

WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.

IBLA 95-554

Decided June 9, 2005

Appeal from a decision of the Assistant Director, Office of Surface Mining Reclamation and Enforcement, in response to a "supplemental citizen's complaint," declining to conduct regular monthly and quarterly Federal inspections at certain West Virginia mines where the State is operating under an approved State program.

Affirmed as modified.

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

In a jurisdiction where the State is the primary regulatory authority, OSM is required in its oversight capacity to conduct an inspection under 30 CFR 842.11(b)(1)(ii)(B)(1) whenever it has reason to believe as a result of a citizen's complaint that a permittee is in violation of a State program and the State regulatory authority has failed to take appropriate action in response to a ten-day notice to cause the violation to be corrected or to show good cause for such failure.

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

When a citizen's complaint does not allege a site-specific violation of the surface mining reclamation program, but rather asserts that a State is not conducting the inspections required to enforce its approved program, that complaint is cognizable under the Federal takeover regulations at 30 CFR 733.12 and

must be presented to the OSM Director under that rule. It may not be presented as a “supplement” to a prior citizen’s complaint to which OSM has previously responded.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, and L. Thomas Galloway, Esq., Boulder, Colorado, for West Virginia Highlands Conservancy, Inc.; Sandra M. Lieberman, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case stems from a letter identified as a “supplemental citizen’s complaint” dated November 29, 1994, filed by West Virginia Highlands Conservancy, Inc. (WVHC or appellant) pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1271(a)(1) (2000), and the implementing regulation at 30 CFR 842.12. The supplemental complaint requested that Office of Surface Mining Reclamation and Enforcement (OSM) commence a program of regular complete and partial inspections, and enforcement for every violation OSM finds as a result of that program, at certain mines in the State of West Virginia operated by LaRosa Fuel Company, Inc., and Cheyenne Sales Company^{1/} as well as all other unspecified mine sites where the State had applied a provision of State law identified as the Colombo Amendment which defines the reclamation standards for releasing the reclamation bond and terminating jurisdiction over certain permitted operations.^{2/} (Supp. complaint at 5, n.6, 13, n.16.) This supplemental complaint is, thus, different from the usual citizen’s complaint in that it requests a program of inspections rather than alleging violations at a particular mine site and requesting an inspection of that site. WVHC had previously requested Federal inspections at the specified LaRosa and Cheyenne mines in earlier citizen’s

^{1/} The mines were identified as:

LaRosa Fuel Company, Inc.	Permit Nos. 97-73, 98-74, 109-74, and 79-76
LaRosa Fuel Company, Inc.	Permit No. 15-79
LaRosa Fuel Company, Inc.	Permit No. 84-78
Cheyenne Sales Company, Inc.	Permit No. 63-77

^{2/} Among the amendments to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) made by the West Virginia legislature in 1983 was the addition of a proviso to § 20-6-26(c)(3) of that Act (later recodified as § 22A-3-23(c)(3)), commonly referred to as the Colombo (or Columbo) Amendment, stating that “* * * a release [of the final portion of a performance bond] may be made where the quality of the untreated postmining water discharged is better than or equal to the premining water quality discharged from the mining site.”

complaints, alleging the existence of “violations of applicable effluent limitations” (Supp. complaint at 3-4). The November 29, 1994, complaint purports to “supplement” those earlier complaints. It does not, however, identify any additional site-specific violations at mine sites.^{3/}

WVHC complained first that OSM failed to require the State to inspect all such sites completely or with the frequency required by the approved State program or inspect all such sites itself in view of the State’s “abdication of regulatory jurisdiction.” (Supp. complaint at 4.) Second, WVHC contended that OSM failed to take the action required by 30 CFR 733.12(b) to either substitute Federal enforcement of the State program or withdraw approval of the State program. *Id.* at 5. Appellant argued that inspections are required under 30 CFR 842.11 at the rate of at least one complete inspection per calendar quarter with intervening partial inspections^{4/} in light of “the State’s abdication of regulatory jurisdiction.” (Supp. complaint at 5-7.) Further, WVHC contended that every complete inspection and every inspection focusing on hydrological factors must include an assessment of water quality at every point source discharge associated with the operation; an assessment of whether the site has a valid discharge permit under the National Pollutant Discharge Elimination System (NPDES), as required by section 402 of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1342 (2000), authorizing discharge from the point sources; a verification of whether the permittee has filed all required monthly NPDES monitoring reports; a citation of violations evident on the face of the monitoring report; and at least one follow-up water quality sample during the same month to determine compliance with the monthly average limitations. (Supp. complaint at 8, n.9.)

By letter dated December 16, 1994, OSM’s Charleston Field Office (CHFO) responded to the WVHC supplemental complaint. Asserting that the request in the complaint to commence a program of regular complete and partial Federal inspections of Colombo sites, take direct Federal enforcement action for all violations

^{3/} WVHC noted that:

“This is a supplemental request for federal inspection and enforcement which extends the Conservancy’s initial requests with respect to the LaRosa and Cheyenne sites in light of subsequent developments. Your office’s issuance of the initial ten-day notices at these sites and West Virginia’s responses fully satisfy the requirements of 30 C.F.R. § 842.11 with respect to the LaRosa and Cheyenne sites, and your office need not rotely repeat those steps.”

(Supp. complaint at 13-14 n.16 (emphasis in original).)

^{4/} This requirement applies when OSM is acting as the regulatory authority under a Federal program and when enforcing a State program in whole or in part under 30 CFR Part 733. 30 CFR 842.11(c).

detected, issue notice to the State under 30 CFR 733.12(b) regarding implementation of the Colombo Amendment, and act to substitute Federal enforcement or impose a Federal program at all such sites raised program implementation issues, CHFO stated it was evaluating the proper course of action to take.

On January 12, 1995, WVHC filed a request for informal review of this decision with the Director, OSM, under 30 CFR 842.15. Appellant contended that CHFO had no basis for failing to initiate immediate supplemental inspections, and enforcement if those inspections were to reveal violations. Citing Peabody Coal Co. v. OSM, 101 IBLA 167 (1988), WVHC asserts that, when a State will not enforce its approved program at sites permitted during the initial regulatory program, OSM need not stand by idly allowing operators to violate the law. In view of prior allegations of acid mine drainage from the mines in its original citizen's complaints, WVHC contends there is no authority for deferring a program of regular quarterly inspections and consequent enforcement under the regulations at 30 CFR 842.11. Thus, WVHC requested that the Director instruct CHFO to immediately begin a regular quarterly inspection program at the mines identified in its complaint without awaiting resolution of the request for enforcement action under 30 CFR 733.12(b). In addition, WVHC requested an award of attorney fees by the Director.

On behalf of the Director, OSM, the Assistant Director, Field Operations, OSM, responded to the request for informal review in a letter dated April 27, 1995. With respect to the issue of conducting regular inspections at the four Columbo Amendment sites specified in the supplemental citizen's complaint, OSM found that the terms of SMCRA and implementing regulations do not establish specific frequency requirements for the conduct of OSM inspections in States with an approved State regulatory program. The Assistant Director noted that, under the regulations at 30 CFR Part 842, OSM conducts inspections "whenever it has reason to believe that a primacy State is not appropriately addressing a violation of its approved program." (Decision at 1.) Focusing on the fact that OSM had inspected the specified sites as a result of WVHC's previous citizen's complaints submitted pursuant to Part 842, the Assistant Director found from the record "that CHFO has inspected and taken appropriate enforcement action at the four Columbo Amendment sites named in your request for informal review." (Decision at 2.) Specifically, he stated that: two notices of violation (NOV) were issued as a result of the inspection of the Cheyenne Sales site (permit No. 63-77); failure to abate cessation orders (FTACO) were issued to LaRosa Fuel Company at the Kittle Flats site on two permits (Nos. 98-74 and 79-76); OSM jurisdiction was found lacking due to the absence of mining after May 3, 1978, on two other permits (Nos. 97-73 and 109-74); ^{5/} at a third site (permit No. 15-79) a FTACO was issued to LaRosa; and at a fourth site operated by LaRosa (permit No. 84-78) an inspection disclosed no violation

^{5/} WVHC did not dispute this finding in the context of its supplemental complaint.

associated with either effluent or reclamation standards. *Id.* With respect to the need to inspect for compliance with NPDES requirements when conducting an inspection, the Assistant Director deferred his decision on those issues since they were involved in an “ongoing policy review and outreach process.” *Id.* Accordingly, he found that the CHFO responded appropriately to the citizen’s complaints.

WVHC contends in its statement of reasons for appeal (SOR) that the State has “abandoned its jurisdiction” at the Colombo sites and refuses to inspect them, thus refusing to enforce State program requirements. (SOR at 6, 9.) Further, WVHC asserts that regular inspections are necessary to Federal enforcement of State program requirements and this is required when the State has expressed an intent not to enforce those requirements, ^{6/} citing 30 CFR 842.11(a)(3). (SOR at 1, 9.) Citing *Peabody Coal v. OSM*, 101 IBLA at 172, WVHC argues that OSM need not await imposition of a Federal program or Federal takeover of a State program before conducting such inspections. (SOR at 12.)

In its Answer, OSM contends that the regulations at 30 CFR 842.11(a)(3) (regarding Federal enforcement of a State program) and 842.11(c) (addressing frequency of inspections) are only applicable to inspections in situations where OSM has imposed a Federal takeover of a State program either in whole or in part, which has not happened here. (Answer at 3-4.) “Unless and until OSM takes over all or part of a State program,” OSM notes that “its role is one of oversight,” citing 30 CFR 842.11(a)(1). (SOR at 5.) OSM challenges appellant’s reliance on *Peabody* on the ground that this case stands for the authority of OSM to cite violations without waiting for the process of substituting Federal enforcement of a State program, noting that OSM has conducted inspections at the four sites cited in appellant’s complaint. *Id.* at 6.

In a supplemental brief filed August 6, 2003, WVHC contends that, “prior to conducting the inspections and taking the enforcement action that OSM carried out, the agency necessarily reasserted regulatory jurisdiction at each site pursuant to 30 C.F.R. § 700.11(d)(2).” (Supplemental SOR at 5.) Appellant argues that when the State declines to regulate surface coal mining and reclamation operations and, thereafter, OSM reasserts regulatory jurisdiction under 30 CFR 700.11(d)(2), the provisions regarding inspections found at 30 CFR 842.11(a)(3) become applicable because the State has disclosed an intent not to enforce requirements and permit conditions under a State program. *Id.* at 2-3.

^{6/} Regarding the frequency of inspections of active surface coal mining and reclamation operations, the regulations provide that when OSM is enforcing a State program in whole or in part it shall conduct an average of at least one partial inspection per month and at least one complete inspection per calendar quarter. 30 CFR 842.11(c).

There are threshold matters which must be addressed in this case. Neither party directly addressed the effect of the prior citizen's complaints involving the LaRosa and Cheyenne sites on this supplemental complaint. The propriety of OSM inspections and resulting citations issued in connection with several of the Columbo sites specified in the WVHC supplemental complaint either has been addressed in previous administrative review decisions or may be still at issue in pending appeals. Under the doctrine of administrative finality--the administrative counterpart of the doctrine of res judicata--when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the case was considered on review, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. Helit v. Goldfields Mining Corp., 113 IBLA 299, 308-309, 97 I.D. 109, 114 (1990); Lloyd D. Hayes, 108 IBLA 189, 192-93 (1989); Turner Brothers, Inc. v. OSM, 102 IBLA 111, 120 (1988). Appellant has not made such a showing here and, as noted below, does not take issue in this case with the OSM inspections made as a consequence of its prior citizen's complaints. Accordingly, we find that the issue of the propriety of the OSM inspections, and of any citations issued as a result, is not properly before us for review in the present appeal.

Both WVHC and OSM assumed in their initial briefs on appeal that the State's jurisdiction over the sites did not terminate with the release of the reclamation bonds. Shortly after the OSM Answer was filed in this case, the Board decided the case of LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334 (1996), in which we held that regulatory jurisdiction had terminated in 1984 upon written findings of compliance in connection with the release of reclamation bonds, that OSM had not properly reasserted jurisdiction over the mine site in question ^{7/} under 30 CFR 700.11(d)(2) prior to taking enforcement action, and remanded the matter to OSM for consideration of the latter question. ^{8/} In its supplemental brief filed August 6, 2003, WVHC asserts that, in response to its inspection request, OSM had necessarily reasserted jurisdiction pursuant to 30 CFR 700.11(d)(2) at the four sites specified in

^{7/} The permit involved in the LaRosa case (No. 79-76) is one of the permits involved in the present appeal. The case arose on administrative review of OSM enforcement actions taken in response to a WVHC citizen's complaint.

^{8/} Consideration of the present appeal was previously suspended by the Board at appellant's request pending judicial review of the LaRosa decision and, subsequently, pending disposition of a petition for Secretarial review of the Board's decision. The petition for review was denied by letter dated Mar. 20, 2003.

its citizen's complaint. (Supplemental SOR at 3, 5.) Appellant has not explained the basis for this assertion and it contradicts our conclusion in La Rosa.^{2/}

With regard to a Federal takeover of the State program, we note that the regulations at 30 CFR Part 733 specifically address procedures for substituting Federal enforcement of State programs. Thus, 30 CFR 733.12(b) provides that “[i]f the Director has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program, the Director shall promptly notify the State regulatory authority in writing,” giving the reasons for his belief and specifying the time allowed for the State to take any necessary remedial action. If the State does not remedy the concerns, the Director shall give further notice to the State and the public giving the basis for his belief and hold a public hearing in the State. 30 CFR 733.12(d). Further, the regulations provide that:

The State will continue to enforce its approved program unless upon completion of the hearing under paragraph (d) of this section and based upon the review of all available information, including the hearing transcript, written presentations and written comments, the

^{2/} recognize that the Board reached a different conclusion with regard to the Cheyenne permit in Cheyenne Sales Co., Inc. v. OSM, 163 IBLA 30 (2004). In that case, we found that the bond release based on a “written determination that all the [reclamation] requirements * * * had been successfully completed was, in fact, a misrepresentation of material fact.” 163 IBLA at 53. We found Cheyenne to be distinguishable from the LaRosa case. In LaRosa the operator had requested final bond release and received the State approved bond release before the Director of OSM had published either his July 1985 finding that West Virginia's Colombo Amendment was inconsistent with section 519(c)(3) of SMCRA and “may not be implemented in any manner,” 50 FR 28316 at 28319, 28322 (July 11, 1985), or the proposed rule to pre-empt and supersede that provision of State law, 50 FR 28343, 28344 (July 11, 1985). In Cheyenne the bond release was made after OSM published the final rule pre-empting and superseding the Colombo Amendment and clarified that the Amendment “[could] not be implemented or enforced by any party” in August 1985. 50 FR 35082, 35084 (Aug. 29, 1985). Thus, we found it was not reasonable for the operator “to expect that effluents as good as those before it began re-mining would be regarded as meeting the requirements of the initial regulatory program, or * * * for West Virginia to believe it was authorized to release a bond based on Cheyenne's compliance with the State law provision relied upon.” 163 IBLA at 53 n.10. Accordingly, OSM's reassertion of jurisdiction to conduct oversight enforcement actions including inspection and issuance of a notice of violation was upheld in Cheyenne. 163 IBLA at 52-53.

Director finds that the State has failed to implement, administer, maintain, or enforce effectively all or part of its approved State program.

30 CFR 733.12(e). There is no dispute that a Federal takeover has not happened in the present case.

[1] Pursuant to section 503 of SMCRA, a State with an approved program has primary responsibility for enforcing the provisions of the State regulatory program within its borders. Danny Crump, 163 IBLA 351, 358 (2004). OSM, however, retains a significant oversight role to ensure compliance with SMCRA's mandates. Id. In this regard, the obligations of OSM in response to citizen's complaints are governed by section 521(a) of SMCRA and implementing regulations at 30 CFR 842.11(b). If, in response to a citizen's complaint requesting a Federal inspection under 30 CFR 842.12, OSM has reason to believe that a permittee is in violation of a State regulatory program, OSM is required to issue a ten-day notice (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); Danny Crump, 163 IBLA at 358; Jim and Ann Tatum, 151 IBLA 286, 298 (2000); Foster E. Sword, 138 IBLA 74, 80 (1997). Thus, OSM is required in its oversight capacity to conduct an inspection whenever it has reason to believe as a result of a citizen's complaint that a permittee is in violation of a State program and the "State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure." 30 CFR 842.11(b)(1)(ii)(B)(1); Danny Crump, 163 IBLA at 358. Frequency of inspections in this oversight role is, thus, occasioned by the existence of reason to believe that a violation exists. This is properly distinguished from the regulation regarding frequency of Federal inspections when OSM is enforcing a State program, in whole or in part, pursuant to the procedures at 30 CFR Part 733 for substituting Federal enforcement of a State program. 30 CFR 842.11(c).

Any person who may be adversely affected by a surface coal mining and reclamation operation may seek informal review by the OSM Director or his designee of an OSM official's "decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for a Federal inspection under [30 CFR] § 842.12." 30 CFR 842.15(a). As noted previously, WVHC did not present OSM with any site-specific evidence of violations in this supplemental complaint. Indeed, with regard to the specific mine sites addressed in WVHC's supplemental citizen's complaint, the issue raised by appellant is not the propriety of the enforcement undertaken by OSM in response to the original citizen's

complaints, which is not challenged by appellant in this case, but rather certain programmatic enforcement issues over which WVHC disagrees with OSM. First, WVHC contends OSM is required to inspect mine sites at least quarterly, citing 30 CFR 842.11, in view of the State's failure to recognize its regulatory jurisdiction. Second, WVHC asserts that, as part of every quarterly complete inspection of mine sites, OSM is required to assess water quality at point source discharges associated with the operation, whether the site has a valid NPDES discharge permit, and whether the permittee has filed the required monthly monitoring reports. Further, WVHC contends OSM must, upon finding violations, cite effluent violations evident from the monitoring reports and conduct at least one follow up water quality sample in the same month to determine compliance with the monthly average limitations.^{10/}

[2] A request in a citizen's complaint to initiate procedures under 30 CFR 733.12(b) for the substitution of Federal enforcement of a State regulatory program on the ground the State has failed to enforce its approved program is properly distinguished from a request for a Federal inspection under 30 CFR 842.12. The former is not subject to the citizen's complaint procedures in 30 CFR Part 842 and, hence, is not properly an issue before us on appeal.^{11/} Accordingly, to the extent that appellant seeks to require OSM to undertake a program to perform more frequent inspections^{12/} or more complete inspections, the nature of such an objection

^{10/} To the extent the Assistant Director indicated that NPDES compliance issues have been taken under advisement by OSM pending "an ongoing policy review and outreach process," we note that the Board has subsequently rejected such deferral of action when a citizen's complaint asserts a violation in that the permittee failed to obtain an NPDES permit and file monitoring reports for point source discharges associated with a surface mining and reclamation operation. West Virginia Highlands Conservancy, 164 IBLA 260, 273-75 (2005); see West Virginia Highlands Conservancy, 152 IBLA 158, 197 (2000). With respect to disclosures of effluent violations reported by operators in monitoring reports, we have held that self-reported noncompliance is not itself "reason to believe" that a violation exists until the regulatory obligation to correct the effluent discharge is ignored. 152 IBLA at 193.

^{11/} The regulation at 30 CFR 842.15(a) provides that any person who may be adversely affected by a surface coal mining and reclamation operation may request informal review by the OSM Director of a "decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12."

^{12/} The provisions of the regulation at 30 CFR 842.11(c) governing scheduling of inspections cited by appellant in its request for more frequent inspections of bond release sites apply, under the express terms of the regulation, only when OSM is

(continued...)

is properly addressed under the Federal takeover provisions of the regulations at 30 CFR 733.12 and is beyond the scope of the citizen's complaint procedures in Part 842. See West Virginia Highlands Conservancy, 152 IBLA at 158, 200-201; Donald St. Clair, 77 IBLA 283, 293-94, 90 I.D. 496, 501-502 (1983). The citizen's complaint procedures in Part 842 are designed to provide a mechanism, in a State with an approved State program, to allow a citizen who observes a violation at a mine site to ask OSM to intervene and issue a TDN to resolve the violation quickly. By contrast, the procedure established in Part 733 is the one which allows an "interested person [to] request the Director to evaluate a State program." The latter question must be presented to the Director at the outset. 30 CFR 733.12(a)(2). It may not be presented as a citizen's complaint under Part 842 by calling it a "supplement" to a prior citizen's complaint.^{13/} This analysis is made even more compelling by recognition of the impossibility of reviewing broader programmatic questions regarding how a State implements its program through the TDN, a notice to be responded to within 10 days, and by the fact that a disagreement with a State's construction of its program cannot provide reason to believe that a violation exists. See 30 CFR 842.11(b)1(ii)(B)(4)(i) (Good cause sufficient to establish appropriate action by the State includes a finding that "[u]nder the State program, the possible violation does not exist.") Finally, the Peabody case cited by WVHC does not support a different result as that case involved oversight inspection responsibility.

^{12/} (...continued)

enforcing a State regulatory program in whole or in part pursuant to section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (2000), and the implementing regulations at 30 CFR Part 733.

^{13/} We find no provision in the OSM regulations for filing a "supplemental citizen's complaint" under Part 842. If a citizen finds information giving a reason to believe another violation exists at a site, another citizen's complaint may be filed and a TDN issued anew.

Therefore, 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 as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge