

Appeal from a decision of the Harrisburg Field Office, Office of Surface Mining Reclamation and Enforcement, affirming a Johnstown Area Office determination that the Pennsylvania Department of Environmental Resources response to Ten-Day Notice No. 87-121-270-3-TV1 was appropriate. 4332/INE 4.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Forfeiture--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: Topsoil: Generally

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

APPEARANCES: Mario L. Marcon, Harrison City, Pennsylvania, pro se; Wayne A. Babcock, Esq., Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mario L. Marcon has appealed from a decision of the Director, Harrisburg Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated October 13, 1987, affirming a Johnstown Area Office determination that the Commonwealth of Pennsylvania Department of Natural Resources (DER) had appropriately responded to Ten-Day Notice No. 87-121-270-3-TV1.

This 10-day notice, dated July 14, 1987, was issued to DER pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982). In its notice, OSMRE stated that "citizen information" offered reason to believe that a violation of 25 Pa. Code ch. 86.215 1/ had occurred. The site of the alleged violation was an abandoned minesite described in mine drainage permit (MDP) 3474SM55, which had been issued to Lakeside Coal Company.

The "citizen information" received by OSMRE was contained in a June 30, 1987, letter from appellant received by OSMRE on July 13. Marcon stated that he owned property adjoining lands described in MDP 3474SM55 2/ and that ground disturbed during stripping operations under this permit was being used by Valley Landfill to build haulage roads and to cover garbage dumped at a nearby landfill site. In appellant's view, these actions would leave insufficient material available to adequately reclaim the stripped lands. Eager to have an existing highwall removed, Marcon asked OSMRE to determine whether sufficient bond had been posted to assure reclamation of the stripped lands and sought information regarding actions to enforce collection of outstanding bonds. 3/

By letter of July 27, 1987, DER responded to the 10-day notice and informed OSMRE and Marcon that Frank Brunner, owner of Valley Landfill (and of much of the property originally mined by Lakeside Coal Company) had been advised that he was required to reclaim the abandoned minesite from which soil had been removed. The letter stated that Brunner had no objection to this requirement, whether set forth in a State solid waste permit or in some other binding agreement with DER. DER noted that if a solid waste permit were to be issued for the landfill, Brunner would be required to post a sizable bond to insure reclamation of all areas affected by the landfill.

In this same letter, DER stated that a mining bond 4/ for Lakeside Coal Company had been forfeited on March 29, 1985. DER noted that this action

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1/ This statute sets forth the procedures for requesting a DER inspection of a coal mine on the basis of citizen information. See also 30 CFR 842.12.

2/ Appellant's letter indicates that three mining permits have been issued for lands within the boundaries of MDP 3474SM55. These mining permits (MP) are: MP 1365-2 (34 acres); MP 1365-2A (44.6 acres); and MP 101365-01-0 (17.3 acres). For an understanding of the State's permitting system, see Thompson Brothers Coal Co. v. OSMRE, 105 IBLA 69, 74 (1988).

3/ Each of the mining permits listed in note 2 was separately bonded. Transamerican Insurance Company issued a bond for MP 1365-2 (No. 5211-60-43) and MP 1365-2A (No. 5211-88-54) in the amounts of \$19,550 and \$22,300, respectively. Rockwood Insurance Company issued a bond for MP 101365-01-0 (No. SM1229) in the amount of \$39,000.

4/ Elsewhere in the record, OSMRE speaks of DER's actions forfeiting bonds (plural) at the abandoned minesite. (Letter to appellant from the Director, Harrisburg Field Office, OSMRE, Oct. 13, 1987, at 1).

had been appealed, but the agency was proceeding with forfeiture. Once forfeiture was complete, DER would rank the minesite on a statewide list of sites to be reclaimed, and the timing of the reclamation operations would depend on the actual ranking of this site.

In deciding whether DER took "appropriate action" in response to OSMRE's 10-day notice, as set out in 30 U.S.C. | 1271(a) (1982), OSMRE prepared various internal memoranda. One such memorandum, dated August 12, 1987, stated that DER had issued a cessation order and a failure-to-abate cessation order for nonconcurrent reclamation of the minesite. Another memorandum, dated August 14, 1987, noted that DER's response had not informed Marcon of his right to an informal review of the response, contrary to DER's program guidance manual. A third memorandum, dated September 1, 1987, attributed this failure to DER's "verbal policy" favoring discretionary use of informal review procedures. This final memorandum recommended that OSMRE find DER's response to be appropriate, but that DER should submit a statement of its discretionary appeal rights policy for OSMRE field office review.

By letter of September 9, 1987, the Johnstown Area Office, OSMRE, informed DER that its response to Ten-Day Notice No. 87-121-270-3-TV1 was appropriate. On this same day, OSMRE wrote to Marcon, advising him of its finding and informing him of a right to informal review under 30 CFR 842.15. Appellant availed himself of this right, and by letter dated September 16, 1987, informed OSMRE that Valley Landfill continued to remove soil from the abandoned minesite for cover on the landfill. Marcon stated that, in response to his question whether Valley Landfill had the right to remove this soil, DER had stated only that the owner of the landfill, Frank Brunner, owned the property from which the soils were being removed. Appellant concluded his letter by asking OSMRE to furnish written authority for Valley Landfill's removal of soil. If such authority had been granted, appellant sought to determine the amount of bond posted to assure reclamation; if such authority had not been granted, appellant asked OSMRE to curtail further removal of soil.

On September 25, 1987, DER wrote Marcon a letter answering a number of the questions posed to OSMRE. The letter read in part:

The Department of Environmental Resources has the regulatory authority over this facility pursuant to the Solid Waste Management Act, the Clean Streams Law and the Surface Mining and Reclamation Act as well as the respective regulations promulgated thereunder. Several different Bureaus within the Department have the responsibility for administration of the individual statutes.

The authorization for the Valley Landfill to continue to operate without a permit pursuant to the Solid Waste Management Act was contained in the Commonwealth Court Decree of September, 1983. There has not been authority granted for any extraction of coal other than that conducted by the Lakeside Coal Company pursuant to Mine Drainage Permit No. 3474SM55. There is no prohibition of the use of soil or spoil from formerly surface

mined areas to be used in the landfill operation. Specific written authorization for use of cover soil as cover material is only required where the operator does not own the property from which the cover material will be removed.

The current bond covering the operation of the landfill is in the amount of \$45,000. In the event that a Solid Waste Management Permit is issued for the landfill, a significantly higher bond would be required. If a permit is denied the operator will be required to reclaim all areas affected by the landfill operation including that of any borrow area used for cover material.

The Department has taken action to forfeit the bond of Lakeside Coal Company, Inc. and that forfeiture action is under appeal by the company. Until such time as the Environmental Hearing Board issues an adjudication on that appeal, the Commonwealth cannot take action to collect on the forfeited bond. At that point the Department would not be involved in the collection of the bond and it would be turned over to the Attorney General's Office for collection. The actual reclamation of the area covered by the Lakeside Coal Company bonds would then be reclaimed under the Department of Environmental Resources forfeiture bond program which is managed by the Bureau of Abandoned Mine Reclamation.

We recognize that the Valley Landfill is continuing to use cover material from the unreclaimed surface mine but [this office] does not have a basis for prohibiting this action by the company.

The overall reclamation of both the landfill, upon its completion, and any borrow area from which cover is taken would be addressed in any permit issued by the Department or as part of the closure process if a permit is denied. \* \* \* The information presented in written correspondence from the Department is from the inspection staff in both the Mining & Reclamation and Waste Management program areas where inspections are conducted on a monthly basis.

Marcon enclosed a copy of the above-quoted letter in correspondence to OSMRE dated October 1, 1987. In this correspondence, appellant expressed his belief that the \$45,000 bond covering operation of the landfill could not be used to reclaim areas outside landfill boundaries.

The results of OSMRE's informal review under 30 CFR 842.15 are set forth in the Harrisburg Field Office (OSMRE) decision of October 13, 1987, presently under appeal. In this decision, OSMRE concluded that DER's action in forfeiting bonds for the abandoned minesite was consistent with Pennsylvania's approved regulatory program. For this reason, the Harrisburg Field Office affirmed the determination of the Johnstown Area Office, OSMRE, that DER appropriately responded to the 10-day notice.

Responding to Marcon's request that OSMRE curtail activity at the forfeited mining site, OSMRE advised Marcon that DER was the regulatory authority responsible for reclamation of forfeited mining operations. OSMRE also found that DER was taking adequate steps to effect restoration of the forfeited permit area. The decision concluded by stating that SMCRA does not grant OSMRE jurisdiction over Pennsylvania's regulatory activities regarding reclamation of forfeited sites.

On appeal, Marcon contends that SMCRA conveys to OSMRE "jurisdiction on Mining Permit #101365-01-0 [5/] issued May 6, 1983, regarding reclamation of such forfeited sites." Appellant also states that DER has not provided written authority for Valley Landfill's removal of soil from the forfeited area and has not required a bond adequate to assure reclamation.

Marcon's opening argument suggests the need for a brief discussion of OSMRE jurisdiction. SMCRA is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." See 30 U.S.C. | 1202(a) (1982). The Act's principal regulatory and enforcement provisions are contained in Title V, which establishes a two-tiered regulatory program to achieve the purposes of the statute. The two tiers consist of an interim, or initial, regulatory program and a permanent regulatory program. 30 U.S.C. | 1251 (1982). The interim regulations implemented only a portion of the Act's performance standards, and applied in each state until the state obtained the Secretary's approval of a permanent state regulatory program, or until the Secretary implemented a Federal program for the state. 30 CFR 710.2. Bannock Coal Co. v. OSMRE, 93 IBLA 225, 232 (1986).

Effective July 31, 1982, the Pennsylvania State program was conditionally approved by the Secretary. 30 CFR 938.10. On that date, DER was deemed the regulatory authority in Pennsylvania for all surface coal mining and reclamation operations and for all exploration operations on non-Federal and non-Indian lands. Id.

When a state program is approved, that state assumes the responsibility for issuing mining permits and enforcing the provisions of its regulatory program. In Re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. Shamrock Coal Co. v. OSMRE, 81 IBLA 374, 376 (1984), appeal dismissed, Civ. No. 84-238 (E.D. Ky. May 13, 1987); Turner Brothers, Inc. v. OSMRE, 92 IBLA 320 (1986).

Upon receipt of appellant's initial letter of June 30, 1987, describing Valley Landfill's use of the abandoned minesite ground, OSMRE exercised its oversight responsibility under SMCRA by issuing Ten-Day Notice No. 87-121-270-3-TV1. This action was taken pursuant to section 521(a)(1), 30 U.S.C. | 1271(a)(1) (1982), which provides in part:

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5/ See note 2.

Sec. 521. (a)(1) Whenever, on the basis of any information available to him, including receipt of information from any per-son, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If \* \* \* the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspec-tion of the surface coal mining operation at which the alleged violation is occurring \* \* \*. [Emphasis added.]

When OSMRE reviewed DER's enforcement of the State regulatory program, OSMRE found that DER had taken appropriate action. Nothing in appellant's pleadings causes us to reverse this finding. OSMRE's decision of October 13, 1987, is properly affirmed.

[1] The record reveals that DER has issued two cessation orders for nonconcurrent reclamation of the minesite. Had the agency stopped here, Marcon's appeal would have greater merit. However, DER has pursued the matter further by instituting an action to forfeit the bonds issued for the minesite. Although an appeal of this suit is presently pending, DER continues on this course. See Turner Brothers, Inc. v. OSMRE, 99 IBLA 87, 91 (1987).

Appellant's initial letter to OSMRE reveals that he knows the amount, serial number, and issuing company of each of the bonds covering operations within MDP 3474SM55. Nowhere in his pleadings, however, does he offer any evidence in support of his concern that reclamation costs will exceed the amounts available for reclamation. All indications in the record suggest that reclamation will occur, whether as the result of the pending bond forfeiture, as a requirement under the contemplated solid waste permit, 6/ or other agreement with DER. Brunner, the owner of the landfill and much of the minesite, does not dispute his reclamation obligation.

Similarly undisputed is DER's statement that Valley Landfill may use the soil or spoil from the abandoned minesite. Though appellant continues to seek written authorization of Valley Landfill's action, he does not con-tradict DER's assertion that written authorization is unnecessary where, as here, the owner of the property from which the cover material is removed is operating the landfill site.

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6/ In his statement of reasons, appellant suggests that the abandoned minesite would be a borrow area under such permit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, Harrisburg Field Office, is affirmed.

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R. W. Mullen  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge