

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
BEFORE THE
COMMISSION ON POLLUTION CONTROL AND ECOLOGY

IN THE MATTER OF:
F. L. Ogle
Permit No. P292-M-CO

LIS 85-018

ORDER
AND
FINDINGS OF FACT

I. STATEMENT OF CASE

Arkansas Department of Pollution Control and Ecology (ADPC&E) issued to F. L. Ogle, Permit No. P292-M-CO, Notice of Violation (N.O.V.) SGU-022-84 on November 14, 1984. The Notice of Violation SGU-022-84 consists of three separate violations designated as: SGU-022-84, 1 of 3, 2 of 3, and 3 of 3. A request for review of the proposed penalty assessments corresponding to these violations was received by ADPC&E on January 7, 1985.

Notice of Violation SGU-028-84 was issued to F. L. Ogle, Permit No. P292-M-CO, by ADPC&E on December 28, 1984. The N.O.V. SGU-028-84 consists of five separate violations designated as: SGU-028-84, 1 of 5, 2 of 5, 3 of 5, 4 of 5, and 5 of 5. A request for review of the proposed penalty assessments corresponding to these violations was received by ADPC&E on February 6, 1985.

A Cessation Order was issued by ADPC&E to F. L. Ogle, Permit No. P292-M-CO, on February 26, 1985, for the failure to abate the violation contained in N.O.V. SGU-028-84, 2 of 5. A request for review of the proposed penalty assessment corresponding to this C. O. was received by ADPC&E.

A pre-hearing conference was held on July 30, 1985 between representatives of ADPC&E and F. L. Ogle to discuss the settlement of the N.O.V.'s and C. O. Although it was agreed that some of the proposed penalties should be reduced, the conference did not result in the settlement of this matter. An adjudicatory hearing was then held on August 20, 1985, before James McHaney, Hearing Officer. Mr. Frank Brown represented F. L. Ogle, the permittee, and presented testimony and other evidence contesting the proposed penalties. Ellen Carpenter represented ADPC&E and presented testimony and other evidence in support of the proposed penalties.

II. LAW

Section 52-952 of the Arkansas Statutes Annotated provides "any person who violates any permit condition ... or the regulations ..., may in accordance with the regulations issued by the Commission be assessed a civil penalty by the Commission, except that if such violation leads to the issuance of a Cessation Order, the civil penalty shall be assessed." Part 845 of the Arkansas Surface Mining and Reclamation Regulations (Code) sets forth the

procedures for calculating the civil penalties proposed to be assessed for cessation orders and notices of violation. A point system is used for notices of violation to assign a numerical value to certain factors. If the points assigned to the factors total 30 points or less, no penalty is proposed. If the notice of violation is assigned points totaling 31 or more, the points are converted to a dollar amount of up to \$5,000.00 in accordance with the schedule set out in Section 845.14 of the Code. The Arkansas Surface Mining and Reclamation Act and Part 845 of the Code provides that a civil penalty of not less than \$750.00 shall be assessed for each day that a cessation order is in effect.

Based upon the evidence presented at the hearing, the Commission on Pollution Control and Ecology hereby issues the following Findings of Fact and Order:

III. FINDINGS OF FACT AND ORDER

1. B & M Coal Company is a contract miner for F. L. Ogle, the permittee in this matter, and is conducting mining operations under Permit No. P292-M-CO. In the operation of this mine, violations of the Code were committed for which ADPC&E issued Notices of Violation (N.O.V.) and a Cessation Order (C.O.). Proposed civil penalties were assessed with respect to the N.O.V.'s and C.O. issued to F. L. Ogle through B & M Coal Company.

2. B & M Coal Company requested review of the proposed penalty assessments corresponding to the three violations contained in N.O.V. SGU-022-84, the five violations contained in N.O.V. SGU-028-84 and the C.O. issued for the failure to abate SGU-028-84, 2 of 5.

3. The Order issued to F. L. Ogle to attend a pre-hearing conference and subsequent hearing to review the proposed penalty assessments corresponding to the N.O.V.'s and C.O. was served upon the permittee through its contract miner, B & M Coal Company, by certified mail which is evidenced by the signed receipt and receipt of the Order was stipulated to by B & M Coal Company.

4. Notice of Violation SGU-022-84, 1 of 3, was vacated by ADPC&E on December 28, 1984, and therefore there is no corresponding civil penalty currently proposed.

5. Notice of Violation SGU-028-84, 3 of 5, was vacated by ADPC&E on February 28, 1985, and therefore there is no corresponding penalty assessment.

6. Notice of Violation SGU-028-84, 1 of 5, was issued on December 28, 1984. Fifty points were assigned and \$3,000.00 was proposed for violation of Section 816.11(c) of the Code (failure to keep information current and correct on the mine identification sign). However, the violation was abated within the time specified for abatement and pursuant to Section 845.13(b)(4) up to one-half of the total points assigned may be subtracted for normal compliance which is

evidence of the operator's good faith in attempting to achieve compliance. ADPC&E indicated at the hearing that one-half of the points should be subtracted from the total points assigned. Therefore, no penalty should be assessed for this violation.

7. Notice of Violation SGU-028-84, 4 of 5, was issued on December 28, 1985. Forty-six points were assigned and \$2,600.00 was proposed for violation of Section 816.11(d) of the Code (failure to clearly mark the perimeter of the permit). However, the violation was abated within the time specified for abatement and therefore up to one-half of the total points assigned may be subtracted for normal compliance which is evidence of the operator's good faith in attempting to achieve compliance. ADPC&E indicated at the hearing that one-half of the points should be subtracted from the total points assigned. Therefore, no penalty should be assessed for this violation.

8. Notice of Violation SGU-028-84, 5 of 5, was issued on December 12, 1985. Forty-five points were assigned and \$2,500.00 was proposed for violation of Section 816.11(g) of the Code (failure to clearly mark the topsoil stockpile). However, the violation was abated within the time specified for abatement and therefore up to one-half of the total points assigned may be subtracted for normal compliance which is evidence of the operator's good faith. ADPC&E indicated at the hearing that one-half of the points should be subtracted. Therefore, no penalty should be assessed for

this violation.


9. Notice of Violation SGU-022-84, 2 of 3, was issued on November 14, 1984. Forty-nine points were assigned at the pre-hearing conference and \$2,900.00 is proposed for violation of Sections 771.19, 816.43(c) and 816.45(a) of the Code (failure to maintain diversion ditch TD-3).

10. Notice of Violation SGU-022-84, 3 of 3, was issued on November 14, 1984. Forty-four points were assigned at the pre-hearing conference and \$2,400.00 is proposed for violation of Sections 816.113 and 816.114 of the Code (failure to revegetate and mulch disturbed areas below sediment pond No. 4).

11. Notice of Violation SGU-028-84, 2 of 5, was issued on December 28, 1984. Fifty points were assigned and \$3,000.00 is proposed for violation of Sections 771.19, 816.45(a) and 816.45(b)(6) of the Code (failure to maintain sediment traps in accordance with the permit and the Code).

12. A Cessation Order was issued on February 26, 1985, for the failure to abate N.O.V. SGU-028-84, 2 of 5 and the C.O. was terminated on March 4, 1985. In accordance with the statutory requirements and the Code, \$750.00 must be assessed for the five days the C.O. was in effect. Therefore, a civil penalty of \$3,750.00 must be assessed for this C.O.

ATTEST:


DIRECTOR

ARKANSAS DEPARTMENT OF POLLUTION CONTROL & ECOLOGY
BEFORE THE
COMMISSION ON POLLUTION CONTROL & ECOLOGY

IN THE MATTER OF:
F. L. Ogle
Permit No. P292-M-CO

LIS 85-018

BRIEF

I. FACTS

B&M Coal Company has conducted mining operations on F. L. Ogle's site as a contract miner since May, 1984. Arkansas Department of Pollution Control & Ecology (ADPC&E) conducted an inspection of F. L. Ogle's site (Permit No. P292-M-CO) on November 14, 1984. Notice of Violation (N.O.V.) SGU-022-84 was issued to F. L. Ogle through B&M Coal Company as a result of the November 14, 1984 inspection. Notice of Violation SGU-022-84 consisted of three separate violations. An inspection of the F. L. Ogle site conducted on December 28, 1984 resulted in the issuance of Notice of Violation SGU-028-84 which consisted of five separate violations.

Proposed penalties corresponding to these violations were issued to and contested by F. L. Ogle through his contract miner or operator, B&M Coal Company. A pre-hearing conference was held but no settlement was reached concerning the proposed civil penalties. A formal hearing was held in this matter on August 20, 1985.

SECRETARY, ARKANSAS COMMISSION ON POLLUTION
CONTROL AND ECOLOGY, 8001 NATIONAL DRIVE,
LITTLE ROCK, ARKANSAS 72209

FILED 11-4-85 Marilyn Woods

II. LAW

Section 52-952 of the Arkansas Statutes provides that any person who violates a permit condition or the regulations may be assessed a civil penalty unless a violation leads to a cessation Order in which case a penalty shall be assessed. Part 845 of the Arkansas Surface Mining Enforcement and Reclamation Regulations (Code) establishes a point system for determining the amount of a penalty to be assessed for a violation. If a violation is assigned thirty points or less, no penalty is proposed. If a violation is assigned thirty-one points or more, a penalty may be proposed in accordance with the schedule contained in Section 845.14 which converts the total number of points assigned to a violation into a dollar amount. The Code provides that the following factors shall be considered in determining whether to assess a penalty: the history of previous violations, the seriousness of the violation, the negligence of the person in causing or failing to correct the violation, and the degree of good faith in attempting to achieve rapid or normal compliance after notification of the violation.

Part 845 provides a maximum number of points which can be assigned to each factor. No more than thirty points shall be assigned for the history of previous violations. The Code further provides that one point shall be assigned for each past violation and five points shall be assigned for each past violation contained in a cessation order. Up to thirty points

can be assigned for the seriousness of the violation. The probability of the occurrence of the event a violated standard is designed to prevent and the extent of potential or actual damage, in terms of the area and impact on the public or the environment, are the items considered in determining the seriousness of the violation unless the violation is of an administrative requirement in which case the extent enforcement is obstructed is the item considered. Up to twenty five points can be assigned for the negligence in causing or failing to correct the violation.

Section 845.13(b)(4) provides that points shall be subtracted based on the degree of good faith in attempting to achieve compliance after notification of the violation. In deducting points, the person's history of previous violations must be taken into consideration. If a person abates a violation in the shortest possible time and that abatement is achieved before the time set for abatement (i.e. rapid compliance is achieved), all of the points assigned to a violation may be subtracted. If the person abates a violation within the time given for abatement (i.e. normal compliance is achieved), up to one-half of the total points assigned to a violation may be subtracted.

Any violation under a cessation order shall be assessed a penalty according to Section 52-952 of the Arkansas Statutes and Section 845.12(a) of the Code. Section 52-952 of the Arkansas Statutes and Section 845.15(b) of the Code specifically provide that a violation contained in a cessation

order which has not been abated shall be assessed \$750.00 for each day the violation continues without being corrected unless the person to whom the order is issued seeks a review of the actual violation or abatement requirements.

III. DISCUSSION

ADPC&E is seeking civil penalties corresponding to one Cessation Order and three of the original eight Notices of Violation issued to F. L. Ogle. N.O.V. SGU-022-84, 1 of 3 (ADPC&E Exhibit 6) and N.O.V. SGU-028-84, 3 of 5 (ADPC&E Exhibit 7) were vacated and therefore no civil penalties should be assessed for these violations (TR. 17, 51, 53). F. L. Ogle should not be assessed penalties for N.O.V. SGU-028-84, 1 of 5 (Exhibit 10), N.O.V. SGU-028-84, 4 of 5 (ADPC&E Exhibit 13), and N.O.V. SGU-028-84, 5 of 5 (ADPC&E Exhibit 14) because one-half of the points assigned for each of these violations could be subtracted from the total points due to the fact that the violations were abated within the time for normal compliance and F. L. Ogle should be given credit for good faith attempts to abate these violations (TR. 33, 34, 36, 37, 52, 53).

The civil penalty originally proposed to F. L. Ogle corresponding to N.O.V. SGU-022-84, 2 of 3 (failure to maintain diversion ditch TD-3) (ADPC&E Exhibit 8) was reduced from \$3,400.00 to \$2,900.00 during the pre-hearing conference. This monetary reduction was based on the reduction of points assigned to the probability of occurrence of the event the

regulation is designed to prevent and a reduction of the points assigned for the extent of damage (ADPC&E Exhibit 15, TR. 50).

The civil penalty originally proposed to F. L. Ogle corresponding to N.O.V. SGU-022-84, 3 of 3 (failure to revegate and mulch disturbed areas below sediment Pond 4)(ADPC&E Exhibit 9) was reduced from \$2,800 to \$2,400 during the prehearing conference. This monetary reduction was based on a clerical error in that only 6 points were assigned for negligence rather than the 10 points recorded on the assessment worksheet. (ADPC&E Exhibit 9, TR. 50).

The \$3,000.00 penalty for the violation contained in N.O.V. SGU-028-84, 2 of 5 (failure to maintain sediment traps in accordance with the permit and Code) (ADPC&E Exhibit 11) is not proposed to be reduced (TR. 53). A Cessation Order was issued for the failure to abate N.O.V. SGU-028-84, 2 of 5, which ran five full days (ADPC&E Exhibit 12). In accordance with the Arkansas Surface Mining and Reclamation Act of 1979, as amended (Ark. Stat. Ann. § 52-935 et seq.) and Code, a penalty of \$3,750.00 should be assessed for the Cessation Order.

The civil penalties proposed for the violations contained in N.O.V. SGU-022-84, 2 of 3, N.O.V. SGU-022-84, 3 of 3 and N.O.V. SGU-028-84, 2 of 5 were calculated after considering the factors specified in Part 845 of the Code and assigning points for the history of previous violations with respect to

the permitted surface coal mining operation, the seriousness of the violations and the negligence in causing or failing to correct the violations (ADPC&E Exhibits 8,9,11,15). No points could be subtracted for good faith attempts to correct these violations because the violations were not abated in a timely fashion (TR 31, 32, 33, 34).

IV. CONCLUSION

Section 845.2 of the Code states, "civil penalties are assessed (under the Act and Part 845 of the Code) to deter violations and to ensure maximum compliance with the terms and purposes of the Act on the part of the coal mining industry." The civil penalties proposed for the Cessation Order (\$3,750.00) and the violations contained in N.O.V. SGU-022-84, 2 of 3 (\$2,900.00), N.O.V. SGU-022-84, 3 of 3 (\$2,400.00) and N.O.V. SGU-028-84, 2 of 5 (\$3.,000.00) were calculated in accordance with the provisions of the Arkansas Surface Coal Mining and Reclamation Act of 1979, as amended, and the Arkansas Surface Coal Mining and Reclamation Regulations. A civil penalty totaling \$12,050 should be assessed to F. L. Ogle, Permit No. P292-M-C0 by the Commission and must be assessed in order to achieve the objective of deterring violations and ensuring maximum compliance with the Act and the Code.