



ENERGY MARKETING CO., INC. v. OSM

178 IBLA 354

Decided February 19, 2010



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

ENERGY MARKETING CO., INC.

v.

OFFICE OF SURFACE MINING, RECLAMATION, AND ENFORCEMENT

IBLA 2009-310

Decided February 19, 2010

Appeal from a decision of Administrative Law Judge Andrew S. Pearlstein upholding issuance of a Notice of Violation No. N08-112-041-001 (West Virginia State Permit No. U-74-83) for failure to reclaim a highwall area as contemporaneously as practicable with mining operations. Hearings Division Docket No. CH-2008-1-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:  
Backfilling and Grading Requirements--Surface Mining  
Control and Reclamation Act of 1977: State Program--  
Surface Mining Control and Reclamation Act of 1977:  
State Regulation: Generally

Under West Virginia's approved permanent regulatory program for coal exploration and surface coal mining and reclamation operations, regrading and backfilling of mining areas is to be completed as contemporaneously as practicable with mining operations and as reflected in the approved mining plan. Reclamation activities shall be initiated within 30 days, and backfilling and regrading shall be initiated within 180 days of completion of underground operations.

2. Administrative Authority: Generally--Surface Mining Control and Reclamation Act of 1977: Inspection: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

When operations to mine and remove coal from a mine area are concluded, the mined area must be reclaimed as contemporaneously as practicable with mining operations. Periodic use of a haul road and tipple area located on the mine site to serve other permitted mine operations does not extend, postpone, or negate the obligation to reclaim mined areas as contemporaneously as practicable with mining operations.

APPEARANCES: Eric L. Calvert, Esq., and F. T. Graf, Jr., Esq., Charleston, West Virginia, for Energy Marketing Co., Inc.; Wayne A. Babcock, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining, Reclamation, and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE PRICE

Energy Marketing Co., Inc. (EMC), acting through its president, Dominick LaRosa, has appealed the August 6, 2009, decision of Administrative Law Judge (ALJ) Andrew S. Pearlstein upholding a Notice of Violation (NOV), No. N08-112-041-001, issued by the Office of Surface Mining, Reclamation, and Enforcement (OSM), U.S. Department of the Interior, on August 1, 2008. The NOV pertains to mining operations conducted pursuant to West Virginia State Permit No. U-74-83, on what is known as Mine 105 East/102 Tipple (Mine site), located near Buckhannon, in Barbour County, West Virginia. The NOV alleges that EMC failed to timely reclaim portions of the Mine site as required by applicable law and regulations.<sup>1</sup> OSM issued the NOV after WVDEP declined to initiate enforcement action.

#### *Background*

The facts are not disputed. Bethlehem Mines Corporation (Bethlehem) originally owned and operated the Mine site under Mine Permit No. U-74-83, which

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<sup>1</sup> West Virginia has primary responsibility for regulating surface mining operations and reclamation under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (2006), pursuant to an approved state program administered by the West Virginia Department of Environmental Protection (WVDEP). The NOV was issued pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2006), and 30 C.F.R. § 843.12(a)(2).

was “keyed” to the underground mining operation designated as Mine 105 East. Decision at 3. The surface manifestation of the underground mine includes a highwall at the Mine portal area, which is located on the west side of the Mine property. The area of the Mine site designated Tipple 102<sup>2</sup> contains the stockpiling, loading, and processing activities and structures, and is located on the east side of the Mine site. A haul road runs between the two areas and connects to nearby roads and serves other nearby separately permitted mining operations.

Rauer Coal Corporation (Rauer) acquired Permit No. U-74-83 in January 1992. It ceased operations and filed bankruptcy in 1992. The mine portal was sealed in early 1995. WVDEP granted “inactive” status for 1 year, beginning on May 31, 1995, during the pendency of the bankruptcy proceeding. In May 1995, WVDEP also approved Permit Revision #3, which authorized the mining of the highwall at the mine portal when underground mining ended, and disposal of approximately 8,000 tons per year of scalp or waste rock from three of Rauer’s nearby, separately permitted, mining operations<sup>3</sup> to reclaim the highwall and portal area. Ex. 10.<sup>4</sup> The disposal of the scalp rock would proceed in two Phases: Phase I was to be the elimination of the existing highwall, and Phase II would be the “completion of the disposal area.” *Id.* at 1. Among other things, under Permit Revision #3, the scalp rock disposal area (that is, the highwall and mine portal area) was to be inspected by a qualified person each month and by a certified person each quarter.<sup>5</sup> *Id.* at 6.

EMC acquired Permit No. U-74-83 with the approval of the bankruptcy court in April 1996. EMC auger-mined the highwall in 1998, contemporaneously backfilling only part of the pit area in front of the highwall. EMC did not completely backfill the area because the supply of the scalp rock ended when mining operations under the three designated permits was completed. WVDEP renewed the “inactive” status for a period that ended in April 1999, the practical effect of which was to temporarily relieve EMC of the obligation to contemporaneously reclaim the area.

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<sup>2</sup> The *tipple* originally was the place where coal cars were tipped to be emptied of the coal they carried. Although the term is still used in that sense, it is “now more generally applied to the surface structures of a mine, including the preparation plant and loading tracks.” *A Dictionary of Mining, Mineral, and Related Terms* (Bureau of Mines 1968).

<sup>3</sup> The three areas were operated under Permit Nos. U-8-85, U-2008-94, and UO-401. See Ex. 10 at 1.

<sup>4</sup> All the exhibits were introduced in evidence by OSM.

<sup>5</sup> There was no dispute regarding these personnel requirements, and they were not addressed by Judge Pearlstein.

WVDEP's inspection reports showed that mining on the Mine site last occurred in December 1998, and that the last time coal was processed occurred in February 2001. Decision at 4, citing Ex. 24 (WVDEP's internal Memorandum regarding OSM's Ten-Day Notice (TDN)) and Tr. at 113-16, 183.

EMC leased the Mine site to Cheyenne Sales, Inc. (Cheyenne). In 2003, EMC initiated litigation to cancel Cheyenne's lease and eject it from the Mine site. Cheyenne departed in 2008. At that time, WVDEP urged EMC to apply for "inactive" status again, but EMC failed or declined to do so. Decision at 4. From 1999 until WVDEP and OSM inspected the Mine site in 2008, coal from other nearby, separately permitted mining operations was occasionally stockpiled and stored in the flat area near the tipple, where it was blended and trucked away. As noted earlier, EMC used the waste material generated by these nearby mining operations to partially reclaim the highwall pit and portal area. WVDEP inspection reports in 2006, 2007, and 2008 documented some road and sediment pond maintenance, but no coal removal from the Mine site. In 2007, EMC abated an NOV issued by WVDEP by reclaiming an "outlying bleeder opening" on the Mine site; however, EMC did not complete the reclamation of the highwall, which eventually became overgrown with substantial vegetation. Decision at 5, citing Exs. 3 (WVDEP Mine Inspection Reports), 5 (photographs of the Mine 105 East and 102 Tipple areas), 13 (OSM Mine Site Evaluation form) at 12, 18, 24, and Tr. at 20-22, 116, 138-40, 184-88, 211-12. The three mines that were to supply the scalp rock for reclamation were "mostly inactive," or there was no mining. Decision at 5. EMC did not request a Permit modification or revision to use waste rock from other operations. *Id.*

#### *Issuance of the Ten-Day Notice*

OSM Reclamation Specialist Rodney A. Moore, of OSM's Morgantown (West Virginia) office, conducted a random inspection of the Mine site on February 21, 2008, accompanied by WVDEP inspector Tim Richard. There was no evidence of any recent activity, and the highwall had not been reclaimed. Moore concluded that reclamation had not been completed as contemporaneously as practicable with mining operations, a violation of applicable State law. Richard conferred with his supervisor, Brent Wiles, and ultimately advised Moore that WVDEP did not intend to initiate enforcement action against EMC. Moore issued a TDN to WVDEP on March 13, 2008, pursuant to section 521(a)(1), 30 U.S.C. § 1271(a)(1) (2006), and implementing regulations at 30 C.F.R. § 842.11, with a copy to EMC. *See* Ex. 7.

WVDEP responded to the TDN, asserting that EMC was completing reclamation as contemporaneously as practicable. Ex. 9 (TDN); *see also* Ex. 24 (WVDEP's internal memorandum regarding the TDN). WVDEP noted that there was periodic activity on the Mine site, that the portal area had been partially backfilled, and that EMC planned to further develop the tipple and associated rail loadout area.

In WVDEP's view, the bankruptcy, changed ownership, and litigation constituted extenuating circumstances that had complicated and impeded EMC's progress with reclamation. By letter dated July 11, 2008, OSM disagreed with WVDEP's conclusions and deemed WVDEP's response inappropriate. Ex. 12. In addition, OSM identified issues pertaining to EMC's compliance with Permit Revision #3, the expired "inactive" status, and the lack of activity involving the loadout area. Decision at 6, citing Ex. 12 and Tr. at 37-39. WVDEP did not appeal that determination.

On July 22, 2008, Moore conducted a Federal inspection. He found the Mine site was inactive, that no EMC personnel were present, the loadout area was idle, the rail tracks were overgrown, and reclamation of the highwall and portal area remained incomplete. Ex. 13 (OSM Mine Site Evaluation form). Moore issued the NOV, under which EMC was to initiate corrective action within 30 days and complete reclamation within 60 days of receiving the NOV.<sup>6</sup> Ex. 19. Thereafter, OSM's Knoxville (Tennessee) office assessed a civil penalty in the amount of \$3,800. EMC appealed the NOV, but did not appeal the penalty. Decision at 7.

Accompanied by LaRosa, Moore again inspected the Mine site on September 2, 2008. At that inspection, the compliance deadline was extended to October 22, 2008. Ex. 20 (OSM Mine Mine Site Evaluation form) at 4. LaRosa indicated he was considering seeking "inactive" status. *Id.* at 4, 6. Moore cautioned him that such a status, if granted, would apply only to the tipple and loadout area; the highwall and Mine portal area would have to be completely reclaimed, failing which OSM would issue a cessation order. *Id.* At the hearing, Moore testified that he had explained to LaRosa that he had no authority to waive or reduce the amount of the civil penalty, and denied saying that he did. Decision at 7, citing Ex. 20 and Tr. at 47-49, 52-53, 93-97, 234-37.

The final inspection occurred on October 22, 2008.<sup>7</sup> Moore found that the highwall had been eliminated and the Mine portal had been completely and satisfactorily regraded and backfilled with material from nearby mines. Ex. 21 (OSM Mine Site Evaluation form). The new operator of the Mine site, United Coals, was present and engaged in grading the highwall area. *Id.* at 4. In addition, the tipple and loadout area had been cleared of debris and brush and, with an electrical supply, restored to active use. That same day, Moore issued a notice of termination of the NOV. Ex. 23.

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<sup>6</sup> EMC received the NOV by certified mail on Aug. 1, 2008.

<sup>7</sup> The ALJ's decision states that the final inspection occurred on Oct. 22, 2009, but it was Oct. 22, 2008. See box 26 of Ex. 21 at 1.

The sole issue at the hearing held on March 3, 2009, was the fact of the violation, and not the amount of the civil penalty.<sup>8</sup> Judge Pearlstein visited the Mine site with the parties to view the violation area on March 4, 2009. He issued his decision on August 6, 2009, and EMC timely appealed it.

### *The Parties' Arguments*

In its statement of reasons (SOR), EMC first complains that the ALJ “relied on the flawed reasoning that somehow the passage of time creates an automatic violation of W. Va. C.S.R. § 38-2-15.2.b.” SOR at 4.<sup>9</sup> It asserts that EMC has “carried on continuous mining operations and contemporaneous reclamation at the permit site except for formal periods of inactive status granted by [WVDEP].” *Id.* at 5. EMC points to the bankruptcy proceedings and the litigation against Cheyenne to buttress its claim that reclamation could not have proceeded more quickly. *Id.* at 5-6. In addition, EMC contends that it is important that “there is no evidence of any type of environmental or other damage or risk at the permitted site as a result of the ongoing reclamation,” further asserting that “it was not environmentally necessary, or even beneficial, to speed up reclamation.” *Id.* at 6. Alternatively, EMC argues that the ALJ erroneously applied a narrower definition of *mining operations* than envisioned by the West Virginia program or SMCRA, both of which define mining operations to encompass use of the haul road and tippie area. *Id.* at 7-8. Lastly, EMC raises a claim of detrimental reliance on oral assurances allegedly given by Moore, maintaining that EMC “made good faith compliance to correct what it deemed to be an erroneous violation based upon representations that monetary damages would be waived in exchange for such compliance.” *Id.* at 8.

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<sup>8</sup> LaRosa, who is evidently not an attorney, appeared on behalf of EMC. OSM was represented by counsel.

<sup>9</sup> EMC captioned its argument in terms of error in “confirming” OSM’s determination that WVDEP’s response to the TDN was arbitrary and capricious and an abuse of discretion. SOR at 1. OSM viewed the argument as a challenge to OSM’s authority to issue the TDN and responded by disputing EMC’s standing to raise it. *See Answer* at 11-16. Judge Pearlstein did indeed conclude WVDEP’s determination to take no action in response to the TDN was arbitrary and capricious or an abuse of discretion, *Decision* at 10-11, but it is clear that the conclusion is simply a logical consequence of finding that the fact of the violation was established. As shown by the discussion above, EMC’s point is that OSM misunderstands the facts of the situation and misconstrues the State’s contemporaneous reclamation obligation. We therefore do not perceive any genuine dispute regarding OSM’s oversight authority, and address the matter no further.

As stated, OSM responds that EMC lacks standing to challenge OSM's authority to issue the NOV. Answer at 11-16. In addition, it argues that WVDEP's failure to take enforcement action in the circumstances of this case was arbitrary and capricious, because it was contrary to the obligation to reclaim contemporaneously with mining operations. *Id.* at 17-21. In particular, OSM disputes the suggestion that the applicable reclamation performance standard allows the permit area to remain unclaimed "until the last 'activity' on the permit area is completed," arguing that "[t]he time for reclamation of an area of a mine site where mining operations are complete cannot be measured by the use of a different area of a mine site." *Id.* at 20. In OSM's view, EMC has deliberately mis-characterized the ALJ's usage of the concept of *mining operations*. *Id.* at 22-23. Finally, OSM maintains that there is no legal or factual basis for estopping the enforcement action. *Id.* at 23-28.

### *Discussion*

Under SMCRA, a State with an approved program has primary responsibility for enforcing the provisions of the State regulatory program within its borders, but OSM retains significant oversight authority to ensure compliance with SMCRA. *Danny Crump*, 163 IBLA 351, 358 (2004). In the exercise of this oversight role, OSM enforces State and Federal standards on a mine-by-mine basis if the State fails to do so. *Lonesome Pine Energy Co., Inc., v. OSM (On Reconsideration)*, 156 IBLA 182, 191 (2002).

[1] SMCRA establishes minimal general performance standards applicable to all coal mining and reclamation operations, including, among others, the obligation to "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations." 30 U.S.C. § 1265(b)(16) (2006). West Virginia has incorporated this performance standard in its approved program:

Regrading and backfilling will be completed as contemporaneously as practicable with mining operations and as reflected on the approved mining plan; provided, however, that reclamation activities shall be initiated within thirty (30) days, and backfilling and regrading shall be initiated within one hundred eighty (180) days of completion of underground operations.

Decision at 8, quoting W. Va. Code St. R. § 38-2-15.2.b. The issue presented is whether the facts and circumstances of this appeal demonstrate that EMC discharged its reclamation obligations as contemporaneously as practicable with mining operations, so that the NOV must be vacated. Judge Pearlstein ruled to the contrary. We agree.

As set forth above, underground mining on the Permit ceased in 1994, auger mining on the highwall ceased in 1998, and coal was last removed from the Permit site in 2001. The backfilling and re-grading of the highwall area, the final phase of the mining related to the underground mine, did not occur until October 2008. Indisputably, there was a substantial period of years between the mining that disturbed the land and final reclamation of that area. Therefore, reclamation did not proceed contemporaneously with mining operations, or the highwall presumably would have been completely reclaimed years earlier. EMC advances two arguments in response: it alleges that it has “carried on continuous mining operations and contemporaneous reclamation . . . except for formal periods of inactive status,” and it contends that contemporaneous reclamation was not practicable. SOR at 5.

With respect to the first assertion, we must begin by noting that EMC’s allegation that it has “carried on continuous mining operations and contemporaneous reclamation at the permit site except for formal periods of inactive status,” SOR at 5, is not borne out by the record. To the contrary, the record reveals a pattern of inactivity sufficient to allow significant overgrowth and re-vegetation, punctuated by occasional activity consisting of truck use of the haul road for other mining operations activities and intermittent usage of the tipple area to stockpile or blend coal and store equipment from such operations.

[2] EMC believes the ALJ adopted an overly restricted definition of *mining operations* to sustain the NOV, presumably to suggest that a broader definition might have changed the outcome in this case. It seems to us that EMC actually means to imply that the obligation to perform reclamation contemporaneously *with mining operations* means contemporaneously *with any mining-related activity* on the Mine site and, consequently, that the reclamation obligation does not arise until any and all mining-related activity on a Mine site ends. Such a position cannot be squared with the legislative purpose and intent of the contemporaneous reclamation requirement, which this Board quoted in *Save Our Cumberland Mountains*, 108 IBLA 70, 80 (1989):

The essence of good reclamation therefore consists of reducing as much as possible the time from initial disturbance of the land surface to the successful reestablishment of a vegetative cover on stable spoil areas. In order to achieve this, performance standards relating to environmental protection must be carried on *concurrently with* the mining operations. [Emphasis added.]

H.R. Rep. No. 218, 95th Cong. 1st Sess. 79 (1977).

We therefore agree with OSM's contentions regarding the requirement to reclaim contemporaneously:

The fact that a haul road, or an equipment storage area, or a stockpile area legitimately remains in continuous use may justify not reclaiming the area in use, but the use of those separate areas does not justify failure to reclaim a completed coal removal area, such as a highwall, or an unused tipple area. Contrary to the state inspectors' assertion, the standard does not allow the whole permit area to remain unreclaimed until the last "activity" on the permit area is completed. The time for reclamation of an area of a mine site where mining operations are complete cannot be measured by the use of a different area of a mine site. Such an interpretation of the regulation [at 30 C.F.R. § 816.101<sup>10</sup>] is obviously contrary to the purpose and intent of the provision and must be rejected.

The regulation, as the legislative history explains, requires that the reclamation of land used for mining occur as contemporaneously as practicable and possible. It is intended to be conducted concurrent with completion of the mining function. Thus, once the use of any specific portion of the land is completed, it is to be reclaimed as quickly as possible. In other words, once the coal removal from an area is complete, the area must be reclaimed.

Answer at 20. Here, the last operation directly associated with the underground mine subject to Permit No. U-74-83 was the mining of the highwall. When operations to mine and remove coal from a mine area are concluded, that mined area must be reclaimed as contemporaneously as practicable with mining operations.<sup>11</sup> Periodic use of a haul road and tipple area located on the Mine site to serve other permitted mine operations does not in the circumstances presented here extend, postpone, or negate the obligation to reclaim mined areas as contemporaneously as practicable with the highwall mining.

Turning to the question of whether reclamation was not practicable, Permit Revision #3 authorized EMC to use waste rock generated by surrounding mining

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<sup>10</sup> The regulations at issue here, 30 C.F.R. Part 817, apply to all underground mining activities conducted pursuant to permanent regulatory programs, including the surface manifestations and surface impacts incident to an underground coal mine. 30 C.F.R. §§ 810.11 and 817.100.

<sup>11</sup> Whether reclamation commences "as contemporaneously as practicable" is a determination that is properly made on a case-by-case basis.

operations to reclaim the highwall and portal area of the Mine site. Reclamation of the pit area in front of the highwall using the designated waste rock timely commenced. *See* SOR at 6. It appears that EMC reasons that, having timely *initiated* reclamation of the highwall, reclamation therefore was contemporaneously proceeding; when the supply of waste rock from the three mining operations identified in Permit Revision #3 ended because those operations had ceased, it was no longer practicable to complete reclamation, and EMC was under no duty to find or seek authorization to use an alternate source of material to reclaim the land. Thus, in the 9 years after the highwall mining ended, EMC did not apply for “inactive” status from WVDEP, even though that status would have had the effect of formally postponing the obligation to complete reclamation during the period of inactivity. EMC also did not seek a permit modification or revision to acquire waste rock from other sources, even though testimony established that such a request is a relatively minor matter.

EMC has offered nothing that explains why it did not or could not apply for “inactive” status or arrange to acquire waste rock from a different source. The evidence bearing on the question shows that little stood in the way of a permit modification. EMC called WVDEP’s Wiles as its witness. He testified that in the event waste volumes proved inadequate to complete final reclamation of the tippie area, the permit could be modified to authorize a borrow pit, a proposition with which LaRosa orally agreed. Tr. at 118-19. Wiles testified, moreover, that a modification “just to re[-]source the source of the scalp rock” was “insignificant” and a “minor detail,” and that requesting one would be the “normal” thing to do. Tr. at 160-61. The most compelling evidence, however, lies in the fact that when at last forced to comply with the State program requirement, EMC acquired the necessary material and eliminated the highwall “in less than one day’s work.” Decision at 10. EMC has failed to show any fact or circumstance related to the availability of reclamation materials that rendered contemporaneous reclamation impracticable.<sup>12</sup>

Nor are we persuaded that Rauer’s bankruptcy or the litigation against Cheyenne otherwise rendered contemporaneous reclamation impracticable. EMC acquired the Permit in April 1996, after the mine portal had been sealed (apparently by Rauer), after Permit Revision #3 had been approved, and after a 1-year period in

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<sup>12</sup> EMC suggests that the ALJ determined that the mere passage of time automatically establishes the fact of a violation. *See* SOR at 4. This conclusion is not supported by the record. The ALJ considered all the facts and circumstances offered by EMC to demonstrate compliance with W. Va. Code St. R. § 38-2-15.2.b., and found none of them adequate. As *contemporaneous* describes that which exists, occurs, or belongs to the same time or period, *see Webster’s Third International Dictionary*, it was not reversible error for the judge to consider the length of time between the conclusion of coal removal from the permitted area and the date of final reclamation.

“inactive” status. The last period of “inactive” status ended in 1999. On the face of it, the mere existence of the bankruptcy proceedings had no discernible effect on EMC’s subsequent ability to contemporaneously reclaim the areas related to the underground mining conducted by EMC’s predecessors and continued by EMC. In any event, EMC failed to produce any evidence, such as a court order or an agreement or stipulation between the litigants, during the hearing or on appeal, to corroborate its assertions that Rauer’s bankruptcy and/or the litigation against Cheyenne prevented or impeded its performance of the reclamation obligation. Accordingly, this argument is rejected as well.

EMC next suggests that it properly may be relieved of its reclamation obligation upon a showing that no environmental or other damage or risk was presented as a result of the pace of reclamation activities, even going so far as to contend that contemporaneous reclamation in the circumstances of this appeal “was not environmentally necessary, or even beneficial.” SOR at 6. We cannot agree. In enacting SMCRA, Congress has declared that contemporaneous reclamation is environmentally necessary; Congress’ opposite findings defeat any assertion that there is little or no benefit to be derived from contemporaneously reclaiming lands subject to mining operations. See SMCRA, 30 U.S.C. § 1201(c)-(e), (g)-(k) (2006). EMC has cited no statutory or regulatory provision, and no administrative or judicial authority, to buttress these claims or otherwise negate its duty under SMCRA, and we are aware of none. This line of argument therefore is dismissed for lack of merit.

What remains is EMC’s argument that it relied on Moore’s representation that the civil penalty would be waived if it abated the NOV. Judge Pearlstein heard the testimony on this topic and was able to assess the demeanor and credibility of the witnesses, after which he concluded that EMC had apparently misunderstood Moore’s statements during the final inspection. Decision at 11-12. This Board is reluctant to overturn an ALJ’s resolution of factual issues based upon findings about the credibility of witnesses whose deportment and demeanor were observed by the judge. *United States v. Pass Minerals, Inc.*, 168 IBLA 115, 149 (2006), citing *United States v. Pearson*, 148 IBLA 380, 390 (1999), and *United States v. Rothbard*, 137 IBLA 159, 163-64 (1996); see *BLM v. Carlo*, 133 IBLA 206, 211 (1995). Our review of the transcript convinces us that the ALJ correctly concluded that this issue is the product of a misunderstanding. See Tr. at 92-96, 172-73.<sup>13</sup>

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<sup>13</sup> Moreover, even assuming Moore made such a representation, it would not furnish a basis for waiving the civil penalty because estoppel against the Government will not lie in the absence of an official written decision containing the crucial misstatement. *Ron Coleman Mining, Inc.*, 172 IBLA 387, 391-92 (2007), and cases cited.

