

SILICA MINING CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-60

Decided May 13, 1993

Appeal from a decision of Administrative Law Judge David Torbett, Hearings Division Docket No. NX 7-174-R, sustaining Notice of Violation No. 87-132-288-006.

Affirmed.

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. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings."

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 basis that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--Surface Mining Control and Reclamation Act of 1977: State Programs: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Since the initial definition of "affected area" promulgated in March 1979, the intent of the Federal law has

been to include surface areas above underground workings as "affected areas" within the meaning of the Act. The Virginia program was approved on Dec. 15, 1981, on the condition that it define "affected area" to include that land overlying underground mine workings. States are not permitted to modify their programs without the Secretary's approval. 30 CFR 732.17(g). Where a mining operation under the jurisdiction of Virginia reclamation authorities included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres, the area affected is greater than 2 acres; the operator therefore is required to reclaim the area in accordance with applicable program standards for minesites in excess of 2 acres.

4. Estoppel--Surface Mining Control and Reclamation Act of 1977: Generally

One element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5, and where appellant had actual knowledge that OSM would require reclamation in accordance with applicable program standards, appellant cannot be said to be ignorant of the true facts.

5. Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Where a mining operator has been issued an NOV for failure to restore a load-out area to approximate original contour in violation of 30 CFR 717.14, and where the record establishes that the operator created the load-out area at the base of a pre-existing highwall, the NOV requiring reclamation of the pre-existing highwall and the newly created load-out area to approximate original contour will be affirmed on appeal.

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

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Silica Mining Corporation (Silica) has appealed from a decision by Administrative Law Judge David Torbett sustaining Notice of Violation (NOV) No. 87-132-288-006 issued to Silica by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 6, 1987 (Exh. R-15), for failure to reclaim to applicable program standards an underground mining operation encompassing an underground area of 19.2 acres and a surface disturbance of 1.65 acres on Slate Creek in Buchanan County, Virginia. The NOV cited Silica for three violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988), and applicable Departmental regulations.

OSM inspected the site in May 1987 (Exh. R-5). After issuing a 10-day notice to the Division of Mined Land Reclamation (DMLR), Commonwealth of Virginia, advising DMLR that OSM had reason to believe that Silica was in violation of SMCRA and failing to receive an appropriate response from DMLR, OSM issued the NOV in July 1987 (Exh. 15). Specifically, the NOV cited Silica for (1) failure to restore the load-out area to approximate original contour in violation of 30 CFR 717.14; (2) failure to remove topsoil as a separate operation in violation of 30 CFR 717.20; and (3) placing and allowing spoil materials to remain on the downslope in violation of 30 CFR 716.2 (Exh. R-15).

OSM terminated the NOV for the removal of topsoil immediately upon issuance of the NOV because no remedial action could be taken due to natural revegetation of the site over the years (Exh. R-16; Tr. 17). Upon failure of Silica to abate, cessation orders were issued for the two remaining violations. 1/

Silica filed an application for review of the NOV. A hearing was held before Administrative Law Judge David Torbett on October 25, 1988, and March 1, 1989, in Abingdon, Virginia. Both Silica and OSM appeared at the hearing and presented testimony and exhibits. Following receipt of briefs from the parties, on September 21, 1989, Judge Torbett issued his decision sustaining NOV No. 87-132-288-006, and Silica filed a timely notice of appeal to this Board.

A brief history of the case can be gleaned from the testimony at the hearing as summarized by Judge Torbett. His decision reads:

On July 13, 1987, OSM Reclamation specialist Ronnie W. Vicars, a member of the Virginia Two Acre Task Force, conducted an inspection of the surface effects of a partially reclaimed

1/ Cessation Order No. 87-132-288-007 for failure to regrade to approximate original contour was issued Sept. 21, 1987 (Exh. R-18); Cessation Order No. 87-132-288-008 for failure to remove spoil materials placed on the downslope was issued on Oct. 6, 1987 (Exh. R-21).

and abandoned underground mining operation known as Mine No. 2, one mile up Smith Branch on Slate Creek in Buchanan County, Virginia. The mine was being inspected to determine whether its two acre or less exemption had been properly granted.

