

WEST VIRGINIA HIGHLANDS CONSERVANCY

IBLA 95-97

Decided January 11, 2005

Appeal from a decision of Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, on informal review of the alleged failure of the Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, to take appropriate action in response to a citizen's complaint. Appeal Identification No. 94-30-LAMD (West Virginia Permit No. 15-79).

Affirmed in part and affirmed, as modified, in part.

1. Surface Mining Control and Reclamation Act of 1977:
Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

When, in response to a citizen's complaint, OSM has reasserted jurisdiction over a mine site following final bond release by the state regulatory authority and issued a notice of violation and a failure to abate cessation order for water being discharged from the disturbed areas of the site in excess of effluent limitations, it properly responds to a further complaint that it has not taken required alternative enforcement action under 30 CFR 845.15(b)(2) to ensure abatement by forwarding the matter to the Solicitor's Office for an injunctive relief referral to the U.S. Department of Justice, in accordance with established policy.

2. Surface Mining Control and Reclamation Act of 1977:
Abatement: Generally--Surface Mining Control and Reclamation

Act of 1977: Enforcement Procedures--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

OSM may not decline to take additional enforcement action to address alleged violations for failing to obtain a National Pollution Discharge Elimination System permit and to engage in periodic monitoring and reporting concerning water discharges from a mine site, based on the fact that those alleged violations are subsumed in previous enforcement actions citing the operator for discharging water in excess of effluent limitations.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, for appellant; Wayne A. Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

West Virginia Highlands Conservancy (Conservancy or WVHC) has appealed from a September 15, 1994, decision of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), issued in response to the Conservancy's April 22, 1994, request for informal review of the Charleston Field Office's (CFO's) actions relating to the Conservancy's September 17, 1992, citizen's complaint concerning LaRosa Fuel Company, Inc.'s (LaRosa's) activities on State Permit No. 15-79. He concluded that the Conservancy was correct in its assertion that CFO had not initiated alternative enforcement action pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (2000), at the time of its request, but that CFO subsequently had done so. He also declined to cite LaRosa for failure to have a National Pollution Discharge Elimination System (NPDES) permit and failure to undertake NPDES monitoring.

I. Factual and Procedural Background

The State of West Virginia issued State Permit No. 15-79 on February 14, 1979, during the Federal initial regulatory program established by section 502(c) of SMCRA, 30 U.S.C. § 1252(c) (2000), and its implementing regulations (30 CFR Chapter VII, Subchapter B). The permit covered 88.4 acres of private land in Upshur County, West Virginia. LaRosa ceased active surface coal mining operations in June 1980, after having disturbed 26.30 acres, and, following reclamation, sought a

final release of its permit bond.^{1/} On October 7, 1983, the West Virginia Department of Environmental Protection (WVDEP) (formerly Department of Natural Resources), which was the primary regulatory authority under SMCRA, released LaRosa's bond.

In its September 18, 1992, citizen's complaint, the Conservancy requested that OSM conduct a Federal inspection and take appropriate enforcement action to abate ongoing hydrologic violations, including the generation and discharge of acid mine drainage, allegedly resulting from LaRosa's operations under Permit No. 15-79.

On September 24, 1992, OSM issued a Ten-Day Notice (TDN) (No. 92-112-017-08) to WVDEP, attaching a copy of the Conservancy's complaint and stating that "the complaint alleges that acid mine drainage continues to exit the disturbed area in violation of the effluent limitations." OSM listed the State law believed to have been violated as § 38-2-14.5(b) of the West Virginia Surface Mining Reclamation regulations, a permanent program regulation.

On October 5, 1992, WVDEP declined to take enforcement action in response to the TDN, stating that "permit 15-79 was final[ly] released on October 7, 1983," in accordance with "the law and rules that existed at that time." It also asserted that OSM was not justified in reasserting jurisdiction over the mine site, because the release was not based on any "fraud, collusion, or misrepresentation of a material fact," as required by 30 CFR 700.11(d).

On October 30, 1992, CFO determined that WVDEP's response was inadequate because it had not taken appropriate action to cause the violations to be corrected nor shown good cause for its failure to do so. It informed WVDEP that it had

reason to believe that discharges from LaRosa Fuel Company, Inc. permit number 15-79 have [violated] and continue to violate hydrologic [system] protection requirements of the Federal initial regulatory program. The State has failed to show the discharges from the site complied with the effluent limitation set forth in the NPDES program at final bond release.

CFO also informed WVDEP of its right to seek informal review of the determination.

By letter dated November 10, 1992, WVDEP requested informal review of CFO's determination by the Deputy Director, Operations and Technical Services, OSM, arguing that OSM had not demonstrated that WVDEP's response was arbitrary, capricious, or an abuse of discretion. The Deputy Director responded on December 17, 1992, upholding CFO's finding and ordering a Federal inspection.

^{1/} 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.

Following a January 14, 1993, inspection, CFO issued Notice of Violation (NOV) No. 93-112-017-01 to LaRosa on January 20, 1993, stating therein that “[d]ischarges from the disturbed area of Permit #15-79 violated the effluent limitations set forth in the NPDES program and 40 CFR Part 434.” It cited § 38-2-14.5(b) and 30 CFR 816.42, as the regulations being violated. OSM required LaRosa to abate the violation on or before February 5, 1993, by installing, operating, and maintaining adequate facilities to treat any discharges so as to fully comply with effluent limitations.

Upon reinspection on February 8, 1993, CFO found that LaRosa had failed to undertake treatment measures and that the violation had not been abated. CFO issued failure to abate cessation order (FTACO) No. 93-112-017-02 on February 9, 1993, directing LaRosa to immediately install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area in order to comply with effluent limitations.

In accordance with section 525 of SMCRA, 30 U.S.C. § 1275 (2000), and 30 CFR 843.16(a), LaRosa filed applications for review of the NOV and FTACO. The Hearings Division, Office of Hearings and Appeals, docketed those applications as 93-3-R (NOV) and 93-5-R (FTACO). They are currently pending in the Hearings Division.

On April 22, 1994, pursuant to 30 CFR 842.15, the Conservancy filed with the Assistant Director, OSM, a request for informal review of “the failure of the Charleston Field Office * * * to take appropriate action” in response to the TDN issued as a result of its citizen’s complaint. (Request for Informal Review at 1.) It asserted that LaRosa had failed, and was continuing to fail, to comply with the FTACO, which was still in effect. It further stated that, given such continued noncompliance, OSM was required by 30 CFR 845.15(b)(2) to take alternative enforcement action to compel compliance and ensure that abatement of the cited violation occurred. It charged that in failing to take alternative enforcement action OSM was in violation of the regulation: “[T]o complainant[']s knowledge, no action has been taken by the C[]FO to enforce the outstanding cessation order.” *Id.* at 3. The Conservancy noted that OSM could take alternative enforcement action against LaRosa in four ways: (1) by initiating a criminal prosecution pursuant to section 518(e) of SMCRA, 30 U.S.C. § 1268(e) (2000); (2) by imposing civil penalties on LaRosa’s corporate officials pursuant to section 518(f) of SMCRA, 30 U.S.C. § 1268(f) (2000); (3) by suspending or revoking LaRosa’s permit pursuant to section 521(a)(4) of SMCRA, 30 U.S.C. § 1271(a)(4) (2000); and/or (4) by making a request to the U.S. Department of Justice to initiate a civil action in Federal court, seeking an injunction or other appropriate relief, pursuant to section 521(c) of SMCRA, 30 U.S.C. § 1271(c) (2000).

In its request for informal review, the Conservancy leveled an additional charge not previously included in its original citizen’s complaint. It stated that, by

failing to obtain an NPDES permit, as required by section 402 of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1342 (2000), and to undertake periodic monitoring and reporting, as required by section 308 of the CWA, as amended, 33 U.S.C. § 1318 (2000), with respect to point source discharges of pollutants from the disturbed areas of the mine site, LaRosa was in violation of 30 CFR 715.17(a). It asserted that OSM was required to take additional enforcement action, and specifically asked the Director to instruct CFO to issue NOV's for such violations.

On May 6, 1994, OSM reinspected the mine site, finding that untreated water that exceeded effluent limitations was still being discharged from the disturbed areas. In a memorandum dated May 9, 1994, CFO provided documentation to the Office of the Solicitor for “the injunctive relief referral [to the U.S. Department of Justice] * * * pursuant to paragraph 4. c. (1)(b) of INE-30[,] dated March 1, 1990.”^{2/} OSM provides evidence on appeal that in response to its May 9, 1994, memorandum, the Solicitor's Office sought authorization from the U.S. Department of Justice to bring a civil action against LaRosa in Federal court. That evidence, attached to OSM's answer to the Conservancy's Statement of Reasons (SOR), is a December 29, 1994, letter from the Field Solicitor's Office in Pittsburgh, Pennsylvania, to the Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., stating that it was “refer[ring] to you for your authorization the filing of a complaint for injunctive relief * * * against two individuals [James D. and James J. LaRosa] and a corporation [LaRosa Fuel Company] pursuant to section 521(c) of SMCRA.”^{3/}

In his September 1994 decision responding to the Conservancy's request for informal review, the Assistant Director informed the Conservancy that it had been

^{2/} The referenced document, INE-30, is a policy directive signed by the Acting Director, OSM, on Mar. 1, 1990, establishing the policies and procedures for implementation of 30 CFR 845.15(b)(2). It states under paragraph 4. a. at page 3: “The Directive specifies procedures for initiating the 518(e) criminal penalty, 518(f) individual civil penalty, and 521(c) injunctive relief processes. Procedures for suspension or revocation of a permit due to a pattern of violations and for actual assessment of ICP's [individual civil penalties] are addressed under separate Directives referenced in Paragraph 6.” The directive does not contain an expiration date.

^{3/} Section 521(c) of SMCRA provides, in relevant part, that the “Secretary [of the Interior] may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which the permittee thereof has his principal office, whenever such permittee * * * fails or refuses to comply with any order or decision issued by the Secretary under * * * [C]hapter [25 of Title 30 of the United States Code.]” [Emphasis added.] 30 U.S.C. § 1271(c) (2000).

correct in asserting that OSM had failed to take alternative enforcement action to compel compliance with the FTACO. However, he noted that CFO had initiated such action with its May 9, 1994, memorandum and, thus, effectively declined to take any additional alternative enforcement action pending the outcome of the referral.^{4/} See OSM Response to Order, dated May 2, 2003, at 2 (“OSM continues to believe it acted appropriately within its discretion in * * * declining to take the additional enforcement actions requested by the West Virginia Highlands Conservancy”).

The Assistant Director declined to take any enforcement action regarding the additional charges made by the Conservancy in its request for informal review. He asserted that those alleged violations were “effectively subsumed” in the existing NOV and FTACO and that “[p]rerequisite to * * * compliance [with effluent limitations] is obtaining an NPDES permit and submitting periodic monitoring reports.” (Decision at 1.) He thus held that separate enforcement actions would be “duplicative.” *Id.* He noted, however, that he was, in addition, instructing CFO to “refer this issue to the agency that administers the NPDES program in West Virginia.” *Id.*

The Conservancy filed a timely appeal of the Assistant Director’s decision. Following briefing by the Conservancy and OSM, the Conservancy filed a motion on February 12, 1998, requesting that the Board suspend consideration of this appeal pending resolution in the form of a final, unappealable order in the Conservancy’s action for judicial review of the Board’s January 30, 1996, decision in LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334, in which the Board held that OSM had not properly reasserted jurisdiction over the mine site in question prior to taking enforcement action. In response, the Board issued an order suspending consideration of the appeal pending final disposition by the U.S. Court of Appeals for the Fourth Circuit of the Conservancy’s challenge to the September 8, 1997, decision of the United States District Court for the Northern District of West Virginia in West Virginia Highlands Conservancy, Inc. v. Babbitt, No. 1:96-CV-34 (N.D. W.Va.), affirming the Board’s decision in LaRosa. On December 7, 1998, the U.S. Court of Appeals for the Fourth Circuit issued its decision in West Virginia Highlands Conservancy, Inc. v. Babbitt, reported at 161 F.3d 797. Therein, it vacated the district court’s decision and remanded the case to the district court for dismissal of the civil action. The court concluded that the matter was not ripe for review because a judicial resolution of the matter was likely to prove unnecessary because OSM was currently attempting to reassert its jurisdiction over the mine site and that, prior to a decision by OSM that it could not or would not reassert jurisdiction, the Board’s decision had not deprived the Conservancy of any rights under SMCRA.

On January 29, 1999, the Conservancy renewed its request for a stay of the proceedings, stating that it had filed a petition under 43 CFR 4.5 for Secretarial review of the Board’s decision in LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996).

^{4/} The Assistant Director also notified the Conservancy that CFO would be directed to keep it informed regarding the progress of OSM’s alternative enforcement efforts.

On March 9, 1999, the Board issued an order staying proceedings in the case pending the Secretary's resolution of the petition for review. On March 20, 2003, the Associate Solicitor, Division of General Law, issued a letter to the Conservancy informing it that the Secretary declined to take jurisdiction over the Board's January 1996 decision in LaRosa. On April 3, 2003, the Board received a copy of that letter and on April 4, 2003, issued an order offering the parties an opportunity for further briefing in the case. In response thereto, on August 6, 2003, the Conservancy submitted an unopposed motion to further stay the proceedings in this case pending issuance by the Board of a decision in Cheyenne Sales Co., Inc. v. OSM, IBLA 94-736, a case presenting issues similar to those decided in LaRosa. By order dated August 8, 2003, the Board stayed consideration of this case pending issuance of a decision by the Board in Cheyenne Sales. The Board further stated that the Conservancy would be placed on the distribution list for the decision and that it would have 30 days from receipt thereof in which to file any additional pleading in this case and OSM would have 30 days from receipt thereof in which to file any desired response. On September 2, 2004, the Board issued a decision in Cheyenne Sales Co., Inc. v. OSM, 163 IBLA 30. The parties have now completed their supplemental briefing and the appeal is ready for adjudication by the Board.^{5/}

II. Discussion

Before proceeding to adjudicate the issues presented by the Conservancy's appeal, we must note an issue that is not presently before us, *i.e.*, OSM's jurisdiction to issue the NOV and FTACO. In LaRosa Fuel Co., Inc. v. OSM, *supra*, the Board vacated an imminent harm 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 mine site (Permit No. 79-76) in 1984. 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 also held that OSM had not properly reasserted jurisdiction under 30 CFR 700.11(d), because it had made no finding that the State's refusal to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion. We added that, 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 written determination "was based on fraud, collusion or misrepresentation of a material fact." 134 IBLA at 351.

In the present case, LaRosa filed applications for review of the NOV and FTACO, therein registering challenges to OSM's jurisdiction to take such actions. Those applications remain pending in the Hearings Division and any substantive decision on those applications by the Hearings Division will be subject to appeal to

^{5/} Motions by both the Conservancy and OSM for leave to file various pleadings, which accompanied those motions, are granted and those pleadings are included as part of the record in this case.

this Board. As the Conservancy represents, “no party to this appeal challenges the propriety of OSM’s decision to reassert jurisdiction.” (Supplemental Brief, dated Sept. 20, 2004, at 2.)^{6/}

The Conservancy identifies “two issues in dispute” in this appeal. (Supplemental Brief at 2.) First, it contends that OSM wrongly refused to take effective alternative enforcement action against LaRosa. Second, it argues that OSM wrongly refused to cite LaRosa for the identified additional violations. We will consider these issues in the order presented.

A. Alternative Enforcement Action

[1] The applicable regulation, 30 CFR 845.15(b)(1) provides, in relevant part, that, when a permittee has not abated a violation within the abatement period established in the enforcement action, OSM shall assess a civil penalty of not less than \$925 for every day thereafter that the failure to abate continues, unless abatement is suspended by the Office of Hearings and Appeals (30 CFR 845.15(b)(1)(i)) or by a court (30 CFR 845.15(b)(1)(ii)). However, the penalty for failure to abate “shall not be assessed for more than 30 days for each such violation.” 30 CFR 845.15(b)(2). In addition, if the permittee has not abated the violation at the end of that 30-day time period, OSM “shall take appropriate action pursuant to section 518(e), 518(f), 521(a)(4), or 521(c) of the Act [SMCRA] * * * within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.” 30 CFR 845.15(b)(2).

Thus, it appears that 30 CFR 845.15(b) imposes two obligations on OSM if a permittee has not timely abated a violation: (1) OSM is required to assess the permittee a penalty of not less than \$925 per day for a period of 30 days, and (2) OSM is required to take alternative enforcement action if, at the end of that 30-day period, the permittee has not abated the violation. Moreover, the regulation imposes a duty on OSM to take that alternative enforcement action within 30 days of the end of the 30-day assessment period.

Under 30 CFR 845.15(b)(2), the determination concerning what action or actions to take in the face of continuing noncompliance is left to OSM’s discretion. Any exercise of discretionary authority must have a rational basis supported by facts of record so that it is not arbitrary, capricious, or an abuse of discretion. William D.

^{6/} The Conservancy asserts that it served both its notice of appeal and SOR on LaRosa. LaRosa, however, has not sought to intervene in the present proceeding. While jurisdiction is not at issue in this case, it clearly underlies the issue of alternative enforcement action, because, if it is ultimately determined by the Department that OSM did not have jurisdiction to issue the NOV or FTACO, it necessarily follows that it would not have jurisdiction to take any alternative enforcement action with respect to that violation.

Danielson, 153 IBLA 72, 74 (2000). Accordingly, in reviewing a decision issued in response to a challenge based on 30 CFR 845.15(b)(2), we must determine whether OSM had a rational basis for its action, or, instead, acted in a manner that was arbitrary, capricious, or an abuse of its discretion.

The Conservancy contends that the Assistant Director erred in concluding that CFO's referral of the matter to the Solicitor's Office was "sufficient compliance with the agency's obligation [under 30 CFR 845.15(b)(2)] to pursue alternative enforcement." (SOR at 6.) It argues that simply asking the Solicitor's Office to request the U.S. Department of Justice to initiate a civil action did not itself constitute alternative enforcement action. The Conservancy further contends that the Assistant Director erred in not directing OSM to take other alternative enforcement action, when it had become clear, 4 months after the referral, that such referral was not likely to bring about abatement of the violation cited in the FTACO, and, indeed, the Solicitor's Office had not even responded to OSM's referral. See id. at 7-8. It charges that OSM "failed either to take alternative enforcement action as required by 30 C.F.R. § 845.15(b)(2) or to inform the Conservancy that it regards alternative enforcement as futile." (SOR at 7.)

While it admits that "OSM may elect among one or any combination of actions under 30 U.S.C. §§ 1268(e), 1268(f), 1271(a)(4), or 1271(c)," the Conservancy maintains that

the bottom line is that the agency is required to take one or more of those actions to bring about abatement or else provide a reasoned assessment of why the agency feels pursuit of such relief would be futile. Because OSM has done nothing except make a pro forma referral to the Field Solicitor's Office and then allow the matter to drop, the agency remains in continuing violation of the Secretary's alternative enforcement regulations.

Id. In essence, the Conservancy argues that, having failed to obtain abatement of the violation by means of the chosen alternative enforcement action, OSM was required to take one or more of the other available actions, and could not decline to do so, absent a showing that taking such action would be futile.

The Conservancy therefore concludes that, despite the fact that the Assistant Director confirmed the errors it pointed out in its informal review request, he did not grant any relief. It asks the Board to order OSM to take alternative enforcement action to compel LaRosa to comply with the FTACO, and abate the violation concerning ongoing discharges from the disturbed areas of its mine site exceeding effluent limitations.

In the present case, the February 9, 1993, FTACO required immediate abatement of the cited violation. Therefore, the 30-day period for penalty assessment

ended on March 11, 1993. In accordance with 30 CFR 845.15(b)(2), OSM was required, within 30 days thereof, to “take appropriate action pursuant to section 518(e), 518(f), 521(a)(4), or 521(c) of [SMCRA] * * * to ensure that abatement occurs[.]” That critical 30-day period ended on April 10, 1993. OSM did not take any action pursuant to any of those four statutory provisions during that 30-day period. Rather, it was not until May 9, 1994, after the filing of the Conservancy’s April 1994 request for informal review, that OSM provided the Solicitor’s Office with information in accordance with INE-30.⁷ Thus, the Conservancy was clearly correct, when it filed its April 1994 informal review request, in asserting that “OSM has failed to take alternative enforcement action as required by 30 C.F.R. § 845.15(b)(2) to compel compliance [with the FTACO].” (Letter to OSM, dated Apr. 22, 1994, at 2.)

However, we are not now concerned with whether OSM was in violation of 30 CFR 845.15(b)(2) when the Conservancy filed its informal review request. Instead, the question is whether the Assistant Director had a rational basis for, in effect, declining to take any additional alternative enforcement action at the time he issued his September 1994 decision. At that time, OSM had initiated the steps, in accordance with INE-30, for action under section 521(c) of SMCRA.

The Conservancy discounts OSM’s rationale for declining to take other alternative enforcement action, asserting that OSM knew or had reason to know that asking the Solicitor’s Office to refer the matter to the U.S. Department of Justice was likely to be a futile effort. It claims that a Federal court had refused in an “earlier case” to grant injunctive relief “based on misgivings about OSM’s jurisdiction;” that such misgivings continued to exist; that the U.S. Department of Justice was likely to decline to file a civil action seeking injunctive relief; or that, even if it did, a Federal court was likely to deny the request for an injunction. (Reply Memorandum in Support of Supplemental Brief (Reply Memorandum), dated Oct. 14, 2004, at 2.) It contends that the violation has yet to be abated.

OSM admits that the violation has not been abated, but it argues that the Assistant Director acted reasonably in September 1994, under the circumstances, in effectively declining to take any additional enforcement action concerning the

⁷ Paragraph 4. c. (2) of INE-30, titled “Injunctive Relief Referrals for FTACO’s or IHCO’s [Imminent Harm CO’s] issued after the date of this Directive with respect to a site on which coal extraction had been completed as of the time of issuance of the FTACO or IHCO, and for any FTACO or IHCO issued prior to the date of this Directive with respect to any site” provides at subsection (a):

“Field Office Directors are responsible for tracking abatement dates and conducting mine site reinspections in order to determine the need for alternative enforcement. If the violation(s) remain unabated more than 30 days following the issuance of an FTACO * * *, the Field Office shall, within 30 days thereafter, prepare the necessary documentation and refer the case to the Solicitors’ Office for injunctive relief * * *.”

FTACO. According to OSM, “[t]he fact that DOJ [Department of Justice] declined to authorize the requested [civil] action does not alter this fact.” (Reply to Supplemental Brief, dated Oct. 5, 2004, at 1.) OSM further explained:

DOJ apparently declined to authorize pursuing injunctive relief in this case because of the jurisdictional issue existing, which stymied efforts to obtain injunctive relief against the same parties in a similar case in the same court. This lack of success in similar circumstances also has dissuaded OSM from pursuing other forms of alternative enforcement to this point as well. The case is being reviewed in light of the recent decision in *Cheyenne Sales Co., Inc. v. OSM*, 163 IBLA 30 (2004).

At the time of the Assistant Director’s September 1994 decision, OSM had taken action, albeit belatedly, in accordance with INE-30. It is clear that at that time it was reasonable for OSM to await the outcome of its referral before proceeding with any additional enforcement actions.^{8/} While 30 CFR 845.15(b)(2) mandates that some action be taken and, in fact, specifies the available alternatives, it does not dictate the sequence for such alternatives. Under paragraph 4. b. (2)(b) of INE-30, OSM established the policy that “Field Directors decide which alternative enforcement measures to implement for all FTACO’s that remain unabated more than 30 days following issuance of an FTACO * * *.” In the same subsection, it dictated, with certain exceptions not applicable here, that all FTACO’s “shall be referred to the Solicitor’s Office for injunctive relief or criminal penalties * * *.” Despite the use of the disjunctive in that subsection, it is apparent, based on the language of paragraph 4. c. (3) of INE-30, titled “Criminal Penalties,” that OSM contemplated, in certain cases, referring a case for both criminal penalties and injunctive relief. That subsection states that “[i]n particularly serious cases, in addition to injunctive relief, Field Office Directors may refer FTACO and IHCO cases to the Solicitor’s Office for criminal penalties if sufficient evidence exists of knowing or willful conduct on the part of a violator.”

INE-30 also states in the same subsection (paragraph 4. b. (2)(b)) that “subsequent to any Solicitor’s Office action on those referrals (or concurrent with those actions if so requested by the Solicitor’s Office), such CO’s shall also be referred to the Field Assessment Office Unit for possible ICP assessment * * *.” Thus, in the absence of a request by the Solicitor’s Office, referral for possible ICP assessment was to await the outcome of Solicitor’s Office action on the referrals for injunctive relief and/or criminal penalties. There is no evidence in this case that the Solicitor’s Office sought referral for possible ICP assessment upon receipt of CFO’s referral of the FTACO for injunctive relief. Nor had any action by the Solicitor’s Office been taken

^{8/} We reject the Conservancy’s assertion in its Reply Memorandum at 3 that OSM’s referral to the Solicitor’s Office was a “knowingly futile request.” OSM acted in accordance with INE-30 and, under the circumstances, it was reasonable to await the outcome of that request.

on the injunctive referral at the time of the Assistant Director's decision. Therefore, no referral for possible ICP assessment was warranted in September 1994.^{2/}

We conclude that the Assistant Director had a rational basis for, in effect, declining to take additional alternative enforcement actions in September 1994. The record shows that at the time he issued his decision OSM had proceeded in accordance with the policy directives of INE-30 by referring the matter to the Solicitor's Office for injunctive relief. The fact that the U.S. Department of Justice, at a later date, declined to approve the pursuit of an injunction does not establish any error in the Assistant Director's decision.

B. Additional Enforcement Action

We turn, therefore, to the Conservancy's contention that the Assistant Director improperly declined to take additional enforcement action. In its request for informal review, the Conservancy asserted that LaRosa had failed to maintain an NPDES permit for point source discharges from the disturbed areas of Permit No. 15-79, in violation of 30 CFR 715.17(a). It also alleged that LaRosa was in violation of 30 CFR 715.17(b) for failing to monitor and report ongoing discharges of water.

[T]he Secretary expressly required coal operators during SMCRA's initial regulatory program to meet **ALL** Federal and State laws and regulations applicable to discharges from surface coal mining and reclamation operations -- a requirement which most certainly includes the NPDES permitting requirement established in the Clean Water Act.

(Surreply Memorandum in Support of Supplemental Brief (Surreply Memorandum), dated Nov. 8, 2004, at 4.) The Conservancy states that, if OSM had any doubt whether an NPDES permit was required with respect to discharges in connection with LaRosa's operations, it should have inquired of the Federal (U.S. Environmental Protection Agency (EPA)) or State (WVDEP) agency responsible for compliance with the CWA, but could not simply decline to take any action.

In determining whether OSM should have taken additional enforcement action as alleged by the Conservancy, we first examine the action that OSM did take. In both the NOV and FTACO, OSM described the nature of the violation in this case, relating to discharges from the disturbed area, as failing to comply with the effluent limitations set forth in the NPDES program and 40 CFR Part 434. In each case, it

^{2/} The Conservancy cites no evidence that would have supported in September 1994 an action by OSM, pursuant to section 521(a)(4), 30 U.S.C. § 1271(a)(4) (2000), to suspend or revoke a permit, another alternative enforcement action listed in 30 CFR 845.15(b)(2). The state regulatory authority had released the bond for the permit in 1983.

identified § 38-2-14.5(b) of the West Virginia Surface Mining Reclamation regulations and 30 CFR 816.42 as the regulations being violated.

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. [^{10/}]

Under 30 CFR 816.42, which is a permanent program regulation, “[d]ischarges of water from areas disturbed by surface mining activities 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.”

Regulation 30 CFR 715.17(a) does not contain a specific requirement that a surface coal mining permittee obtain an NPDES permit or engage in periodic monitoring and reporting concerning discharges of water from the disturbed areas of a permitted mine site. ^{11/} Rather, it provides, in relevant part, that “[d]ischarges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations[.]” Id.

^{10/} 40 CFR Part 434 contains the regulations applicable to coal mining point source discharges that have been adopted by EPA under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1311, 1314, 1316, 1317, and 1361 (2000).

^{11/} We note that 30 CFR 715.17(b) requires surface water monitoring/reporting of discharges, in order to assess fulfillment of the hydrologic system protection requirements of 30 CFR 715.17. We do not think that this obviates the requirement of 30 CFR 715.17(a) (discussed below) to obtain an NPDES permit, when required, and then comply with the specific monitoring/reporting requirements of the CWA. In fact, 30 CFR 715.17(b) provides that, once a permit is issued, compliance with that regulation may be achieved by satisfying the equivalent monitoring/reporting requirements of the CWA, which are then applicable. See 30 CFR 715.17(b)(1)(v); 44 FR 36885, 36887 (June 22, 1979) (“[Monitoring/reporting under the NPDES program] is conditioned upon the discharges being subject to NPDES requirements”).

Two of the “applicable Federal * * * laws” are sections 308 and 402 of the CWA, which require persons discharging pollutants from point sources into waters of the United States to obtain an NPDES permit and periodically monitor and report concerning such discharges.^{12/} See generally 40 CFR Parts 122 and 123. These CWA statutory provisions were in effect at the time of LaRosa’s surface coal mining and reclamation operations under Permit No. 15-79, and have remained in effect since the State’s October 1983 final release of LaRosa’s bond.

The wording of the Assistant Director’s decision implies that LaRosa was, in fact, in violation of the requirement to have an NPDES permit and the monitoring and reporting requirement. Nonetheless, he concluded that at that time OSM was not required to take additional enforcement action because those violations were subsumed under the violation cited in the existing NOV and FTACO.

When the Assistant Director asserted that the violations stemming from failure to obtain an NPDES permit and engage in periodic monitoring and reporting are “subsumed” under the violation cited in the existing NOV and FTACO, he apparently meant that abatement of the effluent limitations violation in the NOV and FTACO would necessarily result in abatement of the NPDES permit and monitoring/reporting violations. See OSM Answer at 5 (“[I]n the normal course of events, abatement of the violation cited in the Notice of Violation would also address WVHC’s current complaints [regarding failure to obtain an NPDES permit and undertake periodic monitoring and reporting]”). That may well be true.^{13/} However, the fact remains that an effluent limitations violation and NPDES permit and monitoring/reporting violations are, as the Conservancy correctly points out, “separate” violations. (SOR at 10.)

^{12/} Section 301(a) of the CWA, as amended, 33 U.S.C. § 1311(a) (2000), also provides that the discharge of pollutants from any point source into waters of the United States, except pursuant to an NPDES permit, is unlawful. See 33 U.S.C. § 1342 (2000); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 986-91 (E.D. Wash. 1994); Hudson River Fishermen’s Association v. County of Westchester, 686 F. Supp. 1044, 1050 (S.D. N.Y. 1988).

^{13/} OSM states at page 6 of its answer that “WVHC points out that the company could institute treatment without obtaining an NPDES permit [by eliminating discharges] and that the current enforcement action could then be terminated. * * * [T]his is possible[.]” However, it is important to note that, at the time offending discharges are occurring, a permittee would be violating both the requirement to ensure that discharges meet effluent limitations and the requirements to obtain an NPDES permit and engage in periodic monitoring/reporting.

Under 30 CFR 715.17(a), which establishes specific requirements regarding discharges from areas disturbed by surface coal mining and reclamation operations, an effluent limitations violation stems from the language of the regulation requiring that such discharges “meet * * * numerical effluent limitations,” while the NPDES permit violation arises from the separate language requiring that such discharges “meet all applicable Federal and State laws and regulations[.]” Id. Monitoring/reporting requirements are found at 30 CFR 715.17(b). Further, the Conservancy is correct that the specific nature of each of the violations and the specific remedial action necessary to abate each of the violations are quite different.

Thus, the rationale offered by the Assistant Director for not citing other violations, *i.e.*, that they were subsumed in the previous NOV and FTACO citing a violation of the effluent limitations requirement, was faulty. OSM is obligated in NOV’s and CO’s to set forth with reasonable specificity the nature of the violation and the remedial action required. See 30 U.S.C. § 1271(a)(5) (2000); 30 CFR 843.11(b) and 843.12(b)(2); Turner Brothers, Inc. v. OSM, 102 IBLA 111, 123 (1988).

The Conservancy asserts that OSM’s refusal to cite LaRosa with separate violations of the NPDES permit and monitoring/reporting requirements is inconsistent with the approach that it later took in West Virginia Highlands Conservancy, 152 IBLA 158 (2000).^{14/} OSM responds, seeking to distinguish that case on the basis that it arose under the permanent, rather than the initial, regulatory program.^{15/} It asserts that the language in 30 CFR 816.42, stating that discharges “shall be made in compliance with all applicable State and Federal water quality laws and regulations,” is distinguishable from the language in 30 CFR 715.17(a), stating that discharges “must meet all applicable Federal and State laws and regulations:”

^{14/} In that case, involving an appeal from a determination of the Assistant Director affirming decisions not to issue TDNs in response to several citizen’s complaints, the Board stated that it was “the parties’ and this Board’s consensus” that allegations that certain “permittees were conducting some sort of SMCRA operations with a point source discharge and no valid NPDES permit,” constituted “‘reason to believe’ a SMCRA violation exists.” 152 IBLA at 197. In such circumstances, the Board held, OSM was obligated to presume the facts as true and issue a TDN. The Board also held that “an allegation that a bond release site has no valid NPDES permit in place does not, standing alone, constitute ‘reason to believe’ a violation exists.” Id. at 200.

^{15/} We note that, despite OSM’s attempted distinction between the language of the initial program and permanent program regulation, both the NOV and FTACO identify the violated regulations as § 38-2-14.5(b) of the West Virginia Surface Mining Reclamation regulations and 30 CFR 816.42, both permanent program regulations.

These regulations are different. * * * OSM read[s] the [initial] program regulation as narrower than the permanent program regulation, which requires compliance with all water quality laws, including permitting. The [initial program] regulation required only that the discharge meet the [performance] standards set forth. [^{16/}]

(Reply to Supplemental Brief at 2; see Response to Reply Memorandum at 2 (“The [initial] regulatory program was focused more on on-the-ground performance standards”).)

The regulatory language does not justify the narrow reading urged by OSM. Under 30 CFR 715.17(a), “[d]ischarges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations,” while under 30 CFR 816.42 the same discharges must comply with “all applicable State and Federal water quality laws and regulations.” Both regulations refer to the CWA’s implementing regulations, either in the text of the regulation (30 CFR 816.42) or in its regulatory history (30 CFR 715.17(a)). See 42 FR 62637, 62649-50 (Dec. 13, 1977); 42 FR 44919, 44921 (Sept. 7, 1977). The fact that section 502 of SMCRA, 30 U.S.C. § 1252 (2000), deferred SMCRA’s own permitting requirement until implementation of the permanent program did not constrain the Secretary from “mandating that coal operators meet applicable permitting requirements of other statutes.” (Surreply Memorandum at 4.) Thus, each regulation requires compliance with applicable provisions of the CWA, a Federal law.

Finally, OSM argues that it cannot, in any event, cite a permittee for failing to have an NPDES permit, since it cannot “compel compliance with the NPDES program,” because it has no control over whether a permit is issued, or, at least, “cannot determine that an NPDES permit is required for a discharge.” (Answer at 6; Response to Reply Memorandum at 2.) Rather, it states that such authority rests solely with the Federal (EPA) or State (WVDEP) regulatory authority responsible for compliance with the CWA. See OSM Answer at 4-5.

It does not appear that the Conservancy disagrees that the regulatory authority responsible for compliance with the CWA may make the first call on the necessity for an NPDES permit.

^{16/} The Assistant Director essentially agreed with the Conservancy’s claim that two other violations existed. His response was, however, that those violations were already covered by the existing NOV and FTACO. OSM apparently now rejects that view, asserting that any action by OSM would be premature because “OSM is not the regulatory authority for the CWA, [and] it cannot determine that an NPDES permit is required for a discharge.” (Response to Reply Memorandum, dated Oct. 28, 2004, at 2.)

To the extent that OSM or its inspector entertained good faith doubts as to whether discharges from Permit No. 15-79 actually required an NPDES permit, such doubts should have led OSM to address that question to the NPDES regulatory authority rather than refuse to take any action at all. Once the NPDES authority confirmed that the discharges in question are unlawful in the absence of a valid NPDES permit, OSM would then have had all the authority needed to order an additional inspection for the purposes of citing LaRosa Fuel for violation of 30 CFR 715.17(a).

(Surreply Memorandum at 5.)

However, the Conservancy complains: “What OSM may not lawfully do is precisely what the agency did in this case: dodge its inspection and enforcement responsibilities based upon asserted doubt concerning the need for an NPDES permit without asking the NPDES permitting authority to resolve the question.” *Id.* at 6.

Returning again to the decision at issue, the Assistant Director did not appear to entertain good faith doubts about whether or not an NPDES permit and periodic monitoring/reporting were required. Instead, he apparently believed that obtaining such a permit and engaging in such monitoring/reporting were prerequisites to compliance with the NOV and FTACO and, therefore, subsumed by them. As explained, *supra*, such a belief was mistaken. Nevertheless, he also directed CFO to “refer this issue to the agency that administers the NPDES program in West Virginia.” (Decision at 1.) By letter dated September 29, 1994, directed to the Hydrology Protection Section of WVDEP, CFO did so. It explained the situation, attached copies of the request for informal review and the Assistant Director’s decision, and requested: “Please provide us copies or advise us of what action you intend to pursue in this matter.” Thus, regardless of whether the Assistant Director entertained good faith doubts about whether the discharges in question actually required an NPDES permit, he did direct referral of the “issue” to the NPDES regulatory authority and CFO took that action. Moreover, based on the record we conclude that whether LaRosa was required, at the time of the Assistant Director’s September 1994 decision, to obtain an NPDES permit and engage in periodic monitoring/reporting were, in fact, matters of some doubt. Accordingly, the Assistant Director’s direction to refer the issue to the NPDES regulatory authority was a reasonable response to the Conservancy’s charges.

In summary, for the reasons stated above, we affirm that part of the Assistant Director’s September 1994 decision effectively declining to take any additional alternative enforcement action pending the outcome of OSM’s referral for injunctive relief, and we affirm, as modified, his response to the Conservancy’s complaints regarding an NPDES permit violation and a violation of monitoring and reporting

requirements. His conclusion that those alleged violations were subsumed in OSM's prior enforcement actions was in error. Nevertheless, under the circumstances, it was appropriate for him to refer the issue to the NPDES regulatory authority.

To the extent not addressed herein, all other arguments presented by the parties have been considered and rejected as contrary to the facts or law, or immaterial.

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 affirmed in part and affirmed, as modified, in part.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James F. Roberts
Administrative Judge