



JOHN L. STENGER

175 IBLA 266

Decided August 6, 2008



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

JOHN L. STENGER

IBLA 2008-115

Decided August 6, 2008

Appeal from a decision of the Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, affirming a decision made by the Charleston Field Office that the West Virginia Department of Environmental Protection had taken appropriate action in response to a Ten-Day Notice. TDN # X06-112-014-001, TV1.

Set aside and remanded.

1. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Record--Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals--Surface Mining Control and Reclamation Act of 1977: Citizens Complaints--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

It is incumbent upon OSM to ensure that its decision is supported by a rational basis which is explained in the written decision, as well as being substantiated by the administrative record accompanying the decision. The recipient of an OSM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. An OSM decision which fails to meet this basic requirement is properly set aside and the case remanded.

APPEARANCES: John L. Stenger, Lost Creek, West Virginia, *pro se*; Steven C. Barclay, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

John L. Stenger appeals from a decision of the Regional Director, Appalachian Regional Coordinating Center (ARCC), Office of Surface Mining Reclamation and Enforcement (OSM), issued on January 31, 2008, affirming on informal review a determination made by OSM's Charleston Field Office (CFO) that the West Virginia Department of Environmental Protection (WVDEP) had taken appropriate action in response to Ten-Day Notice (TDN) # X06-112-014-001, TV1. The TDN was issued by OSM on October 16, 2006, in response to an allegation of a lost agricultural water supply Stenger had raised in a citizen's complaint, filed June 3, 2003, pursuant to the provisions of section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (2000). As discussed below, the limited nature of both the State's response to the TDN and the record before the Regional Director, ARCC, compel us to set aside OSM's decision on informal review and remand the case for further consideration..

*Factual and Procedural Background*

Stenger's citizen's complaint alleged a number of violations of the West Virginia surface mining regulatory program at a site previously mined by United Coals, Inc. (United), and now undergoing reclamation, on Stenger's property. In response to the citizen's complaint, OSM issued a TDN to WVDEP, which provided initial and supplemental responses to this first TDN in June and October 2003. The responses documented three State notices of violation (NOVs) issued to United for placing spoil outside the permit area. WVDEP generally disputed the existence of the other alleged violations. OSM subsequently determined that WVDEP had taken "appropriate action" with respect to the off-permit placement of spoil and had shown "good cause" for not taking enforcement action with respect to the other alleged violations; as a result, OSM declined to take Federal enforcement action.<sup>1</sup> Stenger appealed OSM's decision to IBLA.<sup>2</sup>

<sup>1</sup> See 30 C.F.R. §§ 842.11(b)(1)(ii)(B), 843.12(a)(2).

<sup>2</sup> A substantial part of the Board's decision in *John L. Stenger*, 170 IBLA 206 (2006), *rev'd in part on other grounds*, *John L. Stenger*, 35 OHA 17 (2007), the decision on reconsideration, *John L. Stenger (On Reconsideration)*, 171 IBLA 1 (2006), the decision of the Director, Office of Hearings and Appeals, *John L. Stenger*, 35 OHA 48 (2007), and the Board's order, *John L. Stenger (On Remand)*, IBLA 2007-209 (Sept. 5, 2007), concern the issue of placement of excess spoil outside the permit area. As that  
(continued...)

In *John L. Stenger*, 170 IBLA at 216, *rev'd in part on other grounds*, *John L. Stenger*, 35 OHA 17 (2007), the Board observed that Stenger's citizen's complaint included two issues that OSM had failed to incorporate into the TDN: replacement water for agricultural purposes, and large rocks left on the surface. With respect to the first, we held as follows:

W. Va. Code § 22-3-24(b) requires operators to replace the water supply for agricultural use where the water supply has been affected by "contamination, diminution or interruption proximately caused by the surface mining." Although Stenger claimed in his citizen's complaint that he used the pond for agricultural use and that he needed his 'water supply resources restored'. . . OSM's TDN did not include this issue, so WVDEP did not respond to it. The Federal inspection was similarly focused only on the sediment control issue. We cannot affirm OSM where it has not complied with the SMCRA requirement to inform the State regulatory authority of a citizen's complaint and has failed to make an independent investigation into the matter. We therefore vacate and remand to OSM to issue a TDN to WVDEP on this issue to allow WVDEP an opportunity to respond in the first instance to the issue of replacement water for agricultural purposes.

*John L. Stenger*, 170 IBLA at 216 (footnotes omitted).

On October 16, 2006, OSM's CFO sent TDN # X06-112-014-001, TV1 to the WVDEP. Administrative Record (A.R.) 5. It described the violation Stenger alleged as follows: "The permittee has affected an agricultural water supply. The drainpipe and valve within Pond B, used for supplying water to livestock, have been rendered inoperable." *Id.*

The WVDEP responded to the TDN on October 24, 2006, in a letter from Jeff McCormick, Assistant Director, WVDEP, to Roger W. Calhoun, Director, CFO. (WVDEP TDN Response), A.R. 6. The WVDEP summarized and attached a copy of a September 16, 2004, Final Order from the West Virginia Surface Mine Board (WVSMB or State Board)<sup>3</sup> that addressed Stenger's alleged loss of his agricultural water supply. *Stenger v. WVDEP*, Appeal No. 2004-03-SMB (WVSMB Order or State Board Order). Under "Appeal # 4," the WVSMB's Order states:

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<sup>2</sup> (...continued)

issue is not before us, we discuss it no further, and describe the Department's adjudications only as they bear on the matter at hand.

<sup>3</sup> The hearing followed Stenger's appeal of the State's decision to grant a Stage I bond release. WVSMB West Milford Hearing (May 18, 2004) at 19.

During the site visit, the Board saw that the drainpipe, which had a valve on it to supply water for livestock was plugged and not operating. Overflow from the pond was flowing through [the] pond overflow “trickle pipe” and discharging on the outer side of the dam causing severe erosion to the dam embankment.

The Board Orders that permittee restore the trickle pipe and extend it in a permanent fashion beyond the dam embankment to stop erosion *and for a water supply for agriculture use*, and also permanently repair erosion on [the] face of [the] dam and spillway.

The Board further Orders that *prior to Phase III release, permittee must restore the pond to its pre-mining condition and function.*

WVSMB Order, at 5 (emphasis supplied).

WVDEP’s TDN Response to OSM, interpreted the above-quoted State Order as follows:

In the [WV]SMB Order (pp. 5), the [State] Board required the repair/restoration of the “trickle pipe” and the permanent repair of the erosion on the dam face and spillway. The Board considered the restoration of the trickle pipe to effectively restore Pond B to a water supply for agricultural use.

