

**Editor's note: Reconsideration denied; motion for clarification granted, decision affirmed as clarified by Order dated April 18, 1988 -- see 101 IBLA 197A th D below.**

RITH ENERGY, INC.

IBLA 88-89, 88-90

Decided February 17, 1988

Appeals from decisions of Administrative Law Judge David Torbett sustaining the issuance of Notice of Violation No. 87-92-162-013 and Cessation Order No. 87-92-180-02. Hearings Division Docket Nos. NX 7-169-R and NX 88-9-R.

Decision in NX 7-169-R affirmed; Decision in NX 88-9-R affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Modifications--Surface Mining Control and Reclamation Act of 1977: Permits: Reclamation Plan

Where the evidence demonstrates that reclamation has not occurred as set forth in the currently approved permit, a notice of violation issued for this failure will be upheld.

2. Surface Mining Control and Reclamation Act of 1977: Appeals: Effect of--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

OSMRE has jurisdiction to issue a cessation order for failure to abate a violation contained in a notice of violation that is the subject of administrative review before the Office of Hearings and Appeals.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

A cessation order issued for failure to abate a notice of violation shall be terminated when the violations listed in the notice of violation have been abated. 30 CFR 843.11(f).

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for Rith Energy, Inc.; Judith M. Stolfo, Esq., Office of the Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Thomas J. FitzGerald, Esq., Frankfort, Kentucky, for Save Our Cumberland Mountains, Bledsoe County Chapter.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Rith Energy, Inc. (Rith), appeals two decisions of Administrative Law Judge David Torbett, one sustaining the issuance of Notice of Violation (NOV) No. 87-92-162-013, 1/ the other sustaining the issuance of Cessation Order (CO) No. 87-92-180-02 for Rith's failure to abate the violation for which the NOV was issued. 2/ We granted appellant's motion to consolidate the two appeals. We also granted the motion of the Office of Surface Mining Reclamation and Enforcement (OSMRE) to dismiss expedited review on the grounds that Rith waived the 30-day decision requirement of section 525(b) of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. | 1275(b) (1982), under 43 CFR 4.1187(i). 3/ Our decision is

1/ Decision of Nov. 10, 1987, in Hearings Division Docket No. NX 7-169-R. The appeal to the Board is docketed as IBLA 88-89.

2/ Decision of Nov. 10, 1987, in Hearings Division Docket No. NX 88-9-R. The appeal to the Board is docketed as IBLA 88-90. See 30 U.S.C. | 1271(a)(3) (1982).

3/ Section 525(b) of the Act, 30 U.S.C. | 1275(b) (1982), requires the Secretary to issue a decision on an application for review of a CO issued pursuant to section 521(a)(2) or (3), 30 U.S.C. | 1271(a)(2) or (3) (1982), within 30 days of receipt of the application for review unless temporary relief has been granted by the Secretary, in accordance with section 525(c), 30 U.S.C. | 1275(c) (1982), or by a court, in accordance with section 526(c), 30 U.S.C. | 1276(c) (1982).

The procedures for administrative review in accordance with section 525(b) are set forth in 43 CFR 4.1180-4.1187. Those procedures provide that an applicant for review may waive his right to a decision within 30 days: (1) if he files the application for review in accordance with the procedures for nonexpedited review of CO's that are set forth in 43 CFR 4.1160-4.1171; or (2) if he fails to comply with all of the requirements of 43 CFR 4.1184(a) governing the contents of an application for expedited review; or (3) in accordance with 43 CFR 4.1187(j). An applicant for review shall waive his right to a decision within 30 days: (1) if he obtains temporary relief under sections 525(c) or 526(c); (2) if he fails to perfect the application as provided in 43 CFR 4.1184(b); or (3) in accordance with 43 CFR 4.1187(i). 43 CFR 4.1186.

In this case Rith filed an application for expedited review under 43 CFR 4.1180. Later, however, it requested a continuance of the hearing and an extension of time to file its brief with the Board. 43 CFR 4.1187(i) provides:

"If at any time after the initiation of this expedited procedure, the applicant requests a delay or acts in a manner so as to frustrate the expeditious nature of this proceeding or fails to comply with any requirement of

being issued within 120 days of the filing of the application for review of the CO in accordance with 43 CFR 4.1180.

OSMRE Inspector Alan Boehms issued NOV No. 87-92-162-013 on July 15, 1987, for Rith's "[f]ailure to conduct reclamation operations according to the Reclamation Plan and Backfilling and Soil Stabilization Plan specified in the approved permit and as set forth in [the] letter of July 2, 1987, from OSMRE Division of Tennessee Permitting" at Rith's Eagle-Ferguson No. 1 surface mine in Bledsoe County, Tennessee. The NOV specified that it applied to "cut 13" and the "[p]ermitted area north of Vander-Ferguson Road mined prior to cut 13." As corrective actions, the NOV directed Rith to: (1) immediately initiate reclamation of cut 13 and (2) complete reclamation of cut 13 and the portion of the permitted area mined prior to cut 13. Step 1 was to be undertaken by July 24, and step 2 was to be completed by September 30, 1987 (Exh. R-8).

At the August 13-14, 1987, hearing on the NOV, OSMRE presented Rith's Backfilling and Soil Stabilization Plan that states that "[s]uccessive cuts will be placed in previously excavated cuts to insure that[,] for the lower seam mining activity[,] only one complete length of cut will be open at one time" (Exh. R-1). Inspector Boehms' testimony and the photographs taken during the July 15, 1987, inspection demonstrate two separate cuts were open: cuts 13 and 13c (Exhs. R-3, R-6, R-7; Tr. 54-58). 4/ Based on this evidence, the Administrative Law Judge held that OSMRE "has met its burden

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fn. 3 (continued)

4.1187(a), such action shall constitute a waiver of the 30-day requirement of section 525(b) of the act."

In our Dec. 18, 1987, order granting OSMRE's motion to dismiss expedited review we stated: "43 CFR 4.1187(i) was proposed 'as a means to encourage complete cooperation in the expedited proceeding by the applicant who initiates the proceeding.' 43 FR 15443 (Apr. 13, 1978). Although several comments on the proposed regulation urged that it be eliminated, it was retained. 'They [the commenters] state that the administrative law judge and the Board should have discretion in dealing with delays. Ordinarily, the justification provided by the commenters would be sufficient. The stringent statutory time requirements for a decision necessitate the language of | 4.1187(i).' 43 FR 34382 (Aug. 3, 1978).

"Rith has twice requested a delay of these proceedings, the second being its request for an extension of time to file its brief with this Board. It has thereby waived its right to an expedited decision. The regulation is phrased in the alternative: if an applicant 'requests a delay or acts in a manner so as to frustrate the expeditious nature of the proceeding or fails to comply with any requirement of | 4.1187(a), such action shall constitute a waiver of the 30-day requirement.' (Emphasis added.)"

4/ Cuts 13 and 13c had been open on previous inspections, but Boehms did not then issue an NOV because he was aware that Rith had applied for a permit revision and that if the revision were approved it would be expensive for the company to un-do the corrective action required by an NOV issued while the revision application was pending. He issued the NOV after

of proof in establishing a violation of 30 CFR 773.17 [5/] and the validity of NOV No. 87-92-162-013 \* \* \* [Its] proof shows clearly that the applicant has failed to comply with its approved permit and the requirements of the regulatory program" (Decision in Docket No. NX 7-169-R at 3-4). 6/ After a hearing on November 4 and 6, 1987, on the CO, Judge Torbett found that "the hearing \* \* \* produced no evidence which would in any way render [the NOV] invalid" and that the evidence did support issuance of the CO for "the fail-ure of the applicant to timely abate the underlying notice of violation" (Decision in Docket No. NX 88-9-R at 2).

On appeal Rith argues that: (1) "OSM's own evidence shows that the violation charged did not exist" (Brief at 4); (2) "Rith was denied its constitutional and administrative due process rights to a full and fair hearing" (Brief at 15); (3) "the ALJ erred in not vacating the CO based on OSM's failure to get prior approval to issue" it (Brief at 20); (4) "the ALJ erred in failing to terminate the CO" (Brief at 21); and (5) "mining under the old county road contemplated cut 13 remaining open" (Brief at 23). Rith requests that the NOV be vacated or that the case be remanded "with directions to dismiss the NOV in the event that OSM will not afford Rith a full and fair hearing on all issues" (Brief at 26). Rith also requests that the CO either be vacated or terminated. We will discuss Rith's arguments in order.

Rith argues that before it was issued the NOV it received letters from OSMRE indicating that OSMRE was concerned that the two open cuts constituted a violation of 30 CFR 942.816(e) 7/ (see Exh. A-5); that, at the November 1987 hearing on the CO, OSMRE's inspector testified Rith could leave cut 13

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fn. 4 (continued)

learning the revision had not been approved. (Aug. 13, 1987, transcript at 42-46, 50-51, 54-55, 75, 85-86). See Exh. R-2.

