

M & J COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-564, 88-568

Decided June 4, 1990

Appeal from that part of a decision of Administrative Law Judge Joseph E. McGuire, denying application for review of Cessation Order No. 86-11-433-01, and petition for discretionary review of that part of the decision assessing \$3,500 in civil penalties. Hearings Division Docket Nos. CH 6-15-R, CH 7-1-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there

exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must provide adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

5. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Good Faith

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where an operator allows several days to elapse before responding to an imminent danger cessation order, extraordinary measures to abate have not been shown.

APPEARANCES: W. Henry Lawrence IV, Esq., Clarksburg, West Virginia, for M & J Coal Company; Wayne A. Babcock, 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 HARRIS

M & J Coal Company (M & J) has appealed from that part of a June 24, 1988, decision by Administrative Law Judge Joseph E. McGuire, denying M & J's application for review of Cessation Order (CO) No. 86-11-433-01 (Hearings Division Docket No. CH 6-15-R). In its appeal, docketed as IBLA 88-564, M & J challenges the Judge's findings on the facts of the violation alleged in the CO. M & J also filed a petition for discretionary review of the civil penalty assessment of \$3,500 arising out of the same CO (Hearings Division Docket No. CH 7-1-P), docketed as IBLA 88-568. By order dated September 9, 1988, we granted the petition for discretionary review because consideration of matters of the violation and penalty were so interrelated. In that order, we notified the parties that we would consolidate both dockets for purposes of issuance of a decision.

I. Procedural Background

On April 25, 1986, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued CO No. 86-11-433-01 to M & J. The CO required the immediate cessation of mining at M & J's underground mining operation in the Helen's Run section of Marion County, West Virginia (Permit No. UO-639). At that time, M & J was engaged in a full pillar extraction operation.

The CO cited M & J for violating 30 U.S.C. § 1271(a)(2) (1982) and 30 CFR 843.11(a)(1) (1986), as well as provisions of the West Virginia Code and implementing regulations, by causing a condition which created an imminent danger to the health or safety of the public. ^{1/} OSMRE charged that M & J's mining had "caused deep mine subsidence which has severely cracked the land surface and caused severe structural distress and partial collapse of the occupied [Joseph] Tarley residence" (Exh. R-9). OSMRE ordered M & J to (1) cease its underground coal mining operations immediately; (2) "protect the public from the surface cracks"; and (3) "restore the land to a condition capable of supporting uses it was capable of supporting before subsidence," by 8 a.m., April 29, 1986. In addition, M & J was

^{1/} In the CO, OSMRE cited two sections of the West Virginia Code, 22A-3-16(a), relating to the authority to issue imminent danger CO's, and 22A-3-14(c), providing for the suspension of underground mining under urbanized areas, cities, towns, or communities, if an imminent danger to the inhabitants of such an area were found. It also cited two provisions of the West Virginia regulations, 14A.02, authorizing the issuance of imminent danger CO's, and 7C.02(b), which requires underground miners causing surface damage to restore the land to a condition capable of supporting uses it was capable of supporting before subsidence.

2PCW directed to "[r]evise and resubmit the subsidence control plan as approved April 25, 1986 to ensure that the health and safety of the general public will not be endangered" (Exh. R-9).

On April 28, 1986, OSMRE and State officials met with representatives of M & J at the Tarley residence to discuss the remedial measures necessary to abate the CO. Several citizens, including Tarley, also attended the meeting. After viewing the area, it was determined that M & J would rope or ribbon off the subsided area in order to protect the public and that it would begin to fill the surface cracks the next day (Exh. R-11). The group also discussed the necessary amendments to the subsidence control plan. OSMRE extended the time for abatement to May 1, 1986 (Exh. R-12). OSMRE terminated the CO on April 30, 1986 (II Tr. 101).

On May 23, 1986, M & J filed with the Hearings Division an application seeking review of the facts of the violation alleged in the CO. By letter dated September 19, 1986, OSMRE's assessment conference officer notified M & J of a proposed civil penalty of \$2,700 for the violation cited in the CO. On October 6, 1986, M & J filed a petition for review of the civil penalty assessment. Judge McGuire consolidated those two proceedings and on February 11 and 12, 1987, held a hearing in Morgantown, West Virginia.

Based on his evaluation of the evidence, the Judge held that OSMRE had properly issued CO No. 86-11-433-01. He also increased the proposed civil penalty from \$2,700 to \$3,500.

II. Factual Background

Dennis M. Nunan, a West Virginia Department of Energy (DOE) inspector of the surface effects of all coal mines, inspected the affected surface areas of M & J's mine, also known as the Old Consol No. 63 or the Monongah Mine, in October 1985, and again in February 1986 (I Tr. 65, 258-59; II Tr. 360). ^{2/} At that time, the mine was permitted to Pittsburgh Coal Works, Inc. (PCW), Permit No. UO-639. During his February 1986 inspection, Nunan noted that the "mine appeared to be reactivated" and at the site advised John Markovich, that a permit transfer from PCW to M & J was necessary (I Tr. 257-60). ^{3/}

^{2/} The hearing transcript for each day of the 2-day hearing is separately paginated; therefore, transcript references will be to I Tr. or II Tr.

^{3/} Nunan testified that he "talked to Mr. Markovich's father" also named John (I Tr. 259). On the second day of the hearing, John Thomas Markovich, M & J vice president and manager, testified (II Tr. 358-415). The record does not disclose whether the John Thomas Markovich who testified was the same individual who was advised by Nunan in February 1986, that M & J was required to obtain a permit transfer from PCW.

In response to a telephone call from Carl Dingus, next door neighbor of Tarley, Nunan inspected the Dingus residence on March 5, 1986. ^{4/} He observed surface cracks about 40 feet from, and at a 45-degree angle to, the residence, but he saw no structural damage to the residence (I Tr. 260-61). On March 7, 1986, the State issued a notice of violation (NOV) to PCW, citing it with failing to prevent subsidence that reduced the value and use of the surface lands in violation of the West Virginia Code. Nunan explained that the NOV was issued to PCW, rather than M & J, because PCW was still the official permittee at that time. ^{5/} The NOV directed the permittee to restore the land by filling in or otherwise repairing the large surface cracks by March 22, 1986 (Exh. R-31).

On March 10, 1986, Nunan again inspected the Dingus property noting little change; however, in a March 18, 1986, inspection, he found a new crack extending to within 4 feet of the house and other cracks developing in the driveway and yard (I Tr. 263-64).

Dingus testified that he first noticed cracks on a lot adjacent to his property on February 28, 1986. Also on February 28, the waterline supply-ing water to his house broke (I Tr. 163, 165). Between March 5 and 17, Dingus observed these cracks growing larger and moving towards his house (I Tr. 167-70). On March 21, OSMRE reclamation specialist William Berthy and West Virginia inspector Nunan inspected the surface area affected by M & J's underground mining operations. Both the Tarley and Dingus properties were inspected (I Tr. 34). Berthy testified that there were a number of surface cracks and that one crack "came right up to the [Dingus] house" ^{6/} (I Tr. 43). Berthy testified with reference to a map, Exhibit R-2, depicting surface features superimposed on the underground mine workings. ^{7/}

^{4/} The proximity of the Dingus and Tarley houses can be seen on a photograph, Exhibit R-14, and based on the scale of one inch equals 100 feet, set forth on Exhibit R-1, a map, those residences are approximately 25 feet apart.

^{5/} Permit No. UO-639 was transferred to M & J on Mar. 28, 1986 (Applicant's Exh. J).

^{6/} As a result of the Mar. 21, 1986, inspection, the State, on the same day, issued M & J a NOV for mining without a permit (Exh. R-32). It also extended to Apr. 5, 1986, the time for abatement of the Mar. 7, 1986, NOV issued to PCW (Exh. R-31). On Mar. 27, 1986, the State issued a CO to M & J because it continued to mine without a permit (Exh. R-33). On the same day, the State issued two further NOV's to PCW, citing failure to submit a proper subsidence control plan (Exh. R-34), and failure to notify property owners at least 6 months prior to mining beneath their property (Exh. R-35).

^{7/} Exhibit R-2 is a portion of a map included in M & J's permit package. It is entitled "Supplemental Map, M & J Coal Company, Permit UO-639." The map's legend states, inter alia, that it purports to show the projected limits of mining and occupied structures. OSMRE's "Latest Field Survey 12-4-86" is a plastic overlay scotch taped to Exhibit R-2. Exhibit R-1

Berthy determined, by means of a topographic survey, that the Tarley and Dingus residences were accurately located on that map, above the workings of M & J's underground operations (I Tr. 37-38).

In the early morning hours of March 22, 1986, the Dingus residence subsided. Dingus was unable to open his basement door, his furnace separated from its chimney, the house filled with smoke, water and gas lines broke, and cracks appeared throughout the house (I Tr. 174-77). On that same day, he determined the house was unsafe and moved his wife and four children to a motel (I Tr. 177-79). Dingus testified that Charles Sorbello, later identified as the president of M & J, visited him the following day, apologized for the incident, acknowledged responsibility, offered to pay for a new house or pay the rent on another house, and gave Dingus \$300 for expenses (I Tr. 177-80).

Tarley, who identified his home as that marked "Z. F. Morgan" on the map designated as Exhibit R-1, testified that he first became aware of subsidence problems on his property on March 22, 1986, the same day the Dingus family moved from their home (I Tr. 211-12). On that day, his waterline broke, a door separated from a wall, and the side of his house facing the Dingus property moved (I Tr. 211-13). Tarley performed some repair work and placed jacks under the house to forestall further damage (I Tr. 215-16). He stated that around the second week in April 1986, he called "the mines several times" inquiring "when were they going to fill these holes up because somebody's going to get hurt" (I Tr. 219).

On March 24 or 25, 1986, Albert Lechiara, a deep mine inspector for the State, inspected the underground workings of M & J's mine because of the subsidence problems (I Tr. 143-44). He found the headings closest to the Dingus and Tarley properties to be blocked and impassable due to a collapse of the roof, and for that reason he was unable to get within 100 feet of a point directly below the Dingus residence (I Tr. 145-49). He testified that based on his experience "that generally when you pull pillars, you get falls like that, yes" (I Tr. 150).

On April 14, 1986, Tarley filed a citizen's complaint with OSMRE alleging that M & J's underground coal mining operations had caused subsidence damage to his residence and property on March 22, 1986, and that he had "fear of future damage to my property and safety of my family" (Exh. R-4).

On the same day, OSMRE issued a 10-day notice to the State, in accordance with section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982). The State received that notice the next day (Exh. R-36).

fn. 7. (continued)

appears to be a slightly different portion of the same map. However, the subsidence area, including the Dingus and Tarley residences, is included on both exhibits (see I Tr. 35-42.)

On April 24, 1986, in accordance with instructions he had received from OSMRE, Tarley called OSMRE, stating that M & J had "gone back to work that morning" (I Tr. 53; Exh. R-8). At approximately "one o'clock or so" on April 25, 1986, prior to any response to the 10-day notice from the State, OSMRE received an "emotional call" from Tarley (II Tr. 20). Tarley, who had been called home from work at 11 a.m. that same day, informed OSMRE that his residence had subsided and requested an immediate inspection (I Tr. 211, II Tr. 20). OSMRE contacted State officials, who accompanied OSMRE personnel on their inspection. The inspection confirmed that the Tarley residence had subsided. At the time of their arrival, Tarley was moving furniture out of the house into a van (I Tr. 56; II Tr. 140). The OSMRE inspectors took photographs of the damage. (See Exhs. R-17 through 25.)

The inspection revealed that the surface cracks ran through the house (I Tr. 56). The foundation of the house had cracked; the gas and water lines were broken; several large cracks had developed, including one from 6 to 11 inches wide running through the basement (I Tr. 28-29, 223-24; II Tr. 140-41; Exhs. R-17, 18, 19, and 21). Tarley testified that one crack in the yard was "a foot and a half wide, and you could not see bottom," and that it was "still ripping when I got home" (I Tr. 223). He stated that "the house was creaking like it was going to fall some more," and he "was afraid that the house was going to collapse" (I Tr. 224). The largest crack passed through the Tarley property and onto the property of Tolliver Miller, cracking the Miller driveway (I Tr. 223). Miller, whose wife was ill, expressed his fear to the OSMRE inspectors that further subsidence of his driveway might preclude ambulance service from reaching his house (II Tr. 37, 144).

OSMRE determined that subsidence posed an imminent danger to the public health or safety, and it issued CO No. 86-11-433-01 (Exh. R-9). OSMRE Morgantown Area Office Manager, Charles A. Sheets, explained that based on what had taken place during March and April 1986, and his observations on April 25, 1986:

I felt there was ample reason to--and there was ample evidence that an imminent danger situation did exist and we had reasonable belief or cause that an imminent danger situation did exist.

Based on all these facts and the fact that I had talked to the deep mine inspector, Mr. Lechiara, who had been in the mine, and he confirmed the fact that they had good roof falls in the mine; I had to assume that this was caused by the mining of coal by M & J Coal Company and that there was ample justification to issue a Cessation Order.

(II Tr. 38).

Inspector Nunan testified that the State decided not to issue a NOV because it had been determined that mining operations had already passed the Tarley residence and a citation would be of no use (I Tr. 298).

III. Discussion

A. Issuance of the Cessation Order

The issue raised by M & J's appeal is whether OSMRE properly issued the CO in this case. M & J first contends that OSMRE issued the CO prematurely, in that it failed to wait for the State to act on the 10-day notice. M & J asserts that under sections 521(a)(1) and 521(a)(2) of SMCRA, 30 U.S.C. §§ 1271(a)(1) and 1271(a)(2) (1982), the 10-day notification period may not be waived where a CO is issued because of a danger to the public health or safety; it may be waived only where a CO is issued for reasons of environmental harm (M & J Brief at 16-21). M & J contends that issuance of the CO violated the notice provisions of section 521(a)(1), and that OSMRE had no authority or jurisdiction to intervene and conduct an inspection without giving the State the statutorily mandated 10-day notice.

Section 521(a)(1) of SMCRA provides in pertinent part:

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State regulatory authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause such violation to be corrected or to show good cause for such failure and to transmit notification of its failure to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action.

30 U.S.C. § 1271(a)(1) (1982).

The next provision of SMCRA, section 521(a)(2), and the one cited by OSMRE, provides in part:

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter, or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant imminent environmental harm to land, air, or

water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

30 U.S.C. § 1271(a)(2) (1982). M & J contends that the clause "[w]hen, on the basis of any Federal inspection" in section 521(a)(2) incorporates the 10-day notice requirement in section 521(a)(1), precluding Federal inspection until 10 days following issuance of such notice.

M & J further asserts that under 30 CFR 842.11(b) (1986), which implements section 521(a) of SMCRA, OSMRE could properly have issued the CO only if the State regulatory agency, DOE, had failed to take action to abate the violation within 10 days after being notified, or, if the person notifying OSMRE of an imminent danger situation also indicated that the State regulatory authority had failed to take appropriate action.

The provisions of 30 CFR 842.11(b)(1) (1986) relied on by M & J provide in part:

(b)(1) An authorized representative of the Secretary shall immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this chapter, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources and--

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program under section 504(b) or 521(b) of the Act and Part 733 of this chapter; or

(B) The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; [8/] or

(C) The person supplying the information supplies adequate proof that an imminent danger to the public health and safety or a

8/ 30 CFR 842.11(b)(1)(ii)(B) was revised and substantially expanded subsequent to the events giving rise to this appeal. See 53 FR 26744 (July 14, 1988).

significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action. [9/]

OSMRE answers that the 10-day notice does not apply to a situation of imminent danger to the public health or safety.

[1] Because OSMRE is required by statute to issue a CO immediately upon determining "on the basis of any Federal inspection," that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is not required to issue a 10-day notice to the State before taking that enforcement action. 30 U.S.C. § 1271(a)(2) (1982); 30 CFR 843.11(a)(1); Hazel King, 96 IBLA 216, 238, 94 I.D. 89, 101 (1987); cf. Fresa Construction Co. v. OSMRE, 106 IBLA 179, 190, 95 I.D. 293, 300 (1988) (no notice to State required where operations are causing or can be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources). Thus, although OSMRE had issued a 10-day notice in this case, where OSMRE determines based on "any Federal inspection" during the running of such period, that an imminent danger to the public health or safety exists, it would violate the statutory mandate to "immediately order a cessation" if it were to wait until the notification period elapsed before issuing a CO. The interpretation of the statute urged by M & J, that OSMRE, having detected an imminent danger to the health or safety of the public, must hesitate rather than act to halt activities and order abatement of existing conditions, is contrary not only to the language of section 521(a)(2) of SMCRA, but also to OSMRE's enforcement responsibilities, as well as public policy. Moreover, there is no rational basis for M & J's attempted distinction between notice requirements for significant, imminent environmental harm and imminent danger to the public health or safety.

M & J's argument that the 10-day notice provision of section 521(a)(1) is applicable to section 521(a)(2) must be rejected to the extent it is based on a reading of the Act. However, M & J also argues that 30 CFR 842.11(b)(1) (1986) requires State notification.

[2] That regulation provides that an immediate Federal inspection is required where "the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection)" that there exists any condition which creates "an imminent danger to the health or safety of the public," and where this "reason to believe" standard is coupled with one of three other standards in the regulation. The purpose for this appears to be consistent with the intent of SMCRA that the States be the primary enforcers of the Act and that, therefore, an immediate Federal inspection would be warranted only in limited circumstances.

9/ The 1988 regulatory revisions resulted in 30 CFR 842.11(b)(1)(ii)(C) no longer being connected to 30 CFR 842.11(b)(1)(ii)(B) by the disjunctive "or." See 53 FR 26744 (July 14, 1988).

Thus, the first of these additional standards required for immediate Federal inspection is that there be no State regulatory authority or OSMRE must be enforcing the State program. That was not the circumstance in this case. Second, OSMRE must have provided the State with a 10-day notice and the State must have failed to take appropriate action. That condition did not exist either because although OSMRE had given the State a 10-day notice, the 10-day response period had not expired. Third, the person supplying the information must supply "adequate proof" that "an imminent danger to the public health and safety" exists and that the State regulatory authority has failed to take "appropriate action." The question is whether the facts in this case satisfy the "reason to believe" standard and this third "adequate proof" standard. We believe they do.

In this case, in response to a written complaint filed by Tarley on April 14, 1986, OSMRE issued a 10-day notice to the State, which was received on April 15, 1986. On the morning of April 24, 1986, Tarley telephoned OSMRE. The memorandum of that call stated that Tarley informed OSMRE that M & J was working and that "C. Sheets had told him to notify us when mining commenced." It was also noted that he said that "no one from the state reviewed his subsidence damage" (Exh. R-8). The record shows that OSMRE attempted to contact the appropriate State representative on that date (Exh. R-8). On April 25, 1986, Tarley telephoned OSMRE to inform it that his house had subsided and that he and his family were moving out.

Clearly, following the Tarley telephone calls OSMRE had reason to believe that there existed the possibility of an imminent danger to the health or safety of the public, because the facts, as recounted by Tarley, if true, constituted a condition that created an imminent danger to the health or safety of the public. See 30 CFR 842.11(b)(2) (1986). Therefore, the precondition for an immediate Federal inspection existed. See Donald St. Clair, 77 IBLA 283, 306, 90 I.D. 496, 509 (1983).

[3] We turn now to whether the record shows that Tarley supplied "adequate proof" that "an imminent danger to the public health and safety" existed and that the "State regulatory authority has failed to take appropriate action." M & J argues that it does not because "Sheets' testimony regarding Mr. Tarley's telephone call of April 25, 1986 makes no reference to any comment regarding DOE" (M & J Brief at 19).

We believe that under the circumstances of this case, Tarley's telephone calls constituted "adequate proof" both of the imminent danger and of the State's failure to take appropriate action. Tarley's April 24 telephone call to OSMRE was in response to OSMRE's request that Tarley inform it when M & J began mining. When OSMRE received the April 25 telephone call, it was aware of the situation concerning M & J's mining operation and the subsidence problems of Dingus and Tarley. On March 21, 1986, the State had issued a NOV to M & J requiring it to cease mining because it did not have a permit. The next day the Dingus residence subsided. Although the PCW permit was transferred to M & J on March 28, 1986, M & J did not have an approved subsidence control plan until April 25, 1986 (II Tr. 404-09). Sheets testified that on April 25, 1986, the State ceased taking appropriate action regarding the subsidence problems (II Tr. 66). Sheets admitted,

however, that he did not know that on April 24, 1986, the State had modified the NOV it had issued regarding restoration of the damage to the Dingus property to include restoration of the Tarley property. Nevertheless, prior to proceeding to the Tarley residence, OSMRE personnel went to the State DOE office in Fairmont, West Virginia, and explained the situation to DOE officials, who accompanied them to the Tarley residence (II Tr. 21). Before issuing the CO, OSMRE offered the State the opportunity to write the citation, which it declined (II Tr. 37).

Although the regulations require that the person providing information to OSMRE supply "adequate proof" of the existence of an imminent danger and that the State regulatory authority had failed to take appropriate action, that standard must be a flexible one which deals with the realities of the situation. Thus, where OSMRE has independent knowledge of the circumstances surrounding a mining operation, it would serve no useful purpose to require that the person supplying information to OSMRE have provided all the information which would support the need for an immediate Federal inspection. What is adequate proof must be determined on a case-by-case basis. Thus, as in this case, where OSMRE receives a call from a citizen stating that his home has subsided and OSMRE knows that the neighbor of that citizen has already had his home destroyed by subsidence, the quantum of proof necessary for the citizen to supply to establish that an imminent danger exists may be less than in other circumstances. Moreover, where OSMRE knows that the State has taken enforcement action against a permittee because of subsidence problems, a call from a citizen informing OSMRE that the subsidence continues to occur may constitute adequate proof that the State failed to take appropriate action.

Here, Tarley's April 25 telephone call did not precipitate any rash action on the part of OSMRE. The office receiving the call sought the advice of its supervisory office in Charleston, West Virginia (II Tr. 20-21). It also consulted with State officials prior to conducting the inspection. We conclude that under the circumstances of this case the requirements for an immediate inspection under 30 CFR 842.11(b)(1) (1986) were satisfied and OSMRE was not required to await State action under the previous 10-day notice or issue a new 10-day notice.

B. Prima Facie Case

[4] M & J next argues in its appeal that OSMRE failed to establish a prima facie case in support of the issuance of the CO. OSMRE carries the initial burden of establishing a prima facie case as to the validity of the notice or order it has issued. 43 CFR 4.1171(a); Turner Brothers, Inc. v. OSMRE, 112 IBLA 166 (1989); Innovative Development of Energy, Inc. v. OSMRE, 110 IBLA 119, 123 (1989). Once OSMRE has established a prima facie case, the permittee must bear the ultimate burden of persuasion. 43 CFR 4.1171(b).

First, M & J alleges that OSMRE failed to establish conclusively a connection between the damage to the Tarley property and its mining operation. It charges that OSMRE experts ruled out landslide and sinkhole

phenomena without justification. 10/ M & J supports its argument that it was not the cause of the surface conditions by pointing out that mining did not occur "directly" beneath the Tarley and Dingus properties. Citing to testimony from three witnesses, M & J denies that it mined beneath the Tarley and Dingus properties.