These corrective measures were accomplished on or about May, 2005.

The [WV]SMB further ordered that prior to Phase III Release, the permittee must restore the pond to its pre-mining condition and function.

....

The WVDEP-DMR considers the [WV]SMB Order to require sediment removal prior to Phase III Release, trickle pipe [stet] functioning properly now and prior to Phase III Release, and erosion repair completed and maintained prior to Phase III Release.

WVDEP TDN Response at 1.

The WVDEP TDN Response also referenced and attached a report by Clarence Wright, WVDEP permit engineer, dated September 25, 2002, and described it as “a professional engineer’s opinion on the functionality of the pipe and valve assembly of Pond B.” WVDEP TDN Response at 1; *see* Memorandum dated Sept. 25, 2002, from

Clarence Wright, Permit Engineer, to Craig Griffin (Wright Report). The WVDEP TDN Response did not attempt to interpret or further characterize that report.

Our review of the Wright Report reveals that Wright, accompanied by a WVDEP inspector, Glenn Cox, had examined the pond, drainpipe, riser, and trickle pipe on September 5, 2002. He stated that there were several areas above the pond that were disturbed by Stenger, or others at his request, that were not fully revegetated, contributing to the sediment load in the pond. Wright Report at 1. Wright observed that the drainpipe appeared to be plugged with sediment. *Id.* He spoke to Stenger, who reportedly told Wright that he had constructed the pond in the early 1980's, had put a 6-inch drainpipe in the original stream channel with a 4-foot perforated riser, had installed a guard around the pipe to keep sediment out of the standpipe, and, when the pond was "upgraded for mining use," United, at Stenger's request, had installed a 12' trickle pipe "for his use." *Id.* Stenger also stated that, for a time, he periodically drained the drainpipe to flush out sediment, and last did so sometime after the permit was issued in 1995, around 6 or 7 years ago. *Id.* Finally, Wright reports that Stenger had recently excavated 2 to 3 feet of the streambed to uncover the lower end of the drainpipe and provide a drainway. *Id.* Wright discussed his estimate of the pond's sediment-carrying capacity under State law.<sup>4</sup>

Refocusing on certain of these factors as they relate to the functionality of the pipe and valve at the time that United's mining operations began, Wright analyzed the facts as he understood them as follows:

There ha[ve] been "continuing problems with sediment at the lower area of the pond since the pond was constructed. Otherwise there would be no need to install a guard around the standpipe or periodically flush out the drainpipe." This was at least 10 years before any mining was conducted on the property. When mining commenced, Mr. Stenger requested a 'trickle pipe' be installed. This is another indication the drain pipe was not working properly and required regular maintenance. The fact [that] the drainpipe was buried under 2 to 3 feet of sediment is another indication of the condition that existed prior to mining.

Wright Report at 2.

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<sup>4</sup> This sediment-carrying capacity of the sediment control structure was addressed in the Board's decision in *John L. Stenger*, 170 IBLA at 215-16, where we held that "[t]he pond is permitted as a sediment control device and is apparently performing that function well with extensive capacity to accept further sediment." *Id.* at 216.

By Letter dated November 2, 2006, Bradley W. Edwards, Reclamation Specialist, Morgantown Area Office, OSM, responded to the State. Edwards referred to the WVSMB Order, closely paraphrasing it, but did not reference the Wright Report or explain why the WVDEP TDN Response was determined to be appropriate.

Nearly 8 months later, on June 29, 2007, the CFO wrote Stenger to describe the actions that had occurred since this Board's September 25, 2006, decision, which remanded to OSM the portion of Stenger's complaint regarding the lost agricultural water supply for issuance of a TDN. The letter apologized for its tardiness, and reported that the WVDEP, in its response, had indicated that erosion on the dam face and spillway had been repaired, the trickle pipe had been restored, and that sediment removal prior to Phase II bond release was required. The CFO also reported that OSM had determined that the State had "taken the proper action in this matter," but provided no basis for the State's decision or OSM's determination, and did not mention the Wright Report. Letter dated June 29, 2007, from Roger W. Calhoun, Director, CFO, to Stenger at 1-2.

Stenger appealed, requesting informal review by the Regional Director, ARCC, OSM. Letter dated Oct. 25, 2007 from Stenger to Brent Wahlquist, Regional Director, ARCC, OSM (Request for Informal Review). Stenger asserted that the WVDEP response to the TDN "failed to address the violation of which I complained," and continued as follows:

Repair of the overflow pipe and the erosion damage to the dam have no connection whatsoever to my water supply pipe and associated valves. The "trickle tube" is basically a culvert pipe, which flows with pond overflow. The water supply pipe is a completely separate smaller pipe, which served to convey water beneath the dam and supply water for agricultural purposes to my animals and fields located below the pond. The 'trickle tube' does not supply water in this manner, as it is merely an overflow device with no valve or plumbing and no way to add or attach such plumbing.

Furthermore, during periods of dry weather (which during 2007 have amounted to several months) the pond does not overflow. Thus no water is discharged through the "trickle tube" overflow pipe. The water supply pipe, which is now inoperable, enabled me to draw water from the lower depths of the pond and insured a reliable water supply even in the worst of droughts.

Request for Informal Review at 1-2.

Stenger asserts that "Replacement of water supply" is defined in the Surface Coal Mining and Reclamation Act, W. Va. Code § 22-3-32 (2007), to include

“provision of an equivalent water delivery system,” and that “a disabled water supply pipe with accompanying valves and plumbing can’t be replaced by repairing the overflow culvert.” Request for Informal Review at 2. He also asserts that W. Va. Code § 22-3-24 (2007) requires restoration of the water supply for agricultural uses and that subsection 24(c) requires that the operator permanently restore the supply within 30 days. *Id.*

Stenger states that sediment in the pond has accumulated to a level that is above the inlet elevation of the pond water supply pipe, and that “[to] restore my water[] supply the sediment must be removed.” Request for Informal Review at 2. He contends that removal of the sediment should not wait until Phase III release and that West Virginia’s surface mining rule at Title 38, Series 2, Section 5.4h requires that “abandonment of the pond as a sediment structure (and by inference, the return of a pond to landowner use and control) must occur at least 2 years before final bond release.” *Id.*

Pointing to photographs of the repaired trickle tube, Stenger explains that although the valve is open, “since the pond is not full to overflowing, no water enters the ‘trickle tube’ and since sediment has buried the inlet of my water supply inlet pipe, it cannot discharge water.” Request for Informal Review at 3. He asked that the Regional Director “order an immediate cleaning of sediment from my pond and restoration of my water supply,” and reasserts that the WVDEP response was arbitrary and capricious “as the WVDEP answered with a response concerning an overflow pipe [which] has no connection to my water supply pipe.” *Id.*

#### *ARCC’s Decision on Informal Review*

By letter dated January 31, 2008, the Regional Director, ARCC, responded, with OSM’s apologies for its delayed response. Letter dated Jan. 31, 2008, from Thomas D. Shope, Regional Director, ARCC, OSM to Stenger (Decision on Decision on Informal Review) at 1. The letter methodically details the procedural background of the case, describes the “limited scope of this informal review,” and lays out, in apparent chronological order, certain facts of the case as he understood them “[a]fter review of the record.” *Id.* at 5. The recitation begins by noting that Stenger “constructed the pond, referred to as ‘Pond B’ that served as a source of water for an agricultural water supply in the early 1980s,” and continues with a description of the pond construction, including the 6” pipe, guard, and valve. *Id.* It next states that “[s]ometime after construction of the pond, the valve and piping system became inoperable and the system remains inoperable today.” After discussing the inoperability of the valve and pipe system, the Regional Director’s findings of fact states that United’s permit to mine the site was issued on September 27, 1995. *Id.* After providing additional facts, the recitation concludes by quoting the WVSMB Order. *Id.* at 6.

The Regional Director characterizes the complaint as focusing on one of two water supply delivery systems associated with Pond B: “the pipe and valve system that you installed when you built the pond and the overflow pipe that you requested that United construct prior to mining,” and states that “[t]here is no dispute in the record that the pipe and valve system is currently inoperable, most likely due to the pipe being plugged by sediment.” Decision on Informal Review at 6.

Addressing Stenger’s assertion that the WVDEP TDN Response was arbitrary, capricious, and an abuse of discretion because State law requires United to replace Stenger’s agricultural water supply, the Decision questions “whether the system became inoperable from United’s use of the pond B as a sediment control device during its mining operations or whether other factors caused the system to become inoperable,” and cites § 22-3-24(b) of the West Virginia Code, which provides:

Any operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner’s supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution or interruption proximately caused by the surface mining operation, unless waived by the owner.

The Decision on Informal Review also quotes the definition at § 22-3-3(z) of the West Virginia Code, which provides that:

“Replacement of water supply” means, with respect to water supplies, contaminated, diminished or interrupted provision of water supply on both a temporary and permanent basis of equivalent quality and quantity. Replacement includes provision of an equivalent water delivery system and payment of operation and maintenance cost in excess of customary and reasonable delivery cost for the replaced water supplies.

Decision on Informal Review at 7.

Focusing on the valve and pipe water delivery system, the Regional Director found no violation of State law and, therefore, no basis for ordering a Federal inspection. He “reviewed the record for information that would establish whether United’s surface mining operations or other causes were at fault,” and were “the proximate cause of the valve and pipe delivery system becoming inoperable.” Decision on Informal Review at 7.

The record does not pinpoint the exact time the pipe and valve system ceased to function. The only information in the record that addresses this specific point is the general statement in the WVDEP’s

September 25, 2002, engineer's report which indicates that the last time you flushed out the sediment was "sometime after the permit was started (6 or 7 years ago)."<sup>5</sup> However, from the record it appears that sediment had affected the valve and pipe delivery system before mining had begun.

*Id.* The Decision refers to the Wright Report. *Id.* at 8.

"Additionally," the Regional Director continued,

as noted in the WVSMB's September 16, 2004, Order, the WVSMB conducted a review of the record, and engaged in a site visit and a hearing, which focused, in part, on the drainpipe and valve aspects of the water delivery system. After consideration of this evidence, the WVSMB considered repair of the overflow pipe as restoration of the water supply for agricultural use. *Id.*<sup>6</sup>

Stenger filed a notice of appeal on February 21, 2008, followed by a Statement of Reasons (SOR) on March 12, 2008, which incorporates by reference his letter to the Regional Director dated February 13, 2008, requesting reconsideration of the Decision.<sup>7</sup> The SOR refers to a copy of the transcript from the WVSMB Hearing held at West Milford, Harrison County, West Virginia on May 18, 2004, and at Nitro, Putnam County, West Virginia on June 25, 2004.<sup>8</sup> OSM filed an Answer to the SOR on March 31, 2008, and on April 11, 2008, Stenger filed a Rebuttal to OSM's Answer

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<sup>5</sup> These two sentences cast doubt on the Regional Director's findings of fact which indicate that the pipe and valve system was "inoperable" prior to the start of United's mining. It appears that the Regional Director may have overstated the status of the pipe and valve system prior to mining as "inoperable," just as in its Answer OSM overstates Stenger's characterization of the system as "entirely functional." Answer at 6-7.

<sup>6</sup> The Regional Director also responded to Stenger's assertion that the abandonment rules require the operator to abandon the pond as a sediment structure at least 2 years before final bond release. He determined that, although Pond B by its nature would fall within the scope of the abandonment procedure quoted above, because Stenger wishes to retain the pond after final bond release, its permanent retention is covered instead under West Virginia's surface mining rule at Title 38, Series 2, Section 5.4h, which does not contain a time limitation. Decision on Informal Review at 9.

<sup>7</sup> The Board received the Request for Reconsideration addressed to the Regional Director on Mar. 12, 2008.

<sup>8</sup> The transcript of the 2-day hearing was not attached to the SOR.

with attachments that included photographs identified as Pond B, dated October 1995, and Pond B post-mining, documents identified as the WVSMB West Milford and Nitro Hearing transcripts, and an OSM administrative record, dated June 1, 2004, which we assume was the administrative record for Stenger's appeal in *John L. Stenger*, 170 IBLA 206.

### *Arguments on Appeal*

Stenger's SOR begins as follows: "Nearly six long years ago, Stenger's supply system of pipes and valves ceased to function due to massive sediment from mining activity which gradually accumulated to a level that rose above the pipe intake elevation inside Stenger's pond." SOR at 1. He then highlights what he claims are inconsistencies in the various State and OSM determinations:

OSM and WVDEP both falsely claim they have restored Stenger's water supply system by fixing a completely separate overflow culvert. Paradoxically, OSM asserts that WVDEP has shown good cause for not fixing Stenger's supply system. The WVSMB acknowledged and accepted that sediment caused by mining had to be removed to repair Stenger's water supply, (see Transcript p. 249 and 250). Now OSM is falsely claiming that damage is not related to mining.

