

IBLA 91-321

Decided June 18, 1992

Appeal from a decision of the Deputy Director, Office of Surface Mining Reclamation and Enforcement, refusing to order Federal enforcement action. TDN 90-07-191-6.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Variances: Generally

An operation is exempt from SMCRA if extraction of coal is incidental to extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. If an operation is not exempt, mining without a valid permit would constitute a violation.

2. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable state program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred,

OSM is required by 30 U.S.C. § 1271(a)(1) (1988) to notify the state regulatory authority thereof.

3. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Under 30 CFR 842.11(b)(1)(iii)(A), OSM is required to immediately notify the state regulatory authority in writing when in response to a 10-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the state regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing for informal review of that determination by the Deputy Director within 5 days from receipt of OSM's written determination. While a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold its initial determination.

4. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

The 10-day notification period in 30 U.S.C. § 1271(a)(1) (1988) and 30 CFR 842.11(b)(1)(iii)(A) establishes the response time for state regulatory authorities. The allowance of additional time beyond the 10-day period for the state agency to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well.

5. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Forfeiture

Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under

30 U.S.C. § 1271(a)(1) (1988) simply because a bond was ordered forfeited.

6. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988) unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

7. Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally

Under 30 CFR 843.11(a)(2), surface mining operations conducted without a valid permit constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm.

8. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Under 30 U.S.C. § 1271(a)(1) (1988) and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that an imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

9. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988) and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

APPEARANCES: Robert L. Clewell, Tom Pike, Joseph A. Mattevi, Donald R. Sell, Sandra Arter, and Jim Ewing, Lisbon, Ohio, pro sese.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

This is an appeal from a February 22, 1991, decision of the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement (OSM), denying a request for inspection pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1988). Appellants contend they filed a complaint but that no Federal inspection was conducted, despite repeated findings by OSM that action taken by the Division of Reclamation (DOR) of Ohio's Department of Natural Resources (DNR) was inadequate.

On March 28, 1990, OSM received this confidential citizens complaint: 1/

It concerns a Coal Strip-Mining Operation which was conducted from 1986 to 1989 on 60 acres in Center Township of Columbiana County. The operation was licensed under IM-0959 to Lisbon Coal Crushers, Inc., 37544 Hunters Camp Road, Lisbon, Ohio 44432 (now bankrupt). \* \* \* There remains a very hazardous open pit which has yet to be fully reclaimed.

We report that virtually no aggregate or related materials, other than coal, was mined \* \* \*. This was clearly a coal mine. We find it incomprehensible that anyone could report or certify that nearly ONE MILLION TONS of materials were removed or sold from this mine, or that the mine inspector of the Ohio Division of Reclamation would be involved in a separate property transaction with a principal of the particular company. We are aggrieved that reclamation has not continued. This was clearly a coal mine. It should be designated as such, protected, and reclaimed as such.

Because 30 U.S.C. § 1256(a) (1988) provides "no person shall engage in or carry out on lands within a State any surface coal mining operations

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1/ Appellants originally requested that OSM keep confidential their identity. Pertinently, Departmental regulation 30 CFR 842.12(b) provides that:

"The identity of any person supplying information to the Office relating to a possible violation or imminent danger or harm shall remain confidential with the Office, if requested by that person, unless the person elects to accompany the inspector on the inspection, or unless disclosure is required under the Freedom of Information Act (5 U.S.C. 552) or other Federal law."

When implementation of SMCRA began, the Department established that confidentiality for a citizen complainant was a necessary part of the enforcement program. If, therefore, a citizen requests inspection of a surface mining operation and also requests that his identity be kept confidential as provided by 30 CFR 842.12(b), his identity may not be revealed, even to other parties to a case, unless and until a competent official acting in response to a formal request filed under 5 U.S.C. § 552 (1988) or other Federal law has determined that his identity must be made public because it does not fall within the scope of 5 U.S.C. § 552(b)(7) (1988) or any other exemption from disclosure provided by law. See 42 FR 62665-66 (Dec. 13, 1977). Nonetheless, appellants disclosed their identities to the coal company affected by their complaint when they filed their statement of reasons on appeal. Consequently, since they have themselves revealed their identities, the effort to keep the case record confidential has been discontinued.

unless such person has first obtained a permit issued by such State pursuant to an approved State program," mining coal without a permit violates SMCRA. Had this area been mined pursuant to a SMCRA permit, the permittee would have been required to restore the site to its approximate original contour. 30 U.S.C. § 1265(b)(3) (1988).

[1] Nonetheless, under 30 U.S.C. § 1291(28)(A) (1988), an operation is exempt from the Act if extraction of coal is incidental to the extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. Ohio licensed the mine as an exempt operation. If the operation was not exempt, mining without a valid permit would constitute a violation. Cumberland Reclamation Co. v. Secretary, Department of the Interior, 925 F.2d 164, 168 (6th Cir. 1991); JDG, Inc. v. OSM, 107 IBLA 210 (1989); McNabb Coal Co. v. OSM, 101 IBLA 282, 289 (1988), aff'd, McNabb Coal Co. v. Lujan, No. 88-C-281 (N.D. Okla. Sept. 29, 1989), appeal filed, No. 89-5187 (10th Cir. Nov. 3, 1989). Consequently, the citizen complaint alleges a violation by challenging the exemption allowed.

In 30 U.S.C. § 1271(a)(1) (1988), Congress described OSM's duties when it receives such a complaint as this one:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If\* \* \* the State regulatory authority fails within

ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring \* \* \*. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action.

[2] The first question OSM had to consider was whether appellants' complaint gave it "reason to believe that any person is in violation of any requirement of [SMCRA]." Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable State program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred, OSM is required by the provision quoted above to notify the State regulatory authority, which in this case is the DOR, DNR. 30 CFR 935.10.

When the citizens complaint was received, OSM prepared a "minesite evaluation inspection report" with an attachment indicating that OSM understood the complaint to allege that Lisbon Coal Crushers was operating a coal mining operation without a permit in violation of Ohio Revised Code (ORC) section 1513.17(A), and that the operation exceeded the ratio of coal allowed to be produced by an incidental coal operation as defined in ORC section 1501:13-1-02(S)(1)(a). On March 28, 1990, OSM issued a 10-day notice (TDN) to the State of Ohio identifying Lisbon Coal Crushers and the

following violation: "Conducting a surface coal mining operation without a permit by producing coal in excess of 1/6 of all minerals produced; applies to entire area of IM-959," citing ORC 1513.17(A).

Unlike the typical violation, the one in this case could not be identified simply by an inspection of the site. For an active mine, production records at the site could be inspected for the purpose of determining whether the incidental mining exception was being violated. See generally Tennessee Consolidated Coal Co. v. Andrus, 690 F.2d 588 (6th Cir. 1982); Andrus v. P-Burg Coal Co., 644 F.2d 1231 (7th Cir. 1981). However, the mine in this appeal was inactive, and although some inspection of the site may have been necessary to identify the volume of material removed and to determine the degree of reclamation, OSM believed it needed additional evidence before concluding that the removal of coal was not incidental to the Lisbon mining operation and therefore required a permit.

OSM considered that the only effective way to investigate the alleged violation would be an audit of the mineral production of Lisbon Coal Crushers, but concluded that the State lacked authority to conduct such an audit. Anticipating that the State would respond to the TDN by requesting an audit by OSM, OSM's Columbus Field Office (CFO) requested an audit from OSM's Branch of Fee Compliance on April 6, before the end of the 10-day period. Despite awareness that the operator had declared bankruptcy, OSM did not then consider further enforcement action to be pointless, but stated in the April 6 request for audit that

we believe it is worthwhile to pursue collection of unpaid fees and/or enforcement action, in order to apply the permit block

sanction against the principals of the company. Also, if it [be] determined that the operation should not have been exempt, supplemental bond pool monies are available to help reclaim the site. [Emphasis added.]

Shortly after this request was made, the Branch of Fee Compliance began work to gain access to the company's records, which were in the custody of a court-appointed trustee. 2/

The State DNR replied to OSM on April 12 but did not request the audit as anticipated by OSM. DNR simply reviewed existing records of Lisbon Coal Crushers permit IM-959 for reports indicating that the total amount of coal removed for the 2 years of operations was 149,162 tons and that 1,108,472 tons of other material were mined, so that only 13.5 percent of the material mined was coal. OSM first informed the State of the inadequacy of this response in an April 27 telephone conversation between Randall Pair of OSM and Pat Mayes of DOR. Pair expressed OSM's view that DOR should not have relied on the reported tonnages in view of the allegations that those amounts were incorrect or falsified. OSM pointed out that landholders could have been contacted to check out lease provisions and DOR could have requested a production audit from OSM.

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2/ Both OSM and DOR have overestimated the amount of evidence needed to sustain a violation in this case. The record confirms that information from the surface and mineral owners was readily available. If no royalty was paid them for minerals other than coal, such evidence would be sufficient to sustain the violation alleged, if the operator failed to provide contrary evidence. In Cumberland Reclamation Co. v. Secretary, supra, the court expressly adopted this Board's view that an operator's failure to produce such evidence "speaks volumes." Id. at 168. Both the decision by OSM to wait 10 days and the State decision to take no further action because of lack of evidence are unacceptable.

On May 14, 1990, the CFO Director issued a letter finding the DOR investigation insufficient and the response to the TDN "to be capricious and thereby inappropriate." Copies of this finding were sent to appellants. DOR responded on May 23, 1990, requesting "an extension of time for providing a final response to this TDN until it can obtain the results from a production audit to be conducted by OSM fee compliance personnel."

A summary of a telephone discussion between Pair and John Schalip of DOR confirmed that the IM permit issued to Lisbon Coal Crushers had been forfeited and that a bond forfeiture order was made on January 22, 1990 (Chiefs Order 0640-IM). On May 23, 1990, DOR received a check for the current value of two certificates of deposit filed for the bond, \$9,150.03. On May 31, 1990, Pair called Dave Anna of the OSM Branch of Fee Compliance to cancel the April 6 audit request because of difficulty perceived in obtaining information and legal complications in converting a forfeited IM permit to a coal permit.

By letter dated June 8, 1990, OSM responded to DOR's letter of May 22, 1990. In the letter, OSM deferred final determination on the appropriateness of DOR's response until DOR had determined what other methods of investigating the complaint it would pursue. DOR was informed of the OSM decision not to pursue an audit while OSM had a pending claim before the bankruptcy court for nonpayment of reclamation fees by Lisbon Coal Crushers. OSM stated that surface and mineral owners had been contacted and would be willing to provide records for information to DOR. OSM informed appellants of the actions with respect to the TDN by letter dated June 11, 1990. By

letter dated August 10, 1990, OSM reported to appellants concerning the DOR investigation, stating that the investigation was expected to be completed by September 13, 1990. On September 21, 1990, however, DOR proposed that there be no further action taken, citing the forfeiture of the permit and finding "no substantial evidence to prove that the operator exceeded the coal tonnage requirements."

In a letter dated November 2, 1990, OSM concluded that the DOR investigation "has been incomplete, and [its] conclusion that 'no substantial evidence' indicates the operation to be in violation is arbitrary and capricious." Nonetheless, OSM found there was no further action to be taken on the matter because DOR was pursuing reclamation under the bond forfeiture provisions.

Appellants were informed of this determination by letter dated November 8, 1990, from CFO stating that:

In normal circumstances, a determination by this Office that the Division has not appropriately responded to a Ten-Day Notice would result in a second investigation by this Office, with subsequent Federal enforcement taken if warranted. In this instance, however, the Division has already forfeited the performance bond filed under the Ohio Industrial Minerals law, and has initiated plans to achieve at least some reclamation using these forfeited funds. Also, the responsible party (the permittee) is under Chapter 7 bankruptcy. In this situation no effective enforcement action could be taken against the permittee. Therefore, there is no further action that this Office can take. [3/]

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3/ The letter also referred to new Federal regulations, 54 FR 52092 (Apr. 1, 1990), and Ohio's proposal to incorporate these new, more stringent rules into the State program. While these regulations will help to prevent future abuse of the incidental mining exception by requiring operators to formally apply for an exemption before operations occur, they do nothing to abate the violation that is the subject of this appeal.

Pursuant to 30 CFR 842.15, appellants sought review of the CFO decision and on February 22, 1991, the Deputy Director, Operations and Technical Services, OSM, issued the decision from which this appeal is taken. Determining that CFO's response was "appropriate," he stated:

The Federal regulations at [30] CFR 842.11(b)(1)(ii)(B)(4) allow a State regulatory authority (SRA) not to take enforcement action in response to a TDN if the SRA has forfeited a performance bond. In this case, DOR forfeited the performance bond on this site on January 22, 1990. Both Lisbon Coal Crushers and William Lewis (president of the corporation) are in bankruptcy. There are practically no attainable assets according to the Assistant Ohio Attorney General representing DOR in this case. Further enforcement would offer little or no likelihood of securing abatement or, in this case, obtaining conversion of the operation to a permitted surface coal mining operation.

(Decision at 2). 4/

In their notice of appeal, appellants describe the current condition of the site as follows:

The mining operation has terminated. No reclamation activities are in progress. The spoil, topsoil, and sharply cut, deep, open, watery pit are dangerous, without adequate protection, and constitute a significant hazard to human health and environment. [The pit is located in the] Vicinity, Guilford Lake State Park, Section 7, Center Township,

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4/ The Deputy Director's decision indicates that a copy of his decision was sent to Lisbon Coal Crushers as required by 30 CFR 842.15(b), but OSM did not identify Lisbon Coal Crushers as a party. Neither Lisbon Coal Crushers nor its principals participated in this appeal. We note that Departmental regulation 43 CFR 4.1105 identifies proper parties to surface coal mining proceedings before the Office of Hearings and Appeals, but appeals such as this one arising under 43 CFR 4.1280 through 4.1286 are not listed under 43 CFR 4.1105(a) which designates "statutory parties" for certain proceedings.

Columbiana County, Ohio and proposed routing North Country National Trail, and above headwaters, Beaver Creek National Wild and Scenic River Area. [It o]verlooks principal (sole) pumping station for Salem City Reservoir as well as some 300 acres of prime Wetlands.

Our concern in this appeal is not only with OSM's ultimate disposition of appellants' complaint, but about the way it was handled from the moment it was filed. The applicable statute, 30 U.S.C. § 1271(a)(1) (1988), established the time for evaluating a state agency response:

If \* \* \* the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring \* \* \*. [Emphasis added.]

The most noticeable features of this provision are its mandatory nature and the lack of any ambiguity with respect to the time allowed for action. The State has 10 days, no more, in which to take appropriate action or to show good cause why it should not act. This 10-day period runs from the date of notification, not from any other date. If the State makes neither of the required responses within 10 days, the statute contains no language giving the Secretary discretionary authority to prolong the matter; it appears that he must order an inspection and do so immediately. The only terms flexible enough to allow room for interpretation are "appropriate action" and "good cause," but the response filed by DOR on April 12 was correctly found to show neither. No language in the statute authorizes OSM to defer making an immediate inspection simply by withholding its determination of the appropriateness of state action. Under the foregoing interpretation of

the statute, OSM was obliged to take some action on April 12. Nevertheless, no written determination was made until May 14.

In responding to comments submitted in response to proposed amendments to regulations implementing this statutory provision, OSM offered the following construction of the statutory provision:

As an initial matter, the commenters misinterpret the time limits imposed by the Act. Two time directives are set forth in section 521(a)(1) of the Act, which states if "the state regulatory authority fails within ten days after notification" to take appropriate action or show good cause, then the Secretary shall immediately order federal inspection. The "ten days" requirement establishes the response time for state regulatory authorities but creates no duty upon the Secretary.

The Secretary's responsibility is "immediately" to order a federal inspection when he determines that the state did not take appropriate action or show good cause for such failure. Until such a determination is made, no obligation exists to conduct a federal inspection. Given the statutory goal of protecting the environment, the Secretary's determination must be made expeditiously. The statute does not specify, however, that the determination of the adequacy of the state response, or that the follow-up inspection, must occur on the eleventh day following notification to the state.

53 FR 26742 (July 14, 1988).

[3] Accordingly, OSM published a regulation establishing the following procedure:

The authorized representative shall immediately notify the state regulatory authority in writing when in response to a ten-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the State regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing, for informal review of that determination by the Deputy Director. Such a request for

informal review may be submitted to the appropriate OSMRE field office or to the office of the Deputy Director in Washington, DC. The request must be received by OSMRE within 5 days from receipt of OSMRE's written determination. [Emphasis added.]

30 CFR 842.11(b)(1)(iii)(A). Subparagraph (B) of this rule delays a Federal inspection until the end of the period in which a state may seek review or until the completion of such review if it is requested, unless a cessation order is required under 30 CFR 843.11. <sup>5/</sup> Thus, when we look to the language of the regulation rather than the statute, we find that although a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed under subparagraph (B) until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold an initial written determination that the State had not taken appropriate action or shown good cause. This construction is fully consistent with OSM's explicit promise to ensure that its final decision is expeditiously made, a goal which would be impossible to meet if the initial determination could be indefinitely deferred, as the facts of this case irrefutably demonstrate.

Although OSM's field office had already requested an audit by its Branch of Fee Compliance, OSM did not "immediately notify the state regulatory authority in writing" when DOR failed to take appropriate action or show good cause in response to OSM's TDN as required by the above-quoted regulation. For reasons that are not explained, OSM withheld issuance of the required notice until May 14. OSM's untimely notice

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<sup>5/</sup> We note that a cessation order is not required under 30 CFR 843.11 unless an inspection has already been held.

found DOR's response to the TDN to be insufficient and stated that a Federal inspection would be ordered unless informal review was requested.

[4] DOR filed no request for informal review by the Deputy Director of the May 14 decision. Under 30 CFR 842.11(b)(1)(iii)(A) and (B), a request for informal review is the only mechanism by which a state agency can seek deferral of a Federal inspection. Inasmuch as OSM has recognized that "[t]he 'ten days' requirement establishes the response time for state regulatory authorities," 53 FR 26742 (July 14, 1988), the allowance of additional time beyond the 10-day period to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well. Nevertheless, DOR requested an extension of time until OSM's production audit was completed, but shortly thereafter, OSM cancelled the request for that audit. Although OSM continued to prod DOR to do something, DOR proposed that no further action be taken on September 21, more than 4 months after the May 14 OSM determination and almost 6 months after appellants filed their inspection request. OSM withheld a decision for another month and a half, finally finding on November 2 that DOR's action was inappropriate but deciding that OSM would take no further action.

Although the Deputy Director found the action by OSM's CFO to be "appropriate," the relevant issue under the applicable statute and its implementing regulations was whether the action taken by DOR was appropriate. Although OSM had repeatedly prodded DOR to take further action, the Deputy Director concluded this matter by finding that the action initiated by the State before appellants filed their complaint made

further action by OSM unnecessary. The Deputy Director did not adopt or reject the repeated findings by OSM's CFO that Ohio's DOR had failed to take appropriate action, and he did not base his conclusion on a finding that DOR had taken "appropriate action" or that it had shown "good cause" for failure to do so.

The governing statutory provision, 30 U.S.C. § 1271(a)(1) (1988), is implemented by Departmental regulation 30 CFR 842.11(b)(1), which was amended in 1988 to provide in pertinent part as follows:

An authorized representative of the Secretary shall immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this chapter, the applicable program, or any condition of a permit or exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health and safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources and--

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program \* \* \*; or

(B) (1) The 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. \* \* \*;

(2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.

(3) Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.

(4) Good cause includes: \* \* \* (v) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program[; or 6/]

(C) The person supplying the information supplies adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air, and water resources exists and that the State regulatory authority has failed to take appropriate action. [Emphasis supplied.]

[5] Departmental regulation 30 CFR 842.11(b)(1)(ii)(B)(2) provides that "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so." In Mario L. Marcon, 109 IBLA 213 (1989), the Board affirmed a determination that a state agency had taken appropriate action by issuing cessation orders and commencing a bond

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6/ Prior to the 1988 revision of this regulation, see 53 FR 26728 (July 14, 1988), subparagraph (B) was much shorter and ended with a semicolon followed by the word "or" which connected subparagraphs (B) and (C). See 30 CFR 842.11. In a case involving the application of this regulation prior to its amendment in 1988, M & J Coal Co. v. OSM, 115 IBLA 8, 16-17 (1990), we held that the TDN period provided in subparagraph (B) did not prevent OSM from taking enforcement action when faced with imminent danger under subparagraph (C) when the prior regulations were in effect. In that decision, we observed that the 1988 revisions resulted in subparagraph (C) no longer being connected to subparagraph (B) by the disjunctive "or," id. at 17 n.9, but we now find that OSM's omission of the disjunctive "or" was inadvertent, not only because it would be difficult to make sense of the provision otherwise, but also because OSM's preamble to the 1988 amendments made clear that no modification of the regulatory requirements for imminent danger situations was intended, citing subparagraph (C) repeatedly as a separate basis for action unaffected by the amendment of subparagraph (B). 53 FR 26729, 26730, 26731, 26732, 26737, 26742-43 (July 14, 1988). Were we to interpret the elimination of the word "or" as making 10-day notification period in subparagraph (B) applicable to subparagraph (C), such an interpretation would place the regulation in clear conflict with the mandatory waiver of that time period required by the statute.

