



JOHN L. STENGER (ON RECONSIDERATION)

171 IBLA 1

Decided December 14, 2006

**Editor's Note: reversed in part and remanded to IBLA by Director, OHA, 35 OHA 48 (2007); remanded to OSM by IBLA Order (Sept. 5, 2007)**

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JOHN L. STENGER (ON RECONSIDERATION)

IBLA 2004-253R

Decided December 14, 2006

Petition for reconsideration of [John L. Stenger, 170 IBLA 206](#) (2006), concerning 10-day Notice #X03-112-014-002.

Petition granted; decision clarified.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Federal regulations define “excess spoil” simply as “spoil material disposed of in a location other than the mined-out area,” but provide one exception, *viz.*, that “spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with [30 CFR 816.102(d) and 817.102(d)] in non-steep slope areas shall not be considered excess spoil.” 30 CFR 701.5. Where OSM files a petition for reconsideration showing that two violations of the permit boundary fall under the exception, the Board will clarify that a permit is not required as to those two violations.

APPEARANCES: Steven C. Barclay, 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 HUGHES

The Office of Surface Mining Reclamation and Enforcement (OSM) has filed a request for reconsideration of the part of the Board’s decision in [John L. Stenger](#),

170 IBLA 206 (2006), that reversed OSM's finding that the West Virginia Department of Environmental Protection (WVDEP) acted appropriately by ordering United Coal Co. (United Coal) to reclaim areas where spoil had been placed outside of the permit area without also requiring United Coal to apply for a permit to place the spoil off of the permit. We held that OSM did not have the authority to retroactively waive the requirement that all placement of spoil outside the permit area must be done pursuant to a permit. OSM asks us to reconsider this conclusion in light of new information it has provided relating to the nature of the spoil placed outside of the permit area. Stenger has not responded to OSM's petition. While we grant the petition and clarify our decision, we adhere to our original holding that permits were required under State and Federal law to place spoil outside of the permit area.

United Coal operated a surface coal mine on Stenger's property pursuant to a lease with Stenger and a permit from WVDEP. At the time this action arose, United Coal had completed mining, and its activities on the site were limited to reclamation. In a citizen's complaint, John Stenger challenged several aspects of the reclamation, including the placement of spoil outside of the permit area. In response to the Ten-Day Notice issued by OSM following the citizen's complaint, WVDEP cited two Notices of Violation (NOVs) it issued to United Coal for placement of spoil off-permit dated September 17 and November 13, 2001, both of which had been "terminated" before the TDN was issued.<sup>1/</sup> A subsequent Federal inspection on July 23, 2003, revealed that WVDEP had issued an NOV on June 24, 2003, one day after it completed its TDN response, for the placement of spoil off-permit. That violation was terminated before the case reached the Board. The Federal inspector also found that United Coal had placed spoil off-permit, in addition to the spoil referred to in the previous three NOVs. However, the inspector's report stated that the spoil had been placed off-permit in response to a request from Stenger. WVDEP subsequently issued an NOV for the additional spoil placement discovered in the Federal inspection, requiring reclamation and seeding of the spoil. OSM's Beckley Area Office notified WVDEP that it had determined that this was the appropriate response to the violation. On informal review OSM's Regional Director agreed, stating that, although placement of spoil off-permit without a permit is a violation, WVDEP responded appropriately in requiring the material to be reclaimed in place.

We disagreed with the Regional Director, concluding that the spoil placed outside of the permit area was "excess spoil" and that, as such, it could be placed outside of the original permit area only pursuant to a new or amended permit. OSM now argues that we should reconsider our decision because the spoil placed outside of the permit area is not "excess spoil" within the meaning of State and Federal

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<sup>1/</sup> Under West Virginia regulations, when a violation has been successfully abated, it is recorded as "terminated." W. Va. CSR § 38-2-20.2.d. (2006).

regulations. Instead, OSM argues that such spoil should be treated as a “Surface Disturbance Off the Permit Area,” pointing out that such disturbances do not always require permitting. See 54 FR 13814, 13820 (Apr. 5, 1989).

A petition for reconsideration may be granted only in extraordinary circumstances where good reason is shown therefor. 43 CFR 4.21(d); 43 CFR 4.403; see e.g., Ulf T. Teigen (On Reconsideration), 159 IBLA 142, 144 (2003); Dugan Production Corp. (On Reconsideration), 117 IBLA 153, 154 (1990). We are generally “reluctant to grant a petition for reconsideration on the basis of new information submitted with the petition and unaccompanied by an explanation as to why it was not provided prior to the decision which the party seeks to have reconsidered.” Teigen 159 IBLA at 144. However, we have granted petitions for reconsideration where the party requesting reconsideration provides information that invalidates the premise upon which the Board’s original decision was based. See Teigen 159 IBLA at 144; Gary L. Carter (On Reconsideration), 132 IBLA 46, 48 (1995); Dugan, 117 IBLA at 154-55. Here, OSM alleges that our mis-characterization of the spoil as “excess” led us to the incorrect legal result.

OSM has provided a Mine Site Evaluation Narrative Report (Report) from a Federal inspection conducted on the site on October 13, 2006, containing additional information explaining the placement of the spoil outside of the permit area. OSM states that there are six areas where United Coal affected land outside of the permit boundary. The first two were affected during the course of mining where “backfill on preexisting benches extended beyond the permit boundary as the backfill was blended into those benches.” (Motion for Reconsideration at 2.) In September 2001 WVDEP issued an NOV for those violations that has since been terminated. The other four placements of spoil outside of the permit area were made at Stenger’s request pursuant to his lease agreement with United Coal (Report at 3-8) to fill a ravine covering approximately three acres; to cover fines and gob material left by unrelated, earlier mining on an existing bench; to create a shallow earthen ramp over a plastic gas line to gain access to the bench described above; and to create a temporary berm to assist in cleaning out a sump. (Motion for Reconsideration at 2.) OSM argues that these placements were made to accommodate Stenger, not because United Coal was unable to dispose of the spoil in the pit. Therefore, OSM argues that none of the material should be considered “excess spoil.”

We find this reasoning unpersuasive. West Virginia regulations define “excess spoil” simply as “overburden material disposed of in a location other than the pit.” W. Va. CSR § 38-2-2.47 (2006). Under that definition, all of the spoil from all six locations is “excess spoil.”

[1] Federal regulations also define “excess spoil” simply as “spoil material disposed of in a location other than the mined-out area,” but provide one exception, viz., that “spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with [30 CFR 816.102(d) and 817.102(d)] in non-steep slope areas shall not be considered excess spoil.” 30 CFR 701.5. While the first two violations of the permit boundary (those subject to the September 2001 NOV) may fall under the exception, the other four clearly do not. The map OSM has provided with its Motion for Reconsideration shows that none of the last four placements of spoil is even adjacent to the permit area. Therefore, the spoil could not be necessary to blend the mined-out area with the surrounding terrain or to achieve approximate original contour, as provided in the regulation. OSM admits as much in its description of the spoil placement and in its characterization of those placements as “a favor to Mr. Stenger, who needed it for beneficial uses” (Motion for Reconsideration at 7) that were (it is clear from OSM’s motion) plainly unrelated to “achiev[ing] the approximate original contour or to blend[ing] the mined-out area with the surrounding terrain” within the meaning of 30 CFR 701.5. That the spoil was placed off-permit pursuant to a lease and with apparently good intention does not negate the fact that it is spoil that has been placed outside of the permit area, which is the definition of “excess spoil.”

As it is “excess spoil,” we correctly applied the West Virginia regulations, Federal regulations, and language from the preamble of OSM’s 1989 rulemaking, which left unchanged the requirement for a permit to dispose of excess spoil. 54 FR at 13819. All of that authority supports our conclusion that spoil may not be placed outside of the original permit area without a permit.

The new information OSM has provided has helped us distinguish among the six violations of the permit boundaries. Based upon the information provided, it appears that the first two violations were “[s]urface disturbances off the permit” caused by “mining activities conducted within the permit” as anticipated and discussed in the preamble to the 1989 rulemaking. 54 FR at 13820. With respect to these disturbances, we clarify that, as OSM stated in its preamble, “it is not necessary to require a permit since only reclamation activities [were] conducted to correct these disturbances, because the permittee [was] required to return the land to its previous condition through abatement measures described and ordered in” the September 17, 2001, NOV issued by WVDEP. Id. With respect to the remaining four placements of spoil outside of the permit boundaries, however, the conclusion in our decision remains unchanged. These placements consist of “excess spoil” as it is defined in the West Virginia and Federal regulations, and the regulations are clear that “[t]hose sites used to dispose of excess spoil must be permitted.” Id. at 13819.

Any arguments raised by OSM not specifically addressed herein have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration is granted and our decision at 170 IBLA 206 is clarified as described above.

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David L. Hughes  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge