



SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, *ET AL.*
v.
OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

188 IBLA 310

Decided September 22, 2016



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

703-235-3750

703-235-8349 (fax)

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, *ET AL.*
v.
OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

IBLA 2014-242

Decided September 22, 2016

Appeal from a decision by the Director, Appalachian Region, Office of Surface Mining Reclamation and Enforcement, which reversed a determination by the Knoxville Field Office that the response to a 10-Day Notice was arbitrary, capricious, and an abuse of discretion. Virginia Permit No. 1700624; TDN X14-130-052-001.

Affirmed.

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

Although a State with an approved program has primary responsibility for enforcing SMCRA within its borders, any person may request a Federal inspection by providing information indicating there is a violation. OSM is obligated to issue a 10-Day Notice (TDN) if the facts alleged in the request would, if true, constitute a violation of SMCRA, Departmental regulations, the applicable regulatory program, or any permit condition. A Federal inspection will be conducted if the State regulatory authority fails timely to respond to the TDN, take "appropriate action" to cause the violation to be corrected, or show "good cause" for failing to do so. Where the State responds by asserting it has good cause for not taking an enforcement action based on its finding there is no violation of the approved program, OSM will defer to the State and not substitute its judgment for that of the State authority unless, based on the facts presented, the State's finding is determined to be arbitrary, capricious, or an abuse of discretion.

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

If OSM decides the State regulatory authority's response to a 10-Day Notice is not arbitrary, capricious, or an abuse of discretion, it will so inform the person who provided information indicating there is a violation and that the informant may file an appeal with this Board. An appellant challenging such a decision has the burden of establishing that OSM erred, which can be satisfied by showing that the State response to the TDN was arbitrary, capricious, or an abuse of discretion.

3. Surface Mining Control and Reclamation Act of 1977:
Citizen's Complaints;
Surface Mining Control and Reclamation Act of 1977:
Inspections: 10-Day Notice to State;
Surface Mining Control and Reclamation Act of 1977:
State Program: 10-Day Notice to State

When a citizen request for a State inspection under 4 VAC 25-130-842-12(a) is denied, the requestor has a right to informal review or formal review and a hearing of that denial, but if no such review is requested, the State inspection process is at an end, the denial is final, and any inchoate rights under 4 VAC 25-130-842-12(c) are terminated.

APPEARANCES: Isak Howell, Esq., Lewisburg, West Virginia, and Walton D. Morris, Jr., Charlottesville, Virginia, for Appellants; John Austin, Esq., U.S. Department of the Interior, Office of the Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

The Southern Appalachian Mountain Stewards and Sierra Club (collectively SAMS) appeal from a letter decision dated June 6, 2014 (Decision), by the Director, Appalachian Region (Regional Director), Office of Surface Mining Reclamation and Enforcement (OSM), which reversed a determination made by its Knoxville Field Office (KFO). The Surface Mining Control and Reclamation Act (SMCRA) and

applicable implementing rules¹ require OSM to perform a Federal inspection if it receives a citizen's complaint showing a possible violation of SMCRA and issues a 10-Day Notice (TDN) to the State regulatory authority, and that authority either fails to respond or its response fails to show it is acting to cause the violation to be corrected or has good cause for not acting (*e.g.*, the alleged violation does not exist).²

After receiving SAMS' citizen's complaint regarding Red River Coal Company, Inc. (Red River), and its operation of the Greater Wise No. 1 Mine in Wise County, Virginia, KFO issued a TDN, X14-130-052-001, to the Virginia Division of Mined Land Reclamation (DMLR). The TDN identified alleged SMCRA violations related to SAMS' allegations of selenium contamination resulting from Red River's surface coal mining operations. DMLR responded by concluding there was no violation of the State program. SAMS presented its concerns to KFO, which determined that DMLR's response to the TDN was arbitrary, capricious, and an abuse of discretion. DMLR sought informal review by the Regional Director, who reversed KFO's determination. The Regional Director reasoned that DMLR sampling showed there was no violation of the Virginia approved program. On appeal to the Board, SAMS contends OSM erred, *inter alia*, by relying on DMLR data that was allegedly collected without adhering to proper procedure. We find OSM did not err in relying on DMLR data and, therefore, affirm the Decision determining that the DMLR response to the TDN was not arbitrary, capricious, or an abuse of discretion.³

Background

SAMS submitted a request to DMLR for a State inspection of Red River's Greater Wise No. 1 Mine on January 8, 2014.⁴ Based on publicly available sampling

¹ 30 U.S.C. §§ 1201-1328 (2012); *see* 30 U.S.C. § 1271(a)(1); 30 C.F.R. § 842.11(b)(1)(ii)(B).

² *See, e.g., Morgan Farm, Inc.*, 141 IBLA 95, 100 (1997).

³ OSM submitted a tabbed administrative record on Aug. 25, 2014, which we cite by tab (*e.g.*, Tab X). SAMS then filed a statement of reasons (SOR), which OSM responded to on Dec. 11, 2014 (Answer).

⁴ Tab A; *see* 4 Virginia Administrative Code (VAC) 25-130-842-12(a) ("A person may request an inspection under 4 VAC 25-130-842-11(a), by furnishing to an authorized representative of the Director a signed, written statement . . . giving the authorized representative reason to believe that a violation, condition or practice referred to in 4 VAC 25-130-842-11(a) exists and setting forth a phone number and address where the person can be contacted."); *see also* 4 VAC 25-130-842-11(a) ("a violation of the Act, this chapter, or any condition of a permit . . . or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources.")

data taken from waters upstream of the mine that showed total selenium concentrations of 7.12 micrograms per liter (μ gram/liter) on September 6, 2012, 16.9 μ gram/liter on March 15, 2011, and 19.0 μ gram/liter on November 9, 2010, SAMS claimed it had “reason to believe that Red River is in ongoing violation of the Virginia Coal Surface Mining Control and Reclamation Act of 1979,^[5] administrative regulations promulgated pursuant thereto,^[6] and the terms and conditions of Virginia CSMO/ NPDES permit 1700624.”⁷ According to SAMS, its referred-to-data show “Red River’s discharges are causing violations of Virginia’s chronic aquatic life selenium water quality standard,” and since its National Pollution Discharge Elimination System (NPDES) permit does not include a selenium limit, any discharge of selenium is unauthorized and in violation of section 301 of the Clean Water Act.⁸ It claimed that DMLR needed to conduct comprehensive effluent monitoring over a period of several months to determine the extent of Red River’s violations and requested permission to accompany DMLR inspectors on any resulting inspections.⁹

In a letter dated January 10, 2014, DMLR denied SAMS’ request for a State inspection because Red River’s NPDES permit does not have effluent limitations for selenium and because it concluded “there is no violation that would warrant a citizen inspection.”¹⁰ Nonetheless and to address SAMS’ selenium concerns, DMLR represented that Red River would be required to address selenium when its NPDES permit was being renewed later that year.¹¹ Rather than request an informal review of that denial under 4 VAC 25-130-842-15(a) or formal review and a hearing under Va. Code Ann. 45.1-249, SAMS requested a Federal inspection based on the same

⁵ Code of Virginia (Va. Code) §§ 45.1-226 through 45.1-270.1.

⁶ See 4 VAC 25-130-816.41(a) (permittees to prevent material damage to the hydrologic balance in the permit area), 4 VAC 25-130.816.42 (effluent discharges from disturbed areas to be in compliance with all applicable State and Federal water quality laws).

⁷ Tab A at 1.

⁸ Tab A at 2; see 33 U.S.C. § 1311 (2012); 9 VAC 25-260-240-140, Criteria for Surface Water (“Instream water quality conditions shall not be acutely or chronically toxic except as allowed in 9 VAC 25-260-20 B (mixing zones).”) (acutely toxic if selenium \geq 20 μ gram/liter; chronically toxic if selenium \geq 5 μ gram/liter).

⁹ Tab A at 3 (citing 4 VAC 25-130-842-12(c) (“if an inspection is conducted as a result of information provided [by the requester under 4 VAC 25-130-842-12(a)], the person shall be . . . allowed to accompany the authorized representative of the Director during the inspection”).

¹⁰ Tab B, DMLR Response to SAMS dated Jan. 10, 2014, at 1.

¹¹ See *id.* (“Monitoring of selenium and other parameters will be required [of Red River] and a compliance schedule may be required if there is a reasonable potential for discharges to cause or contribute to exceedance of stream standards.”).

allegations it presented to DMLR and DMLR's denial of its request for a State inspection.¹² KFO responded by issuing a TDN, which identified the alleged violations as: (1) Red River's exceedance of "water quality standards related to [its] discharge of selenium"; and (2) DMLR's denial of SAMS' request for an "immediate state inspection based on alleged violation of water quality standards."¹³

Shortly thereafter, KFO conducted a joint inspection with DMLR of a nearby Red River surface coal mining operation that used the same outfall as its Greater Wise No. 1 Mine, which they sampled on February 21, 2014.¹⁴ By letter dated February 24, 2014, DMLR responded to KFO's TDN by stating "[n]o violation is present" because the data proffered by SAMS did not "indicate that [Red River's] outfall is causing an exceedance of the instream selenium standard."¹⁵ As to SAMS' request for a State inspection under the approved State program, DMLR stated it had no basis for conducting such an inspection because it had no "reason to conclude that a violation exists."¹⁶

By letter decision dated March 26, 2014, KFO determined that DMLR's response to the TDN was arbitrary, capricious, and an abuse of discretion. It explained that SAMS' proffered selenium sample data, "while not exceeding Virginia's 'acute' water quality standard (20 μ gram/liter) for selenium, does provide evidence suggestive that the chronic standards for selenium (5 μ gram/liter) could be in violation," but DMLR did not investigate "to determine whether in fact a violation of state water quality standards exists."¹⁷ DMLR requested informal review of that determination on March 31, 2004, pursuant to 30 C.F.R. § 842.11(b)(1)(iii)(A).

¹² Tab C at 2; *see id.* ("[SAMS] respectfully request that their representatives, their water quality monitoring contractor, and their attorney be permitted to participate in the requested inspections and that split samples be shared with their contractor.").

¹³ Tab E, TDN dated Feb. 19, 2015, at 1 (citing 4 VAC 25-130-816-42 ("Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws, standards and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.") and 4 VAC 25-130-842-11(b)).

¹⁴ *See* Decision at 3.

¹⁵ Tab F, DMLR Response to TDN dated Feb. 24, 2014 (DMLR Response), at 1, 2.

¹⁶ *Id.* at 2 (quoting 4 VAC 25-130-842-12(a)).

¹⁷ Tab H at 3; *see id.* ("The recognition that selenium will likely be addressed in the NPDES renewal seems counter-intuitive to the conclusion that a potential violation cannot exist.").

DMLR unequivocally stated in its request for informal review: “As of this date, there has been no evidence from appropriate water sampling and analysis to show that discharges from outfall 001 have caused or contributed to an exceedance of the instream water quality standard for selenium.”¹⁸ DMLR objected to KFO taking water samples at that outfall during the joint inspection on February 21, 2014,¹⁹ and represented that it had taken its own water samples above, at, and below outfall 001 on March 20, 2014.²⁰ DMLR shared its sampling results with OSM on April 17, 2014, which showed upstream selenium concentrations of 6.6 μ gram/liter, concentrations at the outfall of 4.5 μ gram/liter, and downstream concentrations of 3.5 μ gram/liter.²¹

In his June 6, 2014, Decision, the Regional Director concluded that the initial TDN response, as supplemented by DMLR’s request for informal review and analytical results of water samples taken on March 20, 2014, was not arbitrary, capricious, or an abuse of discretion. He therefore reversed KFO’s determination.²² Although the Regional Director did not believe the initial TDN response by DMLR provided “sufficient information to determine whether a violation of the Virginia program was occurring,” he applauded its sampling, which “indicated that no violation of the Virginia program is occurring with regard to selenium discharges from outfall 001.”²³ As to the TDN’s second violation, “a denial of SAMS’ request to accompany the DMLR on an inspection,” he noted “this concern is not appropriate for inclusion in a TDN” because even though DMLR may not have complied with its obligations under 4 VAC 25-130-842-12(c) when it took samples on March 20, 2014, “KFO has no ability to cite an enforcement action in response to DMLR’s shortcoming.”²⁴ This appeal followed and is now ripe for decision.

¹⁸ Tab I at 1.

¹⁹ *See id.* at 2 (“[Outfall 001] was sampled during this inspection as part of an ongoing citizen complaint.”) (quoting KFO Inspector’s Report, Feb. 25, 2014).

²⁰ *See id.* at 2-3 (“Once the analyses are received from the laboratory, [DMLR]’s water quality section will determine if there is the potential for this permit to cause or contribute to an exceedance of the State selenium standard and determine what measures the company will need to take.”).

²¹ Tab L at 2; *see id.* (“Based upon [DMLR]’s samples, the discharge from outfall 001 was not in violation of nor did it cause/contribute to an exceedance of the State selenium standard.”); *see also* Tab S, results of KFO sampling at the outfall on Feb. 21, 2014 (5.7 μ gram/liter).

²² Tab T, Decision on Informal Review (Decision), at 5.

²³ *Id.* at 6; *see id.* (“As a result, I have determined that the DMLR response to the TDN, when augmented by the additional information in its subsequent letters, is not arbitrary, capricious, or an abuse of discretion.”).

²⁴ *Id.* at 7.

Discussion

[1] Although a State with an approved program has primary responsibility for enforcing SMCRA within its borders, OSM retains a significant oversight role.²⁵ Any person may request a Federal inspection by filing what is known as a “citizen’s complaint,” which provides information indicating there is a violation. OSM is obligated to issue a TDN if the facts alleged in the request “would, if true, constitute a violation” of SMCRA, Departmental regulations, the applicable regulatory program, or any permit condition.²⁶ A Federal inspection will be conducted if the State regulatory authority fails to respond to the TDN, take “appropriate action” to cause the violation to be corrected, or show “good cause” for failing to do so.²⁷ In deciding whether the State authority took appropriate action or showed good cause, its conduct will be judged by whether it acted arbitrarily, capriciously, or abused its discretion, not by what OSM would have or could have done had it been the regulatory authority.²⁸

[2] Where the State regulatory authority asserts it has good cause for not taking an enforcement action based on its finding there is no violation under the approved State program, OSM “will defer to the state” and “not substitute its judgement for that of the state authority” unless, based on the facts presented, it determines that the State’s finding was arbitrary, capricious, or an abuse of discretion.²⁹ If OSM decides the State’s response is not arbitrary, capricious, or an abuse of discretion, it will inform the person who requested the Federal inspection

²⁵ See 30 U.S.C. §§ 1253, 1271(a)(1) (2012).

²⁶ 30 C.F.R. § 842.11(b)(2); see *Robert Gadinski*, 177 IBLA 373, 392 (2009); *Mystic Brooke Development, Inc.*, 175 IBLA 209, 211 (2008); *West Virginia Highlands Conservancy*, 152 IBLA 158, 184 (2000) (“Neither the statute nor an implementing regulation gives OSM discretionary authority to do otherwise.”).

²⁷ 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); see *Danny Crump*, 163 IBLA 351, 358 (2004), and cases cited; see 30 C.F.R. § 842.11(b)(1)(ii)(B)(3) (“Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.”), (4) (“Good cause includes: Under the state program the possible violation does not exist.”).

²⁸ See *Danny Crump*, 163 IBLA at 358; *Jim Tatum*, 151 IBLA 286, 298 (2000).

²⁹ *Morgan Farm, Inc.*, 141 IBLA at 100; 53 Fed. Reg. 26728 (July 14, 1988) (revising 30 C.F.R. § 842.11(b)(1)(ii)(B)) (“[Deference to state on whether a violation exists is] in keeping with the statutory framework, the congressionally mandated concept of primacy, and with the decision in *In re: Permanent Surface Mining Regulations Litigation*, [653 F.2d 514, 523 (D.C. Cir. 1981).]”); *Marion Docks, Inc. v. OSM*, 169 IBLA 47, 51 (2006); *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 75-77, 102 I.D. 1, 10-11 (1995).

of its decision, which can be appealed to this Board.³⁰ An appellant “challenging a decision finding a State’s response to a TDN was ‘acceptable’ [under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2)] has the burden of establishing that OSM erred; it does so by showing that the State’s regulatory action or response to the TDN was arbitrary, capricious, or an abuse of discretion.”³¹

SAMS raises three issues on appeal: (1) OSM erred by relying on data from an unlawful DMLR citizen inspection; (2) OSM was required to conduct a Federal inspection because DMLR failed to justify its denial of SAMS’ request for a State inspection when responding to the TDN; and (3) OSM erred by not addressing unpermitted selenium discharges in its TDN. We will separately address each of these issues below.

1. *SAMS has not carried its burden to show OSM erred in deciding that DMLR’s response to the TDN on its first identified “violation” was not arbitrary, capricious, or an abuse of discretion.*

The Regional Director noted in the Decision that the initial “response to the TDN did not provide sufficient information to determine whether a violation of the Virginia program was occurring” but that DMLR chose not to investigate whether Red River’s discharges were exceeding the selenium water quality standard, as had been alleged by SAMS, which was why KFO determined its response to the TDN was arbitrary, capricious, and an abuse of discretion.³² However, based on the DMLR samples taken on March 20, 2014, indicating there was no violation of the acute State selenium standard, the Regional Director decided that DMLR’s initial response, when augmented by these results, was not arbitrary, capricious, or an abuse of discretion. On appeal, SAMS claims sampling conducted on March 20, 2014, was “unlawful” because SAMS was not properly notified and allowed to participate in that sampling by DMLR and that as a consequence, the Regional Director was required “to ignore DMLR’s selenium data.”³³ We are unpersuaded.

³⁰ See *Robert Gadowski*, 177 IBLA at 393; *Mystic Brooke Development*, 175 IBLA at 212; 30 C.F.R. §§ 842.11(b)(1)(ii)(B)(2), 842.12(d), 842.15(a), 842.15(d).

³¹ *Mystic Brooke Development*, 175 IBLA at 212 (citing *Danny Crump*, 163 IBLA at 358); see *Jim Tatum*, 151 IBLA at 298, and cases cited.

³² Decision at 6.

³³ SOR at 8; see *id.* (“OSM is not entitled to dispose of a citizen’s request for federal inspection based on results obtained during a state inspection conducted in flagrant violation of statutory citizen participation requirements.”), 9-10 (citing 4 VAC 25-130-842-12(c)).

[3] SAMS requested a State inspection under 4 VAC 25-130-842-12(a), but its request was denied on January 10, 2014. Appellants had a right to informal review or formal review and a hearing of that denial under 4 VAC 25-130-842-15, but “[w]hen SAMS failed to seek review of DMLR’s decision not to inspect or enforce, Virginia’s citizen complaint process was over.”³⁴ Since DMLR sampling on March 20, 2014, was in response to KFO sampling at outfall 001 on February 21, 2014, not SAMS’ January 8 request for a State inspection, OSM asserts that SAMS simply had no right to participate in that sampling event under 4 VAC 25-130-842-12.³⁵ We agree.

The sampling performed on March 20, 2014, was not part of the State inspection requested by SAMS because its request was denied on January 10, 2014. When it failed timely to seek review of that denial under 4 VAC 25-130-842-15, the State inspection process was at an end and any inchoate rights SAMS may have had under 4 VAC 25-130-842-12(c) to notice and an opportunity to participate in a State inspection were also at an end. SAMS identified the denial of its request for a State inspection in its request for a Federal inspection, but its doing so did not resurrect any rights SAMS may have had under 4 VAC 25-130-842-12(c). Since we find SAMS was not unlawfully denied notice and an opportunity to participate in the State inspection on March 20, 2014, we reject its claim that the Regional Director was precluded from considering and relying on the DMLR sampling data from that inspection and, therefore, affirm the Regional Director’s determination “that the DMLR response to the TDN, when augmented by the additional information in its subsequent letters, is not arbitrary, capricious, or an abuse of discretion.”³⁶

2. *SAMS has not carried its burden to show OSM erred in deciding that DMLR’s response to the TDN on its second alleged “violation” was not arbitrary, capricious, or an abuse of discretion.*

The second TDN violation was based on DMLR’s denial of SAMS’ request “for immediate state inspection based on alleged violation of water quality standards.”³⁷ While KFO did not separately address this “violation” in its determination, the Regional Director did by characterizing it as a failure to allow SAMS to accompany DMLR inspectors on March 20, 2014. Although noting DMLR may not have complied with its obligations under 4 VAC 25-130-842.12(c) by not allowing SAMS to be present during the DMLR inspection on March 20, 2014, he found KFO’s inclusion of

³⁴ Answer at 11 (citing Declaration of Gavin M. Bledsoe (Bledsoe Declaration), Reclamation Services Manager, DMLR).

³⁵ See Answer at 14; see *id.* at 13-14, 17.

³⁶ Decision at 6,

³⁷ TDN at 1; see DMLR Response at 2.

this alleged noncompliance in its TDN was not appropriate because “KFO has no ability to cite an enforcement action in response to DMLR’s shortcoming.”³⁸

SAMS claims “DMLR has still not provided any justification for its response to the TDN,” but we find the record clearly shows otherwise.³⁹ DMLR’s response clearly addressed this alleged “violation,” claiming it was not required to perform a State inspection because SAMS’ proffered information did not provide it with “a reason to conclude that a violation exists.”⁴⁰ Because SAMS does not address DMLR’s TDN Response or the Regional Director’s decision, we conclude it has not met its burden on appeal and, therefore, reject its claims of error on this issue.

3. *KFO did not err by failing to include the discharge of selenium without an NPDES permit in the TDN issued to DMLR.*

In issuing the TDN, SAMS claims KFO ignored its request for a Federal inspection because “Red River has no authority to discharge selenium in **any** amount.”⁴¹ OSM points out that the case relied on by SAMS “cannot be cited to support [SAMS’] contention that DMLR and OSM[] were obligated to conduct an inspection in response to the complaints of SAMS.”⁴² Discharging a pollutant not identified in an NPDES permit is not a violation of the Clean Water Act if the permittee complied with applicable disclosure requirements when applying for its NPDES permit and the pollutant was within the reasonable contemplation of the permitting authority when it issued the NPDES permit.⁴³ But even if these circumstances might not be present due to NPDES permitting errors or deficiencies, we question how they would be known to KFO and cause it to believe Red River was violating the approved State program. As asserted by OSM, since it “simply has no role to play in the process of acquiring or revising an NPDES permit,” there can be no violation of the approved State program “that would warrant a citizen inspection [under SMCRA].”⁴⁴ But even if this NPDES issue had been identified as a “violation” in the TDN, DMLR’s response would have been little different from the one provided

³⁸ Decision at 7.

³⁹ SOR at 11.

⁴⁰ DMLR Response at 2.

⁴¹ SOR at 12 (citing *S. Appalachian Mt. Stewards (SAMS) v. A&G Coal Corp.*, 758 F.3d 560, 570 (4th Cir. 2014)).

⁴² Answer at 18-19 (citing *SAMS v. A&G Coal*, 758 F.3d at 560).

⁴³ *SAMS v. A&G Coal*, 758 F.3d at 565 (citing *Piney Run Pres. Ass’n v. Cnty. Comm’rs*, 268 F.3d 255, 259 (4th Cir. 2001)); see 30 U.S.C. § 1342(k) (2012).

⁴⁴ Answer at 19 (citing Bledsoe Declaration); see *id.* (“OSM[]’s oversight function is limited to enforcing the effluent limitations established by the EPA [Environmental Protection Agency] and DMLR.”).

in this case. DMLR explained it was addressing selenium by requiring Red River to monitor for it as part of its upcoming NPDES permit renewal process and that it would use these monitoring results to determine whether there is a reasonable potential for Red River selenium discharges to cause or contribute to an exceedance of applicable water quality standards.⁴⁵ We therefore agree with OSM, DMLR was then taking appropriate action to address a potential NPDES permitting issue.⁴⁶

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁴⁷ the Decision appealed from is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
James F. Roberts
Deputy Chief Administrative Judge

⁴⁵ See DMLR Response to SAMS, *supra* Notes 10, 11; DMLR Response at 2.

⁴⁶ See *id.* at 20; Tab Y, Bledsoe Declaration, at 1-2; 30 C.F.R. § 842.11(b)(1) (ii)(B)(3) (“Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.”); 53 Fed. Reg.

at 26728 (“[An] ‘other action’ to cause the violation to be corrected could include the initiation of the process to require a revision or modification to the operator’s permit.”) (“[T]he rule focuses on the goal of the Act itself – to see that violations are corrected. In doing so, the rule allows state discretion in how best to accomplish that goal – but only if those means are authorized under the state program.”).

⁴⁷ See 43 C.F.R. § 4.1.