

Editor's note: Appealed -- settled, dismissed, Civ.No. 88-259 (E.D. KY Feb. 20, 1990)

C&N COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-166

Decided June 28, 1988

Petitions for discretionary review of a decision of Administrative Law Judge David Torbett vacating in part and sustaining in part Notice of Violation No. 80-2-86-5 and affirming in part and vacating in part proposed assessment of civil penalties. NX 3-16-P.

Affirmed in part; affirmed as modified in part; reversed in part.

1. Hearings -- Rules of Practice: Hearings -- Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

Where OSMRE issues a notice of violation and more than 5 years later during a hearing held pursuant to the filing of a petition for review of a civil penalty based on that notice and a subsequent cessation order, the permittee raises for the first time lack of service of the notice of violation, that issue will be considered not timely raised. By failing to raise the issue in its petition or an amendment thereto, the permittee waived its opportunity subsequently to challenge service.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally -- Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Where there is conflicting evidence regarding the existence of a sedimentation pond, that conflict need not be resolved where, even accepting the existence of a pond, the record shows that the pond was located off the permit area, and there is testimony that surface

drainage left the permit area without passing through a sedimentation pond in violation of 30 CFR 715.17(a).

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Evidence: Generally -- Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Where a mining permit requires a 25-foot wide buffer zone between a natural drainage channel and the mining activity, testimony by an OSMRE inspector that a mine pit had been constructed within 5 to 10 feet of that channel and that the pit wall had slumped into the pit thereby diverting drainage in the channel into the pit will support a finding of violation and the assessment of an appropriate civil penalty.

4. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Evidence: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Generally

A notice of violation issued to a company for mining without a permit will be sustained and an appropriate civil penalty assessed where the record shows that the road providing access to the company's permitted minesite also provided the only access to an unpermitted minesite; that access to the road was controlled by a locked gate to which the company had a key; that the company's sign was located at the gate; that the gate was kept locked to protect the company's equipment; and that one of the principals of the company owned the surface of the lands in question.

APPEARANCES: Teresa Taylor, Esq., and Forrest E. Cook, Esq., Whitesburg, Kentucky, for C&N Coal Company, Inc.; R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Both the C&N Coal Company, Inc. (C&N), and the Office of Surface Mining Reclamation and Enforcement (OSMRE) have petitioned for discretionary review of an October 29, 1985, decision by Administrative Law Judge David Torbett affirming in part and vacating in part a proposed assessment of civil penalties for four violations cited by OSMRE at C&N's mining operation in Letcher

County, Kentucky. By order dated December 10, 1985, the Board granted both petitions. ^{1/}

This case was initiated by issuance of Notice of Violation (NOV) No. 80-2-86-5 (Exh. R-1) on February 14, 1980, by OSMRE inspector Thomas W. Clements, following a February 12, 1980, inspection of the minesite. The NOV cited four violations: (1) "[f]ailure to pass surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before leaving the permit area"; (2) "[f]ailure to return the disturbed area in a timely manner to conditions capable of supporting postmining land use"; (3) "[f]ailure to leave buffer zone along creek between creek and the job"; and (4) "[o]pening a site for mining without first obtaining a surface disturbance permit from the state of Kentucky" (Exh. R-1 at 2-5). As initially issued, the NOV required the cessation of all mining. However, it was modified on February 15, 1980, to limit the cessation requirement to the nonpermitted area cited in violation No. 4 (Exh. R-3). The NOV also called for completion of various abatement measures by March 17 and 20, 1980. OSMRE Inspector Clements again inspected C&N's minesite on March 25, 1980 (Exh. R-5), and on March 27, 1980, issued cessation order (CO) No. 80-2-86-9 (Exh. R-6) for all four violations cited in the NOV. The CO called for immediate cessation of all coal mining operations other than those necessary for reclamation and abatement of the violations set forth in the NOV.

On July 9, 1980, an assessment conference was held in the OSMRE office, Hazard, Kentucky, before conference officer Glenn C. Sanders (Assessment Conference Report, dated July 22, 1980, attached to OSMRE's Answer to Request for Production of Documents). Attending the conference were Jim Roarke, an attorney representing C&N, and Wilford Niece and Ernest Cook, identified as the President and Secretary, respectively, of C&N. The conference officer sustained a \$ 1,500 assessment for each of the four violations, based upon the point values assigned. *Id.* The "Conclusion of Conference" cover letter (also attached to OSMRE's Answer to Request for Production of Documents) stated that C&N had a right to petition for review of the assessment and to "include a request for a formal hearing on the fact of the violation if you have not previously been granted or denied such a hearing." The document

^{1/} In the December 1985 order, the Board stated that OSMRE "shall * * * have 30 days from receipt of this order to file [a brief] in support of [its] petition [for discretionary review]," in accordance with 43 CFR 4.1273(a). By order dated Dec. 23, 1985, the Board extended the time for filing an initial brief "to and including January 30, 1986." On Feb. 10, 1986, C&N filed a motion for summary dismissal of OSMRE's petition for discretionary review because it had been mistakenly informed that no brief had been filed by OSMRE as of Feb. 7, 1986. In fact, OSMRE's initial brief had been filed with the Board on Jan. 31, 1986, within the 10-day grace period for filing under 43 CFR 4.401(a). In any case, summary dismissal is discretionary with the Board in the case of late filing of an initial brief, under 43 CFR 4.1273(b), and would not be granted herein where C&N received OSMRE's brief and subsequently responded thereto. C&N's motion for summary dismissal is denied.

also required C&N to submit with its petition for review a payment in the amount of the assessment, to be held in escrow pending the results of administrative or judicial review. In a "Final Order" dated August 5, 1980, the Chief, Division of Enforcement, OSMRE, notified C&N that the assessment was "due and payable" (Exh. R-9). By a "Final Demand Letter" dated August 20, 1980, the Chief, Division of Enforcement, demanded payment within 15 days from receipt of the letter (Exh. R-10).

OSMRE subsequently filed an action in Federal district court, United States v. C&N Coal Co., No. 82-390 (E.D. Ky.), seeking collection of the assessment. By order dated June 6, 1983, the district court approved a settlement agreement between the parties (Petition for Review of Proposed Assessment of Civil Penalty, Exh. C). The agreement stated that C&N "was not served with a copy of the letter concluding the assessment conference concerning NOV 80-2-86-5 and CO 80-2-86-9." Id., Exh. D at 1. Under the agreement, C&N agreed to pay the \$ 6,000 assessment into escrow and to petition for administrative review "of the fact of violation and the amount of penalty assessed," and OSMRE agreed to withhold further collection action "until the completion of administrative review." Id., Exh. D at 2.

