

BANNOCK COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND

ENFORCEMENT

IBLA 85-156

Decided August 22, 1986

Appeal from a decision of Administrative Law Judge Joseph E. McGuire, denying applications for review of Notices of Violation (NOV) Nos. 84-07-252-04 and 84-07-252-05.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Prime Farmlands: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Where surface mining permits are granted under a State approved program for areas that include "prime farmland" and the permittee classifies the post-mining use of all the permit area as "pastureland," in light of the fact the Surface Mining Control and Reclamation Act of 1977 and Federal regulations implementing the Act in 30 CFR Part 715 along with State regulations under the State program require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area, OSM may properly issue NOV's after the State has failed to act in response to 10-day notices to require the permittee to provide crop yield data showing compliance with cited State and Federal regulations.

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

The Secretary of the Interior through OSM properly has jurisdiction to issue notices of violation in states with approved programs, where OSM acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSM issues a 10-day notice and the State fails to take action to ensure abatement of the violations.

APPEARANCES: Frank J. Bruzzese, Esq., Steubenville, Ohio, for appellant; Glenda H. Owens, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., Deborah Molitz, 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 KELLY

Bannock Coal Company (Bannock) appeals from a decision dated November 9, 1984, by Administrative Law Judge Joseph E. McGuire, denying its application for review of Notices of Violation (NOV's) Nos. 84-07-252-04 and 84-07-252-05, issued by the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1982).

On August 10, 1984, Bannock was served with the NOV's at issue which charged Bannock with failure to provide crop yield data as required by 30 CFR 715.20(f)(2)(iii) and section 1501:13-2-15(F)(3) of the Ohio Administrative Code (OAC). Bannock filed applications for review of both violations on August 23, 1984. On September 17, 1984, Bannock filed amended applications for review and a motion for temporary relief and consolidation. OSM responded to Bannock's motion on September 17, 1984, opposing temporary relief. A hearing on the motion for temporary relief and consolidation was held on September 27, 1984. At that hearing the Administrative Law Judge granted the motion for consolidation and granted Bannock temporary relief until November 5, 1984.

After proper notice to the parties, a hearing on the merits of the consolidated matter was held in Pittsburgh, Pennsylvania, on October 29, 1984. The parties presented no witnesses at the hearing, but instead stipulated certain facts and submitted various documents as exhibits for the record. The Administrative Law Judge issued his decision on November 9, 1984, upholding the NOV's. In his decision, the Judge summarized the evidence of record as follows:

#### Summary of Evidence

The parties elected to adduce no oral evidence at the hearing. Instead, they jointly filed a 4-page document (Joint Exh. 1) containing 17 stipulated facts pertaining to NOV No. 84-07-252-04, some 16 stipulated facts concerning NOV No. 84-07-252-05 and 3 stipulated facts of a more general nature, namely that the pertinent State regulatory agency, the Ohio Department of Natural Resources (ODNR) administers an approved State surface mining program, that OSM has not filed an action to revoke the Ohio State program regulating surface coal mining, and that the parties have agreed to defer a hearing on the appropriateness of the proposed civil penalty assessments until the pertinent assessment conference(s) have been held. In addition, respondent placed into evidence 10 documents marked and entered as Respondent's Exhs. 2 through 11

Based upon the previously-mentioned stipulation (Joint Exh. 1), as well as those documents marked and entered into evidence as Respondent's Exhs. 2 through 11, the following facts have been provided.

Concerning NOV No. 84-07-252-04, applicant/petitioner was granted a permit to surface mine coal by ODNR on January 31, 1978. That permit, No. C-806, covered an area of land located in Belmont County, Ohio, consisting of approximately 115.5 contiguous acres, of which 30.5 acres were described as being prime farmland. The general postmining use of the land covered by that permit was that of pasture land. On October 10, 1978, applicant/petitioner requested a modification of the mining and reclamation plan, attaching thereto an addendum, which was the equivalent of a prime farmland restoration plan in prose form. That request was approved on October 24, 1978, and the addendum became a part of permit No. C-806. On October 26, 1982, applicant/petitioner requested a final release of its reclamation bond on that permit from ODNR, which did not act upon that request within the prescribed 90-day period. Section 1513.16(H)(3)(d) of the Ohio Revised Code provides that the State cannot withhold reclamation bonds beyond a 2-year maintenance period.

