



WEST VIRGINIA HIGHLANDS CONSERVANCY

165 IBLA 395

Decided May 13, 2005

Editors Note: Appeal Filed, No. 2:06CV11 (STAMP)(N.D.W. Va), *rev'd and remanded*, [*West Virginia Highlands Conservancy, Inc. v. Kempthorne*](#), 569 F.3d 147 (4th Cir. 2009).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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WEST VIRGINIA HIGHLANDS CONSERVANCY

IBLA 95-570

Decided May 13, 2005

Appeal from decision of Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, declining to order further enforcement after 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. (West Virginia Permit No. 84-78).

Set aside and remanded.

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

Under 30 U.S.C. § 1271(a)(1) (2000), when a citizen's complaint gives OSM a reason to believe that any person is in violation of any requirement of the Surface Mining Control and Reclamation Act or any permit condition required by that Act, OSM must notify the State regulatory authority. If the State regulatory authority fails within 10 days after notification to take appropriate action to cause the violation to be corrected or to show good cause for such failure and transmit notification of its action, OSM must immediately order a Federal inspection of the surface coal mining operation at which the alleged violation is occurring.

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

Under 30 CFR 842.11(b)(1)(ii)(B)(4)(iii), the State regulatory authority's lack of jurisdiction over an alleged

violation or operation under the State program constitutes good cause for not taking enforcement action. When a State responds to a ten-day notice by stating that its release of a bond for an initial program permit prior to the adoption of 30 CFR 700.11(d) in 1988 terminated its jurisdiction over the operation and OSM desires to challenge that termination, OSM must establish, consistent with 30 CFR 700.11(d)(2), that the written determination leading to the termination of jurisdiction was based on fraud, collusion, or misrepresentation of a material fact.

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 ADMINISTRATIVE JUDGE GRANT

The West Virginia Highlands Conservancy (WVHC or appellant) has filed an appeal from the May 15, 1995, decision of the Assistant Director, Office of Surface Mining Reclamation and Enforcement (OSM), declining to order further enforcement after informal review of a decision by OSM's Charleston Field Office (CHFO) and that office's alleged failure to conduct a complete inspection and appropriate enforcement action in response to a citizen's complaint filed by WVHC. The complaint concerned acid mine drainage (AMD) from mining operations conducted under LaRosa Fuel Company (LaRosa) Permit No. 84-78. Consideration of this appeal was previously suspended as explained below.

Permit No. 84-78 was issued in 1978 to LaRosa for a surface coal mining operation that was subject to OSM's initial program regulations that became effective on May 3, 1978. See 30 CFR Chapter VII, Subchapter B. Those regulations established effluent limitations for disturbed areas that set "maximum allowable" concentrations for various pollutants, as well as an allowable "[a]verage of daily values for 30 consecutive discharge days." 30 CFR 715.17(a). To control AMD, a range for pH of 6.0 to 9.0 was established as the standard for both the "maximum allowable" and "average of daily values" limitation. Id. at n.4. LaRosa completed mining in 1979, but certain discharges from its site subsequently fell below pH 6.0.^{1/}

^{1/} In a memorandum dated Mar. 17, 1980, a copy of which was enclosed with WVHC's citizen's complaint, an OSM reclamation specialist described the results of a routine Mar. 10 inspection. Although he characterized the site as "one of the better
(continued...)

Since 1979, the State had criteria allowing bond release in certain circumstances if the post-mining discharge showed an improvement over pre-mining discharge. (Nov. 16, 1979, Memorandum to All Reclamation Personnel from James E. Pitsenbarger, Chief, Division of Reclamation, West Virginia Department of Natural Resources (DNR).)^{2/} 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,^{3/} 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.” The bond covering Permit No. 84-78 was released on October 10, 1983. (Letter of Oct. 10, 1983, from David C. Callaghan, Director, DNR, to LaRosa Fuel Company, AR behind Tab 9.)

On May 13, 1994, WVHC filed a “citizen’s complaint” (AR, Tab 1) concerning LaRosa’s Permit No. 84-78, alleging continuing violations of the hydrologic provisions of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1265(b)(10) (2000), implementing regulations, and the state program regarding AMD. On May 23, 1994, OSM issued 10-day notice (TDN) No. X-94-112-041-004 TV 1 to the State of West Virginia referencing allegations of discharges in excess of effluent limitations from Permit No. 84-78 and asserting that the permittee had failed to minimize damage to the hydrologic balance as asserted in WVHC’s complaint. (AR, Tab 2.) On June 2, 1994, the West Virginia DEP responded by letter stating that the bond was “final released” on October 10, 1983, and jurisdiction terminated at that time under West Virginia Surface Mine Regulation 38-2-1.2(c). (AR, Tab 4.) The response further stated that the release was “not based on fraud, collusion, or misrepresentation of a material fact,” and, hence, section 38-2-1.2(d) regarding reassertion of jurisdiction was not applicable.

^{1/} (...continued)

operations the inspector has visited in quite a while,” he noted that a water discharge from sedimentation pond 1 was sampled and measured a pH of 4.46, a violation of effluent limits.

^{2/} This memorandum appears in Attachment 5 to the letter of June 24, 1994, from Stephen C. Keen, Assistant Director, West Virginia Division of Environmental Protection (DEP), to James C. Blankenship, Director, CHFO. (Administrative Record (AR), Tab 7.)

^{3/} This provision was later recodified as § 22A-3-23(c)(3).

In a letter dated June 10, 1994, OSM addressed the State's response to the TDN and made the following finding:

The response to violation #1 has been determined to be arbitrary, capricious, or an abuse of discretion under the State program in that you have failed to take action to cause the violation(s) to be corrected or to show good cause for such failure. The determination that the response is inappropriate is based on the fact that OSM has reason to believe that discharges from LaRosa Fuel Company, Inc., permit number 84-78 have and continue to violate the hydrologic protection requirements of the Federal initial regulatory program and the State's approved permanent regulatory program. The State has failed to show that discharges from the site complied with the effluent limitations set forth in the [Clean Water Act's National Pollutant Discharge Elimination System (NPDES)] program at final release. The [S]tate's decision to release LaRosa's performance bond does not affect the State's responsibility to take enforcement action against LaRosa for its continued failure to meet applicable effluent limitations and water quality standards.

(AR, Tab 5.)

Subsequently, the State filed a request for informal review of this determination. (AR, Tab 6.) A detailed statement of reasons asserted, inter alia, that neither the State nor OSM could properly reassert jurisdiction over the site:

There is no dispute that the release of the performance bonds and the termination of agency jurisdiction over the site in question w[ere] based on written determinations that all statutory and regulatory requirements had been complied with. Accordingly, the provisions for reassertion of jurisdiction as set forth in current federal regulations at 30 CFR 700.11(d) are applicable to OSM. West Virginia has adopted the same provisions into our rules at CSR 38-2-1.2(c).

(AR, Tab 7, June 24, 1994, letter at 3.) The State contended that the allegations of violations of water quality were unsupported by the facts, and that "[a] careful study of water quality in 1983 at the reclaimed mine site concluded that there was no significant difference between pre-mining and post-mining quality for any parameter." Id. The State further stated that the site was in compliance with applicable effluent limitations in effect at the time of the bond release and that "bond release was granted on the basis that water quality from the reclaimed mine site was equal to or better than that which existed prior to the mining operation." Id. at 4.

On October 5, 1994, OSM's Deputy Director responded to the State's request for informal review and concluded that the State agency had not taken appropriate action and ordered a Federal inspection. (AR, Tab 8.) He rejected the various arguments raised by the State, including the argument that the bond release terminated the regulatory jurisdiction over the permit. In support, he referred to two 1992 decisions from the Hearings Division, Office of Hearings and Appeals, involving LaRosa and Cheyenne Sales Company.

An inspection was held on November 17, 1994, and four locations were sampled for pH and iron. The drainage samples from various locations showed pH between 6.0 and 9.0 for all locations. Three iron samples showed values of 3.0, 0.5, and 0.5 mg/l, but one sample showed iron at 4.0 mg/l. (AR, Tab 9.) Although this figure is below the maximum daily limit of 7.0 mg/l, it is above the 3.5 mg/l limit for the average of daily values for 30 consecutive discharge days. See 30 CFR 715.17(a). On March 10, 1995, the Morgantown Area Office informed appellant of the results of the inspection and stated that no further action would be taken on the citizen's complaint. (AR, Tab 12.)

By letter dated April 7, 1995, appellant requested informal review of the determination to take no further action. (AR, Tab 13.) Specifically, WVHC contended that the mine site remained a surface coal mining operation because no regulatory authority had made a written determination that the requirements of the initial program regulations had been met at the site. WVHC asserted that OSM erred in refusing to cite LaRosa's failure to have a NPDES permit and monitor and report discharges, citing 30 CFR 715.17(a) and (b). WVHC asserted that OSM failed to conduct a complete inspection because, after taking samples on the first day, it did not take any additional effluent samples over the next 29 days to determine compliance with monthly average limitation requirement, particularly with respect to iron. Finally, WVHC asserted that OSM erred in failing to conduct regular quarterly inspections as required under 30 CFR 842.11.

In its May 15, 1995, decision on informal review (AR, Tab 18), OSM denied that its refusal to take further action constituted a termination of jurisdiction with respect to the site. However, OSM declined to conduct further inspections to determine compliance with the monthly average effluent limitations or take further action to enforce water monitoring and reporting requirements under the NPDES program. In its decision, OSM offered the following explanation:

The requested actions raise significant issues with respect to the agency's implementation of the Clean Water Act. These Clean Water Act issues are embraced within the scope of the matters addressed in OSM's Eastern Support Center (ESC) letter dated April 18, 1995. As explained to you in that letter, OSM is deferring action at this time on

these issues to allow an opportunity for policy review and outreach. The outreach concerning enforcement of the Clean Water Act requirements had been initiated with the intent of reaching final agency positions regarding these policies within the 180-day period outlined in that letter. Thus, it would be premature for CHFO to go forward in the manner that you have requested until this process has been completed.

WVHC appealed. (AR, Tab 19.) In its Statement of Reasons (SOR), WVHC states that OSM recognizes that the site continues to be a surface coal mining operation subject to the Act, but that OSM must also take enforcement action under 30 CFR 715.17(a) whenever it discovers that a coal mine operator is discharging pollutants without a valid NPDES permit. WVHC also asserts that OSM must take enforcement action under 30 CFR 715.17(b) whenever it discovers that an operator has failed to report the results of required surface water monitoring. WVHC asserts that OSM has terminated its “policy review and outreach” on the water monitoring issue with respect to other sites, and asserts that OSM’s reliance on that policy in this appeal is inconsistent with those other cases. Finally, WVHC asserts that OSM erred in failing to investigate LaRosa’s compliance with monthly average effluent standards.

In its Answer, OSM states that it properly declined to cite LaRosa for failure to have an NPDES permit, contending that such failure is not a violation of applicable surface mining laws. OSM further contends that it properly declined to cite LaRosa for failure to perform surface water monitoring because no water monitoring plan existed for the site at the time of WVHC’s complaint. Finally, OSM contends that it properly declined to conduct further inspections to establish LaRosa’s compliance with monthly average effluent limitations because there was not a sufficient basis to believe that discharges from the site violate the standards.

In a supplemental brief, WVHC points out that in the decision under appeal, OSM refused its requests “not because the agency determined that they lacked merit, but because OSM decided to defer the requests ‘until OSM reaches closure with respect to’ an outreach and policy review process initiated in connection with” complaints against a number of West Virginia permits for which bonds were released. WVHC refers to our decision in West Virginia Highlands Conservancy, 152 IBLA 158 (2000), where we held: “the pendency of a request for programmatic relief does not excuse OSM from acting independently on inspection requests submitted pursuant to the procedures of 30 C.F.R. §§ 842.11 and 842.12.” 152 IBLA at 186. WVHC also points to OSM’s acknowledgment during its briefing in that case that failure to obtain a NPDES permit is an enforceable violation of Federal and State program rules, 152 IBLA at 196, and contends that this position cannot be reconciled with OSM’s position in the instant appeal. Finally, WVHC points out that although a sample taken as a result of OSM’s inspection showed iron effluent at 4.0 mg/l that was below the maximum daily amount, it was above the maximum average 30-day limit of 3.5.

“If the iron concentration result of a second water quality test on that discharge during the same month had duplicated, exceeded, or even fallen slightly under the initial result, the combined results would have established a violation of the monthly average limitation of 3.5 milligrams per liter.” (Supplemental Brief, 5.) WVHC contends that further sampling was required in order to determine whether the effluent satisfied the 30-day average requirement.

In considering this appeal, we must take cognizance of the fact that WVHC did not raise issues concerning LaRosa’s failure to have an NPDES permit or comply with monitoring and reporting requirements in the complaint filed on May 13, 1994, and, thus, only the issues raised in that complaint are properly before us. See Kenneth & Gwen Thompson, 144 IBLA 257, 266 (1998); Foster E. Sword, 138 IBLA 74, 80 (1997); Betty L. & Moses Tennant, 135 IBLA 217, 227 (1996).^{4/} The only issue in the appeal arising from that complaint is whether another inspection is necessary to establish compliance with monthly average effluent limitations, and we agree with WVHC that “the pendency of a request for programmatic relief does not excuse OSM from acting independently on inspection requests,” as we held in West Virginia Highlands Conservancy, 152 IBLA at 186.

Nevertheless, a threshold question of jurisdiction prevents us from reaching that issue. Both WVHC and OSM have framed their discussion of the issues in the appeal on the assumption that the State’s jurisdiction over the site did not terminate with the release of the bond in 1983. As noted above, the parties based this assumption on two decisions from the Hearings Division in cases involving LaRosa

^{4/} Issues concerning the failure to have an NPDES permit or comply with monitoring and reporting requirements were raised in another supplemental citizen’s complaint WVHC filed on Dec. 1, 1994, that concerned not only Permit No. 84-78, but other LaRosa permits, a permit issued to Cheyenne Sales Company, “as well as all other mines in the State of West Virginia” at which the State applied the Colombo amendment “to release performance bonds and thereby attempt to terminate regulatory jurisdiction.”

OSM’s Charleston Field Office responded to WVHC’s complaint on Dec. 16, 1994, as follows: “Because your letter specifically addresses program implementation issues which must be resolved prior to initiating inspections for effluent violations, we are evaluating the course of action we need to take to address your requests.” WVHC requested informal review of “the decision of the Charleston Field Office not to conduct regular federal inspections,” and by letter dated Apr. 27, 1995, OSM’s Assistant Director for Field Operations found that the Field Office had responded appropriately to WVHC’s concerns. With respect to LaRosa Permit No. 84-78, the Assistant Director referred to OSM’s inspection and stated that no violations had been found. WVHC’s appeal from OSM’s Apr. 27 decision is pending before the Board under docket number IBLA 95-554.

and Cheyenne Sales Company, but subsequent developments in those cases have made consideration of the issues raised by WVHC in this appeal premature.

On January 30, 1996, the day after OSM filed its Answer in this appeal, the Board vacated one of those Hearings Division decisions and remanded the case. LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996). That case also involved permits for which the bonds had been released by West Virginia in accordance with the policy later incorporated in the Colombo amendment that allowed bond release if discharges were better than or equal to the premining water quality discharged from the mining site. In that case, WVHC had filed a citizen's complaint, OSM had conducted an inspection and issued a cessation order (CO), and LaRosa had filed an application for review of the CO. An administrative law judge sustained the CO and found that the State's jurisdiction did not terminate upon bond release, but the Board, as stated, vacated that decision and remanded the case to OSM. In doing so, we noted that except for oversight enforcement responsibilities under 30 U.S.C. § 1271 (2000), the State is granted exclusive jurisdiction upon approval of a State regulatory program for regulation of surface coal mining and reclamation operations under both the permanent and initial programs, including authority to determine when reclamation under the initial regulatory program has been completed. 134 IBLA at 347. 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 concluded that under 30 CFR 700.11(d), 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.

