

INTERIOR BOARD OF LAND APPEALS

Southern Appalachian Mining Co.

v.

Office of Surface Mining Reclamation and Enforcement

153 IBLA 312 (September 29, 2000)

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SOUTHERN APPALACHIAN MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 98-133

Decided September 29, 2000

Appeal from a decision of Administrative Law Judge David L. Torbett vacating Notice of Violation No. 94-91-94-003 containing five violations. NX 94-10-R.

Motion to dismiss denied. Decision affirmed as to violations #2 and #4, and reversed as to violations #1, #3, and #5.

1. Surface Mining Control and Reclamation Act of 1977: Federal Program--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Generally

An administrative law judge's decision vacating as premature a violation contained in an NOV citing an operator with failure to maintain a section of the haul road that runs through the face-up area of the mine, is properly reversed where the performance standard, 30 C.F.R. § 817.150, applies to the haul road identified on the approved permit map and performance standards were required to be met on a continuous basis pursuant to 30 C.F.R. § 817.150(b).

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Federal Program--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

An administrative law judge's decision vacating as premature a violation citing the operator for failure to eliminate spoil piles, for failure to return spoil to the mined-out surface area, failure to eliminate depressions, highwalls, and the disturbed area above highwall as required by 30 C.F.R. § 817.102(a)(2) and (b) and 30 C.F.R. § 817.107(c),

will be affirmed on appeal where the OSM enforcement of the regulatory backfilling and grading requirements was unreasonable and premature under circumstances of the case. Where the applicable regulation provided a 5-year period for vegetative success, where the approximate original contour had been achieved, and where the operator had not sought backfilling and grading Phase 1 bond release and the permit was undergoing active reclamation, issuance of NOV between 3 and 6 months after the initial backfilling and grading, before commencement of the next growing season after backfilling and grading, was unreasonable and premature.

3. Surface Mining Control and Reclamation Act of 1977: Federal Program--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Topsoil: Redistribution

An administrative law judge's decision vacating as premature a violation citing the operator for failing to redistribute all topsoil as required by 30 C.F.R. § 817.22(d), will be reversed on appeal where the record demonstrates that the topsoil pile existed on the permit on the date of inspection, where the operator's approved permit required topsoil to be redistributed to approximately 12 inches in thickness, and where there was no showing that redistributed topsoil approximated 12 inches in thickness as required by approved permit.

4. Surface Mining Control and Reclamation Act of 1977: Federal Program--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Revegetation

An administrative law judge's decision vacating as premature a violation citing the operator for failure to stabilize surface areas and allow rills and gullies to form in violation of 30 C.F.R. § 817.95 (a), (b) will be affirmed where issuance of the violation occurred prior to Phase I bond release, and where OSM failed to establish a prima facie case of violation of 30 C.F.R. § 817.95(a), (b) because it failed to show that rills and/or gullies are unstable or that they interfere with

the post-mining land use or the reestablishment of the vegetative cover or cause or contribute to a violation of water quality standards for receiving streams.

5. Surface Mining Control and Reclamation Act of 1977: Federal Program--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Signs and Markers

An administrative law judge's decision vacating as premature a violation citing the operator with failure to mark a topsoil pile with appropriate signage, will be reversed where 30 C.F.R. § 817.11(a)(1), (b), and (f) require "topsoil or other vegetation-supporting material" to be marked and maintained with appropriate signage "during all activities to which they pertain."

APPEARANCES: J. Nicklas Holt, Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Carl E. Shiles, Esq., Chattanooga, Tennessee, for Southern Appalachian Mining Company.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from an October 29, 1997, decision of Administrative Law Judge David Torbett vacating Notice of Violation No. (NOV) 94-91-94-003. In vacating the NOV, Judge Torbett adopted Southern Appalachian Mining Company's (Southern) brief ^{1/} filed August 5, 1996, in the proceedings below. In his decision, Judge Torbett concluded that "reclamation efforts of [Southern] were proceeding as contemporaneously as practical[.] * * * the violations alleged by the [NOV] were not in fact violations at the time the [NOV] was issued" and "the [NOV] was issued prematurely as to each and every violation contained within the [NOV]." (Decision at 2.)

On March 1, 1994, OSM issued the subject NOV to Southern. The NOV cited five separate violations. The NOV alleged that the operator: (1) "failed to maintain the Haulroad" (the road that runs through the mine face-up area and the "drive-through ditch" section of diversion ditch 10) in violation of 30 C.F.R. § 817.150(e)(2); (2) "failed to eliminate spoil

^{1/} Judge Torbett stated Southern's brief contains "a detailed procedural and factual background along with a cogent discussion of the issues." (Decision at 1.)

piles and return the spoil to the mined-out surface area," "failed to eliminate depressions and all highwalls and the operator disturbed land above the highwall," all in violation of 30 C.F.R. § 817.102(a)(2), 30 C.F.R. § 817(b), section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271(a)(3), and 30 C.F.R. § 817.107(c); (3) "failed to redistribute topsoil" in violation of 30 C.F.R. § 817.22(d)(4); (4) "failed to stabilize surface areas and allowed rills and gullies to form" in violation of 30 C.F.R. § 817.95(a) and (b), and (5) "failed to maintain topsoil markers" in violation of 30 C.F.R. § 817.11(b), 30 C.F.R. § 817.11(f). See OSM Ex. (R)-1.

Southern filed an Application for Review for Temporary Relief and for Immediate Hearing and Decision, on March 4, 1994, pursuant to section 525 of the Act, 30 U.S.C. § 1275 (1994), 43 C.F.R. § 4.1160 and 43 C.F.R. § 4.1260. A hearing on Southern's application was held in Chattanooga, Tennessee on March 21, 1994. At the conclusion of the hearing, Judge Torbett granted temporary relief as to violations #2, #3, and #4 which remained unabated as of March 15, 1994. The remaining two violations, #1 and #5, had already been abated. (Transcript (Tr.) 16-17, 31, 33, 143.)

At the hearing, Judge Torbett requested that OSM counsel produce any directives or "regulatory interpretation of when violations should be issued for backfilling and grading violations prior to actually backfilling and grading bond release." He queried "[i]f we're not to the stage of backfilling and grading [bond] release, when is it appropriate to cite violations for that?" (Tr. 140.) OSM produced nothing in response. OSM explains that "no further evidence needed to be introduced in connection with a decision on the merits." (OSM's Statement of Reasons (SOR) at 2.) Southern concurred that "further proof was unnecessary." (Southern's Brief (Answer) at 2.) Thereafter, Southern and OSM submitted post-hearing briefs and Judge Torbett issued his October 29, 1997, decision. OSM's appeal ensued.

On January 15, 1998, Southern moved to dismiss OSM's appeal alleging OSM had not filed its SOR within 20 days of filing its Notice of Appeal (NOA) as required by 43 C.F.R. § 4.1282(d). Southern avers OSM filed its NOA "on or about December 2, 1997." OSM filed its SOR on January 20, 1998. While we agree with Southern that the filing was late, this Board in its discretion will avoid a procedural dismissal when there has been no showing that the delay in filing an SOR prejudiced the adverse party. The Friends and Residents of Log Creek, 150 IBLA 44, 48 (1999). 43 C.F.R. § 4.1285; 43 C.F.R. § 4.402. No prejudice having been alleged or shown, the motion is denied.

Southern's underground Permit No. 2595 is situated south of Dunlap, Tennessee, off Doss Mountain Road. (Tr. 8-9.) As a predicate to our discussion of the specific violations, we note that at the time of issuance of the subject NOV mining had ceased, and the site was under active reclamation. (Tr. 42.) No application for backfilling and regrading, Phase 1 bond release, had been granted or even filed. (Tr. 9, 42.) OSM argues

in its SOR that the NOV should be sustained as valid, that the Decision is not supported by the record, and that Judge Torbett's decision should be reversed. (SOR at 2, 11-19, 20.) Concerning the evidence of violation, OSM asserts it has "thoroughly documented photographs taken on the date of the inspection." (SOR at 2.) OSM denies that Southern produced evidence disproving the existence of the violations and maintains "there was no showing or other evidence of vindictiveness in the issuance of the NOV." ^{2/} (SOR at 3.)

Violation #1 involved a failure to maintain a section of the haul road that runs through the old face-up area of the mine along the mining bench at diversion ditch No. 10. (Tr. 13.) The ditch was labeled R-2 on a map (Ex. R-4) and it can be described as a drive-through ditch that the permit required to be rock-lined for protection. OSM contends that Exhibits 4a, b, c, and d show the failure of Southern to maintain a durable surface on the haul road. (SOR at 10-11.) Exhibits 4b, d, and 5(b) further depict a washed-out area at the diversion ditch No. 10 crossing. (SOR at 11, Tr. 15.) OSM submits that based on the inspector's observations, as recorded in Exhibit R-4 and R-5, the operator violated 30 C.F.R. § 817.150(e) because of the evidence of the washed out and eroded areas and the absence of a durable surface on the haul road. (SOR at 4, Tr. 16.) It is not disputed that this violation was abated. (Tr. 16, 17, Ex. R-6(a), (c).)

Southern denies that a violation existed on the haul road because this was not a "road" as defined by regulation. (Answer at 4.) Southern states that 30 C.F.R. § 701.5 defines "Road" as "a right-of-way for travel by land vehicles used in surface coal mining and reclamation operations or coal exploration." Id. Southern argues that this term does not include other ramps and routes of travel even though they may be within the immediate mining area or within spoil or coal mine waste disposal areas. Id. Southern claims that it presented evidence through testimony that Southern did not use the "drive-through ditch section of the diversion ditch" to access the mining area or for coal mining, reclamation, or coal exploration. Id., citing Tr. 103, 104, 105. Rather, the drive-through ditch existed specifically to allow the property owner access (Tr. 103), although the ditch was still functioning as a diversion ditch. Id., citing Tr. 105.

While noting that it made improvements to a portion of the road located near the face-up area subsequent to issuance of the NOV, Southern denies the previously-existing conditions failed to meet the relevant

^{2/} Inspector Wilson, in his Mar. 1, 1994, visit to the permit area, served Southern with a notice vacating violation NOV 93-91-094-006 pursuant to a decision by the Deputy Director, Knoxville Field Office, and issued the subject violation NOV 94-91-94-003. OSM surmises that Southern associates some "vindictiveness" with the issuance of the subject NOV because Wilson thought vacating the previous NOV "was inappropriate." (Tr. 72.)

performance standard at 30 C.F.R. § 817.150. Southern urges that it maintained its roads as well as was practical, given the fact that 12.88 inches of precipitation fell in February alone. (Answer at 5, citing Ex. A-23.) Southern submits that should there have been any basis to issue the NOV, issuance was premature given the absence of adverse effects and Southern's efforts. Id.

[1] We reverse Judge Torbett's vacation of the first violation, as the requirement to reclaim this road was not premature. The applicable regulation in this case, 30 C.F.R. § 701.5, defines "Road" as "a right-of-way for travel by land vehicles used in surface coal mining and reclamation operations or coal exploration." The uncontroverted testimony of William Penley (Penley), Tennessee Consolidated Coal Company's (TCC) engineering technician and permit coordinator, established that the access road cited here was maintained for use by the owner of the surface estate to gain access to the permit area to monitor potential violations. See Tr. 103. Thus, this road was an integral part of the coal operation and was provided by the operator for the purpose of ensuring compliance issues were resolved. Although Southern argues that this route was not used as a haul road for operations located at the Southern mine site (Tr. 103-104), the permit map (Ex. R-2) approved by OSM shows the access road as "intersecting and cutting across and going on to the other side as a continuation of the access road through the diversion ditch." (Tr. 99.) When Southern marked this road on the permit diagram (Ex. R-2) to be approved by OSM, it (Southern) identified the road as subject to its coal operation, and further recognized the road as one to be maintained. The fact that Southern elected not to use this road as a haul road under its permit, but rather as an access road into the permit area, does not change the fact that the approved permit authorized Southern to use it as either, and, as such, the road was subject to the performance standards contained in 30 C.F.R. § 817.150.

As noted earlier, the term "Road" is defined in 30 C.F.R. § 701.5 to include both haulroads and access roads maintained for use in surface coal mining and reclamation operations. Because the standards are required to be met on a continuous basis, i.e., maintained, we reject Judge Torbett's finding that issuance of the NOV for this violation was premature. 30 C.F.R. § 817.150(b) "Performance standards," states:

(b) Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemicals or other dust suppressants, or

otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.

(Emphasis supplied.)

The permit map also required the through-ditch which constituted a part of this roadway to be rock-lined to prevent erosion. We find from the testimony and photographic evidence introduced by OSM at the hearing and contained in the record on appeal, that it is clear that the performance standards were violated as asserted in the NOV. See Tr. 13-16; Ex. 4 a-d.

That the violation was abated is not disputed. (Tr. 16-17; Ex. 6(a)-(d); Tr. 105, Exs. A-6(a), (c), A-7; Tr. 106.)

Violation #2 involved a failure to reclaim mined-out areas within the permit area. OSM argues that Inspector Wilson properly cited Southern with violating 30 C.F.R. § 817.102(a)(2), (b), and (c) for failing to eliminate spoil piles or return spoil piles to the mined-out surface area, as well as failing to eliminate depressions and highwalls and the disturbed area above the highwall. (SOR at 3.) Specifically, OSM claims Exhibit 8(c) shows a spoil pile remaining on the reclaimed area. A partially water-filled depression measuring 44 X 65 feet shown in Exhibits 8(b) and (c) is shown on the eastern edge of the permit area. (Tr. 52.)

Additionally, Inspector Wilson reported that the area above the highwall had been disturbed leaving an exposed highwall "which ranged to as much as seven feet tall on the western edge of the face up area." (Tr. 19, 21-22.) Southern's expert Miller testified that the reexposed area of highwall would need to be regraded with machinery. OSM cites the fact that Miller testified that "[this regrading] would cause very minimal disturbance to correct." (Tr. 85; SOR at 5.)

OSM asserts that none of the violations cited was cited prematurely because the applicable regulation requires contemporaneous reclamation. 30 C.F.R. § 817.100 provides:

Reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation on all areas affected by surface impacts incident to an underground coal mine shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities issued under § 785.18 of this chapter. The regulatory authority may establish schedules that define contemporaneous reclamation.

Southern maintains issuance of this violation best exemplifies the issue raised by Judge Torbett in this proceeding: whether Southern should be issued an NOV and penalized for actions which Southern submits are not

yet due. See Tr. 140-41. Specifically addressing the spoil material, Southern states: "[W]hile all parties admit that there were spoil materials which had not been distributed, all parties also recognized the site is still in the process of reclamation." (Answer at 5.) Southern, thus, submits:

The existence of a highwall, spoil piles and/or depressions, is to be expected in a mined out area, and it is to alleviate these physical disturbances that a reclamation process is performed. Nevertheless, all these actions cannot be taken at once, and Southern amply demonstrated that it was proceeding as contemporaneously as practical.

(Answer at 5-6.) Southern asserts that contrary to what Wilson "would subsequently charge, he had written in 1993 that the spoil had been distributed and topsoil spread." (Tr. 119; Ex. A-2; Answer at 6.)

Nonetheless, Southern readily admits there has been settlement in the highwall area through a natural settling process caused by heavy rains and states that "Southern stands ready to reclaim the area with materials stored above it." (Ex. A-23; Tr. 81, 82.) These materials, while cited in the NOV as a "disturbance," are intended to be stored and utilized to reclaim the highwall as specified in the permit. Id. Southern reasons that conditions reported to be existing above the highwall are both contemplated by the permit and are in compliance with the applicable regulation at 30 C.F.R. § 817.107(c). (Answer at 6.)

Notwithstanding its stated intention to reclaim the mined-out area, Southern emphasizes that OSM has provided no evidence nor submitted any arguments explaining why Southern should have been issued an NOV or in any way penalized for having not completed the actions at the time of issuance of the NOV. Id. This, Southern urges, is of particular significance, given that the approximate original contour had already been achieved; the minimum long-term static safety factor had been achieved; there was no evidence of excess spoil (all was to be used in the reclamation process), and there was no evidence presented by OSM that post-mining land uses were adversely affected. Id., see also Tr. 65, 97.

[2] At the hearing Inspector Wilson testified that the face-up area of the permit had been vegetated "late last summer" (before March 1) "probably in September sometime." He further testified that the regrading or "backfilling" on the face-up area of the permit occurred in "the middle of last summer, probably in August." (Tr. 59.) On cross examination, Wilson acknowledged that as of the date of the hearing, the site was still under active reclamation and had not achieved final reclamation. (Tr. 42.) Miller testified that to his knowledge no application for backfilling, grading bond release, Phase 1 has been applied for. (Tr. 80.) The site, he stated, "is in a state of dynamic reclamation now." (Tr. 80.)

Penley, TCC's engineering technician and permit coordinator, testified that Tennessee had filed a "successor-in-interest" application on the

Southern site, and that he was familiar with and had visited the permit several times. (Tr. 102.) He confirmed that no request for bond release had been filed in connection with the site, and that the site was presently "undergoing active reclamation." (Tr. 103.) Penley controverted Wilson's statement to the effect that the permit was all seeded at the same time, stating "[t]he slopes were done in October I believe and the top was done in December around where the spoil storage area was at." (Tr. 112.) Penley, Southern's expert, testified that there had been very little revegetation success on top, but "[the top] was only done in December and followed by very little good weather for it to react with." The "face[-up] area," he remarked, "has responded rather well, it's coming along and greening up rather nicely." (Tr. 112.)

Concerning the settling along the highwall, Penley testified that "it had settled down probably an average to about two (2) feet for a short distance." Some of the deepest settlement on it was "about four (4) feet deep." (Tr. 116.) He explained settlement was to be expected in most cases "[b]ecause it's impossible to fill the voids between all the material that was put back in. Water and time as it goes on fills those voids and the material settles down." He stated "it has been agreed that probably the best thing to do would be to go back in there and regrade a section of that deepest portion." (Tr. 116-17.)

Penley related that he maintains records of rainfall by day and month and, according to those records, there was "a considerable amount of rainfall not only in the last part of February but throughout February, the entire month of February." (Tr. 118; Ex. A-23.) He stated that on the day of Wilson's inspection the area received "an inch of rainfall" (Tr. 117-18; Ex. A-23), and that the area experienced significant rainfall including freezing rain (over 7 inches) in January. (Tr. 124; Ex. A-23.)

According to the permit application, reclamation of the material that is above the highwall, the overburden storage (topsoil, etc.), "was to be bulldozed straight from that pile over the highwall and then smoothed out to reclaim it to approximate original contour," consistent with the bond and the language in the permit. (Tr. 81; Ex. A-4.)

Concerning highwall settlement, Miller stated that he has seen this occur on many sites, and in this case the highwall settlement occurred to a maximum of 3.5 feet. (Tr. 85.) To alleviate the settlement, Miller testified that "a very short section [of the highwall] would have to be regraded with some type of machine with in my opinion some type of very minimal disturbance." (Tr. 85.) Commenting on what the conditions were prior to the mining disturbance, he stated: "[P]revious to the mining disturbance, there was a rock bluff of three (3) to four (4) feet in height on either side of the permit area and, in fact, some of pictures that have been entered into evidence show a rock bluff within the disturbed area." (Tr. 85.) In his opinion that rock bluff should remain because "it's consistent with the areas immediately adjacent to the mining area." (Tr. 86.)

We agree with Judge Torbett that OSM's issuance of the second violation was premature. It is not disputed that the face-up portion of the permit area was first revegetated in October 1993. Southern's witness testified that the highwall was not regraded until December 1993. OSM does not expressly dispute these assertions on appeal, although Wilson testified that backfilling and regrading all occurred at the same time. OSM's Wilson testified that the applicable regulation provides a 5-year period for vegetation success. At the time of issuance of the NOV Southern had not sought backfilling and regrading, Phase 1 bond release. It was not disputed that the permit was under active reclamation at the time the NOV was issued.

OSM's claim, in its SOR at 3, that "reclamation was largely completed," finds no support in the record. OSM does not dispute that revegetation success takes time. OSM has neither referred us to any applicable regulation or policy guidance concerning when it is appropriate to issue NOV's for failure to backfill and regrade. OSM's assertion that this violation was not issued prematurely because 30 C.F.R. § 817.100 requires contemporaneous reclamation is unavailing because OSM does not argue that sufficient time for reclamation to take place elapsed between initial backfill and regrading and March 1. OSM does not explain why Southern should be cited with a violation for actions which Southern maintains are "not yet due" (see Answer at 6) or argue that reclamation is not proceeding as "contemporaneously as practical" as required by the regulation. Thus, Judge Torbett concluded that "reclamation efforts of [Southern] were proceeding as contemporaneously as practical." (Decision at 2.) This conclusion is fully supported by the record on appeal. OSM has presented nothing to the contrary.

In the absence of regulatory guidance on the timing issue, we find that OSM's enforcement of the backfilling and regrading requirements must be tempered with reasonableness. The issuance of the second violation in this case on March 1, 1994, between 3 and 6-months after initial backfill and regrading and before commencement of the next growing season, was unreasonable and premature. Accordingly, we affirm Judge Torbett's decision vacating violation #2 of the NOV.

Violation #3 cited Southern for failing to redistribute topsoil in violation of 30 C.F.R. § 817.22(d). The corrective action required of Southern in the NOV was to "distribute remaining topsoil." (Ex. R-1).

30 C.F.R. § 817.22(d) provides:

(d) Redistribution. (1) Topsoil materials removed under paragraph (a) of this section shall be redistributed in a manner that –

(i) Achieves an approximately uniform, stable thickness consistent with the approved postmining land use, contours, and surface-water drainage systems;

(ii) Prevents excess compaction of the materials; and

(iii) Protects the materials from wind and water erosion before and after seeding and planting.

(2) Before redistribution of the material removed under paragraph (a) of this section, the regraded land shall be treated if necessary to reduce potential slippage of the redistributed material and to promote root penetration. If no harm will be caused to the redistributed material and reestablished vegetation, such treatment may be conducted after such material is replaced.

(3) The regulatory authority may chose not to require the redistribution of topsoil or topsoil substitutes on the approved postmining embankments of permanent impoundments or of roads if it determines that --

(i) Placement of topsoil or topsoil substitutes on such embankments is inconsistent with the requirement to use the best technology currently available to prevent sedimentation, and

(ii) Such embankments will be otherwise stabilized.

(4) Nutrients and soil amendments. Nutrients and soil amendments shall be applied to the initially redistributed material when necessary to establish the vegetative cover.

On appeal, OSM argues that Wilson's inspection revealed that less than all of the available topsoil had been redistributed and the failure to redistribute topsoil caused inadequate topsoil coverage in some areas of the permit and possibly the failure of revegetation success on the old spoil disposal area. (SOR at 5; Tr. 24.) OSM emphasizes that Southern's witness Miller admitted that the remaining topsoil pile had not been distributed on the permit area and that he had not checked to see whether there was at least 12 inches of material covering the mining area as required by the permit. (Tr. 89.)

Exhibit R-11 is a photograph which shows poor topsoil distribution on the western edge of the face-up area, OSM contends. As seen in the Exhibit, the soil in that area is mostly rocky with a high incidence of shale or coal and sandstone in the top mixture. In contrast, OSM insists the permit requires that topsoil be spread one foot thick over the disturbed site. (Tr. 25, 28.)

The topsoil storage area on this permit was located on the northern edge of the permit northeast of Basin 002. (Tr. 22.) OSM states that Exhibit R-16 shows the remaining topsoil pile that should have been distributed. The pile is in the proper location as provided in the permit map and marked as the topsoil pile. (Tr. 27.) Inspector Wilson estimated the length and width of the remaining topsoil pile to be 75 feet on two sides and 90 and 100 feet on the other two sides. (Tr. 51.)

OSM relates that Miller testified that the topsoil pile contains approximately 200 to 300 cubic yards of material and pine trees 3.5 to 4 inches in diameter sit on top of it. Miller expressed his view that the remaining topsoil pile could be used to eliminate the water-filled depression, but admitted that part of the material removed from the pond during construction still remained on the site near the southwestern boundary of the permit. (Tr. 91; SOR at 7.) Wilson testified that the material in the two "slightly elevated piles" (topsoil piles) and the embankment material used to create the basin (pond) would be used to eliminate the pond or basin. (Tr. 90-93.) He stated that "there's just barely adequate, enough material to do that." (Tr. 90-91.) Miller testified that he did not recall whether the basin (pond) was larger than anticipated. (Tr. 91.)

While OSM acknowledges that the proof adduced at the hearing draws a distinction between true topsoil and the subsoils that must be used on this site as partial substitute due to the thinness of the original topsoil, OSM insists that the pile of soil material for which Southern was cited "must be utilized as topsoil and spread throughout the permit area to achieve a minimum thickness of twelve inches." (SOR at 14.) OSM asserts "[the topsoil pile] cannot be arbitrarily labeled by the consulting engineer, in a transparent effort to undermine the violation, as being mere spoil which can be used to eliminate a depression." (SOR at 14.) OSM insists that the photographs and testimony of Inspector Wilson clearly show that the soil redistribution and coverage was inadequate and Southern must comply with the regulation, which states topsoil materials removed under paragraph (a) of this section shall be redistributed in a manner that complies with 30 C.F.R. § 817.22(d)(i) as to uniform thickness, compaction, and protection against erosion.

In acknowledging that OSM has placed emphasis on photographs of the area "which purportedly show rocks in the redistributed surface soils," Southern argues that Miller's testimony, as well as common experience establishes that topsoil in these areas often have rocks as one of their components. (Answer at 7; Tr. 117.) The permit, Southern reiterates, specifically provided that because the "A Horizon" soil was less than 6 inches thick, that part of the "B Horizon" would be utilized in the reclamation process. (Tr. 75.) Citing page 79 of the hearing transcript, Southern insists that "the testimony established that the topsoil, consisting of both horizons, was distributed," but "the resulting reclamation process was limited by the small amount and poor quality of topsoil existing at the site." Southern urges that "[r]ocks in the surface soils was simply consistent with the poor quality soils found naturally at the site." (Answer at 7.)

[3] Close examination of both the regulation and Southern's permit requires reversal of Judge Torbett's finding as to violation #3. Had the permit provided that the topsoil pile cited by Inspector Wilson was to have been used to reclaim the pond, basin, or the water-filled depression, we would agree with Judge Torbett that OSM prematurely issued the NOV for violation of 30 C.F.R. § 817.22(d), because there has been no showing

that sufficient time had elapsed since backfill and regrading (less than 6 months) to require reclamation of such drainage features, particularly where Miller testified as to the utility of the pond as a drainage feature for catching water run-off from newly revegetated areas. See violation #4 infra. This, however, is not the case.

While the permit does not require "a minimum of 12 inches of redistributed topsoil" as contended by OSM, it does require that "redistributed topsoil will be approximately 12 inches thick." Southern does not contend nor has it offered proof that the redistributed topsoil approximates 12 inches in thickness. The presence of the undistributed top soil pile defies any claim that redistribution approximating 12 inches in thickness as prescribed by the permit is not technically feasible or that topsoil coverage could not be better. There is no claim that the reclamation process required the topsoil pile be redistributed at a later point in time in the reclamation process (as in the case of reclaiming drainage features).

Absent proof showing that redistributed topsoil approximates 12 inches in thickness as required by Southern's permit, Southern's claim that fully reclaimed areas look like the subject permit in its present condition is unpersuasive, especially where a topsoil pile remains on the permit. Southern was required to redistribute topsoil as required by its permit. See Harvey Catron, 134 IBLA 244, 264 (1995), Reconsideration denied by order dated Feb. 14, 1996, affirmed, Civ. No. 96-0001-BSG (W.D. Va. Mar. 5, 1997), appeal filed, No. 97-1449 (4th Cir. Mar. 28, 1997); dismissed (Sept. 17, 1997); rehearing granted, D.Ct. order vacated, IBLA decision vacated, (Dec. 30, 1997) (permittee required to comply with permit provision requiring spoil to be used to backfill highwall and permittee could not use spoil to build a better road).

Conversely, had Southern offered proof that the thickness of the topsoil approximated 12 inches, OSM would have been without authority to issue a notice of violation, notwithstanding the rocky nature of the redistributed topsoil (Horizon A and B) and/or Southern's stated intention to use the remaining topsoil to reclaim the pond or water-filled depression because Southern would have satisfied the terms of its permit. Accordingly, we reverse Judge Torbett's decision vacating violation #3 and uphold its issuance within the NOV.

We next address violation #4, which alleges that the operator failed to stabilize surface areas and allowed rills and gullies to form in violation of 30 C.F.R. § 817.95(a) and (b). That regulation provides:

§ 817.95 Stabilization of surface areas.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams; shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

OSM asserts that during the March 1, 1994, inspection, Inspector Wilson observed that rills and gullies had developed on the mine face-up area and on the old spoil disposal area and that erosion was occurring. (SOR at 7). Referring to photograph exhibits, he testified that Exhibit R-13 depicted a gully in the old disposal area and that Exhibits R-14(a)-(d) and R-18(a)-(d), taken on March 1 and February 3, 1994, respectively, were photographs of gullies that had developed in the face-up area. (Tr. 29-30.)

OSM disputed Miller's testimony that the rills and gullies he observed on the site were 4 to 6 inches in depth, and his testimony that he considered these to be minor, and that they could easily be repaired with hay bale maintenance. (Tr. 87.) OSM argues that 30 C.F.R. § 817.95 provides for stabilization of reclaimed surface areas and that the photographs introduced by OSM clearly demonstrate the existence of significant rills and gullies which are contributing to an erosion problem. OSM submits that "the rills and gullies [have been] in existence for too long a period of time without correction" and that this justified issuance of the violation. (SOR at 15.)

Responding to Southern's claim that the violations cited are not ripe because of the reclamation status, OSM insists that 30 C.F.R. § 817.100 requires "contemporaneous reclamation," and therefore the operator may not choose to delay making correction of the reclamation conditions cited in the NOV.

Describing the overall condition of the reclamation and the presence of rills and gullies on the site, Southern's witness Miller stated: "I thought it looked pretty darn good considering the amount of rainfall that we've had during the time period that this site has been reclaimed and the rills and gullies were minor, easily fixed with some hay bale maintenance." (Tr. 87.) Recalling the size of the rills and gullies, Miller stated "they were certainly less than a foot, probably in the four (4) to six (6) inches range." He denied that at the time he observed them they were of the size that would disrupt the approved post-mining land-use or would cause or contribute to water quality violations "because the drainage was still controlled by the sediment pond." (Tr. 88-89.)

Penley agreed with OSM that there had been very little revegetation success on top, recognizing, however, that "[the top] was only done in December and followed by very little good weather for it to react with." With respect to the top area, Penley testified that he did not observe

anything he would classify as a gully, only rills, and that the rills carried water toward the depression. (Tr. 113.) Reviewing Exhibits (photographs) A-18 through A-22, Penley testified that A-18 was "a picture of the slope looking back up the hill through the area where material was brought back down for reclamation of the mine." He noted that the photo "was centered on the two worst gullies on the site." The approximate depth of the gullies, he testified, "would average around seven (7) inches and deeper in places and shallower in places." (Tr. 114.) Penley explained that Exhibit A-22 is "a picture showing a survey rod down in one of the gullies measuring the depth of the gully." "The depth of the gully along the bottom of the stick shows it about seventy-one hundreds of a foot." (Tr. 115.)

[4] We agree with Southern's claim and Judge Torbett's determination that OSM's issuance of an NOV for violation #4 was premature. Inspector Wilson stated in his testimony that 5 years is allowed before judging the adequacy of vegetation for a bond release. (Tr. 56-57.) The testimony of Inspector Wilson further established that OSM expects erosion at these sites, including gullies and rills, before vegetation takes hold. (Tr. 59.) Respondent's witness Miller testified that the revegetated area in question looked good, especially taking into consideration the heavy rains that had occurred. (Tr. 86.) In William H. Pullen, Jr., 132 IBLA 224, 234 (1995), we addressed whether rills and gullies had to be fully corrected at the time that Phase I bond release occurs. We held that these features (rills and gullies) need not be fully remedied at that time. Id. At the time of issuance of this NOV, Southern had not even sought backfilling and regrading, Phase 1 bond release, nor was it disputed that the permit was under active reclamation at the time the NOV was issued.

As we noted in Pullen, supra, "the correction of rills and gullies [is] required by OSM to be [an] 'ongoing activit[y]' during the entire reclamation process," especially because "such activities concern the restoration of the land to a condition capable of supporting the approved postmining land-use, which need only be fully achieved at the conclusion of reclamation." Id. at 234. In support of this assertion, we cited with approval 30 C.F.R. § 816.95(b) and Palmer Coking Coal v. OSM, 96 IBLA 266, 268 (1987). Because these activities were required to be ongoing, we observed in Pullen, supra at 234, note 11:

We agree * * * that the rills and gullies remaining on the land * * * do not preclude a Phase I bond release where [permittee] has generally succeeded, as a result of its backfilling, grading, and related efforts, in "[m]inimiz[ing] erosion" from the reclaimed land by stabilizing the existing channels, as required by 30 CFR 816.102(a)(4) and its reclamation plans. [Citation omitted] The presence of rills and gullies does not (by itself) establish that there has been a failure of stabilization efforts.

Citing Palmer Coking Co. v. OSM, supra at 268-69. Thus in Pullen, we determined that where the rills and gullies were stabilized, no predicate

for issuance of an NOV for failure to comply with 30 C.F.R. § 817.95(a) and (b) existed, at least at the time of Phase I bond release.

This Board has recognized that, in applying the precursors to 30 C.F.R. § 817.95(a) and (b) (i.e., 25 C.F.R. § 216.105(i) (1994) (Indian lands) and 30 C.F.R. § 715.14(i) (non-Indian lands)), to make the case for interim regulation, OSM must show: "the existence of rills or gullies at least 9 inches in depth; that they exist in an area where vegetation has not yet been established; and that they are not stable." Pittsburg & Midway Coal Co. v. OSM, 107 IBLA 246, 250 (1989). Applying regulation 30 C.F.R. § 715.14(i) in Coal Energy, Inc. v. OSM, 105 IBLA 385, 388 (1988), we held that OSM did not make the case for a violation of 30 C.F.R. § 715.14(i) where photographs introduced by the OSM inspector showed the existence of rills and gullies, but "OSM presented no testimony as to the depth of rills and gullies and [the Board was] unable to determine their depth from the photographs put into evidence." In vacating the NOV, we compared Coal Energy, Inc., *supra*, to Palmer Coking Coal Co. v. OSM, *supra* at 268, where OSM presented evidence as to the depth of rills and gullies. Coal Energy, Inc., *supra* at 388.

The current regulation does not contain a reference to the "deeper than 9 inches" standard. In Pittsburg & Midway Coal Mining Co. v. OSM, *supra*, appellant was cited for a violation of Indian regulation 25 C.F.R. § 216.105(i) (1994). In that case, we recognized that the principal difference between the (permanent program) regulations at 30 C.F.R. § 816.95 and 25 C.F.R. § 216.105(i) (1994) (interim program Indian regulation) was that "the latter [interim program regulation] prescribes a specific numerical depth at which the presence of unstabilized rills and gullies constitutes a definite violation on areas where vegetation had not been reestablished," and that proper application of the provisions of 25 C.F.R. § 216.105(i) (1994) in accordance with the July 9, 1987, policy directive would render any differences between the regulations insignificant. 52 Fed. Reg. 34394, 34395 (Sept. 11, 1987).

The July 9, 1987, policy directive referred to in Pittsburg and several other cases, provides:

In evaluating rill and gully conditions, individuals must distinguish between active and inactive channels. Active rill and gully channel erosion is characterized by:

- (1) vertical or near vertical channel sides with the soil exposed;
- (2) overhanging banks or associated bank failures (unstabilized slumping);
- (3) continuing channel expansion or extension headward (uphill), outward (lateral), or downward (depth);

(4) occurrence in the channel of raised clumps of soil (pedestals) contains plants whose roots are exposed around the edge of the pedestal;

(5) temporary establishment of plants on channel sides because the plants have been undermined and translocated by erosional activities;

(6) exposure of root crowns of plants along channel walls;

(7) continuing downchannel deposition of eroded materials; and

(8) lack of litter or organic matter accumulation in the channel.

Characteristics of inactive erosional channels include:

(1) rounding of channel sides;

(2) discontinuance of channel expansion or extension (headward, outward, or downward);

(3) extensive permanent establishment of vegetation on the sides and bottom of the channel;

(4) lack of unanchored clumps of soil and vegetation that have fallen from the channel sides;

(5) discontinuance of down channel deposition of eroded materials;

(6) establishment of a permanent vegetative cover on areas of erosional deposition; and

(7) accumulation of litter and organic matter in the channel.

(July 9, 1987, directive at 2.) With this background, the directive stated that "[o]bservation of a rill or gully is not itself evidence that erosion is presently occurring or that site utility is being impaired," explaining:

Where an erosional channel appears stabilized, based upon an evaluation of the channel characteristics discussed above, and the channel does not interfere with the postmining land-use, permittee should be advised to monitor the site for any change in status, but should not be required to take any corrective action. Inspectors shall also monitor such rills and gullies for any change in status. In general, if a channel displays both active and inactive characteristics, it should be considered active (and hence unstabilized).

Relying on this policy directive in Pittsburg, we rejected OSM's claim that a violation is established by showing that rills and gullies of more than 9 inches in depth exist on the site, stating that both the policy directive and OSM's response to the petition for rulemaking (seeking to incorporate the 9-inch standard in the permanent program regulation) indicate that only unstable rills and gullies constitute a violation, unless they interfere with the post-mining land use. OSM's policy pronouncement, we noted, was consistent with the Board's interpretation of 30 C.F.R. § 715.14(i) in Palmer Coking Coal Co. v. OSM, 96 IBLA at 268, in which we stated:

OSM argues that the presence of such channels by itself establishes that Palmer failed to comply with the regulations. We disagree. In reclaiming an area disturbed by mining, there is a period of time before revegetation stabilizes the newly replaced topsoil to the point that little or no erosion takes place. Cf. 30 CFR 715.20. During that time period, some erosion will inevitably occur, but it must be minimized. We conclude that that is the aim of 30 CFR 715.14(I). Indeed, the regulation provides that as an alternative to filling and grading, a permittee may "otherwise stabilize" rills or gullies. 30 CFR 715.14(I). That is, rills or gullies, which have already formed, may be left in place as long as they are "stabilize[d]."

In Pittsburg, we reaffirmed our holding in Palmer, that the regulation is applicable only where vegetation has "not yet been established." 107 IBLA at 250.

There is no contention in this case that vegetation is established. In fact, Southern claims that the various citations issued are premature precisely because there has been inadequate opportunity for vegetation to become established or inadequate time for growth and attainment of regulatory benchmarks before seeking Phase I bond release. Consequently, establishment of vegetation is not a bar to the application of 30 C.F.R. § 817.95 in this case. That regulation provides:

Stabilization of surface areas.

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved post mining land-use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams; shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted.

OSM, in its response to comments arguing that the requirement to regrade rills and gullies deeper than 9 inches was a specific and enforceable performance standard and that rills and gullies themselves posed a serious impediment to maintenance of water quality and establishment of postmining land-uses, reaffirmed that the amendments found in § 817.95

will require operators to fill, regrade, or otherwise stabilize rills and gullies, to replace lost topsoil, and to reseed or replant if the rills and gullies disrupt the approved postmining land-use or the reestablishment of vegetative cover or if they cause or contribute to the violation of water quality standards for receiving streams.

OSM recognized that the amended language is "a general performance standard" and that "States may continue to include specific size limitations on rills and gullies as appropriate." 48 Fed. Reg. 1160, 1163 (Jan. 10, 1983).

In Tennessee, the applicable permanent program is the Federal program. The Federal program does not contain specific size limitations, save the policy directive recognizing that the difference between the interim program regulation (containing the deeper than 9-inch standard) and the permanent program regulation quoted above, interpreted in conjunction with the policy directive, "is insignificant."

Applying 30 C.F.R. § 817.95(a) and (b), we note that OSM presented no testimony as to the depth of the rills and gullies. See *Coal Energy Inc. v. OSM*, *supra* at 388. Wilson did not testify as to the dimensions, i.e. width or depth of the gullies depicted in the photographs. Most of the gullies save one in the mine face-up area appear to be fairly shallow. This particular gully is depicted in Exhibits R-14(a) and R-14(c) of the face-up area. A yellow hard hat is depicted vertically in this gully showing the approximate depth of the inside of one of the gullies. The gully is sufficiently deep to hold the depth of the hard hat. No testimony was given as to the dimensions of the hard hat. However, testimony elicited from Miller stated the gullies were less than one foot, "probably in the four (4) to six (6) inches range." (Tr. 87.) Penley testified that the approximate depth of the worst gullies "would average around seven (7) inches and deeper in places and shallower in places." (Tr. 114.) One of the gullies pictured in Exhibit A-22 by survey rod measured 7 inches in depth. (Tr. 115.) We cannot conclude that a preponderance of the evidence introduced at the hearing shows that any specific rill or gully had a depth exceeding the 9-inch standard; the evidence is inconclusive on this point.

