



AL HAMILTON CONTRACTING CO. v. OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT

172 IBLA 83

Decided August 2, 2007

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

AL HAMILTON CONTRACTING CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2002-274

Decided August 2, 2007

Appeal from a decision of Administrative Law Judge Marcel S. Greenia denying application for review of and sustaining Notices of Violation 94-121-377-01 and 95-121-377-01. CH 95-3-R and CH-95-4-R.

Affirmed in part; affirmed in part as modified.

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

OSM has authority under section 521(a) of SMCRA to enforce, on a mine-by-mine basis, any part of a State program not being enforced by that State. Where OSM has issued a 10-day notice (TDN) and the State regulatory agency has failed to take appropriate action, 30 C.F.R. § 842.11(b)(1)(ii)(B)(1) expressly requires OSM to immediately conduct a Federal inspection when its authorized representative has reason to believe that there exists a violation of SMCRA, 30 C.F.R. Chapter VII, the applicable program, or any condition of a permit or an exploration approval. An operator's only vehicle to complain about issuance of a TDN is to obtain administrative review of any resulting notice of violation (NOV) or cessation order; it is free to establish in the context of such proceeding that OSM lacked authority to issue the NOV or CO by showing that the State regulatory authority took appropriate action in response to the TDN

or offered good cause for its failure to do so. An applicant for review of an NOV has the burden under 43 C.F.R. § 4.1171(a) of establishing its defense and bears both the burden of going forward and the burden of persuasion on the issue of whether OSM overstepped its oversight authority; OSM is not required to affirmatively prove that it had authority to inspect under the TDN procedures.

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

Where OSM had reason to believe that there was a violation of applicable effluent standards, based on site investigations undertaken immediately prior to the formal inspections leading to the issuance of notices of violation; where OSM had both issued a 10-day Notice (TDN) and advised the State enforcement agency that it had revoked its determination that the State's response to an earlier TDN was appropriate; and where the State had notified OSM that it would not provide any further response to the TDN and had otherwise not responded to OSM, OSM was authorized to conduct an inspection and initiate enforcement action, unless there was some basis to find that the State had taken appropriate action either to cause the violation to be corrected or to show cause for such failure under 30 C.F.R. § 842.11(b)(1)(ii)(B).

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

Where the State agency declined to take any enforcement action following OSM's issuance of a 10-Day Notice (TDN) or its revocation of its "appropriate" determination under a previous TDN, the State's "action or response" was "arbitrary, capricious, or an abuse of discretion under the State program." As a result, the State did not take "appropriate action" to cause a violation to be corrected or establish "good cause" for failure to do so" under

30 C.F.R. § 842.11(b)(1)(ii)(B)(2) and did not take “enforcement or other action authorized under the State program to cause the violation to be corrected under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Where a violation of State effluent standards existed at the time of issuance by OSM of a TDN or revocation by OSM of its determination that the State’s response to an earlier TDN was appropriate, the terms of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i) and (iii) do not apply, and OSM is not barred from conducting an inspection and taking enforcement action.

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

Where OSM issues a 10-Day Notice citing discharges from a location not addressed in a previous enforcement action by the State, 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) does not apply with respect to the State’s failure to inspect discharges from that location, as there was no administrative or judicial order affecting those discharges. Where an effluent discharge has been previously investigated by the State agency and a State notice of violation has been issued; where that violation has been disallowed by a State review board on account of the State agency’s failure to provide sufficient evidence in proper form that the discharge was coming from the cited permit area; where neither the State review board nor reviewing court has barred the State agency from returning to the site to address ongoing acid mine drainage violations; and where OSM cites a current discharge that is ongoing and has recently re-emerged after the operator terminated abatement measures following the decision of the State review board, OSM is not barred by 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) from initiating Federal inspection and enforcement proceedings against that apparent violation, as the State agency was not precluded by a State administrative or judicial order from acting on the possible violation, and as the State review board’s decision was not “based on the” current

violation “not existing” within the meaning of the regulation, but instead on the fact that the previous violation had not been proven by sufficient evidence in sufficient form.

5. Surface Mining Control and Reclamation Act of 1977:  
Enforcement Procedures: Generally

OSM has the burden of going forward to establish a prima facie case as to the facts of the violation. A prima facie case is made when sufficient evidence is presented to establish the essential facts which, if not contradicted, will justify a finding in favor of the party presenting the case. Where there is adequate, uncontradicted evidence in the record to support an administrative law judge’s findings and conclusions that OSM met its burden of proof that acid mine drainage in excess of applicable effluent limitations resulted from an operator’s coal mining operation as alleged in the notices of violation and that the testimony of OSM hydrologists that the discharges resulted from operations occurring on the operator’s surface mining permit area was more credible than that offered to the contrary by the operator’s expert, the decision affirming the NOV’s will be affirmed.

APPEARANCES: Stephen G. Allen, Esq., Lexington, Kentucky, and Alan F. Kirk, Esq., State College, Pennsylvania, 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 HUGHES

Al Hamilton Contracting Co. (Hamilton) has appealed from the March 20, 2002, decision of Administrative Law Judge Marcel S. Greenia (CH 95-3-R and CH-95-4-R) denying its application for review of and sustaining Notices of Violation (NOV’s) 94-121-377-01 (Ex. R-89)<sup>1</sup> and 95-121-377-01 (Ex. R-101), issued to

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<sup>1</sup> The Administrative Record developed as a result of the administrative hearing before Judge Greenia is comprehensive and lengthy. We shall cite, as necessary, in the customary fashion to the exhibits (Exs.) introduced at the hearing as well as the official transcript (Tr.). Exhibits introduced by OSM (respondent’s exhibits) are  
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Hamilton by the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to relevant provisions of the Surface Mining Control and Reclamation Act (SMCRA), *as amended*, 30 U.S.C. §§ 1201 through 1328 (2000). The NOV's alleged that Hamilton had exceeded maximum allowable effluent limitations for discharges from its Caledonia Pike surface coal mine site, located in Clearfield County, Pennsylvania, into unnamed tributaries of Grimes Run and Sandy Creek.<sup>2</sup>

On appeal, Hamilton argues that Judge Greenia's decision was in error, as it failed to properly consider an "identical state enforcement action against Hamilton which absolved the company of liability for the discharges." Brief and Statement of Reasons on Appeal (SOR) at 2. Appellant also contends that Judge Greenia erred by upholding the NOV's because the Pennsylvania State Department of Environmental Resources (PADER)<sup>3</sup> took "appropriate action" so that, under provisions of SMCRA granting States primary authority to enforce SMCRA, OSM was not authorized to substitute its own judgment for that of the State. *Id.* at 2, 49.

In order to put this appeal in context, it is appropriate to set out the statutory and regulatory bases for OSM's involvement in this matter, which concerns NOV's issued by OSM for violations allegedly occurring in the State of Pennsylvania following approval of its permanent regulatory program. SMCRA is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a) (2000). Its principal regulatory and enforcement provisions are contained in Title V, 30 U.S.C. §§ 1251 through 1279 (2000), which establishes a regulatory program to achieve the purposes of the statute.<sup>4</sup> Effective July 31, 1982, the

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<sup>1</sup> (...continued)

identified herein by the preface "Ex. R-" and the exhibit number; exhibits introduced by Hamilton (applicant's exhibits) are identified by the preface "Ex. A-" and the exhibit number. Two Court exhibits were introduced at the hearing. Exhibit A (Ex. A), which sets forth the stipulated facts agreed to by the parties, is the only Court exhibit cited herein.

<sup>2</sup> The NOV's were amended for purposes of modifying abatement schedules. Exs. R-90 and 103.

<sup>3</sup> PADER was, at some point subsequent to events pertinent herein, renamed the Department of Environmental Protection.

<sup>4</sup> SMCRA provided for both an interim (or initial) regulatory program and a permanent regulatory program. 30 U.S.C. § 1251 (2000). The interim regulations implemented only a portion of SMCRA's performance standards; they were in effect in a particular State until it obtained the Secretary's approval of a permanent State

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Pennsylvania State program was conditionally approved by the Secretary. 30 C.F.R. § 938.10. On that date, PADER was deemed the regulatory authority in Pennsylvania for all surface coal mining and reclamation operations and for all exploration operations on non-Federal and non-Indian lands. *Id.* When a State program is approved, that State assumes the responsibility for issuing mining permits and enforcing the provisions of its regulatory program. *In re Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 822 (1981); *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). In accordance with section 503 of SMCRA, 30 U.S.C. § 1253 (2000), a State with an approved State program has primary responsibility for enforcing SMCRA within its borders.

However, even after a State is granted primary enforcement authority, OSM retains a significant oversight role to ensure compliance with SMCRA's mandates under 30 C.F.R. § 842.11(b)(1), considered in detail below. Thus, following its issuance of a 10-Day Notice (TDN), OSM, in its oversight role, will judge whether a State took appropriate action or demonstrated good cause for not taking enforcement action.

NOV 94-121-377-01 was issued to Hamilton on December 5, 1994, by OSM. It alleged that discharges located near unnamed tributaries of Grimes Run at the northeastern and northern sections of Hamilton's Caledonia Pike coal mine site, located in Clearfield County, Pennsylvania, exceeded the maximum allowable numerical effluent limitations for acidity (pH), iron, and manganese. Ex. R-89. NOV 95-121-377-01 was issued to Hamilton as the result of an oversight inspection by OSM Inspector Isaac E. Isaacson on February 14, 1995, and alleged that discharges from a pipe to an unnamed tributary of Sandy Creek located at the southwestern section of the Caledonia Pike mine site exceeded the maximum allowable numerical effluent limitations for pH and manganese. Ex. R-101. The NOV's cited, *inter alia*, 30 C.F.R. § 816.42,<sup>5</sup> 30 U.S.C. § 1265,<sup>6</sup> section 315 of the

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<sup>4</sup> (...continued)

regulatory program, or until the Secretary implemented a Federal program for the State. 30 C.F.R. § 710.2; *Mario L. Marcon*, 109 IBLA 213, 217 (1989).

<sup>5</sup> That permanent program regulation provides: "Discharges 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 C.F.R. § [P]art 434." Part 434 contains the regulations applicable to coal mining point source discharges that have been adopted by EPA under the Federal

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State of Pennsylvania's Clean Streams Act,<sup>7</sup> and State regulation 25 Pa. Code 87.102(a),<sup>8</sup> as well as effluent limitations specified by Hamilton's two permits for the Caledonia Pike mine site.<sup>9</sup> The validity of those NOV's is at issue in the present appeal.

There is an extensive history of State enforcement actions and administrative and judicial review prior to OSM's involvement in enforcement. The history is relevant because of Hamilton's assertions that the results of those State proceedings barred OSM from taking the action under review.

MDP 4577SM8 was issued by PADER for the Caledonia Pike mine on May 23, 1977, under interim surface mining regulations for 280 acres and was amended on November 16, 1977, to include 349.3 acres. With respect to acid mine drainage (AMD), it provides, *inter alia*, that (1) "[t]he permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than 6.0 or greater than 9.0"; (2) "[t]he permittee shall at no time discharge to

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<sup>5</sup> (...continued)

Water Pollution Control Act, 33 U.S.C. §§ 1311, 1314, 1316, 1317, and 1361 (2000).

<sup>6</sup> Section 515 of SMCRA, 30 U.S.C. § 1265 (2000), lists performance standards for the conduct of surface coal mining operations. Section 515(b)(8)(C), 30 U.S.C. § 1265(b)(8)(C) (2000), requires that water discharges from impoundments located on mine sites "will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream."

<sup>7</sup> Sec. 315 of that Act provides:

No person . . . shall . . . allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department . . . . The operation of any mine or the allowing of any discharge . . . contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department[] is hereby declared to be a nuisance.

35 P.S. § 691.315 (2004).

<sup>8</sup> State regulations found at 25 Pennsylvania Administrative Code (Pa. Code) § 87.102(a) establish certain effluent discharge limits for, *inter alia*, iron, manganese, and pH.

<sup>9</sup> Those permits are identified as Mine Drainage Permit (MDP) 4577SM8 (Ex. R-110) and Surface Mining Permit (SMP) 17773155 (Ex. R-117).

the waters of the Commonwealth mine drainage from any source containing a concentration of iron in excess of 7 milligrams per liter”; and (3) “[a]ll water, encountered during mining, shall be directed through two (2) collection basins from each point of discharge, constructed of sufficient size and in series, for treatment of all acid water to neutrality and for settling prior to discharge to the receiving stream.” Ex. R-110 (“Standard Conditions Accompanying Permits Authorizing the Operation of Coal Mines”) at ¶¶ 10, 11, and 18, respectively.

SMP 17773155 was issued for 142.6 acres on May 11, 1984, under Pennsylvania permanent program standards. Ex. R-117. It superseded MDP 4577SM8, except for certain permits authorizing reclamation activities at the Caledonia Pike mine site that were reissued under the provisions of MDP 4577SM8. See Ex. R-117, Part B, ¶ 5. The SMP authorized discharge, subject to restrictions, from facilities to two unnamed tributaries of Sandy Creek and Grimes Run to Mosquito Creek (Ex. R-117) and established effluent limitations for mine drainage treatment facilities at the following concentrations (mg/l):

<u>Discharge Parameter</u>	<u>Average Monthly</u>	<u>Maximum Daily</u>
Iron	3.0	6.0
Manganese	2.0	4.0

The standard for pH was set at not less than 6.0 standard units nor greater than 9.0 standard units at all times. Ex. R-117 at Part A.

AMD flowing into unnamed tributaries of Grimes Run located to the north and northeast of the Caledonia Pike mine site had occurred over a period of years since July 1981, engendering various enforcement efforts by PADER and OSM officials. Ex. A ¶¶ 3-16, 18-22. Inspections by PADER in 1981 and 1982 led to implementation of an abatement plan by Hamilton that proved unsuccessful. Ex. A ¶¶ 3-9. In 1987, PADER required Hamilton to submit a new abatement plan, and, in January 1988, Hamilton proposed to “construct wetlands in areas occupied by beaver ponds in each unnamed tributary to Grimes Run draining the Caledonia Pike mine site for passive treatment of drainage from the site, while conducting a study to identify ‘hot spots’ within the reclaimed surface mine spoils” to determine additional necessary abatement practices. Ex. A ¶ 10.

On February 22, 1988, PADER issued Compliance Order 88H008 to Hamilton for allowing water discharges from its mine site in violation of the applicable effluent limitations and the State code.<sup>10</sup> Ex. A ¶ 11; Ex. R-10. Those discharges were

<sup>10</sup> Although the parties stipulated that PADER’s action was taken “in response to OSM oversight” (Ex. A ¶ 11), we find in the record no TDN issued by OSM prior to

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depicted in the PADER Compliance Order as coming from locations along the east side of the permitted area; the depicted topography would suggest that they drained toward Grimes Run. Ex. R-10 at 6. PADER identified six discharge areas that it contended “are either on or hydrogeologically connected to the site.” In addition, PADER cited Hamilton for failure to properly design, construct, and maintain adequate treatment ponds and facilities and failure to properly maintain sedimentation ponds. Ex. A-3 (*Opinion and Order sur Motion to Sustain Appeal*, [PAEHB] Docket No. 88-113-W (Dec. 24, 1992) at 1749. The Compliance Order required formulation and implementation of a plan for treatment of all discharges from areas disturbed by mining that are in violation of effluent standards. Ex. R-10 at 5. Hamilton appealed that order to the State Environmental Hearing Board (PAEHB). Ex. A ¶ 12; Ex. R-41.

Despite appealing, in April 1988, Hamilton proposed a compliance plan for both interim and permanent abatement which relied on the passive treatment of discharges via “wetlands” constructed below the discharge areas identified in Compliance Order 88H008. Ex. A ¶ 13. In May 1988, in response to PADER’s notice that the proposed compliance plan was inadequate, Hamilton proposed an interim plan to collect the drainage from the Caledonia Pike mine site in existing “beaver ponds” in each of the unnamed tributaries to Grimes Run, and then to pump the water collected there to “treatment facilities constructed on the mine site for chemical treatment before release further downstream” in the Grimes Run tributaries. Ex. A ¶ 14. The interim plan was approved by PADER on May 11, 1988. Ex. A ¶ 15; Ex. R-29 at 2. In a letter dated August 1, 1988, PADER approved the technical aspects of Hamilton’s permanent abatement proposal. Ex. R-41.<sup>11</sup>

On September 20, 1988, OSM issued TDN 88-121-377-03 to PADER, citing a citizen complaint (CC-PA-JOH-I&E-80-063) for an inspection giving reason to believe that a violation exists, including an allegation that the pH of the effluent was 3.9. Exs. R-1, -29, and -38. A joint OSM/PADER inspection on September 29, 1988, followed, revealing that, although Hamilton was treating the AMD chemically as proposed, the beaver ponds were “leaking at their bases”; further, they were located off the permit area, so that Hamilton was effectively conducting surface coal mining activities outside the boundaries of its permit. Ex. A ¶ 18 and Ex. R-3. According to

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<sup>10</sup> (...continued)

that action. However, the record does contain a copy of a report from a Jan. 27, 1988, inspection conducted jointly by PADER and OSM. That report refers to “TDN 87-121-148-21,” which does not appear in the record, so far as we can determine.

<sup>11</sup> There is little documentation in the record concerning that action or the submission of any permanent plan to PADER.

OSM, the inspection showed that Hamilton allowed untreated discharges not meeting effluent standards to flow into both the southern and western branches of Grimes Run. Ex. R-29. According to the OSM inspector, the State inspectors stated that they would not “write the violations,” since “the paperwork had been put in to bond the area and mine within 100 [feet] of [the] stream.” Exs. R-3 at 5 and R-29 at 2. OSM subsequently indicated that the State inspector “declined to take a sample of the untreated discharge” during the inspection. Ex. R-30.

On October 4, 1988, PADER sent its response to TDN 88-121-377-03 to OSM. PADER indicated simply that it would “continue to monitor the discharge and treatment facilities on this site to ensure compliance.” Ex. R-1. On October 13, 1988, OSM advised PADER that the State had not taken appropriate action and that its response was inappropriate, as arbitrary and capricious, not by reason or law, and an abuse of discretion. OSM noted that both the PADER inspector and his supervisor were aware of the seepage from the two sumps/dams in the stream but failed to address the problem. Ex. R-19 at 2. The letter noted that the September 29, 1988, “inspection showed that [Hamilton] allowed untreated discharges not meeting effluent standards to flow into both the southern and western branches of Grimes Run,” and that, although PADER had approved the use of beaver dams as sumps,<sup>12</sup> those dams were leaking at their bases, allowing untreated water to continue down the branches of Grimes Run. *Id.* at 1.<sup>13</sup>

By letter dated October 21, 1988, PADER notified Hamilton that, due to untreated leakage from the beaver dam sumps, the “satisfactory progress” status<sup>14</sup> of the initial violation had been withdrawn. Exs. R-20 and -21. As a result, PADER

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<sup>12</sup> In that process, Hamilton “utiliz[ed] beaver dam ponds to collect mine drainage,” and the “water [was] pumped from the ponds to a treatment facility and, after treatment, [was] discharged to the stream at a point about 700 feet downstream.” Ex. R

<sup>13</sup> Meanwhile, on Oct. 3, 1988, OSM Inspector Isaacson had issued an additional TDN to PADER, No. 88-121-377-05, alleging that the operator was conducting surface coal mining activities off its permitted area and within 100 feet of a stream. Ex. A ¶ 19; Ex. R-17. PADER responded to TDN 88-121-377-05 on Oct. 19, 1988, noting that permitting and bonding revisions were underway and would be completed very soon. Hamilton’s permit was subsequently corrected to include the “beaver dam impoundments used to collect drainage from the mine site.” Ex. A ¶ 21. By letter dated Nov. 9, 1988, OSM advised PADER that its response to TDN 88-121-377-05 was considered “appropriate action.” Ex. R

<sup>14</sup> That may refer to Hamilton’s efforts to establish a compliance plan between May and August 1988.

considered Hamilton to be in violation of the requirements of Compliance Order 88H008, evidently still in effect although under appeal at that time. Exs. R-21 and -24. Although on November 9, 1988, PADER indicated that Hamilton had, to that time, demonstrated a good faith effort toward compliance with that order, it was required to “collect all drainage subject to” that compliance order by November 28, 1988, and to submit an acceptable bond “to permit the areas affected by [Hamilton’s] abatement activities” by that date, on pain of receiving a State “Cease Order” and associated civil penalties. Ex. R-27. A bond was timely filed. Ex. R-28. On November 23, 1988, OSM observed that the “actions taken to date by [PADER] will cause the violation to be corrected” and recommended that its response to TDN 88-121-377-03 should be determined to be “appropriate.” Ex. R-31.

An inspection on December 1, 1988, revealed that the “sumps/pond-beaver dams” were still leaking at their bases. The PADER supervisor stated that, due to the uncertainty regarding the source of the effluent below the southern and western beaver pond sumps, PADER was going to require Hamilton to conduct a hydrologic study of the entire area. Ex. R-32. On December 15, 1988, PADER advised OSM that “[r]ecent field evaluation by our technical staff has failed to determine the specific source of water emerging in the stream channels below both ‘beaver dams.’ We are therefore unable to determine that a violation exists and are returning the company to a satisfactory progress status.” Ex. R-33.

An inspection on February 2, 1989, revealed the site to be unchanged; no hydrological report had been completed at that time. Ex. R-34. On February 7, 1989, PADER issued an order requiring Hamilton to prepare a groundwater study. Ex. R-35.

In April 1989 OSM issued another determination that PADER’s response to TDN 88-121-377-03 was appropriate. Exs. R-37, -38, and -39. OSM advised the party filing the citizen’s complaint that it would continue to monitor PADER’s enforcement action. Ex. R-39.

In a letter dated September 22, 1989, PADER noted that no work had been done by Hamilton on the approved permanent system required by Compliance Order 88H008, which evidently remained in effect although under appeal. Ex. R-41. PADER requested that Hamilton submit a schedule for the implementation of the approved abatement plan and initiate reclamation activities pursuant to it, on pain of initiation of enforcement action against it. *Id.* Hamilton submitted such schedule on October 11, 1989, indicating that “wetland construction is now proposed to begin in April, 1990,” and PADER approved that schedule, subject to the condition that a portion of the work on the construction commence in November 1989. Ex. R-43.

On June 15, 1990, Hamilton notified PADER that it did “not intend to construct a wetland as previously proposed.” It advised that, instead, it was “treating the six discharges cited in Compliance Order #88H008, as well as considerable volumes of flow exceeding the burden of treatment required by the Compliance Order,” by intercepting all waters at the collection sumps and treating them to meet effluent standards. Hamilton attached a revised plan for treatment of the discharges cited in Compliance Order 88H008. Ex. R-44. PADER responded on June 27, 1990, that this submission was inadequate and not acceptable to PADER, and that Hamilton remained in violation. PADER advised that the treatment plan could not be modified without its approval. Still, PADER seemed to condone the change in approach to chemical treatment, requiring Hamilton to submit more specific details of that plan and operation and maintenance of such system and maps showing the layout of the treatment facility. Ex. R-45. On July 23, 1990, Hamilton reiterated its decision to abandon the construction of the wetland and submitted details for collection and chemical treatment of water. Ex. R-46. PADER advised on August 17, 1990, that it did not consider the system to be an acceptable permanent treatment system, but merely a description of the interim chemical treatment system currently in place, which it also did not consider to be acceptable. PADER advised that Hamilton remained “in violation status.” Ex. R-47. On August 30, 1990, Hamilton defended the adequacy of its treatment facilities, asserting that no water from the cited discharges had escaped the collection sumps and that water had been consistently treated to meet the State effluent limits. It attached a treatment plan modified to provide more detail in sludge disposal. Ex. R-48. A second letter dated September 19, 1990, and attachments elaborated on the operation and maintenance of the system. Ex. R-49. Ultimately, on November 14, 1990, PADER approved “the system as an acceptable permanent chemical treatment system on the condition that [Hamilton] notify [it] of the first sludge disposal activities.” Ex. R-50.

In the meantime, in September and October 1990, PAEHB conducted a hearing related to Compliance Order 88H008. Following the hearing, PAEHB issued many rulings on the matter, concluding that PADER failed to prove that any discharges of mine drainage were located within the boundaries of Hamilton’s permitted area or were hydrogeologically connected to Hamilton’s mining activities.

First, by Order dated October 29, 1992, PAEHB ruled inadmissible into evidence a copy of a topographical map from Hamilton’s State mine drainage permit (MDP) application. PADER, the proponent of admission of the map, contended that the map represented the boundaries of Hamilton’s Caledonia Pike MDP, the structure contours of the underlying Middle Kittanning coal seam, and the six discharge areas that were the subject of PADER’s compliance order. In finding the copy of the permit map tendered by PADER inadmissible, PAEHB cited (1) the “best evidence rule [applying] to documentary evidence such as a photocopy of [an MDP] application

map when it is being offered as proof or evidence of a material fact,” ruling that a “photocopy is admissible into evidence only when its proponent has offered a satisfactory excuse for the absence of the original and the photocopy satisfies the requirements of Uniform Photographic Copies of Business and Public Records as Evidence Act, and (2) the “*Frye* test for the admissibility of scientific evidence [applying] to structure contour lines on a map if those lines were generated by a computer and are being offered as substantive evidence,” noting that “the proponent must establish that the method of producing the structure contour lines is generally accepted within the relevant scientific field.” PAEHB held that the copy of the map tendered by PADER was “inadmissible under the best evidence rule” and, “[f]urthermore, [that] the structure contour markings on” the copy of the map “that represent the topography of the Middle Kittanning coal seal prior to Hamilton’s operations [were] inadmissible because they do not satisfy the *Frye* test governing the admission of scientific evidence.” Ex. A-2 (*Opinion and Order sur Objection to the Admission of Exhibit C-10 as Evidence*, [PAEHB] Docket No. 88-113-W (Oct. 29, 1992)) at 1375; Ex. A-4 (*Opinion and Order sur [PADER’s] Application for Reconsideration*, [PAEHB] Docket No. 88-113-W (Apr. 1, 1992)).

Second, on December 24, 1992, PAEHB ruled that PADER had failed to present a *prima facie* case of Hamilton’s liability for the violations cited in Compliance Order No. 88-113-W insofar as it addressed discharges from five of the six discharge areas. Ex. A-3 (*Opinion and Order sur Motion to Sustain Appeal*, [PAEHB] Docket No. 88-113-W (Dec. 24, 1992)) at 1747; Ex. A-5 (*Adjudication*, [PAEHB] Docket No. 88-113-W (July 24, 1994)) at 1082. PAEHB ruled that, although there was ample evidence showing that discharges from those areas violated State effluent limitations, PADER had not presented evidence showing that Hamilton was liable for that AMD. Ex. A-3 at 1751. PAEHB made it clear that, largely because of the inadmissibility of the copy of the topographical map from Hamilton’s State MDP application, PADER had failed to provide proof that those “discharges are either located within [Hamilton’s] permitted area or hydrogeologically connected to [its] mining operations.” Ex. A-3 at 1751 and 1754; *see also* Ex. A-5 at 1082 (“[PADER] failed to prove the discharges were located within the area encompassed by [Hamilton’s permit] because it did not introduce into evidence a map showing the boundaries of that permit.”)<sup>15</sup> PAEHB adopted the December 24, 1992, *Opinion and*

<sup>15</sup> In its Dec. 24, 1992, Order, PAEHB declined to hold that Hamilton failed to adequately monitor groundwater, principally because it felt that, “even if Hamilton was aware of [the AMDs], it was under no duty to correct them,” undoubtedly because of the lack of proof that the AMD emanated from its permit area. Ex. A-3 at 1755.

PAEHB also ruled in its Dec. 24, 1992, Order, that a *prima facie* case of liability had been established as to the sixth discharge, which was “emanating from

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*Order sur Motion to Sustain Appeal* and affirmed the action taken therein in an April 1, 1993, *Opinion*. Ex. A-4; see Ex. A-5 at 1077.

PADER appealed the PAEHB's ruling to the Commonwealth Court of Pennsylvania. Ex. A ¶ 34.

On August 1, 1994, Hamilton "stopped treating the discharges from the Caledonia Pike mine site in response to the PAEHB's decision." Ex. A ¶ 35. On September 1, 1994, OSM Inspector Isaacson conducted a joint follow-up investigation of the Caledonia Pike mine site with PADER and confirmed that "water treatment had stopped," noting that PADER planned to take no further action on the site pending its appeal of the PAEHB decision. Ex. A ¶ 36; Ex. R-51 at 5.

On October 19, 1994, OSM advised PADER that "its actions regarding the discharges to the tributaries to Grimes Run were no longer effective, since treatment had stopped" following the PAEHB decision. OSM advised that its previous determination that PADER's response to TDN 88-121-377-03 was "appropriate" was therefore being reversed.<sup>16</sup> Ex. A ¶ 40. PADER did not request an informal review of OSM's decision to revoke that determination. Ex. A ¶ 42. On November 18, 1994, OSM inspector Isaacson and hydrologist Donald Stump conducted an inspection of the mine site. Their investigation led them to conclude that water was "being allowed to leave the permit area at the beaver dams previously utilized to impound the discharges for collection and treatment" in violation of the applicable effluent standards. Ex. A ¶ 43; Ex. R-82. The source of this discharge was determined to be

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<sup>15</sup> (...continued)

the breastwork of an erosion and sedimentation control pond[]," because, under State regulations, such ponds are by law "deemed to be located within [Hamilton's] permit area." Ex. 3 at 1747, 1752. However, in an *Adjudication* dated July 27, 1994, PAEHB found that the evidence as a whole failed to establish sufficient grounds to find that this discharge area was "located within the area encompassed by" Hamilton's permit, and that "Hamilton, therefore, is not liable for the discharge emanating from" that discharge area. Ex. A-5 at 1083-86.

<sup>16</sup> Isaacson indicated as follows in a memorandum dated Sept. 13, 1994, to the Johnstown Area Office, OSM:

"The treatment of the discharges to meet effluent limits and the ground water study were the reasons for the previous appropriate recommendation. The facts that the discharges are no longer being treated and do not meet effluent standards, and [that] the ground water study was vacated, are reasons for our current recommendations of an inappropriate TDN response."

Ex. R-64.

the same source cited by PADER in Compliance Order 88H008. Ex. A ¶ 45. The November 18, 1994, investigation resulted in issuance of NOV 94-121-377-01 on December 5, 1994. Ex. A ¶ 44; Ex. R-89. Hamilton initiated treatment of the discharges by December 22, 1994, but a follow-up inspection on that date confirmed that leakage was still occurring. Ex. R-94 at 4. Hamilton subsequently proposed placing a liner in the beaver ponds to prevent leakage. Tr. 266-67; Ex. R-96. Upon completion of the placement of liners in the ponds and verification that leakage had stopped, on March 9, 1995, Isaacson terminated the NOV pertaining to the Grimes Run discharges as abated. Tr. 279-80; Exs. R-104 and -105;<sup>17</sup> *see also* Ex. A ¶¶ 46-47; 52.

In the meantime, on September 22, 1994, Isaacson investigated a discharge on the southwest portion of the permit, which OSM believed had not previously been cited by PADER. Ex. R-65 at 4. The southwest area includes Sandy Creek. Exs. R-65 at 6 and R-73. The inspector found that it was located on the permitted area, measured [90] feet long and 100 feet wide, and failed to meet the effluent limitations for water discharges from the mine site.” Ex. A ¶ 38; Ex. R-65 at 5. On October 13, 1994, OSM sent PADER TDN 94-121-377-04 with respect to that alleged discharge. Ex. A ¶ 39; Ex. R-75. On October 24, 1994, PADER responded to TDN 94-121-377-04, indicating that it was conducting a “hydrogeologic investigation” of the discharge and requesting an additional 30 days to complete the investigation (Ex. A ¶ 41; Ex. R-77); OSM found that response to be appropriate. Ex. A ¶ 41; Ex. R-81 and -93. PADER subsequently notified OSM that it would not provide any further response to the TDN. Ex. R-93. By letter dated December 16, 1994, OSM advised PADER accordingly that, since the “violation is still occurring and PADER has not

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<sup>17</sup> Ex. R-104 is a Federal follow-up investigation report prepared by Isaacson with respect to NOV-94-121-377-01. The report notes:

The northern discharges cited were collected by two separate ponds. The water was pumped from these up hill to gravity drain ponds. The system mixes caustic soda with the raw water. The mix discharges into a series of ponds. The final pond was discharging during this inspection. Field test showed the pH to be 9.8 and [iron] less than 1. . . .

The treatment system . . . demonstrates a substantial effort to design and construct a system which would reliably collect and treat the pollutional discharges which were the subject of federal enforcement action.

Ex. R-104 at 4.

taken appropriate action to cause the violation to be corrected or exhibited good cause for failing to do so,” OSM was finding PADER’s “response to be inappropriate.” Ex. R-93; *see* Ex. A ¶ 42. OSM further advised PADER that a Federal inspection would be conducted unless it requested informal review under 30 C.F.R. § 842.11(b)(1)(iii)(A). Ex. R-93. PADER did not respond. Ex. A ¶ 42.

OSM conducted a formal inspection of the area on February 2, 1995, and determined that “water in violation of the applicable effluent limitations was discharging from the southwest side of the permit area to an unnamed tributary to Sandy Creek.” Accordingly, OSM issued NOV 95-121-377-01 for that violation to Hamilton on February 14, 1995. Ex. A ¶¶ 48-50; Ex. R-101. Hamilton effectively treated the cited AMD discharges on the southwest portion of its mine site, and OSM terminated that NOV as abated on April 21, 1995. Ex. A ¶¶ 53-54; Ex. R-107.<sup>18</sup>

Meanwhile, in January and March 1995, respectively, Hamilton filed timely applications for review of OSM’s NOVs 94-121-377-01 and 95-121-377-01 in the Hearings Division, Office of Hearings and Appeals, pursuant to 30 C.F.R. § 843.16 and 43 C.F.R. § 4.1160 through 4.1171. Those applications for review were docketed, respectively, as *Al Hamilton Contracting Co. v. OSM*, CH 95-3-R, and *Al Hamilton Contracting Co. v. OSM*, CH 95-4-R. Following filing of appropriate pre-hearing pleadings, the cases were consolidated, and a joint hearing was held before Judge Greenia on February 14 through 16, 2000, in State College, Pennsylvania, and concluded on January 8, 2001, in Pittsburgh, Pennsylvania. ALJ Decision at 2.

On September 12, 1995, the Commonwealth Court of Pennsylvania affirmed PAEHB’s July 27, 1995, adjudication on the ground that PADER had failed to demonstrate that Exhibit C-10 accurately represented what it purported to represent. *Pennsylvania Department of Environmental Resources v. Al Hamilton Contracting Company (PADER v. Hamilton Contracting Co.)*, 665 A.2d 849, 852-53 (1995). PADER’s petition for appeal to the State Supreme Court was subsequently denied. Ex. A ¶ 34.

At the hearing before Judge Greenia, OSM hydrologist Stump testified that he used the elevation of drill holes as plotted on a “bonding increment map” (Tr. 235)

<sup>18</sup> Ex. R-107 is an OSM follow-up investigation report prepared by Isaacson with respect to NOV-95-121-377-01. The report notes that “the discharge area per the NOV on the southern part of the permit was being collected for treatment by a system of ditches and two ponds. Caustic soda was being added to the discharge collected in the ditch system.” The report noted that the system was designed to “reliably collect and treat the pollutional discharge area” that was the subject of the NOV. Ex. R-107 at 4.

entitled “Mine Drainage Map on the Caledonia Pike Operation,” prepared for Hamilton by Tallamy, Van Kuren, Gertis, and Thielman, Engineers (Ex. R-73), to ascertain the surface, coal, and seep coal elevations at various drill hole points on the mine site. Tr. 553-57. Those data, among other indicia, led him to conclude that “the coal appears to be higher in the southern part of the permit and lower in the northern part of the permit to give you a slope that the ground water would flow from the south to the north.” Tr. 544. He thus concluded that the effluent discharges were draining through the broken rock and spoil to the pavement<sup>19</sup> in a northerly direction to the beaver ponds north of the mine site (Tr. 549-50, 557, 570-71) and from there into the tributaries of Grimes Run.

OSM hydrologist Jay Hawkins verified Stump’s conclusions that the coal dipped to the north by drawing geologic cross sections of the mine site and contouring the coal structure based on the drilling information. Exs. R-119-21; Tr. II 29-35. Hawkins rebutted testimony by Hamilton’s expert, Wilson Fisher, Jr., that a fault running through the mine site in a northwesterly to southeasterly direction depicted on Ex. R-73, which had been originally mapped by the Pennsylvania Geological Survey (Ex. A-17; Tr. 723-24, 729), caused the pavement to slope to the northwest on the north side of the fault and to the southwest on the south side of the fault. Tr. 729-42. Fisher had testified that the existence of this fault caused most of the groundwater to flow to the southwest, away from the beaver ponds leading to the Grimes Run tributaries. Tr. 742-45. Hawkins, however, testified that the fault inferred by Fisher had never been proven to exist. Tr. II 16-25. From his tour of the permitted area and review of the drill logs, he concluded that, even if the inferred fault did exist, it did not impact groundwater movement. Exs. R-124 and -125; Tr. II 53-55, 100-105, 187-89. He stated that, from visual inspection as well as inspection from the drill logs, he had found evidence of another fault on the mine site south of Caledonia Pike. Ex. R-119; Tr. II 24-29. The dip of the coal towards the north, coupled with the fault located south of Caledonia Pike, caused most of the groundwater to flow north. Tr. II 50-52. South of that fault, a “very small amount” of the groundwater flowed southwest, which would explain the discharges into the tributary of Sandy Creek. Tr. II 51, 64-65.

Although Fisher had originally testified that he relied on local drill logs to determine water flow (Tr. 731-38, Tr. II 130-32, 156-57), he altered his testimony after hearing Hawkins’ testimony, stating that the drill logs were not reliable because they were not generated by a geologist. He stated that information supplied by the

<sup>19</sup> Also termed “pit floor” (Tr. Vol. II (II) 35), “pavement” is defined as “the floor of a mine,” or “a layer immediately underlying coal or any other workable material.” *A Dictionary of Mining, Mineral and Related Terms*, U.S. Department of the Interior, 1968, at 798.

Pennsylvania Geological Survey and a geologist named Vic Skema indicating the presence of the inferred fault crossing the permit area from northeast to southwest was far more reliable. Tr. II 130-31, 134-143, 156-57.

On March 20, 2002, Judge Greenia issued the decision under review herein sustaining both NOV's, holding that OSM had established at the hearing that the discharges were connected with Hamilton's then current surface mining permits. Decision at 14-19. Judge Greenia found that Hawkins' testimony was "more credible given the consistency of evidence presented" in that he "relied on local data to determine local structure rather than drawing from the more general geographical information," referring to the State Geological Survey. Decision at 18. His decision stated that there was no basis for doubting the accuracy of the local data, which had been used to "mine the site" and to "update the permit"; that no inaccuracies were identified or anomalies found in the numerous ensuing "mine site inspections and hydrogeological reviews"; and that the "permit data was also consistent with the one and only State Geological Survey drill hole located on the site." *Id.* Finally, Judge Greenia concluded that Fisher's credibility had been undermined by the fact that, after Hawkins' testimony, he discounted his own prior testimony regarding the reliability of local drill hole data, and instead relied on "the more generalized [State Geological Survey] data." *Id.* Accordingly, Judge Greenia held that "the discharges not only occurred on the MDP in violation of SMCRA, but furthermore OSM provided sufficient evidence of linking the discharges to mining on the primacy permit, SMP #17773155." *Id.*

Judge Greenia rejected Hamilton's argument (Hamilton Supplemental Brief (Supp. Brief) at 22-25) that it should have been granted summary judgment because the PAEHB decision and the State appellate court decision affirming it constituted "good cause" for PADER's failure to take action to cause the violations to be corrected under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). He held that "OSM is required to defer to the ruling of a state that no violation exists *unless* it determines the ruling is arbitrary, capricious, or an abuse of discretion of the state program," citing *Turner Brothers, Inc. v. OSM*, 101 IBLA 84 (1988). Decision at 9. He also ruled that, "[i]n making such a determination, OSM may review a state's administrative action or judicial decision," citing *Pittsburg & Midway Coal Mining v. OSM*, 132 IBLA 59, 79-81 (1995). He noted that neither the PAEHB adjudication nor the decision of the Commonwealth Court of Pennsylvania found that the discharge violations did not exist, and that they did not rule on the merits of PADER's allegations in any way. Decision at 9-11. He concluded that, given the full particulars of the PAEHB and the State Court rulings, PADER's reliance on the PAEHB decision as the basis for its failure to take action to cause the violations to be corrected was arbitrary and capricious. Decision at 11. Accordingly, Judge Greenia held that OSM properly exercised its statutory oversight authority and independently inspected the site. *Id.*

Hamilton also argued before Judge Greenia that “OSM failed to properly apply the provisions of 30 C.F.R. § 842.11(b) before issuing the NOV’s.” Supp. Brief at 11. OSM responded that Hamilton had framed this argument in terms of whether OSM’s TDN determination was adequate, an issue that, pursuant to 30 C.F.R. § 843.17, is not open to challenge by coal permittees. OSM Response to Supp. Brief at 1-6. Judge Greenia’s decision stated that Hamilton’s argument was “predicated on the theory that the [TDN] process is a prerequisite and a necessary element of proof in an enforcement action.” Decision at 11. Citing *Appolo Fuels, Inc. v. OSM*, 144 IBLA 142 (1998) (*aff’d* 270 F.3d 333 (6th Cir. 2001), *cert. denied*, 535 U.S. 955 (2002)), and *Harlan Cumberland Coal Co. v. OSM*, 123 IBLA 129, 134 (1992), Judge Greenia held that “Hamilton lacks standing to challenge OSM’s TDN to the state of Pennsylvania” and that “the TDN is neither a jurisdictional prerequisite to issuance of an NOV nor an essential element of proof in establishing a *prima facie* case.” Decision at 11, 13. He concluded that the two NOV’s “were properly issued following PADER’s failure to take action.” *Id.*

Hamilton timely appealed Judge Greenia’s decision to this Board. It contends on appeal that it “clearly has standing to challenge the NOV’s under 30 C.F.R. § 842.11(b); that “operators are *absolutely entitled* to challenge” an OSM determination that the State failed to take appropriate action or did not have good cause for such failure; and that “OSM must prove as an element of its *prima facie* case” that the State’s determination was inappropriate. SOR at 11. Hamilton contends that OSM incorrectly applied the standards established in 30 C.F.R. § 842.11(b), which, if properly applied, compel the conclusion that PAEHB’s decision constituted good cause for PADER’s failure to act following the TDN. SOR at 14-44. Citing *Appolo Fuels v. OSM*, 144 IBLA at 142, and *Harlan Cumberland Coal Co. v OSM*, 123 IBLA at 129, OSM responds that “Hamilton’s contention that the [TDN] notice process is part of an enforcement action that OSM must establish the agency implemented correctly as part of its *prima facie* case is contrary to Board precedent, the regulations, and the SMCRA enforcement scheme.” Brief of the Appellee (Answer) at 31.

Hamilton also argues that judicial decisions interpreting other environmental laws support a prohibition against Federal enforcement proceedings where the State agency has commenced or concluded “a similar action on the same matter.” SOR at 45-50. OSM responds that Hamilton’s reliance on PAEHB’s decision is inappropriate, arguing that Hamilton’s contention that “overfiling” by OSM of a State enforcement action should be prohibited is another attempt by Hamilton to persuade the Board to apply principles of *res judicata* and collateral estoppel to proceedings under SMCRA, which arguments have been previously rejected by the Board. Answer at 40-41, 42-43.

[1] We find no basis to conclude that OSM lacked authority to issue the NOV's here. Neither *Pittsburg & Midway Coal* nor *Turner Brothers* applies preclusion doctrines to OSM oversight enforcement under section 521 of SMCRA beyond the limited circumstances set forth in 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). See also *Farrell-Cooper Mining Co. v. OSM*, 141 IBLA 72, 73 (1997); *Ron Deaton v. OSM*, 126 IBLA 320, 326 (1993); and *R.C.T. Engineering v. OSM*, 121 IBLA 142, 147-49 (1991). It is well established that OSM has authority under section 521(a) of SMCRA to enforce, on a mine-by-mine basis, any part of a State program not being enforced by that State. 30 U.S.C. § 1271(a) (2000); *Annaco v. Hodel*, 675 F. Supp. 1052, 1056 (E.D. Ky. 1987); *Pittsburg & Midway Coal Mining Co. v. OSM*, 132 IBLA at 72, 92 I.D. at 8 (1995); *Annaco v. OSM*, 119 IBLA 158, 163 (1991). Where OSM has issued a TDN and the State regulatory agency has failed to take appropriate action, Departmental regulations expressly *require* OSM to

immediately conduct a Federal inspection . . . when its authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of [SMCRA, 30 C.F.R. Chapter VII,] the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air or water resources.

30 C.F.R. § 842.11(b)(1)(ii)(B)(1).

Further, Federal authority to issue an NOV is not barred by the doctrines of *res judicata* or collateral estoppel when a State regulatory authority or administrative body has vacated a State-issued citation for the same violation, unless (1) the determination of the State regulatory authority or administrative body vacating the citation is based upon the violation not existing, and (2) that determination is not arbitrary, capricious, or an abuse of discretion. As we noted in *R.C.T. Engineering, Inc. v. OSM*, 121 IBLA at 146 n.5, the position that OSM is collaterally estopped by State agency proceedings is undercut by the regulatory language of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv), which provides the mechanism for determining whether OSM was collaterally estopped from taking enforcement actions. Our holding herein that appellant failed to show that there was good cause for the State's decision not to take enforcement action due to previous administrative or judicial orders disposes of appellant's collateral estoppel argument.

The TDN process contemplates formal communications between OSM and the State regulatory authority; the operator does not participate. *See Patrick Coal Co. v. OSM*, 661 F. Supp. 380, 384 (W.D. Va. 1987). Nevertheless, although an operator's only vehicle to complain about issuance of a TDN is to obtain administrative review of any resulting NOV or CO (*Lonesome Pine Energy, Inc. v. OSM*, 156 IBLA 182, 191 (2002)), it is free to establish in the context of such proceeding that OSM lacked authority, specifically including whether or not, prior to a TDN, the State regulatory authority had failed to take appropriate action or subsequently did not offer good cause for its failure to do so. *Turner Brothers, Inc. v. OSM*, 101 IBLA at 87. OSM's burden of proof in administrative review proceedings of section 521 notices or orders is set forth at 43 C.F.R. § 4.1171(a), providing that, "[i]n review of section 521 notices of violation . . . , OSM shall have the burden of going forward to establish a prima facie case *as to the validity of the notice . . .*" (Emphasis supplied.) Under 30 C.F.R. § 4.1171(b), "[t]he ultimate burden of persuasion shall rest with the applicant for review." Thus, it is not the validity of its TDN procedures that OSM is assigned the burden of going forward to establish, but instead the validity of the *notice of violation*. 43 C.F.R. § 4.1171(a); *see also Lonesome Pine Energy, Inc.*, 156 IBLA at 192. We conclude accordingly that it is the applicant for review of the notice of violation that bears both the burden of going forward and the burden of persuasion on the issue of whether OSM overstepped the bounds of its oversight authority and reject Hamilton's argument that OSM must "prove as an element of its *prima facie* case . . . that the state agency failed to take appropriate action or otherwise show good cause for such failure." SOR at 11.

[2] It remains to determine whether appellant has shown that the initiation of enforcement action by OSM was improper. As noted above, under 30 C.F.R. § 842.11(b)(1), OSM is required to immediately conduct a Federal inspection (1) when it has reason to believe that there is a violation of SMCRA, 30 C.F.R. Chapter VII, the applicable program, or any condition of a permit or an exploration approval (30 C.F.R. § 842.11(b)(1)(i)); and (2) when it has notified the State regulatory authority of the possible violation and more than 10 days have passed since notification and the State regulatory authority has failed either (a) to take appropriate action to cause the violation to be corrected or (b) to show cause for such failure and to inform OSM of its response. 30 C.F.R. § 842.11(b)(1)(ii)(B)(1).<sup>20</sup> Thus, if OSM has reason to believe that a permittee is in violation of a State regulatory program, it issues a TDN to the appropriate State regulatory authority. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1). Unless the State either takes "appropriate action" to cause the violation to be corrected or shows "good cause

<sup>20</sup> The regulations also allow OSM to conduct an inspection where it has reason to believe that a violation exists and no State program is in place. 30 C.F.R. § 842.11(b)(1)(ii)(A).

for the failure to do so” within 10 days of receiving the TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); *Danny Crump*, 163 IBLA 351, 358 (2004); *Jim Tatum*, 151 IBLA 286, 298 (2000).

There is no doubt that OSM had reason to believe that there was a violation of applicable effluent standards in the present case, based on site investigations undertaken immediately prior to the formal inspections leading to the issuance of the two NOV's at issue herein. PADER had been advised that OSM had revoked its determination that PADER's response to TDN 88-121-377-03 (concerning apparent effluent violations on the east side of the permit area) was appropriate but had not responded.<sup>21</sup> PADER had also received a new TDN, No. 94-121-377-04 (concerning apparent effluent violations on the southwest side of the permit area), and (after an extension of 30 days under 30 C.F.R. § 842.11(b)(1)(B)(4)(ii)) had notified OSM that it would not provide any further response to the TDN. PADER had also been advised that OSM had found that PADER had not taken appropriate action to cause the violation to be corrected or exhibited good cause for failing to do so under 30 C.F.R. § 842.11(b)(1)(ii)(B) (discussed immediately below), and, again, PADER did not respond. In these circumstances, OSM was authorized to conduct its inspection and initiate enforcement action.

The regulations at 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) provide that “an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the State program shall be considered ‘appropriate action’ to cause a violation to be corrected or ‘good cause’ for failure to do so,” such that OSM is not required to conduct an immediate inspection. *Danny Crump*, 163 IBLA at 358; see *Pittsburg & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 79-81, 102 I.D. 1, 11-12 (1995). Further, under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3), “appropriate

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<sup>21</sup> OSM might have elected to issue a new TDN instead of revoking its approval of the State's response to the 1988 TDN. As noted herein, we do not regard the situation in 1988 as separate and distinct from that found in 1994, but as the reappearance of the discharge after Hamilton stopped abatement, supporting OSM's decision to treat the re-emergence of AMD at the site as a continuation of circumstances found in 1988. OSM's decision is further supported by the fact that PAEHB had specifically acknowledged at the time of Isaacson's decision to revoke approval that conditions seriously violating State effluent standards existed on the site in 1988, even though it had not been convinced by PADER that the AMD emanated from Hamilton's permit site. OSM plainly believed that it could succeed where PADER had failed in making the evidentiary showing required to establish the source of the AMD. We do not fault OSM for making the administrative decision to proceed as it did, since it advanced the purpose of SMCRA, to correct violations as quickly as possible.

action” includes enforcement or other action authorized under the State program to cause the violation to be corrected. Finally, 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) lists specific situations that are considered by law to constitute “good cause” for a State’s failure to take appropriate action following OSM’s TDN. “Good cause” exists where (1) the violation of the State surface mining law “does not exist” (30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i)); (2) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation (30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iii)); or (3) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) of SMCRA have been met (30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv)).<sup>22</sup> Where, following the issuance of a TDN, the terms of 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), (B)(3), or (B)(4) are met, OSM is not required to conduct an immediate inspection.

[3] In view of the fact that PADER declined to take *any* enforcement action following OSM’s issuance of TDN 94-121-377-04 and its revocation of the “appropriate” determination under TDN 88-121-377-03, we must conclude that, under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), PADER’s “action or response” was “arbitrary, capricious, or an abuse of discretion under the State program” and therefore is not properly “considered ‘appropriate action’ to cause a violation to be corrected or ‘good cause’ for failure to do so.” By the same token, it cannot be said in these circumstances that, under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3), PADER took “enforcement or other action authorized under the State program to cause the violation to be corrected.”

Nor can it be said that the violation of the State surface mining law did not exist, or did not appear to exist, either time that PADER decided not to take action. The facts as discovered by OSM and communicated to PADER clearly showed a serious, ongoing violation of State effluent standards, a matter over which PADER

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<sup>22</sup> Two situations considered to constitute “good cause” are not relevant to the present matter. The first concerns the situation where the State regulatory authority needs a reasonable and specified additional amount of time to determine whether a violation of the State program exists. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(ii). Although such an extension was granted concerning TDN 94-121-377-04, where PADER requested and was granted 30 days to respond, the provision became inapplicable following the expiration of the 30-day period. The second situation (addressed by 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(v)) concerns a State’s enforcement of the surface mining law with respect to abandoned mine sites and is not at issue here.

had administrative jurisdiction. Accordingly, the terms of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i) and (iii) do not apply.

[4] Despite the failure of the State to take any cognizable action under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), (B)(3), (B)(4)(i), or (B)(4)(iii), there may still be “good cause” for that failure under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv), and the question of whether OSM properly initiated enforcement action against Hamilton turns on the applicability of that provision. It provides that “good cause” exists (and that OSM is not required to conduct an immediate inspection) if the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing. Hamilton argues that PAEHB’s adjudication constituted “good cause” under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) for PADER’s failure to take action in response to OSM’s TDN, as it resolved the question of Hamilton’s liability under State law by finding that the violations in proximity to the Caledonia mine site did not exist and that Hamilton had no liability for abatement. SOR at 20, 24-28, 36-44.

The record establishes that the NOV’s deal with discharges from two different areas on either side of the permit area. One discharge was into the tributaries of Grimes Run and the other into the tributaries of Sandy Creek. PADER compliance order 88H008 addressed only effluent discharges draining into the tributaries of Grimes Run; consequently, PAEHB’s subsequent adjudications did not make findings pertaining to discharges into the Sandy Creek tributary. Judge Greenia correctly held, therefore, that Hamilton’s defense that good cause was established under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) is unavailing with respect to PADER’s failure to inspect the discharges into the tributaries of Sandy Creek (Decision at 9 n.5), as there was no administrative or judicial order affecting those discharges, and there is no basis under that provision to disturb NOV 95-121-377-01.

The other discharge (from the tributaries of Grimes Run) had been previously investigated by PADER, so that at least a portion of the areas cited in the NOV’s are the same as those considered by PADER, and it is appropriate to consider those areas. We conclude that the PAEHB ruling was not “based on the violation not existing” within the meaning of 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). Central to our conclusion on this point is the fact that the violation in question was ongoing. While it might be logical to bar OSM from pursuing a violation where the State had failed to provide adequate proof at a review hearing that Hamilton had committed a one-time offense, it is illogical to say that, because the State’s evidence was insufficient to show that there was violation at one point in time, OSM may not take enforcement action when it finds that AMD is still occurring.

Phrased in terms of the regulation, the State could not permissibly refuse to take action following OSM's renewal of the TDN asserting a violation in the form of AMD from the permit site in 1994 on the basis of the PAEHB decision, as that decision was not "based on the [1994] violation not existing." The PAEHB's decision was instead based on the fact that the 1988 violation had not been proven by sufficient evidence, or, more accurately, had not been proven by evidence presented in correct form.<sup>23</sup>

We also deem it significant that, upon cessation by Hamilton in 1994 of its abatement efforts following PAEHB's decision, acid runoff reappeared in the permit area. The 1994 violation that the TDN referred to can, in these circumstances, be viewed as a new violation separate and apart from the 1988 violation addressed by the PAEHB. It is also significant that, after OSM's issuance of two NOVs for AMD in excess of applicable effluent limitations, Hamilton successfully abated the violations. See Ex. A ¶¶ 52-54; Exs. R-104, -107. Plainly Federal intervention in the matter was necessary, as judged by the fact that it was successful.

The fact that the State was awaiting completion of judicial review of PAEHB's adverse decision did not, by itself, establish that there was good cause for failure to take enforcement action. As set out in its preamble, the 1988 rulemaking expanded the definition of "appropriate action" to include "more than just enforcement actions" (such as issuing notices of violation or cessation orders), that is, to include "other action authorized under the state program to cause the violation to be corrected." Concerned commenters feared that the broadening of the definition would allow operators a "free bite," allowing the State to freely refuse to issue NOVs or COs where OSM notified the State via TDN of a violation of the permit or state program. OSM explained that, to the contrary, a

State regulatory authority continues to have an obligation to take the actions provided in the approved state programs to cause a violation to be corrected. In most situations, that means issuing an NOV. In a few instances, *other action may be appropriate*, if it is authorized by the state program and if it will cause the violation to be corrected. The rule does not change that obligation.

53 Fed. Reg. 26,733 (July 14, 1988) (emphasis supplied). However, the only two examples of such "other action" specified in the Preamble are the initiation of the process to require a revision or modification to the operator's permit under 30 C.F.R.

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<sup>23</sup> There is little doubt that PAEHB could have found that the AMD was either located within Hamilton's permitted area or hydrogeologically connected to its mining operations if the photocopy of the permit map had not been excluded from evidence.

§ 774.11(b) where the original permit contained a defect, and commencement of a proceeding to forfeit the performance bond if the bond amount is adequate to correct the violation and achieve reclamation, as allowed under 30 C.F.R. § 800.50. 30 Fed. Reg. 26733 (July 14, 1988). No mention was made of the possibility of asserting “appropriate action” by virtue of the pendency of an appeal from a negative state-level administrative decision.

In that context, the Preamble went on to state, in the language cited by Judge Jackson, that the amended

rule focuses on the goal of the Act itself—to see that violations are corrected. In so doing, the rule allows state discretion in how best to accomplish that goal—but only if those means are authorized under the state program. [OSM] is not permitting a “free bite”, but is simply saying that the federal government will not substitute its judgment and second-guess the state on a case-by-case basis, unless the state action is arbitrary, capricious or an abuse of discretion.

53 Fed. Reg. 26,734 (July 14, 1988). The proper way to interpret that statement, in the context presented, is that OSM will accept action by the State other than issuance of NOV and COs as “appropriate,” but only if the action is authorized by the state program, and only if the action (like initiation of the process to require a revision or modification to the operator’s permit or commencement of a proceeding to forfeit the performance bond) will otherwise result in the correction of the violation. Withholding action pending completion of State judicial review of a State enforcement action is not addressed and therefore cannot be deemed to have been recognized by OSM as being *per se* “appropriate action” to a TDN within the meaning of 30 C.F.R. § 842.11(b)(1)(ii)(B)(3).

Nor can we find that “good cause” was established for the State’s failure to act under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) because we do not see that PADER was precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible 1994 violation.<sup>24</sup> Neither the administrative decision nor the State court decision barred PADER from returning to

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<sup>24</sup> In *OSM v. Thompson Bros. Coal Co.*, 148 IBLA 148, 150-51 (1999), we noted with evident approval a case where OSM had revoked an earlier determination that PADER’s response to a TDN was appropriate and had proceeded to conduct a Federal inspection despite the pendency before the PAEHB of a matter presenting a controlling issue of law, stressing that this action was proper where, during consideration by the PAEHB, no ameliorative actions were occurring. The circumstances in the present matter are similar.

the site to address ongoing AMD violations. At most, the final effect of those decisions is limited to a finding that Hamilton was not liable for AMD during the period at issue cited in PADER's compliance orders.

This interpretation is consistent with the Preamble to the 1988 rulemaking addressing 30 C.F.R. § 842.11(b)(1)(B)(4)(iv), which states that good cause for failing to take action pursuant to a TDN is established under that provision only in situations where an injunction has been issued: “[OSM] has considered the conflicting comments and court decisions, and believes that a state regulatory authority has good cause for not taking action *when it is enjoined from doing so* by a state administrative or judicial body acting within the scope of its authority under the state program.” 53 Fed. Reg. 26,739 (July 14, 1988) (emphasis supplied).<sup>25</sup> There was no injunction issued here; accordingly, 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) does not operate to establish that there was good cause for the State's failure to act.

We note that to hold otherwise would promote PADER's failure to provide evidence in a satisfactory form in an administrative proceeding into a permanent exemption for Hamilton from the effluent control provisions of State regulations and SMCRA, a result that cannot be condoned. If the State authorities had ruled that PADER's failure to present evidence in proper format in the 1988 administrative proceeding forever barred it from returning to the site to address ongoing AMD violations, we would not hesitate to conclude that such implied finding “did not have a proper basis” and therefore did not constitute “good cause” under 30 C.F.R. § 842.11(b)(1)(ii)(B)(iv). See *Marion Docks, Inc. v. OSM*, 168 IBLA 47, 50-51, 53 (2006); *Pittsburg & Midway*, 132 IBLA at 80, 102 I.D. at 12.

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<sup>25</sup> Moreover, not every injunction issued by a State court would be good cause for the State regulatory agency's failure to take enforcement action: “[OSM] concludes that good cause exists for the regulatory authority not acting *only where the order has a proper basis*,” and that “[s]uch a basis would exist if the temporary relief criteria of the state program (which presumably would reflect those in sections 525 and 526 of SMCRA) are satisfied or if the state court concluded the violation does not exist.” 53 Fed. Reg. 26,739 (July 14, 1988) (emphasis supplied). No injunction applying temporary relief criteria was issued by the State court; nor, we have found, was the State court's decision based on this ongoing violation not existing.

[5] Having determined that OSM properly issued the NOVs,<sup>26</sup> it remains to decide whether Hamilton successfully challenged them in the application for review proceedings. We conclude that Judge Greenia properly affirmed the NOVs.

The burden of proof imposed upon OSM in this review proceeding is set forth at 43 C.F.R. § 4.1155. OSM has the burden of going forward to establish a *prima facie* case as to the facts of the violation. A *prima facie* case is made when sufficient evidence is presented to establish the essential facts which, if not contradicted, will justify a finding in favor of the party presenting the case. *S & M Coal Co.*, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984).

There is adequate evidence in the record to support his findings and conclusions (1) that OSM met its burden of proof that AMD in excess of applicable effluent limitations resulted from Hamilton's coal mining operation at the Caledonia mine site, as alleged in the NOVs; and (2) that the testimony of OSM hydrologists that the discharges resulted from operations occurring on Hamilton's surface mining permit area was more credible than that offered to the contrary by Hamilton's expert. As OSM noted in its answer, Hamilton has, on appeal, "abandoned all factual contentions that it is not responsible for the acid mine discharge violations." Answer at 29. Most tellingly, when Hamilton implemented effective abatement measures, AMD into the Grimes Run and Sandy Creek tributaries ceased.<sup>27</sup>

All other arguments contrary to our analysis herein have been considered and rejected.<sup>28</sup>

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<sup>ccc</sup> Inasmuch as Judge Greenia's conclusion that OSM properly issued the NOVs is based on a substantially different legal basis (that PADER's reliance on the PAEHB decision as the reason for its failure to take action to cause the violations to be corrected was arbitrary and capricious (Decision at 11)), his decision on this point is affirmed as modified.

<sup>27</sup> We are unable to determine that there was any other mining operation in the area that might have been responsible for the AMD.

<sup>28</sup> Item 5 of Hamilton's Notice of Appeal raises issues concerning whether OSM established that the permit to which OSM referred in the NOVs was in effect at the time OSM issued the NOVs. Item 6 is a general objection to the ALJ's evidentiary rulings. In its SOR, Hamilton has limited its argument to whether Judge Greenia properly ruled on Hamilton's challenge to the NOVs under the standards set forth in 30 C.F.R. § 842.11(b). *E.g.*, SOR at 11, 14. The regulations governing appeals from decisions ruling on applications for review expressly provide that an "appellant shall state specifically the rulings to which there is an objection, the reasons for such

(continued...)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified.

\_\_\_\_\_/s/  
David L. Hughes  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
H. Barry Holt  
Chief Administrative Judge

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<sup>28</sup> (...continued)

objections, and the relief requested” and provide that the “failure to specify a ruling as objectionable may be deemed by the Board as a waiver of objection.” 43 C.F.R. § 4.1273(c). Accordingly, we construe Hamilton’s omission of argument in its Brief with respect to Items 5 and 6 of the NOA to be a waiver of those objections.

ADMINISTRATIVE JUDGE JAMES K. JACKSON DISSENTING IN PART:

I respectfully dissent from my colleagues' overly constrained interpretation and application of the "appropriate action" and "good cause" bars against Federal enforcement in states with approved programs under the Surface Mining Control and Reclamation Act of 1977, *as amended*, 30 U.S.C. §§ 1201 through 1328 (2000) (SMCRA). Since I believe their views render the federalism concepts embodied in the Act and echoed in implementing rules promulgated by the Office of Surface Mining Reclamation and Enforcement (OSM) to be a mere formality, without meaning or practical effect in the context of state enforcement proceedings, I am impelled to write separately.<sup>1</sup> *See Hodel v. Virginia Surface Mining and Reclamation Association*, 424 U.S. 264, 289 (1981) (SMCRA "establishes a program of cooperative federalism that allows the States . . . to enact and administer their own regulatory programs, structured to meet their own particular needs"); 53 Fed. Reg. 26728 (July 14, 1988).

Congress declared in enacting SMCRA that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." 30 U.S.C. § 1201(f). (2000) It then established detailed requirements for states "to assume exclusive jurisdiction" over surface mining and reclamation operations. 30 U.S.C. § 1253; *see* 30 C.F.R. Parts 730 (General Requirements), 731 (Submission of State Programs), and 732 (Procedures and Criteria for Approval or Disapproval of State Program Submissions). No Federal enforcement program under SMCRA exists in states with approved state programs,<sup>2</sup> 30 U.S.C. § 1254(b); after OSM approves a state program, it retains only limited oversight authority in those states. OSM's ability to take an enforcement action under its residual oversight authority is expressly conditioned on its first performing a Federal inspection under

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<sup>1</sup> My disagreement stems from the majority's treatment of the OSM-Harrisburg Field Office (HAFO) notice of violation (NOV) involving discharges to unnamed tributaries of the Grimes Run; I have no disagreement with their resolution of Hamilton's separate appeal of the Sandy Creek NOV. *See* Note 7.

<sup>2</sup> The only circumstance under which a Federal enforcement program can exist after State program approval is if the Secretary finds that a state is not enforcing and lacks the capability and intent to enforce all or any part of its approved program. 30 U.S.C. § 1271(b); *see* 30 C.F.R. Part 733. A Federal enforcement program is then substituted for the state's, but only after OSM gives notice, provides an opportunity for an informal conference, holds a public hearing, and finds that the State has not only failed to implement, administer, maintain, or enforce effectively its approved program, but also lacks the demonstrated capability and intent to administer that program. 30 C.F.R. § 733.12. Such programmatic actions are not taken lightly; no such circumstance is here presented.

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1).<sup>3</sup> A Federal inspection may be conducted only if OSM: (1) has reason to believe that there is a violation of SMCRA; (2) notifies the State of that possible violation by issuing a ten-day notice (TDN); and (3) determines that the state is failing “to take appropriate action to cause said violation to be corrected” or lacks “good cause” for failing to take appropriate action. *Id.* If all three of these elements are present, a Federal inspection can be conducted and a notice of violation (NOV) issued based on that inspection. An applicant for review of a resulting NOV is free to challenge that NOV by contesting the validity of and authority for OSM conducting a Federal inspection “pursuant to 30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 842.11(b)(1)(ii)(B)(1).” *Lonesome Pine Energy v. OSM*, 156 IBLA 182, 191 (2002).

It is uncontroverted that OSM’s Harrisburg Field Office (HAFO), was aware that certain discharges were exceeding applicable effluent limitations and entering tributaries of the Grimes Run in the vicinity of Hamilton’s Caledonia Pike mine site and that it gave a 10-day notice of that possible violation to the State regulatory authority (*i.e.*, the Pennsylvania Department of Environmental Regulation (PADER)). What was contested below and is raised on appeal is whether HAFO’s written determination concerning PADER action/inaction had a proper basis and was supported by the facts then known to it.

My colleagues opine that seeking judicial review of an adverse-to-the-state adjudication under an OSM-approved State program is not “cognizable” under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3) and, therefore, conclude that PADER’s appeal was “arbitrary, capricious, or an abuse of discretion under the State program.” 172 IBLA at 105, 107-07.<sup>4</sup> The majority also addresses “good cause” under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4), viewing an administrative adjudication and a decision by the Commonwealth Court of Pennsylvania, ruling and affirming that Hamilton was

<sup>3</sup> OSM may take immediate action to address a violation which is causing or may cause significant imminent environmental harm without prior notice to the state. 30 U.S.C. § 1271(a)(2); *see also* 30 U.S.C. § 1271(a)(3) and (5) (notices of violation and abatement orders). No such circumstance is here presented.

<sup>4</sup> The majority reasons that its conclusion is dictated by the fact that “PADER declined to take *any* enforcement action following OSM’s issuance of TDN 94-121-377-04 [Sandy Creek] and its revocation of the ‘appropriate’ determination under TDN 88-121-777-03 [Grimes Run].” 172 IBLA at 105. I am at a loss to understand the relevance of the Sandy Creek TDN to HAFO’s determination concerning the Grimes Run TDN and NOV. *See* Notes 1, 9. Moreover, I fail to see how a determination made without any analysis or supporting explanation could affect this Board’s consideration of whether “PADER’s ‘action or response’ was ‘arbitrary, capricious, or an abuse of discretion under the State Program.’” 172 IBLA at 105.

not responsible for the effluent discharges at issue, as irrelevant to whether good cause existed for PADER failing to initiate yet another enforcement action for these same discharges. 172 IBLA at 105-09. I disagree most strongly with their views of what constitutes “appropriate action” and “good cause” under SMCRA. To place my views in perspective, I briefly recount facts salient to what I believe is a more proper and appropriate resolution of this case.

#### FACTUAL BACKGROUND

The Pennsylvania State program was approved by the Secretary, effective July 31, 1982. 30 C.F.R. § 938.10. On that date, PADER became the regulatory authority and assumed exclusive jurisdiction for all surface coal mining and reclamation operations in Pennsylvania, excepting only certain, limited, Secretarial responsibilities under 30 U.S.C. §§ 1271 and 1273. *In re Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C. Cir.), *cert. denied*, 454 U.S. 822 (1981); *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980); *see* 53 Fed. Reg. 44356, 44359-60 (Nov. 2, 1988). PADER thereafter issued and amended MDP 4577SM8 and later issued SMP 17773155 for Hamilton’s Caledonia Pike mine under its approved State program. Exs. R-110, R-117.

Acid mine drainage, believed to be coming from the Caledonia Pike mine site, has been the subject of extensive enforcement efforts by PADER since the early 1980s, culminating in its issuance of Compliance Order 88H008 (Compliance Order) for allowing discharges in violation of applicable effluent limitations to enter tributaries of the Grimes Run. Ex. A ¶¶ 3-16, 18-22; Ex. R-10. PADER claimed that this effluent was coming from six identified discharge areas. Ex. R-10 at 6. Hamilton disagreed that it was responsible for these discharges and appealed that Compliance Order to the State Environmental Hearing Board (PAEHB). Ex. A ¶ 12; Ex. R-41. As required by that order, Hamilton proposed and PADER approved an abatement plan for collecting effluent from these discharge areas in existing beaver ponds and to pump, treat and later discharge that water into tributaries of the Grimes Run. Ex. A ¶¶ 13-15; Ex. R-29 at 2.

In response to a citizen complaint, HAFO issued TDN 88-121-377-03 to PADER. Both HAFO and PADER personnel then inspected the Caledonia Pike mine. They observed that effluent discharge water was being collected by Hamilton in the beaver ponds under and as required by the Compliance Order, but that some of this collected water was leaking from the beaver ponds into the Grimes Run. Ex. A ¶ 18; Exs. R-1, R-3, R-29, R-38. After PADER directed Hamilton to “collect all drainage subject to” its Compliance Order, HAFO determined that PADER’s actions were appropriate. Exs. R-27, R-31.

A subsequent PADER inspection revealed that the beaver ponds/dams were still leaking. Due to uncertainty regarding the source of effluent below the beaver dams/ponds, PADER issued an order requiring Hamilton to prepare a groundwater study. Exs. R-32 through R-35. HAFO again determined that PADER's actions were appropriate. Exs. R-37 through R-39. PADER later directed Hamilton to submit an implementation schedule and to initiate reclamation activities under the Compliance Order. Ex. R-41. PADER approved Hamilton's proposed schedule and a revised abatement plan. Exs. R-43 through R-50. Hamilton implemented that plan, collecting, pumping, and treating effluent from the six discharge areas until the Compliance Order was dismissed by PAEHB nearly six years later. See discussion *infra*.

On review of the Compliance Order, PAEHB ruled that while effluent from the six identified discharge areas was violating applicable limitations, PADER had failed to demonstrate that effluent from five of these discharge areas was either located within Hamilton's permit boundaries or hydrogeologically connected to its mining operations. Ex. A-3 at 1747-54 (Opinion and Order dated Dec. 24, 1992); see also Ex. A-2 at 1366-67 (Opinion and Order Sur Objection to the Admission of Exhibit C-10 As Evidence dated Oct. 29, 1992).<sup>5</sup> After a separate hearing on remand to determine Hamilton's liability for the sixth and final discharge area, PAEHB ruled that PADER also failed to prove that this discharge area was on permit or hydrogeologically connected with Hamilton's mine site. Ex. A-5 at 1082-83 (Adjudication). Although an important document (Exhibit C-10) had been excluded from evidence nearly 2 years earlier when PAEHB ruled that Hamilton was not responsible for effluent from five of the six identified discharge areas, Exs. A-2, A-3, PADER inexplicably failed again to present substantial testimonial or other evidence that Hamilton was responsible for this discharge area. PADER appealed this matter and the dismissal of its Compliance Order to the Commonwealth Court of Pennsylvania under and as provided for in the OSM-approved State program. Ex. A ¶ 34.<sup>6</sup> Since Hamilton was no longer required to pump and treat discharges collected

<sup>5</sup> PADER unsuccessfully sought reconsideration by PAEHB, and immediately thereafter petitioned for judicial review. The Commonwealth Court of Pennsylvania quashed its petition and remanded for a final adjudication on the remaining discharge area. *Pennsylvania Department of Environmental Resources v. Al Hamilton Contracting Company (PADER v. Hamilton)*, 665 A.2d 849, 851 (Pa. Com. Ct. 1995).

<sup>6</sup> The Commonwealth Court later affirmed PAEHB's adjudication. *PADER v. Hamilton*, 665 A.2d at 852-53. PADER's request for reargument was unsuccessful; its petition for review by the Pennsylvania Supreme Court was denied. Ex. A, ¶ 34. See *Commonwealth, Department of Environmental Resources v. Al Hamilton Contracting Co.*, 686 A.2d 1310 (Pa. 1996).

in the beaver ponds under the then dismissed Compliance Order, it ceased pumping and treating those collected discharges.

Inspector Isaacson, HAFO, participated in a joint follow-up investigation of the Caledonia Pike mine site on September 1, 1994, which confirmed that Hamilton had stopped pumping and treating the discharges collected in the beaver ponds and that PADER was then appealing the adverse-to-the-state adjudication. Ex. A ¶ 36; Ex. R-51 at 5. Nonetheless, HAFO determined that PADER's actions were "inappropriate," ostensibly because it had failed to prevail and PAEHB had dismissed its Compliance Order. Ex. R-76; *see* Ex. R-64 (Isaacson recommended determination).<sup>7</sup> Armed with that determination, Isaacson and OSM hydrologist Donald Stump conducted a Federal inspection on November 18, 1994, which indicated that effluent from the same six discharge areas addressed in the Compliance Order then on appeal was being collected in the beaver ponds but that untreated water was again leaking into the Grimes Run.<sup>8</sup> Ex. A ¶¶ 43, 45; Ex. R-82. HAFO issued NOV 94-121-377-01 on December 5, 1994. Ex. A ¶ 44; Ex. R-89.

Hamilton timely sought review of that NOV, which was terminated as abated after Hamilton resumed pumping and treating water collected in the beaver ponds. Tr. 266-67, 279-80; Exs. R-96, R-104, R-105; *see also* Ex. A ¶¶ 46-47; Ex. R-52. After a 4-day hearing, Judge Greenia issued his decision on March 20, 2002 (Decision). He rejected Hamilton's argument that PADER had taken appropriate action and/or had good cause for failing to take action to correct the Grimes Run violations, concluding that PADER's actions were arbitrary and capricious and that HAFO properly exercised its oversight authority by conducting a Federal inspection of the Caledonia Pike mine site and issuing the Grimes Run NOV. Decision at 9-11.<sup>9</sup>

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<sup>7</sup> At the time of Isaacson's recommendation and HAFO's determination, neither were aware of PAEHB's rationale or supporting analysis for dismissing the Compliance Order, only that PADER had failed to prevail and was appealing that dismissal. *See* Tr. 328-29.

<sup>8</sup> The majority deems as significant the fact that effluent violating applicable limitations then "reappeared" in the beaver ponds. 172 IBLA at 107. Consistent with PAEHB's adjudication, however, this "reappearance" merely suggested that water from another mine site in the area (active or long-since abandoned) may be responsible for the effluent from the six identified discharge areas. It was PADER's burden to establish that Hamilton was responsible for these discharges (a burden it failed to meet); it was not Hamilton's burden to identify and prove which other mine or mine site was responsible for those discharge areas.

<sup>9</sup> On Sept. 22, 1994, Isaacson separately investigated a discharge which affected the Sandy Creek and that failed to meet applicable effluent limitations. Ex. A ¶ 38;

(continued...)

## ANALYSIS

PADER is the regulatory authority under the approved State program and assumed “exclusive jurisdiction” for regulation and enforcement within Pennsylvania under SMCRA, with only limited oversight authority being retained by OSM. OSM is authorized to conduct a Federal inspection only if it makes an independent, written determination that the state regulatory authority arbitrarily, capriciously, or in an abuse of discretion is failing to take “appropriate action” or lacks “good cause” for failing to take appropriate action under 30 U.S.C. § 1271(a)(1). 53 Fed. Reg. 26728, 26732 (July 14, 1988); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1)-(2); *see Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 73-77 (1995). An applicant for review of an NOV based on a Federal inspection following an OSM determination is free to challenge that determination and to establish that OSM lacked the authority to proceed by demonstrating that the state regulatory authority was then taking appropriate action or had good cause for failing to so act. *See Turner Brothers, Inc. v. OSM*, 101 IBLA 84, 87 (1988). It is to each of those issues I now turn.

*1. By Appealing an Adverse Decision, PADER Was Taking Appropriate Action to Correct Violations and Had Good Cause for Failing to Initiate Another Enforcement Action for the Same Violations then on Appeal.*

As discussed in detail above, PADER aggressively pursued Hamilton for discharging water that violated applicable effluent limitations from six identified discharge areas into tributaries of the Grimes Run. After issuing Compliance Order 88H008, Hamilton appealed that order and abated the alleged violation by pumping and treating water collected from these discharge areas. Ex. R-10. HAFO repeatedly determined that PADER was taking appropriate action until PAEHB dismissed that order, ruling that PADER failed to establish that these discharge areas were located on Hamilton’s permit or hydrogeologically connected to its operations at the Caledonia Pike mine site. Exs. A-3, A-5. On October 19, 1994, HAFO informed PADER that it would conduct an oversight inspection based upon the following determination:

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<sup>9</sup> (...continued)

Exs. R-65 at 4, 5, 6; R-73. This discharge was wholly separate and different from the six discharge areas draining into the beaver ponds on tributaries of the Grimes Run, a separate water course in the area. TDN 94-121-377-04 was sent to PADER, but it later notified OSM that it would take no further action. Ex. A ¶¶ 39, 41; Exs. R-75, R-77, R-81, R-93. OSM determined PADER’s response to that TDN to be inappropriate, conducted an inspection, and issued the Sandy Creek NOV, NOV 95-121-377-01. Ex. A, ¶¶ 42, 48-50; Exs. R-93, R-101 Hamilton sought review of that NOV, abated the discharge, but elected not to pursue its appeal of the Sandy Creek NOV. Ex. A ¶¶ 53-54; Ex. R-107. *See* Note 1.

A recent Field Office inspection found that the operator has ceased treating the discharges [into the Grimes Run]. Treatment was ceased because of an Environmental Hearing Board decision. Water samples of the discharges indicate that significant effluent violations are continuing on a day-to-day basis. *PADER actions have not been effective in causing the violation to be corrected. As a result, the Field Office now finds the response to the TDN [88-121-377-03] to be inappropriate.*

Ex. R-76 (emphasis added). Noticeably absent from that determination is any mention of the PAEHB adjudication or PADER's pending appeal to correct these violations. Moreover and as candidly admitted by Inspector Isaacson, he had not even read the PAEHB adjudication at the time he recommended that PADER's actions be deemed "inappropriate." Tr. at 328-29. HAFO was apparently fixated on whether the violations had been corrected to the total disregard of whether PADER was then taking appropriate action to correct those violations under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3).

Appropriate action under 30 U.S.C. § 1271(a)(1) includes any "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). *See National Coal Association v. Interior Department*, 39 ERC 1624, 1634-35 (D.D.C. 1994). This regulatory definition was added to address OSM experience that "the absence of a well-established review standard has resulted in disparate treatment of states and coal mine operators nationwide." 53 Fed. Reg. at 26733. As there explained:

[The regulatory definition of "appropriate action"] focuses on the goal of the Act itself—to see that violations are corrected. In doing so, the rule allows state discretion in how best to accomplish that goal—but only if those means are authorized under the state program. *OSM is not permitting a "free bite," but is simply saying that the federal government will not substitute its judgment and second-guess the states on a case-by-case basis, unless the state action is arbitrary, capricious or an abuse of discretion under its program.*

*Id.* at 26734 (emphasis added). In further limiting OSM's ability to substitute its judgment for a state's or to second-guess state enforcement decisions when making determinations concerning "appropriate action" and "good cause," under the arbitrary, capricious, and abuse of discretion standard to be used in evaluating state action/inaction, 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), the rulemaking states: "An arbitrary or capricious response, or one that is an abuse of discretion under the State program, would be one in which *the State regulatory authority has acted irrationally, or without adherence to correct procedures, or inconsistently with applicable law, or without proper evaluation of relevant criteria.*" 53 Fed. Reg. at 26733, reaffirming

52 Fed. Reg. 34050, 34051 (Sept. 9, 1987) (emphasis added).

When HAFO made its October 19, 1994, determination, it knew PADER was appealing the PAEHB adjudication to the Pennsylvania Commonwealth Court, yet it inexplicably ignored that fact in making its determination. At that time and thereafter, PADER was continuing its on-going enforcement action, attempting to resuscitate that action, and/or undertaking “an other action authorized under the State program to cause the violation to be corrected.” 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Had PADER prevailed on appeal, its Compliance Order would have been reinstated, Hamilton’s abatement obligations would then immediately reattach, and the violations would be corrected as they had been for the six years before the 1994 adverse adjudication. Since PADER’s appeal was taken to correct the violations identified in its Compliance Order, it is beyond my ken to understand how that appeal is not “cognizable” under 30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). *See* 172 IBLA at 105.<sup>10</sup>

The majority explains that “appropriate action” means issuing an NOV (or a cessation order) because the 1988 rulemaking does not there mention an appeal. 172 IBLA at 107-08; *but see* 52 Fed. Reg. at 34052, *reaffirmed*, 53 Fed. Reg. at 26739 (“If a state is seeking to overturn [an administrative or judicial] injunction, good cause would exist”). The reason for such silence is as apparent as it is obvious, once an enforcement action is undertaken, all steps in reasonable aid of that action are “appropriate” so long as they seek to correct the violations at issue.<sup>11</sup> In explicating the meaning of “appropriate action” under SMCRA, OSM recognized a distinction between enforcement and other actions to correct a possible violation, stating, “[e]nforcement would include, but would not be limited to, the issuance of an NOV to the operator” and an “other action” could include a permit revision or a proceeding to forfeit a bond, but noting that these “examples are not meant to be an exhaustive list of acceptable responses.” 52 Fed. Reg. at 34051. It added:

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<sup>10</sup> The majority fails to discuss whether PADER’s decision to appeal was arbitrary, capricious, or an abuse of discretion or whether HAFO made any such determination under and as required by 30 C.F.R. § 842.11(b)(1)(ii)(B)(1)-(2). Since appealing an adverse decision is unquestionably a reasonable and appropriate action, the majority looks elsewhere to conclude that this appeal is not “cognizable” under 30 C.F.R. § 842.11(b)(1)(ii)(B)(3).

<sup>11</sup> Consistent with this view, HAFO earlier determined PADER’s requiring a study to determine whether Hamilton was responsible for certain acid mine drainage entering the Grimes Run was “appropriate,” notwithstanding the fact that the study would not, itself, correct that violation. *See* Exs. R-32 through R-35.

By this rule, *OSMRE would reject the concept that appropriate action to cause a violation to be corrected would only include responses showing that at the time of the State response either the condition constituting the possible violation of the Act no longer exists or the State has issued an NOV or cessation order . . . .* Direct OSMRE enforcement against an operation would not be utilized . . . when the State is acting reasonably to correct a possible violation. Under the proposed rule, appropriate action would mean that certain conditions may continue in the short term, but ultimately the violation of the State program will be resolved.

*Id.* (emphasis added); *see also* 53 Fed. Reg. at 26733. The final rulemaking goes even further, stating that “actual abatement of a violation is not the standard for determining whether a state response is appropriate,” provided the state response would “lead to abatement within a reasonable time.” 53 Fed. Reg. at 26734. HAFO’s “inappropriate” determination and its exclusive reliance on the fact that the alleged violations were not then being abated stand in stark contrast to the above guidelines and uniform standards established by OSM. Moreover, there is no suggestion in this record or any argument advanced by the Government that PADER’s decision to appeal was arbitrary, capricious, or an abuse of discretion under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) or that its actions were “irrational,” “without adherence to correct procedures,” “inconsistent with applicable law,” “without proper evaluation of relevant criteria,” or would take an unreasonable amount of time before the alleged violations could be abated.<sup>12</sup> 53 Fed. Reg. at 26733, 26734. It is difficult to envision how or under what circumstances appealing an adverse adjudication could ever be arbitrary, capricious, or an abuse of discretion. If there ever was a case where an appeal of an adverse-to-the-state decision would be an “appropriate action,” this is that case.

The majority places central importance on the on-going nature of the alleged effluent violations, claiming that “it is illogical to say that, because the State’s evidence was insufficient to show that there was [a] violation at one point in time, OSM may not take enforcement action when it finds that acid mine drainage is still occurring” and, later, that the effect of the PAEHB adjudication, affirmed on appeal by the Commonwealth Court, “is limited to a finding that Hamilton was not liable for [acid mine drainage] during the period at issue cited in PADER’s compliance order[.]” 172 IBLA at 106, 109. The adverse-to-the-state issue adjudicated by PAEHB and appealed to the Commonwealth Court, however, was not whether effluent violations existed when the Compliance Order was issued (1988), at the time of the PAEHB hearings (1992-1993) or when PAEHB adjudicated and the Court affirmed that adjudication. Rather, the issue that was contested and extensively

<sup>12</sup> It is worth noting that PADER’s initial appeal to the Commonwealth Court was resolved in less than 10 weeks. *See* Note 5.

litigated was whether effluent being discharged from identified discharge areas were either located on Hamilton's permit or hydrogeologically connected to its mine site. Regardless of characterization, the majority fails to take cognizance of the preclusive effect that PAEHB's adjudication had on PADER action under the doctrine of *collateral estoppel* (i.e., issue preclusion). Just as a failure to prove that a one-time effluent violation was coming from a discharge area located on a defendant's permit or hydrogeologically connected to its mine site would preclude an enforcement action against that defendant for subsequent and repeated effluent violations from that same discharge area, so, too, would a state be barred from relitigating whether that defendant is responsible for an on-going effluent violation coming from that discharge area under the doctrine of *collateral estoppel*. The preclusive effect of the state adjudication, affirmed on judicial review, simply cannot be so easily dispensed with by claiming that it is an on-going violation.<sup>13</sup>

I consider PADER's appeal of an adverse-to-the-state adjudication to be "cognizable" and clearly appropriate and that HAFO was simply second-guessing the state's enforcement decisions in issuing its determination on October 19, 1994. This is not a case where the state did nothing; it mounted an immediate appeal and sought judicial review of that adjudication. The Government proffers no rationale to support HAFO's "inappropriate" determination, other than to express incredulity with the result reached by PAEHB. Decision at 11; Answer at 41n. 7. Even so, it must be recalled that the arbitrary, capricious, and abuse of discretion standard to be applied by HAFO is directed to the action of the state regulatory authority (PADER), not to the adjudication made by PAEHB. On its face and absent any reasoned explanation, I believe HAFO's determination was in clear error, without a proper basis, and made in contravention of the uniform OSM standards and applicable guidelines reflected in 30 C.F.R. § 842.11(b)(1)(ii)(B)(2)-(3).

In addition or in the alternative, I believe PADER had "good cause" for failing to initiate another enforcement action on the same operative facts while appealing an adverse-to-the-state adjudication. In discussing "good cause" under SMCRA and 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv), OSM observed that if "a State is seeking to overturn the injunction, good cause would exist." 52 Fed. Reg. at 34052, *reaffirmed*, 53 Fed. Reg. at 26739. If good cause exists when a state appeals a preliminary injunction barring further enforcement action, it should also exist when a state

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<sup>13</sup> Under the majority's view, there is no action PADER could take which would be appropriate. Although it suggests that another NOV would be appropriate, I disagree because an NOV to address effluent from the very same discharge areas for which Hamilton had been absolved of liability and which were then on appeal to the state courts would not only be met with obvious *res judicata* and *collateral estoppel* defenses, but also expose PADER and its counsel to sanctions and claims of malicious prosecution or an abuse of governmental authority for such action.

appeals a decision which would otherwise preclude an enforcement action under *res judicata* and *collateral estoppel*. Having elected to appeal, perforce PADER had good cause for not initiating another enforcement action for the same violation during the pendency of its appeal to the state courts.

HAFO was understandably dissatisfied with PAEHB's adjudication, but in the parlance of the 1988 rulemaking, its desire to prove that Hamilton was responsible for these discharges was little more than a second bite while the first bite was being digested by the state courts. *See* 53 Fed. Reg. at 26734. I believe PADER's appeal of that adjudication is "cognizable" and determinative on whether it was taking "appropriate action." 30 C.F.R. § 842.11(b)(1)(B)(2)-(3). Accordingly, I would find that Hamilton demonstrated by a preponderance of the evidence that PADER's appeal was reasonable, justified, and supported by the circumstances presented and conclude that HAFO's determination was in error, that its inspection was improper, and that its resulting Grimes Run NOV must be set aside.

*2. The Adverse Administrative Adjudication, Affirmed on Judicial Review, Constitutes "Good Cause" under Rules Implementing SMCRA.*

Before considering the majority's view on the merits of appellant's "good cause" claim, I first address whether that issue should even be reached under the record presented. The burden is normally on a defendant to show that good cause existed before an NOV will be set aside, but I believe that burden attaches only where OSM has made such a determination. Where no good cause determination is made before conducting a Federal inspection, I believe any resulting NOV must be set aside, regardless of what OSM might have or could have determined.

On October 19, 1994, shortly before conducting the Federal inspection which precipitated the NOV here on appeal, HAFO determined that "PADER actions have not been effective in causing the violation to be corrected. As a result, the Field Office now finds the response to the TDN to be inappropriate." Ex. R-76. At most, HAFO determined that PADER was not then taking "appropriate action." *See* discussion *infra*. Its failure to address or even mention "good cause" in that determination renders it deficient and insufficient to support a Federal inspection. 30 C.F.R. § 842.11(b)(1)(ii)(B)(1) expressly requires that "before inspection, the authorized [OSM] representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met."

Considering the determination made by HAFO (not one it might have, could have, or should have made), *see* 172 IBLA at 105-09, I am unwilling to morph the word used, "inappropriate," into an implied determination that PADER lacked good cause for failing to initiate another enforcement action (i.e. that it arbitrarily, capriciously, or in an abuse of discretion failed to take appropriate action). Nor for

that matter, am I willing to deem HAFO's use of that word to be a legally sufficient written determination that the standards for appropriate action were unmet. *See* discussion *supra*. This obvious failure to issue a written determination that the good cause (or appropriate action) standards were unmet is not a mere procedural error or technical oversight which can be corrected after the fact based upon *post hoc* rationalization. This failure not only strikes at the heart of the "cooperative federalism intended by Congress" and implemented by OSM's 1988 rulemaking, but also suggests a disregard of (not a respect for) the role of the states with approved programs. 53 Fed. Reg. at 26728, 26731. Accordingly, I would reverse ALJ Greenia's affirmance of the Grimes Run NOV on the simple rationale that HAFO made no written "good cause" determination *before* conducting its inspection which led to that NOV, under and as required by 30 C.F.R. § 842.11(b)(1)(ii)(B)(1). I turn now to the merits of the "good cause" issue addressed by the majority.

OSM rules define "good cause" as including situations where "the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from action on the possible violation, where that order is based on the violation not existing . . . ." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). We extensively considered the import and effect of this rule in *Pittsburgh & Midway Coal Mining v. OSM*:

The preamble to clause (B)(4)(iv) states that 'a state regulatory authority has good cause for not taking action when it is enjoined from doing so by a state administrative or judicial body acting within the scope of its authority under the state program.' 53 FR 26739 (July 14, 1988). Also, 'good cause exists for the regulatory authority not acting only where the order has a proper basis.' *Id.* Thus, it appears that what OSM requires of the state is that the administrative or judicial body be 'acting within the scope of its authority under the state program' and that the decision or order have a 'proper basis.' There is no indication that OSM intended to conduct a *de novo* review of all the evidence presented to the administrative or judicial body and make an independent determination. As stated by the court in *National Coal Association v. Uram, supra* at 20 [39 ERC at 1634]:

The federal government's role is one of oversight. The due deference Congress intended the states be accorded under SMCRA is analogous to the deference accorded executive agencies given primary responsibility for the implementation of particular statutes. In such instances, the standard of review of the agency's action is arbitrary and capricious. *See* 5 U.S.C. § 706 (1988).

We conclude that the applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failure to correct a violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Thus, OSM is required to defer to the ruling of the state administrative body that no violation exists, unless it determines that the ruling is arbitrary, capricious, or an abuse of discretion of the state program. Such a ruling would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling.

132 IBLA at 79-81 (footnotes omitted). *See also Marion Docks, Inc. v. OSM*, 168 IBLA 47, 50-52 (2006). Simply stated, OSM is not to conduct an independent, *de novo* review of the evidence presented in state enforcement proceedings under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). Rather, the scope of its duty is limited to determining whether the decision of the state administrative or judicial body had a “proper basis.” Based on that standard and the PAEHB adjudication, I believe PADER had good cause for failing to pursue another enforcement action during the pendency of its appeal. *Cf. Elk Run Coal Co. v. Babbitt*, 919 F.Supp. 225, 229-31 (S.D.W.Va. 1996).

HAFO’s inspection, resulting NOV, and presentation before Judge Greenia on review of that NOV focused on whether Hamilton was responsible for effluent from the same six discharge areas which were the subject of PADER’s above-described enforcement efforts. Ex. A ¶ 45. Hamilton contended before Judge Greenia and argues on appeal that OSM’s enforcement action was precluded under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). SOR at 14-44. The Government’s only response on the merits of this issue is its *post hoc* rationale that “it appeared to OSM that the PAEHB misapplied the law regarding causation of a violation of the Pennsylvania Clean Streams law,” Answer at 41 n. 7, but the law of causation applied by PAEHB was the same as used by Judge Greenia (*i.e.*, whether the six discharge areas were on Hamilton’s permit or hydrogeologically connected with its mine site). The Government apparently also claimed that the PAEHB adjudication must be wrong because it was unable to “determine how the EHB ignored testimony that the discharges were located within the permit boundaries.” Decision at 11. This claim not only appears based on an improper, *de novo* review of the evidence presented to PAEHB, but also a review that occurred several years *after* HAFO’s determination, inspection, and NOV and, therefore, could not have influenced HAFO decisionmaking on October 19, 1994. *See also* Tr. 328-29.

It is clear from my review of PAEHB's adjudications and the Commonwealth Court decision that the linchpin of PADER's case against Hamilton was a map (Exhibit C-10) depicting the location of the mine site, Hamilton's permitted area and the six discharge areas. After that map was ruled to be inadmissible, *Al Hamilton Contracting Co. v PADER*, 1992 EHB 1366 (Ex. A-2) and 1993 EHB 418 (Ex. A-4), and based on its review of the testimony presented, PAEHB twice ruled that PADER had failed to establish that these discharge areas were on Hamilton's permit or hydrogeologically connected to its mining operations. *Al Hamilton Contracting Co. v PADER*, 1992 EHB 1747 (Ex. A-3) and 1994 EHB 1074 (Ex. A-5).<sup>14</sup> On PADER's petition for review, the Commonwealth Court affirmed PAEHB's excluding that map because PADER failed to demonstrate that it "accurately represents what it purports to represent." *PADER v. Al Hamilton, supra*, 665 A.2d at 853. PADER also contended that PAEHB erred in holding that Hamilton was not liable for these discharges and discharge areas, but without the excluded exhibit, it later acknowledged that it had not presented substantial evidence of Hamilton's liability for the discharges or discharge areas in either 1992 or 1994. *Id.* PADER's request for reargument was denied, as was its petition for review by the Pennsylvania Supreme Court. See Note 7.

The majority applies a formulaic interpretation to 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv), holding that it applies only to an injunction, not to an adjudication or final judicial decision on the merits of the state's enforcement action. 172 IBLA at 108, 109. Under their view, HAFO is free to disregard state adjudications and final judicial decisions so long as they are not injunctions, but no such distinction was drawn by the Federal District Court on judicial review of OSM's oversight enforcement authority in *Elk Run Coal Co. v. Babbitt, supra*. In applying that good cause rule to a final administrative decision (not an injunction), the court held: "WVDEP, the State regulatory authority, was precluded by SMB, an independent administrative body, from acting on a possible violation based on SMB's determination that a violation did not exist." 919 F. Supp. at 230. Here, PAEHB ruled and the Commonwealth Court affirmed that Hamilton was not responsible for the discharges alleged by HAFO. Although water in excess of applicable effluent limitations was coming from the six identified discharge areas, PAEHB and the Commonwealth Court determined that Hamilton was not responsible for those discharge areas. Thus and as to Hamilton and these discharge areas, they determined

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<sup>14</sup> As the case presented to Judge Greenia by OSM demonstrates (Decision at 14-18), PADER might well have achieved a different result had it committed a comparable level of time, resources and expertise to its enforcement action as had OSM to this proceeding. See 172 IBLA at 110. Although this might suggest a programmatic concern under the approved state program which should be addressed by OSM, it is irrelevant to a review of OSM's actions under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv).

that a violation by Hamilton had not been shown to exist. In my view, “good cause” then existed for PADER electing not to pursue yet another enforcement action for these same effluent discharge violations.

The “good cause” question to be decided should more properly be whether the PAEHB adjudication and the Commonwealth Court’s affirmance of that adjudication had a “proper basis.” See *Pittsburgh & Midway Coal Mining v. OSM*, 132 IBLA at 81. If they did, PADER had “good cause” for failing to pursue another enforcement action against Hamilton under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv). PAEHB considered the evidence presented, applied the proper legal standards, excluded a key piece of evidence (Exhibit C-10), and held that PADER failed to establish that Hamilton was liable for the effluent from these discharge areas. PADER conceded on appeal that PAEHB’s adjudication could be overruled only if the Commonwealth Court reversed PAEHB’s evidentiary ruling (*i.e.*, PADER acknowledged that it had not presented substantial testimonial or other evidence that the six discharge areas were on Hamilton’s permit or hydrogeologically connected to its mine site). Simply put and without Exhibit C-10, PADER had failed to make its case to the PAEHB.

The only possible claim that the PAEHB adjudication and Commonwealth Court decision lacked a proper basis is the correctness of their evidentiary rulings. As recognized by OSM, however, “Congress clearly envisioned a regulatory structure in which states would bear the primary responsibility for enforcing the law, but with oversight by the federal government. That oversight must be based on respect for the role of the states.” 53 Fed. Reg. at 26731. It is hard to imagine a greater intrusion into the role of the states than our second guessing their evidentiary rulings under Pennsylvania law, as made by the PAEHB Chairman (Ex. A-2), the full PAEHB (Ex. A-4), and the Pennsylvania Commonwealth Court. To go further and engage in a *de novo* review of the evidence presented by PADER, as suggested by the Government, would significantly exceed OSM’s limited oversight responsibilities in a state with an approved State program under 30 U.S.C. § 1271(a)(1). Accordingly, I would find that HAFO’s implied determination that PADER lacked “good cause” for failing to pursue another enforcement action against Hamilton was error.<sup>15</sup>

Although I would reverse Judge Greenia’s affirmance of HAFO’s appropriate action/good cause determination under the facts of this case, I note that this does not

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<sup>15</sup> Judge Greenia believed that OSM’s NOV was significantly different from PADER’s enforcement action because the NOV was based on water collected in the beaver ponds from the six discharge areas and PADER’s action was based on water coming directly from these same discharge areas but before it was collected. Decision at 11. I simply fail to see a legal distinction between effluent limitation discharge violations based on sampling effluent discharge water before (as by PADER) or after (as by HAFO) it is collected. See Ex. A ¶ 45.

preclude future enforcement action by the state or HAFO if predicated on a new or different basis. For example, they could proceed if other discharge areas affecting the Grimes Run were identified and shown to be on Hamilton's permit or hydrogeologically connected to its mining operations. Simply claiming that a violation is "continuing," "ongoing," or occurring at different point in time, however, would not be a new and different basis. *See* discussion *supra*. Since the state adjudication and decision determined that Hamilton was not liable for any effluent from these discharge areas, PADER was precluded from pursuing a new enforcement action against Hamilton based on these same discharge areas under *collateral estoppel* and/or *res judicata*. OSM should be similarly precluded from taking an enforcement action for those same violations, not under *collateral estoppel* or *res judicata*, but under rules prohibiting Federal enforcement under SMCRA when the state has "good cause for failing to take such action. As we observed in *RCT Engineering v. OSM*, 121 IBLA 142, 146 n.5 (1991): "Despite OSM's continued adherence to the view that it is not collaterally estoppel by proceedings of state agencies (see discussion, [*id.* at 148-49]), [30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv)] in many cases may have a similar effect in practice." I believe the circumstances presented are one of those "many cases."

/s/

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James K. Jackson  
Administrative Judge