Under 30 CFR 700.11(d)(2), a regulatory authority is required to reassert jurisdiction "if it is demonstrated that the bond release or written determination referred to in paragraph (d)(1) of this section was based on fraud, collusion, or misrepresentation of fact." In LaRosa, we stated:

By declining to reassert jurisdiction, a State regulatory authority, either explicitly or implicitly, makes a finding that its written determination was not based on fraud, collusion, or misrepresentation of a material fact.

Under 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). There is no evidence that OSM made such a finding in this case. Absent such a finding, there is no basis for OSM to reassert jurisdiction over a particular minesite because it is not a surface coal mining and reclamation operation.

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 written determination “was based on fraud, collusion or misrepresentation of a material fact.”

134 IBLA at 350-51. Because we concluded OSM did not have jurisdiction to issue the cessation order, we vacated it, as well as the administrative law judge’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.

WVHC sought judicial review of the Board’s LaRosa decision which was affirmed in West Virginia Highlands Conservancy, Inc. v. Babbitt, No. 1:96-CV-34 (N.D. W.Va., Sept. 8, 1997). WVHC appealed the Court’s decision, and filed a motion to suspend consideration of this and other cases docketed by the Board pending the outcome of judicial review, which WVHC believed would “either be dispositive of this appeal” or “require resolution of the legal issues in a substantially different legal context than now exists.” (Motion to Stay Proceedings, 2.) By order dated April 14, 1998, the Board suspended consideration of this appeal. On December 7, 1998, the U.S. Court of Appeals for the Fourth Circuit vacated the District Court’s decision and remanded the case to the District Court for dismissal of the civil action. West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797 (4th Cir. 1998). The court concluded that the matter was not ripe for review and that 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 WVHC of any rights under SMCRA.

On January 29, 1999, WVHC renewed its request for a stay of the proceedings in this case, 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), and the Board allowed its prior suspension to remain in effect. On March 20, 2003, the Associate Solicitor, Division of General Law, issued a letter to WVHC informing it that the Secretary declined to take jurisdiction over the Board’s January 1996 decision in LaRosa. In that letter, the Associate Solicitor observed that “LaRosa Fuel is still pending before OSM” and that “the jurisdictional issue raised in the IBLA’s 1996 decision remains pending before the IBLA in another case, Cheyenne Sales Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, IBLA No. 94-736.”

On September 2, 2004, the Board issued its decision in Cheyenne Sales Co., Inc. v. OSM, 163 IBLA 30 (2004). Although in Cheyenne OSM had requested that we reconsider the reasoning set forth in LaRosa, we found it unnecessary to do so because we found in Cheyenne that the bond release based on a “written determination that all the [reclamation] requirements * * * had been successfully completed was, in fact, a misrepresentation of material fact.” 163 IBLA at 53. In Cheyenne, we found a distinction from the LaRosa case in which the operator had requested final bond release and received the State approved bond release before the Director of OSM had published either 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 Cheyenne the bond release was made 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, we found it was not reasonable for the operator “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 * * * for West Virginia to believe it was authorized to release a bond based on Cheyenne’s compliance with the State law provision relied upon.” 163 IBLA at 53 n.10.

[1] Unlike LaRosa or Cheyenne, the jurisdictional issue in this case does not arise in the context of an appeal by the operator after enforcement action had been taken; it arises in the context of OSM’s decision not to take further action in response to a citizen’s complaint. Under 30 U.S.C. § 1271(a)(1) (2000), when a citizen’s complaint gives OSM a reason to believe that any person is in violation of any requirement of SMCRA or any permit condition required by SMCRA, OSM must notify the State regulatory authority. See Robert L. Clewell, 123 IBLA 253, 258-59, 99 I.D. 100, 104 (1992). Subsection 1271(a)(1) further provides that if the State regulatory authority fails within 10 days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action, OSM must immediately order a Federal inspection of the surface coal mining operation at which the alleged violation is occurring. Departmental regulation 30 CFR 842.11(b)(1)(ii)(B)(1) provides in part:

After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause have been met.

[2] In this case, West Virginia asserted that it did not have jurisdiction over the operation under its program because the bond had been released upon a written

determination. See 30 CFR 700.11(d)(1)(i). Generally, under 30 CFR 842.11(b)(1)(ii)(B)(4)(iii), the State regulatory authority's lack of jurisdiction over the possible violation or operation under the State program constitutes good cause for not taking enforcement action. When OSM in this case found that the bond release did not result in termination of the State's jurisdiction, it relied in part on the decision from the Hearings Division, but that decision was later vacated by the Board in LaRosa where we stated:

[I]f OSM desired to challenge the termination of regulatory jurisdiction over an initial program permit which occurred prior to the adoption of 30 CFR 700.11(d) in 1988, OSM was required to establish, consistent with 30 CFR 700.11(d)(2), that the written determination was based on fraud, collusion, or misrepresentation of a material fact.

134 IBLA at 346.^{5/}

In the decision under appeal, OSM declined to take further action not because it found that the State agency had "good cause," but because OSM, after conducting an inspection, deemed further action unnecessary. When declining to take any action to reassert jurisdiction in this case in response to the TDN, the State contended that its termination of jurisdiction was not based on fraud, collusion, or misrepresentation of a material fact. (Letter of June 2, 1994, AR, Tab 4.) In the context of this case, we must conclude the OSM inspection was premature in the absence of a determination by OSM that the decision by the State not to reassert jurisdiction was arbitrary, capricious, or an abuse of discretion based on a factual finding that the determination was based upon fraud, collusion, or misrepresentation of a material fact. See LaRosa Fuel Co., Inc. v. OSM, 134 IBLA at 350-51. Were we able to conclude on the record that the State's jurisdiction had terminated with respect to this permit and there was no basis for reasserting jurisdiction under 700.11(d)(2), we would affirm OSM's decision not to take further action on that basis without considering whether an additional inspection was necessary to establish compliance with monthly average effluent limitations.

^{5/} We referred to the following statement in the rulemaking preamble: "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 regulatory jurisdiction was arbitrary, capricious, or an abuse of discretion under the approved State program."
53 FR 44362 (Nov. 2, 1988).

In this case, however, the record is not sufficient to establish that jurisdiction terminated because West Virginia's response to the TDN contained no copy of a written determination that applicable requirements had been successfully completed as required by 30 CFR 700.11(d)(1)(i).^{6/} Furthermore, the State provided no evidence of pre-mining water quality to support its assertion that there was "no significant difference between pre-mining and post-mining quality for any parameter." (AR, Tab 7, June 24, 1994, letter at 3.) Such evidence would be relevant in determining whether there was a "misrepresentation of a material fact" that would trigger the obligation to reassert jurisdiction under 30 CFR 700.11(d)(2).^{7/}

We recognize that many years have elapsed since the release of the bond for the LaRosa site. Much of this time has involved periods of agency and judicial review in other cases of the jurisdictional principles which must be applied here. Nevertheless, bringing this matter to a proper conclusion consistent with those principles requires us to remand this case to OSM to determine whether jurisdiction terminated under 30 CFR 700.11(d)(1)(i) and whether or not a basis for reasserting jurisdiction has been established under 30 CFR 700.11(d)(2).

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 set aside and the case is remanded for further action consistent with this opinion.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

^{6/} In LaRosa, 134 IBLA at 348, we noted that the written finding was incorporated in the bond release form utilized by the State in releasing the bond. In the instant case, the record contains only a copy of the cover letter for the bond release; it does not include a copy of the bond release or any other document containing the necessary written finding.

^{7/} We note that in LaRosa, 134 IBLA at 350-51, we declined to consider what effluent limitations would be applicable to LaRosa's site.