it exceeds an agency's lawful authority. When an agency makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and the decision can be invalidated on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; and action not based upon consideration of relevant factors is arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law if it was taken without observance of procedure as required by law (Natural Resources Defense Council, Inc. v. U.S. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)). However, there is no singular standard for what constitutes an arbitrary and capricious decision.

Our review shows that WVDEP did not have good cause for failing to take corrective action because the violation cited in the TDN exists under the approved State program and no other circumstances demonstrating good cause have been asserted or exist under the good cause criteria at 30 CFR 30 CFR §842.11(b)(1)(ii)(B)(4). Furthermore, because WVDEP's decision in this case clearly exceeds its legal authority under the State's approved permanent regulatory program, we must find your actions with regard to the extension of Marfork Coal Company Permit No. S-3028-05 to be arbitrary, capricious, and an abuse of discretion.

In accordance with 30 CFR §842.11(b)(1)(iii)(A), you may file a request for informal review of this determination. Authority to conduct these reviews and render a final decision has been delegated by OSM's Deputy Director to the appropriate Regional Director. Therefore, your request for informal review must be submitted to:

Thomas Shope, Regional Director
U.S. Department of the Interior
Office of Surface Mining
Reclamation and Enforcement
Appalachian Region
Three Parkway Center
Pittsburgh, Pennsylvania 15220

Your request for informal review must be received by Mr. Shope within five days from your receipt of this determination. If you do not request informal review within five days from receipt of this decision, or if the Regional Director affirms this determination upon informal review, OSM will conduct a Federal inspection and take any enforcement action it deems appropriate. We encourage you to take immediate action to cause this terminated permit to be corrected, which would avoid the need for a Federal enforcement action.

Please contact me if you have any questions regarding this determination or OSM's informal review procedures.

Sincerely,



Roger W. Calhoun, Director
Charleston Field Office

cc: Rob Goodwin, Coal River Mountain Watch
Stephanie Morgan, Permit Manager,
Marfork Coal Company