

H&B COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1405

Decided August 3, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying applications for review of a notice of violation and a cessation order. NX 5-42-R (NOV No. 84-13-290-10), NX 5-104-R (CO No. 85-13-290-6).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally-- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Where an Administrative Law Judge upholds a notice of violation issued on the basis that discharges from a permittee's sedimentation ponds had reaffected downslope areas outside the permit area by causing erosion, but the evidence submitted at a hearing on the notice of violation establishes that previous mine operators had placed spoil on the downslope; that they had abandoned the minesite without stabilizing or reclaiming the downslope area; that the permittee did not commence its operations until many months after abandonment; and there is testimony that there were no discharges from those ponds, the Administrative Law Judge's decision will be reversed.

APPEARANCES: Thomas L. Pruitt, Esq., Grundy, Virginia, for appellant; 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

H&B Coal Company, Inc., (H&B) has appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated June 2, 1986, denying H&B's

applications for review of notice of violation (NOV) No. 84-13-290-10 and cessation order (CO) No. 85-13-290-6 issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) with respect to H&B's underground coal mining operations (Mine No. 1) in Buchanan County, Virginia.

On September 24, 1984, following a September 18, 1984, inspection, OSMRE Inspector Carroll Blevins issued Ten-day Notice (TDN) No. 84-13-290-8 notifying the State of Virginia that H&B had conducted "surface coal mining operations" outside the area permitted to H&B under State permit No. 1400064 without obtaining prior approval from the Virginia Division of Mined Land Reclamation (VDMLR) (Exh. F at 1). The TDN stated that it applied to the "downslope material located below the Blair and Eagle Coal Seams on the old Cumberland and R.J.B. Mining sites." Id. In a "Narrative for Minesite Evaluation Report," dated September 18, 1984, attached to the TDN, Blevins stated that H&B's mining operations had "reaffected" the "downslope material" areas "in that these areas were seeded and drainage structures (ponds) discharge onto these outcrops. Slides, erosion, and slips have occurred on these areas." Id. at 4. At the time the TDN was issued, the State of Virginia was operating under an approved State program. See 30 CFR 946.10.

VDMLR declined to take any action in response to the TDN (Tr. 7-8; 51-52). Thereafter, on November 27, 1984, Blevins inspected the minesite, and on December 7, 1984, he issued NOV No. 84-13-290-10 to H&B for failure to obtain the prior approval of VDMLR for "surface coal mining operations" outside the permit area (Exh. R-1 at 2). The NOV stated that it applied to the same "downslope material" cited in the TDN. Id. 1/ H&B was required in the NOV to abate the violation by submitting on or before February 8, 1985, an application for a permit and/or an amendment of the existing permit with respect to the unpermitted area. 2/

On December 19, 1984, H&B filed applications for review of and temporary relief from the NOV. This case was docketed as NX 5-42-R, and on March 14, 1985, Judge McGuire held a hearing in Abingdon, Virginia. At the hearing, H&B pursued its application for temporary relief, which was denied by Judge McGuire in an oral ruling (Tr. 219). H&B took no appeal from that ruling.

After the hearing and following an April 26, 1985, inspection of the minesite, OSMRE Inspector Blevins issued CO No. 85-13-290-6 to H&B on May 6, 1985, for failure to abate the violation cited in the NOV. The CO required

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1/ OSMRE cited 30 CFR 771.11 (1983) as the regulation being violated. That regulation required one undertaking surface coal mining and reclamation operations to obtain a permanent program permit. That regulation is presently found at 30 CFR 701.11(a). OSMRE also cited the Virginia equivalent of 30 CFR 771.11 (1983)--VCSMR | 771.11.

2/ We note that if OSMRE determined based on a Federal inspection that H&B was conducting surface coal mining and reclamation operations without a valid permit, 30 CFR 843.11(a) requires OSMRE to issue a CO. See S&S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350, 355 (1985).

the immediate cessation of all surface coal mining operations being conducted on the "downslope material," and compliance with the abatement measures ordered in the NOV "in the most expeditious manner physically possible." H&B sought review of the CO (docketed as NX 5-104-R) and by order dated July 29, 1985, Judge McGuire, with the concurrence of H&B, consolidated the proceedings for purposes of rendering a final decision on H&B's applications for review of the NOV and CO. On June 2, 1986, Judge McGuire issued his decision denying H&B's applications for review. H&B has appealed from this decision. 3/

It is undisputed that the area encompassed by appellant's underground mining operations and certain adjacent areas had previously been subject to mining activity by R.J.B. Mining, Inc. (RJB), and the Cumberland Mining Corporation (Cumberland) and that RJB and Cumberland had placed spoil material on the downslope areas below the Eagle and Blair coal seams, which areas are for the most part outside the area currently permitted to appellant. 4/ The evidence indicates that RJB and Cumberland abandoned the minesite in October 1981. See Tr. 34; Exh. E at 3. It is also undisputed that appellant began its underground mining operations on or about June 1982, submitted an application for a permit to conduct mining operations, prepared by John E. Munsey Consulting Engineer, to the VDMLR on February 23, 1983, and, on May 6, 1983, received an approved permit. The record does not contain a copy of the approved permit. However, as described in appellant's permit application, appellant's mining operation was principally to involve two underground mining operations in the Clintwood and Eagle coal seams and a bench wastefill, the surface disturbance of which would encompass 4.16 acres of land

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3/ In his decision, Judge McGuire in recounting the evidence stated that it included "12 documentary exhibits marked and entered into evidence as applicant's Exhibits A through G and I through M" (Decision at 3). The transcript of the hearing shows, however, that another exhibit--Exh. H, styled the H&B Coal Co. Geology-Surface Water Hydrology Map, was marked and received into evidence (Tr. 3A 85-86). That exhibit was not included as part of the record before this Board.

4/ At the hearing, appellant submitted copies of NOV's (Nos. 81-1-25-28 and 81-1-25-27) issued by OSMRE Inspector Blevins on Nov. 12, 1981, citing RJB and Cumberland in part with improper placement of spoil material on the downslope areas in violation of 30 CFR 717.14(c). See Exhs. A and C. The NOV's required RJB and Cumberland to remove all spoil material, grade the affected areas to approximate original contour, and seed, fertilize and mulch the graded areas by Jan. 15, 1982 (Cumberland), and Jan. 22, 1982 (RJB). In addition, appellant submitted a copy of CO No. 81-1-25-1 subsequently issued by OSMRE Inspector Blevins to RJB on Feb. 2, 1982, in part for failure to abate the violations regarding improper placement of spoil material. See Exh. B. On July 25, 1984, Administrative Law Judge Frederick A. Miller affirmed issuance of the NOV and CO to RJB and the NOV to Cumberland. See Exh. E. Subsequent to that decision and following his Sept. 18, 1984, inspection of the minesite, OSMRE Inspector Blevins issued a CO on Sept. 25, 1984, to Cumberland for failure to abate the NOV upheld by Judge Miller. Neither RJB nor Cumberland ever took any action to stabilize or reclaim the downslope material.

situated in a region characterized as "unmanaged forest land with average land slopes in excess of 26 [degrees]" and "thin topsoil cover with varied stone exposures" (Permit Application at 35). <sup>5/</sup> The permit application provided for the control of sediment run-off by means of directing run-off to basins constructed in the bench portions of the permit area. Of particular concern to the present case are the two basins denominated B-2 and B-5 located immediately uphill from the two downslope material areas situated, respectively, below the Eagle and Blair coal seams. These basins are the "drainage structures (ponds)" allegedly discharging onto the out slopes referred to in the September 18, 1984, "Narrative for Minesite Evaluation Report" attached to the TDN.

Basin B-2 was to control drainage from the Clintwood coal seam stockpile area, a topsoil storage area and a portion of an access road (Permit Application at 6). In addition, a berm constructed along the outer edge of the bench area was to direct run-off away from the downslope areas and into basin B-2 and a silt fence constructed along the toe of the downslope material immediately below the bench area was to stabilize that material in order to insure revegetation. Id. Basin B-5 was to control drainage from both the northern and southern portions of the Eagle coal seam mine bench, as well as a topsoil storage area and an access road. Id. at 6-7. In addition, run-off was to be directed into basin B-5 by means of rock rip-rap and corrugated metal pipe flumes and a berm constructed along the outer edge of the bench area. The berm was to direct the run-off away from the downslope areas. Id. A silt fence constructed along the toe of the downslope material immediately below the bench area was to stabilize that material. Id. at 7. The permit application provided that all basins would discharge through corrugated metal pipe outlets, the basins would be constructed to provide storage for 0.125-acre feet of water for each disturbed acre and the basins and outlets would be constructed to safely pass peak flow for a 10-year 24-hour storm event. Id. Finally, the permit application provided that "[a]ll discharge points" would be "rock rip-rapped or a sock flume installed to insure no erosion of the out slope." <sup>6/</sup> Id.

In a May 11, 1984, letter to the VDMLR, H&B stated that it had completed mining "as of April 5, 1984" and that all structures would be letter

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<sup>5/</sup> Appellant's permit application, along with appendices A through F, is contained in Exhibit R-13 submitted by OSMRE. That exhibit also includes a loose document which consists of a May 22, 1984, letter from Carl Collins, Permit Supervisor, VDMLR, to appellant with an attached May 11, 1984, letter from Harold Mullins, President, H&B, to VDMLR. For ease of reference, we will refer to the documents which constitute Exhibit R-13 by appropriate description and associated page number, rather than to the exhibit as a whole.

<sup>6/</sup> The permit application, at page 20, also stated that "[a]ll sediment structure outlet points will \* \* \* be rip-rapped with durable sandstone." Nevertheless, presuming that VDMLR approved appellant's permit application in toto, we must conclude that appellant was permitted to install sock flumes as an alternative to rip-rap. Judge McGuire in his decision, at page 7, took note that "all discharge points were to be rock rip-rapped or a sock flume was to have been installed in order to insure that no erosion would occur on the out slope."

removed from the minesite and backfilling and grading completed "within 60 days." In a May 22, 1984, letter to H&B, VDMLR acknowledged the May 1984 and stated that the permit had expired for mining purposes on May 18, 1984, and only reclamation work could be performed. VDMLR required appellant to backfill and regrade all disturbed areas, seed and mulch regraded areas and "[i]nsure adequate sediment/drainage control is provided for the disturbed areas (including haulage and access road)."

It is undisputed that, at the time of OSMRE's inspections, basins B-2 and B-5 were properly situated within the permit area and were constructed so as to discharge through corrugated plastic, rather than metal, pipe outlets with attached sock flumes. <sup>7/</sup> However, there is considerable dispute in the record regarding the condition of the discharge structures, whether any discharge had occurred and what, if any, effect such discharges had caused.

OSMRE Inspector Blevins testified that the corrugated plastic pipes had "cracked" and "broken away to a certain extent" once they left the basin embankments and portions of the sock flumes had "pulled away" from the pipes (Tr. 15). He stated that he had concluded that the condition of the discharge structures had caused water to bypass the sock flumes and rundown the spoil material, thereby causing erosion (Tr. 20-21). He testified that he observed "some erosion" underneath the sock flumes running 80 to 100 feet down the downslope areas (Tr. 16). In addition, OSMRE introduced photographs taken by Blevins of the downslope areas. See Exhs. R-2 through R-11.

Billy C. Mullins, co-owner of H&B, testified that the ends of the sock flumes were not attached completely around the outlets of the corrugated plastic pipes but were partially connected to the bottoms of the pipes with pieces of wire and then split "just a little bit" at the top so that water could enter the flumes (Tr. 172). Mullins considered the arrangement adequate because water would gradually increase its rate of flow as it was discharged from the basins. Id. James E. Smith, a reclamation inspector with VDMLR who inspected the minesite, testified that the sock flumes were properly connected to the pipes and any discharge from the basins would enter the sock flumes (Tr. 98-99, 114). However, John E. Munsey, whose firm prepared the permit application, testified that the sock flumes had originally been installed so that the ends were attached completely around the outlets of the pipes and that flumes only half around the outlets would not be considered properly attached (Tr. 133-34).

Appellant's position at the hearing, however, was that the condition of the plastic pipes and sock flumes aside, no discharges had ever occurred from the two basins. Mullins testified that he was present at the minesite 5 to 6 days a week during the course of mining operations and had been to the site since the cessation of operations but had never observed any

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<sup>7/</sup> There is no evidence that appellant was ever cited by VDMLR or OSMRE for deviating from the approved permit by using plastic, rather than metal, pipe. See Tr. 97.

discharges from the basins, even during periods of heavy rain. He attributed this to the size of the basins (Tr. 176-78). He stated that any water which collected in the large basins would evaporate (Tr. 178). Munsey testified that he had observed no discharge during his five visits to the minesite (Tr. 125-26, 133). He attributed the absence of any discharges principally to the "smaller watershed" contributing water to the basins owing to the elongated nature of the minesite located near the top of the mountain (Tr. 126-27). Smith testified that after the issuance of the permit he visited the site approximately 10 or 15 times and never observed a discharge from the basins (Tr. 83, 88-89). George J. O'Quinn, an environmental engineer employed by Munsey, visited the minesite on a monthly basis beginning in May 1983 in order to monitor water. He, likewise, testified that he never saw any discharges from the basins (Tr. 153-54). In addition, appellant introduced copies of monthly "Discharge Monitoring Report[s]" prepared by O'Quinn and submitted to VDMLR, which covered the period from May to December 1983 with the exception of July 1983 (Exh. K), January to December 1984 (Exh. L), and January 1985 (Exh. M). Each of these reports stated that no discharge had occurred during the reporting period. These reports were based on one or more visits to the minesite with respect to each month's reporting period (Tr. 158). Further, OSMRE Inspector Blevins, conclusions regarding the causes of erosion were based on his viewing of the site, not on any personal observation of any discharges from the basins (Tr. 42-43).

In his June 1986 decision, at page 8, Judge McGuire initially concluded that the photographs introduced by OSMRE, along with Blevins' explanatory testimony, were sufficient to establish a prima facie case that appellant's mining operations had caused "off permit disturbances," specifically erosion immediately below and adjacent to the discharge points for basins B-2 and B-5, and, thus, supported issuance of the NOV and CO. Judge McGuire then concluded that appellant had not rebutted that prima facie case. He reasoned that discharges from the basins must have been envisioned given the reported annual precipitation and capacity of the basins and that, in any event, the photographs established that erosion had, in fact, occurred below or adjacent to the discharge points for the basins and, thus, must necessarily have been caused by discharges from the basins, especially given the poor condition of the discharge structures. Id. at 9-10.

[1] From our review of the evidentiary record, we are unable to conclude that there were any discharges from basins B-2 and B-5 during the relevant time period. There is no evidence of the observance of any discharges by any of the witnesses at the hearing. There was no testimony that the basins were not adequate to accommodate the surface drainage from the associated watersheds. In fact, Judge McGuire specifically found that:

"One can reasonably presume that when the personnel of John E. Munsey consulting engineering firm designed these two sediment structures, their dimensions would be commensurate with the amount of surface drainage that each would be required to accommodate, depending upon ascertainable and known climatological factors" (Decision at 9). Moreover, there is no evidence which supports Blevins' conclusion that erosion on the downslope areas was caused by discharges from appellant's basins and associated discharge structures. Appellant offered testimony which indicated that the spoil

material on the downslope areas had never been properly stabilized by RJB and Cumberland and was subjected to uncontrolled drainage prior to construction of the berms, silt fences and sediment control basins. Specifically, Blevins, Smith, and Mullins all testified that the spoil material had never been seeded or otherwise stabilized by RJB and Cumberland (Tr. 44, 91, 176). The only action taken to stabilize the spoil material outside H&B's permit area was hydroseeding by appellant, undertaken at the request of VDMLR Inspector Smith (Tr. 90, 174-75).

Smith testified that no sediment control measures had been implemented prior to issuance of the permit to appellant and that erosion had previously occurred on the downslope areas (Tr. 90-91). The record contains only two relatively close-up photographs of the areas of the two sock flumes and immediately adjacent areas (Exhs. R-2 and R-9). <sup>8/</sup> These photographs indicate the presence of vegetated rocky soil; however, there is no evidence of erosion in Exh. R-2 and while there are some bare areas visible in Exh. R-9, it is not clear that they were caused by discharges from the basins and associated discharge structures. Thus, despite Blevins' testimony that drainage had exited the basins and created some erosion (Tr. 16, 19-21, 43), none of the photographic evidence specifically supports that claim. While OSMRE's evidence may have been sufficient to establish a prima facie case that appellant created the erosion which OSMRE alleged gave rise to the violation, H&B clearly overcame that case and established by a preponderance of the evidence that it was not responsible for that condition. <sup>9/</sup>

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<sup>8/</sup> The record contains two distant photographs of the sock flume below basin B-2 (Exhs. R-7 and R-11), but it is impossible to tell from the photographs the condition of the areas underneath or adjacent to the flume. There are other photographs which depict the effects of erosion in the vicinity of the basins (Exhs. R-3, R-5, R-8, and R-10), but, other than Blevins' testimony, there is no evidence that the erosion is clearly associated with any discharges from the basins. See Tr. 18-19, 21-22, 43, 46-48, 145, 182. In fact, the worst erosion is depicted in Exhibit R-3, yet on cross-examination Blevins testified as follows regarding that exhibit:

"Q. Why does the flume not show up in that particular eroded area?

"A. The flume is to the right or left of it. More than likely its's out of the picture.

"Q. Are you saying that this is an area where the flume ran, but it just cannot be seen for some reason?

"A. I don't know whether the flume ran there or not, but obviously that is an erosion gully that exists from the pond."

(Tr. 47).

<sup>9/</sup> In its brief, at page 15, OSMRE contends that Judge McGuire's June 1986 decision is also supported by the fact that appellant's silt fence failed causing erosion in portions of the downslope areas other than below or adjacent to the discharge points for basins B-2 and B-5. The narrative attached to the TDN indicates that the NOV was not issued on the basis of failure of the silt fence. See Tr. 17, 28, 63. Indeed, Blevins' testimony regarding failure of the silt fence was based on a visit to the site by him on the day before the hearing (Tr. 25-27, 52). At the hearing, appellant's counsel objected to the introduction of any evidence regarding failure of the silt fence because "that is not what we are charged with" (Tr. 22). Although Judge McGuire overruled the objection (Tr. 23-24), he did not rely on failure

Since we have concluded that H&B is not responsible for the condition which Judge McGuire found supported the violation, it is unnecessary to determine whether such "off-permit disturbances," if they had been caused by H&B, would constitute "surface coal mining operations" within the meaning of 30 U.S.C. | 1291(28) (1982), 10/ and, thus, support the violation cited by OSMRE--conducting surface coal mining and reclamation operations without a permit. 11/

However, OSMRE alleges that two other actions by H&B justify the issuance of the NOV and CO, even though they were not relied upon by Judge McGuire in reaching his conclusion--hydroseeding of the downslope area and the actual installation of the sock flumes. We will address each of these allegations in turn.

OSMRE contends that the hydroseeding undertaken outside the permit area by appellant at the request of the VDMLR inspector supports the violation because that action constituted "surface coal mining operations" (OSMRE Brief at 15; see Tr. 16, 48). Although Judge McGuire summarized Inspector Blevins' testimony by stating that Blevins had noted that the downslopes

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fn. 9 (continued)

of the silt fence in rendering his June 1986 decision. As noted supra, the silt fence was only intended to stabilize the portion of the downslope areas below the berms to the edge of the permit area. According to VDMLR Inspector Smith, the fence was removed once that portion of the downslope areas had revegetated (Tr. 95). Further, there is no conclusive evidence that any erosion beyond the permit boundary resulted from H&B's actions, rather than from the previous mining activity.

10/ The term "surface coal mining operations" is defined by SMCRA, 30 U.S.C. | 1291(28) (1982), to include "activities \* \* \* subject to the requirements of sec. 516 [30 U.S.C. | 1266 (1982)] surface operations and surface impacts incident to an underground coal mine" and the "areas upon which such activities occur or where such activities disturb the natural land surface." The regulations at 30 CFR 701.5 define "[u]nderground mining activities" as a combination of--

"(a) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage area, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

"(b) underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting."

11/ We note that where a discharge structure is not properly constructed or maintained thereby resulting in erosion or other disturbances, a permittee may be charged, in the case of an underground coal mine, with a violation of 30 CFR 817.47 (or its state equivalent). That regulation provides that "[d]ischarge from sedimentation ponds \* \* \* shall be controlled, by energy dissipators, rip-rap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance."

had eroded as a result of discharges from the pond and "as a result of applicant's attempts to reseed both downslope areas" (Decision at 3), Blevins specifically testified that seeding the downslopes had "no detrimental effect" (Tr. 49). Blevins' position was that the seeding "clearly falls within the meaning of reclamation activity with respect to surface coal mining operations" (Tr. 49).

OSMRE does not take issue with the evidence that appellant seeded the downslope areas solely at the request of the VDMLR inspector in order to stabilize areas disturbed by previous mining activity. Moreover, Blevins admitted that appellant was under no obligation to reclaim the areas (Tr. 48). Rather, OSMRE notes that the seeding of the entire downslope area benefited appellant by ensuring the stability of that portion of the downslope area within the permit area (OSMRE Brief at 14).

Where appellant did not disturb the downslope areas outside the permit area and was under no obligation to stabilize that area and where its seeding activities were undertaken at the request of the State inspector, such action clearly cannot be considered "surface coal mining operations" so as to require the acquisition of a permit for that area, despite the fact that appellant may have derived some benefit from its action.

Further, since the regulation cited by OSMRE in support of the violation (see note 1, supra), referred to conducting "surface coal mining and reclamation operations" without a permit and the OSMRE inspector described the seeding as reclamation, the question arises whether appellant's seeding activity fits that definition. "Surface coal mining and reclamation operations" is defined in SMCRA as "surface coal mining operations and all activities necessary and incident to the reclamation of such operations." 30 U.S.C. | 1291(27) (1982). Was the seeding of off-permit areas "necessary and incident to the reclamation" of appellant's surface coal mining operations? Clearly not; appellant had no obligation to seed the areas in question since they were not disturbed in the course of appellant's surface coal mining operations.

Finally, OSMRE alleges that the actual placement of the sock flumes constituted "surface coal mining operations." Again, Judge McGuire made no determination that such activity supported the cited violation, and, in fact, the narrative attached to the TDN made no mention that OSMRE was concerned about their placement. See Exh. F; Tr. 64. Further, placement of the sock flumes was apparently undertaken pursuant to state approval of the permit application. Placement of the flumes does not support the charged violation. 12/

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12/ Appellant also challenges OSMRE's issuance of the NOV on jurisdictional grounds, contending that OSMRE had no authority to issue an NOV where the State of Virginia was operating under an approved State program and OSMRE had not taken over enforcement of that program pursuant to sec. 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982). It is now well established by the Board that 30 CFR 843.12(a)(2) requires issuance of an NOV where, after issuance

Therefore, we hold that OSMRE improperly issued the NOV and CO in question and we reverse Judge McGuire's June 1986 decision affirming issuance of that NOV and CO and denying appellant's applications for review thereof.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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Bruce R. Harris  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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Gail M. Frazier  
Administrative Judge

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fn. 12 (continued)  
of a TDN, a state fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300, 302 (1987). That regulation has not been declared invalid by a court of competent jurisdiction and remains binding on the Department.