However, beyond showing the relative depth of the rills and gullies present on the permit, OSM is obligated to show that the rills and/or gullies are unstable, or absent instability, that they interfere with the post mining land-use or the reestablishment of the vegetative cover or cause, or contribute to a violation of water quality standards for receiving streams. *Pittsburg*, *supra* at 250. This OSM plainly did not do.

OSM's Inspector Wilson, although testifying that erosion (instability) was occurring, did not identify the factual basis for his conclusion. He produced no evidence of this fact (i.e., measurements or documentation of visual observations), nor did OSM testify as to application of the criteria identified in the Directive for determining whether a channel created by a rill or gully was stable versus unstable, i.e., whether there were active erosion channels versus inactive erosion channels. See Palmer Coking Coal Co. v. OSM, supra at 269.

Absent instability, a violation will lie at Phase I bond release only if rills or gullies are shown to interfere with the post-mining land use or the reestablishment of the vegetative cover, or are shown to cause or contribute to a violation of water quality standards for receiving streams. OSM elicited no testimony or evidence on this latter standard at the hearing. ^{3/} As the rills and gullies observed in this case would not support a violation at Phase I bond release, it was certainly premature to allege any such violation prior thereto.

We further hold that the mere existence of rills and gullies prior to Phase I bond release, absent proof of instability or proof that rills or gullies interfere with the post-mining land use or the reestablishment of the vegetative cover or cause or contribute to a violation of water quality standards for receiving streams, is insufficient to establish a violation of 30 C.F.R. § 817.95(a) and (b) such that Southern would be required to fill, regrade, or otherwise stabilize the rills and gullies, to replace lost topsoil, and to reseed or replant. Because OSM failed to establish a prima facie violation of 30 C.F.R. § 817.95(a) and (b), we find that that this second rationale would also support Judge Torbett's decision vacating violation #4 of the NOV.

In violation #5, Inspector Wilson cited Southern for failing to maintain topsoil markers as required by 30 C.F.R. § 817.11(b) and (f). OSM claims that Wilson, in previous inspections of this permit, had observed that the topsoil pile had been marked with a sign as required by applicable regulation, which provides, in pertinent part:

(a) Specifications. Signs and markers under this part shall

(1) Be posted, maintained, and removed by the person who conducts the underground mining activities;

^{3/} Southern's expert Miller testified to the contrary, that the rills and gullies observed would not disrupt the post-mining land-use or vegetative cover. The rills and gullies, he stated, would not cause or contribute to water quality violations "because the drainage was still controlled by the sediment pond." (Tr. 87-88.)

- (2) Be of a uniform design throughout the activities that can be easily seen and read;
- (3) Be made of durable material; and
- (4) Conform to local laws and regulations.

(b) Duration of Maintenance. Signs and markers should be maintained during all activities to which they pertain.

(f) Topsoil markers. Where topsoil or other vegetation supporting material is segregated and stockpiled as required under Section 817.22, the stockpiled material shall be clearly marked.

Southern, while seeking to draw a distinction between topsoil and subsoil layers (B Horizon) which are to be used as a topsoil substitute, is nonetheless required to comply with the regulation because its terms extend to "other vegetation supporting material." Significantly, Southern does not argue that citation for this violation was premature as found by Judge Torbett. Rather, Southern defends its position that there was no need to mark the pile because all topsoil had been distributed. To the contrary, OSM insists "the evidence clearly proved the existence of the same topsoil pile at the same location where it had long existed" and applicable regulation required Southern to mark it as Southern had done in the past. (SOR at 17.)

Southern, citing the hearing transcript, page 107, avers that "the topsoil had already been distributed and therefore, there was no need for a marker." Southern adds that

Wilson, himself, had written in 1993 that the topsoil had been spread, nullifying any basis for this violation. (Tr. 119; Ex. A-2.) Southern states that, in response to the violation, it placed a marker in the vicinity where OSM contended the topsoil existed solely "to avoid further penalty," notwithstanding its claim that the violation has no basis in fact.

(Answer at 8.)

[5] We reverse Judge Torbett's decision vacating violation #5 on the grounds that issuance of this violation was premature. Southern does not seek to have Judge Torbett's decision upheld with respect to this violation on the grounds that issuance of the violation was premature. Rather, Southern contends no factual predicate exists for issuance of the violation. We disagree with this assertion. Page 107 of the hearing transcript does not demonstrate that the topsoil had already been distributed. Rather, Penley testified that a topsoil sign was placed on a small rise of material "to prevent issuance of a [cessation order]."

(Tr. 108.) Although Southern is correct that Wilson stated with reference to an earlier violation (Ex. A-2; Tr. 119) that the topsoil had been spread, Wilson explained on redirect examination that that statement was made with reference to the face-up area in order to indicate that backfilling and grading on the face-up area from the spoil in the overburden storage area had been spread and that Southern had completed reclamation in the highwall area. (Tr. 126.)

OSM, as recognized in our discussion of violation #3, established that a topsoil pile consisting of soils from Horizon A and B remained on the permit as observed by Inspector Wilson on March 1, 1994. See violation #3 supra. The topsoil pile was in the same position as it was the previous month except it was not marked with a sign when Wilson inspected the site on March 1. (Tr. 31.) We recognize that 30 C.F.R. § 817.11(a)(1) and (f) require that "topsoil or other vegetation-supporting material" is to be marked and to be maintained as marked. Accordingly, we reverse Judge Torbett's decision and sustain the issuance of violation #5.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision of Administrative Law Judge Torbett vacating NOV 94-91-094-003 is affirmed as to violations #2 and #4, and reversed as to violations #1, #3, and #5.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge