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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

MABEN ENERGY CORPORATION, APPLICANT	Contest of Citation
v.	Docket No. WEVA 79-123-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 637722 April 23, 1979 Maben No. 4 Mine

DECISION

Appearances: James M. Brown, Esq., File, Payne, Scherer & Brown,
Beckley, West Virginia, for Applicant
Edward H. Fitch, Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for Respondent,
Mine Safety and Health Administration (MSHA)

Before: Judge Melick

This case is before me upon the application of the Maben Energy Corporation (Maben) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (Footnote 1) to contest a citation issued by the Mine Safety and Health Administration (MSHA) under section 104(a) of the Act. A hearing was held on October 23, 1979, in Beckley, West Virginia, at which both parties, represented by counsel, presented evidence.

The issue in this case is whether Maben is responsible for a violation of the Act by failing to conduct the inspections required by 30 CFR 77.216-3(a) at an impoundment structure known as the Wyco Freshwater Dam located in Wyoming County, West Virginia. 30 CFR 77.216-3(a) provides as follows:

All water, sediment, or slurry impoundments which meet the requirements of section 77.216(a) (Footnote 2) shall be examined

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by a qualified person designated by the person owning, operating or controlling the impounding structure at intervals not exceeding 7 days for appearances of structural weakness and other hazardous conditions. All instruments shall be monitored at intervals not exceeding 7 days by a qualified person designated by the person owning, operating, or controlling the impounding structure.

The parties have stipulated that the impounding structure at issue in this case, the Wyco Freshwater Dam, meets the criteria in 30 CFR 77.216(a) and therefore comes within the inspection requirements set forth in 30 CFR 77.216-3(a). Maben admits that it has not been making the inspections but contends that it does not own, operate or control the impounding structure and that therefore, it is not the person responsible for such inspections. MSHA concedes that Maben does not own the impounding structure but contends that it both operates and controls that structure and is thus nevertheless responsible for such inspections. In determining whether Maben was in violation of 30 CFR 77.216-3(a), I must, therefore, first determine whether Maben is a person "operating or controlling" the structure within the meaning of the cited regulation.

The Wyco Freshwater Dam, constructed in the early 1970's by the Whitesville A & S Coal Company in connection with a strip-mining operation, consists of a cross-valley earth and rockfill structure approximately 400 feet long, 20 feet high, 300 feet wide at the base and 40 feet wide at the crest. There is a 60-foot wide spillway discharge cut through rock at one end of the structure and a 24-inch diameter decant pipe extending through the structure. The impoundment upstream of the dam covers an area of about 2 acres and the drainage area upstream includes more than 2,000 acres. Engineering tests have shown the dam to be stable and not to be a safety hazard.

The dam and the pond it created were used by the Westmoreland Coal Company in its Maben No. 4 Mine--the mine now operated by Applicant--beginning in the early 1970's as a source of water for its mining equipment, for firefighting and for its bathhouse. The Maben No. 4 Mine is a drift mine located on a nearby hill above and to the southwest of the dam. According to the evidence, Westmoreland has had and continues to have a leasehold interest over the entire property under discussion, including the actual coal seam being mined, the access roads, and the Wyco Dam and its impoundment pond. Westmoreland had previously accepted responsibility for the dam and in this regard a notice was issued to Westmoreland on October 22, 1974, by the Mining Enforcement and Safety Administration (MESA), MSHA's predecessor, for a violation of 30 CFR 77.216, alleging that the Wyco Dam was not of substantial construction. The notice was terminated on April 20, 1977, after Westmoreland enlarged the spillway around the dam. Apparently, revised design and maintenance plans submitted by Westmoreland under the provisions of 30 CFR 77.216-2(a) have never been approved by MESA (nor by its successor (MSHA)), and Westmoreland's request in May 1976 to abandon the dam has apparently never been acted upon by either

MESA or MSHA.

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On October 3, 1977, Westmoreland, contracted with Maben for Maben to "mine, remove, transport and deliver" coal from a tract of land (including Westmoreland's Maben No. 4 Mine) near, but not including, the area of the Wyco Dam. In that contract, Westmoreland designated itself as owner of the mine property. Soon thereafter, Maben began its mining operations under the contract. On April 23, 1979, MSHA issued the citation at bar for Maben's failure to inspect the nearby Wyco Dam at 7-day intervals.

As I have already noted, whether Maben is responsible for the inspections required by 30 CFR 77.216-3(a) depends on whether it is found to be a person "operating or controlling" the dam. The words "operating" and "controlling" as used in the context of the cited regulation are not defined in the regulations. In this context, however, the word "operate" is defined in the American Heritage Dictionary of the English Language (1976), as "to run or control the functioning of." The word "control" in this context is defined therein as "the exercise of authority or dominating influence over; direct; regulate." I find that these definitions appropriately reflect the meaning of the terms "operating" and "controlling" as used in the cited regulation.

MSHA alleges primarily four reasons to support its contention that Maben was "controlling" and "operating" the impoundment: (1) Maben used an access road to its mine that lies partly over the impoundment structure, (2) Maben used water from the impoundment pond for an employee bathhouse, (3) Maben modified the spillway outlet by construction work on its access road; and (4) Maben maintains a gate at the entrance to the mine access road and to the main road to the impoundment area.

There is no dispute that Maben has continued to travel the access road and both the MSHA inspector, Harold Owens, and an engineer testifying on behalf of Maben, Andrew Fox, located a portion of that road upon the impoundment structure. I cannot find from the evidence however that Maben was in fact dumping mine products on the structure as alleged by MSHA. Estimates by the MSHA inspector as to the approximate location of a coal stockpile appearing in a Government photograph, in the face of direct contradictions by Maben, were too uncertain to enable me to establish its precise location as alleged. The evidence is uncontradicted, however, that Maben did in fact raise the access road about 2-1/2 to 3 feet above the spillway floor at its outlet thereby modifying the spillway and potentially affecting the level of water behind the impoundment structure. Evidence that Maben maintains a gate at the entrance to the mine access road and to the main road to the impoundment area is also unchallenged.

While these facts clearly show that Maben has used the impoundment structure and its pond in connection with its mining operations and that such use could very well affect the impoundment structure, I cannot equate that use with the degree of dominating influence required to constitute an "operating" or "controlling" of the structure. In support of its contention

that Maben has been operating and controlling the Wyco Dam, MSHA
cites Kessler Coal, Incorporated v. MESA, Docket No. HOPE 76-235

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(March 18, 1976), in which Judge Stewart found that Kessler owned and controlled a refuse pile created by a previous mine operator. In that case, however, a lease existed under which Kessler was specifically granted leasehold rights over mine property, including the property on which the refuse pile was located, thereby placing Kessler in a position of special ownership with controlling and operating rights over that refuse pile. In the instant case on the other hand, no such lease exists and in its contract with Westmoreland, Maben was given essentially only the right to extract coal in a defined area not including the Wyco Dam or its pond and was not granted any ownership interest in the land. Thus, Maben has been given no specific legal authority to operate or control the impoundment structure and as a factual matter has not exercised operating or controlling influence over the structure.

MSHA also appears to argue that since Maben has used other property outside of the contract area such as roads, office buildings and for the drilling of a well, that it actually has the right to control all property within the vicinity of the mine complex, including the impoundment structure at issue. The mere use of such property does not, however, give rise to a right to control it since the use may very well be trespassory. Moreover, even assuming that Maben had a right to control certain other property unconnected with the impoundment structure, it does not, of course, follow that such a right would, for that reason, attach also to that structure. While MSHA also suggests that the definition in the 1977 Act of the term "operator" should govern the definition of the term "operating" as used in the cited regulation, I find no basis for such a conclusion. The terms are separate and distinct and used in entirely different contexts.

Under the circumstances, I conclude that Maben is not the person owning, operating or controlling the Wyco Dam and is not therefore responsible for the inspections required by 30 CFR 77.216-3(a). The citation that is the subject of this proceeding is therefore vacated.

Gary Melick
Administrative Law Judge

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1 30 U.S.C. 801 et seq. (1978), hereinafter referred to as "the Act."

~Footnote_two

2 30 CFR 77.216(a) provides that certain plans be filed for impounding structures that can:

"* * * (1) Impound water, sediment, or slurry to an

elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or (2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or (3) As determined by the District Manager, present a hazard to coal miners."