

**Editor's note: Erratum -- See 122 IBLA 108A (June 12, 1992) below.**

J & M COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-504

Decided January 14, 1992

Petition for discretionary review of a decision of Administrative Law Judge David Torbett (Docket No. NX 6-60-P) denying petition for review of proposed civil penalties for Notices of Violation Nos. 85-132-523-005 and 86-132-523-002.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977:  
Exemptions: 2-Acre

Until its amendment in 1987, sec. 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), provided that SMCRA would not apply to the extraction of coal for commercial purposes where the surface mining operation affected 2 acres or less. Departmental regulations at 30 CFR 700.11(b), implementing the 2-acre exemption, provide that SMCRA applies to all surface mining and reclamation activities except the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of 2 acres or less. Operations are deemed related if they (1) occur within 12 months of each other, (2) are physically related, and (3) are under common control.

2. Surface Mining Control and Reclamation Act of 1977:  
Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

An operator challenging OSM's jurisdiction on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. OSM's determination that more than 2 acres have been disturbed at related minesites will be affirmed on appeal where the operator fails to show the contrary.

3. Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

A letter from counsel for OSM to an operator that (1) speaks only of "considering the possibility of settlement," (2) cautions that remedial action required by the NOV's must be completed and failure-to-abate CO's terminated before any settlement can be negotiated, and (3) invites the operator to contact him after completion of reclamation if it is still interested in settlement, creates no basis on which the operator may reasonably rely that OSM agreed that the civil penalties for the NOV's would be settled when reclamation was completed. Where an offer to settle is made by counsel for OSM following completion of reclamation, but is not accepted by the operator, there is no basis to consider estopping OSM from collecting civil penalties for the NOV's.

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

The value of the land on which the minesites are located is not germane to the process of assessing civil penalties.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally

Although backfilling and grading, the remedial action required to abate a violation of 30 CFR 717.14, may also be helpful in remedying a violation of 30 CFR 717.17 (concerning protection of the hydrologic system from mine runoff) by helping to control water flow from a minesite, an NOV citing violations of both 30 CFR 717.14 and 717.17 is not duplicative where the record establishes that there were violations of both regulations.

6. Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSM has determined that two minesites are related and that their combined acreages exceed 2 acres, so that the operations are not exempt from regulation under SMCRA, and where OSM has issued two NOV's at different times citing the operator of the two minesites for identical violations at both sites, the second NOV will be vacated and treated as an amendment

to the first for the purposes of calculating the civil penalty due for the violations.

APPEARANCES: Thomas L. Pruitt, Esq., Grundy, Virginia, for appellant; Paul A. Molinar, Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

By order dated August 3, 1989, the Board granted the petition of J & M Coal Company (J&M) for discretionary review of a May 18, 1989, decision of Administrative Law Judge David Torbett denying the petition of J&M for review of proposed civil penalties in the amount of \$8,100 for Notices of Violation (NOV) Nos. 85-132-523-005 and 86-132-523-002, issued to J&M by the Office of Surface Mining Reclamation and Enforcement (OSM). 1/

This case was initiated when OSM conducted a series of inspections of two underground minesites operated by J&M, designated as Mine Nos. 11 and 12. The minesites are located on a tributary of Poplar Creek in Buchanan County, Virginia, adjacent to Virginia State Route 614. The inspections were conducted as part of the 2-Acre Task Force by Doyle Boothroy, a trainee for the position of inspector with OSM, and his supervisor, OSM Inspector Marty Adkins.

Inspector Adkins and Boothroy conducted a "relatedness investigation" to determine if the two minesites could be considered together under the relatedness criteria set out at 30 CFR 700.11(b)(2). These criteria apply when deciding whether or not the acreages of separate minesites are properly combined in calculating acreage to determine the applicability of the 2-acre exemption previously provided by section 528 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1278 (1988); W. D. Martin v. OSM, 120 IBLA 279, 286 (1991). 2/ At the completion of the relatedness investigation, Boothroy determined that the two minesites were related. As the total disturbed area of both minesites was found to exceed 2 acres, the sites were not considered exempt from enforcement. Accordingly, Boothroy issued two NOV's.

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1/ On May 24, 1989, Judge Torbett issued a decision correcting a misstatement of the penalty points set forth on page 10 of his May 18, 1989, decision.

2/ We note that, by section 201(c) of the Act of May 7, 1987, P.L. 100-34, 101 Stat. 200, Congress repealed the 2-acre exemption, effective on Nov. 7, 1987. In view of our holding that the 2-acre exemption does not apply, it is unnecessary to consider what effect this repeal might have on the obligation to reclaim these minesites.

W. D. Martin v. OSM, supra, is presently on appeal to the U.S. District Court for the Western District of Virginia, sub nom. Martin v. OSM, Civ. No. 91-01-6313 (filed Sept. 30, 1991).

NOV No. 85-132-523-005 was issued for Mine No. 12 on November 25, 1985, charging J&M with three violations of the interim regulations: (1) failure to pass all surface drainage through a sediment pond in violation of 30 CFR 717.17, 3/ (2) failure to properly backfill, grade, and vegetate the minesite, entryways, and load-out and coal chute areas, in violation of 30 CFR 717.14(a)(1) and (2), and (3) failure to maintain spoil on the solid bench, in violation of 30 CFR 717.14(a)(1) (Exh. R-7).

NOV No. 86-132-523-002 was issued for Mine No. 11 on January 6, 1986, charging J&M with two violations: (1) failure to pass all surface drainage through a sediment pond in violation of 30 CFR 717.17, and (2) failure to place spoil on the solid bench in violation of 30 CFR 717.14(a) and (b), as well as failure to seal mine entries and revegetate the entire area (Exh. R-8). 4/

On August 14, 1986, following completion of the assessment conference with OSM, J&M filed its petition for review of the proposed civil penalty of \$8,100 for both NOV's. J&M's check dated August 15, 1986, in the amount of \$8,100 was sent under separate cover. Judge Torbett expressly ruled that the petition and prepayment were timely. 5/

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3/ The citation in this NOV is to "30 CFR 717.14," but this is plainly an error and did not mislead J&M. See Grafton Coal Co., 2 IBSMA 316, 321, 87 I.D. 521, 524 (1980); Island Creek Coal Co., 2 IBSMA 125, 129-30, 87 I.D. 304, 306 (1980). The section governing sedimentation controls is 30 CFR 717.17, which includes subsections corresponding to those listed by the inspector for this violation. The section was correctly cited for the sedimentation violation noted in NOV No. 86-132-523-002.

The record indicates that the mining activities involved herein took place between March 1978 and December 1981 (Exhs. R-1 and R-2; Tr. 23-26), which was prior to the adoption of the Virginia permanent program on Dec. 15, 1981. 30 CFR 946.10. Accordingly, the OSM Inspector cited J&M with violations of the Department's initial program regulations. See Alpine Construction Co. v. OSM, 101 IBLA 128, 130 n.1, 95 I.D. 16, 17-18 n.1 (1988).

4/ Subsequently, Cessation Order (CO) Nos. 86-132-423-3 and 86-132-423-4 were issued to J&M for failure to abate the violations contained in the two NOV's. The validity of these cessation orders and civil penalties assessed for them is not directly at issue in this proceeding. The fact that the CO's were issued and civil penalties assessed for them arises indirectly in connection with J&M's claim that OSM is estopped from refusing to vacate the NOV's by a settlement agreement, discussed below.

5/ On Sept. 8, 1986, OSM filed a motion to dismiss J&M's petition for review on the grounds that it was deficient and incomplete. Pursuant to Judge Torbett's order to file a more specific pleading, J&M filed a restated petition for review on Nov. 17, 1986.

On Oct. 29, 1986, OSM filed a second motion to dismiss, contending that J&M had not timely filed its petition for review. According to OSM, J&M had received the Assessment Conference Report on July 30, 1986, and under Departmental regulation 43 CFR 4.1151(b) had 15 days from receipt of

Correspondence in the case file between J&M and OSM during October and November 1987 indicates that the parties attempted to reach a settlement in this matter. The case was set for hearing before Judge Torbett on June 20, 1988, in Abingdon, Virginia. 6/ The testimony at the hearing was summarized as follows in Judge Torbett's decision:

[OSM's] evidence consisted of the testimony of OSM Reclamation Specialist Doyle Boothroy, as well as the introduction into evidence of 17 documentary and photographic exhibits marked and entered as [OSM's] Exhibits R-1 through R-17. [J&M's] evidence consisted of the testimony of Chad Hatcher, real estate appraiser; Elmer McClanahan, the owner of J & M Coal; Dennis Willis, a consulting engineer with the firm of Willis, Skeen, & Associates, and Steven F. Gibson, formerly Mr. McClanahan's attorney, who had been allowed to withdraw by the undersigned [(Judge Torbett)] so that he could testify on behalf of his former client. [J&M] also introduced seven exhibits numbered and entered A-1 through A-7. [7/]

Inspector Boothroy testified that he had accompanied Inspector Adkins and had assisted in the relatedness investigation. That investigation revealed that both mine sites were operated by J & M within a 12-month period (Tr. 25, R-1, R-2). [OSM's] exhibits R-1 and R-2, which are the [Virginia Department of Mines and Quarries (DMQ)] Mine Index Reports, show that mining operations ceased on site number 11 in 1980 and began on site 12 in 1980 (Tr. 34). Both mines were also determined to be located on the same watershed on Poplar Creek, within five miles of each other, and both were operated by Elmer McClanahan as a sole proprietorship.

There was considerable testimony by both [J&M] and [OSM] as to the size of the two sites.

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fn. 5 (continued)

service of the report to file a petition for review and prepay the penalty with the Office of Hearings and Appeals (OHA). The petition for review was timely received on Aug. 14, 1986. However, the check for \$8,100 in prepayment was sent under separate cover in an envelope postmarked Aug. 18, 1986, and received by OHA on Aug. 20, 1986. On July 19, 1988, Judge Torbett held a hearing on this motion in Abingdon, Virginia. Because of the exceptional facts in this case, he found that Elmer McClanahan, owner and operator of J&M, had not been served on July 30, 1986, and had not received the Assessment Conference Report until Aug. 8, 1986. Thus, both the petition and prepayment were held timely. By order dated Nov. 17, 1988, Judge Torbett denied OSM's motions to dismiss.

6/ The hearing actually began on June 3, 1988, when all pending motions were discussed and argued before Judge Torbett. At the second hearing held on July 19, 1988, evidence was received on whether or not J&M's petition for review was filed in a timely manner. See note 5.

7/ Exhibit A-7 was apparently not admitted into evidence.

Inspector Boothroy on his 1985 inspections of the two sites had undertaken an informal survey. [OSM's] exhibit R-5 indicates that according to Inspector Boothroy site 12 contained 37,024 square feet. [OSM's] exhibit R-6, also compiled by Boothroy, indicates that site 11 was 99,501 square feet. Each of these exhibits [is] broken down into specific areas.

Inspector Boothroy explained that he had made the survey using a 300-foot tape, but that he did not use any surveying instruments (Tr. 29). He stated that "we just surveyed that area that was actually disturbed in the field" (Tr. 30). On cross examination, Boothroy agreed that no transit was used (Tr. 30), that he had made no effort to determine whether or not Mr. McClanahan had indeed disturbed all the areas that he included in his survey (Tr. 31) and that he had not used any instruments to "close" the survey. Boothroy stated "ours is just a rough general survey to determine the acreage" (Tr. 31). He went on to state that " \* \* \* I would estimate that our degree of accuracy here is possibly as much as plus or minus 10 per cent" (Tr. 31). Boothroy noted that since his initial training period, he had gone on to do over 300 surveys, but that only two of those surveys had ever been [checked] by registered professional surveyors to [determine] their accuracy (Tr. 32). Boothroy testified that some, but not all, sloping areas had been reduced to a horizontal projection not by a planimeter, but by a simple division process (Tr. 32). When asked to describe this process and its possible effect on the number of square feet, Boothroy testified:

\* \* \* A road there, the actual length of the road was either taped or measured and the road was not level, the road goes up the slope and curves around \* \* \* so there you could measure both the length of the road and the width of it to determine an average width and it will be a greater area than if it was reduced to a horizontal projection.

Q. And it would be a much greater area if the slope of the road was greater \* \* \*.

A. Well, yes; but not that much.

(Tr. 33).

The undersigned admitted evidence on the shadow area purely for appeal purposes, as the undersigned follows the Board's opinion in S & M Coal Co. and Jewel Smokeless Coal Co. v. OSM, 83 IBLA 620 (1984), for the principle that the shadow area is not to be retroactively applied to determine the size of an underground mine. Inspector Boothroy testified that he had used mine maps to determine that the underground mine works for mine number 11 were about seven acres and that for mine number 12 about 15 acres (Tr. 36).

There was considerable testimony on two areas--together over 40,000 square feet--of mine site number 11. Area number 7 on R-6 was listed by Inspector Boothroy as being a "slide area" and being approximately 20,248 feet. On cross examination Boothroy was asked about this area:

Q. The area that you have characterized on R-6 \* \* \* as the slide area \* \* \* what is that area exactly?

A. That was the graded area at the base of the slope. The slide area is all that area that was completely saturated with water and was sliding down on to the highway and that is the reason that the retaining wall had to be constructed.

(Tr. 54).

Boothroy agreed that he had simply divided the area to come to "a realistic figure that represented the actual area" (Tr. 55).

This same slide area, number 7 on R-6 was described by Mr. McClanahan. He testified that the Virginia State Highway Department had used the area during the 1978-81 period that McClanahan was mining the site, as a fill area for a slide caused by the old splash dam mine (Tr. 92). McClanahan testified that "they'd [the State Highway Department] haul down that slide area there all the time and dumped it while I was working there" (Tr. 92). As to whether the slide area in 1985 at the time of Boothroy's inspection was the same as it was in the 1978-80 period, McClanahan testified that it was different: "\* \* \* they [the Highway Department] built a retaining wall below it and hauled all the dirt out of it up there on top and filled it" (Tr. 92). As a result of this activity by the Highway Department the area was now a lot higher and filled in as a result of the retaining wall.

There was also considerable testimony on item number 8 on R-6 which was listed as being 20,000 square feet and called the lower bench. Inspector Boothroy testified that it was a large flat area that had been filled in between sites 11 and 12 (Tr. 56). Mr. Hatcher, [J&M's] expert witness on real estate, testified that this fill area was "\* \* \* considerably larger than the other two sites (site 11 and site 12)" (Tr. 86). He estimated that at least 35 or 40 percent of the total disturbance in the area was comprised by this area between the two mine sites (Tr. 86).

Mr. McClanahan testified that he did not disturb the area between the two sites (Tr. 92). He stated that the State Highway Department used the area for dumping. He testified: "they haul dirt up there all the time out of that slide that was coming off of there. The State would go up and move it and then haul it back up there on top" (Tr. 93, 99). McClanahan testified that

his mining did not cause the slide, but that it was caused by an old abandoned underground mine locally called the splash dam mine that was under the slide area that was known to be leaking water (Tr. 100).

When Boothroy was called back to testify on both the slide area and the lower bench area of mine site number 11, he stated that he "had no idea what it (the elevation) was back at the time of mining" (Tr. 120). He stated that he had included the lower bench in his survey of the disturbed area because he surmised that it would have to have been used as a load-out area (Tr. 120). He went on to state: "here again, these are all possibilities that I do not have any knowledge of, but they make sense as far as the mining operation is concerned" (Tr. 121).

When Mr. McClanahan was called on redirect, he testified as follows:

Q. \* \* \* I ask you very pointedly as to the fill area, did you use any portion of that area?

A. No, sir, I didn't.

Q. Did anything prevent you from using that?

A. Yes. \* \* \* There was a ditch line across there. See, after they filled that, they put a drain in there, a drain pipe, because I gave the man the pipe to put in. That was a low, swampy area.

(Tr. 126).

McClanahan testified that he had a different road, a semi-circle, that does not exist today, that provided him access as a haul-out area. McClanahan concluded his testimony by stating that the Highway Department had trucked material into the fill area and also into the slide area so that those areas were considerably altered from what they were in 1978-80 (Tr. 129).

There was also considerable testimony on the issue of the various violations. Both citations included violations requiring [J&M] to construct ponds on the site. Inspector Boothroy agreed that those violations were terminated by OSM although no ponds were ever constructed on the site (Tr. 58). Boothroy testified that the NOV was modified because alternative methods were used to control run-off (Tr. 59). He also agreed that the upper bench area on site 11 was small for a pond, but that one might have been built on the lower bench (Tr. 59). However, he went on to agree that the area he was proposing for a pond was too unstable for a pond (Tr. 60). Boothroy concluded that no ponds were needed to reclaim the site because alternative methods were deemed satisfactory (Tr. 60). In the process of reclaiming

the sites, [J&M] successfully used fabric fences and hay bales until vegetation prevented run-off and erosion (Tr. 60-62).

Mr. McClanahan testified on the appropriateness of ponds on either of these two sites. He stated that there was no place to put ponds on either site and that his lease prevented a pond on site 12 (Tr. 95). [J&M's] expert, Mr. Dennis Willis, testified that it would have been impossible to place ponds on one of the sites and dangerous to place ponds on the other (Tr. 106). He testified that ponds for this type of steep deep mine site were inappropriate (Tr. 108). Mr. Gibson, [J&M's] former lawyer, testified that in an early conference between Boothroy and himself, Boothroy had agreed that the pond violations were "iffy" (Tr. 114). Inspector Boothroy denied having made this statement (Tr. 119).

The sites in their unreclaimed condition are depicted in R-9 through 13 for site 11, and R-14 and R-15 for site 12. The photos show open mine portals (R-10) and various slate and coal debris on the slope below the mine sites (R-15 and R-12).

(Decision at 3-7).

In its posthearing brief filed with Judge Torbett, J&M argued that OSM did not present the required prima facie case that the area disturbed by J&M's mining operations exceeded 2 acres; that Judge Torbett had jurisdiction to rule on J&M's motion that OSM should be estopped from refusing to vacate the NOV's, owing to J&M's reliance on OSM's alleged representation that the civil penalties for the NOV's would be settled if the sites were reclaimed; that the two NOV's for failure to pass drainage through a sediment pond or series of sediment ponds should be vacated because they are duplicative; and that the amount of the civil penalties is manifestly disproportionate to the value of the land and is therefore unjust.

Judge Torbett concluded that OSM had presented a prima facie case to establish jurisdiction over the minesites that J&M's evidence did not overcome. He found that J&M had failed to show what area it did disturb or that this area is less than 2 acres and declined to estop OSM. Judge Torbett affirmed the violations, having found that they were sustained by proof. He also found that the fact that OSM ultimately accepted the sites without the construction of ponds and accepted alternative means of abatement for sediment control violations did not mean that the NOV's were improperly issued. He concluded accordingly that J&M should not be relieved of civil penalties for these violations. Finally, he considered the points properly assigned to the NOV's and affirmed OSM's assessment of civil penalties of \$8,100.

J&M filed a timely petition for discretionary review of Judge Torbett's decision, generally reiterating its arguments before him. Specifically, it claims that OSM included in its survey calculations areas that J&M had not disturbed. If these areas are excluded, it argues, OSM's own evidence makes the disturbed area less than 2 acres. J&M asserts that Judge Torbett

did not consider J&M's evidence that less than 2 acres were disturbed by its operations. On this point, OSM emphasizes in response that its prima facie burden is limited to the fact of violation and the amount of civil penalty and that it does not bear the burden of disproving J&M's less than 2-acre defense. OSM disagrees that J&M has proven that OSM's survey was less than 2 acres.

[1] Section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), previously provided that SMCRA would not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 8/ Departmental regulations at 30 CFR 700.11(b), implementing the 2-acre exemption, provide that SMCRA applies to all surface mining and reclamation activities except "the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." Fresa Construction Co. v. OSM, 106 IBLA 179, 187, 95 I.D. 293, 298 (1988); S & S Coal Co. v. OSM, 87 IBLA 350 (1985). Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other, (2) they are "physically related," and (3) they are under "common control." See W. D. Martin v. OSM, supra at 286.

[2] On the question whether OSM has jurisdiction, OSM bears only the burden of establishing a prima facie case. See 43 CFR 4.1155; Fresa Construction Co. v. OSM, 106 IBLA at 186, 95 I.D. at 298. The 2-acre exemption has consistently been held to constitute an affirmative defense. Consequently, the exemption must be pleaded and proven by the person claiming it. W. D. Martin v. OSM, supra at 287; Fresa Construction Co., 106 IBLA at 187, 95 I.D. at 298; Cumberland Reclamation Co., 102 IBLA 100 (1988); OSM v. C-Ann Coal Co., 94 IBLA 14 (1986); S & S Coal Co. v. OSMRE, supra; Harry Smith Construction Co. v. OSM, 78 IBLA 27 (1983). Accordingly, J&M bears the burden of proving that the 2-acre exemption applies.

Unrebutted evidence establishes that Mine Nos. 11 and 12 are "related" mining operations under these criteria. Elmer McClanahan was the owner and operator of both mines (Tr. 25, 28). The minesites are located within a quarter of a mile of each other in the same hollow and therefore are in the same watershed adjacent to the State highway (Tr. 28). The mines were operated within 12 months of each other (Tr. 25). 9/ Thus, these two

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8/ See note 2, supra.

9/ Boothroy testified that the mines operated within 12 months of each other based on information cards filed with DMQ (Tr. 23-24, 25; Exh. R-1 and R-2). On cross-examination Boothroy stated that the dates on the minesites are related under these criteria, and the acreage disturbed at each site is properly combined to determine whether the 2-acre exemption applies.

Central to the dispute before us is whether more than 2 acres were disturbed at both sites together. The initial program regulations for underground mining operations contain a provision specifying:

For the purpose of this part, Disturbed areas means surface work areas and lands affected by surface operations including, but not limited to, roads, mine entry excavations, above ground (surface) work areas, such as tipples, coal processing facilities and other operating facilities, waste work and spoil disposal areas, and mine waste impoundments or embankments. [Emphasis in original.]

30 CFR 717.11(a)(3). The term "surface operations" used above is in turn defined to mean "construction, use, and reclamation of new and existing access and haul roads, aboveground repair areas, storage areas, processing areas, shipping areas, and areas upon which are sited support facilities including hoist and ventilating ducts, and on which materials incident to underground mining operations are placed." 30 CFR 717.11(a)(1).

We note initially that the current permanent program regulation, 30 CFR 701.5, specifically includes the so-called "shadow area," the area located above underground workings, in the definition of "affected area." However, in S & M Coal Co. v. OSM, *supra*, the Board disapproved including the "shadow area" above underground mine workings in cases arising under the initial regulatory program. S & M Coal Co. v. OSM, Order Denying Motion for Reconsideration (July 16, 1984, at 1-2). As the instant case also arose under the initial program, we agree with Judge Torbett that the shadow area should not be included in calculating whether more than 2 acres were disturbed on both sites.

OSM's case that the area affected by J&M's mining operations exceeded 2 acres was principally established by the testimony of Boothroy that he measured the disturbed area and calculated it to be more than 2 acres. OSM showed that Boothroy, although a trainee at the time of the inspections, had a degree in civil engineering and 7 years of experience as chief engineer for a large mining company (Tr. 21). This was adequate to establish his qualifications to accurately calculate the disturbed area on the minesites. OSM introduced exhibits R-5 and R-6, which are copies of Boothroy's notes and calculations for determining the disturbed area for minesites. 10/

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fn. 9 (continued)

cards were not the dates that the mining actually ceased but rather the dates DMQ logged the information. However, Boothroy also testified that the dates used to establish the 12-month period were obtained from several sources (Tr. 53). J&M presented no evidence to show that the mining operations did not meet the 12-month criterion.

10/ We note that Boothroy did not have established boundaries as a reference for the acreage calculations, as there were no permits for these sites (Tr. 57).

Boothroy explained his measurements in detail at the hearing, noting that they were obtained by tape, and that the location was broken down to various areas, e.g., bench, road, and sloped area. Boothroy testified that the calculations for each area were combined for the total acreage in square feet, which was changed into acres (Tr. 29). He established that Mine No. 12 contained 37,024 square feet (Exh. R-5) and Mine No. 11 encompassed 99,501 square feet (Exh. R-6). The combined total for both mines was 136,525 square feet or 3.13 acres (Exh. R-6).

By Boothroy's own admission, this survey was informal (Tr. 28-29). A tape rather than a transit was used for measurements upon which he based his acreage calculations (Tr. 30-31). However, he surveyed in a conservative, rather than expansive, manner (Tr. 70). He acknowledged that there could be a 10-percent error, either plus or minus, which would still amount to a showing that the affected areas of the sites was more than 2 acres. We find that, despite its informality, Boothroy's survey was sufficient to establish a prima facie case. See James Moore, 1 IBSMA 216, 223 n.7, 86 I.D 369, 373 n.7 (1979); see also Turner Brothers, Inc. v. OSMRE, 112 IBLA 166, 173 (1989); Tiger Corp., 4 IBSMA 202, 205-06, 89 I.D. 622, 623-24 (1982).

OSM having presented a prima facie case that the affected area was more than 2 acres, the burden shifted to J&M to show otherwise. We note that the controversy in this case turns on two areas of Mine No. 11: the "slide area" (area No. 7 on R-6) listed by Boothroy as being approximately 20,248 square feet; and the "fill area" 11/ (area No. 8 on R-6) listed by Boothroy as being 20,000 square feet. J&M presented convincing testimony that neither area was disturbed by its mining. 12/ In light of J&M's testimony that the State disturbed the fill and slide areas, we find it proper to exclude these areas from Boothroy's calculations.

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11/ This area was also referred to as the "lower bench area."

12/ Concerning the slide area, McClanahan testified that during the time he was operating and after he ceased mining, the Virginia State Highway Department removed materials which encroached upon Virginia State Route 614 because of a slide that had existed in that location for approximately 50 years caused by an old splash mine that was known to be leaking water, which presumably caused the slide (Tr. 54, 93, 99, 100, 127). Willis, J&M's expert witness on reclamation, corroborated the fact that the slide was caused by the old mine (Tr. 101, 130).

J&M also showed, through the testimony of McClanahan, that the State Highway Department had used the fill area for dumping while he was mining (Tr. 92, 98). He testified that he did not disturb this area and was prevented from doing so by the presence of a ditch (Tr. 92, 125-26).

On redirect examination, Boothroy testified that he included the fill area in his calculations because he surmised its use was necessary for a load out area, but admitted that he had no knowledge of this fact (Tr. 120-21).

We note that, if the entire fill area (approximately 20,000 square feet) and slide area (approximately 20,200 square feet) are deleted, the total disturbed area is still greater than 2 acres. <sup>13/</sup>

J&M offered only the opinion of Hatcher, its expert on real estate values, that, considering both sites as well as the fill area, about 35 or 40 percent of the total disturbance was encompassed by the fill (Tr. 86). We are unable to determine what acreage this estimate translates to. J&M offered no evidence that the estimate was based on an on-the-ground survey or measurement of disturbed areas. J&M has failed to overcome OSM's showing that more than 2 acres were disturbed by J&M's operations.

[3] J&M asks that we rule that OSM is estopped by a settlement agreement from refusing to vacate the NOV's. J&M cites Turner Brothers, Inc., 102 IBLA 111 (1988), to support its argument that Judge Torbett and, presumably, this Board have the authority to determine whether a contract or basis for promissory estoppel exists. However, that case involved a simple dismissal of an application for review via a consent decision by an Administrative Law Judge, not enforcement of a settlement agreement. An Administrative Law Judge's decision to dismiss an application for review on the joint motion of both parties following completion of a settlement agreement is not equivalent to the present situation, where one party seeks dismissal of NOV's on the basis of an asserted settlement agreement.

It is unnecessary to consider whether we have authority to enforce the terms of a settlement agreement, as a review of relevant correspondence convinces us that there was no settlement. On June 29, 1987, counsel for J&M wrote to counsel for OSM requesting that the possibility of settlement be discussed (Exh. J-1). In his July 2, 1987, response (Exh. J-2), counsel for OSM spoke only of "considering the possibility of settlement" and expressly cautioned that "[b]efore any settlement can be negotiated the remedial work set forth in [the NOV's] will have to be completed and the [NOV's] and failure to abate [CO's] terminated." He invited counsel for J&M to contact him again, if J&M was still interested in settlement after completion of reclamation.

By letter dated October 2, 1987 (Exh. A to J&M's June 6, 1988, Motion To Estop), counsel for J&M reminded counsel for OSM that they had discussed a method of settling the case based on J&M's reclamation of both minesites. He recalled that they had discussed "reducing the fines by vacating the unnecessary Notices of Violation to an amount somewhere around \$50,000," and that "[a]t that point, we would then discount the amount of the fines by considering the costs of reclamation on the sites." Counsel for J&M stated, "I think that it is fair to ask that this case be settled based

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<sup>13/</sup> If the 10-percent margin of error that Boothroy indicated was reasonable were applied to J&M's advantage in every respect, the acreage would be reduced to a fraction under 2 acres. We find no justification for doing so, and note that this margin of error could also increase the acreage by the same margin.

upon the amount of work performed \* \* \*. Please carefully review these matters and contact me at your earliest convenience."

On November 3, 1987 (Exh. B to J&M's June 6, 1988, Motion to Estop), counsel for OSM responded that he was presently waiting for formal terminations of the NOV's and CO's, and that "[u]pon receipt of these terminations I will be able to make a settlement offer relative to the \$120,600.00 in civil penalties assessed these enforcement actions." By letter dated July 15, 1988 (Exh. J-3), counsel for OSM did make an offer to J&M based on its "completed phase '1' reclamation of the 3.13 acres disturbed in the course of mining." However, on July 25, 1988, counsel for J&M informed Molinar that his offer "is not entertained at this time" (Exh. J-4). In the absence of evidence that a settlement offer was accepted by J&M, there is no basis to conclude that OSM is estopped from assessing civil penalties for the NOV's here. 14/

A letter from counsel for J&M to Boothroy dated January 19, 1988, evidently indicated that, on receipt of the letter and the placement of straw bales, the NOV's would be "terminated or vacated" (Exh. A-7). 15/ Even if that letter, which was not written by OSM, accurately represented what OSM had committed to do, it provides no basis for estopping OSM from refusing to vacate the NOV's. The document is ambiguous, as there is a difference between termination of an NOV, which would occur when the conditions cited have been mitigated (such as when the straw bales were placed), and vacating an NOV, which would amount to an admission that it was not properly issued. In fact, following completion of placing straw bales and fabric fences (as alternates to completing the sediment pond originally required) the NOV's were terminated (Tr. 71-72), so that OSM did actually comply with the commitment alluded to in the letter. In sum, OSM's agreement to allow the NOV's to be terminated by mitigation measures short of building sediment ponds did not constitute an agreement either to vacate the NOV's or not to pursue civil penalties for the violations.

J&M also suggests that OSM should be estopped from collecting the penalties because J&M commenced reclamation in reliance on OSM's alleged representation that the amount of the penalties would be settled if the

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14/ OSM points out that it must obtain the "necessary approval from the Eastern Field Operations and the United States Department of Justice as to the terms" of its initial settlement offer to J&M (Answer to Motion to Estop OSM's Denial to Vacate Violations). OSM stated that such approval must be obtained before a binding offer of settlement can be presented to J&M. Any agreement made without the requisite approval, it asserts, would not be binding on the Government. In the absence of proof that J&M accepted OSM's "initial settlement offer to J&M," it is unnecessary to consider the effect of OSM's asserted failure to gain "requisite approval" of the settlement offer.

15/ Exhibit A-7, although reviewed and discussed at the hearing (Tr. 64-66), was evidently never admitted into evidence. Nevertheless, the content of the letter relevant to J&M's claim that OSM agreed to vacate the NOV's is adequately set out in the testimony.

lands were reclaimed. We find no evidence that such representation was made. OSM's statement in its July 2, 1987, letter does not indicate that, if the lands were reclaimed, the civil penalties due would necessarily be settled. Rather, it indicates that settlement negotiations could begin, if at all, only after the lands were reclaimed. Similarly, other letters from counsel to OSM indicate only that settlement negotiations could commence following termination of the NOV's, which would occur when reclamation was complete. This point is confirmed by the fact that OSM made no offer of settlement until after completion of J&M's reclamation efforts, and that the parties only attempted to come to specific terms at that time. Thus, there was no reasonable basis for J&M to conclude that the civil penalties due would be reduced by settlement if it completed reclamation of the site.

[4] J&M asserts that the Administrative Law Judge incorrectly assessed civil penalties because he did not consider the evidence that the value of the disturbed surface land was only one-fifth of the amount of the proposed penalties. We find nothing in SMCRA, the regulations, or in case precedent suggesting that the value of the land is germane to the process of assessing civil penalties. Accordingly, we reject appellant's argument.

[5] J&M contends that the violations must be vacated because they are duplicative and superfluous. J&M notes that the sites were reclaimed by backfilling, regrading, and reseeding, and that the same remedial actions would have been required had no pond violations been written. It argues that the requirement to construct sediment ponds was therefore unnecessary. We are unpersuaded that the NOV's should be altered for that reason.

Boothroy testified at the hearing that the construction of ponds was addressed in the original NOV's as part of the corrective action required, but he admitted that the ponds were never constructed (Tr. 58). He explained that the NOV's were modified to allow J&M to provide alternative methods of controlling drainage until vegetation was established (Tr. 58-59). Specifically, sealing on the outslope controlled some of the drainage, and the alternative method for Mine No. 12 consisted of either filter fabric fence or straw bales upon the bench to control the water from eroding down the sloped area until such time as vegetation was established (Tr. 60-61). OSM terminated the NOV's in March 1988 after the sites were revegetated, the straw bales and filter fabric fences were in place, and OSM had received a letter from a certified engineer that no ponds were needed (Tr. 58, 61-62).

Departmental regulation 30 CFR 717.17, which J&M was cited for violating, deals with protection of the hydrologic system. <sup>16/</sup> That regulation requires an operator to plan and conduct underground coal mining and reclamation activities to minimize disturbance of the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from underground coal mining operations both on and off the site.

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<sup>16/</sup> As discussed above at note 3, the citation for NOV No. 85-132-523-5 actually referred to 30 CFR 717.14, but this was plainly an error.

There is no doubt that the conditions on the sites threatened the prevailing hydrologic balance. OSM presented testimony that no sediment controls existed at Mine No. 12 (Tr. 36-39); that the topography of the site was such that surface runoff would go off the site and into a natural drainage way (Tr. 40); that the site was adjacent to a tributary to the main hollow and any surface runoff coming off the downslope and surface area would go into the natural hollow (Tr. 40); that there was some visible evidence of erosion on the outslope (Tr. 40); and that black material had washed off the site and had gone straight into a tributary of Poplar Creek (Tr. 40-41). OSM's testimony revealed that there were no sediment ponds or other control structures at Mine No. 11; that a ditch was present near the loadout area which would keep the runoff from the graded area, but would divert the runoff through an underground culvert whereby it drained straight into the natural stream (Tr. 47-48); that there were erosion streaks down the slope (Tr. 49); and that some black material was in the creek (Tr. 49).

The remedial action originally required by OSM, construction of sediment ponds was ultimately not employed, evidently because the small size and instability of the sites precluded construction of such ponds. The violation cited by OSM, as it turned out, was mitigated by alternative measures such as straw bales and filter fabric fences. However, the fact that OSM modified the NOV's to allow alternative measures to be taken does not change the fact that a violation of 30 CFR 717.17 existed.

These remedies are distinct from those remedies required to abate the violations of 30 CFR 717.14, which concerns backfilling and grading to approximate original contour. Although backfilling and grading doubtlessly also contributed to restoring hydrologic balance by helping to control water flow from the site, there are other purposes for requiring those measures, not least considerations of visual esthetics. In other words, although the testimony shows that the remedial action required to abate the violation of 30 CFR 717.14 was helpful in remedying the violation of 30 CFR 717.17, these actions did not cure the conditions leading to the violation of 30 CFR 717.17: straw bales and/or fabric filter fences were required to do that (Tr. 58). <sup>17/</sup> In any event, apart from considerations of whether the NOV's could be abated by the same action, the record demonstrates that there were separate conditions at the minesites justifying the issuance of two separate NOV's. Thus, J&M was properly cited for separate violations of the regulations.

[6] J&M also suggests, however, that the NOV's are redundant because they cited both minesites for similar conditions. This issue is more precisely framed as whether OSM, having determined that Mine Nos. 11 and 12 were sufficiently related to be treated as one mine in excess of 2 acres, may justify issuing two separate NOV's for identical conditions at each site. We conclude that OSM should not have issued a second NOV in these circumstances.

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<sup>17/</sup> Boothroy indicated that only straw bales were necessary on Mine No. 12 (Tr. 60-61).

The regulations, at 30 CFR 722.12(a), provide:

Non-imminent dangers or harms \* \* \* If an authorized representative of the Secretary finds conditions or practices, or violations of any requirement of the Act, or of any requirement of this chapter applicable during the interim regulatory program, but such violations do not create an imminent danger to the health or safety of the public, or are not causing and cannot reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the authorized representative shall issue a notice of violation fixing a reasonable time of abatement.

The plain import of this regulation, as shown by its references to "conditions, practices, or violations" in the plural and to "a notice of violation" in the singular, is that a single NOV should normally cover more than single violation of SMCRA. This construction is consistent with Federal enforcement and interim program regulations governing the failure to abate cessation order (see 30 CFR 843.11(f)) and applicable interim program regulations. See 30 CFR 722.11(b) and (g).

If the two minesites were sufficiently related for purposes of barring applicability of the 2-acre exemption, they are also sufficiently related to have noncompliance measured as if OSM conducted a single Federal mine inspection. The evidence adduced at the hearing demonstrates that the minesites, situated within a quarter of a mile of one another, had both been abandoned before OSM's inspection of Mine No. 12 on November 25, 1985. There is no evidence in the record to indicate that, if OSM had inspected both on November 25, 1985, it would have found anything other than the conditions observed on January 6, 1986. If OSM had inspected both minesites as one mine in a single interim program inspection pursuant to 30 U.S.C. § 1252 (1988), we think it is clear OSM would have issued one NOV (rather than two) embracing the violation of multiple standards, consistent with SMCRA and the regulations.

We deem the appropriate action to be to treat NOV No. 86-132-523-002, issued on January 6, 1986, as a modification of NOV No. 85-132-523-005, issued on November 25, 1986. NOV No. 86-132-523-002 is vacated as an NOV. Although NOV No. 85-132-523-005 is amended to include the conditions cited in NOV No. 86-132-523-002, those conditions had already been cited in the earlier NOV and do not, therefore, constitute separate violations. Instead, it is appropriate to consider NOV No. 85-132-523-005 as applying to three violations covering the conditions cited in both NOV's.

The civil penalty assessed for two NOV's cannot be sustained. The penalty assessed for NOV No. 86-132-523-002 is vacated. We, therefore, deem it appropriate to recalculate the penalty points for the remaining modified NOV (NOV No. 85-132-523-005) as provided in 30 CFR 723.13 and 723.14.

For the purpose of calculating civil penalty assessments, the extent of potential or actual damage (30 CFR 723.13(b)(2)(ii)) is cumulative, since it depends directly on the amount of the affected area. As a result,

the calculation of the civil penalties for Violations 1 and 3 of modified NOV No. 85-132-523-005 includes increased penalty points for that factor to reflect the fact that lands in two different locations were affected. In contrast, other relevant factors, including history of previous violations (30 CFR 723.13(b)(1)), probability of occurrence (30 CFR 723.13(b)(2)(ii)), negligence (30 CFR 723.13(b)(3)), and good faith in attempting to achieve compliance (30 CFR 723.13(b)(4)) are not cumulative, and it is inappropriate to increase penalty points for these factors for both sets of conditions.

The civil penalty for NOV No. 85-132-523-005, Violation 1 of 3, issued for failure to pass all surface drainage through a sediment pond or a series of sediment ponds, is recalculated as follows:

1. History of Previous Violations	0
2. Seriousness	
A. (1) Probability of occurrence	14
(2) Extent of potential or actual damage	11
Total Seriousness	25
3. Negligence	12
4. Good Faith	0
	TOTAL POINTS 37
	ASSESSMENT \$1,700

The civil penalty for NOV No. 85-132-523-005, Violation 2 of 3, issued for failure to properly backfill, grade, and revegetate the minesite, entries, and loadout area, specifically including the coal chute area, was not duplicated in NOV No. 86-132-523-002 and is therefore unaffected by our modification of the NOV. That penalty remains \$2,000. The civil penalty assessed below for NOV No. 85-132-523-005, Violation 3 of 3, takes into account the extent of the failure to revegetate that was cited in NOV No. 86-132-523-002, Violation 2 of 2.

The civil penalty for NOV No. 85-132-523-005, Violation 3 of 3, issued for failure to maintain spoil on the solid bench, is recalculated as follows:

1. History of Previous Violations	0
2. Seriousness	
A. (1) Probability of occurrence	14

(2) Extent of potential or actual damage	9
Total Seriousness	23
3. Negligence	18
4. Good Faith	0
TOTAL POINTS	41
ASSESSMENT	\$2,100

The civil penalties assessed for modified NOV No. 85-132-523-005 are set at \$5,800.

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 affirmed in part and reversed in part.

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David L. Hughes  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge

June 12, 1992

IBLA 89-504	:	Hearings Division
	:	Docket No. NX 6-60-P
J & M COAL COMPANY	:	
Petitioner	:	Petition for Review of
	:	Proposed Civil Penalty
v.	:	
	:	
OFFICE OF SURFACE MINING	:	<u>J &amp; M Coal Co. v. OSM,</u>
RECLAMATION AND ENFORCEMENT	:	122 IBLA 90 (1992), amended

ERRATUM

On January 14, 1992, the Board issued a decision in the above-captioned appeal. J & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 122 IBLA 90 (1992). That decision contains a typographical error. At 122 IBLA page 99, three lines of the text were mistakenly included in footnote 9. The last paragraph on page 99 is therefore amended to read as follows:

Unrebutted evidence establishes that Mine Nos. 11 and 12 are "related" mining operations under these criteria. Elmer McClanahan was the owner and operator of both mines (Tr. 25, 28). The minesites are located within a quarter of a mile of each other in the same hollow and therefore are in the same watershed adjacent to the State highway (Tr. 28). The mines were operated within 12 months of each other (Tr. 25). 9/ Thus, these two minesites are related under these criteria, and the acreage disturbed at each site is properly combined to determine whether the 2-acre exemption applies.

Footnote 9 is amended to read as follows, in its entirety:

9/ Boothroy testified that the mines operated within 12 months of each other based on information cards filed with DMQ (Tr. 23-24, 25; Exh. R-1 and R-2). On cross-examination Boothroy stated that the dates on the cards were not the dates that the mining actually ceased but rather the dates DMQ logged the information. However, Boothroy also testified that the dates used to establish the 12-month period were obtained from several sources (Tr. 53). J&M presented no evidence to show that the mining operations did not meet the 12-month criterion.

122 IBLA 108A

Also, at page 95, the quoted portion of the Administrative Law Judge's contains an incorrect citation. The quotation on page 95 is amended as follows:

The undersigned admitted evidence on the shadow area purely for appeal purposes, as the undersigned follows the Board's opinion in [S & M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984),] for the principle that the shadow area is not to be retroactively applied to determine the size of an underground mine. Inspector Boothroy testified that he had used mine maps to determine that the underground mine works for mine number 11 were about seven acres and for mine number 12 about 15 acres (Tr. 36).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the opinion is amended as indicated above.

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David L. Hughes  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

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