Prior to his July 13, 1987 inspection, Vicars had spent time reviewing the pertinent underground and surface coal mining permit data and learned that Silica had been issued a two acre or less permit, No. 3710-U in February of 1982 that had been released in March of 1982. He also learned that a Chapter 23 permit, No. 320050, had been issued to Silica in May of 1983 by the state regulatory authority, Virginia Division of Mined Land Reclamation (DMLA) covering a 1.65 acre minesite (Tr. I-11, R-9, 10). The file search revealed that the last mining done on the site was in the Spring of 1984. Following a consent order between DMLR and OSM, Silica signed a consent agreement (R-30) to convert its Chapter 23 permit to Chapter 19 and submitted an application for a permanent permit on March 9, 1985 (R-13). The application was denied by DMLR on April 21, 1986 (R-13). The disturbed area was reclaimed by Silica to Chapter 23 standards in June of 1986 (R-13). [2/]

Vicars determined from his pre-inspection investigation that Applicant had mined the underground mine from June of 1981 to April of 1984, producing approximately 70,000 tons of coal (R-28, Tr. I-13). After reviewing the underground mine works maps for Silica on file with the Norton MSHA Office, Vicars concluded that 19.9 acres of underground "shadow" area had been disturbed and that therefore Silica was not exempt from Federal regulation for the reason that its underground coal mining operation when combined with its surface coal mining operations exceeded two acres (Tr. I-23, R-31).

Vicars next inspected the mining site and concluded that the site had not been reclaimed to permanent program standards (Tr. I-16, R-1). For that reason, Vicars issued Ten-Day Notice (TDN) No. 87-132-288-002 to DMLR (R-12) in which the latter was

2/ "Chapter 23" refers to the Code of Virginia, Title 45.1-362 through 45.1-380, which provided for an exemption from reclamation requirements under SMCRA for surface mining operations which affected 2 acres or less. Chapter 23 is the Virginia equivalent of section 528 of SMCRA, which also provided for the 2-acre exemption. Section 528 was repealed by section 201(c) of the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300. Although the Act of May 7, 1987, repealed all inconsistent state laws effective as of the repeal of the Federal law, Chapter 23 was officially repealed by Chapter 295 of the Acts of the Virginia General Assembly, approved Mar. 26, 1988. "Chapter 19" is that portion of the Virginia Code which requires compliance with the permanent program standards of SMCRA.

advised that Applicant [Silica] had conducted surface coal mining operations at Mine No. 2 without first having obtained a proper permit from DMLR.

DMLR advised OSM that no enforcement was being taken against Applicant because "all mining activity was conducted under an exempt status or under the Chapter 23 permit conditions," and that the disturbed area "was reclaimed in June 1986 with the highwall created at the mine load-out area eliminated even though the mine was developed under the less than two acre provision" (R-13).

Finding the response of DMLR unsatisfactory, OSM issued NOV No. 87-132-288-006 to Silica on July 6, 1987 * * *.

(Decision at 1-2).

In his decision, Judge Torbett found that the Silica mining operation included a surface disturbance of 1.65 acres and an underground "shadow" disturbance of 19.2 acres (Decision at 3). He also held that Silica was properly issued an NOV and cessation orders for failure to reclaim the site in accordance with applicable program standards for minesites encompassing over 2 acres. Although Silica argued that representations made by OSM inspector David Beam that the minesite was not under the jurisdiction of SMCRA estopped OSM from later issuing an NOV, Judge Torbett concluded that the evidence was insufficient to establish a case of estoppel against OSM. Accordingly, Judge Torbett sustained the issuance of the NOV.

On appeal, Silica argues that OSM had no subject matter jurisdiction to issue the NOV, that Judge Torbett's finding that estoppel does not apply against OSM is in error and should be reversed, and that Silica has no legal responsibility to reclaim the loadout area to approximate original contour, as the highwall resulted from a previous mining operation not under the control of Silica. OSM replies that Silica is not entitled to the 2-acre exemption because its operation affected more than 2 acres, and OSM is not estopped from asserting regulatory jurisdiction over the subject site.

It is Silica's position that the Virginia program standards in effect while the mine was operational should govern the reclamation requirements for Mine No. 2. Appellant argues that OSM has no jurisdiction to require appellant to reclaim an abandoned minesite to more stringent program standards where appellant operated the mine pursuant to a 2-acre exemption issued by State reclamation authorities, and ceased to mine when notified by DMLR that a permit pursuant to the Virginia statutory equivalent of SMCRA would be required to continue its mining operation.

Silica maintains that it was exempt from reclaiming its site under Federal requirements pursuant to a consent order entered into by the State and OSM in litigation attempting to resolve their dispute concerning whether Virginia could exempt underground workings where the surface

disturbance was less than 2 acres. Appellant contends that since the Virginia program had obtained primacy, Virginia had the authority to "make the conversion of its chapter 23 permits conditioned upon future mining" (Silica Brief at 17). Appellant asserts that pursuant to the settlement agreement between OSM and the Commonwealth of Virginia in Commonwealth of Virginia v. Clark, No. 82-0332-B (W.D. Va. Jan. 9, 1985), reclamation under more stringent program standards is not required.

OSM asserts in response that the Virginia program was approved in December 1981 by OSM conditionally upon the requirement that Virginia enforce more stringent program standards where underground workings cause a minesite to exceed 2 acres, and that the consent order relied upon by Silica does not excuse Silica from reclaiming the area as required by the NOV.

[1, 2] Until its amendment in 1987, section 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. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." S & S Coal Co. v. OSM, 87 IBLA 350 (1985).

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 179, 186, 95 I.D. 293, 298 (1988). 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. See J & M Coal Co. v. OSM, 122 IBLA 90, 99 (1992), and cases therein cited. Accordingly, Silica bears the burden of proving that the 2-acre exemption applies.

[3] Judge Torbett's decision relied upon United States v. E & C Coal Co., 846 F.2d 247 (4th Cir. 1988), to conclude that Silica was not entitled to its exempt status after Virginia achieved primacy. In that case the Fourth Circuit Court of Appeals held that since the initial definition of "affected area" promulgated in March 1979, the intent of the Federal law has been to include surface areas above underground workings as "affected areas" within the meaning of the Act. Id. at 248. See 44 FR 15317 (Mar. 13, 1979); 30 CFR 701.5. The Fourth Circuit also noted that the Virginia program was approved "only on the condition that it define 'affected area' to include that land overlying underground mine workings." United States v. E & C Coal Co., supra at 249. See also 46 FR 61085, 61101 (Dec. 15, 1981). "Further," the court added, "states are not permitted to modify their programs without the Secretary's approval. 30 C.F.R. § 732.17(g)." The court concluded by stating: "Virginia simply could not grant an exemption contrary to that allowed by the Act. It was clear that Virginia's definition of 'affected area' would have to conform with the one that had already been promulgated by the Act and defendants should have been aware of this ruling." Id.

We are not persuaded by appellant's argument that the consent order entered into between the State and OSM in Commonwealth of Virginia v. Clark, supra, is properly applied to avoid application of requirements imposed by SMCRA. From our reading of the consent order, we agree with OSM that the consent order does not excuse operators from the responsibility to reclaim areas mined under a Chapter 23 exemption to more exacting program standards. The consent order provides that, if a nonqualifying operator holding a Chapter 23 exemption intends to continue his operation, he must apply for a Chapter 19 permit. The consent order continues: "If an operator fails to timely enter into such agreement with DMLR, or fails to timely file the complete application, he must cease all mining at the location in question. Failure to apply for a Chapter 19 permit will result in appropriate enforcement action by OSM" (Consent Order and Dismissal at 3 (emphasis supplied); Commonwealth of Virginia v. Clark, supra). Contrary to appellant's assertions that the consent order excuses performance under more rigid program standards, it actually places them on notice of impending enforcement by OSM in the event a Chapter 19 permit application is not filed.

[4] The basis for appellant's argument that OSM should be estopped from enforcing more stringent program requirements emanates from representations made to Silica by OSM Inspector David Beam that the consent order would exempt Silica from reclamation requirements. Judge Torbett's decision discussed the evidence surrounding Beam's representations as follows:

The Representations of [OSM] Reclamation
Specialist David Beam to Silica

The permit history of the Silica site is relevant to OSM agent Beam's representations, and to the question of Silica's good faith reliance on those representations. In early 1982, DMLR advised Silica that due to a new interpretation of roads to be included in "affected area," the Silica site would require a permit. Silica applied and received Permit No. 3710-U in February of 1982 (R-9). However, when DMLR Inspector James E. Smith inspected the Silica site, he concluded that the site with road included was 1.65 acres and that a permit was not needed (R-9). Silica's bond of \$2,500 was returned in March of 1982. Next, on December 14, 1982, OSM Inspector Beam made a thorough inspection of relevant records and the site described in detail below. Silica was advised by Beam that it was entitled to a Chapter 23 exempt status. In May of 1983, Silica applied for and received State Permit #320005, giving it a Chapter 23 exempt status (R-10).

[OSM] Inspector David Beam testified that as a result of his December 14, 1982 inspection of the Silica mining operation, he made a written determination that the Silica site was entitled to its Chapter 23 exemption (Tr. I-58, R-38). Beam stated that

he did a relatedness investigation with the help of his supervisor, Carroll Blevins of OSM (Tr. 59). Beam testified that he did not include the underground mine works as part of the "affected area" in his determination of exemption, even though he "knew" that Virginia had obtained primacy and that by current Virginia and federal regulations the shadow area was to be included within the "affected area" (Tr. I-60). He admitted that at the time of the inspection on December 14, 1982, he had studied the Silica mine maps and was aware of the fact that this was an underground mine (Tr. II-47-48). Beam noted in his report that no areas were affected by subsidence (Tr. II-47). Beam testified that his failure to calculate the shadow area as part of the "affected area" was an error and that he had "forgotten" that an earlier settlement [between OSM & SMLR] had expired (Tr. II-45). Beam testified that he never corrected this error even though he was aware that Silica later applied for a Chapter 23 permit (Tr. I-60).

Glade Metz recalled Beam's visit to the site, his conversations with Beam, and Beam's written determination that the site was entitled to the Chapter 23 two acre or less exemption. Metz testified that Beam had fully examined the site, maps (both surface and underground) and other relevant documents on his December 14, 1872 [sic] visit and had told Metz and Yates, "you all are exempt from OSM" (Tr. II-7, 19, 27). On May 23, 1983, after this OSM determination, Silica applied for and received a Chapter 23 exemption from DMLR (R-10).

Metz testified that he operated the site to February of 1984, relying on his Chapter 23 exempt status (Tr. II-7 through 10). When OSM, in 1985, made a determination that Silica must either cease mining or convert its operation to a Chapter 19 permit and so informed Silica (R-29), Metz concluded that he would not submit a Chapter 19 application (Tr. II-8). Instead he reclaimed the site to Chapter 23 specifications (Tr. II-14, 15; R-13). Metz testified that when he paid for the reclamation expenses required under Chapter 23, he had no expectation that any other type of reclamation would be required (Tr. II-16). He stated that Silica did not maintain any reserve for further reclamation expenses (Tr. II-16).

Metz testified that he did sign a conversion agreement (R-30) in February of 1985 when he received a letter (R-29) from OSM telling him that his Chapter 23 permit was invalid (Tr. II-23). However, he stated that he was not sure why he had received the letter from OSM and never submitted a Chapter 19 permit application (Tr. II-8, 23, 24, 26). Metz testified that Harbos Coal Company tried to convert the permit to a Chapter 19 permit (Tr. II-8). After Harbos failed to convert,

Metz testified that the State told him to reclaim the site to Chapter 23 specifications and he did (Tr. II-9, 10).

Metz testified that he had paid the abandoned mine land (AML) fees for the Silica site, despite the fact that they were not required by an exempt operation (Tr. II-28). Inspector Beam, likewise, testified that Silica had voluntarily paid those fees (Tr. I-66), but he also noted that many exempt operations paid the AML fees (Tr. I-70). [Emphasis in original.]

(Decision at 5-6).

With respect to whether OSM should be estopped from issuing the NOV because of Silica's reliance upon Beam's representations, Judge Torbett held:

It has been said that the showing to invoke estoppel against the United States is "extremely difficult." The threshold requirement is that a party must demonstrate it relied on the United States' advice and that it changed its position. Harman Min. Corp. v. Hodel, 662 F. Supp. 629, 634 (W.D. Va. 1987). In Patrick [Coal Co. v. Office of Surface Mining Reclamation and Enforcement], 661 F. Supp. 380 (W.D. Va. 1987)] the court stated [at 385]:

