Appeal from a decision by the Regional Director, Appalachian Region, Office of Surface Mining Reclamation and Enforcement, that affirmed in part and reversed in part determinations by the Knoxville Field Office regarding the State of Virginia’s responses to four Ten-Day Notices (X12-130-157-001, X13-130-157-002, X13-130-157-003, and X13-130-157-004) concerning Virginia Permit Nos. 1101401, 1100044, and 1100717.

Affirmed in part; reversed and remanded in part for actions consistent with this decision.

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

The Office of Surface Mining Reclamation and Enforcement is obligated to issue a Ten-Day Notice to a State if the facts alleged in a citizen complaint would, if true, constitute a violation of the Surface Mining Control and Reclamation Act, Departmental regulations, the applicable regulatory program, or any permit condition.

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

The Office of Surface Mining Reclamation and Enforcement must order a Federal inspection if a State regulatory authority fails timely to respond to a Ten-Day Notice by
taking appropriate action to cause the violation to be corrected or showing good cause for not doing so.

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

If the Office of Surface Mining Reclamation and Enforcement decides a State regulatory authority's response to a Ten-Day Notice is not arbitrary, capricious, or an abuse of discretion, a citizen complainant may seek informal review of that decision. That informal review decision may then be appealed to this Board. An appellant appealing an informal review decision has the burden of establishing error in the decision by the Office of Surface Mining Reclamation and Enforcement, which it satisfies by showing that the State's regulatory action or response was arbitrary, capricious or an abuse of discretion.

APPEARANCES: Jessica Bier, Pound, Virginia, pro se; Steven C. Barclay, Esq., U.S. Department of the Interior, Office of the Field Solicitor, Pittsburg, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

Jessica Bier appeals an informal review decision by the Director, Appalachian Region (Regional Director), Office of Surface Mining Reclamation and Enforcement (OSMRE), resolving her citizen complaints about certain coal mining reclamation operations of the Red River Coal Company, Inc. (Red River), in Wise County, Virginia. In her complaints, the appellant alleged that Red River's coal mining operations and reclamation activities resulted in multiple violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).¹

SUMMARY

The appellant contends that in the informal review decision, the Regional Director erred by declining to order a federal inspection in response to certain allegations contained in her citizen complaints. She also challenges the Regional Director's

decisions to order federal investigations in response to other allegations in her complaints, arguing that the investigations ordered will be unresponsive to those allegations. Last, she contends that in his decision, the Regional Director should have considered that an amendment to Virginia’s federally-approved surface mining program did not comply with SMCRA.

In this decision we determine that the Regional Director properly ordered a federal investigation with respect to some of the appellant’s allegations, and properly decided not to order a federal inspection in response to other allegations. We therefore affirm the April 14, 2014, decision with respect to those allegations. But we conclude that the Regional Director erred in failing to order a federal inspection in response to certain other allegations, and reverse and remand the decision concerning those allegations. Specifically, we reverse the Regional Director with respect to allegations that Red River failed to meet effluent standards during storm events, failed to reclaim refuse used as backfill, and failed to conduct representative groundwater monitoring. Last, we affirm the Regional Director’s decision that he does not possess the authority to review the State’s amendment to its federally approved surface mining program in response to the appellant’s request for informal review. We therefore affirm in part, and reverse in part, the Regional Director’s April 14, 2014, decision.

BACKGROUND

A. The Role of the State and OSMRE in Implementing the Surface Mining Control and Reclamation Act

SMCRA governs the surface mining of coal and reclamation of such mining.\(^2\) Congress granted primary responsibility for the enforcement of SMCRA to states with approved programs for regulating surface mining.\(^3\) Because the State of Virginia has a federally approved program for surface mining reclamation operations, it has primary responsibility for enforcing SMCRA within its borders.\(^4\) OSMRE, however, retains significant oversight and enforcement powers to ensure compliance with the statute.\(^5\)

\(^2\) 30 U.S.C. §§ 1201-1328 (2012); see id. § 1271(a)(1); 30 C.F.R. § 842.11(b)(1)(ii)(B).
\(^4\) 30 C.F.R. §§ 946.10, 946.15.
Those oversight and enforcement powers provide the basis for the decision on appeal. Specifically, with respect to this appeal, SMCRA allows any adversely affected person to notify OSMRE of the existence of a SMCRA violation at any surface mining operation. Such notification is known as a “citizen complaint.” If a citizen complaint gives OSMRE reason to believe that a violation of a SMCRA requirement or permit condition is taking place, OSMRE must notify the appropriate state regulatory agency by issuing a Ten-Day Notice (TDN). This notice provides the state agency with the opportunity to deal with any violation and to respond to OSMRE. SMCRA’s implementing regulations provide that OSMRE “shall have reason to believe” there is a violation of the statute, regulations, or applicable program, or a violation of any condition of a permit “if the facts alleged by the informant would, if true, constitute a condition, practice or violation . . . .”

Upon receipt of a TDN, a state must “take appropriate action to cause said violation to be corrected or . . . show good cause” why the violation has not been corrected within ten days. “Appropriate action” that a state agency may take in response to a TDN “includes enforcement or other action authorized under the State program to cause the violation to be corrected.” In the alternative, a state agency can establish “good cause” why the violation has not been corrected when, “[u]nder the State program, the possible violation does not exist.”

After a state agency responds to a TDN, OSMRE considers the response and determines whether the state has taken appropriate action to cause the violation to be corrected.

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6 30 U.S.C. § 1267(h) (2012); 30 C.F.R. §§ 842.11, 842.12(a); Mystic Brooke Development, 175 IBLA at 211.
10 30 C.F.R. § 842.11(b)(2); see also 4 V.A.C. 25-130-842.11; West Virginia Highlands Conservancy, 152 IBLA at 185.
13 Id.
corrected or has shown good cause for not taking action.\textsuperscript{14} If OSMRE finds that a state agency has failed to take appropriate action or show good cause, OSMRE must "immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring."\textsuperscript{15} After conducting a federal inspection, OSMRE may issue a notice of violation (NOV) based on that inspection.\textsuperscript{16} In the NOV, OSMRE must describe the nature of the violation, the remedial action required, and a reasonable time for abatement.\textsuperscript{17}

[3] If OSMRE decides that the state’s response is appropriate and declines to conduct a federal inspection, a citizen complainant may seek informal review of that decision with the Director of OSMRE or his or her designee (here, the Regional Director).\textsuperscript{18} That OSMRE informal review decision may then be appealed to this Board.\textsuperscript{19} To prevail on appeal, an appellant has the burden of establishing that OSMRE erred, which it does by showing that the State’s regulatory action or response to the TDN was arbitrary, capricious, or an abuse of discretion.\textsuperscript{20}

B. Summary of the Appellant’s Citizen Complaints, the Agency Actions Related to Each Complaint, and the Regional Director’s April 14, 2014, Decision Addressing the Allegations in the Complaints

With these requirements and standards in mind, we turn to the appellant’s challenge to the OSMRE Appalachian Regional Director’s decision that resolved, on informal review, allegations from two citizen complaints the appellant filed with

\textsuperscript{14} Id.; Mystic Brooke Development, 175 IBLA at 211-12; W. Va. Highlands Conservancy, Inc. v. Norton, 343 F.3d at 242.
\textsuperscript{16} 30 C.F.R. § 843.12; Al Hamilton Contr. Co. v. Kempthorne, 639 F. Supp.2d 597, 599 (W.D. Pa. 2009) ("OSM[RE]'s ability to take an enforcement action under its residual oversight authority is expressly conditioned on its first performing a federal inspection under 30 U.S.C. § 1271(a)(1).”).
\textsuperscript{17} 30 C.F.R. § 843.12(b).
\textsuperscript{18} Id. § 842.15(a); Mystic Brooke Development, 175 IBLA at 212; W. Va. Highlands Conservancy, Inc. v. Norton, 343 F.3d at 242.
\textsuperscript{19} 30 C.F.R. § 842.15(d); 43 C.F.R. § 4.1281; Mystic Brooke Development, 175 IBLA at 212.
\textsuperscript{20} Mystic Brooke Development, 175 IBLA at 212 (citing Danny Crump, 163 IBLA 351, 358 (2004)).
OSMRE’s Knoxville Field Office (KFO). The appellant’s complaints concerned Red River’s operations in Wise County, Virginia. In her complaints, the appellant alleged that Red River’s operations under Virginia Permit Nos. 1101401 for the North Fox Gap Surface Mine, 1100044 for the Steer Branch Preparation Plant, and 1100717 for the Buck Knob Mine violated SMCRA. The appellant’s complaints primarily concerned Red River’s alleged improper disposal of mining refuse; the acidity and toxicity of that refuse and its effect on surface water and groundwater; and improper reclamation of mining waste.

Below we provide a summary of each of the appellant’s two citizen complaints; the TDNs issued by the KFO in response to each complaint; the actions taken by the Virginia Division of Mined Land Reclamation (DMLR) in response to the TDNs; the KFO’s responses to the DMLR’s actions; and the Regional Director’s decision on informal review.

1. Citizen Complaint of August 6, 2012, and TDN X12-130-157-001

The appellant filed the first citizen complaint at issue in this appeal on August 6, 2012, alleging that Red River was violating SMCRA in its operations under Permit No. 1101401 for the North Fox Gap Surface Mine. In response, the KFO issued TDN X12-130-157-001 to the DMLR. The TDN identified seven alleged violations of SMCRA: (1) installation of an unapproved sediment structure; (2) failure to design and construct an exit channel to prevent the discharge of suspended solids; (3) failure to meet effluent standards for total suspended solids and settleable solids during storm events; (4) failure to reclaim refuse used as backfill and allowing its weathering and erosion; (5) failure to divert runoff into stabilized diversion channels; (6) failure to minimize damage to the hydrologic balance; and (7) use of unsuitable refuse material as backfill.

The DMLR initially responded to the TDN on August 24, 2012, and provided additional information to the KFO on September 24, 2012. The KFO determined that the DMLR response was appropriate for all allegations except for the first allegation.

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21 Administrative Record (AR) Tab 38 (OSMRE Appalachian Regional Director Decision, Apr. 14, 2014).
22 AR Tab 6 (Citizen Complaint, Aug. 6, 2012).
about installation of an unapproved sediment structure.\textsuperscript{26} The KFO found that the DMLR's initial response to this allegation incorrectly focused on an approved diversion channel, and not on the "berm and long linear catchment basin below the refuse material used as backfill," identified by the appellant in her complaint.\textsuperscript{27} Although the DMLR, in its additional response to the KFO, addressed the linear catchment basin, stating that it issued a Revision Order Notice (RON) to Red River, the KFO found that "use of a RON to address an identified violation is not consistent with the requirements of 30 Code of Federal Regulations."\textsuperscript{28} The KFO therefore ordered a federal inspection to investigate that allegation.\textsuperscript{29}

The KFO conducted the federal inspection on November 2, 2012.\textsuperscript{30} The appellant and two representatives of Red River were present at the inspection, where the KFO found that Red River had removed the unapproved sediment structure that was the subject of the alleged violation.\textsuperscript{31} The KFO therefore found that the alleged violation was no longer present and decided to not take any additional action.\textsuperscript{32}

The appellant sought informal review of the KFO's decision.\textsuperscript{33} On informal review, OSMRE's Regional Director affirmed the KFO's response with respect to allegations one through five, but reversed the KFO with respect to the sixth allegation – failure to minimize damage to the hydrological balance – and ordered a federal inspection in the form of a "comprehensive hydrologic investigation of the effects [coal mining] refuse is having on the hydrologic balance . . . ."\textsuperscript{34} The Regional Director noted that in response to the sixth allegation, the DMLR issued a RON requiring Red River to evaluate and address the surface water impacts of flow from pond #12 into the local watershed.\textsuperscript{35} But the Regional Director also found that the appellant had provided

\textsuperscript{26} AR Tab 14 (KFO Letter to DMLR, Oct. 12, 2012).
\textsuperscript{27} Id. at 1.
\textsuperscript{28} Id. at 2.
\textsuperscript{29} Id. at 1.
\textsuperscript{30} AR Tab 15 (OSMRE Mine Site Evaluation, Permit No. 1101401, Nov. 2, 2012).
\textsuperscript{31} Id. at 3.
\textsuperscript{32} Id.
\textsuperscript{33} AR Tab 34 (Letter from Jessica Bier to OSMRE Appalachian Regional Director, Oct. 16, 2013).
\textsuperscript{34} AR Tab 38 at 23.
\textsuperscript{35} Id.
photographic evidence of numerous seeps in the area, which the DMLR’s response did not adequately address.\textsuperscript{36} He therefore required the KFO to conduct an inspection.\textsuperscript{37}

The Regional Director affirmed the KFO’s response with respect to the seventh allegation—use of unsuitable refuse material as backfill—stating that in response to the TDN the DMLR issued an NOV requiring “Red River to revise its permit to prove that the refuse is suitable for backfilling and to address measures that Red River must take to protect the hydrologic regime for the material already placed.”\textsuperscript{38} Noting that the issuance of an enforcement action can be considered appropriate action under the regulations, the Regional Director affirmed the KFO’s determination that the DMLR’s issuance of the NOV was not arbitrary, capricious or an abuse of discretion.\textsuperscript{39} But in so doing, he also stated that the federal inspection in the form of a “comprehensive hydrologic assessment” that he ordered in response to allegation six will address appellant’s concerns about the effects that coal mining refuse deposition may be having on surface and groundwater.\textsuperscript{40}


The appellant subsequently sent the KFO a second citizen complaint on April 25, 2013, that identified several issues she wished OSMRE to consider.\textsuperscript{41} In response to the appellant’s complaint, the KFO issued three TDNs to the DMLR: X13-130-157-002, X13-130-157-003, and X13-130-157-004.\textsuperscript{42}

\textsuperscript{36} Id. ("The DMLR’s response to the allegation appears to be directed toward the discharge from pond #12 only and does not adequately address the numerous seeps you noted in your letters.").

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} AR Tab 18 (Letter from Jessica Bier to OSMRE Appalachian Regional Director, Apr. 25, 2013).

The first TDN the KFO issued in response to the appellant's April 25, 2013, complaint, TDN X13-130-157-002, contained five allegations that Red River was violating SMCRA in its operations on permit number 1101401 for the North Fox Gap Surface Mine: (1) use of unsuitable refuse material as backfill; (2) failure to conduct representative groundwater monitoring; (3) failure to contemporaneously reclaim lands where refuse material was used as backfill; (4) failure to eliminate highwalls and spoil piles and establish stable backfill; and (5) failure to store acid and toxic material in a manner that protects ground and surface waters.\footnote{AR Tab 19 at 1-2.}

The DMLR responded to the KFO on May 14, 2013, stating that no violations were present with respect to any of the five allegations and therefore the DMLR would take no enforcement action.\footnote{AR Tab 22 (Notice of DMLR Action, May 13, 2013).} The DMLR stated that it approved a revision to Red River's permit on December 10, 2012, which required Red River to address the use of coarse refuse in the backfilling of highwalls and install an additional monitoring well (Piezometer P-5) to monitor the coarse refuse backfill area and also included a variance allowing for a delay in completing final backfilling and regrading.\footnote{Id. at 2-3.} The DMLR found that the permit revision addressed allegations one, two, three, and five, and therefore no violation was present with respect to those allegations.\footnote{Id.} With respect to the fourth allegation—failure to eliminate highwalls and spoil piles and establish stable backfill—the DMLR stated that it had issued an NOV requiring Red River to eliminate highwalls, spoil piles, and depressions, and regrade and stabilize disturbed areas.\footnote{Id. at 3.} The DMLR further stated that it terminated the NOV and "the area has been seeded and vegetation is becoming established"; as a result, "no significant stability problems exist."\footnote{Id.} The DMLR therefore determined that no violation was present and it would take no enforcement action.\footnote{Id.}

The KFO then determined that the DMLR's responses were appropriate for all five allegations, finding that DMLR had shown good cause for not taking enforcement action because the alleged violations did not exist.\footnote{AR Tab 27 at 2-4 (KFO Letter to DMLR, June 20, 2013).}
The appellant sought informal review of the KFO's determination.\textsuperscript{51} On informal review, the Regional Director reversed the KFO's determination that the DMLR's response to allegations one and five was appropriate.\textsuperscript{52} For the first allegation—use of unsuitable refuse material as backfill—the Regional Director found that the DMLR improperly determined that the refuse material was suitable for backfill based on monitoring reports.\textsuperscript{53} He stated:

After reviewing the record, I have determined that there was insufficient weight accorded to the net neutralization potential for the refuse being deposited on the permit. A majority of the tests indicate negative values, some substantial, that indicate that refuse may not be suitable for use as a backfill material.”\textsuperscript{54}

For the fifth allegation—failure to store acid and toxic material in a manner that protects ground and surface waters—the Regional Director disagreed that the permit revision will sufficiently protect surface and ground water resources by requiring proper handling of any refuse material. He noted that “refuse deposition has been occurring for more than 10 years and there is limited information in the record to definitively prove whether or not the refuse is toxic or acid producing.”\textsuperscript{55} Additionally, the Regional Director stated that although a report from a KFO hydrologist indicated that refuse deposition was having a limited effect on groundwater, “there was an upward trend in sulfate levels which could indicate an influence from mining.”\textsuperscript{56} He therefore required a federal inspection to investigate these allegations.

With respect to allegations three and four—failure to contemporaneously reclaim lands and failure to eliminate highwalls and spoil piles—the Regional Director affirmed the KFO's determination that the DMLR's response was not arbitrary, capricious, or an abuse of discretion.\textsuperscript{57} And he affirmed the KFO's determination that the DMLR provided an appropriate response by requiring Red River to install a monitoring well to correct the second alleged violation—failure to conduct representative groundwater monitoring.\textsuperscript{58} But the Regional Director provided further direction to the KFO to issue a new TDN to

\textsuperscript{51} AR Tab 34.
\textsuperscript{52} AR Tab 38 at 23-25.
\textsuperscript{53} Id. at 23.
\textsuperscript{54} Id. at 23-24.
\textsuperscript{55} Id. at 25.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 24-25.
\textsuperscript{58} Id. at 24.
the DMLR if it determined that the monitoring well was not an appropriate monitoring well to evaluate groundwater quality and allow the DMLR to respond to that determination.\textsuperscript{59}

\textbf{TDN X13-130-157-003}

The second TDN issued by the KFO in response to the appellant's April 25, 2013, complaint, TDN X13-130-157-003, included two allegations that Red River was violating SMCRA on permit number 1100044 for the Steer Branch Preparation Plant: (1) failure to contemporaneously reclaim lands where refuse material was used as backfill; and (2) use of unsuitable refuse material as backfill.\textsuperscript{60}

In response to the TDN, the DMLR relied on pending permit revision applications from Red River that would address the potential violations to find that no violation was present and thus, the DMLR would take no enforcement action.\textsuperscript{61} The KFO determined that this response neither caused the violation to be corrected nor showed good cause for failure to do so and ordered a federal inspection.\textsuperscript{62} The KFO stated: "While the pending revisions to the Red River permit may be responsive to the alleged violations, it is not appropriate to consider unapproved permit revisions."\textsuperscript{63} The KFO therefore ordered a federal investigation to address both alleged violations.\textsuperscript{64}

The DMLR requested informal review of the KFO's determination,\textsuperscript{65} and the Regional Director on informal review affirmed the KFO and ordered a federal inspection.\textsuperscript{66}

Despite the KFO's determination to order a federal inspection with respect to both allegations in TDN X13-130-157-003, and the Regional Director's decision affirming the KFO's determination, the appellant also sought informal review of the Regional Director's

\textsuperscript{59} Id.
\textsuperscript{60} AR Tab 20 at 1.
\textsuperscript{61} AR Tab 23 at 1-2 (Notice of DMLR Action, May 14, 2013).
\textsuperscript{62} AR Tab 28 at 2-3 (KFO letter to DMLR, June 28, 2013).
\textsuperscript{63} Id. at 1 (violation 1), 2 (violation 2).
\textsuperscript{64} Id. at 2 (violation 1), 3 (violation 2).
\textsuperscript{65} AR Tab 29 (DMLR Review Request, July 1, 2013).
\textsuperscript{66} AR Tab 30 (OSMRE Appalachian Region letter to DMLR, Aug. 12, 2013); id. at 3 ("[DMLR]'s reliance upon the submittal of these [revision] applications . . . now pending for 10 to 14 months, cannot be deemed to be appropriate action to assure that the violation is correct or good cause for failing to do so.").
decision. She stated that the TDN violations and the NOVs issued by the DMLR after the inspection ordered by the KFO “fail to adequately address the violation I alleged in my complaint.” On informal review, the Regional Director declined to revisit his decision to affirm the KFO and order a federal investigation of the allegations. He explained: “[T]he purpose of an informal review is to decide whether to conduct a Federal inspection. Because I have already made that decision with regard to this TDN, I will not revisit the issues presented by that TDN . . . .” But the Regional Director noted that the federal inspection he was requiring with respect to other allegations would, “of necessity, include a hydrologic assessment of all three of Red River’s permits in this area,” including permit number 1100044 for the Steer Branch Preparation Plant that was the subject of TDN X13-130-157-003. He further added that if the appellant was alleging that violations still exist that are not the subject of the impending hydrologic assessment, she “should inform the DMLR of those concerns through the citizen’s complaint process.”

**TDN X13-130-157-004**

The last of the three TDNs issued in response to the appellant’s April 25, 2013, complaint, TDN X13-130-157-004, included two allegations that Red River’s operations were violating SMCRA on permit number 1100717 for the Buck Knob Mine. The allegations in this TDN are the same as those alleged in TDN X12-130-157-003 for Red River’s permit number 1100044 for the Steer Branch Preparation Plant – (1) failure to contemporaneously reclaim lands where refuse material was used as backfill, and (2) the use of unsuitable refuse material as backfill.

The DMLR responded to both allegations by stating that no violation was present because coarse refuse is not used as backfill material on this permit, and therefore, the DMLR would take no enforcement action. The KFO found that the DMLR’s response to both allegations was appropriate and that the DMLR had shown good cause for not

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67 AR Tab 34 at 13-15.
68 Id. at 14; id. at 15 (“The NOVs issued by DMLR do not cause the violations to be corrected.”).
69 AR Tab 38 at 25.
70 Id.
71 Id. at 26.
72 Id. at 25.
73 AR Tab 21 at 1.
taking enforcement action because the alleged violations did not exist.\textsuperscript{75} The KFO stated: “Refuse material is not used as backfill material on this permit and the disturbed, unreclaimed portion of this permit is currently in temporary cessation status.”\textsuperscript{76}

The appellant sought informal review of the KFO’s decision, and the Regional Director affirmed the KFO’s determination that the DMLR’s response to both allegations was not arbitrary, capricious, or an abuse of discretion.\textsuperscript{77} With respect to the first allegation—failure to contemporaneously reclaim lands—the Regional Director noted that in response to the appellant’s request for clarity on the area of the permit where refuse material was placed, the KFO stated that the area of refuse “was considered to be a road used to haul refuse to permit 1101401 for backfilling.”\textsuperscript{78} The Regional Director further noted that in the appellant’s request for informal review, she stated that the road regulations were not followed and the refuse was acid/toxic and not handled properly.\textsuperscript{79} Because the Regional Director concluded that the roadway constructed of refuse material to convey refuse from one permit to another did not fall within the definition of “road” as defined by State law, the road regulations referred to by the appellant were not applicable.\textsuperscript{80} The Regional Director therefore concluded that DMLR’s response was not arbitrary, capricious, or an abuse of discretion.\textsuperscript{81} The Regional Director also determined that the DMLR’s response to the second allegation—use of unsuitable refuse material as backfill—was appropriate since the “permit revision allowed the disposal of underground mine refuse on this permit in a bench fill adjacent to the underground mine and that refuse is not used as backfill.”\textsuperscript{82}

In his decision, however, the Regional Director stated that the federal inspection he was requiring would, “of necessity, include a hydrologic assessment of all three of Red River’s permits in this area” including permit number 1100717 for the Buck Knob Mine that was the subject of TDN X12-130-157-004.\textsuperscript{83} Consequently, the hydrologic assessment would determine if the refuse deposited so far is adversely affecting the hydrologic balance.\textsuperscript{84}

\textsuperscript{75} AR Tab 25 at 2 (KFO letter to DMLR, May 29, 2013).
\textsuperscript{76} Id.
\textsuperscript{77} AR Tab 38 at 26.
\textsuperscript{78} Id. at 26.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
DISCUSSION

Now that we have summarized the citizen complaints, agency actions, and the OSMRE Regional Director’s decision on informal review, we turn to the appellant’s challenge to that informal review decision. Below we address the appellant’s argument with respect to the Regional Director’s resolution of each of the allegations in each of the four TDNs that resulted from the appellant’s complaints. Last, we consider the appellant’s argument that the Regional Director erred in not considering that, according to the appellant, an approved amendment to Virginia’s state program did not comply with SMCRA.

A. **TDN X12-130-157-001**

1. **TDN X12-130-157-001 Allegation 1: Installation of an Unapproved Sediment Structure**

The appellant challenges the Regional Director’s resolution of the first allegation in TDN X12-130-157-001 – installation of an unapproved sediment structure. She argues that the alleged violation in the TDN issued by the KFO, and the subsequent federal inspection on November 2, 2012, did not address her complaint, and that this error continued throughout the DMLR response, KFO response to DMLR, and Regional Director’s decision.\(^{85}\) She also alleges that during the November 2, 2012, inspection, the pH of the westernmost seep was found to be acidic, with values between 5 and 5.5, and that the KFO should have taken appropriate enforcement action by issuing a notice of violation based on this finding.\(^{86}\)

The appellant contends that her complaint focused on the quality of the water entering the drainage structure for Pond 12, but the agencies ignored this aspect of her complaint and instead focused on the fact that the structure had not been approved. Specifically, the appellant states that the TDN described the violation as Red River having “installed an unapproved sediment structure on the bench which allows water to drain into the backfill,”\(^{87}\) but her complaint about the structure focused not on whether it had been approved, but rather on the quality of the water that it conveyed, which she contends had very low pH values, high conductivity, and iron and aluminum sulfate

\(^{85}\) See Statement of Reasons (July 3, 2014) (SOR) at 1-2 (stating she alleged violations that were not included in the TDNs issued by the KFO).

\(^{86}\) Id. at 18-19.

\(^{87}\) AR Tab 7 at 1; AR Tab 38 at 5.
precipitate. She therefore argues that the removal of the structure, which was the basis for the KFO’s decision not to take any additional action, did not address her allegation regarding the water quality of the drainage that she raised in her complaint. She states “[t]hat removal of the basin corrected the lack of permit approval for the sediment structure, but did nothing to correct the polluted runoff and leachate leaking into the backfill.” She further states that while the Regional Director recognized the issue of the effects of “water leaking into Red River’s fill,” he did not specifically address the alleged violation and the DMLR and KFO responses.

We find, however, that the Regional Director’s decision addressed the alleged violation as characterized by the appellant. The Regional Director first concluded that OSMRE had conducted a federal inspection on November 2, 2012, with respect to the violation, found that the drainage structure had been removed, and therefore, no further review was necessary. We agree with the appellant that the inspection and removal of the structure, and the Regional Director’s reliance on that inspection and removal, did not address her allegations regarding water quality. But we find that in his discussion of this alleged violation, the Regional Director specifically recognized the appellant’s “concern over the effects of water leaking into Red River’s fill” and stated that he would address this issue later in the decision. And in discussing the sixth alleged violation under TDN X12-130-157-001, the Regional Director ordered the KFO to conduct a federal inspection in the form of a comprehensive hydrologic assessment of ground and surface waters in the area. This assessment “will include a determination of the effects, if any, of water leaking into the fill.” At the time of its Answer, OSMRE represents that this federal inspection is ongoing.

The appellant responds that this hydrologic assessment is not a “true inspection” and that it is not equivalent to an inspection. We disagree. As discussed above, SMCRA requires that OSMRE conduct a federal inspection in response to an alleged

88 SOR at 18.
89 Id.
90 Id. at 18-19.
91 Id. at 18.
92 AR Tab 38 at 21.
93 Id.
94 Id. at 23; see also Answer to Statement of Reasons at 14-15 (Aug. 29, 2014) (Answer).
95 Answer at 14.
96 Id. at 18.
97 Reply at 1, 2 (“The hydrologic assessment is not equivalent to an inspection and has not resulted in enforcement action.”).
violation that a state agency has not appropriately addressed. The Regional Director's decision to order KFO to conduct a comprehensive hydrologic assessment responds to alleged Violation 1 of TDN X12-130-157-001 because that assessment is intended to assess "the impact that refuse deposition is (or is not) having on surface and groundwater." This responds to the appellant's allegation that the water conveyed by the removed structure had very low pH values, high conductivity, and iron and aluminum sulfate precipitate. The Regional Director's decision to conduct a federal inspection in the form of a comprehensive hydrologic assessment thus complies with OSMRE's duty under SMCRA to order a federal inspection when a state agency has not appropriately addressed an alleged violation.

We therefore conclude that the appellant has not met her burden to show that the Regional Director erred in his decision or that DMLR's response to this allegation was inappropriate.

2. TDN X12-130-157-001 Allegation 2: Failure to Design and Construct an Exit Channel to Prevent the Discharge of Suspended Solids

The appellant next challenges the Regional Director's resolution of the second allegation addressed in TDN X12-130-157-001, namely that Red River's Pond 12 exit channel did not prevent suspended solids from being deposited on her property, and that the channel contained improperly sized rip-rap. She alleges that the DMLR response was arbitrary, capricious and an abuse of discretion, and that the KFO and Regional Director were incorrect in concluding that the DMLR had appropriately addressed the alleged violation.

On informal review, the Regional Director affirmed the KFO's decision that the DMLR had responded appropriately to this allegation. First, the Regional Director stated that "the DMLR responded to this allegation by noting that the structure was certified by a registered professional engineer upon its construction in 1994, and has received annual certifications since that time." OSMRE reiterates this point, stating that "there is no dispute that the channel was designed, constructed, and certified" by a professional

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99 AR Tab 38 at 23.
100 SOR at 18.
101 AR Tab 7 at 1; SOR at 19-22.
102 SOR at 21-22.
103 AR Tab 38 at 21.
engineer. However, the fact that the channel may have been designed, constructed and certified by a professional engineer does not address the appellant’s allegation that erosion following rain events contributed excessive amounts of solids downstream and off permit.

The Regional Director further noted in his decision, however, that the DMLR directly addressed this allegation by issuing RON No. DLH0007890 on August 8, 2011, requiring Red River to revise its permits to address surface water impacts resulting from flows out of Pond 12. Based on this RON, he concluded that “this portion of the TDN, issued specifically for failure to design and construct an exit channel, ha[d] been addressed by the DMLR.” In closing his treatment of the appellant’s second allegation, he also stated that “[i]f the redesigned and reconstructed stream channel has since exhibited erosion, [the appellant] should inform the DMLR of that potential violation through the citizen complaint process.

