

COLLINS MINING CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-327

Decided June 23, 1988

Petition for discretionary review of a decision by Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation No. 85-07-250-08 and Cessation Order No. 85-07-250-01 and fixing civil penalties. CH 6-2-R; 6-2-P; 6-4-P.

Affirmed in part; affirmed as modified in part; vacated in part; and remanded to the Office of Surface Mining Reclamation and Enforcement.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

OSMRE may properly find that a state has not taken appropriate action to correct a violation where the state has granted an extended abatement period to a permittee without requiring the permittee, contrary to state regulations, to document the basis for its extension request and, following a 10-day notice, has taken no remedial action. Upon such a finding, OSMRE shall inspect the permittee's operation and, if the underlying violation continues, issue a notice of violation.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Negligence

Where the record in a civil penalty proceeding fails to show that a permittee's failure to abate OSMRE's notice of violation was the result of reckless, knowing, or intentional conduct, the assignment of 23 points in the negligence category is improper. However, where the record does show that the permittee was negligent, the case may be remanded to OSMRE for a proper assignment of points for negligence and the recalculation of the civil penalty.

APPEARANCES: Neal S. Tostenson, Esq., Cambridge, Ohio, for appellant; Lynne N. Crenney, Esq., Lloyd A. Cook, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Collins Mining Company (Collins) seeks review of a decision by Administrative Law Judge Frederick A. Miller, dated February 6, 1987, affirming issuance by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of Notice of Violation (NOV) No. 85-07-250-08 and Cessation Order (CO) No. 85-07-250-01 and fixing civil penalties. 1/ Judge Miller's decision was rendered after a hearing held on September 24, 1986.

Prior to issuing NOV No. 85-07-250-08, OSMRE served a 10-day notice (TDN) on the Division of Reclamation, Ohio Department of Natural Resources (ODNR), pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982). This TDN stated that Collins had failed to justify the need for an extension of time to correct a landslide on property mined by it. At the time OSMRE issued its TDN, Collins had just received its third extension of time from ODNR to abate this landslide violation. 2/ Abatement had been ordered by the State in NOV No. 14037, issued on or about November 11, 1984, directing Collins to construct a perimeter drainage control system and to take all measures necessary to regrade and stabilize the landslide.

OSMRE issued NOV No. 85-07-250-08 on or about September 13, 1985, after ODNR had responded to the TDN by acknowledging that Collins "should have indicated climatic conditions * * * directly related to the soil moisture conditions of the slide" in seeking its extension (Exh. R-2). ODNR stated, however, that its grant of an extension, which would commence on August 5, 1985, was appropriate because "a slip, almost invariably, cannot be properly repaired during any months but August and September" (Exh. R-5). Collins had begun its slip repair work at the appropriate time, ODNR noted, and by this extension had "the best chance of successful repair work" (Exh. R-5).

1/ Collins originally filed a "Petition for Appeal" of Judge Miller's decision. In response to a motion filed by OSMRE seeking clarification of whether Collins was appealing or seeking discretionary review, the Board issued an order dated May 4, 1987, directing Collins to clarify its intent. In response it filed an "Amended Application for Review." We construe that filing to be a petition for discretionary review of a proposed assessment under 43 CFR 4.1150. Based on the allegations in this pleading, we grant the petition.

2/ The initial compliance period, 90 days in duration, ended Feb. 6, 1985; thereafter, three extensions were granted ending May 6, Aug. 4, and Oct. 31, 1985, respectively.

NOV No. 85-07-250-08 cited Collins for its "failure to shape and grade the overburden in such a way as to prevent slides and protect off-site areas." The NOV required Collins to submit detailed engineering plans to OSMRE for stabilization and reclamation of the landslide and, upon concurrence by OSMRE, ^{3/} to begin immediately and continue to implement those plans. A deadline of September 30, 1985, was set for the submission of plans to OSMRE and later extended to October 11, 1985; a deadline of December 13, 1985, was set for completion of all stabilization and reclamation procedures.

Upon Collins' failure to submit its stabilization and reclamation plans on time, OSMRE issued CO No. 85-07-250-01 on October 15, 1985. ^{4/} This order cited Collins for its failure to meet the October 11 deadline for such plans. After a meeting of the parties at which Collins agreed to retain a consulting engineering firm, the CO was terminated effective October 18, 1985. ^{5/} The underlying NOV remained in effect, however, until June 1986 (Tr. 48).

OSMRE assessed Collins a civil penalty in the amount of \$2,600 for the violation identified in NOV No. 85-07-250-08 (failure to shape and grade). A second civil penalty, in the amount of \$1,500, was assessed for Collins' failure to submit engineering plans on time, as reflected in CO No. 85-07-250-01. Following an assessment conference for each of these civil penalties, Collins prepaid these assessments and petitioned the Hearings Division for review of the penalties. Prior to this request, Collins had sought review of the fact of the violation itself, as set forth in the NOV. Judge Miller's decision affirming OSMRE on all counts is the decision now on appeal.

Collins charges that NOV No. 85-07-250-08 was issued by OSMRE in error because ODNR had previously cited it for this same violation (failure to shape and grade) and it was in the process of abating this violation. Petitioner's argument requires that we examine section 521(a) of SMCRA, 30 U.S.C. | 1271(a) (1982), the source of OSMRE's oversight authority. That section states:

(a)(1) Whenever, on the basis of any information available to him, * * * the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State

^{3/} Concurrence by OSMRE was later deleted by a modification to the NOV on Oct. 2, 1985.

^{4/} This order was issued pursuant to section 521(a) of SMCRA, 30 U.S.C. | 1271(a) (1982), and 30 CFR 843.12(d).

^{5/} Exh. R-13; Tr. 39. But see Exhibit R-27 where the date of termination is Oct. 17.

regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *. [Emphasis added.]

[1] There appears to be no dispute between the parties that a violation of SMCRA and Ohio law occurred. Ohio Reclamation Law 1513.16(A)(3) and (20) requires an operator to shape and grade overburden in such a way as to prevent slides, both on- and off-site. SMCRA requires these same acts at section 515(b)(3) and (21), 30 U.S.C. | 1265(b)(3) and (21) (1982). Petitioner acknowledges that a slide occurred in November 1984 at the area of its prior coal mine, and OSMRE and ODNR inspectors personally viewed the slide. On the basis of this evidence, we hold that OSMRE had reason to believe that Collins had violated SMCRA and Ohio law. Its issuance of a TDN to ODNR was, therefore, appropriate.

As noted above, the State's response to the TDN was to acknowledge that Collins should have indicated climatic conditions in its extension request. ODNR further stated that its grant of an extension was consistent with its "policy" to allow an operator to repair a slide during August and September (Exh. R-5). The State took no action to alter its extension grant and, indeed, stated its intention to continue this policy (Exh. R-5).

During this period, the Ohio Administrative Code (OAC) 1501:13-14(02)(B)(5) and Federal regulation 30 CFR 843.12(h) placed the burden on Collins to establish by clear and convincing proof that it was entitled to an extension of the abatement period. Division Advisory Memorandum No. 37, issued by the Division of Reclamation, ODNR, on August 28, 1984, required Collins to "submit independently gathered or verified rain-fall data" to substantiate an extension request based on unfavorable weather.

Petitioner's support for its extension request is set forth in two documents, both filed after the abatement period for NOV No. 14037 had passed. ^{6/} The first of these documents stated that the "[a]rea of the slip is just now drying up" (Exh. R-24). Drilling of leaching holes had commenced on August 2, 1985, appellant stated, but "time is needed to see if seeps along and within the slippage area dry up so repair work on the slip itself can be accomplished." The second document stated that the "area of the slip within the past 90 days has been very wet and even small dozer work could not be achieved" (Exh. R-2).

^{6/} See White Winter Coals, Inc., 1 IBSMA 305, 314, 86 I.D. 675, 679 (1979), for the proposition that OSMRE does not abuse its discretion in denying an extension request when the operator waits until after the time for performance has expired to make that request.

Some 2 months prior to petitioner's statements, ODNR had inspected the landslide and found it "much drier", while acknowledging that water was cutting a channel between the straw and logs placed on-site. (Emphasis in original.) "Most seep areas [are] dry or moist, not wet," ODNR continued. It concluded, "Operator should have plans from engineer soon and start work!" ODNR's comments were based on an inspection occurring June 5, 1985, the same day OSMRE inspected the landslide (Exh. R-21).

We agree with Judge Miller that ODNR, having received the TDN, did not take appropriate action to cause the violation to be corrected or to show good cause for its failure to do so. The regulations make clear that Collins had the burden of showing by clear and convincing proof that it was entitled to an extension. ODNR should have required appellant to provide facts to support its conclusion of unfavorable conditions for remedial work. Rainfall data, as mentioned in Division Advisory Memorandum No. 37, is a good example of the factual information lacking in appellant's request. Moreover, 2 months prior to its action, ODNR had received a report from its inspector setting forth conclusions, quoted above, conflicting with petitioner's description of soil moisture. In light of this conflict and petitioner's apparent disregard of OAC 1501:13-14(02)(B)(5), we hold that ODNR did not take appropriate action to cause the violation identified in NOV No. 14037 to be corrected or to show good cause for such failure. Further inspection of the minesite by OSMRE was, therefore, authorized by section 521(a).

OSMRE was not, however, limited to reinspection. Regulation 30 CFR 843.12(a)(2) outlined further action available. That regulation states:

Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate.

In Turner Brothers, Inc. v. OSMRE, 92 IBLA 320, 323 (1986), the Board stated that appropriate action was such action as was "calculated to secure abatement of the violation." In that case, OSMRE issued an NOV, even though the State of Oklahoma had itself issued an NOV in response to the TDN. OSMRE's reinspection of the Collins minesite on or about September 10, 1985, revealed that the landslide area had not yet been repaired. This fact, in conjunction with our reasons expressed above in determining whether reinspection of the minesite was correct, cause us to hold that NOV No. 85-07-250-08 was properly issued.

Petitioner's next argument focuses upon the civil penalty assessed by OSMRE for NOV No. 85-07-250-08. OSMRE assessed a penalty in the amount of \$2,600 based upon the point system set forth at 30 CFR 845.13. Using factors identified in section 518(a) of SMCRA, 30 U.S.C. | 1268(a) (1982), OSMRE assessed Collins 23 points for the seriousness of the violation and 23 points for the negligence of the operator. Within the seriousness

category, OSMRE assessed Collins 13 points for probability of occurrence (out of a possible 15) and 10 points for extent of damage (out of a possible 15).

Regulation 30 CFR 845.13(b)(2)(i) states that OSMRE shall assign up to 15 points based upon "the probability of the occurrence of the event which a violated standard is designed to prevent." In the instant case, Collins was cited for its failure to shape and grade overburden or spoil in such a way as to prevent landslides both on- and off-site. Thus, the "event" identified by the regulation is a landslide. The landslide having occurred, the regulation provides that the maximum number of points (15) be assigned. OSMRE assigned 13 points, and Judge Miller found this figure to be appropriate. The regulation, however, states that 13 points are to be assigned if the event is "likely" to occur. No explanation was offered by OSMRE at the hearing as to why the maximum was not assigned (Tr. 43-44). In light of the clear expression in 30 CFR 845.13(b)(2)(i) providing for 15 points to be assigned when the event has occurred, we modify Judge Miller's decision and assign 15 points for probability of occurrence.

Petitioner next contends that an assignment of 10 points for extent of damage was incorrect. A prior slide had occurred in the same area during the summer of 1984, petitioner states, and a portion of the material from this earlier slide was still in the area. Collins contends that no additional damage was caused by the later slide.

At the hearing, no evidence was offered to support petitioner's view that additional damage had not occurred. OSMRE presented evidence, however, that as of June 5, 1985, the landslide was still moving (Exh. R-21). Inspector Stephen Rathbun testified that the landslide, which was approximately 4 acres in area, was over 400 feet off the permit area (Tr. 29).

Regulation 30 CFR 845.13(b)(2)(ii) authorizes OSMRE to assign up to 15 points "based on the extent of the potential or actual damage, in terms of area and impact on the public or environment." If the damage or impact which the violated standard is designed to prevent would extend outside the coal exploration or permit area, OSMRE "shall assign" 8 to 15 points, depending on the duration and extent of damage or impact. In light of the continuing encroachment of the landslide on lands adjacent to the permit area, we hold that Judge Miller properly found OSMRE's 10-point assignment to be proper.

Petitioner's final argument focuses upon the 23 points assigned to it for negligence. Collins contends that the landslide at issue, occurring in November 1984, followed by some 3 months the repair of an earlier landslide at the same site. In making this repair, Collins states that it followed the specifications of the Division of Reclamation, ODNR, and performed all work in accordance with sound engineering practices (Exh. A-1). No negligence points should be assigned, Collins argues, because its repair work of the earlier slide was accomplished per ODNR's specifications.

OSMRE presented no evidence addressed to whether petitioner was negligent in causing the November 1984 slide. In contrast, petitioner's argument focuses on this limited subject of causation. OSMRE instead appears to be focusing upon the degree of care exercised by Collins in repairing its November 1984 slide. Thus, in its pleading filed November 5, 1986, OSMRE argues that negligence is shown by Collins' failure to take corrective action almost a year after the November 1984 slide had occurred. The parties, therefore, are focusing upon two different aspects of Collins' conduct.

Under the regulations, OSMRE is required to assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued "in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission." 30 CFR 845.13(b)(3)(i) (emphasis added). Thus, OSMRE is to assign points where the person to whom the notice or order was issued was at fault in causing or in failing to correct the violation. Collins argues that it was not negligent in causing the November 1984 slide, and there is no evidence in the record to suggest that it was. Moreover, OSMRE's argument in support of the negligence points relates strictly to the failure to correct the violation.

At the hearing counsel for OSMRE questioned OSMRE inspector Stephen Rathbun about how he would evaluate negligence in this particular case. Rathbun stated that he "would go with the high range for negligence on 25, knowing and willful" (Tr. 46). He explained:

The state NOV that existed at the time that the federal notice was issued had been in place since November of 1984. Work had not been accomplished on the slide as it relates to stability.

The operator was aware through the issuance of a TDN, ten-day notice, and a copy sent to Collins Mining of the concerns of the Office of Surface Mining. No action was taken from that point on by the operator.

(Tr. 46).

The State inspector, Holly B. Michael, testified regarding the history of State enforcement action relating to the violation in question. The State NOV was issued on November 7, 1984. She stated that on November 7, 1984, she met on site with appellant's representative, Lou Barker, to discuss the type of work that could be done during the winter "on the slide and maintenance of a dyke" (Tr. 95). She explained that there had been a straw dyke installed for a previous landslide in order to reduce the amount of runoff but that it had deteriorated over time and was in need of maintenance (Tr. 95). On December 5, Inspector Michael returned to the site and

found that the slide was moving and that the dyke had broken and was no longer functional (Tr. 95). During a March 12, 1985, inspection she noted that the slide again was moving and for the first time she identified the water sources for the slide and reminded the operator that remedial action A was due in April (Tr. 96). ^{7/}

Inspector Michael conducted a compliance inspection on April 2, 1985. She testified that at that time no attempt had been made to undertake remedial action A which she described as "simply to construct and maintain a perimeter drainage system to prevent sediment from leaving the slide area until repairs are completed" (Tr. 97). Because of the failure to comply with action A, she issued a cessation order. On April 5 she returned to the site and noted that while some work had been started, Collins still was not in compliance. She described the work as follows:

[T]he operator had installed a diversion on the west end, the diversion being this hand-cut small trench. However, the toe of the slide was still undirected. In other words, the main toe of it continued not to have drainage controls. What they had done was install diversions on either side leading down to the toe but the toe itself was still undirected.

The ditch installed on the west end enters right directly into the stream with no sump or dyke installed. In other words, that ditch that they constructed just cut directly into the stream, it did not end with a small sump or any other type of dyke as a sediment control structure.

(Tr. 97-98).

Collins remained in noncompliance on April 17 when Inspector Michael again visited the site. She found that no work had been done at the toe of the slide. She stated:

[T]he water had not been cut. And by that I mean when the slide moved, it had pooled, naturally had a slump in the middle of it that pooled surface water and some ground water as far as we can tell.

^{7/} The original abatement date was Feb. 6, 1985 (Tr. 87). On Feb. 6, 1985, Collins filed a request for an extension of the time for abatement (Tr. 87; Exh. R-18). The State granted an extension until Apr. 1, 1985, for action A and an extension until May 6, 1985, for action B (Tr. 87). Action A was to "construct and maintain a perimeter drainage control system, to prevent sediment from leaving the slide area, until repairs are completed." Action B was to "take all measures necessary to regrade and stabilize the landslide and protect it from erosion" (Exh. R-17).

(Tr. 98). The State believed that the pooling of the water created the saturation problem and contributed to the continued movement of the slide. According to Inspector Michael, during her discussions with Barker, "not only on site but after each inspection report," she explained to him the necessity that the water be "cut" (Tr. 98). Even though he assured her that it would be done, it was not. 8/

During a May 7, 1985, compliance inspection, Inspector Michael found that Collins had undertaken some work but that it was insufficient and the "toe of the landslide was now fifteen feet high and moving down this hol- low and it appeared to be extremely muddy" (Tr. 99). On May 14, 1985, she terminated the noncompliance with regard to remedial action A because Collins had installed at the toe of the slide a gabion, a log structure with straw bales in front to try to stop the mud from moving into the stream. 9/ She also discussed with Collins at that time the other remedial work still required by the State.

In a June 5, 1985, inspection report Michael stated that the gabion needed maintenance because water was cutting a channel beneath it. She also reported that the landslide was "much drier, most seep areas dry or moist, not wet" and that Collins "should have plans from engineer soon and start work!" (Exh. R-21; emphasis in original).

In her July 11 and July 26 reports, she indicated no work done on the slide. On August 6, 1985, ODNR District Supervisor Gregory Mills met on-site with Collins' representative, Lou Barker. Mills' report states:

[E]xtended abatement date was 8-4-85. Operator indicates that drilling activities on hill above the slip area began 8-5-85. Holes are being drilled approximately 100 ft. deep in an attempt to dewater the seepage zones. Operator submitted an additional extension request during today's inspection. Operator technically is in noncompliance to NOV 14037 since the abatement date has past & cessation order 7189 is issued for failure to abate. [Emphasis in original.] [10/]

(Exh. R-22). Mills disapproved the extension request, but at a higher level of ODNR that determination was overridden, the extension request granted,

8/ On Apr. 29, 1985, the State approved an extension of the time until Aug. 4, 1985, for Collins to complete its remedial action B (Exh. R-20).

9/ On the same date she noted that Collins had a small dozer at the minesite repairing another slip in another area of the permit and that a third slide had been recently reworked (Tr. 93-94).

10/ Mills' report related to remedial action B of the Nov. 7, 1984, NOV.

and the cessation order terminated (Exhs. R-24, R-25). Subsequently, OSMRE issued the TDN and the NOV under consideration in this case.

At the hearing Collins called only one witness, Senator Oakley Collins, a 26-year veteran of the Ohio State Senate, who had been in the mining business for over 40 years. He stated that the company is a partnership consisting of him and his brother (Tr. 114-15). He stated that although there were other slide areas on this permit which could be worked at any time, the slide in question was larger and too wet to do so. He recalled that it rained so much in the spring and June and July of 1985 that "you just couldn't make it in there at all" (Tr. 120). He recounted the steps that were finally taken to correct the condition.

The record clearly shows that Collins was less than diligent in attempting to address the State NOV issued in November 1984. Although remedial action A required only the construction of a drainage control system, it was not until May 14, 1985, that the State inspector found that Collins had complied with that action by erecting the gabion. In addition, Collins knew that remedial action B was to be completed by August 4, 1985; nevertheless, it did not commence its drilling activities to attempt to dewater the site until after the date set for abatement. Collins' actions were not those of a diligent operator attempting to achieve rapid compliance.

The record also shows a lack of diligence in complying with OSMRE's NOV. OSMRE issued the NOV on September 13, 1985. The corrective action called for in the NOV was, inter alia, the submission of detailed engineering plans and specifications by September 30, 1985, for the stabilization and reclamation of the landslide. ^{11/} On or before that date, Collins submitted a general plan of abatement and on October 1, 1985, OSMRE extended the abatement time for filing the detailed plans until October 11, 1985. When those plans were not timely filed, OSMRE issued a CO on October 15, 1985. It was subsequently terminated.

[2] Collins was negligent in failing to abate the violation cited by OSMRE. The record clearly shows an operator who desired to deal with the violation at its own pace and not according to the schedule dictated by either the State or OSMRE. That lack of diligence in complying should not be rewarded with an assignment of zero points for negligence, as the dissent suggests. However, neither can we agree with OSMRE's assignment of 23 points for negligence. Under the regulations, that assignment equates to "[a] greater degree of fault than negligence." 30 CFR 845.13(b)(3)(i)(C).

^{11/} Clearly, Collins was aware of the necessity for engineering plans, even before the issuance of OSMRE's NOV, and apparently had taken some steps to secure such plans (Exh. R-21).

The regulations define that phrase as "reckless, knowing, or intentional conduct". 30 CFR 845.13(b)(3)(ii)(C). The record does not show that Collins' failure to abate OSMRE's NOV was the result of reckless, knowing, or intentional conduct. The facts support a finding that Collins was not diligent in pursuing the corrective action required by OSMRE's NOV. That constitutes negligence, not a greater degree of fault than negligence.

If an assignment of 23 points is too many, then what is the proper number under the circumstances of this case? Looking to the regulations is confusing because while 30 CFR 845.13(b)(3)(i) states that OSMRE shall assign up to 25 points based on the degree of fault for causing or for failing to correct a violation, it also states that "(B) A violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence." (Emphasis added.) Thus, that part of the regulation which speaks to the application of points for negligence refers only to causation, not to a failure to correct. This seems clearly to be an unintentional omission since the definition of negligence at 30 CFR 845.13(b)(3)(ii)(B) includes failure to abate.

We conclude, therefore, that Collins was negligent in failing to abate the violation in a timely manner in accordance with the schedule established by OSMRE in its NOV, as modified. Its actions, however, do not equate to a greater degree of fault than negligence. The fact that Collins was also negligent in addressing the State NOV appears to have entered into OSMRE's assignment of negligence points (Tr. 46; Exh. R-3). However, we do not believe that fact was a proper consideration for OSMRE in its assignment of negligence points for failure to correct the condition cited in its NOV. Any penalty assessed by the State should reflect the degree of fault in failing to abate its NOV in a timely manner. OSMRE's assignment of points for negligence should relate to the degree of fault of Collins in failing to provide the detailed engineering plans in accordance with the time limits established in the NOV, as modified.

The record does not support OSMRE's assignment of 23 points for negligence. However, contrary to the dissent's conclusion, it does justify an assignment of some points for negligence. The proper number to be assigned is a consideration for OSMRE in the first instance. Therefore, we will remand the case to OSMRE for an assignment of points for negligence. OSMRE should provide a justification for the number selected and it should calculate the penalty, if any, for this NOV. 12/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge

12/ Judge Miller also concluded that \$1,500 was the appropriate civil penalty for CO 85-07-250-01. Collins did not directly challenge that conclusion. Therefore, we affirm that civil penalty.

Miller is affirmed in part; affirmed as modified in part; vacated in part, and remanded to OSMRE for action consistent herewith.

Bruce R. Harris
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

103 IBLA 36

Dissenting Opinion by AJ Arness, 103 IBLA 37 through 39, is missing.