

INTERIOR BOARD OF LAND APPEALS

John L. Stenger

170 IBLA 206 (September 25, 2006)

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JOHN L. STENGER

IBLA 2004-253

Decided September 25, 2006

Appeal from decision of the Office of Surface Mining Reclamation and Enforcement, affirming a decision made by the Charleston Field Office that the West Virginia Department of Environmental Protection had taken appropriate action in response to a Ten-Day Notice. TDN #X03-112-014-002.

Affirmed in part, reversed in part, and vacated in part and remanded.

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

Where OSM declines to take enforcement action in response to a citizen's complaint because it finds that the State's response to the Ten-Day Notice (TDN) was appropriate, any party appealing OSM's decision must establish, by a preponderance of the evidence, that the State's regulatory action or response to the TDN was arbitrary, capricious, or an abuse of discretion.

2. Surface Mining Control and Reclamation Act of 1977:
Spoil and Mine Wastes: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

SMCRA does not authorize State regulatory authorities to retroactively waive the requirement that operators obtain a permit before placing excess spoil outside of the permit area.

3. Surface Mining Control and Reclamation Act of 1977:
Hydrological System Protection

West Virginia State regulation W. Va. Code St. R § 38-2-5.4.b.7 requires that sediment control structures be cleaned out when the sediment accumulation reaches 60 percent of design capacity, which is the capacity determined during the permitting process to be necessary for its function as a sediment control structure. Where a pre-existing structure is used as a sediment control structure, the sediment-cleaning requirement is triggered only when the capacity remaining in the structure is 40 percent or less than the capacity determined in the permitting process to be necessary for its function as a sediment control structure.

4. Surface Mining Control and Reclamation Act of 1977:
Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Ten-Day Notice to State

Where OSM has not complied with the SMCRA requirement to inform the State regulatory authority of specific aspects of a citizen complaint and has failed to make an independent investigation into each allegation, the matter may be remanded to OSM with instructions to issue a Ten-Day Notice (TDN) to the State on the unconsidered allegations to allow the State an opportunity to respond to the allegations in the first instance. However, the failure to notify the State in the initial TDN may be regarded as harmless where a subsequent Federal inspection revealed that the condition complained of did not exist and where issuing the TDN would not have altered subsequent regulatory analysis and conclusions.

APPEARANCES: John L. Stenger, Lost Creek, West Virginia, pro se; Steven C. Barclay, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

John L. Stenger appeals from a decision issued by the Office of Surface Mining Reclamation and Enforcement (OSM) affirming on informal review a determination made by OSM's Charleston Field Office that the West Virginia Department of Environmental Protection (WVDEP) had taken appropriate action in response to a Ten-Day Notice (TDN) issued by OSM in response to Stenger's citizen's complaint alleging nine violations relating to the reclamation of a surface mine on Stenger's property.

Section 503 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1253 (2000), grants primary responsibility for enforcing SMCRA to states with approved programs for regulating surface mining. Frank Hubbard, 145 IBLA 49, 52 (1998). However, OSM retains a significant oversight role to ensure compliance with the statute. When a citizen's complaint provides OSM with reason to believe that a permittee is in violation of a state regulatory program, OSM is required to issue a TDN to the appropriate state regulatory authority. 30 U.S.C. § 1271(a)(1) (2000); 30 CFR 842.11(b)(1); Frank Hubbard, 145 IBLA at 53. Unless the state takes "appropriate action" to cause the violation to be corrected or shows "good cause" for the failure to do so within 10 days of receiving the TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. 30 U.S.C. § 1271(a)(1) (2000); 30 CFR 842.11(b)(1); Frank Hubbard, 145 IBLA at 53.

United Coal Co. has completed operations on and begun reclamation of a surface coal mine on Stenger's property in the State of West Virginia pursuant to a lease agreement with Stenger and appropriate State permits. Stenger submitted a citizen's complaint to OSM on June 9, 2003, alleging various violations in the reclamation process. (Administrative Record (AR) 1.) ^{1/}

In response to Stenger's complaint, OSM sent a TDN to WVDEP, which submitted its response on June 24, 2003. (AR 3.) WVDEP concluded that there were no current violations at the site. Although the record does not reflect that OSM believed that WVDEP had failed to take "appropriate action," OSM nevertheless conducted a Federal inspection on July 23, 2003. (AR 4.) That inspection showed one existing violation on the site, the placement of excess spoil off-permit.

On October 15, 2003, WVDEP submitted a supplemental response to the TDN (AR 5), acknowledging the violation revealed in the Federal inspection and showing

^{1/} The AR contains 14 documents identified in the index. We will cite to documents by their AR numbers.

that it had responded by issuing a State Notice of Violation (NOV) requiring remediation. After OSM received WVDEP's supplemental response to the TDN, the Beckley Area Office informed WVDEP, and the Charleston Field Office informed Stenger, that OSM considered WVDEP's response to the TDN "appropriate." (AR 8.)

Stenger subsequently requested informal review (AR 13), and the OSM Regional Director conducted informal review and issued a decision on April 7, 2004, concluding that WVDEP took "appropriate action" in response to the TDN and declining to take further enforcement action. (AR 14.) Stenger appealed that decision to this Board.

[1] Where, as here, OSM declines to take enforcement action in response to a citizen's complaint because it finds that the State's response to the ensuing TDN was appropriate, a party appealing OSM's decision must establish by a preponderance of the evidence that the State's regulatory actions or response to the TDN was arbitrary, capricious, or an abuse of discretion. Frank Hubbard, 145 IBLA at 53. On appeal Stenger argues that OSM incorrectly concluded that WVDEP's response was appropriate with respect to eight alleged violations of the State's regulations controlling reclamation of surface mines.

Stenger argues that United Coal has not placed required perimeter markers around the permit area. WVDEP claimed and the Federal inspection revealed that perimeter markers were adequately placed as required for the current stage of reclamation. On appeal Stenger provides only unsubstantiated claims that WVDEP failed to enforce its own regulations and that the Federal inspector "did not choose to pursue the issue" presumably because the inspector "did not consider this a serious matter." (Statement of Reasons (SOR) at 2.) These claims are not supported by any evidence aside from Stenger's allegations; this is insufficient to support Stenger's burden of proof. William H. Pullen, Jr., 150 IBLA 5, 9 (1999). Stenger has not carried his burden to show by a preponderance of the evidence that WVDEP's determination that the perimeter marking is in compliance was arbitrary, capricious, or an abuse of discretion.

Stenger argues that United Coal failed to comply with West Virginia's concurrent seeding requirements. W. Va. Code St. R § 38-2-9.1.d. The Federal inspector found that revegetation is at the stage it should be for this period in the reclamation. Stenger has provided no evidence other than his assertion United Coal failed to seed concurrently. The evidence on the ground does not support his assertion. See William H. Pullen, Jr., 150 IBLA at 9. Moreover, even if Stenger is correct that United Coal was late in seeding, the revegetation is now current, and the West Virginia regulations do not provide for retroactive penalties where the regulatory authority has not documented a history of failure. Thus there is no relief

that this Board can offer on appeal. In such a situation, we properly reject appellant's argument. See West Virginia Highlands Conservancy, 152 IBLA 158, 208 (2000).

Stenger argues that United Coal has failed to restore productive topsoil. The record shows that Stenger's property had been mined once before United Coal began its operations. In the time between the mining operations Stenger used the land to grow hay. When United Coal obtained its permit to mine from WVDEP, it obtained a waiver from the State requirement that topsoil be separated and returned to the land in reclamation because the land had been previously mined and there was concern that the existing topsoil would be insufficient.

State regulations allow the use of a topsoil substitute where the substitute will be sufficient to support the post-mining use of the land. W. Va. Code St. R § 38-2-14.3.c. To use a substitute, an operator must obtain a certification that the substitute is of adequate quality. Id. The record reflects that United Coal obtained a certification stating that the approved substitute would be at least as good as the existing topsoil for the purpose of growing hay. (AR 10.)^{2/} Although Stenger states that the promise that the substitute would be as good or equal to the existing topsoil is "false" and "a sham," he does not provide evidence to support his claim such as a documented difference in productivity between the previously existing topsoil and the substitute. (SOR at 5.) Stenger has failed to carry his burden of proof. See William H. Pullen, Jr., 150 IBLA at 9.

Stenger argues that WVDEP failed to make required quarterly inspections of the remediation and failed to require the repair of rills and gullies that have formed in the remediated area. Stenger argues that W. Va. Code St. R § 38-2-9.3.c, which he believes WVDEP has failed to enforce, requires the operator to conduct quarterly inspections of remedial work. The regulation provides:

Time for Inspection. Prior to the recognized spring and fall planting seasons, the operator shall review all areas which were seeded and/or planted during previous planting seasons. The operator shall then cause those areas deficient in vegetative cover to be retreated (graded, seeded, planted, mulched, limed, etc.) to establish the required level of vegetation success.

^{2/} AR 10 includes documentation of the response to a citizen's complaint Stenger filed in 1997 concerning the decision to use a topsoil substitute on his property. After receiving WVDEP's response to the TDN, the Charleston Field Office concluded that the use of a substitute on Stenger's property was appropriate. Stenger did not seek informal review of that decision.

Although the OSM regulation requires seasonal inspections (as OSM asserts), rather than quarterly inspections (as Stenger asserts), Section H of United Coal's permit requires United Coal to conduct quarterly inspections during remediation.^{3/} It is unnecessary to resolve which requirement appertains, because Stenger has failed to adequately support his claim that United Coal failed to conduct inspections. He has not provided any documentation, such as a history of complaints to WVDEP, to show that United Coal failed to meet its quarterly inspection requirement. See William H. Pullen, Jr., 150 IBLA at 9. Moreover, the AR indicates that at least as of September 25, 2002, Stenger had refused to allow United Coal access to the property to complete reclamation due to a dispute relating to the sediment pond. (AR 3, Attachment 1 at 1.) Given the record before us on appeal, there is no evidence aside from Stenger's unsupported allegation that United Coal has failed to meet its permit requirement to conduct quarterly inspections.

Stenger also complains that the reclaimed area has formed rills and gullies which have not been timely repaired, arguing that W. Va. Code St. R § 38-2-9.2.e requires the repair of rills and gullies in reclaimed areas. OSM correctly notes that the regulation is not so broad. Instead the regulation requires revegetation plans submitted in the permitting process to

contain a statement asserting that rills and gullies which form in areas that have been regraded and topsoiled and which disrupt postmining land use, interfere with the reestablishment of the vegetation cover, or cause or contribute to a violation of applicable water quality standards will be filled, regraded, stabilized, topsoiled, and reseeded or replanted.

(Emphasis added.) Thus, the regulation tolerates rills and gullies that do not disrupt postmining land use, interfere with the reestablishment of the vegetation cover, or contribute to a violation of the applicable water quality standards. The Federal inspection found that Stenger had successfully cut and baled "several round bales of hay"; that "[r]eclamation is as current as possible"; and that "[v]egetation is becoming established." (AR 4, Mine Site Evaluation Narrative Report at 2.) Thus, the Federal inspector did not find conditions that would trigger the repair commitment United Coal undertook pursuant to W. Va. Code St. R § 38-2-9.2.e.

^{3/} The AR does not contain a complete copy of United Coal's permit. Both Stenger and OSM have submitted portions of the permit. Stenger submitted a page purporting to be the permit and containing sections H and I of the permit. (AR 13, Complaint #7.) OSM acknowledges the substance of the requirement for quarterly inspections. (OSM Response to SOR at 15.)

The inspector did note that minor erosion gullies had formed that require repair as weather permits. WVDEP acknowledged in its original TDN response that “[t]he vegetation on all reclaimed areas is only one year old and erosion repair is a seasonal activity and may remain valid until final release.” (AR 3 at 2.) OSM did not consider the existence of these minor gullies to be evidence of WVDEP’s failure to properly regulate United Coal’s reclamation effort as they are to be expected in the reclamation process and may resolve themselves with time. Nor do we find that Stenger has provided evidence to show that the rills and gullies are evidence of a failure of oversight.

We are sensitive to Stenger’s concerns about off-permit gullies allegedly caused by inadequate drainage on the off-permit spoil deposits. (Reply to BLM Response at 5-6.) However, because the photographs Stenger attached to his Reply are dated May and June 2004, we do not know whether these gullies existed during the summer of 2003 when the Federal inspection took place and when WVDEP made its response to the TDN. We therefore cannot consider them evidence of a failure of oversight. If gullies still exist on the property and are interfering with post-mining use of the land for hay production or if other gullies and rills have formed which cause such interference, Stenger may seek enforcement action from WVDEP or OSM.

[2] Stenger argues that United Coal placed spoil outside of the permit area. WVDEP’s original response to the TDN responded to this argument by citing two State NOVs it issued to United Coal for placement of spoil off-permit dated September 17, 2001, and November 13, 2001, both of which had been “terminated” before the TDN was issued.^{4/} The Federal inspection on July 23, 2003, revealed that WVDEP had also issued an NOV on June 24, 2003, one day after it completed its TDN response, citing placement of spoil off-permit. That NOV has since also been terminated. The Federal inspector also found that United Coal had placed spoil off-permit in addition to the spoil referred to in the previous three NOVs (AR 4 Mine Site Evaluation Narrative Report at 1), although he reported that the spoil had been placed off-permit in response to a request from Stenger. *Id.* WVDEP subsequently issued a fourth NOV for the additional spoil placement discovered in the Federal inspection, requiring reclamation and seeding of the spoil. The Beckley Area Office determined that this was the appropriate response to the violation and notified WVDEP. (AR 8.) On informal review the Regional Director agreed, stating that, although placement of spoil off-permit without a permit is a violation, WVDEP responded appropriately in requiring the material to be reclaimed in place.

^{4/} Under West Virginia regulations, when a violation has been successfully abated, it is recorded as “terminated.” W. Va. Code St. R § 38-2-20.2.d.

Stenger argues that, regardless of the reclamation WVDEP required, it violated Federal regulations by failing to require a permit for the spoil placed off-permit. The Regional Director acknowledged that including these areas of off-permit spoil disposal in the original permit would have been the best regulatory course, given the fact that United Coal and Stenger had planned for this off-permit placement from the beginning of the project. (AR 14 at 9.) However, the Regional Director considered the failure to permit for off-permit spoil placement to be harmless error that was cured by the issuance of appropriate remediation requirements. *Id.*

Both OSM and Stenger cite the Preamble to a 1989 rulemaking where OSM clarified the permitting requirements for reclamation, declaring that permit renewal was not required when the sole remaining activity at a mine site was reclamation. 54 FR 13814, 13815 (Apr. 5, 1989). OSM argues that this exemption from the permitting requirement applies to placement of spoil off-permit in the present case. Stenger objects, citing a section of the Preamble stating that “[t]his final rule does not affect the requirements contained in 30 CFR 780.35 to provide permit information and receive approval for proposed excess spoil disposal sites and designs of spoil disposal structures. * * * These sites used to dispose of excess spoil must be permitted.” 54 FR at 13819 (emphasis added).

We have reviewed all of OSM’s rulemakings that have interpreted SMCRA as it relates to excess spoil and conclude that Stenger’s interpretation is correct.^{5/} The exemption from permitting for reclamation was never intended to apply to disposal of excess spoil off-permit. The plain text of the Federal and West Virginia regulations governing the disposal of excess spoil supports this conclusion. West Virginia requires excess spoil to be “placed on designated disposal sites within the permit area.” W. Va. Code St. R 38-2-14.14.a.1 (emphasis added). The regulation allows an exception from the on-permit requirement where spoil is used to reclaim abandoned mine lands “under a reclamation contract pursuant to section 28 of the Act and this rule.” *Id.* It appears that United Coal and Stenger planned to use the exception in Code St. R 38-2-14.14.a.1 to use spoil from United Coal’s operation to reclaim an area abandoned by a previous mining operation. It is undisputed, however, that they did so without a permit or a reclamation contract. The West Virginia regulations do not leave much room to argue that additional permitting is not necessary to place spoil off the original permit area, and if they did, the Federal regulations close the door. Under 30 CFR 816.71(a), excess spoil must be “placed in designated disposal areas within the permit area.” (Emphasis added.) Further, 30 CFR 816.71 contains the general requirements for the placement of excess spoil, and 30 CFR 816.72 through 816.74 provide more specific rules for the disposal of excess spoil in valley

^{5/} See 56 FR 65612 (Dec. 17, 1991); 48 FR 44780 (Sept. 30, 1983); 48 FR 32910 (Jul. 19, 1983).

fills, in durable rock fills, and on existing benches. All of those sections require the spoil to be disposed of pursuant to a permit. Although the steps WVDEP took in response to spoil disposal outside the permitted area may have been correct in terms of stabilizing and revegetating the land, WVDEP did not have the authority to waive the permitting requirement. We therefore reverse OSM on this issue and remand for actions consistent with this holding. ^{6/}

[3] Stenger argues that United Coal has used a pond he constructed on his property as a sediment collector and has damaged its utility for agricultural purposes. It is undisputed that Stenger did not protest during the permitting process when United Coal proposed to use the pond, which is outside of the permit area, as a sediment collector. Stenger states that he “made no objection to use of my pond as a sediment trap during permitting because [he] was assured by the operator that [the operator] would protect [the] pond from sediment.” (Response to BLM Reply at 3.) The assurance Stenger refers to between himself and United Coal may have been oral: Our review of the record does not reveal any agreement included in the permit, and Stenger does not argue that any such agreement was included in the permit. ^{7/} The parties agree that United Coal is required to restore the pre-mining capacity and function of the pond, but they disagree on the timing of that responsibility. Stenger argues that the sediment should be removed now whereas OSM contends that the pond need only be returned to pre-mining status when the pond’s service as a sediment control structure is complete.

To the extent that Stenger and United Coal may have entered into a private agreement on this question, we decline to intervene. Cf. Cooper v. BLM, 144 IBLA 44, 47-48 (1998) (“[t]he Department has historically declined to adjudicate private disputes involving the validity or effect of a lease assignment and has maintained the status quo until the parties have had an opportunity to settle their dispute privately or in a court of competent jurisdiction”), quoting Charles H. Dorman, 79 IBLA 209, 212 (1984). Our jurisdiction here extends only to matters governed by SMCRA. Thus we can provide relief to Stenger only to the extent he can demonstrate that the sediment is filling his pond in violation of SMCRA or the regulations implementing the statute at the State or Federal level.

State regulation W. Va. Code St. R § 38-2-5.4.h prohibits an operator from abandoning sediment control structures before a time that is at least 2 years after the

^{6/} We do not reach Stenger’s argument regarding the adequacy of the drainage and revegetation of the off-permit spoil as those issues will be addressed in the permitting process.

^{7/} Our analysis of the point is limited because the AR does not contain a complete copy of the permit. See n.3, supra.

last augmented seeding and not less than 2 years before the final bond release. OSM argues that this regulation prohibits United Coal from removing sediment from the pond now because the appropriate time has not yet arrived. (OSM Reply to SOR at 12.) We do not agree with OSM's interpretation of the regulation. The regulation prohibits operators from abandoning sediment control structures, but says nothing about maintenance. By removing sediment from the pond we do not believe that United Coal would be abandoning the structure; to the contrary, it would be engaging in maintenance activity, which is authorized and, in certain cases, required by the regulations. Thus, W. Va. Code St. R § 38-2-5.4.b.7 requires that sediment control structures "[b]e cleaned out when the sediment accumulation reaches sixty-percent (60%) of design capacity." Cleaning sediment, therefore, can be a maintenance action necessary for the proper functioning of the sediment control structure.

The question before us is whether the sediment accumulation in Stenger's pond reached the threshold for required cleaning pursuant to W. Va. Code St. R § 38-2-5.4.b.7. In its response to the TDN, WVDEP attached a report from Permit Engineer Clarence Wright, who inspected the pond on September 5, 2002. Wright concluded that the capacity of the pond at that time was 9.7 acre-feet, which he added was "much greater" than the required capacity of 5.83 acre-feet. (AR 3 Attachment.) We infer that the "required capacity" Wright referred to was the capacity needed for the pond to perform its function as a sediment control structure. Wright did not compare the existing capacity against the originally-designed capacity of the pond. Because the pond predated the mining activity, however, we believe that Wright's basis for comparison was correct: The appropriate basis for comparison is not the pond's original design capacity but the capacity needed to fulfill its role as a sediment control structure. The regulation requiring sediment cleaning instructs that the cleaning be done "so as to restore design storage capacity as indicated on plans submitted for each structure." W. Va. Code St. R § 38-2-5.4.b.7. Where, as here, a pre-existing structure is used as a sediment control structure, we hold that the sediment-cleaning requirement of W. Va. Code St. R § 38-2-5.4.b.7 is triggered only when the capacity remaining in the structure is 40% or less than the capacity determined in the permitting process to be necessary for its function as a sediment control structure.

In this case, the 2002 inspection showed that the existing capacity of the pond was approximately 9.7 acre-feet, 160% of the 5.83 acre-feet capacity required in the permitting process. Although Stenger disputes Wright's calculation of the capacity, he has not presented alternative data to contradict Wright's results. Therefore, we hold, W. Va. Code St. R § 38-2-5.4.b.7 has not been triggered, and United Coal is not required by that regulation to clean the sediment. We conclude accordingly that WVDEP did not act arbitrarily and capriciously in failing to require the pond to be

cleaned immediately. The pond is permitted as a sediment control device and is apparently performing that function well with extensive capacity to accept further sediment. Because sediment control was the only issue before WVDEP in the TDN, it could have reasonably concluded that cleaning the pond was not necessary for sediment-control purposes.

[4] Stenger's citizen's complaint included two issues that OSM failed to incorporate into the TDN: Replacement water for agricultural purposes, and large rocks left on the surface.

W. Va. Code § 22-3-24(b) requires operators to replace the water supply for agricultural use where the water supply has been affected by "contamination, diminution or interruption proximately caused by the surface mining."^{8/} Although Stenger claimed in his citizen's complaint that he used the pond for agricultural use and that he needed his "water supply resources restored" (AR 1 at 2),^{9/} OSM's TDN did not include this issue, so WVDEP did not respond to it. The Federal inspection was similarly focused only on the sediment control issue. We cannot affirm OSM where it has not complied with the SMCRA requirement to inform the State regulatory authority of a citizen's complaint and has failed to make an independent investigation into the matter. We therefore vacate and remand to OSM to issue a TDN to WVDEP on this issue to allow WVDEP an opportunity to respond in the first instance to the issue of replacement water for agricultural purposes.

Stenger argues that United Coal has left large rocks on the surface that interfere with the land's post-mining use for hay production. OSM failed to include this potential violation in the TDN, and WVDEP accordingly did not respond to it. OSM acknowledges that, as a potential violation of a permit condition, this allegation should have been included in the TDN. See AR 14 at 11-12; see also West Virginia Highlands Conservancy, 152 IBLA at 185 ("When the information provided by appellants in their citizen's complaints provided OSM with reason to believe, that, if the proffered information were true, the enumerated permittees had violated the terms of their SMCRA permits, OSM's obligation was to respond to the citizen's complaint by issuing TDN's to the State for all of appellants' site-specific allegations.")

^{8/} Federal law does not protect commercial agricultural use. See Jim & Ann Tatum, 151 IBLA 286, 299-301 (2000). However, W. Va. Code § 22-3-24(b) explicitly does, and does so without differentiating between domestic and commercial agricultural use. Accordingly, we need not determine whether Stenger's agricultural activities are domestic or commercial.

^{9/} Stenger expands this argument on appeal to emphasize the agricultural use aspect, stating that "[m]y animals are in need of a replacement water supply." (Response to OSM Reply at 3.)

(emphasis added)). OSM argues, however, that its error was harmless because its Federal inspection did not reveal rocks on the property of the kind described by Stenger.

Stenger disputes the validity of the Federal inspector's conclusions regarding rocks because he contends that OSM's failure to include the rocks issue in the TDN left the Federal inspector ignorant of the alleged violation. Thus, he argues, the inspector's conclusion that there were no rocks on the property that would interfere with post-mining use as hayland is unreliable because the inspector did not know to look for rocks. This does not necessarily follow, as, unlike WVDEP, OSM did have institutional knowledge of the rocks issue. More importantly, the record shows that the OSM inspector who conducted the inspection, Brad Edwards, had knowledge of the entirety of Stenger's complaint, because he prepared the TDN for the complaint, as evidenced by his signature on the TDN as the authorized representative. We note that Stenger included a photograph showing two rocks in his SOR and referred to photograph 12 (AR 7), taken during the Federal inspection, showing what appears to be the same rocks. The Federal inspection did not consider these rocks significant enough to interfere with the post-mining use of the land for hay production. We agree with OSM that OSM's procedural error in failing to notify WVDEP of Stenger's allegation concerning large rocks on his property was harmless because a subsequent Federal inspection revealed no rocks that would interfere with post-mining use. Cf. ASARCO Inc., 152 IBLA 20, 28 (2000) (MMS' failure to review certain information provided by a lessee was harmless where it was apparent that doing so would not have altered MMS' analysis and conclusions.)

Finally, Stenger argues that United Coal failed to remove vegetative and organic matter before placing spoil off-permit. Both Federal and West Virginia regulations require the removal of organic matter from spoil disposal sites before spoil can be placed on the sites. 30 CFR 816.71(e); W. Va. Code St. R §§ 38-2-14.14.d.2, 38-2-14.14.e.8, and 38-2-14.14.f.5. On appeal Stenger argues that United Coal did not do so before placing excess spoil off-permit. We do not reach this argument because this issue will be addressed in the permitting process for the off-permit spoil that will occur on remand as we held above.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and vacated in part and remanded..

David L. Hughes
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge