

CLINCHFIELD COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-159

Decided February 18, 1987

Appeal from a decision of Administrative Law Judge Frederick A. Miller, assessing civil penalties for violations cited in Notice of Violation No. 81-I-43-21 and Cessation Order No. 81-I-43-5. CH 2-23-P, CH 2-66-P, CH 2-39-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

2. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

Access roads or terraces created during mining operations must be backfilled and graded so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated. Where an access road or terrace not described in a mining plan is constructed, and a NOV is issued as a result thereof calling for backfilling and regrading as the means for abatement, OSM may properly refuse acceptance of a subsequently submitted mining plan designating the disturbed area as a road necessary for postmining land use.

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

Where assessment of civil penalties comports with the procedures set out in 30 CFR Part 723, such assessment will not be disturbed on appeal absent a showing that it was arbitrarily, capriciously, or unfairly imposed.

APPEARANCES: James P. Jones, Esq., Bristol, Virginia, and Fletcher A. Cooke, Esq., Lebanon, Virginia, for appellant, Clinchfield Coal Company; Susan K. Hoven, Esq., and C. Cleveland Gambill, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Background

Clinchfield Coal Company (Clinchfield) has appealed from the October 3, 1983, decision of Administrative Law Judge Frederick A. Miller assessing civil penalties under the Surface Mining Control and Reclamation Act of 1977 (Act) 1/ for violations of the Act charged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation (NOV) No. 81-I-43-21 and Cessation Order (CO) No. 81-I-43-5, issued at Clinchfield's Splashdam Strip No. 3 site (Permit No. 3012), in Dickinson County, Virginia.

Clinchfield's Permit No. 3012 was approved by the Virginia Division of Mined Land Reclamation (DMLR) on April 24, 1979. At the time this permit was issued, OSM was enjoined from enforcing the Act in southwestern Virginia. Due to this injunction, OSM was not provided copies of permits issued by DMLR and was unable to review the Splashdam permit until the injunction was lifted by the United States Court of Appeals for the Fourth Circuit on August 10, 1979.

Permit No. 3012 indicated a valley fill at one end of the site, a finger ridge removal area and a flat terrain area known as "the point" at the other end, with a contour strip area in the center. The permit called for a first cut along the contour and construction of a sediment channel. The first cut was shown to include backfilling and grading resulting in less than total elimination of the highwall created by the cut. The remaining highwall was shown as approximately 1,800 feet long and 22 feet high.

Clinchfield commenced mining after its permit was approved by DMLR and in October 1979 began an unapproved second cut on the contour area. DMLR issued a citation for mining above the highwall and directed Clinchfield to amend its permit to incorporate the second cut. Clinchfield submitted an amendment to DMLR on November 8, 1979, showing the second cut. (Amendment No. 1). In response to the amendment submitted by Clinchfield, DMLR requested

1/ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (1982).

that Clinchfield propose an alternate postmining land use plan. DMLR also informed Clinchfield that it had erred in approving its permit which called for less than total highwall elimination of the first cut and that company engineers should resubmit a cross-section showing complete elimination of the remaining highwall. DMLR's actions in this regard were apparently in response to OSM's request that DMLR correct inconsistencies between State and Federal law existing in the mining permits issued during the injunction.

During the course of mining in the area of the first cut, Clinchfield found that the coal underlying the second cut area had previously been mined from underground operations. Clinchfield abandoned the second cut without having reached the coal seam or extracting any coal therefrom. By special order dated June 2, 1980, DMLR directed Clinchfield to further amend its mining plan to show elimination of highwalls on both the first and second cut (Appellant's Exh. 1). Clinchfield then filed a plan of rehabilitation dated April 22, 1981, which did not contemplate further excavation, provided for backfilling and regrading of the "second cut" area, and noted that backfilling of the second cut was almost complete (Amendment No. 2).

OSM Inspector Brent Virts began regular inspections of the Clinchfield mining operation in January 1981. During an inspection made in February 1981, he informed Clinchfield representatives of apparent reclamation problems (Tr. 22). Reclamation began approximately April 1, 1981, beginning at the point, progressing to the valley fill and subsequently to the contour area. In May 1981, Clinchfield commenced reclamation of the first cut by taking a bulldozer above the backfill, excavating virgin terrain above the highwall and placing the excavated material on the fill from the first cut (Appellant's Exh. 1).

After three inspections of the Splashdam site on June 29, July 1, and Clinchfield on July 6, 1981. Clinchfield challenges two of the violations issued, Nos. 2 and 3, which state:

Violation No. 2 . . . The person [Clinchfield] has failed to have the siltation structures certified by a qualified registered engineer verifying that the structure[s] are constructed as designed and approved in the reclamation plan. [citing 30 U.S.C. 1265; § 515(b)(10)(B)(ii) of the Act]

Violation No. 3 . . . The person [Clinchfield] has disturbed land above the highwall without the regulatory authority finding that the disturbance will facilitate compliance with the requirements of 30 CFR Section 716.2; and, the person has failed to transport, backfill and grade all spoil material to eliminate all highwalls, spoil piles, and depressions in order to achieve the approximate original contour. [Citing 30 CFR 716.2(a), 30 CFR 715.14 (first unnumbered paragraph) and 30 CFR 715.14(b)(2).]

Clinchfield did not challenge the portion of violation No. 3 which cited it for disturbing land above the highwall without the required regulatory finding. At an on-site meeting between Clinchfield representatives and representatives of OSM and DMLR regarding Splashdam reclamation, Clinchfield agreed to submit a further amendment to DMLR and OSM.

On July 30, 1981, Clinchfield submitted its amendment to DMLR and OSM. (Amendment No. 3). The proposed amendment included changes in the location of sedimentation structures, a change in postmining land use, and a permanent road above the first cut, which would be left as an access road from the entrance of the permit area to the area at the point to support a new postmining land use (hay and pasture land) (Appellant's Exhs. 1 and 6). DMLR approved this amendment on September 22, 1981, and sent OSM a copy of its letter of approval. By letter dated September 29, 1981, Clinchfield separately advised OSM of this approval and requested an extension of time for abatement of violation Nos. 2 and 3 of NOV No. 81-I-43-21. Clinchfield commenced reclamation in accordance with the amended plan before receiving OSM's response. By letter dated October 27, 1981, OSM advised Clinchfield:

Your request for an extension to the 90-day abatement period set forth in NOV 81-I-43-21 has been considered by both our Regional and Washington Offices.

We have been advised, by solicitor opinion, that in accordance with sections 701(28)(b), 515(b)(3), and 521 of the Act, Notice of Violation 81-I-43-21 was properly issued to your company, and that the requirement to backfill, compact, and grade the disturbed area to achieve the approximate original contour is the appropriate remedial action.

Based on the above determination, our office cannot consider the amendment to permit 3012, approved on September 22, 1981, as an appropriate remedy in this matter. Our Notice of Violation will, therefore, stand as issued.

However, because your company was involved in pursuit of designs and plans related to our Notice of Violation, and because we were somewhat delayed in our response to your inquiries and extension request, we will grant an extension of 60 days (expiring 8:00 a.m., December 1, 1981) for violations 2 and 3 of NOV 81-I-43-21, provided that your company agrees to perform the necessary remedial actions promptly.

Should you desire, we would be willing to meet with representatives of your company, and/or the regulatory authority, to discuss the required remedial action in more detail.

(Appellant's Exh. 9).

Clinchfield continued its reclamation efforts in accordance with the DMLR-approved plan, as amended, even though OSM had informed Clinchfield that its plan was not acceptable.

On December 1, 1981, the end of the abatement period allowed by OSM, Inspector Virts issued CO No. 81-I-43-5. The CO cited Clinchfield as follows:

Violation No. 1 . . . The person has failed to abate Violation No. 3 of Notice of Violation No. 81-I-43-21 [unauthorized disturbance and failure to achieve approximate original contour]

within the time originally fixed or subsequently extended. [Citing 30 CFR 722.13.]

Violation No. 2 . . . The person has failed to abate Violation No. 2 of Notice of Violation No. 81-I-43-21 [siltation structure certification] within the time originally fixed or subsequently extended.

The closure order further provided that the following corrective action must be undertaken:

Violation No. 1. * * * Immediately perform the corrective action required in Notice of Violation #81-1-43-21 under Violation No. 3, on those areas marked in cross-hatch orange on the attached topographic map.