SOR at 4. In the Rebuttal, Stenger asserts that the trickle tube repair "does absolutely nothing to restore the disabled water supply system"; that State law requires prompt replacement of restoration of damaged water supplies; and that the Wright Report, relied upon by the Regional Director, is fraught with error, and only finds that "the water supply system required regular maintenance and wasn't 'functioning properly' prior to mining," not that it was "disabled" prior to mining. Rebuttal at 1-2. He contends that the WVDEP "has never in all the years since this dispute began in the summer of 2002 made a claim that the pipes were disabled before mining." *Id.* at 2. Stenger further contends that any sediment in Pond B that originated from on-site or off-site spoil disposal areas are the responsibility of the operator and were generated by the mining operations. *Id.* at 5. He asserts that much of the evidence supporting his contention that the pipe and valve system had been functioning when mining began is contained in the record for the WVSMB hearing, and asks that the Board consider the transcripts from the WVSMB hearing and an administrative record dated June 1, 2004.<sup>9</sup> *Id.* at 4-8.

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<sup>9</sup> We cannot determine with certainty whether the documents identified as a hearing transcript comprise the entire transcript, or whether the documents identified as a 2004 administrative record comprise the administrative record that was before the Board in *John L. Stenger*, 170 IBLA 206.

OSM distills two contentions from Stenger's appeal: that OSM improperly supplied its own rationale for not taking enforcement action, rather than relying upon the WVDEP response, and that the delivery system "was entirely functional" prior to United's mining and ceased functioning due to clogging from sediment produced from those operations. Response at 6-7. With the regard to the first, OSM argues that it acted properly when it considered the Wright report a component of the WVDEP TDN response and decided not to take further action in reliance on this "rationale provided by the WVDEP." *Id.* at 7. With respect to the second contention, OSM states that the Wright report concluded that the drainpipe was clogged prior to mining, that "the WVDEP accepted its engineer's conclusion, and took no further action," and that OSM "acted properly in upholding the WVDEP's decision, because the 'evidence' provided by Mr. Stenger is insufficient to tip the scale in his favor on this question." *Id.* at 8. OSM argues that since the photographs and excerpts from the WVSMB hearing, which Stenger relies on for support, "were not provided to OSM prior to its informal review decision, they are not part of the administrative record. As such, this evidence should not be considered by the IBLA." *Id.* However, OSM continues, "even if evaluated on their merits, the attachments are not persuasive." *Id.* OSM discredits the probative value of the photographs dated April 25, 1994, and May 2, 2004, as lacking "any evidence that sedimentation, whether from mining or another source was blocking the pond's drainpipe." *Id.* at 9. OSM finds a third photograph equally unhelpful. *Id.*

Turning to the excerpts of WVSMB testimony, "hand-picked by the Petitioner," OSM states:

Without the benefit afforded by a review of the entire transcript, neither OSM nor the IBLA may fairly decide whether the preponderance of evidence supports or refutes Stenger's contention that United's mining activities disabled the pond's water delivery system. Should the IBLA choose to evaluate the excerpts on their own merits, however, OSM contends that they are insufficient to prove the Petitioner's allegation.

Answer at 9. OSM avers that the excerpts "merely suggest, but do not prove by a preponderance of the evidence, that United's mining activities contaminated and interrupted his water supply, and thus, also fail to prove that the WVDEP's decision was arbitrary, capricious or an abuse of discretion." *Id.* at 10.

## ANALYSIS

1. *Statutory and Regulatory Authority for Informal Review*

Under section 503 of SMCRA, 30 U.S.C. § 1253 (2000), a state with an approved state program has primary responsibility for enforcing its state standards, under section 521(a)(1), 30 U.S.C. § 1271(a)(1) (2000), but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. *John L. Stenger*, 170 IBLA at 208; *Pittsburg & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 72 (1995); *Harvey Catron*, 132 IBLA 244, 255 (1995).

When a citizen's complaint provides OSM with reason to believe that a permittee is in violation of a state regulatory program, OSM is required to issue a TDN to the appropriate state regulatory authority. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); *John L. Stenger*, 170 IBLA at 208; *Frank Hubbard*, 145 IBLA 49, 52 (1998). Unless the state regulatory authority takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so in response to a TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); *Jim & Ann Tatum*, 151 IBLA 286, 298 (2000). If, upon inspection, OSM finds any violation of any requirement of SMCRA or any permit condition required by the statute, OSM must issue a citation and require abatement of the violation. 30 U.S.C. § 1271 (2000).

The regulations at 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), provide that both "appropriate action" and "good cause for failure to act" are measured by whether the state regulatory authority's action or response to a TDN was arbitrary, capricious, or an abuse of discretion under the state program. *Pittsburg & Midway Coal Mining Co. v. OSM*, 132 IBLA at 72, 74, 75-77; *Shamrock Coal Co. v. OSM*, 81 IBLA 374, 379 (1984).

"Appropriate action" is defined as "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). The regulations at 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) list "five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 Fed. Reg. 26735 (July 14, 1988). A state may have good cause for failing to act on a TDN where, *inter alia*, "[u]nder the State program, the possible violation does not exist," or "the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i)-(ii).

The Department “will not substitute its judgment for that of the state regulatory authority,” or second-guess state enforcement decisions when making determinations concerning “appropriate action” and “good cause,” “except where OSM concludes that the response to the TDN was arbitrary, capricious, or an abuse of discretion.” *Harvey Catron*, 134 IBLA at 256, *citing Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA at 60. In promulgating that rule, the Department further explained: “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,” or that would take an unreasonable amount of time before the alleged violations could be abated. 53 Fed. Reg. at 26733-734, *reaffirming* 52 Fed. Reg. 34050, 34051 (Sept. 9, 1987).

Where OSM, under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), has declined to take enforcement action pursuant to a citizen’s complaint because it finds that the state regulatory authority’s response was appropriate or that there was good cause for not taking enforcement action, any party seeking to challenge such a finding must establish, by a preponderance of the evidence, that the state regulatory authority’s action or response to a TDN was arbitrary, capricious, or an abuse of discretion. *See John L. Stenger*, 170 IBLA at 209; *Morgan Farm, Inc.*, 141 IBLA 95, 100 (1997); *Betty L. & Moses Tennant*, 135 IBLA 217, 227 (1996); *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA at 74.

## 2. *Consideration of Additional Evidence*

[1] To begin, Stenger has forwarded to the Board, and urges us to consider along with OSM’s administrative record for this appeal, documents identified as copies of the transcript from the WWSMB’s hearing held in May and June 2004, photographs, and an OSM administrative record dated June 1, 2004. OSM argues that the excerpts from the State Board hearing transcript and photographs were not provided to OSM prior to its informal review decision and, as they are not part of the administrative record, should not be considered by IBLA. Regarding the State hearing testimony, OSM asserts that “[w]ithout the benefit afforded by a review of the entire transcript, neither OSM nor the IBLA may fairly decide whether the preponderance of evidence supports or refutes Stenger’s contention that United’s mining activities disabled the pond’s water delivery system.” Answer at 9. OSM urges the Board to limit our review to the State Board order and Wright report without consideration of the State Board hearing transcripts submitted by appellant.

Those transcripts, however, which include testimony from several witnesses, including Wright, and commentary from State Board members regarding the historical, current, and potential functionality of Pond B and its various pipes and valves, shed some light on the proper interpretation of the State Board order and the Wright Report, and on the reasonableness of the State’s TDN Response. We decline

the invitation to render uninformed interpretations of a State Board order and engineer's report attached to a TDN Response wholly lacking in reasoned analysis. And we find OSM's willingness to ignore evidence that bears on the reasonableness of its own inferences troubling, particularly in view of the fact that the TDN in this appeal was issued after this Board remanded the matter to OSM for failure to include the water delivery portion of Stenger's citizen complaint in the TDN issued in 2003. In view of the circumstances, where, as here, it is obvious that the record on which OSM based its decision is inadequate, the best course is to set aside the decision and direct OSM to obtain the entire, certified transcript and exhibits, and any other documents necessary to fairly decide whether the State response to the TDN was arbitrary, capricious, or an abuse of discretion.

This Board has held that a state hearing officer's decision is not *per se* evidence of good cause for the failure of the state agency to take action. See *Morgan Farm, Inc.*, 141 IBLA 95, 101 (1997); *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 80-81, 102 I.D. 1, 12 (1995). We are especially reluctant to affirm a decision not to take enforcement action that is based on a State order and a State engineer's report where, as here, OSM's interpretation of (1) the order, (2) report, and (3) purpose of WVDEP in referencing those two documents is inconsistent on its face and undermined by additional evidence indicating that the record before OSM on informal review was inadequate to determine whether the State response to the TDN was arbitrary, capricious, or an abuse of discretion.

In *The Pittsburgh & Midway Coal Mining Co. v. OSM*, 140 IBLA 105 (1997), the Board explained OSM's responsibility for providing a decision that is supported by a rational basis which is substantiated by the administrative record:

[W]e note that it is incumbent upon the administrative adjudicator at OSM to ensure that the decision is supported by a rational basis, and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. See *U.S. Oil & Refining Co.*, 137 IBLA 223, 232 (1996); *Larry Brown & Associates*, 133 IBLA 202, 205 (1995); *Eddleman Community Property Trust*, 106 IBLA 376, 377 (1989); *Roger K. Ogden*, 77 IBLA 4, 7, 90 [I. D.] 481, 483 (1983). Thus, we have held that the recipient of a decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. *Kanawha & Hocking Coal & Coke Co.*, 112 IBLA 365, 367-68 (1990); *Southern Union Exploration Co.*, 51 IBLA 89, 92 (1980). An administrative decision is properly set aside and remanded if it is not supported by a case record providing the information necessary for an objective, independent review of the basis for the decision. *Shell Offshore, Inc.*, 113 IBLA 226, 233, 97 [I. D.]

73, 77 (1990); *Fred D. Zerfoss*, 81 IBLA 14 (1984). . . .

140 IBLA at 109; *see also The Navajo Nation*, 152 IBLA 227, 234 (2000) (The Board has stated that a BLM adjudicator has the same responsibilities). For the reasons that follow, we conclude that OSM has failed to meet this basic standard. The decision of the Regional Director was not supported by a record providing the information necessary for an objective, independent review of the basis for the decision.

We are not unaware of the challenges that the Regional Director faced as he endeavored to interpret and review for appropriateness the WVDEP's terse TDN Response. That Response provided no explicitly reasoned basis for its tacit determination not to take enforcement action, but merely referenced the State Board Order and the Wright Report, attaching both. It is also our understanding, based on the administrative record provided the Board by OSM, that the Regional Director made his decision on informal review on the basis of a limited record that apparently did not include the permit at issue, the transcript of the hearing which produced the Order so heavily relied upon, or the administrative record that was before the former Regional Director when OSM considered an earlier appeal relating to the same citizen's complaint. In view of this background, as well as the Regional Director's reliance on the State Board Order, the particular weight he accorded the Order due to its issuance following the WVSMB site visit and 2-day hearing, and his reliance on the report by WVDEP's engineer, whose testimony is contained in the WVSMB hearing transcript provided by Stenger, we grant appellant's request, and also set aside and remand OSM's decision.<sup>10</sup>

As discussed above, the Regional Director "reviewed the record [before him] for information that would establish whether United's surface mining operations or other causes were at fault," and were the "the proximate cause of the valve and pipe delivery system becoming inoperable," and found that only the Wright Report touched on that issue. Decision on Informal Review at 7. As we note below, however, that issue was discussed at some length in the WVSMB hearing transcript that was not in the record before the Regional Director.

The Regional Director interpreted the WVDEP TDN Response as relying on the Wright Report, and he read the Wright Report as finding "that the valve and pipe delivery system were clogged by sediment that originated from disturbances other than mining." Decision on Informal Review at 8. As further support for his ultimate determination on informal review (and perhaps also for his interpretation of the WVDEP TDN Response), the Regional Director points to the WVSMB Order, noting

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<sup>10</sup> We have also considered other documents pertaining to United's authorization to use Pond B as a sediment control structure. OSM provided those documents to the Board on June 11 and 19, 2008, in response to our request for portions of United's permit relating to Pond B and to information on the status of bond release.

that it was issued following a site visit and hearing. *Id.* He states that “[a]fter consideration of this evidence, the WVSMB considered repair of the overflow pipe as restoration of the water supply for agricultural use.” We understand this portion of the Regional Director’s decision to mean that evidence produced at the site visit and hearing showed that pre-mining problems, and not United’s mining, were the proximate cause of Stenger’s water loss from the pipe and valve system, and, accordingly that the WVSMB determined that State law did not require United to repair or replace that water delivery system now or at Phase III bond release.<sup>11</sup> Our reading of the WVSMB Order, in the context of the transcript provided by Stenger leads us to question this basis for the decision on informal review. Having read the transcript provided by Stenger, the documents identified as the June 1, 2004, administrative record, which includes excerpts of the permit at issue, and the April 7, 2004, decision on informal review of Brent Wahlquist, former ARCC Regional Director, we are convinced that Regional Director Shope’s careful consideration of the appeal on informal review and of the opaque TDN Response would have benefitted significantly from review of this additional evidence.

We are not here deciding whether, on the basis of the photographs, transcript, permit and other evidence, Stenger has preponderated on the issue of whether the State’s decision not to take action was arbitrary, capricious, or an abuse of discretion. Rather, we have determined that the record before OSM was inadequate to support its finding that the State’s response was appropriate, and we remand to OSM to review the permit, 2004 administrative record, WVSMB transcript,<sup>12</sup> photographs, and any other relevant evidence to determine whether the State’s response was arbitrary, capricious, or an abuse of discretion.

Stenger asserts that the Regional Director supplied the WVDEP rationale. OSM says it properly based its decision on a rationale provided by the WVDEP, which, it says, relied on both the WVSMB and the Wright Report. But the WVDEP TDN Response included references and attachments with little or no rationale, and with only an implicit conclusion. We observe that the Regional Director took the opportunity presented by the dearth of analysis in the State’s TDN Response and by the limited record before him to articulate the rationale, which he assumed lay at the heart of the WVDEP determination not to take further action on the water delivery

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<sup>11</sup> The Regional Director finds support for this interpretation in the fact that the WVSMB Order only required United to replace the trickle pipe and not the pipe and valve system.

<sup>12</sup> We advise OSM to pay particular attention to testimony, as well as questions and commentary from the WVSMB, regarding the permit and permitted use of Pond B, the use of Pond B as a source of agricultural water, the pipe and valve system, the trickle pipe, and additional ponds, which may have been created by United as replacement sources of agricultural water.

complaint. In finding that the WVSMB had ordered the immediate restoration of what he characterized as one of two water delivery systems (the trickle pipe) and that the Wright Report found that the second water delivery system (drainpipe and valve) had not been functioning when United began its mining operations, the Regional Director appeared to try to harmonize the two attached documents. In doing so, he explained why the WVSMB had ordered United to repair the one system, but not the other, but did not, and without additional documents could not, properly interpret the WVDEP TDN Response in light of a background that included a State permit with specific provisions regarding Pond B and a 2-day WVSMB hearing, in which the WVDEP actively participated as a named party and which included testimony on direct and cross-examination from Wright and others on the subject of Pond B.

### 3. *The Pipe and Valve System of Pond B*

The Wright Report says that a “condition” existed before mining began and that the evidence leads to the conclusion that the pipe and valve were not functioning properly. As Stenger asserts, neither the WVDEP TDN Response nor the Wright Report deny that, when mining began, the pipe and valve system was delivering some water through the embankment to a pond or trough below Pond B for use for agricultural purposes. Stenger contends that Wright’s conclusion that the pipe and valve system was not functioning properly does not equate with a conclusion that it was not functioning at all as a water delivery mechanism for livestock.<sup>13</sup> In the decision on informal review of the TDN that was the subject of Stenger’s appeal in *John L. Stenger*, 170 IBLA 206, the then-Regional Director, Brent Wahlquist, made this finding of fact, after review of the record before him, which included the Wright Report:

United’s permit provides that Pond B is to remain on the site after mining as a permanent impoundment to be used for watering cattle. Prior to mining you had used Pond B as a water source for agricultural and recreational purposes. The pond contains valves and pipes for watering cattle. Sediment has accumulated in pond B and the valves are no longer operable.

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<sup>13</sup> Indeed, as Stenger colorfully explains, Stenger has farm tractors over 30 years old, one smokes and uses oil, another rattles and shakes, another has poor compression, reduced power, and no muffler. The fact that none are functioning properly certainly doesn’t show they are disabled since they still function regularly and reliably, and have for years. Stenger has poor vision, a bum knee, and a bad back, and isn’t functioning properly. However, he is not disabled.

Rebuttal at 2.

April 7, 2004, decision on informal review at 8.

Although this finding does not explicitly state that the delivery system was effectively transporting water when mining began, nor detail the exact amount of water that was delivered, read in context of the entire decision, it appears that in 2004 OSM understood Pond B, with its drainpipe and valve, to be functioning as an agricultural water supply when United's mining began, and interpreted the permit and State statute and regulations to require restoration of that supply and system, but not until prior to Bond III release.

In his decision, Regional Director Wahlquist directly addressed the third allegation of Stenger's complaint, which is the subject of the TDN at issue in the appeal before us. The Regional Director noted the allegation and addressed it on informal review. He did so despite the fact that the June 9, 2003, TDN (X03-112-014-001, TV 8) at issue before him had summarized that part of the complaint in a way that this Board later found did not include with adequate specificity Stenger's allegation regarding the lost water delivery function, and thus that the WVDEP TDN Response, with its focus on the sediment carrying capacity of the pond, had not specifically addressed it.<sup>14</sup> See *John L. Stenger*, 170 IBLA at 216. It is apparent to us that the record before the Regional Director at that time was more extensive than the record before us now. In view of that fact, we find instructive Regional Director Wahlquist's explanation of the functionality of the pipe and valve system before and after United's mining operations began, the permitted purpose of the pond, and the requirements of State law in the context of the particular underlying facts and permit at issue in these appeals and, therefore, we include the following substantial portions of Regional Director Wahlquist's informal review decision:

With regard to alleged violation 3 (failure to protect a water supply), the MAO [Morgantown Area Office] indicated that you had built pond B for your private use prior to United's permit being issued. United included the pond in its permit application and most of the runoff from the mining operation was directed through it. Currently the pond contains a large amount of sediment. MAO noted that you had installed a drain and a gate valve at the base of the pond in order to water livestock in the pasture below the pond. These devices are now inoperable. MAO indicated that the current WVDEP storage capacity of

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<sup>14</sup> Regional Director Wahlquist noted that "[t]he eight alleged violations of the TDN were worded slightly differently than the nine violations you alleged in your June 3 letter, apparently in an attempt to match them up with specific regulatory requirements." Apr. 7, 2004, decision on informal review.

the pond is 9.7 acre feet which exceeds the required capacity of 5.83 acre feet.

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3) Water supply damaged because of the existence of sediment in a pond. The pond you are referring to is pond B of the approved erosion and sedimentation control plan in United's permit. While you had used the pond prior to mining for agricultural and recreational purposes, its use during mining is as an approved part of the erosion and sedimentation control plan. To the extent that the agricultural and recreational uses of the pond may be incompatible with its use as a sedimentation pond, those uses are not protected during its permitted use as a sediment pond. The function of sediment ponds is to collect sediment to keep it from going off the permit; therefore, sediment collecting in the pond is an indicator that it is functioning as planned.

West Virginia's approved program requires the replacement of a water supply of an owner of interest in real property when a supply used for domestic, agricultural, industrial, or other legitimate use has been affected by a surface mining operation (West Virginia Surface Coal Mining and Reclamation Act § 22-3-24). In this case your pond was used prior to mining as an agricultural water supply. Additionally, the permit provides that the pond will be retained as a permanent impoundment for use as livestock watering at the conclusion of mining and reclamation activities. While West Virginia's program requires that your water supply must be restored when its use as a sediment pond is terminated, the permit did not mandate that those uses be maintained during its permitted use for sediment control. Under West Virginia law, United cannot remove (or, in this case, convert to its pre-mining use) sediment control structures until two years after the last augmented seeding nor less than two years before final bond release. (Title 38-Series 2-Section 5.4h.) Those times have not yet expired which means that United is required to keep the ditches leading to the pond in place and is required to keep the pond in use as a sediment control facility.<sup>[15]</sup> WVDEP provided a report from a registered professional

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<sup>15</sup> Addressing the sediment control issue, we disagreed with OSM's interpretation on appeal that this regulation prohibited United from removing any sediment from the pond at that time, and held that while the regulation prohibits operators from abandoning sediment control structures, it says nothing about maintenance. We further held, however, that United was not required to maintain the pond by cleaning it of sediment because sediment accumulation had not reached the maximum

(continued...)

engineer that indicates that the pond is in compliance with the approved program. Therefore, WVDEP's claim that no violation exists at this time was not arbitrary, capricious, or an abuse of discretion.

Please understand, United must restore your pond to its pre-mining condition and functions upon completion of its use as a sediment control structure. That must include restoring its capacity through the removal of sediment and restoring its function as a water supply through repair or replacement of valves and pipes.

April 7, 2004, decision on informal review at 4, 10.

In addition, our reading of the transcripts compels us to consider whether the WVSMB may have declined to order immediate restoration of the water supply from the drainpipe and valve for reasons other than the one advanced by the Regional Director, that is, because it did not consider United's mining to be the proximate cause of the inoperability of the pipe and valve system. OSM should consider whether, for instance, the WVSMB was troubled by the impracticality of requiring United to repair the current pipe and valve system since it apparently believed that sedimentation removal was the only means of restoring that water supply, and it did not believe that United was required to remove sedimentation until a later phase of bond release. OSM should also consider whether State law requires United to immediately replace the agricultural water delivery system in lieu of repairing the current system, and if so, whether it believed that United already had effected appropriate replacement of the water by creating additional ponds on Stenger's property.

As noted, it is clear that there was some sedimentation that required periodic flushing by Stenger. This may mean that the system was not functioning perfectly or "properly," but there was testimony on both days of the hearing, even from the State's inspector, Glenn Cox, on the second day, which indicates that several years after United's mining operation began, around the fall of 2002, Pond B was supplying some water via the pipe and valve apparatus through the embankment to a pond below, and that farm animals were drinking that water. WVSMB Nitro hearing at 130.<sup>16</sup>

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

allowed under State regulation and, therefore, was not necessary for the proper functioning of the sediment control structure. *John L. Stenger*, 170 IBLA at 215.

<sup>16</sup> See also WVSMB West Milford hearing at 61, 64 (testimony of Allen K. Harrouff that he had seen the pipe functioning as a conduit for water from the dam to a water trough in the fall of 1991, which Stenger and Harrouff corrected to refer to 2001).

The transcript before us also suggests that WVSMB Vice Chairman Paul Nay considered Pond B to have been used for agricultural purposes when United began mining, and that the WVSMB sought testimony from the State witness on the issue of whether State law required United to replace the lost agricultural water supply from Pond B, given that Pond B was permitted as a sediment control pond. Pursuing a line of questioning regarding United's responsibilities under State law vis-a-vis Pond B, Vice Chairman Nay asked inspector Cox to look at the provision of W. Va. Code § 22-3-24 requiring replacement of damaged water sources. The Vice Chairman commented that "this pond is obviously being used for watering livestock, and I'm confused as to how the fact that it was also permitted for sediment control affects the fact that it was also a pond used for livestock watering." WVSMB Nitro hearing at 136. Addressing the Vice Chairman's query, the State inspector stated the following:

As I understand it, when the lease was made, that's - - and the pond was made part of the permit, and the law says that it will be a drainage control structure, and it's subject to the requirements of the Act and the regulations, then in our case the primary purposes and the purpose for the duration of this permit is as a sediment control structure.

WVSMB Nitro hearing at 136. The Vice Chairman continued his questioning: "But doesn't it also have to be maintained for domestic livestock use?" The witness responded, "I don't believe that it does during the interim of the permit." *Id.*<sup>17</sup>

The WVSMB also heard testimony concerning other "areas" that "might have been contributing to sedimentation in the pond other than the surface mining operation," such as areas with spoil disposal piles, lack of vegetation, and erosion. WVSMB Nitro Hearing at 127-29, 132-33.

In addition, Inspector Cox testified that United had constructed additional ponds on the property "[a]t John [Stenger]'s request to provide him some water up on the bench area for his livestock," which will be left following Phase III bond release, as requested by Stenger. *Id.* at 130-31.

Clarence Wright, author of the Wright Report, also appeared as a witness at the State Board hearing. On direct examination he testified that Stenger had told

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<sup>17</sup> The discussion ended with the following exchange:

Mr. Giffin [counsel for WVDEP]: We will hear some testimony later about that, Chairman Nay, if you would like to, from Mr. Ray.

Vice Chairman Nay: All right. If you're going to get into that, I will postpone questions on it until we get into that.

WVSMB Nitro Hearing at 137. The transcript provided by Stenger does not include the testimony of any witness referred to as "Mr. Ray."

him that he had flushed sediment from his pond beginning before United's mining commenced, "periodically every five or six years," with the last time being "right about the beginning of the mining." WVSMB Nitro Hearing at 195. He discussed the pipes and the guard that Stenger put around the perforated stand pipe before mining began, because, he stated, "there were plugging problems," and explained that "[i]t could be for a variety of reasons, but included sediment in the pond and other material, maybe leaves or whatever, that might be in the bottom of the pond." *Id.* at 196. On cross-examination, Stenger asked Wright if it was possible that Wright had misunderstood Stenger to say that he had installed the stand pipe after having trouble with sediment, rather than when he built the pond. *Id.* at 219. Wright replied that "[i]t's very possible." *Id.*<sup>18</sup>

The hearing transcript shows that the WVSMB heard testimony of livestock obtaining water in the trough below Pond B by means of the pipe and valve system until sometime in 2001 or 2002, and wrestled with when and how (not whether) State law required United to replace the water supply, given the permitted use of Pond B as a sediment control structure.<sup>19</sup>

In his closing argument before the State Board, WVDEP counsel asserted that "United is currently under no obligation to clean out Pond B at its current capacity," as "Phase II bond release has not been reached." WVSMB Nitro Hearing at 228. He also noted that the pond is being used for livestock watering purposes; that there is an ample supply of water in the pond; and that United had constructed three other ponds on Stenger's property "that can be used as an agricultural water supply." *Id.* at 229.

Vice Chairman Nay then addressed Stenger:

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<sup>18</sup> Wright also testified that, to his knowledge, Stenger had not objected to the permit designation of Pond B as a sediment control structure. In addition, Wright testified at length on direct and cross-examination regarding the sediment load of Pond B and State regulations requiring the operator to clean a sediment control structure when 60 percent of the sediment-carrying capacity is reached. WVSMB Nitro Hearing at 196-218.

<sup>19</sup> Furthermore, we take special note of the findings of fact of former ARCC Regional Director Wahlquist, in the Apr. 7, 2004, decision on informal review at 8, which stated that "[p]rior to mining [Stenger] had used Pond B as a water source for agricultural and recreational purposes. The pond contains valves and pipes for watering cattle. Sediment has accumulated in pond B and the valves are no longer operable."

Vice Chairman Nay: I have one question regarding the pond. Did you have a livestock watering trough below that you ran water into, below your pond --

Mr. Stenger: Yeah.

Vice Chairman Nay: – or did the livestock just drink out of the pond?

Mr. Stenger: No. According to the Department of Agriculture, I'm not supposed to let my cattle go into the pond and drink, so they're supposed to drink out of the trough below, which is disabled.

Vice Chairman Nay: You had a trough below that you ran water into?

Mr. Stenger: Yeah.

WVSMB Nitro Hearing at 238-39.

At the conclusion of the hearing, the Board recessed for purposes of deliberations and when it returned Vice Chairman Nay announced the Board's decision with regard to each of Stenger's complaints. Addressing number 4, "failure to protect and restore the water supply," he stated:

And the Board will – when we were out there on the site, we did observe erosion in the dam embankment, which will severely damage the dam if it's left.

So we will require that the trickle tube, the trickle pipe, be restored in a – or extended in a permanent fashion beyond the dam for a water supply for agricultural use and repair the eroded area in the dam, because it's washing out pretty bad there where the water is discharging.

And we understand that for Phase III release, which is down the road a ways, the pond must be restored completely to its pre-mining condition and function, and we think that extending the trickle tube down for agricultural use will stop the erosion in the dam and provide an agricultural water supply *in the meantime*.

WVSMB Nitro Hearing at 244-45. (Emphasis supplied.)

Vice Chairman Nay noted that Stenger had "[p]artially prevailed" on two issues—"the pond and the rocks" (WVSMB Nitro Hearing at 248-49). Stenger then sought clarification of the order relating to the trickle tube. Contrary to the

inference, which the Regional Director apparently drew from the State Board Order, the State Board seems to have understood that repair of the trickle tube would not replace the pipe and valve water delivery system. Although the pipe and valve system had supplied some water prior to 1995, including during dry seasons, the WVSMB felt it could not order repair of the pipe and valve system before final reclamation.

The reason for this perceived constraint is not explicitly disclosed, but we see no reason to limit the possible explanations to the one apparently chosen by the Regional Director—that the WVSMB did not believe that mining was the proximate cause of the current complete inoperability of the system. Excerpts from the transcript provided by Stenger invite other reasonable interpretations for the WVSMB to decline to require restoration or replacement of the water supply from the pipe and valve system. Among these is the possibility that the WVSMB considered that the State statutory and regulatory provisions, interpreted by Stenger to require immediate sediment cleaning by United, are inapplicable to situations like his, involving permitted use of a pond for sediment collection, or that they require repair or replacement of an affected water supply system, but do not limit remediation to sediment cleaning. With respect to the latter possible interpretation, it may be that the WVSMB considered that the availability of alternative sources of agricultural water, which, according to some testimony, United already provided in other ponds, or the availability of an alternative delivery siphoning system, as suggested by McMillion below, satisfy the requirements of State law prior to Phase III bond release.

Mr. Stenger: If it gets dry, there is no water comes through the trickle tube. Most years in the summer the trickle tube doesn't run.

Vice Chairman Nay: We discussed that. We didn't really know quite what to do about it, because we didn't feel that under the law and the regulations we could actually require complete cleaning of the pond at this time.

Now, it will have to be done. It will have to be restored to its original configuration and use before they can get Phase III bond release. But we didn't find anything in the regs. that we felt we could require them to clean it now.

If you could - - if there was a practical way to open up the under dam pipe so that you could get water from there, frankly, we didn't know what it was, what it would be. Randy [McMillion, Member WVSMB Board]?

Mr. McMillion: Practically, what typically happens in these instances is the landowner would take a half inch or three-quarter inch black plastic water line, submerge it, fill it, throw it over the embankment, and let it

just siphon during this time. Because during the mining operation, it's a sediment control thing.

But typically, that is what you're going to find for people to do when water would drop below the trickle tube. It's a pretty common practice, at least in the mining industry.

WVSMB Nitro Hearing at 249-50. Vice Chairman Nay then asked counsel for WVDEP to prepare the order, noting that the Board would change it if the order did not reflect the Board's decision. *Id.*

OSM argues that “[w]ithout the benefit afforded by a review of the entire transcript, neither OSM nor the IBLA may fairly decide whether the preponderance of evidence supports or refutes Stenger’s contention that United’s mining activities disabled the pond’s water delivery system.” Answer at 9. In view of the benefit OSM anticipates from such a review, the tortuous history of this case, State and OSM reliance on an ambiguous State Board order arising from a 2-day hearing and site visit, and testimony from the hearing transcript provided by Stenger (that raises questions bearing on the TDN and proper interpretation of the WVSMB order and Wright Report), it is incumbent upon OSM to obtain and consider, on remand, an expanded record that includes, a certified transcript, complete with exhibits, and the administrative record that was before Regional Director Wahlquist in 2004.

#### *Conclusion*

For the foregoing reasons, we have determined that the decision of the Regional Director on informal review was not supported by a rational basis substantiated by a record accompanying the decision that was adequate to determine whether the State response to the TDN was arbitrary, capricious, or an abuse of discretion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we set aside the decision of the Regional Director, ARCC, OSM, on informal review and remand the case to OSM for actions consistent with this decision.

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
T. Britt Price  
Administrative Judge