forfeiture proceeding in the absence of a showing by the appellant that reclamation costs would exceed the amount available for reclamation. In the instant case, however, the reclamation costs undoubtedly exceed the amounts forfeited, so we will not affirm OSM's decision that forfeiture alone constituted appropriate action. Furthermore, bankruptcy proceedings do not bar the exercise of OSM's regulatory power. Cherry Hill Development v. OSM, 108 IBLA 92 (1989).

In his decision here under review, the Deputy Director referred to a different regulation, 30 CFR 842.11(b)(1)(ii)(B)(4) which pertains to good cause for failure to take appropriate action. By doing so, he implicitly determined that DOR's action was not appropriate. In so doing, he also implicitly rejected any suggestion that the conditions on the site pose "a significant, imminent environmental harm" within the meaning of subparagraph (C) of the above-quoted regulation, an issue we will address later. The regulation cited by the Deputy Director, however, does not support his view that a state regulatory authority is not required to take enforcement action in response to a TDN if the performance bond has been forfeited. None of the situations in the five subparagraphs of the cited regulatory subsection refers to bond forfeiture. Subparagraph (v), however, does refer to situations where "the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program," but this language refers to abandoned sites as defined in 30 CFR 840.11(g), where the State regulatory authority has made a written finding that it "[i]s taking action to ensure that the permittee and operator, and owners and operators of the permittee and operator, will be precluded from

receiving future permits while violations continue at the site." 30 CFR 840.11(g)(3)(i) (emphasis added). No such written finding by the State regulatory authority appears in the record of this appeal. We therefore conclude that the Deputy Director's reliance on the cited regulation was misplaced. Indeed, if a state's failure to seek a permit block can preclude a finding of "good cause," we find it difficult to see how anything short of a permit block could constitute "appropriate action."

Departmental regulation 30 CFR 842.11(b)(1)(ii)(B)(4) is not the only reason for concluding that a state's failure to obtain a permit block for a site with unreclaimed violations may preclude a finding of appropriate action or good cause. Under 30 U.S.C. § 1260(c) (1988), OSM and state regulatory authorities are required to deny surface coal mining permits to applicants who own or control operations in violation of the Act. This Department has been required to implement section 1260(c) by establishing a computer system to determine whether there are ownership or control links between applicants for new permits and operators with uncorrected violations. Save Our Cumberland Mountains, Inc. v. Clark, No. 81-2134 (SOCM) (D.D.C. Jan. 31, 1985). <sup>7/</sup> Because operators may attempt to avoid

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<sup>7/</sup> While this appeal was under active consideration, the court-approved settlement in SOCM was vacated because the District Court was found to lack jurisdiction. Save Our Cumberland Mountains v. Lujan, No. 90-5374 (D.C. Cir. May 22, 1992). Nonetheless, the court observed, that because the Secretary viewed the settlement agreement as "fair, reasonable, and consistent with the law, that nothing in this opinion precludes OSM's maintenance and improvement of the AVS [applicant violator system], and adherence to the agreement's terms, as a matter of official policy." Id. slip op. at 22. A reexamination of our disposition of this appeal would be warranted only if OSM were to abandon the AVS.

reclamation costs by dissolving one corporation that has violated SMCRA and using a new corporate entity to apply for a new permit, the effectiveness of this system would be limited if we were to hold that bankruptcy and dissolution of a corporate permittee prevent future action against the bankrupt or its principals for a violation. Because there would then be no record of any violation, they could avoid reclaiming the site while they reentered the coal mining business. The administrative permit block affords some possibility that reclamation will be made if an offending operator seeks to return to the coal mining business. When OSM's CFO requested an audit on April 6, 1990, the request mentioned the importance of further enforcement action to apply the permit block sanction against the principals of the company. This observation was correct, although it was later overlooked.