On August 29, 1983, C&N filed its petition for review, together with payment of the assessment as stipulated in the settlement agreement. A hearing was held before Judge Torbett in Hazard, Kentucky, on May 9, 1985. In an October 29, 1985, decision, Judge Torbett vacated the NOV as to violation Nos. 1 and 2 and sustained the NOV as to violation Nos. 3 and 4 and the corresponding civil penalty assessments. OSMRE seeks review of that portion of the decision vacating violation No. 1. C&N seeks review of the decision insofar as it sustains the NOV as to violation Nos. 3 and 4.

C&N also argues that OSMRE failed to properly serve the NOV and that, as a result, the company was prejudiced in subsequent administrative proceedings and denied procedural due process rights. Specifically, C&N contends that, as testified to at the hearing by Niece, the president of C&N, the company did not receive a copy of the NOV until it was sent to the company with the proposed penalty assessment (Tr. 58, 75, 89). As a consequence, C&N contends, the company was deprived of its rights to (1) submit under 30 CFR 723.17(a) written information about the factual circumstances of the alleged violation prior to the calculation of the proposed civil penalty assessment, (2) have an evidentiary hearing as provided by 30 U.S.C. § 1275(a)(1) (1982), and (3) undertake abatement measures or have the abatement period extended prior to the issuance of the CO.

OSMRE argues in response that Judge Torbett correctly ruled that the hearing before him "completely protects the Petitioner as to due process and equal protection of the law" (Decision at 3). OSMRE also argues that Judge Torbett correctly determined that, because C&N failed to raise the issue of service in its petition for review, the issue was not properly raised at the hearing. It additionally argues that even if C&N was not served with the NOV until it received the proposed penalty assessment, no deprivation of rights occurred because a proposed assessment is not a final assessment until all administrative proceedings are completed and C&N has had an opportunity to obtain review.

Procedural Matters

We will first discuss the issue that the dissent finds is determinative of the outcome of the petitions for discretionary review -- the matter of service of the NOV. For the reasons set forth below, we conclude that Judge Torbett properly ruled that C&N could not raise the issue of service of the NOV at the hearing in this case.

OSMRE issued the NOV on February 14, 1980. There is no indication in the present case record that C&N raised lack of service of the NOV at any time prior to the date of the hearing on its petition for review, May 9, 1985. At the hearing, counsel for C&N questioned OSMRE Inspector Clements about service of the NOV, stating that counsel was attempting "to establish what the procedure was and the policy was" (Tr. 45). Counsel for OSMRE objected, stating:

I would just say that the government is truly surprised by this. We don't keep our [certified mail] return receipt cards with our other documents. We never did in these old cases, and if we had known this was an issue, we would have made an effort to pull them together. [2/]

(Tr. 46-47).

Judge Torbett allowed the questioning to continue, "subject to Mr. Welch's [counsel for OSMRE] objection which I haven't finally really determined yet" (Tr. 47). However, in his decision, Judge Torbett concluded that "Respondent [OSMRE] was surprised by this issue at trial and could not properly prepare for it. Thus, the issue was not properly raised" (Decision at 3).

[1] Section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982), requires that an NOV be "given promptly to the permittee or his agent," but does not specify the manner of service. That is set forth in 30 CFR 722.14(a) and 30 CFR 843.14(a), which provide that an NOV shall be served either by personal service or by sending a copy of the notice by certified mail. See A&S Coal Co. v. OSMRE, 96 IBLA 338, 342 (1987). The question raised by this case is whether C&N waived its right to assert lack of service of the NOV by failing to raise that issue in its petition for review.

In previous decisions we have indicated that OSMRE's burden of producing evidence at a hearing to establish a prima facie case of the fact of a

2/ As a practical matter, OSMRE should maintain a case record for each NOV and CO it issues which would show that such documents have, in fact, been served on the operator or that service has been refused. See 30 CFR 843.14. Clearly, the signature of the operator on the NOV or CO or signed and dated certified mail return receipt cards included in such records would constitute the best evidence of service of those documents. Furthermore, having such records available at hearings on applications or petitions for review should be routine procedure for OSMRE.

violation and the amount of a penalty is, to some extent, limited by the issues actually raised by a party's petition for review. Bell Coal Co. v. OSMRE (On Reconsideration), 81 IBLA 385, 392 (1984); Titan Coal Corp. v. OSMRE, 78 IBLA 205, 212 (1984). This approach is in accord with the general principle that the purpose of a hearing is to resolve disputed questions of fact. Clearly, there is no reason to burden a hearing by requiring OSMRE to introduce evidence establishing the fact of matters which are not denied or disputed. See Harry Smith Construction Co. v. OSMRE, 78 IBLA 27, 31 (1983); Diamond Coal Co., 3 IBSMA 292, 297-99, 88 I.D. 826, 829-30 (1981). ^{3/}

In the surface mining context, OSMRE's issuance of an NOV, a CO, a notice of proposed assessment of a civil penalty, or a notice of the conclusion of an assessment conference constitutes a first pleading. It is, in essence, a "complaint." Although the permittee's application or petition actually initiates the administrative review process, it is the second pleading and is more akin to an answer because it is the pleading which joins the issues for the hearing. OSMRE's answer to an application or petition is the third pleading and usually consists of merely a denial of the permittee's allegations. William Francis Rice, 3 IBSMA 17, 21, 88 I.D. 269, 271 (1981). Thus, in ordinary circumstances, the matters raised in the permittee's application or petition join the issues upon which evidence will be presented at the hearing.

In this case, C&N's failure to raise lack of service in its petition for review may be analogized to the failure to raise timely the defense of lack of personal jurisdiction under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(h), 28 U.S.C. 4/ It has been stated that:

If a defendant proceeds first on the merits, as by a motion to dismiss for failure to state a claim or by an answer on the merits, and thereafter attempts to challenge jurisdiction over his person or improper venue, the challenge should fail, since it comes too late, and has not been made in the manner prescribed in Rule 12. [Footnote omitted.]

2A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, P12.12 (2d ed. 1987). This quotation from Moore's Federal Practice was relied upon by the court in United States v. Fishing Vessel Mary Ann, 466 F.2d 63, 65 (5th Cir. 1972), when it held that two individuals who had not been served with process in the case, but who had answered the complaint asserting defenses on the merits, could not claim lack of jurisdiction based on a

^{3/} Certain matters involving the jurisdiction of OSMRE to take enforcement action have been held to be affirmative defenses which a permittee must plead and prove. Harry Smith Construction Co. v. OSMRE, *supra* at 29-30.

^{4/} That rule provides in pertinent part:

"(1) A defense of lack of jurisdiction over the person * * * is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

failure to serve. See Cactus Pipe & Supply Co. v. M/V Montmartre, 756 F.2d 1103, 1108 (5th Cir. 1985).

In this case, OSMRE issued the NOV in February 1980. C&N did not file an application for review of the NOV. 5/ In March 1980, OSMRE issued the CO. C&N did not file an application for review of the CO. When OSMRE sought collection of the assessed civil penalty in Federal district court, the parties agreed that because C&N had not received a copy of the letter concluding the assessment conference, C&N could petition for administrative review of the fact of violation and the amount of the penalty assessed. 6/ When C&N filed its petition for review, it made no claim that OSMRE had failed to provide timely service of the NOV. 7/ We find that under the particular circumstances of this case, by failing to make such a claim in its petition or in an amendment thereto, C&N waived the opportunity subsequently to raise that issue at the hearing. Judge Torbett correctly ruled that the issue was not properly raised at the hearing. 8/

Substantive Matters

We now consider the question of whether Judge Torbett properly ruled on the three violations at issue. 9/ A permittee may be assessed a civil penalty for any violation of a subchapter of SMCRA, its implementing regulations,

5/ C&N does not contend that it never received a copy of the NOV; it admits that a copy was included with the proposed assessment of the civil penalty.

6/ There is no indication in the pleadings filed in district court that C&N raised lack of service of the NOV in that proceeding.

7/ Given our determination on the service issue, we need not rule on the question whether the evidence tending to show that C&N attended a minesite hearing on the NOV, prior to the issuance of the CO, constituted actual knowledge of the NOV.

8/ The timeliness of OSMRE's response to C&N's request for production of documents bears absolutely no relationship to the procedural issue raised in this case, despite the dissent's claim to the contrary. Establishment of service of an NOV or CO is not an element of OSMRE's prima facie case obligation, unless the permittee makes it one by challenging service in its application for review or petition for review or amendment thereto. C&N did not make it an issue in its pleadings. Thus, its request for production of documents could have had no bearing on the service issue. The dissent laments the fact that C&N had "only 9 days to digest the information submitted [by OSMRE] and respond." The simple answer to that is that C&N knew in 1980 whether or not it had received the NOV; it had 5 years to "respond."

Moreover, we believe the dissent misreads our conclusion on the procedural issue. We do not directly apply rule 12 to this case; we examine it by way of analogy and reach our conclusion based on "the particular circumstances of this case." Thus, this case should not be considered as establishing some sort of policy that this Board will "use the Federal rules to determine procedural requirements."

9/ C&N initially contends that Judge Torbett erred in concluding that the NOV had set forth with reasonable specificity the "nature of the violation[s],"

or a permit condition, in accordance with section 518(a) of SMCRA, 30 U.S.C. § 1268(a) (1982). Delight Coal Corp., 1 IBSMA 186, 86 I.D. 321 (1979). In a civil penalty review proceeding, OSMRE has the burden of persuasion "as to the fact of violation and as to the amount of the penalty." Bell Coal Co. v. OSMRE (On Reconsideration), supra at 392. ^{10/} With these principles in mind, we will examine each of the violations separately -- first, violation No. 1 which was vacated by Judge Torbett and for which OSMRE seeks review.

Sedimentation Pond Violation

[2] C&N was cited for violation No. 1 which was described in the NOV as a failure to pass surface drainage through a sedimentation pond or a series of sedimentation ponds before leaving the permit area (Exh. R-1). That condition is a violation of 30 CFR 715.17(a). The NOV stated that the violation applied to "[a]ll parts of the disturbed area which drain into natural drainage channels" (Exh. R-1 at 2). Inspector Clements testified that C&N did not have a sedimentation pond on the permitted area (Tr. 15-16). Clements also testified that soil was eroding "around the site," but primarily from a spoil pile in the northern part of the area into an intermittent stream which ran along the eastern edge of the permitted area and then entered a perennial stream (Tr. 11-12, 15; see Exh. R-2 at 4). Clements confirmed that sediment was "leaving the site" (Tr. 11).

On the other hand, Niece testified that C&N had a sedimentation pond located approximately 500 feet north of the mine pit and 20 to 50 feet east of the access road leading to the permitted area (Tr. 60-61, 72). Niece identified the location of the pond on a sketch map attached to the February 12, 1980, inspection report by marking thereon a red "X" and the letters "S.P." (Exh. R-2 at 4; Tr. 61-63). Niece described it as a "pretty good-sized pond," which was visible from the access road (Tr. 72-73). In his decision, at page

fn. 9 (continued)

as required by section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982). See Decision at 4. C&N asserts that the NOV should be vacated for that reason, citing Old Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980). We conclude that the NOV adequately describes the practices and circumstances alleged to be in violation and thus is reasonably specific under section 521(a)(5) of SMCRA. See Sam Blankenship, 5 IBSMA 32, 90 I.D. 174 (1983); cf. OSMRE v. Ewell L. Spradlin Coal Co., 93 IBLA 386 (1986). In each instance, the NOV specified the area to which the violation applied, as well as the nature of the violation.

^{10/} On Oct. 15, 1987, the Department issued proposed regulations announcing an intention to change 43 CFR 4.1155 to provide that the petitioner for review, rather than OSMRE, would have the ultimate burden of persuasion as to the fact of violation in a civil penalty review proceeding under section 518(a) of SMCRA, 30 U.S.C. § 1268(a) (1982). The purpose of the proposed change is to make the allocation of the burden of proof concerning the fact of violation consistent with 43 CFR 4.1171 and with the legislative intent expressed in S. Rep. No. 128, 95th Cong., 1st Sess. 93 (1977). 52 FR 38246-47 (Oct. 15, 1987).

4, Judge Torbett concluded that he was inclined to believe that a sedimentation pond "did exist," especially in view of an August 27, 1979, inspection by OSMRE inspector Gary W. Hall, which resulted in NOV No. 79-II-56-48 (Exh. R-13), which did not cite C&N for failure to have a sedimentation pond. Judge Torbett then found that the "sediment going into the nonperennial stream had resulted from the buffer zone being washed out"; and he held that C&N could not be cited for the sedimentation pond violation where this "result[ed]" from the buffer zone violation, cited as violation No. 3 of 4 in the NOV (Decision at 5).

Judge Torbett incorrectly analyzed the evidence concerning violation No. 1. His reliance on a previous inspection which did not result in a citation for a failure to have a sedimentation pond, in order to support his finding of the existence of a sedimentation pond, is misplaced. ^{11/} In order to prove a violation of 30 CFR 715.17(a), OSMRE must establish that there was a failure to pass surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before leaving the permit area. Alpine Construction Co. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988). It is not necessary that OSMRE establish the occurrence of any environmental damage. Id.

Even assuming a sedimentation pond did exist as testified to by Niece, its location, as depicted by Niece on the map attached to the February 1980 inspection report (Exh. R-2 at 4), is north of the permit area, and, thus, could not have intercepted any surface drainage before it left the permit area. Inspector Clements' un rebutted testimony clearly established a violation of 30 CFR 715.17(a). Judge Torbett improperly vacated violation No. 1.

Moreover, Judge Torbett's conclusion that C&N could not be cited for the sedimentation pond violation because it resulted from the buffer zone violation cannot be sustained. First, the sedimentation pond violation arose because of the fact that no sedimentation pond was located to receive surface drainage prior to such drainage exiting the permit area. Second, the record evidence shows the two violations are completely unrelated. Inspector Clements testified that most erosion was occurring along the eastern edge of the permit area and from a spoil pile on the northern end of the permit area (Tr. 11-12; Exh. R-2 at 4). The buffer zone violation was at the southern end of the permit area, and it resulted in the disruption of a stream channel, thereby diverting water into a mine pit located at the southern end of the permit area. The water diverted into the pit did not exit the permit area ^{12/} (Tr. 40-42, 64; Exh. R-2 at 4). Therefore, the

^{11/} We note the record also contains a copy of a State mine inspection report, dated Jan. 16, 1980, which indicates the absence of an "approved silt structure" (Exh. R-12 at 10).

^{12/} On page 5 of his decision, Judge Torbett stated that "it is obvious that the sediment going into the non-perennial [intermittent] stream had resulted from the buffer zone being washed out." To the contrary, the record shows

buffer zone violation had nothing to do with the erosion taking place on the spoil pile at the northern end of the permit area. Surface drainage from that spoil pile carried sediment into the intermittent stream which flowed off the permit area into the perennial stream. We, therefore, reverse Judge Torbett's decision to the extent it vacated violation No. 1.

In response to OSMRE's challenge to Judge Torbett's ruling on violation No. 1, C&N stated that even if the violation were sustained, no penalty points should be assessed. ^{13/} Having determined that the violation existed, we will review the assessment.

At the hearing, OSMRE introduced Exhibit R-8 which sets forth the penalty points determined in accordance with 30 CFR 723.13 and the amount of the proposed civil penalty assessment for each violation in accordance with 30 CFR 723.14. See *Peabody Coal Co. v. OSMRE*, 90 IBLA 186, 191-92 (1986). ^{14/} OSMRE determined the amount of the penalty for violation No. 1 to be \$ 1,500 based on an assignment of 3 points for history of previous violations, 20 points for seriousness (determined as 12 points for probability of occurrence and 8 points for extent of damage), and 12 points for negligence.

In its posthearing brief, OSMRE argued that based on the evidence presented at the hearing the amount of the civil penalty for violation No. 1 should be recalculated to \$ 3,100 based on 51 points assigned as follows: 3 points for history, 30 points for seriousness (15 points for probability of occurrence and 15 points for extent of damage), and 18 points for negligence.

fn. 12 (continued)

that but for the buffer zone violation any sediment which entered the intermittent stream in the southern part of the permit area would have flowed north into the perennial stream. The disrupted stream channel allowed that flow to enter the mine pit.

^{13/} C&N also argues that it was not served with a "complete copy" of the worksheet showing the computation of the proposed civil penalty assessment within 30 days of issuance of the NOV, as required by 30 CFR 723.17(b), and thus was "unable to effectively contest the amount of the proposed penalty" (C&N's Initial Brief at 4). OSMRE contends that the regulation is "directory rather than mandatory," citing *Sahara Coal Co.*, 3 IBSMA 371, 88 I.D. 1025 (1981). Critical to the holding in *Sahara* was the failure of Sahara to show any actual prejudice from OSMRE's failure. Thus, the failure to serve a worksheet will not be a bar to a civil penalty assessment in the absence of a showing of actual prejudice. See *Lone Star Steel Co. v. OSMRE*, 98 IBLA 56, 63-64 (1987); *Bernos Coal Co. v. OSMRE*, 97 IBLA 285, 94 I.D. 181 (1987). In view of C&N's participation in the July 1980 assessment conference, as well as the May 1985 hearing and subsequent appeal to the Board, we can find no prejudice to C&N resulting from the alleged absence of service of a "complete copy" of the worksheet on C&N.

^{14/} The Board has the authority to recalculate the amount of the proposed assessment utilizing the point system and penalty conversion table. 43 CFR 4.1270(f); *Lone Star Steel Co. v. OSMRE*, *supra*.

Since Judge Torbett vacated violation No. 1, he did not address OSMRE's argument regarding the amount of the penalty.

In its brief in support of its petition for review, OSMRE reiterates its contention that the penalty for violation No. 1 should be \$ 3,100. On the other hand, C&N asserts that no points should be assigned for either seriousness or negligence and that, therefore, no penalty should be assessed.

There is no challenge to the three history points assigned in accordance with 30 CFR 723.13(b)(1) because of three violations cited in NOV No. 79-II-56-48 (Exh. R-13). Exhibit R-8 shows 12 points assigned for probability of occurrence of the event which the violated standard was designed to prevent, *i.e.*, sediment leaving the permit area and entering the hydrologic system. An assignment of 12 points under 30 CFR 723.13(b)(2)(i) means the probability of occurrence was likely.

C&N argues that the probability was none or insignificant. OSMRE asserts that the record shows that sediment had, in fact, left the permit area and entered the intermittent stream and that, therefore, the event had occurred. The regulation, 30 CFR 723.13(b)(2)(i), dictates that 15 points are to be assigned in such a circumstance. We agree with OSMRE that 15 points must be assigned for probability of occurrence.

OSMRE originally assigned eight points for the extent of potential or actual damage on the basis of 30 CFR 723.13(b)(2)(ii)(B), which provides that "[i]f the damage or impact which the violated standard is designed to prevent would extend outside the permit area, the Office shall assign eight to fifteen points, depending on the duration and extent of the damage or impact."

OSMRE now contends the maximum of 15 points should be assigned. The NOV states that only "[s]ome sedimentation will occur off of the permitted area" (Exh. R-1 at 6). OSMRE has not justified an assignment of more than the eight points set forth in Exhibit R-8.

Under 30 CFR 723.13(b)(3), OSMRE assigned 12 negligence points. See Exh. R-8. C&N argues that there was no negligence since any violation was caused by "conditions beyond [its] control" (C&N's Reply Brief at 7). OSMRE argues that 18 points should be assigned because C&N acted "recklessly, knowingly or intentionally" (OSMRE's Initial Brief at 8). Inspector Clements stated in the NOV that the violation was caused by a "lack of concern" (Exh. R-1 at 6). Negligence is defined in the regulations as "the failure of a permittee to prevent the occurrence of any violation * * * due to indifference, lack of diligence, or lack of reasonable care." 30 CFR 723.13(b)(3)(ii)(B). OSMRE failed to establish a greater degree of fault than negligence. 30 CFR 723.13(b)(3)(ii)(C). Therefore, we conclude that the total assigned points should be 38 and that the civil penalty for violation No. 1 should be increased to \$ 1,800, in accordance with 30 CFR 723.14.

Buffer Zone Violation

[3] OSMRE cited C&N with violation No. 3 for failure to leave a buffer zone along the intermittent stream (natural drainage channel), between that stream and the minesite (Exh. R-1 at 4). It is undisputed that C&N's mining permit (Permit No. 067-0029) required a 25-foot wide buffer zone. See Exh. R-11. Inspector Clements testified that at the time of his inspection there was no buffer zone (Tr. 16). He concluded that the mine pit had been constructed "too close to the drainage channel" and that the pit wall had "slumped in and fallen into the pit," causing the intermittent stream to be diverted into the pit (Tr. 17; see Exh. R-2 at 2). He stated that the pit had been constructed within 5 to 10 feet of the drainage channel. Id.; see Tr. 18-21, Exh. R-2 at 4. He surmised that water in the pit was dissipating into the ground through auger holes (Tr. 26, 42).

Niece testified that the buffer zone was washed away by a severe flood during January/February 1980 (Tr. 59-60, 64). He also stated that at a subsequent time during reclamation C&N attempted to restore the buffer zone (Tr. 64-65, 70-71). In his October 1985 decision, at page 5, Judge Torbett sustained violation No. 3, concluding that C&N had failed to rebut Clements' testimony that C&N had "cut into the 25-foot buffer zone."

C&N argues that the evidence fails to establish that the cut in the buffer zone was caused by C&N rather than by "excessive flooding" (C&N's Initial Brief at 11). C&N asserts that Clements' testimony on violation No. 3 is equivocal. We do not agree. Although Clements indicated that the entire buffer zone could have been eroded, it was his opinion that the mine pit "had been constructed extremely close to the channel there, within five to ten feet" and that he was unsure whether the final cut "through" to the channel had been made by C&N or was caused by erosion (Tr. 20-21). C&N has not contradicted this evidence, except with the unsupported assertion by Niece that flooding caused by excessive rain washed away the entire buffer zone (Tr. 64).

We find OSMRE properly cited C&N for failure to maintain the 25-foot wide buffer zone in accordance with the permit condition. ^{15/} We, therefore, affirm Judge Torbett's decision to the extent it sustained violation No. 3.

C&N has challenged the civil penalty assessed with respect to violation No. 3. Judge Torbett sustained the \$ 1,500 proposed civil penalty, which was

^{15/} C&N also argues that it could not be cited in any event for failure to maintain the buffer zone because no environmental damage resulted due to the fact the intermittent stream flowed into the mine pit and there was no proof that water was discharged into any stream. We note that the NOV identified "[u]nknown harm to aquatic environment and hydrologic system downstream from the diversion of water into the pit." Regardless of the extent of resulting environmental damage, C&N violated a permit condition and was properly cited. The actual extent of damage is considered infra in calculating the amount of the civil penalty.

calculated based upon a point assignment of 3 points for history, 20 points for seriousness (12 points for probability of occurrence and 8 points for extent of damage), and 12 points for negligence (Exh. R-8). OSMRE asserted in its posthearing brief that the civil penalty should be \$ 3,800 based on the following point totals: 3 for history, 15 for probability of occurrence, 15 for extent of damage, and 15 for negligence. C&N argues that no penalty should be assessed. It does not dispute the assignment of three points for history of violations, but it does assert that the probability of occurrence was none or insignificant. OSMRE argues that 15 points should be assigned because the event which the violated standard was designed to prevent, *i.e.*, destruction of a natural drainage channel, had occurred. Clements testified that the buffer zone was designed to prevent destruction of the channel, as well as to keep sediment "from getting in the channel" (Tr. 26). The evidence does not establish that sediment was going into either the intermittent stream or the perennial stream as a result of the breach of the buffer zone. However, the evidence establishes that destruction of the drainage channel had occurred. Fifteen points are properly assigned under 30 CFR 723.13(b)(2)(i).

C&N argues that the extent of damage was "overstated" (C&N's Initial Brief at 17). OSMRE argues that 15 points should be assigned; however, it offers nothing to support such an increase. Since the natural drainage channel, which was outside the permit area, was destroyed, we conclude that OSMRE properly assigned eight points under 30 CFR 723.13(b)(2)(ii).

C&N further asserts that failure to maintain the buffer zone was caused by "conditions beyond [its] control" (C&N's Initial Brief at 18). OSMRE argues that the maximum 25 points should be assigned because C&N intentionally cut into the buffer zone. There is no proof, however, that C&N intentionally cut into the buffer zone. At best, the evidence establishes that C&N failed to exercise reasonable care which equates to negligence under 30 CFR 723.13(b)(3)(ii)(B). OSMRE properly assigned 12 points under 30 CFR 723.13(b)(3)(i)(B). Therefore, we conclude that the total assigned points should be 38 and that the civil penalty for violation No. 3 should be \$ 1,800, in accordance with 30 CFR 723.14.

Failure to Obtain Mining Permit

[4] OSMRE cited C&N with violation No. 4 for failure to obtain a State surface disturbance permit prior to mining (Exh. R-1 at 5). The NOV identified the disturbed area as "up the hollow and at a higher elevation than the permitted area." *Id.* That area is south of the permitted area, "[approximately] 300-400 feet beyond the permitted area" (Exh. R-2 at 2, 4). Clements testified that this area and the permitted area shared a common access road. Entrance to the access road was through a locked gate at the highway. At the gate there was also a sign which referred to C&N (Tr. 21-23; Exh. R-2 at 4). Clements noted that this was the only access road for both sites (Tr. 23). Part way along the access road, a road created by bulldozer cuts led to the unpermitted site (Exh. R-2 at 2, 4). Clements was asked about the nature of the disturbance on the unpermitted area:

Q. * * * Did you -- could you determine what kind of disturbance had occurred on the unpermitted area?

A. There was removal of a large amount of soil which had been pushed away from the area and the creation of a highwall behind that and a bench had been created.

Q. Had trees been removed and vegetation?

A. Yes.

Q. Did you see any evidence of mining of coal?

A. To my memory, there was a little bit [of] spoil around but I couldn't see a coal seam exposed.

(Tr. 25). He subsequently stated with regard to the site: "I knew there was coal there and I saw evidence of some coal waste being around * * *" (Tr. 27). Clements observed some heavy equipment on the site, but did not know who owned it and made no attempt to determine ownership (Tr. 22). When questioned whether on February 12, 1980, he could observe any physical relationship between C&N and the unpermitted site, Clements stated, "[o]nly by association of road and distance" (Tr. 43). 16/

On the other hand, Wilford Niece testified that C&N was not responsible for the disturbance (Tr. 65-66). Niece attributed the disturbance to a "fellow * * * named Trigg" (Tr. 66). He stated that C&N had not built the gate but that it had been there for years. Id. He did not know who maintained the lock on the gate, but he stated that "we had a key close by the gate," which was used by the "whole company" (Tr. 66-68). He stated that the purpose of the locked gate was "to keep the rogues out of there from stealing everything we had" (Tr. 68).

16/ In his Feb. 12, 1980, inspection report, Clements stated that one Ricky Niece had told him on Feb. 5, 1980, that the equipment on the site belonged to C&N and that the company planned to fill in the hollow and put a tipple there (Exh. R-2 at 3). Ricky Niece was apparently the son of Wilford Niece (Tr. 27). Judge Torbett sustained an objection at the hearing to any testimony by Clements concerning his conversation with Ricky Niece (Tr. 27-28). However, Clements' statement was included in Exhibit R-2 which was accepted into evidence without objection by counsel for Niece. Clements' representation of what Ricky Niece said is clearly hearsay. Hearsay is admissible in an administrative proceeding so long as it is relevant, material, and not unduly repetitious. Darmac Coal Co., 74 IBLA 100 (1983); Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980); Casey Ranches, 14 IBLA 48, 80 I.D. 777 (1973). Nevertheless, the evidence is sufficient without that statement to support the violation.

Judge Torbett sustained violation No. 4, concluding that C&N "controlled the land in question which was unpermitted" and was, thus, responsible for the "wildcat operation," citing Bell Coal Co. v. OSMRE (On Reconsideration), *supra*. In Bell Coal, we concluded that a permittee was properly cited for mining without a permit where it had failed to exercise its legal control over the disturbed area "as a lessee" by at least attempting to halt the unauthorized mining by others. *Id.* at 393. Judge Torbett analogized the present case to Bell Coal: "Here, one of the partners owned the land where the coal was illegally mined. [17/] In addition, the Petitioner cut, maintained, and guarded the only road to the unpermitted site. Further, no representative of the Petitioner made any effort to report the illegal operations" (Decision at 6).

C&N contends that OSMRE failed to establish that it was responsible for disturbance of the unpermitted area. 18/ We conclude that the evidence establishes that C&N was, in fact, responsible for the disturbance. The evidence which supports the violation is the fact that the unpermitted site and the permitted site shared a common access road. Entrance to that road was through a locked gate. There was a C&N sign at the gate and C&N had a key to the gate lock. The gate was kept locked to protect C&N's equipment. There is no evidence of any other access by road to the unpermitted site, which Clements described as up on a ridge (Tr. 21). The evidence also indicates that the surface of the land on the unpermitted site was owned by Ernest Cook. In C&N's surface disturbance mining permit, Cook is identified as the surface owner of the permitted site and land within 500 feet of that site (Exh. R-11 at 12,

17/ The surface disturbance mining permit indicates that Niece and Cook are the principal parties with respect to C&N (Exh. R-11 at 6). The permit application identifies C&N as a partnership, but the permit refers to C&N as a corporation. *Id.* at 1, 6. In its reply brief, at page 4, C&N identifies Cook as "one of its shareholders."

18/ C&N does not dispute the fact that surface coal mining operations were required to have a State permit, but argues that the disturbance south of the permitted area does not qualify as a surface coal mining operation because Clements admitted that he observed no exposure of a coal seam. However, the creation of a bench and highwall, the presence of spoil, and evidence of coal waste establish the existence of such an operation, as defined in section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982), which operation included the excavated area and the extended access road. Russell Prater Land Co., 3 IBSMA 124, 88 I.D. 498 (1981); *cf.* Squire Baker, 1 IBSMA 279, 86 I.D. 550 (1979) (excavation not for purpose of extracting coal). Moreover, the evidence indicates this unpermitted area was related to the permitted area and, thus, both must be viewed in the aggregate. Titan Coal Corp. v. OSMRE, 78 IBLA 205 (1984); Mud Fork Coal Corp., 5 IBSMA 44, 90 I.D. 181 (1983); *cf.* Claypool Construction Co., 1 IBSMA 259, 86 I.D. 486 (1979) (distinct operations).

45). ^{19/} That would make Cook the surface owner of the unpermitted site, which Clements stated in his February 12, 1980, inspection report (Exh. R-2) was approximately 300 to 400 feet from the permitted site. Counsel for C&N admitted as much in a question to Clements at the hearing (Tr. 35).

C&N has not substantiated Niece's assertion that someone other than C&N was responsible for disturbance of the unpermitted site. Niece's professions of ignorance concerning what was happening so close to C&N's purportedly active mining operation does not overcome the evidence supporting OSMRE's conclusion that C&N was responsible for the disturbance. Accordingly, OSMRE properly cited C&N for mining without a permit. Compare with A&S Coal Co. v. OSMRE, supra at 344-45. Judge Torbett's decision to the extent it sustained violation No. 4 is affirmed.

OSMRE assessed a civil penalty of \$ 1,500 for violation No. 4 on the basis of the assignment of the same point totals as set forth above for violation Nos. 1 and 3 (Exh. R-8). C&N argues that no penalty should be assessed. OSMRE contends, as it did in its posthearing brief, that C&N should be assessed \$ 3,800 on the basis of a point assignment of 3 for history of violations, 15 for probability of occurrence, 15 for extent of damage, and 25 for negligence.

Three points for history of violations is undisputed. C&N, however, contends that no points should be assigned for probability of occurrence. The points should be increased to 15, OSMRE argues, since mining without a permit had occurred at the time of inspection. We agree that 15 points should be assigned in accordance with 30 CFR 723.13(b)(2)(i), on the basis of evidence that the unpermitted area was disturbed by mining operations. See West Virginia Energy, Inc., 3 IBSMA 301, 308, 88 I.D. 831, 835 (1981).

C&N argues that no points should be assigned for extent of damage. OSMRE argues that the points should be increased to the maximum 15 because, in the absence of a bond, the "possibility of preventing increased damage by reclamation is diminished" (OSMRE's Initial Brief at 9). In West Virginia

^{19/} Regarding ownership of the land, Niece testified at the hearing as follows:

"Q. Who owns the land where the unpermitted disturbance is?

A. At this time?

Q. At the time when the NOV was issued.

A. I don't honestly know.

Q. Who owned the land you were mining?

A. I don't honestly know who owned the land. I know who leased the coal to us.

Q. Who was that?

A. Marlowes.

Q. Do you know who owned the surface?

A. No, I don't."

(Tr. 67).

Energy, Inc., supra, we concluded that no points for extent of damage are appropriate under 30 CFR 723.12(c) for mining without a permit. That conclusion was based on the following rationale:

The regulatory guidelines for the assessment of penalty points for "extent of damage" are found in 30 CFR 723.12(c)(2) and (3). Subparagraph (3) provides a formula for computing extent of damage points where the violation involved concerns a requirement "to keep records, give notice, or conduct any measuring or monitoring * * *." It is not applicable to this case since the violation charged, mining without a permit, is not described in any of the three categories mentioned in that subparagraph.

There are two separate methods under section 723.12(c)(2) for determining the proper number of extent of damage points to be assigned, each depending upon the geographical extent to which the damage or impact the violated standard is designed to prevent in fact occurs. Under section 723.12(c)(2)(i), up to seven points may be assigned if that damage or impact remains within the permit area, and under section 723.12(c)(2)(ii) from 8 to 15 points may be assigned if that damage or impact extends beyond the permit area. When the violation charged is mining without a permit, there is no permit area against which to judge which of these provisions to apply, so their applicability at all is in doubt at the outset. Moreover, the language of these provisions, making the assignment dependent upon the location of the "damage or impact the violated standard is designed to prevent," suggests that they apply to violations of substantive performance standards and not to essentially procedural ones like mining without a permit. Thus in this case no points for extent of damage are appropriate.

Id. at 309, 88 I.D. at 835-36. We, therefore, delete the eight points assigned under 30 CFR 723.13(b)(2)(ii).

C&N contends that it was not responsible for the violation and no negligence points should be assigned. OSMRE argues that C&N intentionally engaged in mining operations on the unpermitted site, with full knowledge that a permit was required, and that the maximum 25 points should be assigned. The record evidence supports OSMRE's argument. Twenty-five points should properly be assigned under 30 CFR 723.13(b)(3). Therefore, we conclude that the total assigned points should be 43 and that the civil penalty for violation No. 4 should be \$ 2,300, in accordance with 30 CFR 723.14.

To summarize, we hereby reverse Judge Torbett's October 1985 decision to the extent it vacated violation No. 1 and affirm the decision to the extent it sustained violation Nos. 3 and 4. A civil penalty of \$ 1,800 is assessed for violation No. 1. Judge Torbett's decision assessing a civil penalty of \$ 1,500 for each of violation Nos. 3 and 4 is modified to the extent a civil penalty of \$ 1,800 is assessed for violation No. 3 and a civil penalty of \$ 2,300 is assessed for violation No. 4.

Therefore, 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 affirmed in part, affirmed as modified in part, and reversed in part.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

Normally the question of whether an issue may be raised at a hearing is properly decided by examining whether the opposing party was reasonably informed and had an opportunity to prepare to present evidence. However, there are issues so fundamental to the system of justice that they may be raised at any point in a proceeding. I am of the opinion that service of a notice of violation (NOV) or cessation order (CO) is so fundamental to procedural due process and the purposes of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), the issue of proper service may be raised for the first time at a hearing. The history of this case illustrates why.

Following the assessment conference, the Office of Surface Mining Reclamation and Enforcement (OSMRE) filed a complaint in Federal district court seeking to collect the penalties assessed for failure to abate the violations of SMCRA set forth in the NOV's now before us. The complaint and summons were properly served on C&N Coal Company, Inc. (C&N), which filed an answer. A stipulated settlement was entered into on May 24, 1983, and approved by the court on June 6, 1983. Based on the approved settlement agreement, the court dismissed the complaint on October 3, 1983. The settlement agreement provided that C&N would apply for administrative review of the fact of violation and the amount of the penalty assessed for NOV No. 80-2-86-5. OSMRE was to withhold further collective action on the penalty for CO No. 80-2-86-9 until completion of administrative review of the NOV.

A Petition for Review was filed with the Hearings Division, Office of Hearings and Appeals, on August 29, 1983. That petition did not allege a failure to properly serve the NOV. On May 18, 1984, C&N filed a request for production of documents. On August 22, 1984, counsel for C&N sent a letter to the Solicitor's Office seeking a response to the request for production of documents. On February 5, 1985, Administrative Law Judge Torbett set March 20, 1985, as the date of the hearing. On February 20, counsel for C&N filed a Motion to Compel Discovery. On March 5, counsel for OSMRE filed a Motion for Continuance seeking a new hearing date and to be given until April 12, 1985, to respond to the discovery request.

The hearing was postponed and the time sought for response to the discovery request was granted by an order dated March 5, 1985. In that order Judge Torbett admonished OSMRE for not having acted upon the request for production for 9 months and filing a motion for additional time only after the hearing date had been set and a motion to compel had been filed. The hearing was reset for April 25, 1985.

On April 2, 1985, counsel for OSMRE again sought additional time to respond to the production request and a postponement of the hearing. By order dated April 11, 1985, OSMRE was granted until April 30, 1985, to respond to the discovery request and the hearing was set for May 9, 1985. On April 30, 1985, almost a year after the request, but a mere 9 days before the hearing, OSMRE complied with the production request. The issue of service of the NOV was first raised at the hearing on May 9, 1985.

SMCRA requires that an OSMRE inspector, upon detecting a violation, "forthwith inform the operator in writing." 30 U.S.C. § 1267(e) (1982); see also section 1271(a)(5) (1982). As noted by the majority, the regulations promulgated under SMCRA require that an NOV or CO be served by tendering it at the minesite, sending a copy by certified mail, or delivering it personally. 30 CFR 722.14(a), 843.14(a). In the case before us, the NOV was not tendered at the minesite or hand delivered. The question raised at the hearing was whether the NOV had been served by mail.

An NOV informs a mine operator of the specific act which has resulted in a violation, the section of SMCRA or the regulations which has been violated, the abatement measures to be undertaken, and the times in which the measures must be undertaken. 30 U.S.C. § 1271(a)(5) (1982). Such information is necessary for procedural due process protections to have meaningful effect. Service of an NOV or CO is the fundamental fact upon which the legitimacy of subsequent enforcement procedures rests and the measuring point for undertaking them. See 30 U.S.C. §§ 1268(c), 1271(a)(5), 1275(a)(1) (1982); 30 CFR Parts 722, 843; 43 CFR 4.1162(a).

It is abhorrent to the legal system that any proceedings may be begun against a party, be they civil or criminal, judicial or administrative, without his being informed. The provision of SMCRA requiring a written NOV, specifying its contents, and mandating prompt delivery, are in accord with this principle. As a practical matter, service of an NOV or CO also is the mechanism by which SMCRA's purposes of protecting the environment and assuring reclamation of mined lands are achieved. See 30 U.S.C. § 1202(d) and (e) (1982). If an NOV is not served, the environmental problems for which the NOV was written will not be corrected because the mine operator will neither know that he is required to abate nor know the measures to be taken.

The majority concludes that C&N, by failing to raise the issue of service in its application for review or an amendment to the application, waived its right to subsequently raise the issue. It reaches this result by analogizing an NOV with a civil complaint, an application for review with an answer, and an answer by OSMRE with a reply. Based on the analogy, the majority applies rule 12(h) of the Federal Rules of Civil Procedure. I reject this approach.

The majority is misled by its analogy. The fact that documents in a surface mining enforcement proceeding are usually written in a particular order does not mean that they are analogous to documents filed in the same order in a civil proceeding before a court. The sequence of drafting does not determine the nature or purpose of a document. The documents are defined by the procedural rules under which they are prepared and filed. An NOV or CO is not a complaint, and an application for review is not an answer.

Although an NOV or CO is indeed the first document prepared in a surface mining enforcement proceeding, an NOV or CO is neither a pleading nor a complaint. It does not initiate a judicial proceeding or an administrative hearing. See Fed. R. Civ. P. 3. A hearing will be held only if the party receiving an NOV or CO requests one by filing an application. Nor does an

NOV or CO give "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In fact, an NOV or CO makes no claim for relief whatsoever and is not before any forum which can grant or deny relief.

Strictly speaking, an NOV or CO does not even contain any "averments." Fed. R. Civ. P. 8. Rather, an NOV or CO constitutes the findings of the inspector as to the fact of a violation of the surface mining laws. See 30 U.S.C. §§ 1267(e), 1271(a)(2), 1271(a)(3) (1982); 30 CFR 843.11, 843.12. These findings will be conclusive unless challenged by filing an application for an administrative hearing. An NOV orders an operator to correct the violations cited by undertaking the abatement measures it prescribes, and a CO orders an operator to stop mining. A civil complaint has no such effect.

Although an application for review may be the second document, it is neither the second pleading nor an answer. It is not a document which "joins the issues for the hearing" because an NOV or CO does not define any issues. It is unlikely that this Board would ever find sufficient an application which did no more than simply "admit or deny the averments upon which the adverse party relies." Fed. R. Civ. P. 8(b). It is even less likely we would approve of one which simply asserted that the party was "without knowledge or information sufficient to form a belief as to the truth" of the averments. Id. Rather, an application for review is required to contain, inter alia, "[a] statement of facts entitling that person to administrative relief" and "[a] request for specific relief." 43 CFR 4.1164.8(a). In fact, an application for review may be dismissed for failure to state a claim upon which administrative relief may be granted. 43 CFR 4.1169.

The majority is misled by its analogy because it neglects the rules governing surface mining enforcement proceedings. If any document in a surface mining civil enforcement proceeding is analogous to a civil complaint, the regulations clearly indicate that it would be the application for review, not the NOV or CO. Compare 43 CFR 4.1164 with Fed. R. Civ. P. 8(a). If any document is comparable to an answer to a civil complaint, it is an answer to a petition for review. Compare 43 CFR 4.1169 with Fed. R. Civ. P. 8(b). There may be good and valid reasons for requiring a party to raise certain issues in its application for review or for otherwise limiting the time within which some issues may be raised. However, the fact that an application for review may be the second document prepared in a surface mining enforcement proceeding is not one.

The second reason I reject the approach taken by the majority is that I am not of the opinion that it is wise to adopt the Federal Rules of Civil Procedure as controlling practice before an Administrative Law Judge. However, if it is to be the policy of this Board to use the Federal rules to determine procedural requirements, I hope that all of the rules will be followed, rather than doing so piecemeal. In saying this, I would also find the Federal rules regarding amendment of a complaint (rule 15) and discovery (rules 26 through 37) applicable. The procedural history of this case illustrates the inherent unfairness of not doing so.

A terse reading of rule 15 leaves little doubt that, if during the course of discovery a party finds that he has not raised a relevant issue or has mischaracterized an issue in the complaint, he may seek leave to amend his complaint. 1/ Leave to amend pleadings is to be freely given when justice requires. Not only can one seek leave to amend his pleadings prior to trial, pleadings may even be amended after the trial in order to conform the pleadings to the evidence.

There can be no doubt that OSMRE did not comply with the Federal Rules of Civil Procedure with respect to the timely response to the request for production of documents. See Fed. R. Civ. P. 34(b). As a matter of fact, it would appear that for 9 months no effort was made to comply. By that time the hearing date had been set and C&N had filed a motion to compel production. Had OSMRE complied with the request for production within a reasonable time, C&N would have had ample time to amend its Application for Review. As it developed, there was effectively no time to do so.

Considering the apparent practice of OSMRE to not respond to a request for production until after a hearing date has been set and the apparent practice of the Administrative Law Judge to set the hearing date prior to the completion of discovery -- giving only 9 days to digest the information submitted and respond -- a petitioner is effectively barred from amending a petition for review based upon evidence disclosed as a result of a request for production of documents. 2/

The majority contends that OSMRE properly claimed surprise when the issue of service was raised at the hearing. I contend that this "surprise" was a direct result of OSMRE's failure to act upon the request for production of documents in a timely manner. I further find that OSMRE's claim of surprise could easily have been substantiated by a submittal of proof of service with post-trial briefs or with the answer to the statement of reasons on appeal. Surely OSMRE can no longer claim that there was no time to prepare an answer to this contention or to submit evidence of service. Rather, it has chosen to challenge C&N's claim on procedural grounds. As it now stands,

1/ The Departmental regulations pertaining to amendment of pleadings were amended subsequent to the date of the hearing. 43 CFR 4.1363 now provides that:

"(c) A request for review may be amended once as a matter of right prior to filing of an answer or motion or statement filed in accordance with paragraph (b) of this section. Thereafter a motion for leave to amend the request shall be filed with the Administrative Law Judge. An Administrative Law Judge may not grant a motion for leave to amend unless all parties agree to an extension of the date for commencement of the hearing under § 4.1364. A request for review may not be amended after a hearing commences."

52 FR 39527 (Oct. 22, 1987).

2/ Under the Departmental regulation set out in note 1, this bar would be absolute if OSMRE did not agree to an amendment. In this case it vigorously opposed all attempts to raise the issue of proper service.

I find nothing in the record to convince me that OSMRE ever complied with 30 CFR 722.14(a) or 30 CFR 843.14(a).

When justice would be served by the amendment of a petition for review, the Administrative Law Judge and this Board should be liberal in the grant of leave to amend. Under the circumstances of this case, for this Board to deny the consideration of proper service of the NOV on strictly procedural grounds serves only to perpetuate an injustice created by OSMRE's failure to timely respond to a request for production of documents.

R. W. Mullen
Administrative Judge