In Heckler v. Community Health Services of Crawford County, Inc. 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984), the Supreme Court declined to adopt a blanket prohibition of the defense of estoppel against the United States. The threshold requirements, that a private party must demonstrate when asserting an estoppel defense against the United States, is that it relied on the United States' advice and that it [(the United States)] changed its position.
* * *

* * * * *

There is no question about the fact that [OSM] Reclamation Specialist David Beam gave Silica written notice of its exempt status in December of 1982. However, in order to make an estoppel claim against the government, the Applicant must have justifiably relied on that representation. Applicant was aware that OSM and DMLR were going through a series of negotiations when DMLR determined in 1982 that the newly revised two acre road regulations would not have an impact on the Silica site. Indeed, Silica was refunded its \$2,500.00 bond. Inspector Beam testified he told Applicant that its exempt status could change if Applicant expanded the area of disturbance. The fact that Inspector Beam made an error in failing to include the shadow area in the exempt status calculations does not relieve Applicant from the requirement that ". . . those who deal with the Government are expected

to know the law and may not rely on the conduct of Government agents to the contrary." * * * [Heckler at 467 U.S.] 54.

Applicant was aware that its two acre exempt status no longer existed as of February of 1985. Applicant received a letter from [OSM] informing it of the change in status. Applicant signed a conversion agreement and considered submitting an application for the Chapter 19 permit. Applicant did not reclaim the site until June of 1986. At that time Applicant had been put on notice that its Chapter 23 status had been revoked. Applicant was not justified at that point in time in relying on a representation that had been made in 1982. Perhaps if Applicant had ceased mining and reclaimed the site in 1983, it could claim justifiable reliance on Inspector Beam's representation. However, by the time Applicant reclaimed the site--at which time there was equipment on the site and funds allocated from its reserves for reclamation--Applicant knew that its Chapter 23 status had been revoked and that more extensive reclamation requirements could be required. Applicant cannot claim that it justifiably relied on Beam's representation at that crucial point--the reclamation stage.

(Decision at 8-9).

Appellant argues that Judge Torbett did not consider that the law pertaining to Virginia's implementation of the 2-acre rule, as it applied to areas affected by underground mining, was not "settled" until after appellant reclaimed the site pursuant to Chapter 23, to its detriment. However, one element for invoking estoppel is that the person asserting it must be ignorant of the true facts. Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989). Virginia's program was given primacy in December 1981 contingent upon, inter alia, an adjustment of its regulatory scheme to include underground workings within the 2-acre rule. Silica is charged with constructive knowledge of this contingency. Furthermore, appellant had actual knowledge well in advance of its choice of reclamation options that DMLR's interpretation of the 2-acre rule had crumbled.

Where appellant had constructive knowledge of regulation 30 CFR 701.5 and the conditions under which the Virginia program obtained primacy, which included the requirement to conform to 30 CFR 701.5; and where appellant had actual knowledge that OSM would require reclamation in accordance with more exacting program standards, appellant cannot be said to be ignorant of the true facts. Accordingly, we uphold Judge Torbett's findings and conclusions that appellant's claim of estoppel must fail.

[5] Relying upon the Board's decision in H & B Coal Co. v. OSM, 103 IBLA 286 (1988), appellant argues that Judge Torbett's decision upholding violation No. 1 of the NOV for failure to restore the load-out area to approximate original contour in violation of 30 CFR 717.14 should be reversed and the NOV vacated, as the pre-existing highwall had

not been disturbed by Silica. ^{3/} In his decision, Judge Torbett stated that one of the issues to be resolved was "[d]id Silica intergrate [sic] both pre-existing and new areas into its mining operations * * *." With respect to this issue, the Judge included the following discussion:

The Splashdam seam at Silica Mine No. 2 had been mined at least since 1959 by several coal companies (Tr. II-19). The drift mouth with its high wall has been reclaimed by Silica to AOC [approximate original contour] in 1985 (Tr. I-37). The only remaining areas of contention between OSM and Silica were the load-out area and the area downslope from the load-out area. Inspector Vicars testified from photographs R-1A through R-1D that the load-out area had not been returned to AOC, and that spoil had been placed on the downslope (Tr. I-15, R-1). He also testified that top soil should have been segregated (Tr. I-16). Vicars elaborated on this testimony by describing changes in the mine site visible on two TVA aerial photographs--R-8 dated April 1980 and R-7 dated May 16, 1984. Vicars testified that the 1980 aerial photo [taken before Silica began mining] showed a pre-existing highwall but no pre-existing load-out area, while the 1984 photo appeared to show a newly cut load-out area (Tr. I-19). Vicars testified that since the load-out area had been created by Silica it must be returned to AOC (Tr. I-19). He reiterated that the load-out area had not been part of any disturbance that pre-existed the Silica mining operation (Tr. I-41). Vicars further testified that the load-out area had been part of an integrated Silica mining operation from 1981 to 1984 (Tr. I-41).

