



CHEYENNE SALES CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
WEST VIRGINIA HIGHLANDS CONSERVANCY, INC., INTERVENOR

163 IBLA 30

Decided September 2, 2004

Editor's Note: Appeal Filed, No. 2:04CV74 (N.D.W. Va), *aff'd*, *Cheyenne Sales Co., Inc. v. Norton*, 2007 WL 773904 (Mar 9, 2007).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CHEYENNE SALES CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
WEST VIRGINIA HIGHLANDS CONSERVANCY, INC., INTERVENOR

IBLA 94-736

Decided September 2, 2004

Appeal from a decision of Administrative Law Judge David Torbett upholding
Notice of Violation No. 92-112-017-06. Docket No. CH 92-14-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Under 30 CFR 700.11(d)(2), the Office of Surface Mining Reclamation and Enforcement properly reasserts jurisdiction to issue a Notice of Violation to a permittee after the state regulatory authority terminated jurisdiction over the mine site, pursuant to a written determination under 30 CFR 700.11(d)(1), when the record shows that the state regulatory authority's written determination was based on a misrepresentation of a material fact because all requirements imposed under Subchapter B, Chapter VII, Title 30, of the Code of Federal Regulations had not been successfully completed.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Acid and Toxic Materials--Surface Mining Control and Reclamation Act of 1977:

Water Quality Standards and Effluent Limitations:
Discharges from Disturbed Areas

The Office of Surface Mining Reclamation and Enforcement properly issues a Notice of Violation when discharges from disturbed areas are more acidic than the 6.0-9.0 pH range provided in 40 CFR 434.52(a), incorporated by 30 CFR 816.42 of the permanent program regulations, and in 30 CFR 715.17(a) of the initial program regulations, and violate the hydrologic balance provisions of 30 CFR 715.17 and 816.41.

APPEARANCES: Dean K. Hunt, Esq., Lexington, Kentucky, for Cheyenne Sales Co., Inc.; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Walton D. Morris, Jr., Esq., Charlottesville, Virginia, and L. Thomas Galloway, Esq., Boulder, Colorado, for West Virginia Highlands Conservancy, Inc.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Cheyenne Sales Co., Inc. (Cheyenne), appealed Administrative Law Judge David Torbett's June 1994 decision that, although the State of West Virginia had released Cheyenne's performance bond for a mine site in 1987, the jurisdiction of the Office of Surface Mining Reclamation and Enforcement (OSM) had not terminated and therefore OSM had jurisdiction in 1992 to issue the company a Notice of Violation for discharging untreated water from the site. Judge Torbett also held that the Notice of Violation (NOV) was properly issued. Cheyenne challenges both Judge Torbett's conclusion that OSM's jurisdiction did not terminate with the State's release of Cheyenne's bond and his conclusion that the NOV was proper. We deal with the question of jurisdiction first.

Procedural Background

In April 1996, after Cheyenne and OSM had filed their original briefs in this appeal, Cheyenne filed a Notice of Later Authority with us, identifying our January 1996 decision in LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996), as relevant to the issues in this appeal. That decision vacated a cessation order issued to LaRosa by OSM in 1992 on the grounds that OSM did not have jurisdiction to issue it because West Virginia had released the bond for the site in 1984. "Specifically," Cheyenne observed, "Cheyenne raised virtually the same defense in relation to this matter as was raised by LaRosa." In response, on April 4, 1996, we issued an order asking

OSM whether it believed this appeal was governed by LaRosa, and, if it believed it was not, why that case was distinguishable.

In May 1996, prior to a response from OSM, we suspended consideration of this appeal pending the outcome of judicial review of our decision in LaRosa sought by West Virginia Highlands Conservancy, Inc. (Conservancy), intervenor in that case. Summary judgment was granted in favor of LaRosa and the Secretary in September 1997 by the U.S. District Court for the Northern District of West Virginia and the Conservancy's appeal was dismissed. West Virginia Highlands Conservancy, Inc. v. Babbitt, No. 1:96-CV-34 (D.C., N.D. W. Va., Sept. 8, 1997). In December 1997, upon learning that the Conservancy had appealed the District Court's decision to the U.S. Court of Appeals for the Fourth Circuit, we issued an order extending the time for OSM to respond to our April 1996 order until 15 days after the Fourth Circuit issued its decision.

In December 1998, because it found our LaRosa decision was not ripe for review, the Fourth Circuit vacated the District Court's decision and remanded the case with instructions to dismiss it. West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797 (4th Cir. 1998). The District Court dismissed the action in May 1999. OSM filed a Memorandum in Response to our April 1996 order, Cheyenne replied, and OSM responded to the reply.

In January 1999, the Conservancy filed a petition that the Secretary review our LaRosa decision under the authority reserved in 43 CFR 4.5(a)(2). On March 20, 2003, the Secretary declined to do so, in part because "the legal question presented in La Rosa Fuel is at issue in other litigation before the IBLA. The IBLA thus will have the opportunity to address and reconsider the question which you are asking the Secretary to review." (March 20, 2003, letter from Associate Solicitor Hugo Teufel III to Walton D. Morris, Jr., Esq., counsel for the Conservancy.) Following denial of that petition, we offered OSM an opportunity to file a supplemental brief if it wished to do so and Cheyenne an opportunity to respond if OSM did so. OSM stated it did not intend to file a supplemental brief, so this appeal became ripe for our review. We granted the Conservancy's petition to intervene in this appeal in April 2004.

Factual Background

Cheyenne obtained Permit No. 63-77 from the State of West Virginia to mine a 46-acre site in Upshur County in April 1977. The site had previously been mined in the 1960's, and severe water quality problems, including acid mine drainage, existed there when Cheyenne began re-mining it. On May 3, 1978, the site became subject to the initial regulatory program regulations in subchapter B, Chapter VII, Title 30

CFR, that were adopted pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 - 1328 (2000) (SMCRA). 30 U.S.C. § 1252(c) (2000); 30 CFR 710.11(a)(3)(ii). Those regulations included 30 CFR 715.17, "Protection of the hydrologic system".

In January 1981, the Secretary approved West Virginia's state permanent regulatory program, with several conditions. 46 FR 5915, 5954 (Jan. 21, 1981); see 30 CFR 732.13. By this time, mining at the site had been completed, although reclamation had not.

In February 1983, Harold Parsons, an inspector for West Virginia's Department of Natural Resources (DNR), recommended that a portion of Cheyenne's bond be released because grading had been completed and its operation was not responsible for deteriorating the water quality. "According to a policy memo, [dated] July 21, 1980, concerning water quality release criteria, a grading release may be approved if water discharged from the permit area does not meet acceptable standards only as a result of pre-existing or natural conditions," Parsons wrote. (Respondent's Exhibit 1). ^{1/} In April 1983, West Virginia approved the grading and reduced the amount of Cheyenne's bond from \$46,000 to \$11,500 based on compliance with the backfilling and grading "provisions of Article 6, Chapter 20, Official Code of West Virginia of 1931, as amended," and implementing regulations. (Resp. Ex. 3).

In March 1983, the West Virginia legislature enacted legislation that made several amendments to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA). Among the amendments was the addition of a proviso to § 20-6-26(c)(3) of that Act, commonly referred to as the Colombo (or Columbo) amendment, stating that ". . . a release [of the final portion of a performance bond] may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site." ^{2/}

^{1/} Exhibits offered by OSM at the hearing were labelled Respondent's exhibits and are referred to as Resp. Ex. __; those offered by Cheyenne were labelled Petitioner's exhibits and are referred to as Pet. Ex. __

^{2/} This provision was later codified as § 22A-3-23(c)(3) of the West Virginia Energy Act (WVEA), which was signed into law on May 3, 1985. The full text of § 22A-3-23(c)(3) reads:

When the operator has completed successfully all surface mining and
(continued...)

West Virginia submitted an amendment of its conditionally-approved permanent regulatory program to OSM in February 1983 and further revisions based on the March legislation in April 1983. 48 FR 52034, 52035-36 (Nov. 16, 1983). The permanent program regulations submitted with the legislation

indicated that this provision [i.e., the Colombo Amendment] would only be applicable at Phase II bond release [available after revegetation has been established] and all the requirements of the WVSCMRA, including effluent limitations, would be met at the completion of mining. The State's interim bond release requirements at Subsection 4I.03(b) of the State's regulations were also revised to include this provision. Because OSM's interim program regulations did not require the submission of a performance bond and the State's performance standards required that permanent and interim program operations had to comply with NPDES [National Pollutant Discharge Elimination System] effluent limitations during and upon completion of mining, OSM did not disapprove the interim bond release requirements.

(Resp. Ex. 6, at 4). ^{3/}

^{2/} (...continued)

reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified in subdivision (20), subsection (b), section twelve of this article: Provided, That the revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan: Provided, however, That such release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.

50 FR 28343, 28344 (July 11, 1985).

^{3/} The reference to "NPDES effluent limitations" is to the program for issuing permits for discharges of pollutants that will meet effluent limitations adopted pursuant to the Federal Water Pollution Control Act. See 30 U.S.C. § 1342 (2000). OSM's understanding of the regulations submitted by West Virginia is reflected in its response to a comment on the proposed amendments to the State's permanent regulatory program:

35. The FWS [U.S. Fish and Wildlife Service] stated that Section 4I.02(c)(2)(B) should require that all water quality parameters be

(continued...)

On May 20, 1985, the Governor of West Virginia submitted a proposed amendment of the State's permanent regulatory program to OSM based on the WVEA signed earlier in the month. 50 FR 28316 at 28316-17 (July 11, 1985). In the meantime, OSM had determined that West Virginia was using the Colombo Amendment to release the bonds on sites with water discharges that did not meet NPDES effluent limitations. (Resp. Ex. 6 at 4.) On July 11, 1985, the Director of OSM approved the proposed amendment of the State's permanent regulatory program, with certain exceptions. 50 FR at 28322 (July 11, 1985). Among the exceptions, the Director found § 22A-3-23(c)(3) of the WVEA inconsistent with section 519(c)(3) of SMCRA, 30 U.S.C. § 1269(c)(3) (2000), which prohibits final release of an operator's performance bond until the period of operator responsibility specified in section 515, 30 U.S.C. § 1265 (2000), has expired and all reclamation requirements of SMCRA are fully met. 50 FR 28316, 28319 (July 11, 1985).

In approving West Virginia's proposed amendment, the Director stated: "Those provisions the Director has not approved today may not be implemented in any manner until such time as the Director approves them." 50 FR at 28322 (July 11, 1985); see 30 CFR 732.17(g).

Also on July 11, 1985, the Director proposed a rule to pre-empt and supersede certain language in § 22A-3-23(c)(3). See 30 CFR 730.11(a). "The specific wording proposed for preemption and supersession is: 'Provided, however, That such a release may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.'" 50 FR 28343, 28344 (July 11, 1985). On August 29, 1985, OSM made this proposed rule final. 50 FR 35082, 35083 (Aug. 29, 1985); see 30 CFR 948.13(c) (2002). When doing so, the Director stated: "This action clarifies that those provisions [found

^{3/} (...continued)

within established standards prior to bond release. Section 4I.02(c)(2)(B) is comparable to 30 CFR 800.40(c)(2), as amended on July 19, 1983, (48 FR 32932-32964). Both of these sections relate to partial bond release following revegetation of the disturbed area. This phase of reclamation is concerned primarily with the establishment of vegetation and the control of sediment. None of the provisions relate to other water quality standards. The determination that other water standards are being met is made at the time of final bond release as provided by Section 4I.02(c)(3)(B) and 30 CFR 800.40(c)(3).

48 FR 52034, 52049 (Nov. 16, 1983).

inconsistent with SMCRA] cannot be implemented or enforced by any party.” 50 FR 35084 (Aug. 29, 1985).

Although Cheyenne’s application for final bond release is not in the record, on July 31, 1985, the West Virginia DNR conducted the final inspection of Cheyenne’s mine site and recommended final release of the bond. In June 1986, however, OSM issued a ten-day notice to the West Virginia Department of Energy alleging Cheyenne’s failure to meet effluent limitations set forth in the NPDES program and 40 CFR Part 434.^{4/} In response, West Virginia issued a notice of violation to Cheyenne for violation of § 22A-3-12(b)(10) of the WVSCMRA^{5/} and § 6B.04(b) of the State’s regulations and ordered Cheyenne to set up a treatment system and treat the water to meet effluent limitations.

In August 1986, Parsons wrote: “During a Staff Meeting on July 24, 1986, we were requested to submit to the Charleston office any permits that might qualify for final release under the ‘Columbo Amendment’. On July 31, 1985, Cheyenne Sales’ permit 63-77 was submitted for final release. Apparently, the release was not approved because, in June 1986, an OSM inspector conducted an oversight inspection and issued three ten-day notices. All violations issued against this permit are now terminated. The application for final release, along with the water quality documentations, remain in the Charleston office. If this release cannot be approved, please advise me of what action we should take.”

In May 1987, West Virginia granted final release of Cheyenne’s bond.

In May 1992, the Conservancy filed a citizen’s complaint with the Charleston, West Virginia, Field Office of OSM alleging the discharge of acid mine drainage from

^{4/} 40 CFR Part 434 contains the regulations applicable to coal mining point source discharges that have been adopted by the U.S. Environmental Protection Agency under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311, 1314, 1316, 1317, and 1361 (2000).

^{5/} This performance standard requires all surface mines to

[m]inimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and ground water systems both during and after surface-mining operations and during reclamation by: (A) Avoiding acid or other toxic mine drainage by such measures as * * * (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; * * * .

Cheyenne's Permit No. 63-77 site. Because mining had been completed before Cheyenne would have been required to obtain a permanent regulatory program permit for the site, the Conservancy requested an inspection pursuant to 30 CFR 721.13 of the initial regulatory program and issuance of a Notice of Violation if the inspection confirmed the violations of 30 CFR 715.17 that it alleged. (Resp. Ex. 1 at 3-4.) Alternatively, the Conservancy stated that the permanent regulatory program provisions of 30 CFR 816.41 and 816.42 were being violated and suggested that the inspection and enforcement procedures of 30 CFR Part 842 be followed.

OSM's Charleston Field Office forwarded the Conservancy's complaint to OSM's Morgantown, West Virginia, Area Office. That office elected to send a ten-day notice to the West Virginia Division of Environmental Protection (DEP), which had become the State's regulatory authority, in accordance with 30 CFR 842.11(b)(1)(i)(B)(1) of the permanent program regulations, along with a copy of the complaint. (Resp. Ex. 2).

In response, West Virginia "agree[d] that mining at the site had been completed prior to the time it [Cheyenne] would have been required to obtain a permanent program permit. But we strongly differ with the assertion that this fact somehow negates our primacy authority under our approved program." West Virginia's response continued:

* * * [t]he complaint suggests that bond releases and termination of jurisdiction which occurred in 1983 and 1987 should now be somehow overturned by OSM, through a reassertion of jurisdiction. This would be both improper and unauthorized.

Contrary to the erroneous allegation in the complaint, the release of the performance bonds and the termination of agency jurisdiction over the site in question were indeed based on written determinations that all statutory and regulatory requirements had been complied with (see copies of bond release decision documents attached). Accordingly, the provisions for reassertion of jurisdiction as set forth in current federal regulations are applicable to OSM. * * * According to [these] rules, jurisdiction shall be reasserted only ' . . . if it is demonstrated that the written determination . . . was based upon fraud, collusion, or misrepresentation of a material fact' [30 CFR 700.11(d)(2)]. The complainant has not even alleged, much less demonstrated, that such occurred. Accordingly, OSM should not and we maintain cannot take direct action in this matter as requested by the complainant. * * *

The permit in question was issued before SMCRA was even passed. Bond release and termination of jurisdiction over permit 63-77 was granted on the basis of state policies and procedures which also pre-dated SMCRA. The rationale for the release was that the quality of water was improved in relation to the pre-mining conditions, as those conditions were affected [sic] by older pre-law abandoned mines. [The Conservancy] has not disputed these facts, or that the environment was actually improved by the operation in question.

(Resp. Ex. 3 at 1-2, 3).

West Virginia's reference to "current federal regulations * * * applicable to OSM" was to 30 CFR 700.11(d), the regulation adopted by OSM in 1988 which provides that a regulatory authority 1) may terminate its jurisdiction over a reclaimed site when it "determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed" (700.11(d)(1)(i)), and 2) must re-assert jurisdiction if it is demonstrated that the termination "was based upon fraud, collusion, or misrepresentation of a material fact" (700.11(d)(2)).

Like the 1983 bond release, the 1987 bond release document West Virginia attached to its response is based on compliance with State law:

WHEREAS, it has been made to appear to the * * * State of West Virginia that the * * * "Surface Mining" * * * for which [Permit No. 63-77] was granted has been completed and that [Cheyenne] has fully complied with the provisions of [Article 3, Chapter 22A] of the Code of West Virginia * * * and the rules and regulations promulgated and adopted pursuant to [those] sections * * *

NOW, THEREFORE, * * * the State of West Virginia * * * does hereby release [Cheyenne], the [principal of a surety bond in favor of West Virginia], and * * *, the surety of said bond, from any and all liability thereunder, and further certifies that said principal has fully complied with the provisions of the law referred to above and the rules and regulations promulgated and adopted pursuant to [those] sections * * *.

(Resp. Ex. 3).

In accordance with 30 CFR 842.11(b), OSM's Morgantown Area Office advised the West Virginia DEP that it found the State's response to the ten-day notice was "arbitrary, capricious and an abuse of discretion under the approved State program":

The State has failed to show that the discharges from the site complied with the effluent limitations set forth in Cheyenne's NPDES permit at final bond release. The State's contention that the rationale for the release was the post mining water quality had improved in relation to the pre-mining conditions appears invalid. Test results for water samples collected during the State's final site inspection indicate the water quality had worsened. Furthermore, the State's decision to release Cheyenne's performance bond and the "Colombo Amendment" as discussed do not affect the State's responsibility to take enforcement action against Cheyenne for its continued failure to meet applicable effluent limitations and water quality standards.

(Resp. Ex. 4.)

The West Virginia DEP sought informal review by the Deputy Director of OSM under 30 CFR 842.11(b)(1)(iii)(A). West Virginia stated that the "staff who inspected and regulated [Cheyenne's] site for years were and are confident that water quality was improved" when final bond release occurred:

That, along with reclamation which was in compliance, was the basis for the final release recommendation.

We do not believe the actions of this agency in the Cheyenne case were erroneous. We suggest you note, however, the results of our actions; those results include reclamation of pre-law abandoned mine lands and the improvement of water quality as a result of the mining operation in question. If OSM believes this to be an arbitrary, capricious, and/or abusive action by the state, others might believe OSM has lost sight of the intent of the Surface Mining Control and Reclamation Act.

(Resp. Ex. 5, at 2).

West Virginia also maintained that "the Columbo Amendment is a permissible provision, under SMCRA, insofar as it deals with the relationship between water quality and bond release."

The record of OSM's actions shows that the reason for its disapproval in 1985 had nothing to do with water quality. * * * [T]he pertinent federal register [notice] * * * dated July 11, 1985, describes OSM's reasoning that the provision was believed inconsistent with the federal program in that, and apparently only because, it allegedly " . . . would authorize final bond release even if revegetation has not been established in accordance with the reclamation plan, . . . " .

Id. at 3.

OSM's Morgantown Area Office explained its rationale for determining West Virginia's response inappropriate in findings accompanying a July 23, 1992, memorandum to OSM's Chief, Branch of Inspection and Enforcement:

Cheyenne has violated and continues to violate the basic hydrologic protection provisions of the Act, the implementing regulations and, to the extent applicable, the approved State program.

* * * * *

On October 19, 1981, the United States Environmental Protection Agency (EPA) issued Cheyenne a permit to discharge in accordance with the National Pollutant Discharge Elimination System (NPDES) established by the Clean Water Act, as amended, 33 U.S.C. 1251 et seq. NPDES Permit Number WV0052124 took effect on November 19, 1981, and expired on November 19, 1986. State records indicate that Cheyenne did not renew its NPDES Permit. The maximum daily discharge limitations established by this permit were as follows:

ACTIVE MINING EFFLUENT LIMITS

During the period beginning with the effective date and lasting through the expiration of the permit, the permittee is authorized to discharge from all point sources from existing or new source surface mine drainage until revegetation:

Total Iron	7.0 mg/l
Total Manganese	4.0 mg/l
Total Suspended Solids	70.0 mg/l
pH	Within the range of 6.0 to 9.0 standard units

POSTMINING EFFLUENT LIMITS

During the period beginning with commencement of revegetation and lasting through the expiration date of the permit, the permittee is authorized to discharge from all point sources from surface mine reclamation areas until bond release:

Settleable Solids	0.5 mg/l
pH	Within the range of 6.0 to 9.0 standard units

In addition, the special conditions on the permit by EPA required Cheyenne to 1) cover all acid-forming, toxic forming, or combustible material with a minimum of 4 feet of the best available nontoxic and noncombustible material in a manner so as not to cause or pose a threat of water pollution, and 2) meet an in-stream standard of 1 milligram per liter for total iron, unless it could be demonstrated that the ambient receiving stream level upstream from the mining is equal to, or greater than, 1 milligram per liter for total iron.

* * * * *

On June 13, 1986, OSM issued a ten-day notice to the State for Cheyenne's failure to meet effluent limitations at this site as required by Subsection 6B.04 of the State's permanent program regulations. Subsection 6B.04 of the State's permanent program regulations, like Subsection 7B.03 of the State's interim program regulations, requires all discharges from surface mining operations to meet the effluent limitations set forth in 40 CFR Part 434 and all applicable State and Federal water quality standards. The State's interim program regulations further provided that in no event could a discharge from a surface mining operation have a pH of less than 6.0 or greater than 9.0 and the iron could not exceed 7.0 ppm [sic]. OSM's samples indicated that discharges from sedimentation pond A had a pH of 2.96, total iron of 10.5 mg/l, and total manganese of 16.4 mg/l. Seeps from the backfilled area had pH ranging from 2.79 to 6.52, total iron from 0.52 to 19.6 mg/l, and total manganese from 2.0 to 11.6 mg/l. On June 26, 1986, the State issued a notice of violation in response to OSM's ten-day notice. The enforcement action was later terminated by the State because Cheyenne commenced treatment.

Water samples taken by the State on December 8, 1986, disclosed that a discharge from the site had a pH of 3.4, total iron of 28.1 ppm [sic], total manganese of 18.0 ppm, and total suspended solids of 41 ppm. These results indicate that Cheyenne failed to comply with the effluent limitations set forth in the State's permanent program regulations and the NPDES permit discussed above. Nevertheless, on May 29, 1987, the State released the remaining portion of Cheyenne's performance bond after finding that the company had fully complied with all permanent program requirements.

A final bond release document for Cheyenne was submitted with the State's June 11, 1992, response. However, the State has failed to submit any additional information demonstrating that discharges from the site complied with applicable effluent limitations and water quality standards. Subsection 6B.06 of the State's permanent program regulations, like Subsection 7A.02 of its interim program regulations, requires surface water monitoring of all discharges from disturbed areas after grading release. A minimum one-year history of meeting effluent limitations without treatment is required by the State in order to demonstrate that the hydrologic balance is being preserved. Since the State has failed to submit the required data and all information available to OSM indicates that the untreated discharges from the site could not comply with the required effluent limitation standards set forth in the NPDES permit discussed above and Subsection 6B.04(b) of the State's approved permanent program regulations, OSM must find the State's release of this site to be improper. * * *

As required by 30 CFR 700.11(d)(2), which was reinstated on May 11, 1992, if it is determined that these bond release actions were based upon fraud, collusion, or misrepresentation of a material fact, the State will be required to reassert its jurisdiction over this site. As provided by 30 CFR 700.11(d)([1]), a State can not terminate jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation * * * until all of the requirements of its interim or permanent regulatory program are fully met (57 FR 12461-12463) . The reference to the Federal Register is to the notice reinstating the suspended rule after it was upheld by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991). 57 FR 12461 (April 10, 1992).

^{6/} The reference to the Federal Register is to the notice reinstating the suspended rule after it was upheld by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991). 57 FR 12461 (April 10, 1992).

(Resp. Ex. 6, at 1-4).

The Morgantown Area Office also related the history of the Colombo Amendment, set forth above, concluding: “On September 5, 1985, West Virginia was advised of this action [the August 29, 1985, final rule pre-empting a portion of WVEA § 22A-3-23(c)(3)] and informed that it would have to enforce its approved program as if the preempted and superseded provisions identified in the August 29, 1985, Federal Register notice did not exist * * * . Thus, the State can not legally implement this provision.” Id. at 4-5.

On informal review, OSM’s Deputy Director affirmed the OSM Morgantown Area Office’s finding and ordered a federal inspection.

Under the West Virginia program, the decision to grant final bond release is based on a finding that all requirements of the Act, and the permit terms and conditions have been met. There is no dispute in the record that the effluent limits established under your program for the Cheyenne permit were not being met at the time of final bond release nor are they being met now. Disapproval of the Colombo Amendment on the basis of vegetation rather than water quality does not alter the fact that it has been set aside and, therefore, cannot be applied to your approved program. In any event, there is no evidence in the record adequately documenting that the postmining discharges from the permit were improved from the premining conditions at the time of final release.

(Resp. Ex. 7, at 2.)

During the August 1992 field investigation that followed, OSM found that the untreated discharges violated the effluent limitations in the NPDES program and 40 CFR Part 434. “These same acid discharges were identified during a previous OSM oversight inspection conducted on 6/13/86.” (Resp. Ex. 14).^{7/} OSM issued NOV #92-112-017-06 on August 26, 1992, listing 30 CFR 816.42 and § 38-2-14.5(b) of the West Virginia Surface Mining Reclamation Regulations as the provisions

^{7/} “Pond A remains at the southeast corner of the disturbed area of #63-77. The discharge at the Pond A outlet field tested at pH 2.8, Fe > 7.0 mg/l, Mn > 10.0 mg/l, est. flow ≈ 20-30 gal/min. * * * Another acid discharge was evident along the southern border of #63-77. This discharge flowed along remnant Ditch B and exited the disturbed area in the vicinity of reclaimed Pond B. This discharge field tested pH 3.2, Fe > 7.0 [mg/l], Mn 10.0 mg/l, est. flow ≈ 5 gal/min. * * *”

violated, and required Cheyenne to install, operate, and maintain treatment facilities so that any water discharged from the site would comply with the effluent limitations in the NPDES program and 40 CFR Part 434. (Resp. Ex. 16). When OSM inspected in November 1992, it found Cheyenne was operating adequate treatment facilities, so it terminated the NOV. The inspector noted that the “treatment measures must continue indefinitely.” (Resp. Ex. 17).

Cheyenne filed an application for review of the NOV and Administrative Law Judge Torbett held a hearing in Morgantown on November 17, 1993.

In its brief to Judge Torbett following the hearing, Cheyenne argued that OSM lacked jurisdiction to issue the NOV because jurisdiction had terminated in May 1987 when West Virginia released Cheyenne’s bond. That release was the “written determination” specified in 30 CFR 700.11(d)(1)(i) as the basis for when a regulatory authority may terminate jurisdiction over initial regulatory program sites, Cheyenne argued, as explained in the preamble to OSM’s regulation:

Where performance bonds were required, the written determination required by this rule could take the form of an approved bond release application or other document that the State regulatory authority uses to accompany final bond release, provided that the document relied upon meets the requirement of paragraph (d)(1)(i) for a written determination of compliance with the initial program standards.

(53 FR 44356, at 44359 col. 3 (Nov. 2, 1988). Brief of the Petitioner at 7-8.)

In rejecting Cheyenne’s argument that OSM lost its jurisdiction over the site in May 1987 when West Virginia released Cheyenne’s bond, Judge Torbett referred to the language of § 700.11(d)(1)(i) that a regulatory agency may terminate its jurisdiction when it “determines in writing that under the initial program, all requirements imposed under subchapter B of [Chapter 30, CFR] have been successfully completed.” Judge Torbett held:

Subchapter B of the chapter requires the Applicant to conduct surface mining operations so as to minimize water pollution and use treatment methods to control water pollution where necessary. Subchapter B also requires that discharges from areas disturbed by surface mining and reclamation meet all applicable federal and state laws and, at a minimum, meet the effluent limitations found in 30 C.F.R. § 715.17 (emphasis added). If water pollution can only be controlled by treatment, the permittee is required to maintain

treatment facilities for as long as treatment is required. 30 C.F.R. § 715.17 (1993).

Although West Virginia released Cheyenne from its bond, the State did not require the Applicant to meet all federal laws. West Virginia, at that time, only required Cheyenne to leave the water on its site in a condition “equal to or better than” premining conditions. OSM has never approved this standard and has never used it to terminate its own oversight jurisdiction.

At the time of final release, water from the Cheyenne mine site met the required pH levels of 6 to 9, but only because the water was being treated. [^{8/}] The record indicates that after final bond release, the Applicant no longer treated the water. As a result, water from

^{8/} See Resp. Ex. 14. At the hearing, OSM Inspector Funkhouser testified on cross-examination that untreated discharges must meet the effluent standards:

Q. [by Dean Hunt, Esq., for Cheyenne] One of the things you testified to is you said that the State failed to show discharges that met the effluent limitations at the time of bond release. Is that statement not inconsistent with what’s recorded on this [May 1987] inspection report and that was included in your report?

A. Yes, that would be inconsistent. However, what I meant to say is the written finding was untreated discharge[s] do not meet effluent limitations.

Q. I see. So you think – let me get this correct, that you think untreated discharges have to meet effluent limitations?

A. For final bond release based on the State if that’s what you mean.

Q. That’s from the interim regulatory program?

A. Based on the State’s [program] if that’s what you mean.

Q. Based on the Surface Mining Program?

A. That’s correct.

Tr. 39-40.

several points on the site has a pH well below the level required, as well as iron levels much higher than those allowable. Under federal law the Applicant would have been required to treat the discharge for as long as necessary to meet effluent limitations. The undersigned finds that the State's release of Cheyenne's bond did not satisfy the standards of the federal initial program which were necessary for termination of jurisdiction, and therefore, [OSM's] jurisdiction over the site was not terminated.

June 9, 1994, Decision at 11-12 (emphasis in original).

On appeal, Cheyenne argues Judge Torbett erred in ruling that jurisdiction over its site was not terminated at the time OSM issued the NOV.

Under 30 C.F.R. § 700.11(d), the state's written finding that Cheyenne met all requirements of the regulatory program terminates regulatory jurisdiction under SMCRA. * * *

Here the West Virginia regulatory program incorporated the requirements of the federal initial regulatory program, and the State of West Virginia received approval of its regulatory program effective January 21, 1981. (30 C.F.R. Sec. 948.10.) The determination accompanying the release of Cheyenne's bond on Permit No. 63-77 included a written determination that Cheyenne had fully complied with the standards of the applicable laws and regulations. * * *

Here the threshold determination is not whether the OSM or the ALJ agrees or disagrees with such a determination. Rather, the threshold determination is simply this: was such a written determination made by the regulatory authority. * * *

This is not to say that the state's finding could not be set aside under certain conditions. The conditions under which the state's finding may be set aside are in fact specified in § 700.11(d)[2]. However, OSM made no determination to reassert jurisdiction, and there was no evidence that the state's written determination was obtained by fraud, collusion or misrepresentation. Accordingly, under the provisions of 30 C.F.R. § 700.11(d), the OSM was without jurisdiction to issue NOV No. 92-112-017-06.

(Appeal Brief of the Appellant at 7, 9-10, 12 (footnote omitted; emphasis in original)).

“Cheyenne’s argument,” OSM responds, “fails to establish the key element that the bond release document satisfied the requirement that there be a written determination that there was compliance with the initial program standards. * * * The hearing established that West Virginia applied a far different water quality standard for release of a permit where the site was a remining operation.” (Brief of the Appellee at 15 (emphasis in original)).

The State, for the most part, adhered to a standard of equal to or better than premining water quality for final bond release of a remining operation when Cheyenne’s bond was released. OSM’s standards, on the other hand, required that a permittee minimize water pollution, including, at a minimum, meeting the effluent limitations for discharges for areas disturbed by surface mining operations. 30 C.F.R. § 715.17(a). Thus, the State bond release form could not be deemed to have constituted a determination that the initial program standards were met by Cheyenne and OSM’s jurisdiction, therefore, could not be deemed to have terminated.

Id.

If Cheyenne’s contention is that the State bond release determination constituted a finding that Cheyenne met Federal initial program standards for water quality, OSM argues, then it would have to be concluded that the determination was based on fraud, collusion or misrepresentation, and reassertion of jurisdiction would have been required. “[I]f an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application.” Id. at 16-17, quoting the Secretary’s brief in National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991), the decision on a challenge to the 30 CFR 700.11(d) rulemaking.^{2/} “As the Court of Appeals noted, the fundamental

^{2/} The Court of Appeals for the District of Columbia Circuit quoted the regulation:

“[T]he regulatory authority *shall* reassert jurisdiction if . . . the bond release . . . was based upon fraud, collusion, or misrepresentation.’
30 C.F.R. § 700.11(d)(2) (emphasis added).”

National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991) at 770. The
(continued...)

principle is that full reclamation is required. 950 F.2d at 770. This principle was not met here; thus, OSM's jurisdiction over the site continues." *Id.* at 17.

Our Decision in LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996)

As noted above, we suspended consideration of Cheyenne's appeal pending the outcome of review of our decision in LaRosa. In that case, OSM issued a cessation order to the company in 1992 because its failure to treat water discharges to meet effluent limitations was causing significant, imminent environmental harm downstream from its Kittle Flats minesite. Mining at the site began in 1945 and extended into the 1960's. In 1973 the State of West Virginia issued permits to

^{2/} (continued...)

Court noted:

The preamble adopts an objective standard, stating that jurisdiction must be reasserted whenever "any reasonable person could determine" that fraud, collusion or misrepresentation had occurred. 53 Fed. Reg. 44,359 (1988). The Secretary's brief not only adopts this standard but also clarifies its scope:

It is important to note in this connection that the filing of an application for bond release is in itself a representation that the operator has satisfied his reclamation obligations since an operator is not entitled to release from the bond unless he has met those obligations. . . . If an operator applies for release but has not fulfilled his obligations, he is guilty of misrepresentation by the very fact of making an application.

Brief for the Secretary at 27 n. 11. This is a reasonable way of implementing the Act's condition "[t]hat no bond shall be fully released until all reclamation requirements of this chapter are fully met." 30 U.S.C. § 1269(c)(3). The condition implies that *after* reclamation requirements are met, the bond *may* be "fully released." *Id.* When it turns out that the operator had in fact not fulfilled its reclamation obligations at the time of release, the Secretary's interpretation of "misrepresentation" ensures that jurisdiction "shall" be reasserted. 30 C.F.R. § 700.11(d)(2).

Id.

LaRosa to mine at Kittle Flats. In May 1978 the site became subject to the initial regulatory program regulations in subchapter B, Chapter VII, 30 CFR. In July 1981, LaRosa requested that West Virginia grant final release of the bonds for its Kittle Flats permits. Finding that water quality had deteriorated since LaRosa began its operations, the State denied bond release and directed the company to re-establish treatment measures. LaRosa appealed that action to the State Reclamation Board of Review. As part of the settlement of that suit, West Virginia released the bonds for LaRosa's permits in July 1984. 134 IBLA at 341.

In November 1985, OSM issued a ten-day notice to the State, alleging that LaRosa failed to maintain the effluent limitations set forth in the NPDES program. West Virginia responded that it had no jurisdiction over the site since final bond release but that it was studying the feasibility of correcting the water quality problems there under the Abandoned Mine Lands Program. OSM considered West Virginia's response was not appropriate action under 30 CFR 842.11(b)(1)(ii)(B)(1), but declined to take enforcement action based on the "inappropriate release of [LaRosa's] liability" because West Virginia had assumed liability for the site. 134 IBLA at 342.

In December 1991, the Conservancy filed a citizen's complaint with OSM and requested it issue a cessation order for imminent environmental harm because the site was in violation of the initial regulatory program requirements, including 30 CFR 715.17. OSM sent the complaint to State officials and then met with them to discuss it, at which time the Director of the West Virginia DEP "deferred to OSM." OSM inspected the site, and eventually delivered an imminent-harm cessation order to the company. 134 IBLA at 343, 350.

In his decision on LaRosa's application for review of and temporary relief from OSM's 1992 cessation order, Judge Torbett concluded that OSM had jurisdiction to issue the cessation order and that the cessation order was properly issued. 134 IBLA at 343-44.

On appeal by LaRosa, we first reviewed the question whether OSM had jurisdiction to issue the cessation order. We quoted the following language from the preamble to 30 CFR 700.11(d):

If the regulatory authority has terminated jurisdiction at sites where [OSM] has reason to believe that reclamation was not complete at the time of such termination, whether by bond release or other means, under the rule [OSM] will notify the State of possible violations (including incomplete reclamation) it believes exist at the site. Should

the State decline to reassert jurisdiction under § 700.11(d)(2), [OSM] will determine whether or not the State's decision not to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion under the approved State program.

134 IBLA at 346, quoting 53 FR 44356, 44362 (Nov. 2, 1988). This language was important, we said, because

it delineates the process by which OSM may reinvolve itself with a former minesite which would otherwise be outside its jurisdiction because it is no longer a surface coal mining and reclamation operation. Thus, where OSM has reason to believe that reclamation was not complete at the time of termination, it is required to notify the State regulatory authority of possible violations and allow the regulatory authority an opportunity to respond. If the response is that it will not reassert jurisdiction, OSM must determine whether the response is arbitrary, capricious, or an abuse of discretion.

134 IBLA at 346-47 (footnote omitted). This determination, we added, should be in writing and provide the basis for the conclusion. 134 IBLA at 347, n. 13.

We noted that West Virginia's release of LaRosa's bond "contained the language that LaRosa Fuel 'had fully complied with the provisions of the Code of West Virginia * * * and the rules and regulations promulgated and adopted pursuant to the sections of the Code of West Virginia * * *'" and that, in 1984, the West Virginia regulation "applicable for release of a permit on an initial regulatory program minesite * * * provided that [the] bond could be released if 'the quality of untreated water discharge is equal to or better than the premining water quality discharged from the mine site' * * *". 134 IBLA at 347-48.

We found that West Virginia had the authority to release LaRosa's bonds in 1984. From 1984 until 30 CFR 700.11(d) was adopted in 1988, we said, the State's release of the bond had no effect on OSM's jurisdiction "because OSM possessed independent enforcement jurisdiction over initial program sites and a State bond release had no effect on its jurisdiction," citing OSM v. Calvert & Marsh Coal Co., Inc., 95 IBLA 182, 189 (1987). Id.

Both OSM and [the Conservancy] argue that the 1988 rulemaking did not change the policy as expressed in the Calvert & Marsh case that only successful completion of reclamation according to Federal initial regulatory program standards could terminate OSM's

jurisdiction and that OSM never lost jurisdiction in this case because the site in question was not reclaimed to initial program standards at the time of bond release.

However, if, as argued by OSM and [the Conservancy], OSM never lost jurisdiction because a particular site allegedly had not been reclaimed, there would never be a need for a procedure for reassertion of jurisdiction as outlined in the 1988 rulemaking; OSM could, in its oversight role, bring enforcement actions against operators at any time, even after final bond release, just as before the rulemaking. Such a position is inconsistent with the purpose [of] the rulemaking which sought to eliminate the confusion, disagreements, and second-guessing that had developed because there was not an established point at which regulatory jurisdiction ended under the Act for both the State regulatory authority and for OSM. See 53 FR 44356 (Nov. 2, 1988); 52 FR 24092 (June 26, 1987).

134 IBLA at 349. We concluded that the State's written finding in the bond release terminated both its jurisdiction and OSM's oversight jurisdiction "whether or not OSM agreed with that determination." 134 IBLA at 350.

We found that OSM had not properly reasserted jurisdiction as described in the preamble language quoted above because it had made no finding that the State's refusal to reassert jurisdiction was arbitrary, capricious or an abuse of discretion. When OSM does make such a finding, we added, that finding must be based on OSM's factual finding that the written determination "was based on fraud, collusion, or misrepresentation of a material fact." 134 IBLA at 351.

Because we concluded OSM did not have jurisdiction to issue the cessation order, we vacated it as well as Judge Torbett's decision and remanded the case to OSM. We therefore declined to consider any other issues, including what effluent limitations would be applicable to LaRosa's site. Id.

In April 1996 OSM petitioned for reconsideration of our LaRosa decision, but we dismissed its petition as untimely under 43 CFR 4.1276. In its December 1998 Memorandum in Response to Board Order in this case, OSM again requests that we reconsider our interpretation of § 700.11(d) in LaRosa and in our earlier decision in Appolo Fuels, Inc. v. OSM, 125 IBLA 369, 100 I.D. 63 (1993).

OSM's Jurisdiction to Issue the Notice of Violation

[1] We do not find it necessary in this case to consider OSM's arguments that we reconsider our interpretation of § 700.11(d) because the circumstances are readily distinguishable from those in LaRosa. As noted above, in LaRosa we said "[u]nder the reassertion procedure, if the State declines to reassert jurisdiction following notice from OSM, OSM is required to determine whether that action by the State was 'arbitrary, capricious, or an abuse of discretion.' 53 FR 44362 (Nov. 2, 1988). * * * Moreover, when OSM does make a finding that a State's determination not to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion, that finding must be based on OSM's factual finding that the [State's] written determination was 'based on fraud, collusion or misrepresentation of a material fact.'" 134 IBLA at 351.

In this case, after issuing a ten-day notice to West Virginia, OSM did find the State's response refusing to re-assert jurisdiction was arbitrary, capricious, and an abuse of discretion. Resp. Ex. 4. The "rationale for [OSM's] inappropriate response determination on [the ten-day notice] is explained in the attached findings," i.e., the OSM Morgantown Area Office's July 23, 1992, memorandum (Resp. Ex. 6) quoted above.

Because the OSM Morgantown Area Office's findings were prepared well before our statement in LaRosa that OSM's arbitrary and capricious finding must be based on a "factual finding" that the State's written determination was based on fraud, collusion or misrepresentation of a material fact, the memorandum does not in terms contain such a factual finding. It does, however, show the Morgantown Area Office knew the final rule requires that re-assertion of jurisdiction be based on a demonstration of fraud, collusion or misrepresentation of a material fact. It also shows it knew that "misrepresentation of a material fact" replaced "intentional wrongdoing" as a basis for not considering final release of a bond by a state valid, in which case "regulatory jurisdiction would continue," 52 FR 24092, 24094, col. 2 (June 26, 1987). A finding of misrepresentation of a material fact need not be based on "evidence relating to the intent of the persons involved with the bond release proceeding" but "can be established by objective evidence relating to whether the reclamation plan was fully complied with and completed at the time of bond release, and, in certain instances, can be inferred from an examination of the site on which jurisdiction was terminated." 53 FR 44356, 44362, col. 3 (Nov. 2, 1988). The OSM Morgantown Area Office's July 23, 1992, memorandum, set forth above, provides such objective evidence, i.e., that effluent limitations were not being met without treatment at the time of bond release. In these circumstances, as the D.C. Circuit stated, supra note 9, "[w]hen it turns out that the operator had in fact not fulfilled its

reclamation obligations at the time of release, the Secretary's interpretation of 'misrepresentation' ensures that jurisdiction 'shall' be reasserted." In this case, West Virginia's release of Cheyenne's bond, based on its written determination that all the requirements imposed by Subchapter B had been successfully completed, was, in fact, a misrepresentation of a material fact.^{10/}

Therefore, although we must modify Judge Torbett's statement, written before our decision in LaRosa, that OSM's jurisdiction over Cheyenne's mine site did not terminate, we conclude that OSM had jurisdiction to issue the NOV to Cheyenne. We consider next whether it was properly issued.

Cheyenne's Discharges Were Not in Compliance with the Applicable Regulations

In the NOV it issued on August 26, 1992, OSM described the nature of the violation as "[u]ntreated discharges from the disturbed area of Permit #63-77 violate the effluent limits as set forth in the NPDES program and 40 CFR Part 434." As noted above, the NOV listed 30 CFR 816.42 and § 38-2-14.5(b) of the West Virginia Surface Mining Reclamation regulations as the provisions violated.^{11/} The outlet of

^{10/} In LaRosa, the company requested that West Virginia grant final release of its bond and the State released it before the Director of OSM had published his July 1985 finding that West Virginia's Colombo Amendment was inconsistent with section 519(c)(3) of SMCRA and "may not be implemented in any manner," 50 FR 28316 at 28319, 28322 (July 11, 1985), or the proposed rule to pre-empt and supersede that provision of State law, 50 FR 28343, 28344 (July 11, 1985). In this case, however, West Virginia recommended on July 31, 1985, that Cheyenne's application for bond release be approved -- after publication of the OSM Director's finding, and West Virginia released the bond in May 1987 -- after OSM published the final rule pre-empting and superseding the Colombo Amendment and clarified that the amendment "[could] not be implemented or enforced by any party" in August 1985. 50 FR 35082, 35084 (Aug. 29, 1985). Thus, after July 11, 1985, it was not reasonable for Cheyenne to expect that effluents as good as those before it began re-mining would be regarded as meeting the requirements of the initial regulatory program, or, after August 29, 1985, for West Virginia to believe it was authorized to release a bond based on Cheyenne's compliance with the State law provision relied upon.

^{11/} 30 CFR 816.42 is the permanent program regulation that provides that discharges from areas disturbed by surface mining "shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434."

(continued...)

Pond A and the discharge leaving the disturbed area in the vicinity of reclaimed Pond B were listed as the portions of the operation to which the NOV applied. Although Cheyenne completed removal of coal before September 22, 1982, and therefore did not apply for a permanent program permit for its site, 30 CFR 710.11(e) provides “[w]here there is a counterpart Permanent Program performance standard * * * that corresponds to an Initial Program performance standard in subchapter B * * *, meeting either performance standard will satisfy the requirements of subchapter B.” (Resp. Ex. 6, at 1). OSM cited § 816.42 because the effluent limitations differ somewhat between the permanent program regulations and the initial program regulations; in all other relevant respects, the standards are the same. (Brief of the Respondent at 20; Brief of the Appellee at 19.)

In its brief following the hearing, Cheyenne stated that 30 CFR 715.17(a) of OSM’s initial program regulations incorporated EPA’s original 1977 effluent limitations applicable to coal mining point sources. However, OSM intended to apply these effluent standards after final grading even though EPA’s regulations did not. (Brief of the Petitioner at 11). Cheyenne pointed out that in In re Surface Mining Litigation, 627 F.2d 1346, 1366-68 (1980), the U. S. Court of Appeals for the District of Columbia Circuit rejected the omission in § 715.17(a) of three variances and exemptions contained in EPA’s regulations, and that the U.S. District Court had remanded the regulation to the Secretary for revisions consistent with those EPA variances, exemptions and related practices. (Brief of the Petitioner at 13-15). From this Cheyenne concluded that “the effluent limitations applicable to Cheyenne Permit No. 63-77 are limited by and to the standards adopted by the EPA.” Id. at 17. When it revised its regulations in 1982, EPA adopted post-mining effluent limitations applicable to discharges from reclamation areas (40 CFR Part 434, Subpart E), but only until the performance bond has been released, at which time a mine becomes an

^{11/} (...continued)

Section 38-2-14.5(b) of the West Virginia Surface Mining Reclamation regulations provides:

Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations shall be governed by the standards set forth in the NPDES Program under the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et seq. and the rules and regulations promulgated thereunder. Effluent limitations are those contained in federal regulations at 40 CFR Part 434.

abandoned mine to which no EPA effluent limitations apply, Cheyenne argued. In 1992, when the NOV was issued, Cheyenne's mine was an abandoned mine, and in any event Cheyenne had ceased mining before the 1982 post-mining regulations became effective. *Id.* at 18. "Under either analysis," Cheyenne argued, "the effluent limitations alleged to be violated in [the NOV] were not, at the time of the alleged violation, applicable to the operations and site covered by Cheyenne Permit No. 63-77." *Id.* at 19.

Cheyenne also argued that no extraction of coal took place in the drainage area of Pond A after May 3, 1978, so OSM had no jurisdiction over that discharge, and that, even assuming effluent limitations were applicable to Cheyenne's operations, they would not apply to the discharge in the vicinity of reclaimed Pond B because it was a groundwater seep that disappeared into the woods, not a point source discharge to the waters of the United States. *Id.* at 19-23.

In response, OSM quoted the language of 30 CFR 715.17, "Protection of the hydrologic system," the initial program regulation that implements section 515(b)(10) of the Act, 30 U.S.C. § 1265(b)(10) (2000): ^{12/}

^{12/} Section 515(b) sets forth "[g]eneral performance standards [that are] applicable to all surface coal mining and reclamation operations" that provide minimum requirements for all operations. Section 515(b)(10) provides that the operation must:

(10) minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--

(A) avoiding acid or toxic mine drainage by such measures as, but not limited to –

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; * * *

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality * * * shall be minimized such that * * * applicable Federal and State statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flow in preference to the use of water treatment facilities. * * * If pollution can be controlled only by treatment, the permittee shall operate and maintain the necessary water-treatment facilities as long as treatment is required.

(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed areas has met the water quality requirements of this section * * * . Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations: * * *

(Emphasis supplied.) “The permanent program standards require the same,” OSM argued, citing 30 CFR §§ 816.41, 816.42, 816.45, and 800.40(c)(3). “Thus, Cheyenne was required to avoid polluting surface or ground water systems, both during and after its mining operations, and, in particular, it was to avoid acid mine drainage. If such pollution was not avoided, Cheyenne was required to treat the water for as long as required.” (Brief of the Respondent at 21; Brief of the Appellee at 20.)

Cheyenne’s site was not an abandoned mine under the EPA regulations applicable to discharges from post-mining areas, OSM argued, because 40 CFR 434.11(d), like 30 CFR 700.11(d)(1)(i), defines bond release in terms of a determination by the regulatory authority that reclamation work “has been satisfactorily completed,” which did not occur. Even if West Virginia had made such a determination, OSM would be compelled to re-assert jurisdiction because §700.11(d) fills a regulatory gap under the Federal Water Pollution Control Act and

is therefore authorized under SMCRA in accordance with the analysis in In re Surface Mining Regulation Litigation, *supra*. (Brief of the Respondent at 23-25; Brief of the Appellee at 28-31.)

OSM argued that discharges from Cheyenne's site are in violation, no matter which effluent limitations apply -- those in § 715.17(a) that include limits on iron, manganese, and pH, or, in accordance with 30 CFR 710.11(e), those in 40 CFR 434.52(a) of the EPA regulations (which are incorporated by § 816.42 of the permanent program regulations) that include only limits on settleable solids and pH. "The discharges from Cheyenne's mine site have never met the limits for any of these parameters absent treatment. The water emanating from the site is clearly polluted by any standard. It is extremely acidic and laden with iron and manganese." (Brief of the Respondent at 29-30; Brief of the Appellee at 35-36.)

Addressing Cheyenne's argument that its discharges from the vicinity of Pond B on the west side of the mine were not a point source and therefore were not subject to EPA effluent limitations, OSM responded that the discharges were sampled in a drainage ditch, which is regarded as a point source, and that, in any event, the regulations under SMCRA were not limited to point source discharges. (Brief of the Respondent at 30-31; Brief of the Appellee at 36-37.) OSM argued that even if mining on the east side of the site were complete before May 3, 1978, it was established at the hearing that reclamation-related activities that fall within the definition of surface coal mining operations took place in the drainage of Pond A after that date and, in addition, the area was used to haul coal from the west side of the mine and was therefore subject to OSM's jurisdiction. (Brief of the Respondent at 32-34; Brief of the Appellee at 37-40.)

As noted above, Judge Torbett held:

Subchapter B of the chapter requires the Applicant to conduct surface mining operations so as to minimize water pollution and use treatment methods to control water pollution where necessary. Subchapter B also requires that discharges from areas disturbed by surface mining and reclamation meet all applicable federal and state laws and, at a minimum, meet the effluent limitations found in 30 C.F.R. § 715.17 (emphasis added). If water pollution can only be controlled by treatment, the permittee is required to maintain treatment facilities for as long as treatment is required. 30 C.F.R. § 715.17 (1993).

(Decision at 11-12). “The Applicant argues that this site is governed by the Clean Water Act rather than the Surface Mining Control and Reclamation Act,” Judge Torbett continued.

However, EPA’s effluent limitations apply only to point source discharges. SMCRA is not so limited. The Act and its implementing regulations address both surface and ground water. The sampling upon which this NOV is based was done in existing ponds and drainage ditches. In addition, one of the purposes of the Act is to establish a nation-wide program to protect society from the adverse effects of surface mining. SMCRA § 102(a) 1977 [30 U.S.C. § 1202(a) (2000)]. Surface mining operations must be conducted so as to minimize the disturbances to the prevailing hydrologic balance at the site and in associated off-site areas and to the quality of water in surface and ground water systems by avoiding acid drainage. SMCRA § 515(b)(10) 1977 [30 U.S.C. § 1265(b)(10) (2000)]. The concerns addressed by Congress in passing this Act are directly at issue in this case, and the issues will be decided under the SMCRA and its regulations.

Id. at 12.

Judge Torbett found that both the eastern and western sides of the site were subject to the Act and that “[t]he record indicates that OSM’s water sampling found several sites where water chemistry failed to meet the required effluent limits. Although the western area water was of a much higher quality, one sample (17-8-26-91-1) showed an acidic pH of 3.2. Samples taken on the eastern side show water with pH levels as low as 2.8.” Id. at 13. Judge Torbett noted that Cheyenne’s witness, Dr. Streib, attributed the poor quality water sample near Pond B on the western side of the site to a former deep mine, but he held Cheyenne was responsible for it. “Water coming from the site did not meet [the] applicable federal limit. To avoid liability for [an] effluent limitation violation, the Applicant must prove that formerly mined sites were the sole cause of the violation,” Judge Torbett held, citing Innovative Development of Energy, Inc. v. OSM, 110 IBLA 119, 124 (1989), and

Cheyenne did not sustain that burden.^{13/} Id. at 14. He concluded that the NOV was properly issued.

[2] We agree that the NOV was properly issued. Even if active mining was complete on the eastern side of the site that drains into Pond A before May 3, 1978, reclamation and use of the eastern side for a haul road to transport coal mined from the western side after that date rendered the eastern side a surface coal mining operation. The record supports the conclusion that discharges from Pond A were significantly more acidic than the 6.0-9.0 pH range provided in 40 CFR 434.52(a) that is incorporated by 30 CFR 816.42 of the permanent program regulations, if applicable by virtue of 30 CFR 710.11(e), as well as in 30 CFR 715.17(a) of the initial program regulations, and these discharges also exceeded the effluent limitations for iron and manganese in § 715.17.

In addition, these discharges violated the hydrologic balance provisions of 30 CFR 715.17 and of 30 CFR 816.41, the permanent program regulation analogous to § 715.17, quoted above, that implements section 515(b)(10) of the Act.^{14/} The

^{13/} In Innovative Development we held: “The source of the contamination of the water discharged from Pond No. 1 has no bearing on the standards imposed, and allegations that the IDE [Innovative Development of Energy] operations were not the source are of no benefit to appellant in the instant case. The sediment pond was constructed pursuant to the permit and placed in a manner to achieve compliance with the requirement that discharges from a disturbed area meet the effluent limitations. These limitations apply to the discharges flowing through the pond, irrespective of the fact that the low pH water may have originated at stockpiles and an abandoned underground mine located at or near its site. Cravat Coal Co., Inc., 2 IBSMA 249, 255, 87 I.D. 416, 419 (1980). Appellant’s allegation that the low pH water originated at a nearby subdivision development was not supported by the evidence. In order to prevail in such a case, the operator must prove that the violation relates solely to drainage from an area which has not been disturbed by the permitted operations. National Mines Corp. v. OSMRE, 104 IBLA 331, 351, 95 I.D. 181, 193 (1988). Appellant clearly failed to establish this fact.” 110 IBLA at 124.

^{14/} The pertinent provisions of § 816.41 provide:

a) *General.* All surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved

(continued...)

emphasized language in both regulations is reflected in the corresponding provisions

^{14/} (...continued)

permit and the performance standards of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

* * * *

(d) *Surface-water protection.* In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter, and the following:

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.

* * * *

(f) *Acid- and toxic-forming materials.* (1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by –

(i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. * * *

(2) Storage, burial or treatment practices shall be consistent with other material handling and disposal provisions of this chapter.

of West Virginia regulations, referred to in OSM's July 23, 1992, memorandum (Resp. Ex. 6 at 3). Section 7A.02(f) of the West Virginia Surface Mining Reclamation Regulations (Department of Natural Resources, Chapter 20-6, Series VII (1978 and 1982)) provided:

After disturbed areas have been regraded and seeded in accordance with these regulations, the operator shall monitor surface water flow and quality. Data from this monitoring shall be used to demonstrate that the quality of quantity of runoff without treatment will be consistent with the requirement of this section to minimize disturbance to the prevailing hydrologic balance and with the requirements of these regulations to attain the approved postmining land use. This data shall provide a basis for approval by the director for removal of water quality or flow control systems and for determining when the requirements of this section are met. A one (1) year history of meeting effluent limitations shall be adequate for demonstrating that the water has stabilized to an acceptable level. The nature of data, frequency of collection and reporting requirements will be the same as that during the mining operation.

(Emphasis supplied.) Cf. Section 6B.06(a) 2., West Virginia Surface Mining Reclamation Regulations (Department of Natural Resources, Chapter 20-6, Series VII (1983)). The record establishes that Cheyenne's discharges were not in compliance with these standards without treatment for more than one year before its bond was released.

Similarly, the quality of the sample taken in the ditch in the vicinity of Pond B on the western side of the site violated these same standards.^{15/}

To the extent Cheyenne's arguments have not been specifically addressed, they have been considered and are rejected.

^{15/} See note 7, supra.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Torbett's June 9, 1994, decision is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Deputy Chief Administrative Judge