[6] We recognize that there may be circumstances in which it would not be arbitrary and capricious for a state to decline to seek a permit block, even though an outstanding violation might remain on a minesite, notwithstanding our discussion concerning 30 CFR 842.11(b)(1)(ii)(B)(4)(v) above. Nevertheless, the responsibility of OSM and the state regulatory authorities to implement 30 U.S.C. § 1260(c) (1988) impels the conclusion that such circumstances will be very rare. Thus, even though an operator is bankrupt and has forfeited his reclamation bonds, if outstanding violations remain on a minesite and the proceeds of the bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988) unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program and

is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site. Although the OSM field office suggested that a permit block might be a proper objective of enforcement action, the decision on appeal contains no finding why the permit block was not pursued.

[7] Although we have shown that OSM's processing of appellant's complaint failed to meet the requirements of 30 CFR 842.11(b)(1)(ii)(B), OSM made a more fundamental error when it received appellants' complaint that Lisbon had mined without the required permit. Although mining without a permit was not, in and of itself, considered to cause significant, imminent environmental harm when enforcement of SMCRA began, *see, e.g., Claypool Construction Co. v. OSM*, 2 IBSMA 81, 87 I.D. 168 (1980), OSM considered it necessary to be able to issue cessation orders to operators mining without a permit and amended Departmental regulation 30 CFR 843.11(a)(2) so that surface mining operations conducted without a valid permit would "constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm." 47 FR 18555, 18558 (Apr. 29, 1982).

[8] Under 30 U.S.C. § 1271(a)(1) (1988) and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to waive the 10-day period and conduct an immediate inspection when the person informing OSM provides adequate proof that an imminent danger or a significant imminent environmental harm exists and that the State has failed to take appropriate action. When OSM first proposed regulations to implement the inspection provision, it received

comments suggesting a requirement that OSM consult with a state and give the state an opportunity to act in a situation involving imminent danger or harm. OSM emphatically rejected this suggestion: "While the Federal inspector would naturally try to contact the State to determine whether the State had acted, to require this as a prerequisite to a Federal inspection would be contrary to Section 521(a)(1)." 44 FR 15299 (Mar. 13, 1979). Thus, if OSM receives "adequate proof," an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection even 10 days when an imminent danger or significant, imminent environmental harm is involved. OSM adhered to this position when amending its regulations in 1988, stating that the amended rule would not affect a decision to inspect based on § 842.11(b)(1)(ii)(C) when adequate proof is supplied that an imminent danger to the public health and safety or significant, imminent environmental harm exists. 53 FR 26731 (July 14, 1988).

[9] In M & J Coal Co. v. OSM, 115 IBLA 8, 19 (1990), we observed: "Although the regulations require that the person providing information to OSMRE supply 'adequate proof' of the existence of an imminent danger and that the State regulatory authority had failed to take appropriate action, that standard must be a flexible one which deals with the realities of the situation." OSM has recognized that to impose strong evidentiary requirements on citizen complaints would unduly diminish the effectiveness of enforcement. In promulgating the interim regulations, OSM stated:

[A] rigid rule regarding necessity of documentary proof in every case seems totally contrary to the intent of Congress. Such documentary evidence as photographs, while desirable

and preferable, obviously cannot always be available if for no other reason than [that] citizens would have no legal right of access onto mine property to photograph violations.

42 FR 62665 (Dec. 13, 1977). When OSM published the permanent program regulations, this issue was considered again when defining "adequate proof:" "In many instances a signed statement will suffice. A high standard of proof should not be required. It would be tragic if another Buffalo Creek disaster occurred because an oral complaint followed by a signed statement was not accepted as 'adequate proof.'" 44 FR 15299 (Mar. 13, 1979). The Board, too, has recognized that prior to an inspection, a citizen cannot reasonably be required to produce evidence of such a character that it "is doubtful that the citizen \* \* \* could lawfully obtain the needed information" or where an inspection would be required to yield that information. Thomas J. FitzGerald, 88 IBLA 24, 28 (1985). In this case, appellants had submitted a signed statement, and because the violation set forth therein would constitute a "significant, imminent environmental harm" by definition, no further evidence of harm or danger was required. By showing that the State had improperly licensed the operation as exempt from SMCRA reclamation requirements and those requirements had not been met, appellants provided adequate proof that the State had failed to take appropriate action as of the date their complaint was filed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

from is reversed and the case is remanded for further action and inspection consistent with this opinion.

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Franklin D. Arness  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

