

DANNY CRUMP

IBLA 2004-69

Decided November 8, 2004

Appeal from a decision of the Acting Assistant Director, Program Support, Office of Surface Mining Reclamation and Enforcement, approving the decision of the Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, finding the State regulatory authority's response to Ten-Day Notice No. X03-030-110-004 TV2 to be appropriate.

Reversed in part; affirmed as modified in part.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Upon review of action taken by the State regulatory authority in response to a Ten-Day Notice, OSM is obligated to conduct an inspection unless the State takes appropriate action to cause the violation to be corrected or shows good cause for failure to do so. OSM's standard on review of the State's findings is whether the State regulatory authority's action or response to the notice is arbitrary, capricious, or an abuse of discretion under the State program.

2. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

When the possible violation cited by OSM in a Ten-Day Notice is the failure to comply with the terms and

conditions of the permit requiring mining in contiguous pits through a particular tract of land, the State regulatory authority's response in issuing a notice of violation will be considered to be arbitrary, capricious, or an abuse of discretion, when the notice describes the violation as a failure to mine in accordance with the approved mining plan, and the record indicates that allowing mining to continue west of the tract does not conform to the approved plan, but the abatement action in the notice is only to prohibit mining by auxiliary methods to the north and east of the tract.

APPEARANCES: Danny Crump, Mt. Pleasant, Texas, pro se; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Danny Crump has appealed from the October 18, 2003, decision of Arthur W. Abbs, Acting Assistant Director, Program Support, Office of Surface Mining Reclamation and Enforcement (OSM), approving the July 2, 2003, decision of Michael C. Wolfrom, Director, Tulsa Field Office, OSM, finding the response of the Texas State regulatory authority, the Surface Mining and Reclamation Division, Railroad Commission of Texas (hereinafter, RCT) to Ten-Day Notice (TDN) No. X03-030-110-004 TV2 to be appropriate. OSM had issued the TDN in response to Crump's April 28, 2003, citizen's complaint concerning activities conducted by TXU Mining Company LP (TXU) at the TXU-Monticello Mine, Permit No. 34D, in Titus County, Texas. The mine provides lignite for the Monticello Power Plant.<sup>1/</sup>

#### Procedural and Factual Background

Crump is the lessor of a 19.6-acre tract of land (Tract 1638) in Titus County, Texas. The lessee, TXU, included Tract 1638 in its mining plan when it secured Permit No. 34D from RCT on February 6, 2001. The permit states that TXU's mining operation will use methods and procedures consistent with other mines in the State

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<sup>1/</sup> TXU Generation Company LP, the operator of the mine and the owner of the lignite, petitioned to intervene in this proceeding. It stated in its petition that it contracted with its affiliate, TXU, to mine the lignite and that Permit No. 34D was filed in the name of TXU. By order dated Jan. 8, 2004, the Board granted that petition.

in the development of the lignite resources in this permit area and that mine operations will be conducted to maximize the lignite recovery and operate in an economical and efficient manner. Thus, at the time it secured Permit No. 34D, TXU intended to mine the lignite in Tract 1638.

The permit calls for TXU to mine in four primary areas throughout the permit term of five years, the G-Area, the H-Area, the L-Area, and the M-Area, and in six auxiliary areas, which are considered sources of supplemental coal. Within those areas are five active pit areas that are “the continuance of existing pit alignments approved in the previous Monticello Permit Nos. 34C and 30C.” (Permit No. 34D, Revision No. 3 at 139(a)-1.)<sup>2/</sup> Those pits are designated as the F-2 Auxiliary, G, H, L, and M mining areas. The other auxiliary areas “are low stripping ratio deposits which are normally mined with auxiliary equipment such as end-dumps, excavators, scrapers, front-end loaders, draglines, auger machines, etc. in order to supplement production from dragline mining areas.” *Id.* However, auxiliary areas may also be mined with primary stripping equipment, which is listed in the permit as three 60-80 cubic yard draglines, one 100-125 cubic yard dragline, and a bucket wheel/cross-pit spreader system. Further, auxiliary equipment “may be utilized to work in combination with a dragline when in deeper cover or as an independent operation \* \* \*.” *Id.* at 139(a)-3.

