

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

v.

CALVERT AND MARSH COAL CO., INC., AND BATTLE CREEK MINING CO., INC.

IBLA 85-462  
85-561

Decided January 13, 1987

Appeals from two decisions by Administrative Law Judge David Torbett vacating Notices of Violation 83-10-80-03 and 83-10-97-01.

Decisions affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of

Release of a surface mining reclamation performance bond by a state does not reduce or affect the authority of the Office of Surface Mining Reclamation and Enforcement to regulate the miner. The fact of release of a performance bond is not relevant to the determination whether reclamation has properly been performed.

2. Board of Land Appeals -- Surface Mining Control and Reclamation Act of 1977: Inspections: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State -- Surface Mining Control and Reclamation Act of 1977: Federal Program: Generally

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

3. Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

Failure to revegetate surface mining sites in conformity to state and Federal regulations was not shown by use of random sampling method, the origin and application of

which were not explained, where miner's proof established there was a complete revegetation of surface mining sites in conformity to regulation in force.

APPEARANCES: Paul A. Molinar, Esq., Office of the Field Solicitor, Department of the Interior, Knoxville, Tennessee, for appellant Office of Surface Mining Reclamation and Enforcement; Edward R. Jackson, Esq., Jasper, Alabama, for appellees Calvert and Marsh Coal Company, Inc., and Battle Creek Mining Company, Inc.; Norman P. Snell, Esq., Assistant Attorney General of the State of Alabama, for Amicus State of Alabama Surface Mining Commission.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

In these consolidated appeals, the Office of Surface Mining Reclamation and Enforcement (OSM) seeks review of two decisions by Administrative Law Judge David Torbett which found sufficient revegetation had been achieved on two surface coal minesites in Alabama so as to meet Federal and state standards requiring revegetation of the sites. The mines are both located in Blount County, Alabama. Both were inspected by OSM pursuant to a study of Alabama performance bond release practices conducted by OSM in 1983. Because of the similarity between the two appeals, they are consolidated for decision.

Both mines were charged with violation of reclamation standards for revegetation of mined areas established by the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1265(b)(19), and by 30 CFR 715.20(f)(2). Separate hearings into both charges were conducted in May 1984. Following hearing, Judge Torbett vacated both OSM's notice of violation and the cessation order issued in each case, finding the miners had fully complied with the legal requirements for revegetation of both sites.

The appeal of Calvert and Marsh Coal Company, Inc. (Calvert), arises from notice of violation (NOV) No. 83-10-80-3, alleging that the Act and Departmental regulations were violated by Calvert when it failed to establish a permanent vegetative cover on the disturbed ground left by mining in Blount County, Alabama, on State permit P-2579. The NOV recites that Calvert had achieved inadequate reclamation judged by State standards for revegetation having obtained only a "50% vegetative success" as a result of its reclamation effort at the mine in violation of 30 CFR 715.20(a). A cessation order was issued to Calvert on March 29, 1984, for failure to abate the violation alleged by the NOV.

In the second OSM appeal under consideration, Battle Creek Mining Company, Inc. (Battle Creek), was issued an NOV on June 10, 1983, alleging that it also had failed to establish "a diverse, effective, and permanent vegetative cover" on its minesite in Blount County in violation of 30 CFR 715.20(a). The Battle Creek NOV recites that an inadequate "68% vegetative success" was achieved at this site. On March 22, 1984, a cessation order was issued to Battle Creek for failure to abate the charged violation, in accordance with section 521(a)(3) of the Act.

Although the Battle Creek and Calvert hearings were conducted separately, similar procedures were used in handling each case. Both coal companies presented their evidence by deposition after the May hearing before Judge Torbett was completed. At the May 1984 hearings before the Administrative Law Judge, OSM presented evidence concerning the reclamation effort by the coal companies through OSM inspectors who described their observations of the two minesites. At the later depositions, the coal companies presented testimony by State of Alabama inspectors which directly contradicted the OSM evidence. Judge Torbett, in each case, found the State's evidence to be persuasive, and gave it greater weight than that presented by OSM. <sup>1/</sup>

The brief summary of the parties' evidence which appears in the Administrative Law Judge's decisions on appeal, however, is too abbreviated to adequately explain the conclusions reached by him. Although the Board finds his conclusion to be ultimately correct, his opinion is not supported by an adequate statement of the facts upon which it is based in either case. We are therefore obligated to independently review the verbatim record of the proceedings before Judge Torbett in detail to establish the facts of each case. The evidence in each case is considered separately in this opinion.

In the Calvert case, OSM Inspector Windham testified that OSM sent his fellow inspector, Flowers (who was not available to testify at the hearing), to survey the Calvert minesite on June 22, 1983, as part of a program of systematic review directed towards the State of Alabama's practices in ordering the release of miner's performance bonds in the exercise of the State's primary regulatory authority under the Act (Calvert Tr. 19). According to Windham, before the State, acting under its regulations, can release a miner entirely from its performance bond, it is required to ensure that 80 percent of the mined area has been covered by vegetation (Calvert Tr. 20). Flower's job, as an inspector of the State practices in these cases, was to determine whether the Calvert mine had been revegetated in compliance with the State regulation before Calvert's bond was ordered released by the State (Calvert Tr. 20). To make this determination, Inspector Flowers used a method of random sampling called the "point frequency method," which Windham believed had originated from the "Pittsburgh Technical Center East" (Calvert Tr. 34). Windham explained the operation of this method in practice in response to questions by counsel:

Q. And who was that that trained him? If you recall?

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<sup>1/</sup> We note in both decisions, Judge Torbett concluded more weight must be given to evidence resulting from the State's inspection, made at the time of the bond release, rather than evidence derived from OSM's inspection, made some 2 months later. Calvert Decision at 5, 6; Battle Creek Decision at 6. We find no authority to support the proposition that evidence derived from the State's inspection must be given more weight solely because the inspection occurred at the time of the bond release and preceded OSM's inspection by some 2 months.

A. I don't recall, but he was from the Pittsburgh Technical Center East.

Q. How much time was spent training Mr. Flowers?

A. Well, he was trained at the same time I was, which was approximately four hours on the mine site.

Q. Would you tell me what you do to use a point frequency method of determining vegetation cover?

A. It is -- first, we take a map of the mine site and we plot 100 points on the map.

Q. Random plots?

A. Random plots. And we scale the distance from each point and get a bearing from one point to the other, from a known location. We go on the mine site and we go to this known location, get our bearings of the next point, and the distance and we take a staff with a tube that has a cross hair in the top and a cross hair in the bottom. We look through this tube down at the ground, lining up the cross hairs. If these cross hairs hit, that's green vegetation and we count it as covered. If they don't hit green vegetation, we count it as not covered. So, on 100 points, if 20 points don't hit vegetation, green vegetation, that -- then you have 80% coverage.

Q. All right. So, let me make sure I understand this. You put that down on the ground and if there is no grass underneath that tube --

A. Well, not the tube. The crosshairs.

Q. How are the cross hairs up in the tube?

A. They are at the end of the tube. I mean, it wouldn't matter --

Q. How high it is?

A. How high it is or how big around, just so you line your cross hairs up looking down at the ground.

Q. What is the purpose of the cross hairs?

A. Just to give you a point on the ground to look at.

Q. Would you have a point -- I'm just trying to understand this, just by looking through the tube? If you found one piece of grass, would that be sufficient to be vegetation cover at that point?

A. No, you need a precise location on the ground. That's the reason you line the cross hairs up.

Q. How big a location on the ground do you measure?

A. Oh, well when you line your cross hairs up, you're just hitting a speck. It's like looking down sites of a gun.

(Calvert Tr. 34, 35). Further questioning of Windham concerning the origin and scientific basis for this method of random sampling elicited the response that it came from "Penn State University" (Tr. 40). The genesis and rationale of the method is nowhere further explained in the record.

Independent of the reported results of this sample taken by his fellow inspector, Windham had no opinion concerning the condition of the reclamation on the Calvert mine at the time of the bond release in 1983 (Calvert Tr. 43). However, Windham did personally inspect the Calvert site in March 1984, although he did not use the point frequency method employed by Flowers when he did so (Calvert Tr. 50). The purpose of his visit in March was to determine whether there had been any further reclamation activity on the land; determined there had been none, and expressed no opinion as to whether 80 percent of the site was grassed-over when he visited it (Calvert Tr. 51). He did, however, state that the photographs taken of the Calvert site by Flowers in June 1983 showed grass coverage which appeared to him to be the same as the site he saw the following March (Calvert Tr. 54).

State's Inspector Wilkinson, who had inspected the Calvert minesite for the State of Alabama in 1983, testified by deposition on behalf of Calvert that the minesite was 90 percent or more covered by vegetation when he made his visit to the site (Wilkinson Dep. at 11). He testified that photographs (Deposition Exhibits 1 through 5) accurately show the site as it appeared in 1983 (Wilkinson Dep. at 13). According to Wilkinson, the site was revegetated with two grasses, sericea lespedeza and fescue (Wilkinson Dep. at 13, 14). The entire site was fully covered in 1983 (Wilkinson Dep. at 14, 15). Wilkinson used the visual method of inspection (Wilkinson Dep. at 15). He had first inspected the site in summer 1981, at which time the land had been graded and planted (Wilkinson Dep. at 17). Grass was growing on the site in the fall of 1981 (Wilkinson Dep. at 18). The appearance of the minesite in late 1981 indicated that there had been a successful revegetation of the location (Wilkinson Dep. at 19). Wilkinson described his inspection of the site, in answer to question by counsel, as follows:

Q. When you do a bond release inspection, do you use any scientific or statistical method of determining the portion of vegetative cover?

A. Well, like I said, we use the visual method.

Q. Could you describe that for me?

A. Okay. I go out, and first I look at the site to see if there is just any bare areas, and if there is a large bare area I immediately sense that the vegetative cover is lacking. But in this particular area I went out and saw no grossly naked areas of vegetation, and when it's all covered, it's all covered, you know.

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Q. Basically, you do an estimate on your visual inspection of the site to determine the proportion. You go out and look at it and then estimate what your percentage of cover is. That's what you just described

A. Yes, that describes the visual method. Yes.

Wilkinson made quarterly inspections of the site, visiting it in spring, summer, and fall and found an apparently successful revegetation to be in progress (Wilkinson Dep. at 20, 21, 23). In April 1983, when he made his final inspection, there were no bare spots at all (Wilkinson Dep. at 24). Overall coverage of the mined site was greater than 90 percent (Wilkinson at Dep. 31). Wilkinson was accompanied at this final inspection by Walter Pridmore, who inspected the Battle Creek minesite for the State in the companion appeal.

In the Battle Creek case, two inspectors were also called, Inspector Stanley for OSM and Inspector Pridmore for the miner. OSM Inspector Stanley testified that his observations, like those of Flowers and Windham, were based upon use of the point frequency sampling method, which he described in terms similar to the description given by Inspector Windham (Battle Creek Tr. 14-17, 20). Stanley's inspection of the Battle Creek site took place in June 1983 (Battle Creek Tr. 20). Using the point frequency method, he determined the Battle Creek site was only 68 percent covered by vegetation (Battle Creek Tr. 21).

Stanley reinspected the site on March 21, 1984 (Battle Creek Tr. 25). He found, upon reinspection, that there was no evidence of further reclamation work on the site since his inspection of 1983, by comparing the 1984 site to photographs taken in 1983 (Battle Creek Tr. 25, 26). Except for a small burned area, the site appeared to be unchanged (Battle Creek Tr. 26).

Stanley explained that his only knowledge of the point frequency method of surveying reclaimed minesites was derived from 4 hours of training prior to actual use of the method on the job (Battle Creek Tr. 29). He and Flowers, the Calvert site inspector, attended the same training session (Battle Creek Tr. 35). The Battle Creek mine was the second reclamation site where Stanley had used the point frequency method to inspect (Battle Creek Tr. 30). In his opinion, aside from the use of the required method and based upon his personal

inspection of the minesite, the Battle Creek site was in fact 80 percent revegetated (Battle Creek Tr. 30).

Testifying for Battle Creek by way of deposition, Inspector Pridmore stated that he is qualified for his work inspecting reclamation sites by training and experience, having both master's and bachelor's degrees in agriculture and 29 years experience with the Soil Conservation Service (Pridmore Dep. at 8). He inspected the Battle Creek site on April 1983, and found two grass crops growing; sericea lespedeza and fescue (Pridmore Dep. at 11, 12). He found, considering the slope of the land, the soil and the grass cover, that the site was "above 90 percent" grass covered (Pridmore Dep. at 13). Pridmore identified the Battle Creek minesite from photographs taken by him 18 months after his final inspection, which, however, accurately portrayed the condition of the land at the time of his inspection, and which he stated was unchanged in appearance from the conditions observed at his final inspection in 1983 (Pridmore Dep. at 15, 16).

Pridmore saw the discrepancy between the results obtained by the OSM inspectors' use of the point frequency method and the reports of inspections performed by the state inspectors as a consequence of a lack of consideration of the characteristics of the two grass plants used to revegetate the site (Pridmore Dep. at 51). According to Pridmore, the growing season of the two grasses is not the same, nor do the growing seasons for the grasses correspond directly to the calendar year (Pridmore Dep. at 44). Although both grasses are perennial, Pridmore compared sericea to a deciduous tree; the plant comes up in April, turns brown in the fall, and drops its leaves (Pridmore Dep. at 38). Fescue, however, grows in the fall, seeds in June, and is dormant in summer and winter (Pridmore Dep. at 39). The two plants are therefore as unlike in appearance as evergreen and deciduous trees are unlike, and display their green aspect at different seasons, a fact which could deceive a viewer unfamiliar with their differing characteristics (Pridmore Dep. at 35-42). Based upon his education, experience, and personal observation of the site, Pridmore testified that the Battle Creek site had been effectively stabilized by the reclamation work and planting done on the site, there had been no significant soil erosion, and an effective plant cover was established covering over 90 percent of the mined area at the time of his final inspection in 1983 (Pridmore Dep. at 48-52).

The Judge found the issues on appeal in each case could be resolved into a single question: "the extent that OSM retains enforcement authority over a mine site that has been given 100% bond release by a state regulatory authority" (Calvert Decision at 2; Battle Creek Decision at 2). OSM has objected to this characterization of the issues in these cases, contending that release of a reclamation bond is irrelevant, that OSM properly acted within the scope of its permanent program authority when it took action against Calvert and Battle Creek for failure to properly revegetate their minesites, and that the evidence at hearing shows there had not been an 80 percent revegetation of either site within the requirements of state rules implementing the permanent Federal surface mining regulatory scheme in Alabama.

In response to the OSM position, both Calvert and Battle Creek question the jurisdiction of OSM to act at all in these cases, so long as the State of Alabama exercises primary regulatory authority over surface mining operations within the State. Both appellees also contend that there was compliance with the revegetation requirements of law as to both minesites.

The Board finds that OSM did exercise proper oversight jurisdiction when it inspected each minesite, and that State release of a reclamation performance bond is not an event which can trigger release of a minesite from Federal regulation. The Board also finds that, based upon the evidence at the hearing, both mines were successfully revegetated in 1983 because Calvert and Battle Creek proved that each mine's reclaimed areas had achieved the 80 percent revegetation required by law.