On July 3, 1984, OSM issued 10-Day Notice No. 84-07-251-26 (Respondent's Exh. 4), by the terms of which the State of Ohio was advised that applicant/petitioner had failed to demonstrate equivalent yields on the prime farmland which it had restored for the 2-consecutive-year period prior to its having filed the application for the release of its reclamation bond. On July 12, 1984, ODNR responded to that notice by advising OSM that ODNR was required to release applicant/petitioner's bond at the conclusion of the 2-year maintenance period. On August 10, 1984, NOV No. 84-07-252-04 was issued and served upon applicant/petitioner by OSM and some 10 days later it was notified that a proposed civil penalty of \$ 1,500 had been assessed. On August 23, 1984, applicant/petitioner requested an assessment conference, which OSM granted on October 5, 1984. That assessment conference had not been scheduled as of the date of the hearing.

Meanwhile, the parties' stipulation (Joint Exh. 1) contains the following facts concerning NOV No. 84-07-252-05. Permit No. C-1479 was issued by ODNR to applicant/petitioner on July 31, 1981, covering 20.6 contiguous acres located in Belmont County, Ohio, and 7.7 acres of that permit area was identified as being prime farmland. The postmining use under that permit was that of pasture land and the pertinent permit application package contained a prime farmland restoration plan. That plan set forth the manner in which applicant/petitioner would mine and reclaim those 7.7 acres described as prime farmland and applicant/petitioner also advised the State regulatory authority therein that it would demonstrate equivalent or higher productivity

on the prime farmland by cutting the hay crop on the reclaimed prime farmland and comparing the yields.

On September 15, 1983, OSM issued 10-Day Notice No. 83-7-252-43 (Respondent's Exh. 8) to the State of Ohio placing that jurisdiction on notice that applicant/petitioner had failed to demonstrate equivalent yields on the farmland for the 2-consecutive-year period prior to its having applied for the release of its reclamation bond. Resultingly, ODNR issued Chief's Order No. 4911, which revoked the prior approval of the release of applicant/petitioner's reclamation bond. That revocation order was appealed to the Ohio Reclamation Board of Review, a hearing was conducted on November 10, 1983, and on April 10, 1984, that Board issued a ruling reversing the revocation contained in Chief's Order No. 4911. On August 10, 1984, OSM issued and served upon applicant/petitioner NOV No. 84-07-252-05 and 10 days thereafter a notice of proposed assessment was issued in which applicant/petitioner was advised that a \$ 1,500 proposed civil penalty was being assessed. Three days later, applicant/petitioner requested an assessment conference and OSM granted that request on October 5, 1984. That assessment conference had not been scheduled as of the date of the hearing.

Respondent's documentary evidence disclosed the following. Applicant/petitioner's permit application for permit No. C-806 contained prime farmland (Respondent's Exh. 2). Its addition to that permit contains the statement that "the area of prime farmland will be restored to equivalent or higher yields" (Respondent's Exh. 3 at 1). On October 10, 1978, applicant/petitioner filed a request to modify its mining and reclamation plan for permit No. C-806 in which it described the plan as having been one "for the mining and restoration of areas of prime farmland" (Respondent's Exh. 3 at 2). On July 15, 1981, applicant/petitioner's environmental director, F. John Hladek, filed a three-page prime farmland restoration plan, containing his signature, as attachment "I" on permit No. C-806. That attachment was filed because there was prime farmland on the permit area. It was also noted that the Soil Conservation Service had been consulted in developing a prime farmland restoration plan, that a hay crop which averaged 2 tons per acre had been grown on the prime farmland for the last 2 years prior to mining, the depth of the prime farmland soils was described as being uniform throughout the permit area, all of the prime farmland was declared to be contiguous and owned by the same landowner, the land was to be returned to a hay crop, cut from the prime farmland areas and comparisons made of the production results (Respondent's Exh. 7).

(Decision 3-5).

The Judge concluded OSM properly issued the two NOV's, stating:

The evidence discloses that the acreage contained in permit No. C-806 was 115.5 and that 30.5 acres therein were described by applicant/petitioner as being prime farmland. Similarly, of the 20.6 acres contained in permit No. C-1479, some 7.7 acres represented prime farmland, as designated by the applicant/petitioner. Despite that designation by the applicant/petitioner and the unequivocal congressional and decisional expressions previously noted, applicant/petitioner wishes to avoid the requirements of 30 CFR 715.20(f)(2)(iii) even as they apply to those 28.3 [1] acres determined to be prime farmland by simply designating the postmining use for those acres to be "pastureland" rather than "cropland." The adoption of this rationale would have the effect of ignoring the definitions of "prime farmland" as found in the Act and the implementing regulations as well as subverting the clear congressional dictate that prime farmland be given unequivocal preference for postmining reclamation purposes. For these reasons, I find that designating the postmining use of land previously designated as prime farmland by a permittee as "pastureland" rather than "cropland" does not relieve the permittee of the crop yield reporting requirements contained in 30 CFR 715.20(f)(2)(iii) as they apply to that portion of the permit area involving prime farmland.

(Decision at 6).

In denying the applications for review the judge rejected appellant's argument that OSM was without authority to issue the NOV's because the State of Ohio had already put in place an approved program for the regulation of surface coal mining operations and therefore enjoyed exclusive enforcement jurisdiction. He concluded OSM properly exercised jurisdiction over appellant in the exercise of its oversight duties stating:

While this argumentation adopts the congressional finding, as expressed in section 101(f) of the Act that primary enforcement authority should rest with the states, it fails to recognize the constant oversight role reserved for and assigned to OSM in section 521 of the Act following the placement of primary enforcement responsibilities in the states by utilization of their conforming enforcement programs. [Footnote omitted].

(Decision at 6).

Bannock has appealed contending, *inter alia*, it has not violated the reporting requirements found in 30 CFR 715.20(f)(2)(iii) or section 1501:13-2-15(F)(3) of the OAC because a post-mining use of "pastureland" does not trigger the reporting requirements found in either section of the Federal or the State regulations. Bannock states

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1/ We note the correct total acreage of prime farmland is cc.2 acres.

[J]ust as the Ohio Regulation is triggered only by "cropland," so too, the Federal Regulation is triggered only by postmining use of "cropland."

Just as the Ohio Regulation is not triggered by "pastureland," so too, the Federal Regulation is not triggered by "pastureland."

Since the prerequisite, which triggers the obligation to report yield data, does not exist, neither the Federal Regulation nor the State Regulation applies, and the failure to report such yield data, consequently, is not a violation of either the Federal Regulation or the State Regulation.

(Statement of Reasons at 4).

Appellant also reiterates one of its primary arguments considered below that the Secretary of the Interior acting through OSM has no authority to issue the NOV's in question. Appellant asserts that under SMCRA, a state such as Ohio which has an approved plan for the regulation of surface coal mining and reclamation operations, has exclusive enforcement authority, subject to only a few specified exceptions. It concludes the approval of Ohio's state program vested Ohio with the exclusive enforcement authority, subject to the d in Section 521 and 523 and Title IV of the Federal Act. Since appellant takes the position that none of the three exceptions to Ohio's exclusive enforcement jurisdiction applies to this case, it argues that this is not a proper case for substituting Federal enforcement of State programs. Even if this were a proper case for substituting Federal enforcement, it maintains the Secretary has failed to take the necessary prerequisite action under 30 CFR 733.12 prior to taking substitute enforcement action. (Statement of Reasons 5-9).

OSM has responded that section 510 of SMCRA provides that:

[I]n order for the regulatory authority to grant a permit to mine on prime farmland, the regulatory authority must find in writing that the operator has the technological capability to restore the mined area to an equivalent or higher level of yield as non-mined prime farmland in the surrounding area. 30 U.S.C. § 1260(d)(1); see, 30 C.F.R. § 716.7(f)(i). Section 519 of the Act further provides that the reclamation bond on prime farmlands may not be released until soil productivity has been restored to equivalent levels of yield as non-mined land of the same soil type in the surrounding area. 30 U.S.C. § 1269(c)(2).

(OSM Response at 5).

OSM further asserts the implementing regulation 30 CFR 715.20(f)(2)(iii) and the applicable State regulation at 1501:13-2-15(F)(3) embody these requirements which must be applied to that portion of the permit areas involving

"prime farmland." OSM asserts the stipulated facts show that 30.5 acres on permit C-806 and 7.7 acres on permit C-1479 were identified as prime farmland for which the original permit mining and reclamation plans contained prime farmland restoration proposals. OSM concludes: "Thus, contrary to Bannock's assertions, the postmining land use of the subject acreage was prime farmland and the regulations at 30 C.F.R. § 715.20(f)(2)(iii) apply. The Administrative Law Judge's finding to that effect should, thus, be upheld." (OSM Response 6-7).

OSM disagrees with appellant as to its jurisdiction to issue the NOV's in question. It cites the Secretary's oversight responsibility under SMCRA to assure State enforcement of approved regulatory programs. It states:

If the Secretary discovers a violation of the Act, the state's program or permit conditions, the Act authorizes the Secretary to take enforcement action if, after notification, the state fails within ten days to "take the appropriate action to cause said violation to be corrected \* \* \*" or show good cause why such action will not be taken. 30 U.S.C. § 1271(a)(1).  
\* \* \* \* \*

Moreover, Congress believed a strong federal presence and enforcement role was necessary even where a state had primary regulatory authority over surface coal mining operations under an approved regulatory program. Regarding the federal role Congress stated:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal back-up to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine by mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.  
(Emphasis added.)

S. Rep. No. 128, 95th Cong. 1st Sess. 88 (1977).

(OSM Response 8-9).

OSM asserts the State's ultimate action in response to the 10-day notices was inappropriate in each case where the State was informed by OSM that appellant had failed to comply with Ohio revegetation regulations. In relation to NOV No. 84-07-252-04, ODNR allowed the release of appellant's reclamation bond on permit No. C-806 rather than issue a State notice of violation. OSM asserts this inaction "constituted the failure of the State

to take 'appropriate action' and thereby triggered OSM's enforcement authority." (OSM Response at 10). In relation to NOV No. 84-07-252-05, ODNR first responded to the OSM 10-day notice by rescinding its approval of the bond release on permit No. C-1479. However, OSM asserts that ODNR's failure to take further appropriate corrective action after the Ohio Reclamation Board of Review had reversed its ruling on the bond release triggered OSM's enforcement authority.

(OSM Response at 11).

[1] 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." See 30 U.S.C. § 1202(a) (1982). The Act's principal regulatory and enforcement provisions are contained in Title V, which establishes a two-tiered regulatory program to achieve the purposes of the statute. The two tiers consist of an interim, or initial, regulatory program and a permanent regulatory program. 30 U.S.C. § 1251 (1982). The interim regulations implemented only a portion of the Surface Mining Act's performance standards, and applied in each state only until the state obtained the Secretary's approval of a permanent state regulatory program, or until the Secretary implemented a Federal program for the state. 30 CFR § 710.2

The case at hand involves the application of a permanent state regulatory program where the State of Ohio has assumed primary jurisdiction over regulation on "non-Federal" lands within its borders through submission to and approval by the Secretary of the Interior of its "State program." The stipulated facts made part of the hearing record show the ODNR operates under such an approved state program. <sup>2/</sup> 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, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, 81 IBLA 374, 376 (1984), appeal titled, Shamrock Coal Co. v. Clark, Civ. No. 84-238 (E.D. Ky., July 27, 1984); Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement, 92 IBLA 320 (1986).

From our review of the record, we find appellant has failed to establish that Judge McGuire erred in sustaining OSM's actions in issuing these NOV's and denying the applications for review. We agree with the Judge's conclusion that the NOV's were properly issued by OSM where the evidence shows appellant's actions under these permits totally disregarded the restoration of the 38.2 acres of original "prime farmland" within the permit areas to the equivalent yield status as originally proposed.

There is no question SMCRA provides for the protection and restoration of prime farmland used for surface mining operations where the granting of a

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<sup>2/</sup> The Stipulation of Facts at section c.1. specifically states "The Ohio Department of Natural Resources operates under an approved state mining program."

permit to mine on prime farmland is made conditional on proper reclamation techniques. Section 510 of SMCRA provides that in order for the regulatory authority to grant a permit to mine on prime farmland, the regulatory authority must find in writing that the operator has the technological capability to restore the mined area to an equivalent or higher level of yield as non-mined prime farmland in the surrounding area. 30 U.S.C. § 1260(d)(1); 30 CFR 716.7(f)(i). SMCRA further provides in section 519 that the reclamation bond on prime farmland may not be released until soil productivity has been restored to equivalent levels of yield as non-mined land of the same soil type in the surrounding area. 30 U.S.C. § 1269(c)(2).

Both the Federal regulation in 30 CFR 715.20(f)(2)(iii) and the Ohio State Regulation OAC 1501:13-2-15(F)(3) carry out this same theme requiring revegetation of crop land of the mined area to be equal to or greater than an approved referenced area for a two-year period. <sup>3/</sup> Moreover, appellant does not dispute the original classification of 38.2 acres of the permit areas as prime farmland. In fact, the record confirms appellant originally included some form of prime farmland restoration plan for each permit indicating an initial perfunctory attempt at showing an intent to reclaim the prime farmland areas pursuant to the regulatory requirements. (See Stipulations A.5, 6, 7 for permit No. C-806, NOV No. 84-07-252-04; and Stipulations B.5 and 6 for permit No. C-1479, NOV No. 84-07-252-05 and the Judge's decision 4-5).

Accordingly, we must agree with the Judge's conclusion that appellant is not properly relieved of complying with the crop yield reporting requirements of 30 CFR 715.20(f)(2)(iii) for the prime farmland acreage of these permits by designating the post-mining use of all land in the permit areas as "pastureland."

[2] We also agree with the Judge's rejection of appellant's allegation of lack of jurisdiction for OSM to consider these matters and issue the NOV's in question. As previously indicated, approval of a state program does not invest a state with exclusive jurisdiction. Appellant attempts to make much of OSM's failure to comply with the technical requirements for notice and public hearing under 30 CFR 733.12 prior to substituting Federal enforcement of a state program. However, these requirements do not pertain

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<sup>3/</sup> 30 CFR 715.20(f)(2)(iii) provides in pertinent part:

"Success in revegetation of cropland shall be determined on the basis of crop production from the mined area compared to the reference area. Crop production from the mined area shall be equal to that of the approved reference area for a minimum of two growing seasons \* \* \*."

Ohio Administrative Code Section 1501:13-2-15(F)(3) similarly provides in pertinent part:

"When affected areas are to be used for agricultural cropland purposes, success of revegetation of cropland shall be determined on the evaluation of the crops that were planted in accordance with the approved planting plan as approved by the chief of the division of reclamation. The planting shall be deemed to be successful if the yield from the particular crop for two consecutive years is equal to or greater than the average local yield for the particular crop."

to enforcement actions conducted pursuant to the oversight responsibility under 30 CFR 843.12(a)(2). 4/

The regulation at 30 CFR 843.12(a)(2) was promulgated pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), providing in part for Federal oversight enforcement of individual violations of state programs "[w]henever, on the basis of any information available to him, \* \* \* the Secretary has reason to believe that any person is in violation." (Emphasis added.)

In Shamrock Coal Co., Inc., supra at 378-380, we recently reviewed the question of whether OSM has the authority to issue a NOV for a violation found as a result of an oversight inspection pursuant to section 521(a)(1) where the state fails to take action to ensure abatement. We examined the Department's position on this issue and confirmed OSM's authority to act in such cases, stating at page 379:

Deletion of the language in 30 CFR 843.12(a)(2), as not being authorized by SMCRA, was considered. See 46 FR 58467, 58473 (Dec. 1, 1981). Subsequently, the regulation was issued in final rulemaking in the present form recognizing authority for issuance of a NOV as a result of oversight inspections. 47 FR 35638 (Aug. 16, 1982). Finally, the Department issued a "Statement of Policy" by the Acting Assistant Secretary, Energy and Minerals, dated February 28, 1983. The statement, published in the Federal Register, held that SMCRA requires a Federal inspector to issue a NOV to an operator if a state has been notified of the existence of a violation and has failed to take appropriate action or show good cause for inaction within 10 days:

#### Statement of Policy

Upon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.

4/ 30 CFR 843.12(a)(2) provides:

"When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or an exploration approval required by the Act or the State program which does not create an imminent danger or harm for which a cessation order must be issued under 30 CFR 843.11, the authorized representative may give a written report of the violation to the State and the person responsible for the violation, so that the appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative may reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate

It is the Department's opinion, as set forth in the original preamble to 30 CFR 843.12, that "Congress did (not) intend OSM to sit idly by while \* \* \* violations ripen into imminent hazards." 44 FR 15302, March 13, 1979. Rather as the preamble stated, the legislative history indicates that when "an OSM inspector discovered a violation at the mine, he must report the violation to the operator and the state and give the state 10 days to take appropriate action to require the operator to correct the violation. If the State takes such action, OSM does nothing further." 44 FR 15303. However, if the state fails to take adequate action or show good cause for such failure, OSM under 30 CFR 843.12 shall issue a notice violation.

48 FR 9199 (Mar. 3, 1983). 5/

Consistent with these guidelines we find OSM properly acted within the scope of its constant oversight role pursuant to section 521 of SMCRA and, therefore, properly issued NOV Nos. 84-07-252-04 and 84-07-252-05 on August 10, 1984.

As for appellant's motion for extension of the temporary relief originally granted by Judge McGuire we find no basis for the Board to entertain and grant such a remedy in this case. The record shows it was agreed by the parties to the appeal in the course of a hearing conducted on September 27, 1984, that appellant would be granted temporary relief for the 90-day period commencing from the receipt of the notices of violation. See Tr. 21, 25. An order confirming this agreement was issued by Judge McGuire on October 1, 1984. Under the terms of this order, temporary relief was granted until November 5, 1984. No appeal from this order granting limited temporary relief was filed, though the regulations clearly would have permitted such an appeal. See 43 CFR 4.1267(a).

It is also clear from the record that no further request for temporary relief was filed with Judge McGuire prior to issuance of his decision. See 43 CFR 4.1261. As we previously noted in our order of January 15, 1985, since Judge McGuire's order granting limited temporary relief was not timely appealed, the instant motion cannot be treated as an appeal from a decision of Judge McGuire granting or denying temporary relief. Moreover, there is no regulatory provision authorizing the filing of a motion for temporary relief with this Board. Accordingly, since appellant failed to exercise its right

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5/ We note in Clinchfield Coal Co. v. Hodel, No. 85-0113-A (W.D. Va. June 20, 1985), the district court found 30 CFR 843.12(a)(2) expanded OSM's authority beyond that contemplated by the Act and held the Secretary had no authority to issue notices of violation in states with approved programs, except where OSM finds a violation causes "imminent danger of environmental harm." That decision is on appeal. Clinchfield Coal Co. v. Hodel, Civ. No. 85-2206 (4th Cir., Nov. 11, 1985).

of appeal from the Judge's original decision within the 30-day appeal period allowed to the Board by the regulations in 43 CFR 4.1271, we find the Board is without authority to consider such a request at this juncture. We therefore must deny appellant's request for an extension of temporary relief.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

Wm. Philip Horton  
Chief Administrative Judge