Violation No. 2. * * * Immediately perform the corrective action required in Notice of Violation #81-1-43-21 under violation #2; - or -
Immediately perform the corrective action required in Notice of Violation #81-1-43-21 under notation No. 2; considering the design for siltation structures approved by the Regulatory Authority on the 9-22-81 Permit Amendment.

On March 3 and 4, 1982, a hearing was held before Administrative Law Judge Miller in Abingdon, Virginia. In his October 3, 1983, decision, Judge Miller upheld violation Nos. 2 and 3 of NOV No. 81-I-43-21, and assessed civil penalties therefor of \$700 and \$1,400, respectively. He also affirmed the failure to abate violation Nos. 2 and 3 of the NOV as cited in CO No. 81-I-43-5 and assessed a civil penalty of \$22,500 for each failure.

Discussion, Findings, and Conclusions

[1] On appeal Clinchfield claims it was error for the Administrative Law Judge to refuse to determine whether the purported access road built above the area of the first cut incorporates a highwall. In his decision, Judge Miller stated: "It is not essential to the final determination in this case whether a highwall was created when the access road was cut and the undersigned expresses no opinion on that matter" (Decision at 8). By footnote to this statement, Judge Miller explained:

Since there were other bona fide highwalls mentioned in the notice of violation and that elimination of a highwall is a specific requirement of 30 C.F.R. Section 715.14 which must be satisfied in order to achieve approximate original contour, if a highwall has not been eliminated, it necessarily follows that return to approximate original contour has not been accomplished. Little Sandy Coal Sales, 2 IBSMA 25 (February 19, 1980).

Id. at note 3.

Judge Miller's reasoning is criticized by Clinchfield as follows:

The central issue which resulted in the issuance of the Notice of Violation and Cessation Order in question was that of whether the vertical component of the access road on the site of Permit 3012 was a "highwall" within the definition of 30 CFR § 710.5 and whether, accordingly, that vertical component and, necessarily, the access road had to be eliminated. This is clear from noting Clinchfield's Petition for Review and Application for Review, the amount of time spent on this issue in the hearing, and the briefs of the parties. The incorporation of the access road into the reclamation plan for Permit 3012 was an essential element which enabled Clinchfield to eliminate the first cut highwall and allowed Clinchfield to amend its post-mining use as had been required by the Regulatory Authority. After the amendment providing for these changes was approved by the Regulatory Authority, OSM notified Clinchfield that the amendment was not an appropriate remedy to the Notice of Violation. When Clinchfield proceeded to reclaim the site pursuant to the approved amendment, OSM issued the Cessation Order, thereby resulting in this proceeding. Thus, a resolution of the issue of the access road is essential to a resolution of this case.

* * * * *

Clinchfield requests this Board to do what the Judge erroneously refused to do -- determine that the vertical component to the access road is not a highwall within the definition of 30 CFR § 710.5 and thereby release Clinchfield from any requirement to eliminate the access road.

(Brief of Appellant at 3-6).

The parties do not dispute that in an effort to eliminate the first cut highwall, Clinchfield excavated material from above the highwall to obtain spoil to fill the area below the first cut. This excavation above the highwall created a terrace or bench 22 feet in width, and averaging 16-1/2 feet in height. As previously noted, Clinchfield subsequently designated the upper bench area as a road to serve as access to the point area.

From our review of the record, we fully agree with Judge Miller's position that it is not necessary to make a determination whether the disturbed area above the first cut resulted in a highwall or the vertical component of an access road. 2/ The sequence of events in this case dictates these

2/ We note that the OSM witnesses who inspected the site were unanimous in their opinion that the alleged access road was not useable as a road. Inspector Virts testified that the alleged road was not passable because so much material had sloughed down and eroded (Tr. 84). He walked the entire length of the "access road" on Dec. 1, 1981. From this and other occasions at the site, Virts testified he never saw any vehicles on this "upper road"

findings: (1) A mining plan was issued but did not provide for a road above the first cut highwall; (2) Clinchfield excavated above the highwall in violation of its then existing mining plan; (3) A notice of violation was issued by OSM in light of this unauthorized surface disturbance; (4) Clinchfield filed an amendment to its mining plan describing the disturbed area as a road to be used as a part of a postmining land use, thus eliminating the requirements that the disturbed area be backfilled to grade and the site revegetated; (5) Amendment of the plan was rejected by OSM as an acceptable means for abatement of the violation; and (6) Clinchfield did not return the disturbed area above the first cut to approximate original contour.

The Surface Mining Act contemplates that the permittee will seek and obtain approval of an exemption under the Act prior to undertaking activity which, but for the exemption, would be contrary to the Act. See Hardly Able Coal Co., 2 IBSMA 270, 87 I.D. 434 (1980). As noted in Hardly Able Coal Co., this gives interested parties an opportunity to object to proposed mining activity before perceived harm occurs. 2 IBSMA at 275, 87 I.D. at 437. Clinchfield's "roadbuilding" activity would have necessitated two exemptions. The first would have been an exemption from the regulations prohibiting disturbance of land above the highwall (see 30 CFR 716.2(b)) and the second would have been from the requirement that all access roads be removed and the land affected regraded and revegetated. (30 CFR 715.17(1)(1)). At the time of issuance of the NOV, Clinchfield had neither sought nor received the required exemptions.

Clinchfield did not abate citation No. 3 by backfilling and regrading, as directed by OSM. Further, OSM has never accepted the retention of the road as an acceptable element of the abatement program, and clearly stated that it would not do so. Since Clinchfield did not abate citation No. 3 in the time and manner specified, the civil penalty imposed by Judge Miller for this violation was proper.

[2] Clinchfield is wrong in maintaining that the Administrative Law Judge avoided ruling on the access road question. While it is true he did not formally characterize the vertical face created by the alleged access road cut to be a highwall within the meaning of 30 CFR 710.5, he expressly held that the surface disturbance above the highwall evidenced a violation of the statutory obligation to restore the permit area to approximate original contour. At pages 7 through 8 of his decision Judge Miller stated:

Creating a vertical face in the process of a mining operation, in this case generating spoil to back fill a highwall and

fn. 2 (continued)

and that the sediment channel at the bottom of the first cut is the only route he saw vehicles travelling to the finger ridge area (Tr. 62). OSM Reclamation Specialist Michael Superfesky testified that the purported "access road" was unsafe for vehicles (Tr. 387). Jack Spadaro, OSM physical scientist and mining engineer, testified that the alleged access road was "a road to nowhere" which he would be afraid of using because it was in an unstable area (Tr. 338). Johnathan Ventura, OSM civil engineer, characterized the "access road" as unstable, sloughing away, and in a state of failure (Tr. 364-367).

leaving a terrace called an "access road," is contrary to the principle of returning to approximate original contour * * *."

The crucial element in affirming violation three of the notice of violation is Clinchfield's failure to restore to approximate original contour.

"Approximate original contour" as defined at 30 CFR 710.5 means:

[T]hat surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated * * *. [Emphasis added].

Clinchfield seems to believe that because it garnered State acceptance of its plan to utilize the bench area above the first cut as an "access road," it thereby was exempt from the requirements of the Act and implementing regulations to restore the land to approximate original contour. No such exemption pertains, however, because OSM did not approve retention of an access road as part of an amended postmining land use plan.

At 30 CFR 715.17(1)(1), it is provided:

All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of §§ 715.14 and 715.20, unless retention of a road is approved as part of a postmining land use under § 715.13 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured. [Emphasis added.]

To the extent Clinchfield seeks a Board determination that OSM was wrong in not approving its postmining land use amendment which called for retention of an access road above the first cut, we decline to so rule. Instead, we hold it was within OSM's authority to disallow retention of the alleged road as a means of abatement of the notice of violation.

As held by Judge Miller, Clinchfield's failure to properly reclaim the minesite was not confined to the area of the access road:

Besides the access road there were other areas included in the notice of violation such as the downslope of the road from the contour to the valley fill, downslope below the lower sediment channel, a highwall in the point area and a highwall in the second cut area (Exh. R-1). OSM substantiated these violations and Clinchfield's failure to correct them (Exh. R-14-20, 22-32; Tr. 26-28, 34-35, 56-65, 71-78, 82-89).

Decision at 8.

The testimony of record leads ineluctably to the conclusion that permit area 3012 had not been restored to approximate original contour in July 1981 when Inspector Virts cited the company for violations. The only testimony submitted by Clinchfield on this issue was testimony based on a viewing of the site in March 1982. Such testimony could not rebut the evidence presented on the violations, and, at best, is only relevant as to whether the violations were subsequently abated. As to the latter, Judge Miller was not persuaded by Clinchfield's witnesses, nor is the Board. The Board finds that OSM's witnesses had more expertise in the area of the Surface Mining Act's reclamation requirements and the condition of the permit site than did the expert witnesses who testified for Clinchfield. ^{3/}

Clinchfield also contends that Judge Miller erred by failing to make a finding as to the method by which reclamation of the site could be best accomplished. Though Inspector Virts believed that grading and compacting should be done by dozer, several witnesses testified that grading by dozer would be hazardous to the operator (Tr. 160-62, 186). Numerous methods of reclamation were discussed at the hearing (Tr. 88, 89, 283-85, 290). Appellant argues that the method it used (dragging a dozer track across backfilled slopes) was reasonable and effective.

Method of reclamation was not a dispositive issue in this proceeding. It was therefore not error for Judge Miller to refrain from making findings thereon. OSM concedes that Inspector Virts had no authority to prescribe the methods of reclamation. However, the record made before Judge Miller does not show that Clinchfield performed the reclamation work required in the NOV or that it refrained therefrom because of disputes over the merits of one method of reclamation over another.

With respect to violation No. 2 of the NOV, Judge Miller found as follows:

The evidence concerning violation number two of the notice of violation is clear and simple. Pursuant to [section 515(b)(10)(B)(ii) of the Act (30 U.S.C. § 1265(b)(10)(B)(ii) (1982)] Clinchfield was required to certify that its sediment control structures were constructed as designed and two years after mining began and four months after coal extraction ended,

^{3/} Clinchfield called three expert witnesses to view Splashdam and testify on its behalf. John Melham, a landscape architect; Benjamin Greene, the president of West Virginia Coal Industry Association; and Franklin Parker, a West Virginia reclamation enforcement official. As summarized by OSM:

"Each witness testified that the area had been restored to its approximate original contour though none had seen the area until a few days before the hearing at which he testified. (Tr. 271-273). In fact, Mr. Greene had never walked on the permit site (his testimony was based on a helicopter overflight) and, had never examined the permit, permit amendments, or design specifications of the site. (Tr. 301, 302)." (Answer Brief at 17, n.8).

Clinchfield did not have its permanent sediment channels approved and certified.

(Decision at 8).

The cited statutory provision, 30 U.S.C. § 1265(b)(10)(B)(ii) (1982), reads:

(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to --

* * * * *

(10) minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface coal mining operations and during reclamation by --

* * * * *

(B) * * *

(ii) constructing any siltation structures pursuant to subparagraph (B)(i) of this subsection prior to commencement of surface coal mining operations, such structures to be certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan; * * *.

At pages 34-37 of its brief, Clinchfield attempts to explain its failure to complete and have its sedimentation structures certified. Clinchfield's engineer testified, however, that these structures were unfinished at the time of the hearing and were not accomplishing their purpose (Tr. 149-50). The violation was established and Judge Miller correctly so held. 4/

4/ The dissent submits that OSM's Dec. 1, 1981, cessation order served to modify the notice of violation regarding siltation structure certification and that Clinchfield "should have been afforded an opportunity to comply with the amended NOV prior to issuance of a closure order." According to the dissent, the cessation order "is the first indication in the record that the siltation structures as shown in the State-approved plan amendment would be acceptable to OSM." While it is arguable that OSM's October 1981 disapproval of Clinchfield's amended plan, which was approved by the State regulatory authority on Sept. 22, 1981, did not repudiate the company's revised siltation structure proposal (see OSM's Oct. 27, 1981, Letter to Clinchfield, quoted in full supra, wherein the only remedial action specifically discussed is the "requirement to backfill, compact, and grade the disturbed area to achieve the approximate original contour"), the company's action in this case was consistently one of adhering to its amended plan as filed with the regulatory authority on July 30, 1981, irrespective of approval or rejection of that amendment in whole or in part. Clinchfield failed to obtain certification of its siltation structures at any time under any plan.

[3] Finally, Clinchfield contends that the civil penalties assessed by Judge Miller were excessive. Judge Miller found:

As to the civil penalty assessed for violation number three of the notice of violation, OSM's evidence established that the harmful events prohibited by 30 C.F.R. 715.14 and 716.2 actually occurred (Tr. 89, 90), thereby justifying fifteen (15) points for the probability of occurrence. Inspector Virts also testified that the environmental changes were confined to the permit area, thereby justifying seven (7) points for extent of damage. The proper number of points assessed for negligence is twelve (12) because Clinchfield failed to prevent the occurrence of any violation of the Act due to indifference, lack of diligence or lack of good faith, therefore, the total number of penalty points for violation number three is thirty-four (34).

The assessment for violation number two of the notice of violation should be as follows: fifteen (15) points are proper for the probability of occurrence and twelve (12) points are justified for negligence, yielding a total of twenty-seven (27) points.

* * * * *

30 C.F.R. Section 723.15(b) provides for a mandatory civil penalty of seven hundred fifty dollars (\$750.00) per day, up to a maximum of twenty-two thousand five hundred dollars (\$22,500.00) for each violation of a cessation order issued for failure to abate violations in a notice of violation. The cessation order was issued on December 1, 1981. As of January 27, 1982 the violations were still not abated. Under the Act, it is mandatory to impose penalties for a cessation order. Save our Cumberland Mountains v. Watt, 550 F. Supp 979 (1982).

(Decision at 7, 8). As noted earlier, Judge Miller established a penalty of \$700 and \$1,400 respectively, for violations No. 2 and 3 of the NOV and \$22,500 for each of the violations of the CO.

Clinchfield argues that no points should be assessed for negligence for violation No. 2 of the CO. 30 CFR 723.13(b)(3) allows assignment of up to 25 points based on degree of fault. As Judge Miller indicated in his decision, the facts establishing this violation and its lack of abatement are

fn. 4 (continued)

There is no evidence the company deemed clarification necessary from OSM as to what remedial actions were appropriate in this regard or that it sought additional time for compliance because of alleged weather complications. In any event, the administrative law judge computed the civil penalty for failure to abate the subject violations after Dec. 1, 1981, noting that "[a]s of January 27, 1982 [more than 30 days after the CO was issued and the day before the first hearing in this case], the violations were still not abated" (Decision at 8).

simple. At the least, the record demonstrates a casual indifference to the harm this statutory provision (30 U.S.C. § 1265(b)(10)(B)(ii)) was designed to prevent. Clinchfield was given a 60-day extension to abate this violation. Yet, 4 months after extraction of coal had ceased, Clinchfield's sedimentation structures were not completed or certified. No basis is shown for disturbing the assessments made by Judge Miller.

With respect to violation No. 3 of the NOV, Clinchfield contends that Judge Miller assigned excessive points for negligence, probability of occurrence, and extent of potential or actual damage. Clinchfield contends that it acted in good faith to abate the violation, and that rather than the 34 points assigned by Judge Miller, 22 points should be assigned for an assessment of \$440. In support of mitigating these point assignments, Clinchfield cites its dilemma when faced with the need to comply with conflicting rules of both the State and the Federal regulatory authority. It contends that OSM should be estopped from enforcing penalties and that the CO should be vacated.

A thorough review of the record does not permit the conclusion that Clinchfield was diligent in pursuing its reclamation work. Moreover, the argument that confusion arose in the interplay of State versus Federal regulatory authority cannot serve as an excuse for failing to abate a violation or for reducing penalty assessments. Tollage Creek, *supra*; Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979). Judge Miller's assessments for the failure to abate cited in the CO were mandated by law and were properly made. Apex Co., Inc., 4 IBSMA 19, 89 I.D. 87 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision of the Administrative Law Judge in Docket Nos. CH 2-23-P and CH 2-66-P is affirmed. 5/

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

5/ The Board is obliged to note that in the course of considering this appeal it was discovered that numerous exhibits of the Government were not part of the administrative record. The missing Government exhibits are photographs of the permit site. The Board has been advised by OSM it has no other copies of these photographs. All of appellant's evidence has been considered. Among other considerations, the Board regards itself able to decide this case without the need for remand because of the thorough testimony offered by the witnesses regarding the missing photographs, the abundance of other photographs of record showing the permit site, and the persuasiveness of the record as a whole.

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN PART AND DISSENTING IN PART:

The critical events in this case took place prior to December 15, 1981, when the Commonwealth of Virginia (State) was deemed the regulatory authority for surface coal mining and reclamation operations on non-Federal and non-Indian lands in Virginia. Thus, technically, the primacy issue does not exist in this case. However, this case does illustrate one of the problems faced by an operator when working with both Federal and State enforcement officials, especially when those officials appear to be in disagreement.

The basis for my dissent becomes apparent upon an examination of events leading to violation No. 2 in the OSM notice of violation and actions subsequently taken. As noted in the majority opinion, the NOV No. 81-I-13-21 was issued on July 6, 1981. Violation No. 2 cited Clinchfield for failure to have the siltation structures certified by a qualified registered engineer, verifying that the structures are constructed as designed and approved in the reclamation plan. 1/ Prior to issuance of the Federal NOV, the State had also cited Clinchfield for its structures and directed Clinchfield to amend its mining plan to provide for structures which would comply with the Act and build the structures in accordance with the amended plan.

Clinchfield eventually prepared an application for amendment, dated July 30, 1981, which was filed with the State on August 3, 1981, and approved by the State on September 22, 1981. The approved plan was submitted to OSM on September 29, 1981, and on October 27, 1981, OSM advised Clinchfield that the amendment was not an appropriate remedy, for abatement and directed Clinchfield to abate Violation No. 2 by December 1, 1981, in the manner outlined in NOV No. 81-I-43-21. 2/ What is disturbing about this action is the record discloses no reason whatsoever why the siltation structures, as shown in the September 29, 1981, amended mining plan submitted by Clinchfield would not be acceptable to OSM, if constructed in accordance with that amended plan amendment and subsequent directives of DMLR. In fact, the evidence leads to a contrary conclusion.

On December 1, 1981, OSM issued a CO for failure to abate the violation. The CO order stated the corrective action was to either perform the corrective action set forth in the initial NOV or perform the corrective action, "considering the designs for siltation structures approved by the regulatory authority on the 9-22-81 permit amendment." The "9-22-81" (September 22, 1981) permit amendment is the same amendment rejected by OSM on October 27, 1981, and this statement in the CO is the first indication in the record that the siltation structures as shown in the September 22, 1981, State-approved plan amendment would be acceptable to OSM. In effect, the December 1, 1981 CO amended the July 6, 1981 NOV. 3/ OSM assessed civil

1/ Citation No. 1, which was not contested by Clinchfield, was for failure to properly construct the structures.

2/ The text of the Oct. 27, 1981, letter is set forth in the majority opinion.

3/ Had OSM approved that portion of the mining plan related to the structures on Sept. 29, 1981, rather than rejecting the plan in its entirety, I would have no difficulty whatsoever affirming the Dec. 1, 1981, issuance of the CO or the subsequent levy of penalties.

penalties commencing December 1, 1981, based upon an NOV amended the same date. ^{4/} There was no time lapse between amendment of the NOV and issuance of the CO.

After a review of the record as a whole, including the abatement required by the NOV, the October 27, 1981 letter from OSM, the December 1, 1981 CO, and the testimony of the witnesses, it is my conclusion that Violation No. 2 of NOV No. 81-I-43-21 was modified by OSM on December 1, 1981. Clinchfield was first given notice of the modification on December 1, 1981, and should have been afforded an opportunity to comply with the amended NOV prior to issuance of a closure order.

As no imminent danger was shown to exist on December 1, 1981, I further find sufficient evidence to support a finding that between December 1, 1981, and the time Clinchfield commenced the additional work required by DMLR in November, climatic conditions were such that abatement would have caused more environmental harm than it would prevent. See 30 CFR § 722.12(e)(4). The citation was for failure to certify the structures as built, and this certification could not be issued until the construction of the structure had been completed. For this reason, I would affirm Judge Miller's assessment of a civil penalty in the amount of \$750, but would vacate the CO and the assessment of an additional civil penalty of \$22,500 for violation No. 2.

I find sufficient evidence to affirm the civil penalties for violation No. 3, (disturbing the land above the highwall) and support the majority holding regarding this violation and the penalties assessed therefor.

R. W. Mullen
Administrative Judge

^{4/} The issuance of the CO also results in five additional points being assigned when calculating the penalty to be assessed for later violations. See 30 CFR 713.13(b)(1).