We find that the appellant does not demonstrate that the Regional Director erred in affirming the KFO’s and DMLR’s responses to this allegation. The appellant recognizes that Red River received approval of Permit Revision 1007489 on December 6, 2012, and pursuant to that permit revision repaired the erosion by adding “approximately 400’ of rock rip rap channel from the exit channel to the stream bed at the toe of the hollow” which “should suffice as a permanent repair to prevent current and future erosion repairs from Pond 12.”

In addition, the evidence the appellant provided to support her allegations of a SMCRA violation predate the permit revision. She provided photographs of exit channel erosion that occurred in August 2011 and July 2012, and alleges that “the channel again contributed excessive sediment on August 31, 2012, and September 1, 2012.” The appellant asserts that the DMLR should have issued an NOV for the July 2012 event, but notes that Red River “agreed voluntarily to repair the channel.”

Answer at 15.
SOR at 19.
AR Tab 38 at 21.
Id.
Id.
SOR at 20.
Id. at 21.
Id. at 20-21.
The appellant fails to show that the DMLR’s response in issuing the RON, which resulted in a permit revision that approved repair and reconstruction of the channel, is not an “appropriate action to cause said violation to be corrected” as required by SMCRA and its implementing regulations.112 The appellant has not demonstrated otherwise by providing evidence of erosion following the repair and reconstruction, and we therefore uphold the Regional Director’s decision affirming the KFO on this allegation.

3. **TDN X12-130-157-001 Allegation 3: Failure to Meet Effluent Standards During Storm Events**

The third allegation in this TDN was the failure to meet effluent standards for total suspended solids and/or total settleable solids during storm events.113 The Regional Director upheld the KFO’s determination that the DMLR’s response to this allegation was not arbitrary, capricious, or an abuse of discretion because neither Red River’s monitoring reports nor an inspection showed violations for total suspended solids or total settleable solids.114

The Regional Director also acknowledged receipt of photographs, sent by the appellant via an email on October 29, 2012, of a water sample she had collected on July 31, 2012, and provided to the KFO.115 But the Regional Director stated that the record showed “no results from laboratory tests for water quality of the water depicted in the photographs,” and that to “prove the existence of a violation,” such evidence was necessary.116 The Regional Director therefore concluded that “there is not sufficient information in the record to overturn the KFO’s determination that the DMLR’s response to this allegation was not arbitrary, capricious or an abuse of discretion.”117

The appellant contends that the Regional Director’s reliance on the DMLR monitoring reports was erroneous.118 She states that the data reported no flow for an underdrain, but that the underdrain “has had continuous flow for the 10 years [she has] lived there . . . .”119 The appellant further states that there were other inconsistencies in the water data, including the data’s report of no discharge from Pond 12 when this “was

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113 AR Tab 7 at 1; SOR at 22.
114 AR Tab 38 at 22.
115 Id.
116 Id.
117 Id.
118 SOR at 22.
119 Id.
clearly not the case.”\textsuperscript{120} The appellant specifically contends that the Regional Director should not have relied on the inspection based on the timing and location of the samples taken. She states first that the lack of a violation based on a sample taken on the morning of July 25, 2012, is problematic since the sample was taken approximately 6 hours after heavy rain stopped, and the time for peak discharge following a heavy rain event is “probably 1-2 hours.”\textsuperscript{121} Second, she states that the sample was “presumably taken from the Pond 12 discharge spillway, at the top of the exit channel, where all the DM[L]R samples for Pond 12 are collected.”\textsuperscript{122} But she alleges that the “primary source of the total suspended solids (TSS) referenced in [her] complaint was the exit channel erosion, located below the Pond 12 spillway where water sampling is conducted.”\textsuperscript{123} Last, she disagrees with the Regional Director’s conclusion that she had not provided sufficient evidence to prove a violation of water quality and demonstrate that the DMLR response was arbitrary and capricious. She states that having notified both the KFO and Regional Director of the water sample she took, “KFO should have had the sample tested.”\textsuperscript{124}

Based on the evidence before us, we find that the Regional Director erred in affirming the KFO with respect to this allegation. In her citizen complaint of August 6, 2012, the appellant alleged that suspended solids were being deposited below the exit channel after rain events.\textsuperscript{125} The DMLR and OSMRE responses that no violations were found above the exit channel therefore were not responsive to her allegation. As discussed above, an appellant can demonstrate that OSMRE errs on informal review when it declines to order a federal inspection by demonstrating that the state agency response was arbitrary, capricious, or an abuse of discretion.\textsuperscript{126} The record demonstrates that the DMLR and OSMRE both failed to consider whether the effluent requirements for total suspended solids and total settleable solids were being met by discharges from the exit channel following rain events.

Furthermore, DMLR could not properly presume that no violation of a water quality standard had occurred. As a federal court stated in a recent case challenging

\textsuperscript{120} Id. at 23.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 24.
\textsuperscript{125} AR Tab 6 at unpaginated (unp.) 3, 5 (alleging that “sediment washed out of the exit channel and off the permit” during a number of rain events), and 7 (alleging that “tons of sediment were eroded” from the exit channel after a rain event).
\textsuperscript{126} Mystic Brooke Development, 175 IBLA at 212 (citing Danny Crump, 163 IBLA at 358).
OSMRE’s failure to order a federal inspection in response to alleged water quality violations, the “reason to believe’ standard does not demand that citizens prove the existence of a violation by a preponderance of the evidence before they can obtain an inspection” because “[c]ollecting evidence is the purpose of the inspection.” Here, the appellant provided evidence of the possibility of a water quality violation with respect to suspended solids below the exit channel resulting from runoff from Red River’s reclamation activities. The DMLR, by addressing only runoff above the exit channel, failed to address the appellant’s allegation and its response was for that reason arbitrary, capricious, or an abuse of discretion. We accordingly reverse the Regional Director’s decision not to order a federal inspection in response to allegation three of TDN X12-130-157-001.

4. TDN X12-130-157-001 Allegation 4: Failure to Reclaim Refuse Used as Backfill

The fourth alleged violation in the TDN was that Red River had failed to reclaim refuse used as backfill and had not graded, topsoiled or vegetated the material showing weathering and erosion. The DMLR responded that it had issued an NOV requiring the cessation of the placement of coarse refuse and that “[t]he placement of refuse and reclamation of the material to eliminate highwalls on previously mined land is being addressed” in an ongoing permit revision process. The DMLR also stated that “[a]reas below the refuse placement are vegetated,” and there is “continued progress towards eliminating the existing highwalls.” Consequently, the DMLR concluded that no further enforcement action was warranted.

The Regional Director upheld the KFO’s determination that the DMLR’s response to this allegation was not arbitrary, capricious, or an abuse of discretion on the ground that the NOV issued by the DMLR to Red River “provide[s] sufficient direction to the operator to either obtain the necessary approvals to use the coarse refuse during reclamation of the highwalls or to backfill and grade the highwalls to approximate original contour.” And while the Regional Director recognized that the appellant has “concerns that the existing refuse that has been deposited has not been reclaimed and

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128 AR Tab 7 at 2; SOR at 24.
129 AR Tab 9 at 4.
130 Id. at 4-5.
131 Id. at 5.
132 AR Tab 38 at 22.
that erosion has been occurring to that material," he stated that "Red River is at all times responsible for ensuring that drainage from the disturbed areas meets effluent criteria" and that "erosion that is occurring must not contribute to sedimentation from the permit that exceeds effluent criteria."\textsuperscript{133}

On appeal, the appellant argues that the Regional Director did not address her allegation, but rather a different allegation from a different TDN.\textsuperscript{134} She states: "Facts related to alleged Violation 4 from the 2nd TDN issued to PN 1101401 have been intermingled with facts related [to] this alleged Violation 4 from the 1st TDN."\textsuperscript{135} OSMRE admits the appellant is correct, but asserts that the DMLR responded appropriately to the correct allegation.\textsuperscript{136}

Because the Regional Director did not address the correct allegation from the correct TDN in his informal review decision, we must evaluate whether the DMLR response to the TDN was arbitrary, capricious, or an abuse of discretion.\textsuperscript{137}

The appellant argues that the DMLR response was not appropriate for two reasons. First, she notes that OSMRE found, with respect to a different allegation in a different TDN at issue in this appeal, that a permit revision application is not appropriate action to cause a violation to be corrected or good cause for failing to take appropriate action to do so, citing the Regional Director’s informal review decision concerning TDN X13-130-157-003.\textsuperscript{138} The appellant is correct – the DMLR’s reliance on a pending permit revision application to avoid taking enforcement action is not an appropriate response.

Second, the appellant challenges the DMLR’s reliance on the NOV and resulting cessation of the placement of coarse refuse, asserting that the NOV and cessation were unrelated to the alleged violation and do not cause the violation to be corrected.\textsuperscript{139} Although the appellant does not specifically say so, we understand her to be arguing that the NOV did not address “the main problem with Red River’s refuse/backfill operation,” which she states is “the improper handling of acid/toxic material.”\textsuperscript{140} She states that the

\textsuperscript{133} \textit{Id.}
\textsuperscript{134} SOR at 26.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} Answer at 16.
\textsuperscript{137} \textit{Mystic Brooke Development, 175 IBLA at 212} (citing \textit{Danny Crump}, 163 IBLA at 358).
\textsuperscript{138} SOR at 26-27 (citing AR Tab 30 at 3); see also \textit{infra} at 46-49.
\textsuperscript{139} \textit{Id.} at 27.
\textsuperscript{140} \textit{Id.} at 25.
failure to grade, topsoil, and vegetate the refuse contributes to this problem.\textsuperscript{141} The appellant further states that “abatement for this NOV was to cease placing refuse until plans are updated and approved to place this material,” and that such action is unrelated to the violation alleged.\textsuperscript{142}

OSMRE asserts that the DMLR properly responded to the allegation because it explained that it was not requiring that Red River grade, cover, and vegetate the refuse because the refuse needs to be placed in lifts to ensure stability and minimize infiltration.\textsuperscript{143} As such, OSMRE argues that until refuse needed to eliminate the highwalls is placed, topsoiling and revegetation would be premature.\textsuperscript{144}

We agree that the DMLR’s response notes that “to ensure stability and minimize infiltration, the refuse must be placed in lifts” and that topsoiling would occur only after the material has been placed.\textsuperscript{145} But the DMLR’s response makes clear that these issues were to be addressed as part of the permit revision application the agency relied upon to avoid taking action.\textsuperscript{146} And as we have noted above, and discuss in more detail below, the Regional Director determined that a permit revision application is not appropriate action to cause a violation to be corrected or good cause for failing to take appropriate action to do so.\textsuperscript{147} We agree and therefore find, as did the Regional Director in his informal review of TDN X13-130-157-003, that the DMLR’s response was not appropriate and that a federal inspection is required to address this allegation. Accordingly, we reverse the Regional Director’s decision in response to this allegation.

5. **TDN X12-130-157-001 Allegation 5: Failure to Divert Runoff into Stabilized Diversion Channels**

The appellant challenges the Regional Director’s resolution of the fifth alleged violation in the TDN – that Red River had failed to divert all runoff from where it placed excess spoil into stabilized diversion channels.\textsuperscript{148} The DMLR responded to this allegation by stating that a bench diversion ditch above the fill, and side diversions around the fill,

\textsuperscript{141} Id.
\textsuperscript{142} Id. at 27.
\textsuperscript{143} Answer at 16.
\textsuperscript{144} Id.
\textsuperscript{145} AR Tab 9 at 5.
\textsuperscript{146} Id. at 5 (“DMLR is requiring clarification of timing of topsoil application in the review of Revision Application No. 1007489.”).
\textsuperscript{147} AR Tab 30 at 3.
\textsuperscript{148} AR Tab 7 at 2; AR Tab 38 at 22.
are in place and functioning properly. The DMLR also stated it may require additional drainage control measures based on its final decision on Red River’s revision application, made in response to the RON No. DLH0007890. The KFO found that the DMLR’s response was appropriate because the diversion structures were in place and functioning. The Regional Director upheld the KFO’s determination that the DMLR’s response was not arbitrary, capricious or an abuse of discretion. In his decision, the Regional Director acknowledged the appellant’s argument, in her request for informal review, that the RON “is unrelated to this allegation because it focuses only on flow from pond #12,” but stated that the appellant did not dispute that the diversions were in place and functioning.

On appeal, the appellant again asserts that the DMLR’s reliance on a RON in response to this allegation addresses only Pond 12, and does not address the flow from the diversion ditch. She further contests the Regional Director’s conclusion that she did not dispute that the diversions were in place and functioning, referring to a letter contained in her request for informal review in which she alleged that “there is no mention of whether DMLR staff actually looked at the area.” She states that the DMLR’s response “did not indicate whether [it] actually inspected the drainage control . . . to determine whether Red River has controlled drainage according to plans or whether the side diversions were constructed properly . . .” The appellant also asserts that “there are several areas unprotected by riprap in the eastern diversion” and that it “does not appear to be constructed to handle a 6 hr 100 yr rain event.”

We find that the appellant has not met her burden to show that the DMLR inappropriately concluded that the diversions were in place and functioning, and therefore that the alleged violation had been addressed. The appellant provides no basis for finding that the DMLR failed to examine the diversions before concluding that they

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149 AR Tab 9 at 5.
150 Id.
151 AR Tab 14 at 2.
152 AR Tab 38 at 22.
153 Id.
154 SOR at 28.
155 Id. (referencing AR Tab 34, Attachment 4, at 10).
156 Id.
157 Id.
were "in place and functioning properly." Nor does she provide information or evidence showing that any of the diversions is not functioning. Without any more than her statement that the diversions were not functioning, the appellant has not demonstrated that the DMLR response was arbitrary, capricious, or an abuse of discretion, or that the Regional Director erred in his decision. We therefore affirm the Regional Director's decision regarding this allegation.

6. **TDN X12-130-157-001 Allegation 6: Failure to Minimize Damage to the Hydrologic Balance**

The sixth allegation in the TDN is that Red River had failed to minimize damage to the hydrologic balance. The DMLR responded that it had issued a RON to Red River requiring that it submit revisions to its plans to evaluate and address surface water impacts of flow from Pond 12 into the local watershed, and that the DMLR might require additional drainage control measures based on its final decision on the revision application. The DMLR stated that it would inform OSMRE of its findings and actions resulting from the RON, and that no further enforcement action was deemed warranted at the time. The KFO found the response to be appropriate because a violation was not known to exist and the RON was "an effective investigative tool" for evaluating hydrologic impacts.

The Regional Director reversed the KFO's determination that the DMLR's response to this allegation was not arbitrary, capricious, or an abuse of discretion. He stated that the appellant had provided "ample photographs showing the seeps emanating from Red River's permits," and that "[t]he impact of these seeps on ground and surface waters in the area is not adequately addressed in the record." The Regional Director "determined that a comprehensive hydrologic investigation of the effects this refuse is having on the hydrologic balance would be necessary before a determination could be

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158 AR Tab 9 at 5; see Answer at 17 ("[T]he statements made by the DMLR indicate that it did inspect the areas in question. OSM has no basis to conclude that these statements are not true.").

159 Mystic Brooke Development, 175 IBLA at 212 (citing Danny Crump, 163 IBLA at 358).

160 AR Tab 7 at 2; AR 38 at 23.

161 AR Tab 9 at 6.

162 *Id.*

163 AR Tab 14 at 3.

164 AR Tab 38 at 23.

165 *Id.*
made on whether this allegation is justified."166 He therefore required that the KFO conduct a federal investigation regarding this allegation.167

The appellant agrees that this investigation should be conducted, but contends that there is “ample evidence” demonstrating that a violation in fact existed.168 She states: “The finding of the [Regional Director’s] Decision, although reversing KFO’s determination, failed to recognize the existence of Violation 6.”169 OSMRE argues that the Regional Director’s decision was correct because the agency must first conduct the federal inspection – which it states was ongoing at the time OSMRE filed its Answer – and, based upon the results of the inspection, may then issue a notice of violation.170

We agree. A federal inspection is a necessary predicate to a notice of violation,171 and the issue before us is whether the Regional Director properly ordered an inspection. Because we conclude that he properly determined that an inspection was necessary, we affirm the Regional Director’s decision to order a federal inspection.

7. TDN X12-130-157-001 Allegation 7: Use of Unsuitable Refuse Material as Backfill

The seventh allegation in the TDN was that Red River used unsuitable refuse material as backfill because the material is acidic and/or toxic.172 The DMLR, in response to the allegation, issued an NOV to Red River stating that the “coal processing waste to eliminate exposed highwalls on this permit... has been shown to be acid or toxic by acid/base samples accounting.”173 The NOV directed Red River to revise its permit to “prove that the coal processing waste material used or to be used as backfill is suitable” for use as backfill and to “also address what measures shall be taken... to protect the

166 Id.
167 Id.
168 SOR at 30, 29; id. at 30 (“Whether this violation exists can be determined by considering evidence for the following two statements: (1) The refuse has adverse impacts on surface and groundwater quality, and (2) Red River has failed to minimize these adverse impacts (hydrologic damage).”).
169 Id. at 35.
170 Answer at 17-18.
171 Al Hamilton Contr. Co., 639 F. Supp.2d at 599 (“OSM[RE]’s ability to take an enforcement action under its residual oversight authority is expressly conditioned on its first performing a federal inspection under 30 U.S.C. §1271(a)(1).”).
172 AR Tab 7 at 2; AR 38 at 23.
173 AR Tab 13 at 1 (NOV, Permit No. 1101401, Jan. 4, 2013).
hydrologic regime for the material already placed, to include encapsulation of any acid/toxic material in a timely manner." The Regional Director affirmed the KFO’s determination that the DMLR’s response to this allegation was not arbitrary, capricious, or an abuse of discretion. However, in addition to affirming the DMLR response, the Regional Director stated that “events since 2012 have led [him] to believe that a comprehensive hydrologic investigation is necessary” and that, in response to Allegation 6, he is “requiring the KFO to conduct a Federal inspection to complete that assessment.”

On appeal, the appellant contends first that the DMLR’s response was arbitrary, capricious, and an abuse of discretion because the NOV did not cause the violation to be corrected. She states that “the only abatement required was for Red River to prove the refuse was suitable in the permit revision,” but the “DMLR had already determined the refuse was unsuitable for general backfilling.” The appellant further states that the DMLR terminated the NOV on December 7, 2012, after approving Red River’s permit revision 1007489, but that the approved revision did not address the allegations made in her complaint because it “did not include limits on acidity of the refuse, did not require adequate monitoring of the placed material, did not include any time requirements for encapsulating the refuse already placed, and did not address the presence of the seeps and polluted drainage.”

Having reviewed the record, we agree with the appellant that the DMLR response was not appropriate because it did not address her allegation. The DMLR’s issuance of the NOV on October 4, 2012, initially was an appropriate response, and based on the contents of that NOV, the KFO was correct in determining on October 12, 2012, that the DMLR had responded appropriately. But the DMLR’s subsequent dismissal of that NOV based on its approval of permit revision 1007489 – which the KFO specifically found was not responsive to the allegation – was not an appropriate response. We

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174 Id.
175 AR Tab 38 at 23.
176 Id.
177 SOR at 35 (“Enforcement action should only be considered []appropriate if it causes the violation to be corrected.”) (citing 30 C.F.R. § 42.11(b)(1)(ii)(B)(3)).
178 Id.
179 SOR Attachment 33 at 1; AR Tab 17 at unp. 7.
180 Id. at 36;
181 AR Tab 14 at 4.
182 Id. at 3 (“The pending revision is deemed not responsive to the existence of acid/toxic material documented to be present in the backfill.”).
therefore find that the DMLR’s decision to dismiss the NOV upon approval of the permit revision was arbitrary, capricious, and an abuse of discretion.

Consequently, we find that the Regional Director, based on the record before him at the time he made his decision, should have found that the DMLR’s response to this allegation was arbitrary, capricious, or an abuse of discretion, and ordered a federal investigation. However, the Regional Director also stated that events since 2012 convinced him that a federal inspection was necessary, and required that the KFO conduct such an inspection.\(^{183}\) We therefore reverse the Regional Director’s conclusion that the DMLR provided an appropriate response, but affirm his decision to conduct a federal investigation concerning this allegation.

**B. TDN X13-130-157-002**

The appellant also challenges the Regional Director’s resolution of the allegations contained in TDN X13-130-157-002. This TDN concerned the following five allegations made by the appellant regarding Red River’s permit number 1101401 for the North Fox Gap Surface Mine: (1) use of unsuitable refuse material as backfill; (2) failure to conduct representative groundwater monitoring; (3) failure to contemporaneously reclaim lands where refuse material was used as backfill; (4) failure to eliminate highwalls and spoil piles and establish stable backfill; and (5) failure to store acid and toxic forming material in a manner that protects ground and surface waters.\(^ {184}\)

**1. TDN X13-130-157-002 Allegation 1: Use of Unsuitable Refuse Material as Backfill**

The appellant challenges the Regional Director’s resolution of the first allegation – that Red River used unsuitable material as backfill because the material is acidic and/or toxic.\(^ {185}\) This allegation is the same as the seventh allegation in TDN X12-130-157-001. The Regional Director agreed with the appellant concerning this allegation, reversed the KFO’s determination that the DMLR’s response was appropriate, and ordered a federal inspection.\(^ {186}\) The Regional Director determined that “insufficient weight [was] accorded to the net neutralization potential for the refuse being deposited on the permit,” and that “[a] majority of the tests indicate negative values, some substantial, that indicate that

\[^{183}\] AR Tab 38 at 23.  
\[^{184}\] AR Tab 19 at 1-2.  
\[^{185}\] SOR at 40.  
\[^{186}\] AR Tab 38 at 24.
refuse may not be suitable for use as backfill material.”^{187} He concluded that the DMLR’s reliance on the data as confirmation that the material is suitable for backfill was arbitrary, capricious, or an abuse of discretion.^{188}

Despite the fact that the Regional Director ordered a federal inspection concerning this allegation, the appellant seeks on appeal to challenge his decision, stating that “it does not appear this alleged violation is being considered” as part of the federal inspection.^{189} The Regional Director, however, specifically mentions acid base monitoring in discussing this allegation and the need for a federal inspection,^{190} which appears to address the appellant’s concerns regarding the acidity of runoff from the backfill.^{191} Moreover, until the federal inspection is completed, all that is before us is the decision to order the inspection. We cannot now assess whether the inspection ordered by the Regional Director sufficiently addresses this alleged violation. We therefore affirm the Regional Director’s decision to order a federal inspection regarding this allegation.

2. **TDN X13-130-157-002 Allegation 2: Failure to Conduct Representative Groundwater Monitoring**

The appellant next challenges the Regional Director’s resolution of the second allegation in TDN X13-130-157-002, namely that Red River failed to conduct representative groundwater monitoring.^{192} In response to this allegation, the DMLR stated that Red River was required to install, and had installed, an additional monitoring well, Piezometer P-5, to monitor the coarse refuse backfill area.^{193} The KFO found this response to be appropriate, stating that the DMLR has “shown good cause for not taking enforcement action because the alleged violation does not exist.”^{194}

The Regional Director upheld the KFO’s determination that the DMLR response to this allegation – requiring Red River to install a new piezometer to monitor groundwater

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^{187} Id. at 23-24.
^{188} Id. at 24.
^{189} SOR at 42.
^{190} AR Tab 38 at 23-24.
^{191} SOR at 40-41.
^{192} AR Tab 19 at 1.
^{193} AR Tab 22 at 2.
^{194} AR Tab 27 at 2.
was appropriate.\textsuperscript{195} The Regional Director noted, however, that the record shows that the new piezometer installed for purposes of monitoring groundwater “did not register any groundwater readings.”\textsuperscript{196} He then stated that

because of the relationship this issue has to the subject of the Federal inspection I ordered above (i.e., the effect, if any, of refuse disposition on groundwater quality), if the KFO determines that [the piezometer] is not an appropriate monitoring well to evaluate groundwater quality, KFO will issue a TDN to the DMLR to allow the DMLR to respond to that determination.\textsuperscript{197}

The appellant contends that the Regional Director erred in affirming the KFO’s determination that the DMLR’s response was appropriate. She asserts the DMLR response was arbitrary and capricious because the DMLR “had no knowledge of whether [the piezometer] was representative” since at the time of its response “no information on construction or monitoring had been submitted by Red River.”\textsuperscript{198} She states that six months after the DMLR’s response to this allegation, it issued an NOV to Red River for failure to submit well construction data and baseline data following installation of the piezometer.\textsuperscript{199}

To resolve this allegation, we again turn to the standard by which we evaluate the appellant’s challenge to the Regional Director’s decision: whether she has met the burden of establishing that OSMRE erred by showing that the DMLR’s action or response to the TDN was arbitrary, capricious, or an abuse of discretion.\textsuperscript{200} We find that she has met this burden for this allegation.

The appellant alleged that Red River was failing to conduct representative groundwater monitoring, and the DMLR agreed and ordered Red River to install a piezometer to remedy this failure. As recognized by the Regional Director, however, the record demonstrates that this new piezometer was dry and therefore did not monitor any groundwater.\textsuperscript{201} Without any data, the well cannot provide information that is

\textsuperscript{195} AR Tab 38 at 24 (“I am affirming the KFO’s determination of an appropriate response to the TDN because the DMLR took action to cause the violation to be corrected.”).
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id.; AR Tab 36 at 1 (NOV, Permit Number 1101401, Nov. 12, 2013).
\textsuperscript{199} Id.; AR Tab 37 (E-mail from DMLR to Jessica Bier, Nov. 18, 2013, attaching data for P-5 showing a dry well).
\textsuperscript{200} Mystic Brooke Development, 175 IBLA at 212 (citing Danny Crump, 163 IBLA at 358).
\textsuperscript{201} AR Tab 37 (E-mail from DMLR to Jessica Bier, Nov. 18, 2013, attaching data for P-5 showing a dry well).
representative of groundwater conditions. Because record evidence demonstrates the lack of groundwater readings at this piezometer, its installation did not resolve the appellant's allegation that Red River was failing to conduct representative groundwater monitoring.

The DMLR response therefore was not an appropriate response to the allegation, and the Regional Director erred in affirming the KFO's decision that the DMLR response was not arbitrary, capricious, or an abuse of discretion. While the KFO did not possess this record evidence when it affirmed the DMLR's decision to require installation of the piezometer, the Regional Director did have this record evidence available to him when he determined that the DMLR response to this allegation was appropriate. We accordingly reverse the Regional Director's decision concerning this allegation.

3. **TDN X13-130-157-002 Allegation 3: Failure to Contemporaneously Reclaim Lands Where Refuse Material Was Used as Backfill**

The appellant contests the Regional Director's resolution of the third allegation in TDN X13-130-157-002— that Red River failed to backfill and grade lands disturbed by mining in a contemporaneous manner in accordance with the approved permit. The DMLR responded that a previously approved permit revision addressing backfilling and grading and the use of coarse refuse in the backfilling of highwalls contained a variance under which Red River was not required to contemporaneously backfill so that it may utilize coarse refuse from a neighboring permit as it becomes available. As a result, the DMLR stated that no violation was present. The Regional Director upheld the KFO's determination that the DMLR response to this allegation—that a permit revision allowing a variance from the contemporaneous backfilling requirement was in place and therefore no violation exists—was appropriate.

The bases for the appellant's allegation are state and federal regulations implementing SMCRA requiring that “reclamation efforts, including but not limited to

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202 AR Tab 19 at 1; SOR at 43-45.
203 AR Tab 22 at 3; AR Tab 27 at 2-3; id. at 3 ("[T]he approved revision ties the availability of coarse refuse for use [as] backfill on this permit to the need for coarse refuse to construct the refuse impoundment on adjacent Red River permit #150071; e.g., when coarse refuse is not needed to expand the impoundment, it will be diverted to this permit for use as backfill.").
204 AR Tab 22 at 3.
205 AR Tab 38 at 24.
backfilling. . . shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance . . . .  

While the DMLR may issue a permit that grants a variance from this contemporaneous reclamation requirement, the permit must include a number of written findings to justify the variance, including a finding that "the surface area of surface mining activities proposed for the variance has been shown by the applicant to be necessary for implementing the proposed underground mining activities . . . . "

In her appeal, the appellant states that the Regional Director's decision "suggests that any violation of contemporaneous reclamation can be remedied simply by approval of a variance." In support of her argument, the appellant focuses on the requirement that necessity be shown by the applicant; she states that a variance should only be granted "after a detailed analysis demonstrates additional time is necessary." She states that in her view, "leaving the highwall open and the refuse uncovered for ease of future intermittent refuse placement is not necessary." The appellant further contends that the DMLR should have included information in its response to the TDN showing that the variance was justified.

The regulations state that written findings justifying a variance must be included in the permit; they do not require that the findings be included in the DMLR's response to the TDN. In addition, our review of the record demonstrates that in its response, the DMLR specifically found that the "variance for delay in completion of final backfilling and regrading and final reclamation of the existing highwall is needed and requested for the area to receive the coarse refuse placement." While the appellant disagrees with this conclusion, she does not provide evidence demonstrating that the DMLR's response was arbitrary, capricious, or an abuse of discretion. We therefore affirm the Regional Director's decision concerning this allegation.

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206 30 C.F.R. § 816.100; 4 VAC 25-130-816.100; SOR at 44.
207 30 C.F.R. § 785.18(c); 4 VAC 25-130-785.18(c).
208 30 C.F.R. § 785.18(c)(4); 4 VAC 25-130-785.18(c)(4).
209 SOR at 44.
210 Id. at 44-45.
211 Id. at 45.
212 Id.
213 30 C.F.R. § 785.18(c); 4 VAC 25-130-785.18(c)(4).
214 AR Tab 22, Attachment 13.1 at 2.
4. **TDN X13-130-157-002 Allegation 4: Failure to Eliminate Highwalls and Spoil Piles and Establish Stable Backfill**

The fourth allegation in the TDN was that Red River had failed to eliminate highwalls and spoil piles, and establish stable backfill on areas west of State Route 620.215 The DMLR responded to this allegation by stating that no violation was present because the area had been “previously mined and the company took additional cuts on existing highwalls.”216 The DMLR also stated in its response that it had previously issued an NOV requiring the permittee to eliminate all highwalls and spoil piles at the western end of the permit and that the area had been reclaimed.217 It stated: “[T]he area has been reseeded and vegetation is becoming established . . . . At present, no significant stability problems exist.”218 In its response, the DMLR showed a photograph of a reclaimed, seeded slope.219 It further stated that “[s]ome follow-up seeding may be required on areas where vegetation did not take.”220 The KFO found this response to be appropriate, stating that since the area was mined prior to the passage of SMCRA, “backfilling to approximate original contour is not required.”221 The Regional Director affirmed the KFO’s determination on informal review.222

On appeal, the appellant argues that the area is not reclaimed and that it continues to suffer from stability problems.223 She states that at the time of her complaint, “there were stability problems in this area, slope failure was evident, and vertical rock faces were visible.”224 She made this same argument on informal review, where she took issue with the DMLR’s statement that the area was reclaimed, contending that the area had “stability problems and exposed vertical rock face.”225 The appellant also contends that the area was mined after the enactment of SMCRA, and as a result, the highwalls should be reclaimed and the land should be restored to its approximate

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215 AR Tab 19 at 2; AR 38 at 24.
216 AR Tab 22 at 3.
217 Id.
218 Id.
219 Id.
220 Id.
221 AR Tab 27 at 3.
222 AR Tab 38 at 25.
223 SOR at 45; id. (“More recent reseeding attempts are failing due to the excessive steepness of the slopes.”).
224 Id.
225 AR Tab 34 at 10.
original contour. Under SMCRA, restoring land to its approximate original contour means that the lands should be reclaimed so that it closely resembles the general surface configuration of the land prior to mining. In her request for informal review, the appellant stated that "the majority of the area appears forested in 1995 and then radically disturbed in later GoogleEarth imagery."

On informal review, the Regional Director stated that "[t]he DMLR provided a photograph showing the area backfilled with vegetation establishment," and that there was nothing in the record to indicate that the DMLR's response was arbitrary, capricious, or an abuse of discretion. He further found that although there was "some confusion in the record whether the area was mined prior to SMCRA or that Red River remined pre-existing highwalls, the record shows the area to be reclaimed." He added, however, that even if Red River had remined pre-existing highwalls after the passage of SMCRA, Virginia's mining laws provide that the highwalls are not required to be eliminated. On that basis he affirmed the KFO and DMLR responses.

Although the appellant continues to disagree with the DMLR's and KFO's determination that the area was mined before the enactment of SMCRA and has been reclaimed, we find that she has not met her burden to show that the DMLR's response was arbitrary, capricious, or an abuse of discretion. Other than the several GoogleEarth images the appellant provided with her SOR, which are inconclusive, she provides no information rebutting the DMLR's statement that at least some of the area had been mined before SMCRA. Moreover, as the Regional Director stated in his decision, even if some mining occurred after the passage of SMCRA, Virginia's mining laws do not require elimination of highwalls.

Nor do the other photographs provided by the appellant with her SOR provide a reason to believe that area has not been reclaimed or that the slopes are unstable. The photographs do not identify the location of any of the slopes shown. And while the images show that the slopes in the photographs have some bare spots, the appellant does not explain why the presence of bare spots indicates that the slopes are unstable or that reclamation efforts are failing, given that the DMLR has stated that additional reseeding

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226 SOR at 45.
227 30 U.S.C. § 1291(2) (2012) (definition of "approximate original contour").
228 AR Tab 34 at 10; see SOR, Attachment 1 at 3 (Google Earth images).
229 AR Tab 38 at 24-25.
230 Id.
231 Id. (citing 4 VAC 25-130-816.106).
232 SOR at 45 (citing Attachment 2, at 27).
may occur where “vegetation did not take.” The appellants states only that “reseeding attempts are failing . . .” The appellant’s statements and photographs, however, are insufficient to demonstrate that the DMLR’s response was arbitrary, capricious, or an abuse of discretion. Accordingly, we affirm the Regional Director’s decision regarding this allegation.

5. **TDN X13-130-157-002 Allegation 5: Failure to Store Acid and Toxic Material in a Manner that Protects Ground and Surface Waters**

The fifth allegation in this TDN was that Red River had failed to store acid and toxic forming material in a manner that protects surface water and groundwater. The DMLR responded to this allegation by stating that it had approved a permit revision addressing the use of coarse refuse for backfilling highwalls and that Red River was complying with the requirements of the revised permit. The KFO determined that this response was not arbitrary, capricious, or an abuse of discretion. The KFO noted the revised permit, and stated that monitoring data of surface water discharging from sediment ponds and ground water near the permit boundary did not indicate improper storage of acid or toxic material.

On informal review, the Regional Director agreed with the appellant and reversed the KFO’s determination that the DMLR response to this allegation was not arbitrary, capricious, or an abuse of discretion, and ordered a federal inspection. The Regional Director stated:

I am inclined to agree that the record does not sufficiently support a determination of whether the deposition of coal refuse is having an impact to the hydrologic balance. Refuse deposition has been occurring for more than 10 years and there is limited information in the record to definitely prove whether or not the refuse is toxic or acid producing.

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233 *Id.*
234 AR Tab 19 at 2; Tab 38 at 25.
235 AR Tab 22 at 4.
236 AR Tab 27 at 4.
237 *Id.*
238 AR Tab 38 at 25.
239 *Id.*
The Regional Director acknowledged that the DMLR has taken steps to require Red River to analyze and safely handle refuse, but concluded that "the effects of the material already in place appears to be largely undefined." He further noted that a 2012 hydrologist report from the KFO indicated an upward trend in sulfate levels in groundwater, "which could indicate an influence from mining." He therefore reversed the KFO's determination and ordered a federal inspection.

On appeal, the appellant disputes the Regional Director's conclusion that the record does not "definitely prove" the refuse is toxic or acid producing, but agrees with the Regional Director's decision to order a federal inspection. However, she again takes issue with the form of the inspection, stating that "instead of ordering only a hydrologic assessment, he should have ordered a true inspection." As we have already stated, we cannot consider the appellant's apparent challenge to the scope of the federal inspection ordered until the inspection is completed. What is before us now is the Regional Director's decision to order the inspection, which we affirm.

C. TDN X13-130-157-003

The appellant challenges the Regional Director's resolution of the allegations contained in TDN X13-130-157-003 regarding Red River's permit number 1100044 for the Steer Branch Preparation Plant: (1) failure to contemporaneously reclaim lands where refuse material was used as backfill; and (2) use of unsuitable refuse material as backfill.

The DMLR responded to the first allegation by stating that an approved revision to Red River's permit provided for the use of coarse refuse in the backfilling of highwalls and granted a variance for the delay of contemporaneous reclamation. The DMLR also stated that Red River's pending renewal application 1008457 addressed the use of coal processing waste in backfilling highwalls and contemporaneous reclamation. Because
the permittee was operating in accordance with its permit’s approved plans and was updating its plan for the use of coarse refuse, the DMLR found that no violation was present and no enforcement action would be taken.\textsuperscript{250} With respect to the second allegation, the DMLR stated that it “will request by comment . . . that the permittee address whether acid/toxic material will be encountered and if so how such will be handled . . . .”\textsuperscript{251} The DMLR further stated that it may require additional measures or modifications based on its final decision on the renewal application.\textsuperscript{252} For these reasons, the DMLR found that no further enforcement action was warranted.\textsuperscript{253}

The KFO determined that the DMLR’s responses neither caused the violation to be corrected nor showed good cause for failure to do so and ordered a federal inspection.\textsuperscript{254} The KFO stated that “while pending revisions to the Red River permit may be responsive to the alleged violations, it is not appropriate to consider unapproved permit revisions.”\textsuperscript{255} The DMLR requested informal review of this determination,\textsuperscript{256} and the Regional Director affirmed the KFO and ordered a federal inspection with respect to both alleged violations.\textsuperscript{257}

Following the inspection, which occurred on August 20, 2013,\textsuperscript{258} the DMLR issued NOVs to Red River directing the company to “cease using refuse material to backfill highwalls on the permit until it is proven to be non-toxic and/or placed in a controlled manner in accordance with the regulations,” and “completely backfill, grade, topsoil, and seed all highwalls in Mine Areas D, F1, F2 and H1 in accordance with approved plans.”\textsuperscript{259}

In her request for informal review of the KFO’s decision to order the inspection, the appellant stated that the TDN violations and the NOVs issued by the DMLR after the inspection “fail to adequately address the violation I alleged in my complaint.”\textsuperscript{260} In his decision on informal review, the Regional Director explained that the purpose of an informal review is to decide whether to conduct a federal inspection, and because he

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item AR Tab 28 at 2-3.
\item Id. at 1.
\item AR Tab 29.
\item AR Tab 30.
\item AR Tab 31 (OSMRE Mine Site Evaluation, Aug. 22, 2013).
\item AR Tab 34 at 14.
\item Id.
\end{enumerate}
\end{footnotesize}
already had ordered a federal inspection for the two allegations comprising TDN X12-130-157-003, he would “not revisit the issues presented by that TDN in this informal review decision.”\(^{261}\) He went on to advise that if the appellant was alleging violations “that still exist on the permit and which are not the subject of the impending Federal inspection,” she should file a new citizen complaint.\(^{262}\)

On appeal, the appellant alleges that the KFO failed to correctly characterize her allegations in the TDN because the TDN did not include the “improper handling of acid/toxic material.”\(^{263}\) She further states that the KFO “refused to identify this violation at the inspection.”\(^{264}\) However, as noted by OSMRE, this is the main issue to be addressed by the federal inspection that has been ordered by the Regional Director.\(^{265}\) In his decision, the Regional Director stated:

> Because of the proximity of the three permits involved in your complaint, the Federal inspection I am requiring the KFO to conduct will, of necessity, include a hydrologic assessment of all three of Red River’s permits in this area to determine if the refuse deposited thus far, whether in backfills or as part of a refuse pile, is adversely affecting the hydrologic balance.\(^{266}\)

Therefore, to the extent that the KFO may not have responded to appellant’s allegations in full with respect to this TDN, the Regional Director has remedied that oversight by ordering a federal investigation that responds to appellant’s allegations that caused the KFO to issue the TDN. We therefore affirm the Regional Director’s decision for these alleged violations.

**D. TDN X13-130-157-004**

The appellant further challenges the Regional Director’s resolution of the allegations contained in TDN X13-130-157-004.\(^{267}\) This TDN concerned two allegations made by the appellant regarding Red River’s permit number 1100717 for the Buck Knob Mine. The allegations in the TDN are the same as those alleged in TDN X12-130-157-003 concerning Red River’s permit number 1100044 for the Steer Branch Preparation

\(^{261}\) AR Tab 38 at 25.

\(^{262}\) Id.

\(^{263}\) SOR at 51.

\(^{264}\) Id.

\(^{265}\) Answer at 21.

\(^{266}\) AR Tab 38 at 26-27.

\(^{267}\) AR Tab 34.
Plant: (1) failure to contemporaneously reclaim lands where refuse material was used as backfill; and (2) use of unsuitable refuse material as backfill.\textsuperscript{268}

1. **TDN X13-130-157-004 Allegation 1: Failure to Contemporaneously Reclaim Lands**

The DMLR responded that no violation existed with respect to the first allegation for two reasons: first, the permit was in temporary cessation status and second, a permit revision was approved in 1993 that allowed for the disposal of mining waste in the area, and it has not been used to backfill highwall areas of the permit.\textsuperscript{269} The KFO found this response to be appropriate, stating that the alleged violation did not exist because refuse material is not used as backfill and the disturbed, unreclaimed portion of the permit was in temporary cessation status.\textsuperscript{270}

After receiving a copy of the TDN, however, the appellant clarified in an email to the KFO that her complaint concerned refuse material in a different location than that specified in the TDN.\textsuperscript{271} She indicated that her complaint concerned refuse material extending onto permit 1100717 for the Buck Knob Mine from permit 1101401 for Red River's North Fox Gap Surface Mine.\textsuperscript{272} The KFO stated in response to the appellant's clarification that the refuse was not used as backfill, but rather that the area in which the refuse had been deposited was used as a road to haul refuse to permit 1101401 for backfilling.\textsuperscript{273} In her request for informal review, the appellant challenged the placement of the refuse on the basis that the applicable State road regulations were not followed in its placement, as well as contending that the refuse was acidic, toxic, and not handled properly.\textsuperscript{274}

In his informal review decision, however, the Regional Director disagreed with the KFO and determined that while "the record shows that a roadway has been constructed of refuse material to convey refuse from one permit to another," it does not constitute a

\textsuperscript{268} AR Tab 21 at 1.  
\textsuperscript{269} AR Tab 24 at 2.  
\textsuperscript{270} AR Tab 25 at 2.  
\textsuperscript{271} AR Tab 34 at 13.  
\textsuperscript{272} Id. (incorrectly identifying permit 1100717 as 1101701); AR Tab 38 at 26 (also incorrectly identifying permit 1100717 as 1101701); SOR at 53.  
\textsuperscript{273} AR Tab 34 at 13; AR Tab 38 at 26.  
\textsuperscript{274} AR Tab 34 at 13; AR Tab 38 at 26.
road subject to the regulatory requirements cited by the appellant. The Regional Director then upheld the DMLR's original response to the TDN on the basis that there was no violation because "the Virginia approved program does not provide time and distance requirements for refuse disposal areas."  

On appeal, the appellant contends that if the refuse is not a road or backfill, then it must be a refuse pile. The appellant then asserts that State regulations for refuse piles require drainage control, inspections, and photographic documentation requirements that are not being met. She states: "No matter how this area of refuse placement is labeled, there was an existing violation of improper handling of acid/toxic material and Red River disregarded the acid/toxic determination of the refuse placed on PN 1100717."  

The alleged violation at issue is the failure to contemporaneously reclaim lands where refuse material was used as backfill. The DMLR, KFO, and the Regional Director concluded that refuse material was not used as backfill, and on informal review, the Regional Director determined that because the refuse deposited constituted a refuse pile, there was no requirement for contemporaneous reclamation. The appellant does not refute this conclusion. Rather, as the appellant argued with respect to this same allegation in TDN X13-130-157-003, her main complaint is that the refuse - whether its placement on permit 1100717 constitutes a road or a refuse pile - is "acid/toxic material." But as we concluded above, the Regional Director's decision to order a comprehensive hydrologic assessment that will include all three of Red River's permits to "determine if the refuse deposited thus far, whether in backfills or as part of a refuse pile, is adversely affecting the hydrologic balance" will address the appellant's complaint about the acidity/toxicity of the refuse.  

Moreover, the appellant's new arguments on appeal that there is a SMCRA violation because the State's applicable regulations on refuse piles are not being followed

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275 AR Tab 38 at 26 ("The term road . . . does not include ramps and routes of travel within the immediate area or within spoil or coal mine waste disposal areas.") (citing the definition of "road" as found in 4 VAC 25-130-700.3, which is incorrectly cited, because the definition of "road" is located in the Virginia Administrative Code at 4 VAC 25-130-700.5).
276 Id.
277 SOR at 53.
278 Id.
279 Id.
280 AR Tab 38 at 26-27.
are unsupported. She states only that certain regulatory requirements are not being met, but provides no information or evidence showing that there is a reason to believe any such violation is occurring.\textsuperscript{281} This is insufficient to meet her burden to show that the DMLR's response was not appropriate or the Regional Director's decision was in error. We therefore affirm the Regional Director's decision regarding this allegation.

2. **TDN X13-130-157-004 Allegation 2: Use of Unsuitable Refuse Material as Backfill**

The DMLR responded to the second alleged violation by stating that no violation existed because the refuse was not being used as backfill material, but rather, "[s]calcrock has been placed in a bench fill" under the permit revision.\textsuperscript{282} The KFO found this response to be appropriate and that the violation did not exist because the refuse material was not used as backfill.\textsuperscript{283} The Regional Director upheld these determinations on informal review,\textsuperscript{284} and the appellant does not challenge them.

What the appellant takes issue with is the hydrologic assessment ordered by the Regional Director. In discussing this allegation, the Regional Director stated that "whether the road is composed of acid/toxic material that is causing damage to the hydrologic balance" is something that will be addressed by the inspection he ordered "of all three of Red River's permits in this area," and that will "determine if the refuse deposited thus far . . . is adversely affecting the hydrologic balance."\textsuperscript{285} The appellant, again, questions the scope and effectiveness of the assessment, stating that "it may be difficult to definitively prove the refuse is adversely impacting the hydrologic balance."\textsuperscript{286} But as we have already concluded, we cannot review a federal inspection until that inspection is completed. We accordingly decline to speculate as to the efficacy and results of the inspection and affirm the Regional Director's decision to order the federal inspection.

\textsuperscript{281} SOR at 53 ("These requirements were not met.").  
\textsuperscript{282} AR Tab 24 at 2.  
\textsuperscript{283} AR Tab 25 at 2 ("The revision allows construction of a bench fill adjacent to the underground mine.").  
\textsuperscript{284} AR Tab 38 at 26.  
\textsuperscript{285} Id. at 26-27.  
\textsuperscript{286} SOR at 53-54.
E. Amendment to Virginia's State Program

Last, the appellant sought through the informal review process to challenge OSMRE's approval of an amendment to Virginia's state program - specifically, OSMRE's approval in 1996 of a change to a Virginia state regulation governing the disposal of coal processing waste.\textsuperscript{287} The appellant argued on informal review that this regulation is not as effective as, and is less stringent than, the comparable federal regulation implementing SMCRA.\textsuperscript{288} For this reason, she argued that "[t]he amendment should not have been allowed by OSM and this should be remedied."\textsuperscript{289}

The Regional Director responded that the informal review process "is not the venue to challenge the effectiveness of State programs" and that his authority within the informal review process is limited to deciding whether to conduct a federal inspection.\textsuperscript{290} He explained that someone who wishes to challenge a provision of the Virginia approved program must comply with the citizen suits provision of SMCRA.\textsuperscript{291} This provision specifies that such challenge must be filed in Federal district court.\textsuperscript{292}

We find that the Regional Director correctly decided this issue. Under SMCRA, OSMRE is charged with the task of reviewing and either approving or disapproving State regulatory programs for the control of surface coal mining.\textsuperscript{293} The approval or disapproval of a State program must comply with the procedural and substantive requirements set forth in SMCRA and its implementing regulations.\textsuperscript{294} This includes the requirement that OSMRE not approve a State program unless "the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter."\textsuperscript{295} Review of an amendment to a State program, such as the one the appellant sought to challenge in her request for informal review, utilizes the same criteria applicable to approval or disapproval of a State program in the first

\textsuperscript{287} AR Tab 34 at 15-17 (citing 4 VAC 25-130-817.102(e) and comparing 30 C.F.R. § 817.83 with 4 VAC 25-130-817.83).
\textsuperscript{288} Id. at 16.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 16.
\textsuperscript{291} AR Tab 38 at 27.
\textsuperscript{292} Id. (citing 30 U.S.C. § 1270 (2012)).
\textsuperscript{294} Id. § 1253(b) (2012); 30 C.F.R. § 732.15.
\textsuperscript{295} 30 C.F.R. § 732.15(a).
instance. OSMRE therefore may not approve amendments to a State program unless, at a minimum, the amended State program is “no less stringent than, meet[s] the minimum requirements of and include[s] all applicable provisions of [SMCRA].”

Virginia’s amended program, approved by OSMRE in 1996, is presumed to be at least as stringent as what is required under Federal law. And anyone seeking to challenge OSMRE’s approval is required to do so in the appropriate Federal district court. The Regional Director correctly declined to consider the appellant’s assertion that OSMRE should not have approved the amendment to the Virginia regulation because it was “less effective” than the comparable federal regulation.

Although the appellant, on appeal, now concedes that the Regional Director does not have the authority to review OSMRE’s previous approval of the State program amendment, she argues that the Regional Director should have nevertheless considered that the state regulations are “less effective” than SMCRA during the review process. But the appellant’s arguments about why the amended program is less stringent than what is required under Federal law are arguments that are appropriately made in a Federal court challenge to the approval of the amended program. The Regional Director did not err in applying the approved Virginia program. We therefore affirm the Regional Director’s decision on this issue.

CONCLUSION

After reviewing the record, we conclude that the appellant has met her burden to show that the State’s responses to certain allegations contained in the TDNs were arbitrary, capricious, or abuses of discretion. We therefore reverse the Regional Director’s decision to decline to order a federal inspection with respect to allegation three of TDN X12-130-157-001, allegation two of TDN X12-130-157-002, and allegation four of TDN X12-130-157-001. We affirm the Regional Director’s decision with respect to the remaining allegations.

\[^{296}\] Id. § 732.17(h)(10).
\[^{297}\] Id. § 730.5; see Amerikohl Mining, Inc. v. Office of Surface Mining Reclamation and Enforcement, 191 IBLA 11, 23 (2017).
\[^{299}\] AR Tab 34 at 16.
\[^{300}\] SOR at 59 (“I recognize [the Regional Director] cannot make a formal/legal decision regarding the VA code as part of the informal review process . . . ”).
\[^{301}\] See id. at 54-60.
Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we affirm in part, and reverse and remand in part for action consistent with this opinion, the decision of the Regional Director.

Amy B.  
Administrative Judge

I concur:

James F. Roberts  
Acting Chief Administrative Judge

302 43 C.F.R. § 4.1.