Applicant presented positive testimony on the mining history and the present condition of the site. Glade Metz, president of Silica, testified that the Silica mining operation was on two levels--the drift mouth area where the coal seam was located, and the second level, below, or the load-out area. Metz described how Silica integrated the load-out area into its operations: "We smoothed it out a little bit, and we put a bankment up there . . . so that nothing could come over the hill. . ." (Tr. II-12). Metz

^{3/} We note that the "Conversion Agreement" signed by Metz on Feb. 14, 1985, required that he "begin immediately complying with the Chapter 17 Interim Program performance standards" and that he apply for a permanent program permit. In Peabody Coal Co. v. OSM, 101 IBLA 167, 174 (1988), the Board stated that in the absence of a permanent program permit, an operator was required to comply with the interim program performance standards. See 30 CFR 710.11(a)(3)(iii). In this case, Silica never obtained a permanent program permit for the site in question. Consequently, the regulations cited in the NOV were interim program regulations. However, as explained by Inspector Vicars in response to questions from counsel for OSM, there was little, if any difference, between the interim and permanent program requirements for the violations at issue:

offered evidence that countered Vicars' testimony that the load-out area had been freshly disturbed by Silica in 1981. Metz testified that the bare area observed by Vicars in the 1984 TVA aerial photo had been created by Appalachian Power Company when it cut trees to run a power line to the Silica site (Tr. II-13). Metz also testified that when Silica arrived on the site there was no existing topsoil, only solid rock (Tr. II-14).

(Decision at 4).

The decision held:

The Applicant makes much of the matter that it mined a pre-existing site. The Act makes no distinction between pre-existing and newly created areas of a mine. The determining factor is whether the area is used in conjunction with a present mining operation. Patrick Coal Co. v. Office of Surface Min. 661 F. Supp. 380, 384 (W.D. Va. 1987). The language of the Act points to the fact that land incidental to a mining operation must be included in the definition of "surface coal mining operations":

Such area shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site for such activities and for haulage . . .
30 U.S.C. § 1291(28)(B)

(Decision at 7-8).

The issue in H & B Coal Co., supra, was whether drainage from H & B Coal Company's current mining operation was discharging and therefore causing erosion of outcrops created and reclaimed by a pre-existing mining operation. The Board held that there was no evidence in the record to support that there were any discharges from H & B's basins during the relevant time period, nor was there evidence to support OSM's conclusion that erosion on the outslope was due to H & B's mining practices. Thus, OSM failed to show a connection between the pre-existing site and H & B's

fn. 3 (continued)

"Q Were there any differences between the interim performance standards and the permanent program standards?

"A There were minor differences but, in the violations that are written on this site, they would be the same from interim to permanent.

"Q So, with regard to this site, the distinction means what between interim program and permanent program?

"A Very little, if anything."

(Tr. I-22).

present mining practices which would warrant upholding the NOV. See Patrick Coal Co., supra. The facts of this case, however, warrant a different conclusion. We are in agreement with the findings of Judge Torbett, stated as follows:

It is readily apparent that Silica used both the upper level where the portals were located, and the lower level where the load-out area was located as an integrated mining operation. The load-out area was improved with a berm. The area was improved when Appalachian Power cut trees to supply the mine with electricity. The key factor is use. Clearly, both areas were used by Silica in its mining operations.

(Decision at 8).

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. 4/

Gail M. Frazier
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

4/ On Dec. 27, 1989, OSM filed a Motion to Strike the Brief of Silica Mining Company in this case on the basis that it contained factual distortions and "bold mistatements [sic] of the law." Counsel for appellant filed a response denying the allegations of OSM, and a request for "reasonable cost and expenses, including attorney's fees," incurred in filing appellant's response. After due consideration, both motions are herein denied.