5/ 30 CFR 773.17 provides in part:

"Each permit issued by the regulatory authority shall be subject to the following conditions:

\* \* \* \* \*

"(b) The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit.

"(c) The permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and the requirements of the regulatory program."

6/ In this decision Judge Torbett also rejected several arguments presented by Rith for not upholding the NOV, several of which are raised on appeal and discussed below.

7/ 30 CFR 942.816(e) provides:

"(e) Backfilling and grading: General requirements. In addition to the requirements of 816.102(a)(6) of this chapter, backfilling and grading shall proceed in accordance with the following timing requirements:

"(1) Contour mining. Rough backfilling and grading shall follow coal removal by not more than 60 days or 1,500 linear feet.

"(2) Area mining. Rough backfilling and grading shall be completed within 180 days following coal removal and shall not be more than four spoil

open, mine cuts 13a-c, and then return to cut 13; <sup>8/</sup> and that, in another related proceeding, OSMRE has argued that the NOV arguably contains the requirement stated in 30 CFR 942.816(e)(2). <sup>9/</sup> As a result, Rith contends that it was not fairly apprised of the violation being charged and that OSMRE has so changed its testimony concerning the NOV that no basis remains for upholding it.

[1] Rith's argument is unpersuasive. While the earlier OSMRE letters refer to 30 CFR 942.816(e), the NOV specifically refers to Rith's "[f]ailure to conduct reclamation operations according to the Reclamation Plan and Backfilling and Soil Stabilization Plan specified in the approved permit," and to 30 CFR 773.17 as the provision of the regulations violated (Exh. R-8). That plan provides that "only one complete length of cut will be open at one time." Inspector Boehms testified that Rith was not in compliance with that plan because "[m]ore than one cut remained open at the time of inspection" (Aug. 13, 1987, Tr. 44). The evidence supports the inspector's conclusion--both cuts 13 and 13c were open on the date of inspection. Therefore, we must conclude that the 2-cut violation existed on the date of inspection. Any testimony by the inspector at the hearing on the CO regarding how Rith might have proceeded with its mining does not support vacating the NOV. Technically, a violation existed, and it was cited. <sup>10/</sup> OSMRE's argument in its brief in the Save Our Cumberland Mountains proceeding (see n.9, supra) that the NOV may incorporate a violation of 30 CFR 942.816(e) does not contradict the existence of a violation of the more general requirements of 30 CFR 773.17. Mining must take place as set forth in the currently approved permit. Turner Brothers, Inc. v. OSMRE, 92 IBLA 381, 388 (1986). Where the evidence demonstrates it has not, as in this case, an NOV issued for this failure will be upheld.

At the August 1987 hearing on the NOV, some OSMRE employees who had been subpoenaed by Rith were limited to testifying about the NOV (and not about OSMRE's July 2, 1987, letter to Rith) by the permission granted on

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fn. 7 (continued)

ridges behind the pit being worked, the spoil from the active pit being considered the first ridge.

"(3) The Office may grant additional time for rough backfilling and grading if the permittee can demonstrate, through the detailed written analysis under Section 780.18(b)(3) of this chapter, that additional time is necessary."

<sup>8/</sup> See Nov. 6, 1987, transcript at 204.

<sup>9/</sup> See OSMRE Brief in IBLA 87-692, Save Our Cumberland Mountains, Inc. v. OSMRE, at 6.

<sup>10/</sup> We note that Trusdell Miller, President of Tare, Inc., a consulting engineering firm, who prepared Rith's mining plan maps and permit application and who also prepared its permit revisions, testified that although he labeled cuts 13a, 13b, 13c, and 13d separate from cut 13, he intended that Rith would mine up cut 13, then mine out the cut 13 lettered sequences before continuing into cut 14 (Aug. 13, 1987, Tr. at 92, 105). He considered the lettered cuts to be merely an extension of cut 13 (Nov. 6, 1987, Tr. 168). See note 14, infra.

August 10, 1987, by OSMRE in accordance with 43 CFR 2.82 (Exh. A-3). <sup>11/</sup> This regulation prohibits an employee from testifying in an administrative or judicial proceeding concerning matters related to the business of the Government without the permission of the head of the bureau. 43 CFR 2.82(a). It also authorizes the Solicitor "to exercise all of the authority of the Secretary of the Interior under this section." 43 CFR 2.82(c).

After considering the questions OSMRE's employees were prohibited from answering at the hearing, the Administrative Law Judge concluded that even if those answers would have benefited Rith they would not have established a defense to the violation cited in the NOV (Decision in NX 7-169-R at 8). We agree, and we note further that when Rith sought judicial review of the Administrative Law Judge's denial of temporary relief, it did not persuade the court that its rights under the Administrative Procedure Act had been "substantially prejudiced by the limited authorization of the OSMRE agents." <sup>12/</sup>

[2] Rith argues that the Administrative Law Judge erred in not granting Rith's motion to dismiss the CO because OSMRE did not seek authority from the Administrative Law Judge before issuing it. Rith interprets Apache Mining Co., 1 IBSMA 14, 85 I.D. 395 (1978), and White Winter Coals, Inc., 1 IBSMA 305, 88 I.D. 675 (1979) (*aff'd*, White Winter Coals, Inc. v. Andrus, No. 3-80-3, (E.D. Tenn., Apr. 13, 1980)), as requiring that OSMRE must move not only for permission to modify, vacate, or terminate an NOV that is the subject of administrative review but also for permission to issue a CO for failure to abate an NOV that is under review. Because OSMRE must terminate an NOV if the violation is timely abated and must issue a CO if it is not, <sup>13/</sup> Rith argues that "[i]f OSM cannot terminate the violation without applying to the Administrative Law Judge, then an even-handed application of the same principle would require OSM to apply to the Administrative Law Judge before it issued the CO" (Brief at 21).

In Apache Mining Co., *supra*, OSMRE sent two letters to an operator after he had appealed the denial of a small operator exemption to IBSMA. The Board restated long-standing Departmental policy that "when an appeal is taken from the decision of one of [the Department's] offices, that office loses jurisdiction of the matter until that jurisdiction is restored by disposition of the appeal by the appellate body." *Id.*, 1 IBSMA at 15, 85 I.D. at 395. The Board held the letter denying the exemption for a different reason was a nullity and treated the OSMRE letter stating its original decision was in error as a motion to grant the appellant relief and reversed that decision. In White Winter Coals, Inc., *supra*, OSMRE stated in its brief to the Board that it had vacated a CO issued for mining without a permit that had been upheld by the Administrative Law Judge and appealed to the Board. The Board found OSMRE's "attempted vacation" ineffective and stated that if OSM "feels that an appellant is entitled to the relief

<sup>11/</sup> See, e.g., Aug. 13, 1987, transcript at 168-69, 174-75, 177, 181-88.

<sup>12/</sup> Rith Energy, Inc. v. Hodel, CIV-1-87-312 (E.D. Tenn., Dec. 3, 1987) at 7-8.

<sup>13/</sup> See 30 CFR 843.12(d) and (e).

requested or makes its own determination that some other relief should be given, it can at any time move the Board to grant that relief." (Emphasis in original.) Id., 1 IBSMA at 311, at 86 I.D. 677-78. It added, however, that this did not "preclude OSM from taking other action pursuant to 30 U.S.C. | 1271." Id., 1 IBSMA at 311 n.4, 86 I.D. at 677 n.4.

Such other action would clearly include issuing a CO for failure to abate a violation contained in an NOV that was the subject of administrative review, as OSMRE is required to do in accordance with 30 U.S.C. | 1271(a)(3).

B & J Excavating Co. v. OSMRE, 89 IBLA 129, 135 (1985). The NOV was the matter subject to administrative review in this case at the time the CO was issued. It was not until Rith sought review of that CO by filing a separate application for review that the CO came within the jurisdiction of Judge Torbett.

[3] Rith argues the Administrative Law Judge erred in failing to terminate the CO, as requested in its application for expedited review, on the grounds that it had closed cut 13c as of October 15, 1987, and completed grading, seeding, and mulching by November 2, 1987. If two open cuts were the violation and one of the two was closed, Rith argues, then the CO should be terminated even if the cut that was closed was not the one specified in the NOV (Cut 13).

Rith's argument is similar to that made on behalf of its motion at the August 1987 hearing to modify the NOV to change the corrective action required. The Administrative Law Judge decided OSMRE had shown that the NOV requirement to close cut 13 was reasonable and decided that "the abatement action need not be modified" (Decision in NX 7-169-R at 8).

We need not examine that ruling, however, because on November 2, 1987, OSMRE approved a revision of Rith's permit that redesignated the cuts so that there was "no longer a violation on the ground, and the notice of violation should be terminated. Termination of the notice of violation will have the effect of terminating the failure-to-abate Cessation order No. 87-92-180-02" (OSMRE Motion for Leave to Terminate Notice of Violation, filed Nov. 4, 1987). 14/ Although the Administrative Law Judge's decision is correct that the CO was valid because the evidence showed the existence of the two cuts had not been abated by the October 13, 1987, abatement date specified in the NOV, as modified, it is appropriate to regard the CO as terminated as of November 2, 1987, as to this violation. 30 CFR 843.11(f) provides that a CO shall be terminated when the violations listed in the NOV have been abated. The two cut violation was abated on November 2, 1987. Therefore, we approve the termination of the CO as of that date. 15/

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14/ Although the NOV required, as step 1 of abatement, the backfilling and grading of cut 13, Rith backfilled and graded cut 13c and sought the permit revision, approved Nov. 2, 1987, to provide for a change in cut sequence. As OSMRE stated in its approval: "Cuts 13a, b, c, d are revised to become part of cut 13 and cut 13e is revised to become part of cut 14."

15/ In so holding, we limit our consideration to the specific violation in the NOV.

Finally, Rith argues that because OSMRE did not require it to change its plan for water control from one based on gravity drainage when its application to revise its permit so that it could mine under the old county road was approved, OSMRE should not be allowed to cite failure to reclaim cut 13, through which water from mining under the old road would drain, as a violation. In other words, because cut 13 was essential to the drainage of water from mining under the old road, Rith argues that OSMRE's approval of that mining precludes it from objecting to cut 13 remaining open.

To this the answer is that Rith's water control plan did not preclude pumping, so that OSMRE's approval of the revision application did not present Rith with the dilemma of violating either its water control plan or its reclamation plan (see Aug. 13, 1987, Tr. at 63-64).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's decision in NX 7-169-R sustaining the issuance of NOV 87-92-162-013 is affirmed and his decision in NX 88-9-R sustaining the issuance of CO 87-92-180-02 is affirmed as modified.

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Will A. Irwin  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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Anita Vogt  
Administrative Judge  
Alternate Member

April 18, 1988

IBLA 88-89, 88-90	:	Docket No.	NX 7-169-R
	:		NX 88-9-R
101 IBLA 190 (1988)	:		
	:		
RITH ENERGY INC.	:	NOV No.	87-92-162-013
	:		
v.	:	Cessation order No.	87-92-180-02
	:		
OFFICE OF SURFACE MINING	:	SMCRA Notices of Appeal	
RECLAMATION AND ENFORCEMENT	:		
	:	Motions for Reconsideration	
SAVE OUR CUMBERLAND MOUNTAINS, INC.	:	Denied	
Intervenor :	:		
	:	Motion for Clarification Granted	
	:	Decision Affirmed as Clarified	

ORDER

Save our Cumberland Mountains, Inc., Bledsoe County Chapter, (SOCM) has filed motions for reconsideration and for clarification of our decision of February 17, 1988, in these appeals and requested that we stay that decision pending reconsideration. Rith Energy, Inc., (Rith) has also filed a motion for reconsideration, as well as a response to SOCM's motions. The Office of Surface Mining Reclamation and Enforcement (OSMRE) has filed an objection to SOCM's request for a stay (to which SOCM has replied) and a response to Rith's motion. SOCM has filed a response to Rith's motion.

SOCM argues that the Notice of Violation encompasses two violations in addition to the two-open-cuts violation addressed in the Board's decision. SOCM is concerned that our termination of the Cessation order (CO) on the that the two-open-cuts violation had been abated has the "apparently unintended but probable effect" that these other still-existing violations will not be abated. Because the language of the NOV includes these other violations, in SOCM's view, the Board's statement (in footnote 15 of the decision) that "we limit our consideration to the specific violation in the NOV" does not allay this concern. SOCM stated in its motion for reconsideration that the question of termination of the NOV had been briefed and was pending before the Administrative Law Judge and in its motion for clarification (and its reply to OSMRE's objection to its motion) that our decision created uncertainty whether he retained jurisdiction over that question.

In its response Rith contends that if SOCM's interpretation of the language of the NOV is correct, then the NOV fails to set forth with reasonable specificity the nature of the violation and the remedial action required, as required by 30 U.S.C. 1271(a)(5) (1982), and should be vacated. It is Rith's view that the Board decided the issue SOCM contends remains before the Administrative Law Judge. In its petition for reconsideration, Rith pursues its argument that the NOV did not set forth the nature of the violation with reasonable specificity. (SOCM's response to Rith's notion argues the NOV fairly apprised Rith of the backfilling and grading requirements of the regulations and Rith's reclamation plan.) Rith also argues that the testimony of the OSMRE inspector at the November 6, 1987, hearing (see 101 IBLA 193-94, text at note 8) was an "acknowledgment by OSM that in approving the permit revision allowing mining under the old country road OSM had approved a mining procedure permitting the lettered cuts to be mined while cut 13 remained open." Finally, Rith argues that OSMRE must obtain approval for the issuance of a failure-to-abate cessation order that is based on a notice of violation for which administrative review has been sought.

OSMRE's objection to SOCM's request for a stay of our decision pending decision on reconsideration points out that 43 CFR 4.1276(b) provides that filing a petition for reconsideration does not stay the effect of the decision or affect its finality. It also points out that the record on appeal forwarded by the Administrative Law Judge did not contain copies of the briefs of OSMRE or SOCM on the question of the termination of the notice of violation (although SOCM appended a copy of its brief to its brief on appeal). OSMRE's response to Rith's motion for reconsideration observes that Rith has previously argued that the NOV was overly broad and that OSMRE must obtain permission of the Office of Hearings and Appeals before issuing a failure-to-abate cessation order and concludes that Rith has offered no justification for reconsideration.

In our initial review of these appeals we did not focus specifically on the Administrative Law Judge's deferral of consideration of whether the notice of violation should be terminated. We can therefore appreciate the parties' suggestion that the effect of our terminating the CO because the two-cut violation was abated on November 2, 1987, (see 101 IBLA at 196) is ambiguous

In our view the source of the confusion is the general wording of the portion of the NOV describing the "nature of permit condition violated, practice or violation", i. e. , "[f]ailure to conduct reclamation operations according to the Reclamation Plan and Backfilling and Soil Stabilization Plan specified in the operator's permit and as set forth in letter of July 2, 1987, from OSMRE Division of Tennessee Permitting," and the generalness of the regulation cited as the "provision of the regulations . . . violated," i.e., 30 CFR 773.17. Although the NOV specified "cut 13" as the portion of the operation to which it applied, it did not indicate which part of the plan was not conformed to. OSMRE made it clear through the inspector's testimony at the hearing, however, that it was the provision of the plan requiring that "only one complete length of cut will be open at time," that was violated because "[m]ore than one cut remained open at the time of inspection". 101 IBLA at 194; see August 13, 1987, transcript at 44-45. OSMRE made no assertion at the hearings in this case or in any

subsequent pleadings in this proceeding that the NOV covered more than the two-cut violation, regardless of what it may have argued elsewhere. See 101 IBLA at 194, note 9. Although Rith has since argued that the NOV is not sufficiently specific, it did not do so at that hearing. See Grafton Coal Co., 2 IBLA 316, 87 I.D. 521 (1980). Although SOCM believes, not without reason, that the NOV as written may originally have been intended to cover other violations, where OSMRE limits its coverage at the hearing, as it did in this case, and the applicant does not complain at that time of its lack of specificity, we think it fair on review to hold OSMRE to the limits it elected, and we intended in our decision only to address the two-cut violation. If, as SOCM also believes, unabated violations remain at the site, it is of course incumbent on OSMRE to take whatever enforcement action is appropriate, and we expect it to do so now that we have clarified the effect of our decision. <sup>1/</sup> Should such action involve the issuance of an NOV or CO, the document should state the specific section of the Act or regulations or the permit condition that has been violated and describe with particularity the condition which exists that necessitates the issuance of the NOV or CO.

A motion for reconsideration may be granted only in extraordinary circumstances where sufficient reason appears therefor. 43 CFR 4.1276(a) 43 CFR 4.21(c)., Neither SOCM's nor Rith's motion for reconsideration presents such reasons, and both are therefore denied. SOCM's motion for clarification of our February 17, 1988, decision is granted, and that decision is affirmed as clarified in the preceding paragraph.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motions for reconsideration are denied, the motion for clarification is granted, and Board's decision of February 17, 1988, is affirmed as clarified by this order.

Will A. Irwin  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Anita Vogt  
Administrative Judge  
Alternate Member

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<sup>1/</sup> We are aware that if OSMRE finds enforcement action is appropriate because there are violations refining, it will affect SOCM in its pending appeal of OSMRE's decision not to take enforcement action, Save Our Cumberland Mountains, Inc. v. OSMRE, IBLA 87-692, and we expect the parties to file supplementary pleadings in that case in that event.

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