[1] Neither the Act nor Departmental regulations implementing the Act contain provisions which operate to release a minesite from regulation because a reclamation bond is released. On the contrary, the Act provides that the miner shall be liable under the performance bond "for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation." 30 U.S.C. § 1259(b) (1982). Nowhere in the Act is there any provision which suggests, as Judge Torbett indicated in his decision, that the release of a reclamation performance bond is an event which sets in motion a limitation upon the Federal regulation of a minesite which is subject to the Act. Neither Calvert nor Battle Creek have cited any provision of the Act or any regulation implementing the Act which establishes that the fact of bond release is an event which may lead to the termination of Federal regulation of a surface mining site. It must be concluded that it is the fact of successful completion of reclamation according to standards established by the Act and relevant regulations which dictates whether regulation of a given site can be said to be ended. See 30 U.S.C. § 1265 (1982). Whether a bond release has been ordered is not relevant to such a determination, and neither proves nor disproves that adequate revegetation has occurred. Grafton Coal Co., 3 IBSMA 175, 88 I.D. 613 (1981).

[2] The State of Alabama exercises primary regulatory authority over these two mine operations as a result of conditional approval by the Secretary of the Interior of the Alabama State permanent regulatory program on May 20, 1982. 47 FR 22057. OSM retains its direct enforcement authority over surface mining, however, pursuant to 30 U.S.C. § 1271(a)(1) (1982) and 30 CFR 843.12(a)(2). Operating under this latter regulation OSM first notifies the state regulatory authority of a suspected violation and then allows the state 10 days to take action. If the state fails to take appropriate action, OSM then issues an enforcement citation. 30 CFR 843.12(a)(2). In these cases, OSM gave the State of Alabama a 10-day notice that both mines had failed to establish on all lands disturbed, a diverse, effective, and permanent vegetative cover (Exh. R-6). The State of Alabama took no enforcement action (Tr. 26). OSM inspectors then inspected both minesites.

OSM correctly characterizes these cases as situations where OSM followed all requisite procedures in taking the enforcement action at issue. In both cases, OSM gave Alabama the 10-day notice required by 30 CFR 843.12(a)(2). and when the Alabama agency concerned did not take action in response to the notices, conducted a reinspection as required by the regulation, and subsequently issued NOV's to both miners. Thus, the procedures followed by OSM in these cases are those authorized by section 521(a) of the Act, which provides that the Secretary may, after notice to a state authority, order Federal inspection. See 30 U.S.C. § 1271(a) (1982). Where, after notice given, the state takes no action, Departmental regulation 30 CFR 843.12(a)(2) authorizes the issuance of an NOV. Turner Brothers, Inc. v. OSM, 92 IBLA 320 (1986).

Neither Calvert nor Battle Creek argues that OSM failed to follow the provisions of 30 CFR 843.12(a)(2), but instead each argues that the rule is itself illegal, and that the Department lacks a statutory basis to permit it to step in to oversee State enforcement of the Act without first moving to oust the State of its primary responsibility for the regulation of surface mining. In making this argument, Calvert and Battle Creek rely upon Drummond Coal Co. v. Hodel, 85-AR-1411-S (N.D. Ala. 1985) and Ryan's Coal Co. v. OSM, CV-PT-0623-J (N.D. Ala. 1983).

Prior decisions of this Board have approved the authority of OSM to conduct inspections and cite violations in States such as Alabama, despite the fact the State was the primary regulatory authority responsible for enforcement of the Act. See, e.g., Turner Brothers, Inc., supra; Turner Brothers, Inc., 92 IBLA 23, 93 I.D. 199 (1986). Admittedly, in the cited cases, the issues directly considered by the Board concerned whether the provisions of regulation 30 CFR 843.12(a)(2) had been correctly applied by OSM. Implicit in the Board's decisions, however, is a recognition that the regulation is binding Departmental authority which permits continued regulation of surface mining operations despite State assumption of primary regulatory authority.

OSM argues, correctly, in reply to appellants' attack upon the jurisdiction of OSM to inspect their surface mines in these cases, that neither the Drummond nor Ryan's decisions cited in appellants' briefs directly dealt with the question of the validity of 30 CFR 843.12(a)(2). In the fourth and eleventh Circuits, moreover, attempts to bring suits challenging the validity of other OSM regulations have been rejected for lack of subject matter jurisdiction. See Drummond Coal Co. v. Watt, 735 F.2d 469 (11th Cir. 1984); Tug Valley Recovery Center v. Watt, 703 F.2d 796 (4th Cir. 1983). Both circuit courts found, in the two cited decisions, that an attack upon the validity of OSM's surface mining regulations can only be brought in a District Court in the District of Columbia Circuit, because the Act limits jurisdiction to review the validity of those regulations to that court. See 30 U.S.C. § 1276(a)(1) (1982). Since, as OSM points out, this Board is not the United States District Court for the District of Columbia, it is apparent appellants have made this argument to the wrong forum.

Further, the Fourth Circuit Court, in a recent unpublished decision, Clinchfield Coal Co. v. Department of the Interior, No. 85-2206 (4th Cir.

Aug. 27, 1986), reversed a decision of the United States District Court for the Western District of Virginia which had ruled that 30 CFR 843.12(a)(2) exceeded the Secretary's authority conferred by the Act, precisely the argument raised by appellants here. The fourth circuit's decision is directly on the point raised by appellants here, since it finds:

The SMCRA, at 30 U.S.C. § 1276(a)(1), provides for judicial review of the Secretary's rule-making actions as follows:

Any action by the Secretary promulgating national rules or regulations \*  
\* \* shall be subject to judicial review in the United States District Court  
for the District of Columbia Circuit.

In Commonwealth of Virginia v. Watt, 741 F.2d 37 (4th Cir. 1984), we found that an attack on administrative action taken in accordance with the Secretary of Interior's regulations under SMCRA was an attack on the regulations themselves and may be heard only in the U.S. District Court for the District of Columbia. In Tug Valley Recovery Center v. Watt, 703 F.2d 796 (4th Cir. 1983), we concluded that a district court in the Fourth Circuit lacked subject-matter jurisdiction over any action that was tantamount to an attack on a federal regulation issued under SMCRA.

In reaching the decision to issue the temporary injunction in the present case, the district court found that the regulation set forth in 30 C.F.R. § 843.12(a)(2) was void because it went beyond the scope of authority granted to the Office of Surface Mining Reclamation and Enforcement (OSM). Since this represents an attack upon the regulation, the U.S. District Court for the Western District of Virginia did not have jurisdiction to consider this point or make this finding.

Id. at 2, 3. The same finding holds true for the Board on this identical issue which appellants seek to raise in these appeals. Appellants' argument concerning the validity of 30 CFR 843.12(a)(2) is therefore rejected. This Board lacks jurisdiction to entertain the matter which they seek to raise.

[3] The ultimate factual question presented by the record concerning the revegetation of both sites may properly be considered by the Board. This matter is the primary issue on appeal; contrary to Judge Torbett's erroneous dictum, the real issue in both cases is whether OSM's evidence at hearing was sufficient to establish that there was inadequate revegetation of these mines.

Since Alabama is the primary surface mining regulatory authority in these cases, the State regulation establishing and defining revegetation requirements was the agreed focus of the hearings into the alleged non-compliance by Calvert and Battle Creek. The testimony by all witnesses

centered upon the State's regulation and the understanding of each witness concerning the meaning of the relevant state rule governing revegetation, which provides:

C. Permanent vegetation shall be deemed adequate vegetative [sic] cover if the vegetation has survived two growing seasons, and if the following standards are observed:

1. Legumes and perennial grass must cover at least 80% of the affected soil surface. Areas of less than 80% cover shall not exceed one-fourth acre in size nor total more than 20% of the area planted.

2. Tree and shrub species shall be at such a density to provide a minimum of 435 established seedlings per acre of mine soil. A minimum of 200 seedlings per acre will be allowed on one-half (1/2) acre within each five (5) acres of planting. Additional seeding or planting must be performed to make up any deficiency.

3. Where this provision relative to vegetation would be inconsistent with the proposed use, the reclamation plan shall be reviewed and acted upon in accordance with the approved use. In any event, the reclamation plan must provide for expeditious stabilization of the area.

D. Upon the achieving of the adequate vegetative cover in accordance with the satisfactory reclamation plan the portion of the operator's bond held pending revegetation of the affected area shall be released.

Alabama Surface Mining Regulatory Commission (ASMRS), Regulation secs. 3C and 3D, Calvert Exh. R-3. All the parties agree that this cited State regulation is of controlling importance on the issue of whether there was revegetation of these sites. It is also agreed that in each case revegetation was required. In each case, therefore, the issue was whether there had been survival of vegetation on the site in conformity to this rule. Of particular concern to the parties was whether there had been an "80%" revegetation.

The ultimate burden of proof in cases arising under 30 U.S.C. § 1271 (1982) falls upon the miner. See 43 CFR 4.1171. This procedural regulation, however, provides that OSM must first go forward with evidence which, if not contested, would establish the violation as charged had taken place, that is, the agency must make out a prima facie case of violation. Id.; James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). But the burden of proof is finally upon the miner to establish by a preponderance of evidence that there was not a violation as alleged. Here, both Calvert and Battle Creek proceeded to offer evidence after OSM had presented its case, a circumstance which permits this

Board to evaluate the entire record to determine whether the Government's claim of violation has been proved. See Turner Brothers, Inc. v. OSM, 92 IBLA 31, 93 I.D. 199 (1986).

In both these cases OSM inspectors used the point frequency method of random sampling to establish that the State regulation requiring 80 percent cover had been violated by the miners. In its briefs filed with this Board, OSM urges that this method should be considered to be a "statistically based scientific method for determining the percent of vegetative cover" (OSM brief (Calvert) at 2, 3; OSM brief (Battle Creek) at 3). The record, however, offers no support for this assertion concerning the scientific base for the point frequency method, nor does OSM now offer any reasoned explanation of the method to support such a claim. On the contrary, the OSM employees who testified concerning the sampling method used by them were ignorant of its origin or its basis in reason or science, except for the fact it had issued from "Penn State University." There is no testimony in the record anywhere to establish that this method is "statistically based" or even anything to show that it is in any usually accepted sense a "scientific" method at all. The method does appear to be random, in the sense that it is haphazard. Inspector Windham in the Calvert hearing testified that the first 100 points found to appear within the minesite were selected for use as places to be sampled. In the Battle Creek hearing, Inspector Stanley confirmed that "the first 100 that hit within the permit map" were selected. While this described a random method, it seems to be based upon a peculiarly limited sample. It also assumed the existence of a "green" cover which may not be a correct factor to use for evaluating plant growth. The mathematical or statistical basis for the sample is nowhere explained.

More importantly, the meaning of the sample taken in relation to the purpose for which the sampling method was used is not explained. Both inspectors testified that when they analyzed the results of their sampling, they simply counted the number of points where their sighting telescopes had centered a piece of green vegetable matter. In the case of Calvert, this meant that 50 sightings in the crosshairs led to a rating of 50 percent coverage, while the Battle Creek inspector captured 68 green blades of grass for a rated 68 percent coverage according to the sampling scheme. When, at the Calvert hearing, Judge Torbett expressed incredulity at the simplistic approach of this method of estimating the revegetation of the minesite, the inspector had no explanation for the direct equation of actual sightings of green grass to the conclusion by the sampler that each sample represented 1 percent of the total minesite area in terms of vegetation.

This evidence offered by OSM is problematic at best, first since it is a method of appraisal without apparent basis, and second, since it appears there is no adjustment made within the method for the fact that grass, by its very nature, is not a continuous cover over land like a pulverized or granular mulch, but requires spaces to exist between plants in order to permit growth. Clearly, there needs to be some reasoned explanation of this method which permits the inspector to translate a series of random observations into a statistical evaluation of what the observations mean. Thus, Inspector Stanley, who

evaluated the Battle Creek site using the point frequency method, was of the opinion after his inspection that the site was 80 percent revegetated as required by the regulation, despite the contrary reading he obtained using the point frequency evaluation. Clearly, if the inspector himself was not persuaded of the accuracy of his method of evaluation, it is improbable that he should be able to persuade others that the method is any good for the purposes of evaluating the revegetation of surface mines. On the basis of this type of evidence therefore, it is questionable whether OSM succeeded in proving the prima facie case required by the procedural regulation in such cases as these.

Assuming, however, for purposes of decisionmaking, that OSM's evidence based upon its random samples could suffice to require some contrary proof concerning revegetation by Calvert and Battle Creek, the miner's evidence concerning the reclamation of both sites was sufficient to dispose of any suspicion there had been a violation by the miners as charged by OSM.

In the Battle Creek case, the testimony of Inspector Pridmore, which is supported by photographic evidence of the appearance of the site, provides direct and compelling proof that a complete revegetation of the Battle Creek site exceeding 90 percent coverage had taken place when he inspected the location. Pridmore's testimony explains the characteristics of the two types of grass planted on the site in terms of their appearance and seasonal growth patterns. By explaining that the grass is not always green in all seasons, nor ever capable of totally covering all the soil where it grows with a green cover, and is yet able to provide cover over all the site throughout the seasons by virtue of the variation between the two types of grass used, Inspector Pridmore answered completely any OSM evidence tending to prove there was inadequate cover. He also, by his testimony, exposed a basic fault in the sampling system used by OSM, which assumes that living grass is always green.

Referring to the photographs which are part of the record, Pridmore showed that the site was covered by vegetation. His testimony, which is not contradicted by any evidence offered by OSM, is compelling proof that an adequate cover amounting to 80 percent or more of the site had been achieved over two growing seasons as required by the state regulation. The Administrative Law Judge properly relied upon the testimony of the State inspector when he held that OSM had not proven the site had not been revegetated. As Inspector Pridmore summed up his testimony concerning the condition of the plantation on the Battle Creek site in relation to the proofs obtained by use of the point frequency method, "Unless you know the characteristics of the plant, then any kind of method [used to evaluate it] is no good" (Battle Creek Tr. 53).

Although the Calvert mine occupies a different site in Blount County, it is otherwise nearly identical to the Battle Creek minesite. It was reseeded with the same two grasses, which grew over a period of more than 2 years until they were found by a State inspector to have achieved a better than 80 percent revegetation of the minesite. Like the Battle Creek inspection, OSM conducted an inspection of the site as part of a general review program of the State's enforcement of the Act, and determined there had been

a violation of the Act using the point frequency method. The State inspector, testifying for Calvert, testified there was over 80 percent cover provided by vegetation on the site. His testimony, like that of Pridmore in the Battle Creek case, was based upon his personal inspection of the site, supported by photographic evidence of the scene which he described. The photographs indicate the site is entirely grass covered. The testimony of the State inspector is wholly consistent with the photographic evidence in the record, and the discrepancy between the State and OSM inspector's reports is entirely attributable to the use by OSM of the point frequency method. For reasons already explained, the point frequency method, without some further explanation of the basis for its use, is not persuasive in the face of direct credible testimony to the contrary. OSM has not shown it to be an effective substitute for expert testimony, or even for a commonsense evaluation by a witness testifying concerning his personal observations of a site.

OSM also argues that, even if there were adequate vegetation on both sites at the time of their inspection by the State in 1983, the growth had not been in place for two entire growing seasons and therefore was not in compliance with section 3C of the state regulation, quoted above. This argument is simply not supported by the record, which indicates, as discussed by this opinion, the required growth had taken place. The testimony of Inspector Pridmore was to the effect that the correct planting of a site with these two species of grasses, fescue and sericea, virtually assures the result which was obtained on these two sites over a 2-year period. Because there were no intervening events to interfere with the development of the grass, and it was correctly planted, it was successful within the minimum time established by the State regulation.

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

Franklin D. Arness  
Administrative Judge

We concur:

John H. Kelly  
Administrative Judge

R. W. Mullen  
Administrative Judge