By letter dated March 22, 2002, TXU informed Crump that it no longer planned to mine the lignite under Tract 1638. In an August 20, 2002, letter to Crump, TXU stated that it still did not intend to mine the lignite under Tract 1638, but “instead, it will mine in the immediate area and ‘walk’ the dragline across the property on a bench above the single seam of coal believed to be under this tract.” (Administrative Record (AR) at 4.)<sup>3/</sup> Instead of seeking a permit revision, TXU subsequently began to mine to the west and east of Tract 1638, though not on

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<sup>2/</sup> Language quoted and paraphrased from Permit No. 34D in this opinion is the same as that cited by Crump from Permit No. 34C Renewal/Consolidated, provided by him as Exhibit 25 to his Notice of Appeal (NA).

<sup>3/</sup> On Dec. 19, 2003, the Board received a compilation of documents from OSM designated as the “Administrative Record” in this case, which OSM described as: “OSM’s file documents of record prepared or received by OSM (including attachments) in connection with the Danny Crump citizen’s complaint. Page numbers refer to the sequential page[] numbers entered in black ink by hand at the bottom of the right of each page.”

Tract 1638 itself.<sup>4/</sup> On April 28, 2003, Crump filed a citizen's complaint with the Tulsa Field Office, OSM, requesting that OSM investigate TXU for allegedly violating its mining plan by mining around Tract 1638 and violating Texas law by failing to mine all coal on his property. (AR at 1-2.)

The next day, April 29, 2003, the Tulsa Field Office issued Ten-Day Notice (TDN) No. X03-030-110-004 TV2 to RCT identifying two possible violations of the Texas Administrative Code (Tex. Admin. Code). The first, citing 16 Tex. Admin. Code § 12.105, stated: "Failure to comply with the terms and conditions of the permit - mine pits are to be contiguous and not skip Tract 1638." The second listed 16 Tex. Admin. Code § 12.356 and stated: "Failure to recover all coal - the permit states that the operator will retrieve lignite down to 1.5 feet thick." (AR at 18-19.) By letter of the same date, the Tulsa Field Office notified Crump that it had issued the TDN and would promptly notify him of the results. (AR at 20.)

On May 6, 2003, TXU submitted to RCT a request to revise Permit No. 34D to mine Tract 1638 as an auxiliary mine area.<sup>5/</sup> (AR at 89, 96.) On May 12, 2003, OSM received RCT's response to the TDN. RCT stated that it had participated in discussions with Crump for over a year and a half regarding the possibility that TXU might mine around his property and that it had held meetings with TXU during which it had relayed the substance of Crump's concerns to TXU. RCT took the position that the issue between Crump and TXU revolved around the amount of royalty to be paid to Crump for the lignite on his property and that it did not have jurisdiction over such an issue. Further, RCT stated that TXU had applied for a mine plan revision, which "appears to identify property owned by Crump as Auxiliary Mine Areas," and that Crump would have the opportunity to participate in the deliberations regarding the pending revision. RCT did not propose any enforcement action. (AR at 21-22.)

On May 22, 2003, the Tulsa Field Office, OSM, determined that RCT's May 12, 2003, response was inappropriate. OSM found that an April 9, 2003, RCT inspection had revealed that "[t]he operator is mining in the M area with a walking dragline in Pit No. 36 on the west side of Tract 1638 and on the east side of Tract 1638 with

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<sup>4/</sup> An RCT Inspection Report, dated Apr. 9, 2003, for Permit No. 34D, states at page 3 that "[t]he operator is mining in the M area with a walking dragline in Pit No. 36 on the west side of tract number 1638 and on the east side of tract 1638 with auxillary equipment in Pit No. 38." (NA, Ex. 30.)

<sup>5/</sup> This request is identified in the record as Supplemental Document No. 1 to Permit No. 34D Revision Application No. 10, which was pending on May 6, 2003. See AR at 96.

auxiliary equipment in Pit No. 38.” (AR at 52.) It also stated that its review of the approved mining operations map revealed that “the pits shown to be mined are contiguous across Tract 1638 and contiguous throughout the length of Tract 1638.” Id. OSM concluded that TXU had deviated from its approved mining plan by mining around Tract 1638 and that, “if TXU continues to mine around Tract 1638[,] it will continue to be in violation until Revision Application No. 10 is acted upon.” Id. at 53. OSM stated that RCT’s action had failed to cause the violation to be corrected. “Simply requiring a permit revision in this case is not an appropriate action because the operator is violating a permit condition.” Id. OSM specified the appropriate action to be “issuance of a Notice of Violation [NOV].” Id.

A Tulsa Field Office Telephone Conversation Record, dated May 23, 2003, states that OSM was contacted by RCT concerning OSM’s conclusions and that RCT inquired as to what remedial actions the Tulsa Field Office would consider appropriate. OSM replied that appropriate abatement measures for an NOV would be to require TXU “(1) to return the mining to procedures covered by the approved mining plan until a revision changing the mining plan could be approved, or (2) cease mining until a revision changing the mining plan could be approved.” (NA, Ex. 9.)<sup>6/</sup>

In a letter to the Tulsa Field Office, dated May 27, 2003, RCT expressed its belief that “it is more appropriate for OSM to exercise its oversight enforcement responsibility for this alleged violation.” (AR at 55.) RCT expressly waived its right to informal review of the Tulsa Field Office’s May 22, 2003, decision. Id. at 56.

On June 10, 2003, TXU withdrew its request for permit Revision 10, including Supplemental Document No. 1. (AR at 96.) On the same day, it filed Revision No. 11, seeking to exclude Tract 1638 from its mine plan and designate a new auxiliary area north of the Crump property. According to RCT, mining in that area had already taken place using auxiliary equipment. (AR at 97.)

By letter dated June 13, 2003, Jeffery D. Jarrett, Director, OSM, Washington, D.C., responded to a June 9, 2003, letter from Crump inquiring about the handling of his citizen’s complaint. The Director stated that RCT had not taken appropriate action in response to the citizen’s complaint and that, while OSM had scheduled a Federal inspection for June 16, 2003, it had received a request from Melvin B. Hodgkiss, Director, RCT, to postpone the inspection until he had had an opportunity to make a formal presentation to the RCT Chairman and Commissioners about the

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<sup>6/</sup> This document, provided by Crump, was not included as part of the AR forwarded to the Board in this case by OSM.

TDN at RCT's June 24<sup>th</sup> meeting. Jarrett informed Crump that the Federal inspection had been postponed to allow RCT to further consider the matter. (NA, Ex. 12.)

On June 17, 2003, Hodgkiss contacted the Tulsa Field Office in preparation for the June 24<sup>th</sup> meeting and discussed in detail two abatement possibilities. OSM's response was:

Option 1. [O]rder the company to follow its approved plan or stop mining (M area) until a permit revision is approved. (TXU would have to decide if they wanted to mine the Crump property or stop mining (M area is one of four pits operating under permit 34D) until a revision is approved).

We felt this action would be appropriate.

Option 2. [S]hut down the area being mining with auxiliary equipment (on the east side of the Crump property) but would allow the dragline to continue (west side of Crump property) mining a shorter pit, stopping at Crump's western property line.

We couldn't commit to finding an appropriate response on this proposed action. While the operator would return to a dragline operation, the pits would be shorter and still not follow the current approved plan. We were also not sure what [e]ffect this change in the mining would have on final reclamation contours, highwall reduction and future land use.

(NA, Ex. 15.) <sup>Z/</sup>

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<sup>Z/</sup> This document, provided by Crump, is a copy of an e-mail from Wolfrom to three other OSM employees recounting a June 17, 2003, telephone conversation that he and two other individuals had with Hodgkiss about the Crump complaint. Wolfrom stated that Hodgkiss asked, if RCT were to issue an NOV to TXU "for failure to follow its approved permit, what abatement action would OSM find appropriate in response to the TDN? Melvin offered several different abatement possibilities. Two were discussed in detail." This document was also not included as part of the AR forwarded to the Board in this case by OSM, although another e-mail from Wolfrom to the same OSM employees, dated July 1, 2003, discussing a July 1, 2003, conversation with Hodgkiss is included in the AR as page 84.

On June 30, 2003, the Tulsa Field Office received a letter from Hodgkiss, stating that on June 25, 2003, following the June 24, 2003, RCT meeting, RCT had issued an NOV to TXU for failing to follow its approved mining plan in the M-Area for Permit No. 34D.<sup>8/</sup> He stated: "I believe that this action constitutes a satisfactory response to the first of the two cited violations in the TDN." (AR at 81.) He found that no action was necessary for the second cited violation, failure to recover all coal in violation of 16 Tex. Admin. Code § 12.356, because that section only applies to actual mined acreage to ensure that all economically viable coal is mined. In this case, he stated, since no mining had occurred on Tract 1638, there was no violation.

Two days later, on June 27, RCT modified the NOV, as follows: "Time for Abatement is changed as follows: immediately, with respect to mining with auxiliary equipment in the M mine area where this method is not approved and this violation will not be fully abated until the Commission issues a final ruling on operator's permit Revision No. 11." (AR at 87.) On July 23, 2003, RCT assessed a penalty of \$2,600 for this violation. (AR at 115-17.)

By letter dated July 2, 2003, Wolfrom informed RCT that he found its response to Violation No. 1 to be appropriate and its response to Violation No. 2 to show good cause for not taking any action and, therefore, appropriate. (AR at 99.) By letter of the same date, he informed Crump that RCT's action was appropriate and that, if Crump desired to appeal, he could file an appeal with the Regional Director, Mid-Continent Regional Coordinating Center, OSM. (AR at 100.) Crump sought review of Wolfrom's determination. Charles Sandberg, the Acting Regional Director, referred Crump's request for review to Acting Assistant Director Abbs, because of Sandberg's previous involvement in the matter, and, on October 18, 2003, Acting Assistant Director Abbs upheld Wolfrom's decision.

Crump then brought this appeal, requesting review of OSM's conclusion that RCT's response to the TDN was appropriate. Crump seeks an order mandating that TXU either return to its approved mining plan or shut down operations in the M-Area pending a decision on TXU's request for a permit revision.

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<sup>8/</sup> The notice, designated as NOV 249T, stated that an inspection had taken place on May 14 and 15, 2003; that the operator was not mining in accordance with the approved plan as described in Permit No. 34D; that the area affected by the NOV was the "M mining area north and east of land tract Number 1638;" and that the operator was required to "immediately cease mining with auxiliary equipment in the M mining area where this method of mining is not approved." (AR at 83.)

### Discussion

[1] In accordance with section 503 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1253 (2000), a State with an approved State program has primary responsibility for enforcing the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (2000), within its borders. However, notwithstanding the fact that a State may have been granted primary enforcement authority, OSM retains a significant oversight role to ensure compliance with SMCRA's mandates. Thus, if, in response to a citizen's complaint, OSM has reason to believe that a permittee is in violation of a State regulatory program, OSM is required to issue a TDN to the appropriate State regulatory authority. See 30 U.S.C. § 1271(a)(1) (2000); 30 CFR 842.11(b)(1). Under 30 CFR 842.11(b)(1)(ii)(B)(1), unless the state takes "appropriate action" to cause the violation to be corrected or shows "good cause for the failure to do so" within 10 days of receiving the TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (2000); 30 CFR 842.11(b)(1)(ii)(B)(1); Jim and Ann Tatum, 151 IBLA 286, 298 (2000); Foster E. Sword, 138 IBLA 74, 80 (1997).

The applicable regulations further provide at 30 CFR 842.11(b)(1)(ii)(B)(3), that "appropriate action" includes "enforcement or other action authorized under the State program to cause the violation to be corrected." At 30 CFR 842.11(b)(1)(ii)(B)(4), the regulations list five situations which are considered to constitute "good cause" for a failure to take enforcement action. "Good cause" is properly found when the State establishes that the violation of the State surface mining law "does not exist." 30 CFR 842.11(b)(1)(ii)(B)(4)(i).

In deciding whether the State took appropriate action or demonstrated good cause for not taking enforcement action, the State's conduct will be judged by OSM, in its oversight role, not by what OSM would have done in the circumstances, but by whether the State acted arbitrarily, capriciously, or abused its discretion under the State surface mining program law in its actions in response to the TDN. 30 CFR 842.11(b)(1)(ii)(B)(2); Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 74, 102 I.D. 1, 9 (1995).

A party objecting to an OSM decision not to enforce SMCRA in response to a citizen's complaint has the burden of proving that OSM acted in error. Jim and Ann Tatum, 151 IBLA at 298. To do so here, Crump must demonstrate, by a preponderance of the evidence, that the RCT's response to the TDN was arbitrary, capricious, or an abuse of discretion. Morgan Farm, Inc., 141 IBLA 95, 100 (1997) and cases cited.

Violation No. 1

The first violation cited in the TDN was based on 16 Tex. Admin. Code § 12.105, which states that “[a]ll persons shall conduct surface coal mining and reclamation operations under permits issued pursuant to this chapter and shall comply with the terms and conditions of the permit and the regulations of the Act and this chapter.” This provision reflects OSM’s regulatory language, which requires that the permittee “shall conduct surface coal mining and reclamation only on those lands that are specifically designated as the permit area \* \* \*”(30 CFR 773.17(a)); “shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit” (30 CFR 773.17(b)); and “shall comply with the terms and conditions of the permit \* \* \*.” 30 CFR 773.17(c). These rules mandate that a permit revision be approved by the regulatory authority before an operator may deviate from its approved application and permit. See 48 FR 44370 (Sept. 28, 1983).

[2] The parties appear to agree that RCT had adequate grounds to issue an NOV based on TXU’s failure to abide by the language of Permit No. 34D. At issue here, then, is whether the remedial action ordered by RCT was appropriate. “Appropriate action” is defined as “enforcement or other action authorized under the State program to cause the violation to be corrected.” 30 CFR 842.11(b)(1)(ii)(B)(3). Thus, in evaluating the state’s response to a TDN, OSM must determine whether the response is calculated to secure abatement of the violation. West Virginia Highlands Conservancy, 152 IBLA 158, 183 (2000); Turner Brothers, Inc., 99 IBLA 87, 92 (1987).

Crump asserts that TXU violated its permit by mining around Tract 1638 without receiving a permit revision. He argues that the remedial action directed by RCT in the NOV did not cause the violation to be corrected and is, therefore, inappropriate. Crump asserts that the present mining plan provides TXU with the authority to use auxiliary equipment “when the need arises.” (NA at 8.) He poses the following question: “How can stopping the use of unauthorized auxiliary equipment satisfy an NOV, when the use of auxiliary equipment east of Tract 1638 is clearly authorized?” (NA at 8.) He asserts that the violation cited by RCT was the failure to follow the approved mining plan. Crump contends that “TXU stopped mining in a continuous, uninterrupted pit sequence as required by [the] current approved mine plan and mined around Tract #1638.” (NA at 8.) Crump contends that RCT did not act to abate the violation and that the proper remedial action would be to direct TXU to mine Tract 1638 in accordance with its approved plan or “shut mining down in M area until a revision can be issued.” (NA at 9.)

OSM does not dispute that TXU delayed requesting a permit revision until after it had already decided to mine around Crump's property.<sup>2/</sup> Nor does OSM challenge the idea that an operator must abide by the terms of its permit. Instead, OSM argues that RCT appropriately addressed the violation by issuing an NOV and ordering the cessation of "certain mining operations" until TXU is able to gain approval for the revision of its permit. Because RCT is actively taking steps to secure abatement of the violation, OSM argues, there is no jurisdiction to pursue federal inspection and enforcement actions. (Answer at 10-12.)

The TDN identified Violation No. 1 as a possible failure to comply with the terms and conditions of the permit, as required by 16 Tex. Admin. Code § 12.105, because the mine pits were required to be contiguous and not skip Tract 1638. In the NOV, RCT described the violation as "[t]he operator is not mining in accordance with approved mine plan as described in Permit 34D." Implied in the NOV violation description is the TDN language regarding the skipping of Tract 1638.

The remedial action required of TXU by RCT was to "immediately cease mining with auxiliary equipment in the M mine area where this method of mining is not approved." Crump contends that the mining plan allows TXU to use auxiliary mining equipment "when the need arises." We agree. We find no limitation in those parts of the mining plan incorporated in Permit No. 34D (and included in this record) on TXU's use of auxiliary equipment. In fact, after describing the various pit lengths in the M mining area, the plan states that

the depths of overburden at the Monticello Mine are variable and this situation lends itself to utilizing various methods to remove the material in order to uncover the lignite. The draglines/crosspit spreader/auxiliary equipment will uncover lignite utilizing one or more of a combination of digging methods shown in Figures 139(a)-2 thru 16.

Permit No. 34D, Revision No. 3 at 139(a)-3. In explaining various mining methods and equipment to be used, depending principally on the depth of overburden, the plan stated that "[a]uxiliary equipment \* \* \* may be utilized to work in combination with a dragline when in deeper cover or as an independent operation \* \* \*." Id.

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<sup>2/</sup> We note that in a June 17, 2003, briefing memorandum to the RCT Chairman and Commissioners concerning the TDN and options to address it, Hodgkiss stated that "[s]ince 2002, during numerous meetings with TXU representatives to discuss other matters, we advised TXU to file a revised mine plan if they did not plan to mine the Crump property." (AR at 95.)

Thus, the issue is not that “this method of mining [use of auxiliary equipment] is not approved” in the areas north and east of Tract 1638. Quite clearly, the use of auxiliary equipment is discretionary with the operator, utilizing its best judgment in accordance with the approved mining plan in determining the proper mining method. Instead, the violation is mining by any method in those areas because it is not in accordance with the approved mining plan, which requires that the pits be mined contiguously across Tract 1638 and contiguously throughout the length of Tract 1638. See AR at 52. Accordingly, while RCT was correct in halting any mining in those areas north and east of Tract 1638, the question is whether RCT’s action to allow mining to continue in the M-Area to the west of Tract 1638 was appropriate action to cause the violation to be corrected. We find that it was not.

Wolfrom concluded in his July 2, 2003, decision that “[t]he Tulsa Field Office has determined that the June 25, response received from RCT addresses the two alleged violations, and is therefore considered appropriate action by the State. Violation No. 1 of 2, failure to follow the approved mine plan, was addressed by RCT issuing a Notice of Violation (NOV).” Wolfrom provided no further explanation for his conclusion that the State’s response for Violation No. 1 was appropriate.

In addition, in affirming that conclusion, Acting Assistant Director Abbs merely stated that he concurred with Wolfrom’s “finding that the RCT’s issuance of a notice of violation ceasing only the unapproved mining with auxiliary equipment in the area north and east of Tract 1638 rather than all mining in the M mining area is an appropriate response to the allegation in the TDN.” (AR at 122.) He stated that he had “no evidence that other current mining activity in the M mining area is not being conducted in accordance with the approved operation plan” and, for that reason, could not find that the portion of TXU’s operation unaffected by the NOV was in violation of the approved permit or that RCT’s response to Violation No. 1 of the TDN was arbitrary, capricious, or an abuse of discretion. Id.

Neither decision addresses evidence provided by Crump in the form of the Wolfrom June 17, 2003, e-mail that indicates that allowing TXU to return to the dragline operation to the west of Tract 1638 would result in “the pits being shorter and still not follow the current approved plan.” That e-mail expressed concern about what impact “this change in the mining would have on final reclamation contours, highwall reduction and future land use.” Perhaps the Tulsa Field Office satisfied itself that allowing mining to continue west of Tract 1638 would not violate the approved plan. However, any basis for reaching such a conclusion is not part of the record before the Board, and, in fact, Crump offers evidence that such is not the

case. <sup>10/</sup> In addition, Crump repeatedly asserts that the approved plan requires a continuous, uninterrupted pit alignment, which seems to comport with the conclusion of the June 17, 2003, e-mail. Moreover, it is not clear that Acting Assistant Director Abbs was aware of the June 17, 2003, e-mail. It was not presented to the Board as part of the AR; it may not have been provided to him either.

On the record before the Board, we conclude that the action taken by RCT in response to Violation No. 1 of the TDN was arbitrary, capricious, or an abuse of discretion because it failed to address completely the cited TDN violation--failure to comply with the terms and conditions of the permit--that mine pits are to be contiguous and not skip Tract 1638. While RCT correctly precluded mining to the north and east of Tract 1638, it should have directed TXU to follow its approved plan or stop mining completely in the M-Area until a permit revision was approved.

Accordingly, the October 18, 2003, decision affirming the July 2, 2003, decision finding RCT's response to Violation No. 1 of the TDN to be appropriate is reversed, as is the July 2, 2003, decision. OSM is directed to immediately inspect TXU's operations in the M-Area under Permit No. 34D and determine if TXU is complying with the terms and conditions of its permit. If it is not, OSM should order the company to follow the approved plan, including the mining of Tract 1638, or cease all mining in the M-Area (not just to the north and east of Tract 1638) until a permit revision excluding Tract 1638 from the permit is approved.

#### Violation No. 2

In the TDN, OSM cited a second violation. It stated that there was a possible “[f]ailure to recover all coal as stated in permit - permit states operator will retrieve lignite down to 1.5 feet thick,” which it identified as a potential violation of 16 Tex. Admin. Code § 12.356. On June 25, 2003, RCT found that TXU was not in violation of this rule by failing to mine the lignite on Tract 1638. RCT interpreted § 12.356 as applying only to actual mined acreage where economically viable coal is left unmined.

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<sup>10/</sup> Crump has provided the Board with a copy of an e-mail from Sandberg, the Acting Regional Director, to Wolfrom, dated Nov. 28, 2003, the subject of which is “E-mail to Add to Crump package.” It states: “The attached is the E-mail in which I documented my discussion with Danny [Crump] as why I had you ask Melvin [RCT] to re-consider his response once he understood that OSM was not going to dictate his abatement of any violation he might write.” The e-mail referenced by Sandberg is not part of the record before the Board.

Section 12.356 states that “[s]urface mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reffecting the land in the future through surface coal mining operations is minimized.” This language is identical to OSM’s coal recovery performance standards. See 30 CFR 816.59.

RCT interpreted this rule as mandating that all economically viable coal be mined only where mining has actually occurred and that because mining had not occurred on Tract 1638, the performance standard had not been violated. OSM argues that, because the applicable regulations do not define the bounds of this provision, RCT’s interpretation is not arbitrary or capricious. Additionally, OSM states that neither SMCRA nor the regulations compel a mining operator to actually mine coal, leaving the operator with the decision whether to mine an area at all.

30 CFR 842.11(b)(1)(ii)(B)(4) lists five situations that will be considered good cause for the State regulatory authority to fail to take action to have a violation corrected, the first of which is “[u]nder the State program, the possible violation does not exist.” In finding good cause for RCT’s failure to cite a violation, OSM determined that RCT’s interpretation that 16 Tex. Admin. Code § 12.356 applies only to actual mined acreage to ensure that all economically viable coal is mined was not arbitrary, capricious, or an abuse of discretion. The preamble to the Federal rule, in language identical to that of 16 Tex. Admin. Code § 12.356, states that its purpose is to prevent the waste of coal resources at a “particular mining site” and to avoid the environmental harm caused by lands being “reopened.” 44 FR 15178 (Mar. 13, 1979).

In his decision, Acting Assistant Director Abbs stated that “both the State and Federal rules apply only to ‘surface mining activities,’ not necessarily to all lands within the permit area. Therefore, nothing in the State’s decision to interpret its rule as applying only to those areas from which coal is extracted is inconsistent with either the State or Federal rules.” (AR at 123.)

We find no reason to disturb the ultimate conclusion that RCT had good cause for not taking enforcement action regarding Violation No. 2 because RCT’s conclusion was that, under the State program, the possible violation “does not exist.” We base that finding not on a technical reading of what constitutes “surface mining activities” under the regulation, but on the fact that, under the approved mining plan, the coal under Tract 1638 is yet to be extracted. Therefore, if Revision No. 11 is denied by RCT, the permit requires that the lignite be extracted from Tract 1638. If the revision is granted, no extraction will be required because Tract 1638 will no longer be part of

the approved mining plan. We modify OSM's determination on Violation No. 2 accordingly.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 18, 2003, decision of the Acting Assistant Director, Program Support, OSM, is reversed as to Violation No. 1 of the TDN and affirmed as modified herein as to Violation No. 2 of the TDN. The case is remanded to OSM for action consistent with this opinion.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge