

Editor's note: overruled in part, See 114 IBLA 291 (May 10, 1990)

P&K COAL CO., LTD.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-940

Decided June 2, 1987

Appeal from a decision of Administrative Law Judge Michael L. Morehouse granting relief from cessation order. TU 4-8-R.

Reversed

1. Administrative Procedure: Adjudication -- Res Judicata -- Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review -- Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977 Water Quality Standards and Effluent Limitations: Sedimentation Ponds

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

APPEARANCES: Virgil D. Medlin, Esq., Oklahoma City, Oklahoma, for P&K Coal Company, Ltd.; Gerald A. Thornton, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, and Susan K. Hoven, Esq., Office of the Solicitor, Washington, D.C. for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated August 6, 1985 (Decision), granting P&K Coal Company, Ltd. (P&K), relief from an OSMRE cessation order (CO) No. 84-3-11-5, issued for P&K's operations at the Test Burn No. 83-1 mine, Latimer County, Oklahoma. This proceeding was initiated under section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1982).

The facts are essentially undisputed. On April 20, 1983, following a State inspection, the Oklahoma Department of Mines (Oklahoma), the State regulatory authority, issued notice of violation (NOV) No. 83-4-120 to P&K for "failure to construct [a] sedimentation pond in accordance with [the] approved mine plan," as required by section "816.46" of the Oklahoma permanent program regulations (OSMRE Exh. G-3 at 12). The NOV issued by Oklahoma called for abatement of the violation (violation 3 of 3) by April 29, 1983. The deadline for abatement was subsequently extended to May 27, 1983. See Tr. 8.

On May 23, 1983, based on "citizen information," OSMRE issued Ten-Day Notice (TDN) No. 83-3-81-2, notifying Oklahoma, in part, that OSMRE had "reason to believe" P&K was in violation of section "816.46(r)" of the Oklahoma permanent program regulations because "sediment pond #1 has not been constructed as designed or certified after construction by a registered professional engineer" (OSMRE Exh. G-2 at 2, 3). There is no evidence that Oklahoma responded to the TDN. However, on June 6, 1983, following another State inspection, Oklahoma issued CO No. 83-4.1-162 because P&K had failed to abate "Violation 3 of 3" in NOV No. 83-4-120 1/ (OSMRE Exh. G-3 at 2). The CO did not call for the cessation of mining operations, and did not specify the means of abatement. 2/

1/ Oklahoma conducted an inspection on May 25, 1983, and found a "partially constructed pond had been completely removed and a new pond was being constructed at a location south of the pond for which [violation 3 of 3] was * * * written" (OSMRE Exh. G-3 at 5). At that time, Oklahoma issued NOV No. 83-4.1-155A for failure to obtain the approval of a mining plan modification prior to construction. On June 3, 1983, Oklahoma conducted a follow-up inspection, and concluded that issuance of NOV No. 83-4.1-155A "in no way relieves the company of the responsibility for N.O.V. 83-4-120 until such time as [Oklahoma] approves a revision for the removal of the pond and reconstruction. Therefore, in accordance with OPRPR 843.11(b)(1), a Cessation Order is being written." Id. at 6. CO No. 83-4-1-162 followed.

2/ The CO stated that only "slight" damage to an ephemeral stream from surface drainage had occurred as a result of the violation, and that the operator had chosen to ignore Oklahoma's NOV "with the intention of receiving a revision for the removal of the pond and subsequent relocation of the pond" (OSMRE Exh. G-3 at 3).

Following a September 26, 1983, inspection, OSMRE issued NOV No. 83-3-11-15, dated September 29, 1983, citing P&K for "[f]ailure to construct sedimentation pond #1 in accordance with mine approval and regulation" ^{3/} (OSMRE Exh. G-4 at 3). OSMRE directed P&K to construct the pond "in the [northwest] corner of the approval area so as to receive all mine drainage from the disturbed area," by October 20, 1983. Id.; see OSMRE Exh. G-1 at 10-11, G-16 ("Exploration Operations Map").

On October 7, 1983, P&K filed an application for review of and temporary relief from OSMRE's NOV with the Hearings Division, Office of Hearings and Appeals (OHA) (OSMRE Exh. G-5). The case was docketed as TU 4-1-R. One of the bases for its application for review was OSMRE's failure to issue a TDN prior to issuance of NOV No. 83-4-120.

On October 17, 1983, P&K submitted a request for an extension of the abatement period for OSMRE's NOV (OSMRE Exh. G-6). On October 18, 1983, OSMRE modified its NOV, setting forth optional means of abatement and extending the time for abatement (OSMRE Exh. G-7). Option No. 1 required construction of "sedimentation pond #1" in accordance with the approved mine plan by December 1, 1983. Id. at 1. Option No. 2 essentially required P&K to submit a request to Oklahoma for an amendment of the mining plan changing the location of the pond by November 10, 1983, and construct the pond pursuant to the amended plan by December 1, 1983. ^{4/} Id.

By motion dated October 27, 1983, the Office of the Regional Solicitor moved, on behalf of OSMRE, to dismiss P&K's application for review of and temporary relief from OSMRE's NOV "for failure to state a claim upon which administrative relief may be granted" (OSMRE Exh. G-8 at 1). The Solicitor also stated that there was no need for a "temporary relief hearing" in view of OSMRE's subsequent modification of the NOV. Id. By letter dated November 1, 1983, P&K stated it had no objection to "dismissal of the hearing" because the need for temporary relief had been mooted by the modification (OSMRE Exh. G-9).

^{3/} OSMRE cited sections 815.15(i), 816.46(a)(1), 816.46(r), 816.46(u), and 815.11(b) of the Oklahoma permanent program regulations, and their 30 CFR counterparts.

^{4/} The modified NOV specifically stated under option No. 2:

"Interim Step Submit for approval to the Oklahoma Department of Mines, detailed sediment pond design in accordance with OPRPR 816.46, that will allow for a change in the original pond #1 location to the west of the original test burn authorization area. Also, that a drainage control plan be submitted showing how all surface runoff from the disturbed areas will be directed to pass through this new sediment pond. This drainage control plan shall include design criteria for all necessary diversions and overland flows in accordance with OPRPR 816.43.

"Final Step Construct the sedimentation pond, diversions, and or overland flows according to their approved design. Then have these structures certified by a Registered Professional Engineer as constructed as designed while also conforming to the submitted drainage control plan."
(OSMRE Exh. G-7 at 1; emphasis in original).

By order dated December 1, 1983, Administrative Law Judge Frederick A. Miller dismissed P&K's "application for review and temporary relief from Notice of Violation No. 83-3-11-15" (OSMRE Exh. G-10).

Following a March 1, 1984, inspection, OSMRE issued CO No. 84-3-11-5 on March 5, 1984, for "failure to submit certification of sedimentation pond by a registered professional engineer as constructed as designed" 5/ OSMRE Exh. G-12 at 2). The CO directed P&K to submit the required pond certification, but did not require P&K to cease mining operations. 6/

On March 5, 1984, OSMRE received "Construction Design Specifications -- Sedimentation Pond" (Design Specifications) for the Test Burn No. 83-1 mine, which were signed and sealed by Gregory G. Govier, a registered professional engineer (OSMRE Exh. G-11 at 1). This document included a plan view and cross-sections of the pond and a computer model predicting the design capabilities of the pond during a particular "rainfall event." Id. at 3. On March 14, 1984, Govier signed and sealed a document certifying that the pond at the Test Burn No. 83-1 mine was "built in accordance with the design" (OSMRE Exh. G-13). On March 15, 1984, the date OSMRE received the March 14 certification, OSMRE terminated both the NOV and the CO, having "received [the] required pond certification" (OSMRE Exhs. G-14 and G-15; see Tr. 27)

On March 26, 1984, P&K filed an application for temporary relief from OSMRE's CO. The case was docketed as TU 4-8-R and initially assigned to Administrative Law Judge Miller. In its application for temporary relief, P&K contended that there was a substantial likelihood that P&K would receive

5/ The CO issued by OSMRE cited P&K for violating section 816.46(r) of the Oklahoma permanent program regulations and section 751.2.b of Title 45 of the Oklahoma statutes, and their Federal counterparts.

6/ In an inspection report, dated Mar. 6, 1984, the OSMRE inspector stated that a sedimentation pond was built at a "new location" subsequent to issuance of OSMRE's modified NOV in October 1983:

"However, no certification of construction in accordance with approved design was received. On March 1, 1984 the site of the pond was inspected and the certification asked for at the mine site. The pond appears to be a well built structure. The final step of the modified NOV requires the certification. The mine superintendent asked if I would check at the main office in Henryetta, Oklahoma to see if it was there. I told him I would and on Friday, March 2, 1984, I checked at the office.

"I met Mr. Matt Richardson at 1:15 p.m. He told me it had not been certified, but there was a crew at the mine as we spoke making the necessary changes so that certification of the pond could be accomplished. He asked if I would hold off issuing any violation until Monday. He promised to have the certification to me by then. On Monday, March 5, 1984, I received certified pond designs from P & K Company, Ltd.

"The submission of pond designs to [Oklahoma] was required in the first step. The final step required certification by a P.E. that the sedimentation pond had been built in accordance with the approved design. Therefore CO 84-3-11-5 was issued for failure to abate NOV 83-3-11-15." (OSM Exh. G-12 at 5).

a favorable decision because it had not failed to abate OSMRE's NOV, which had cited P&K "for failure to construct sedimentation pond No. 1, "but had not cited P&K failure to file certification by a registered professional engineer. On March 28, 1984, OSMRE filed objections to P&K's application for temporary relief, moving to dismiss the application pursuant to the doctrine of res judicata because P&K had only challenged the validity of the underlying NOV and had not filed an application for review of OSMRE's CO. In the alternative, OSMRE argued that P&K had failed to abate the modified NOV because P&K has failed to have the relocated pond certified as required by the "second option" and section 751.2.b of Title 45 of the Oklahoma statutes.

On April 9, 1984, P&K filed an application for review of OSMRE's March 5, 1984, CO contending it had abated the violation cited in OSMRE's NOV. P&K also contended that the validity of the NOV was not res judicata, that OSMRE had no authority to issue either the NOV or the CO because the State had already acted in response to the TDN and that P&K operations were exempt from section 751.2.b of Title 45 of the Oklahoma statutes. OSMRE filed an answer on April 10, 1984, arguing that the only issue was whether P&K had abated the violation cited in OSMRE's NOV.

By order dated April 19, 1984, Judge Miller denied P&K's application for temporary relief because it had not been preceded or accompanied by an application for review and there were no "extraordinary circumstances," citing Universal Coal Co., 3 IBSMA 218, 88 I.D. 672 (1981). ^{7/} Judge Miller also stated that P&K's application for review was accepted and would be set for hearing. On October 25, 1984, the case was reassigned to Administrative Law Judge Morehouse.

A hearing was held before Judge Morehouse in Tulsa, Oklahoma, on January 8, 1985. In an August 1985 decision, Judge Morehouse stated that the issue was "whether or not the March 5, 1984, CO was validly and properly issued by OSMRE" (Decision at 3). Judge Morehouse concluded that P&K was required both to construct a sedimentation pond and to have the pond certified under the terms of its application for coal exploration (OSMRE Exh. G-1) and the permanent program performance standards. However, Judge Morehouse also concluded that OSMRE's issuance of the NOV and the CO was improper because OSMRE had failed to take any action "immediately" following the 10-day period after issuance of the May 1983 TDN, as required by 30 U.S.C. § 1271(a)(1) (1982) and 30 CFR 842.11(b)(1). Judge Morehouse stated that OSMRE "should have issued another TDN to [Oklahoma]" prior to taking any enforcement action ^{8/}

^{7/} Judge Miller also stated that the application for temporary relief could also be dismissed on the basis that it was an "abortive attempt to revitalize and litigate the validity of the notice of violation."

^{8/} Judge Morehouse also noted that there was some question whether OSMRE had authority to take enforcement action following a TDN, in view of the district court's decision in Clinchfield Coal Co. v. Hodel, Civ. No. 85-0113-A (W.D. Va. June 20, 1985). In Clinchfield Coal, the court, in reviewing an application for temporary relief from an OSMRE NOV, concluded that, in states having primary authority for enforcing the surface mining law, if a state failed to take enforcement action following a TDN, OSMRE was limited by statute to

(Decision at 6). Judge Morehouse also found Oklahoma had taken appropriate enforcement action after issuance of OSM's TDN, by issuing the State CO on June 6, 1983. Id. at 7. Finally, Judge Morehouse concluded that P&K submission of the Design Specifications on March 5, 1984, was arguable in conformance with the applicable regulation regarding certification (30 CFR 816.46(r)) and, in any case, was a "mere technical violation" for which P&K should not be "penalized" (Decision at 7). Therefore, Judge Morehouse granted P&K's "motion for relief." In effect, Judge Morehouse overturned OSMRE's March 5, 1984 CO. This appeal followed.

In its statement of reasons for appeal, OSMRE argues that Judge Morehouse improperly considered the validity of OSMRE's original NOV because, in view of the December 1983 order dismissing P&K's application for review of and temporary relief from the NOV, the matter was res judicata, citing Sierra Club v. Block, 576 F. Supp. 959 (D. Or. 1983). OSMRE also notes that P&K had not challenged OSMRE's modified NOV. OSMRE concludes that the only issue is "whether P&K failed to abate the modified NOV at the time OSMRE issued the CO" (OSMRE Brief at 7).

P&K contends that the December 1983 order did not render the issue of the validity of OSMRE's original NOV res judicata because the order was "not on the merits," was "without prejudice," was not binding on a subsequent administrative proceeding and the matter was "reopened" at the hearing. See Tr. 29. P&K argues that the issue in this appeal is the validity of OSMRE's CO, which is dependent on the validity of the underlying NOV, and that the surface mining law does not provide for invocation of the principle of res judicata ^{9/} (Brief at 6-8).

P&K also argues OSMRE's statement of reasons does not comply with 43 CFR 4.1273(c) because OSMRE has failed to specify the ruling objected to and the reasons for those objections. That regulation provides the Board with discretionary authority to waive an objection where an appellant has failed "to specify a ruling as objectionable." 43 CFR 4.1273(c). However, we have had no difficulty in ascertaining the basis for OSMRE's objections or the reasons for those objections.

fn. 8 (continued)

withdrawing approval of the state program. The district court concluded that 30 CFR 843.12(a)(2), upon which OSMRE has based issuance of its NOV, exceeded the Secretary's statutory authority. However, subsequent to Judge Morehouse's decision, the Fourth Circuit Court reversed the district court and found the District Court for the Weston District of Virginia lacked jurisdiction to consider the validity of the regulation. Clinchfield Coal Co. v. Department of the Interior, No. 85-2206 (4th Cir., Aug 27, 1986); see also, OSMRE v. Calvert and Marsh Coal Co., 95 IBLA 182 (1987).

^{9/} The basis for the argument is that res judicata cannot be invoked because that issue was not properly pleaded at the "trial." However, the Board is not bound by strict rules of pleading and may consider, under its de novo review authority, issues not raised below. Benton C. Cavin, 83 IBLA 107 (1984); Shiny Rock Mining Corp. (On Reconsideration), 77 IBLA 261 (1983), aff'd, Shiny Rock Mining Corp. v. United States, Civ No. 84-643 (D. Or. Jan. 10, 1986); Larson v. Utah, 50 IBLA 382 (1982).

[1] We start first with OSMRE's assertion that the question of the validity of OSMRE's original NOV is res judicata. The administrative counterpart of the principle of res judicata is the doctrine of administrative finality. That doctrine generally bars consideration of an appeal which raises the "same claim and issues" involved in a prior "final Departmental adjudication." Village of South Naknek, 85 IBLA 74, 76 (1985), and cases cited therein; see generally Union Oil Company of California, 71 I.D. 169 (1964), vacated, Oil Shale Corp. v. Udall, 261 F. Supp. 954 (D. Colo. 1966), aff'd, 406 F.2d 759 (10th Cir. 1969), rev'd, 400 U.S. 48 (1970). The doctrine of administrative finality is equally applicable in the case of prior decisions of subordinate agencies of the Department which have become final in the absence of an appeal. Inexo Oil Co., 93 IBLA 351 (1986); Ida Mae Rose, 73 IBLA 97 (1983); Elsie V. Farington, 9 IBLA 191 (1973), aff'd, Farington v. Morton, Civ. No. S-2768 (E.D. Cal. Dec. 5, 1973). The exception to the rule is where there are compelling legal or equitable reasons for reconsideration. Ben Cohen, 21 IBLA 330 (1975).

As the Solicitor stated in Union Oil Company of California, supra at 177, the doctrine of administrative finality is "designed to achieve orderliness in the administration of the public lands as well as finality of decisions which have been closed finally and have not been appealed or otherwise attacked." We recognize that the December 1983 order of Judge Miller did not resolve the question of the validity of the original NOV and, thus, cannot be considered a judgment "on the merits." Compare with L.M. Perrin, Jr., 9 IBLA 370 (1973); Elsie V. Farington, supra; United States v. Devenny, 3 IBLA 185 (1971); Gabbs Exploration Co., 67 I.D. 160 (1960), aff'd, Gabbs Exploration Co. v. Udall, Civ. No. 219-61 (D.D.C. Dec. 1, 1961), aff'd, 315 F.2d 37 (D.C. Cir.), cert. denied, 375 U.S. 882 (1963). Rather, it constituted a dismissal of P&K's application for review at the request of the parties. Nevertheless, the December 1983 order disposed of that application for review and, in the absence of a timely appeal, constituted a "final Departmental adjudication." That order is equally entitled to repose in the absence of compelling legal or equitable reasons for reconsideration which are not apparent in the record. Therefore, if there was nothing further, we would not permit P&K to resurrect the question of the validity of the original NOV where P&K had sought dismissal of its prior application for review and had not appealed the December 1983 order dismissing that application. Moreover, there is no requirement that SMCRA provide for invocation of the doctrine of administrative finality, which is an elementary principle of administrative law and not governed by statute, in order for it to be invoked in an administrative proceeding before OHA. See Malvin Pedrolli, 75 I.D. 63, 67 (1968).

Nevertheless, we conclude that there is an additional fact in this case which would preclude imposition of the doctrine of administrative finality as a complete bar to P&K's challenge of the violation underlying OSMRE's CO. That fact is OSMRE's attempt to modify its original NOV while P&K's October 1983 application for review was pending before the Hearing Division, OHA. As noted supra, P&K application for review was filed timely pursuant to section 525(a)(1) of SMCRA, 30 U.S.C. § 1275(a)(1) (1982), with the Hearing Division on October 7, 1983. On October 18, 1983, OSMRE issued a modification of the NOV.

We do not deny that OSMRE has the authority to modify an NOV pursuant to section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982). However, as noted in Gateway Coal Co. v. OSM, 84 IBLA 371, 374 (1985), "when an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal (either an Administrative Law Judge or this Board)." Concordant with that, jurisdiction to take any further action regarding that subject matter is removed from OSMRE, and lodged with the reviewing authority. Id. at 375. Thus, any OSMRE modification of an NOV when an application for review of the original NOV is filed timely would have "no force or effect" until approved by the Administrative Law Judge, or until jurisdiction over the subject matter is returned to OSMRE. Id. That is the situation herein.

However, subsequent to OSMRE's modification of its original NOV, Judge Miller dismissed P&K's challenge to that NOV by order dated December 1, 1983. That dismissal was not "effective" to remove jurisdiction from the Administrative Law Judge and return it to OSMRE until the conclusion of the 30-day appeal period provided by 43 CFR 4.1271. 43 CFR 4.21(a). Thus, OSMRE's modification of its original NOV did not become effective until 30 days after receipt of the December 1, 1983 order.

When the modified NOV became effective P&K had the right to file an application for review OSMRE's modified NOV. See section 525(a)(1) of SMCRA. That section provides that a permittee "may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination." 30 U.S.C. § 1275(a)(1) (1982); see 43 CFR 4.1162(a). P&K's right to apply for review is statutorily recognized and cannot be barred by the doctrine of administrative finality, regardless of the fact that the underlying violation, i.e., P&K's failure to construct a certified sedimentation pond, had not changed. In a sense, OSMRE's modification of its original NOV created a new cause of action under SMCRA which had not been finally adjudicated in any prior administrative proceeding. P&K's right to apply for review of the modified NOV gave P&K an opportunity to reopen the question of OSMRE's authority to issue the underlying NOV.

However, P&K did not file an application for review of OSMRE's modified NOV within the 30-day period following the effective date of the modified NOV. In fact, P&K never filed an application for review of the modified NOV. The application for review filed by P&K on April 9, 1984, within 30 days of receipt of OSMRE's CO, as required by 30 U.S.C. § 1275(a)(1) (1982) and 43 CFR 4.1162(a), purports to be an application for review of the CO. However, in the course of challenging the propriety of OSMRE's issuance of its CO, P&K raised various questions regarding whether OSMRE had properly issued the original NOV, including the question of whether OSMRE was required to issue a TDN prior to conducting the inspection leading to the underlying NOV. To the extent that P&K's April 1984 application for review seeks review of OSMRE's jurisdictional authority to issue the modified NOV, it is untimely. In such circumstances, 43 CFR 4.1162(b) provides that the application for review "shall be dismissed." See Green Coal Co., 2 IBSMA 199, 87 I.D. 362 (1980).

We, therefore, conclude that Judge Morehouse improperly considered questions regarding OSMRE's jurisdictional authority to issue its original NOV or OSMRE's jurisdictional authority to issue its modified NOV because the application for review was untimely. 43 CFR 4.1162(b). The issue of whether a TDN should have been issued prior to the inspection had been waived by P&K when it failed to apply for review of the modified NOV, and Judge Morehouse should have confined his decision to considering only whether, given the fact of violation and proper issuance of the modified NOV, P&K had taken appropriate steps to abate the cited violation within the established abatement period.

[2] We, therefore, turn to the only question which is properly the subject of this administrative proceeding, *i.e.*, whether P&K properly abated the violation cited in OSMRE's modified NOV. At the outset, we note that, because OSMRE's modified NOV was issued during the pendency of P&K's prior application for review, there must be an adjustment to the abatement period. The modified NOV initially required final abatement (whether under option Nos. 1 or 2) by December 1, 1983. This constituted a 42-day extension of the original abatement period which expired October 20, 1983. We conclude that such extension will be deemed to be 42 days from the effective date of the modified NOV, 42 days after P&K's receipt of the order dismissing the initial action. *Cf. Mobil Oil Corp.*, 35 IBLA 375, 85 I.D. 225 (1978)

The real issue is whether P&K abated the violation cited in OSMRE's NOV, as modified. There is no question that a sedimentation pond had been constructed at the time of issuance of OSMRE's CO on March 5, 1984. *See* Tr. 43. OSMRE's CO was, therefore, issued for failure to have the pond certified by a registered professional engineer, as required by OSMRE's modified NOV. The modified NOV had required P&K to either construct a sedimentation pond "in accordance with [its] approved mine plan" or construct a relocated pond (OSMRE Exh. G-7 at 1). Option No. 2 also specifically required P&K to have the relocated pond "certified by a Registered Professional Engineer as constructed as designed while also conforming to the submitted drainage control plan." *Id.* While P&K never formally indicated which option it chose, its actions constituted a *de facto* acknowledgment that it sought to comply with option No. 2. Despite the clear requirement that P&K have the relocated pond certified "as constructed as designed," Judge Morehouse concluded that what certification was required was "very unclear" (Decision at 8). Judge Morehouse based this conclusion on a reading of the regulation "in force at the time the OSMRE NOV [was] issued," *i.e.*, 30 CFR 816.46(r) (1983). ^{10/} That regulation stated that "[e]ach pond shall be designed

^{10/} P&K states on appeal that 30 CFR 816.46(r) (1983) was identical to the applicable Oklahoma regulation "on September 26, 1983" (Brief at 22). The Departmental regulation was redesignated and amended effective Oct. 26, 1983, to specifically require that siltation structures, including sedimentation ponds, be "certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan." 30 CFR 816.46(b)(3) (48 FR 44051 (Sept. 26, 1983)). The preamble to the final rulemaking stated that this language was "required by section 515(b)(10)(B)(ii) of the Act." 48 FR 44037 (Sept. 26, 1983).

and inspected during construction under the supervision of, and certified after construction by, a registered professional engineer." 30 CFR 816.46(r) (1983). P&K argues with respect to the Oklahoma counterpart of 30 CFR 816.46(r) (1983) as follows:

That regulation does not require by its plain language that the engineer certify the structure to be built as designed. Nor does the regulation require that the certification be more than the usual practice of imprinting the seal and signature of the engineer. The regulation does not require a written statement.

(Brief at 24). While Judge Morehouse did not expressly adopt P&K's reasoning, he concluded that P&K's March 5, 1984, submission, signed and sealed by a registered professional engineer, constituted compliance with the regulation where it "state[d] that a pond designed with the characteristics of those built at applicant's mine should satisfy the OSMRE requirements" (Decision at 7). There is, however, no such statement in the March 5, 1984, submission. See OSMRE Exh. G-11. That document merely consists of design specifications signed and sealed by a registered professional engineer. If there is any certification by virtue of that signing and sealing it is to the sufficiency, accuracy, and legality of the specifications. P&K apparently argues that this form of certification is sufficient under the Oklahoma counterpart of 30 CFR 816.46(r) (1983). We disagree. Certification "after construction" under the regulation necessarily requires a registered professional engineer to certify that the sedimentation pond was built as designed. The preamble to the final rulemaking which promulgated 30 CFR 816.46(r) (1983) specifically stated that "after construction is completed, a registered engineer must certify the sediment pond as conforming to the approved design requirements." 44 FR 15167 (Mar. 13, 1979). The Oklahoma counterpart of 30 CFR 816.46(r) (1983) must be construed in a similar fashion. Moreover, the regulation must be interpreted in light of the statute. The performance standards set forth in section 515(b)(10)(B)(ii) of SMCRA, 30 U.S.C. § 1265(b)(10)(B)(ii) (1982), specifically require that siltation structures, including sedimentation ponds, "be certified by a qualified registered engineer to be constructed as designed and as approved in the reclamation plan." This requirement is also set forth in Okla. Stat. Title 45, § 751.2.b (1984 Supp.), which was in effect at the time of issuance of OSMRE's NOV's and CO. The requirement that an engineer certify that the pond was built as designed was clearly set forth out under option No. 2 in OSMRE's modified NOV. P&K's March 5, 1984, submission did not constitute such certification. It is not enough to argue, as P&K did in its posthearing brief at page 26, that "what [the engineer] certifies is what the regulation requires."

More importantly, as we have construed it, OSMRE's modified NOV required final abatement by way of construction of a sedimentation pond and certification within 42 days of the effective date of the NOV. There is no suggestion in the record that P&K had totally complied with the modified NOV within that time period. Under 30 CFR 843.11(b)(1), OSMRE is required to immediately issue a cessation order "[w]hen a notice of violation has been issued under [30 CFR] 843.12(a) and the permittee fails to abate the violation

within the abatement period fixed or subsequently extended by the authorized representative." See also 30 CFR 843.12(d)(1). This requirement is also set forth in section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1982). P&K had clearly failed to fully abate the violation within the abatement period. There being no evidence that OSMRE had extended the time for abatement further pursuant to 30 CFR 843.12(c), we find OSMRE was required to issue a failure-to-abate CO. B&J Excavating Co. v. OSM, 89 IBLA 129 (1985). It matters not that OSMRE did not act until March 5, 1984.

We, therefore, conclude that Judge Morehouse improperly overturned OSMRE's issuance of the March 1984 CO for failure to submit a registered professional engineer's certification that the sedimentation pond on P&K's minesite was "constructed as designed."

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 reversed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness,
Administrative Judge

John H. Kelly,
Administrative Judge.