M & J refers to the testimony of OSMRE's Sheets who at one point indicated that the Dingus and Tarley properties were "directly" above the area being underground mined by M & J, but then amended his testimony, stating that the Tarley and Dingus residences were "located slightly above, or above the map on the top portion of the map," and "not directly within the area indicated on the map" (II Tr. 265-66). 11/ M & J also cites the testimony of James E. Gilley, the Chief of OSMRE's Branch of Engineering Assistance. Gilley inspected the Tarley and Dingus property and surrounding areas on April 30, 1986, where he "observed a system of surface cracks that were a slight, oblique angle to the direction of work -- the direction of the underground workings of the M & J Coal Company operations as indicated in the map submitted" (II Tr. 221). Gilley explained that the long axes of M & J's workings were roughly parallel to the direction of the surface cracks (II Tr. 222). He indicated that the surface cracks manifested the

10/ M & J also asserts that Judge McGuire erred in "refusing to permit [John Thomas] Markovich [M & J's vice president] to give his own expert opinion on causation while freely permitting OSMRE's representatives to do

so" (Brief at 21). Judge McGuire sustained an objection to a question, posed to Markovich by counsel for M & J, whether he (Markovich) believed that M & J's mining caused the subsidence. Counsel for OSMRE did not get the opportunity to expand on his objection before the Judge ruled that Markovich's response would be self-serving and "it calls for a legal conclusion and invades the province of the fact finder" (II Tr. 413). After the Judge ruled, counsel for OSMRE indicated that his objection related to Markovich's lack of qualifications as an expert (II Tr. 414). Although counsel for M & J requested, he was not allowed to qualify Markovich as an expert. In addition, when counsel for M & J sought to "vouch" the record and "at least let [Markovich] state what his answer would have been," the Judge refused (II Tr. 414). M & J is correct in its assertion of error. Markovich, who testified that he had been in the underground coal mining business since 1977, should have been allowed to answer the question. Clearly, his response would have been self-serving, but such a deficiency would go to the weight to be given such testimony, not to its admissibility. Moreover, Markovich's opinion on the cause of the subsidence would not have constituted a legal conclusion, rather it

was being offered in support of a factual finding regarding the cause of the subsidence. Nevertheless, such error was de minimis in light of the fact that M & J presented almost no evidence to contradict OSMRE's case concerning the cause of the subsidence.

11/ Reference to the "map" is probably a reference to either Exhibit R-1 or R-2. Although this testimony is not clear, as noted earlier, both exhibits depict the residences and subsidence area in relation to the underground workings.

characteristics of mine subsidence surface cracks (II Tr. 223). In his opinion, "the support coal was removed adjacent to the Dingus and Tarley properties, and that caused subsidence of the surface" (II Tr. 227). He ruled out that the subsidence could have been caused by prior mining (II Tr. 227-28, 236).

Finally, M & J refers to the testimony of John Thomas Markovich, M & J vice president, concerning Exhibit R-1, a map. He indicated that he marked the map "February, March, and April" to indicate accurately the areas in which M & J was mining during those months in 1986 (II Tr. 381). The rectangular area marked "April" is closest to the Tarley and Dingus residences. Markovich testified that full pillar extraction was being performed in March and April, without a DOE-approved subsidence control plan (II Tr. 406-09), but that M & J "never mined under" the Dingus or Tarley properties, and that on April 25, 1986, mining occurred "probably 150 to 200 feet" from the closest edge of the Tarley property (II Tr. 388, 390).

OSMRE answers that M & J's mining operations were clearly responsible for the subsidence at issue. We agree. Such a conclusion is fully supported by the record and does not depend on a finding that mining occurred directly (vertically) beneath the subsided areas. In addition to the above evidence relating to the surface effects to M & J's underground mining operations, Michael J. Superfesky, a program specialist in OSMRE's Morgantown Area Office, who is a registered professional engineer with a Masters Degree in Civil Engineering, testified that subsidence is not just a vertical phenomenon but incorporates horizontal movement also. He explained that where a large void is formed, for example by a coal pillar-ing operation, a caving zone develops, the material remaining above begins to "bend and deflect" and a "sag or trough" forms on the surface. This movement is characterized by an "angle of draw" which is "the angle made with the vertical of the point of the furthest disturbance from the top of the coal seam to the point that's, I guess, farthest away that is disturbed or affected" (II Tr. 158). Later, he again described the angle of draw as "the angle that is projected upward from the coal seam, the edge of the mining to the surface where the land is [a]ffected--where it has horizontal movement, vertical movement, rotational movement, and so forth" (II Tr. 189). He stated also that when conventional longwall or retreat mining passes under a house it may take 90 days for the house to complete settling (II Tr. 193), and that where support coal is removed fairly completely, the influence zone will precede underground mining "by that area subtended by the angle of draw on the surface" (II Tr. 229). Asked to elaborate on why he thought M & J coal removal caused the subsidence and structural damage to the Dingus and Tarley properties, Superfesky stated: "I could tell by the cracking pattern, the fact that the cracks stayed open, the fact that the movement was really not landslide-related * * * and the most important reason is the fact that we know for sure that this support, this 125-foot solid block of coal [adjacent to the Tarley and Dingus residences] has been removed" (II Tr. 164; see also II Tr. 197-98). Based on his study of Exhibit R-1, he prepared an exhibit (Exh. R-54) on which he projected a line up vertically from the mined area and he concluded that mining had occurred

within 10 feet (on the horizontal) of the Dingus and Tarley properties (II Tr. 178-79).

The evidence presented by OSMRE clearly established that M & J's mining operation caused the subsidence which destroyed the Tarley residence. 12/

Second, M & J charges that OSMRE failed to show that the conditions which existed resulted in an imminent danger to the health or safety of the public. M & J points to 30 U.S.C. § 1291(8) (1982) which provides the definition of "imminent danger to the health and safety of the public" as

the existence of any condition * * * which * * * could reasonably be expected to cause substantial physical harm to persons outside a permit area before such condition * * * can be abated. A reasonable expectation of death, or serious injury before abatement exists if a rational person, subject to the same conditions * * * giving rise to the peril, would expose himself or herself to the danger during the time necessary for abatement.

See Hazel King, 96 IBLA at 238, 94 I.D. at 102.

M & J contends that no imminent danger to the health or safety of the public could have existed because "numerous officials from OSMRE, DOE, M & J and neighbors" * * * "willingly exposed themselves to these cracks." It charges that the photographic evidence (Exhs. 23, 27, and 28) shows "many OSMRE personnel standing at the edge of the crack without any apparent concern for this 'imminent danger'" (M & J Brief at 22). Paraphrasing an excerpt from the Tarley testimony (I Tr. 223-24), M & J attempts to minimize the danger by noting that the cracks were "only 18 inches wide," and "no one could fall [into them] more than waist deep" (M & J Brief at 21-22).

M & J's challenge to the existence of an imminent danger ignores the evidence in this case. The surface cracking caused Dingus and Tarley to evacuate their families and belongings from their residences. One of the Dingus children told an OSMRE inspector that one of their puppies had fallen into one of the cracks and been lost (II Tr. 18). Tarley expressed concern that his blind daughter might fall in one of the cracks (II Tr. 214). It cannot be seriously contended that ruptured gas and water pipes, twisting and cracking walls, doors and windows separating from their mountings, chimneys separating from furnaces, and large cracks in the surface do not present an expectation of death or serious injury to the rational person

12/ The only testimony to the contrary is that of M & J's witness, Gary Gardner, a consultant engaged in preparing deep and surface mining permits. His initial testimony was that the surface cracks on the Tarley property were caused by a "combination of mechanisms" including "mine voids," topography, steepness of slope, stratigraphy, and gravity (II Tr. 437-38, 440, 444). In other testimony, however, he indicated that Superfesky and Gilley had "pretty well covered the causes," and that the subsidence was probably initiated by M & J's mining (II Tr. 443, 444-45).

exposed to such conditions. The record presents a graphic picture of an imminent danger situation and although little could be done to protect the Dingus and Tarley residences, the Millers and their property were clearly threatened. The surface cracks had proceeded through the Tarley property and onto Miller's property on April 25, 1986, and at the inspection on that day, Miller informed OSMRE of his safety concerns. M & J's contentions to the contrary lack merit and deserve no additional discussion.

The record testimony overwhelmingly demonstrates that at the time of OSMRE's April 25, 1986, inspection, an imminent danger existed. Thus, OSMRE established a prima facie case in support of the issuance of the CO. M & J presented virtually no evidence to the contrary and, therefore, failed to sustain its ultimate burden of persuasion.

C. Revised Subsidence Control Plan

In its next argument, M & J challenges one of the corrective actions required by OSMRE in the CO, *i.e.*, to "revise and resubmit the subsidence control plan, as approved April 25, 1986, to ensure that the health and safety of the general public will not be endangered" (Exh. R-9). M & J contends that this remedial measure bears no rational relation to the violation alleged in the CO, and amounts to an unconstitutional taking of property.

M & J elaborates by pointing out that its initial subsidence control plan, as approved by DOE, complied with State law. M & J contends that OSMRE directed it to revise its subsidence control plan to protect occupied dwellings, but that no such requirement is found in West Virginia or Federal law, and the revision provided no further protection for the Tarley property because M & J had ceased mining in the area. M & J asserts that it had the right to subside, that such right was approved by DOE, and that neither OSMRE, nor Judge McGuire challenged such right. It contends that by requiring revisions to its subsidence control plan, OSMRE infringed upon this right and deprived it of property without just compensation.

OSMRE contends that certain changes to M & J's subsidence control plan were "essential to make the plan minimally effective" to protect the health and safety of the public (Answer at 34). OSMRE states that for this purpose it required a map of sufficient scale with surface structures marked thereon. OSMRE points out that M & J asked OSMRE personnel what would be acceptable as a reasonable means of protecting the public and that M & J was advised that defining occupied dwellings as protected structures under the plan and providing a sufficient angle of draw to protect such structures from subsidence would be effective. OSMRE states that M & J accepted such advice, without making counter proposals, and that there was no coercion involved. Therefore, it asserts, no uncompensated taking of M & J's property occurred.

First, M & J's assertion that revision of its subsidence control plan is not a rational corrective action, is specious. Superfesky testified with reference to Exhibit R-41, a two-page document identified by him as

a "section out of the permanent program permit for Pittsburgh Coal Works" (II Tr. 170). Exhibit R-41 contains an engineering formula involving a 15 degree angle for determining the amount of support required for a given surface area. It also states that "[n]o pillars shall be extracted between two support areas where the distance between two support areas is less than the depth of cover" (see II Tr. 176). Superfesky testified that these specifications were not adhered to in that M & J mined a block of coal 125 feet wide in an area where the cover was 150 feet (II Tr. 176). Superfesky explained that Exhibit R-41 was superseded by the subsidence control plan approved on April 25, 1986 (II Tr. 205-06).

Gary Gardner testified for M & J (see note 12, supra). He prepared the subsidence control plan which was approved on April 25, 1986. This plan utilized a 15-degree angle of draw, which he explained "had been adequate in protecting protected structures on previous plans that we had submitted" (II Tr. 429-30). He stated that at an April 28, 1986 meeting, OSMRE officials were asked "what they would accept in the way of a revised subsidence control plan" (II Tr. 433). After consultation with OSMRE, M & J agreed to a 30-degree angle of draw. Gardner testified: "The reason we did this was that M & J was shut down. We wanted something that we could go with on the 30 [of April] that would be acceptable without coming back two days later with another modification. For that reason, the 30 degrees was adopted as a worst case situation" (II Tr. 434). As further revisions, OSMRE required that occupied dwellings be included in the plan as "protected structures," and that a larger scale, more easily readable map be submitted (II Tr. 95-96, 101, 132, 431). On April 30, 1986, both DOE and OSMRE approved the modifications and the violation was terminated (II Tr. 101).

The evidence shows that M & J mined coal without regard for the effect of its operation on the Dingus and Tarley residences. Although M & J asserts that under West Virginia law it had the right to subside occupied residences, even assuming that were true, if its actions created a condition which resulted in an imminent danger to the health or safety of the public, and OSMRE were justified in undertaking an immediate Federal inspection, the discovery of the condition would require, as in this case, the issuance of a CO by OSMRE. And if cessation of operations would not itself alleviate the condition, OSMRE could properly require, as it did in this case, remedial measures designed to ensure the protection of the public health or safety. See 30 CFR 843.11(a)(3) (1986).

Finally, the evidence shows that revisions to the subsidence control plan were in part volunteered by M & J and were, as a whole, the result of arm's-length discussions in which M & J concurred. M & J will not be heard to argue on appeal that it was deprived of rights or property, in compiling and submitting changes to its subsidence control plan.

IV. Civil Penalty Assessment

As a result of a September 3, 1986, assessment conference, OSMRE assigned 47 penalty points for a resulting assessment of \$2,700 (Exh. R-37). Utilizing the civil penalty assessment procedures at 30 CFR Part 723, Judge McGuire increased the penalty points to 55 and the assessment to \$3,500.

Under 30 CFR 845.13(b)(2)(i) and (ii) an assignment of up to 30 penalty points may be made for the seriousness of a violation, based on an assignment of up to 15 points for probability of occurrence, and up to 15 points for extent of actual or potential damage. The Judge found that OSMRE had correctly assigned 15 civil penalty points because subsidence of a residential area, creating an imminent danger, had occurred and 30 CFR 845.13(b)(2)(i) requires an assessment of 15 points in such a situation. 13/ 30 CFR 845.13(b)(2)(ii) requires the assignment of up to 15 points based on the extent of actual or potential damage. The Judge found that the damage extended well beyond the permit area and was extremely severe in character. He therefore assigned 15 penalty points for this factor.

M & J contends that these point assignments are incorrect on the ground that when OSMRE issued the CO, the Tarleys had already left their property and no imminent danger existed.

The existence of an imminent danger, specifically the danger of subsidence as an ongoing event is amply demonstrated by the record. M & J has shown no reason to disturb the Judge's assignment of penalty points for seriousness, based on the above criteria.

Under 30 CFR 845.13(b)(3)(ii)(B) negligence is defined as

the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care.

Subsection (C) of the same regulation states that "[a] greater degree of fault than negligence" means reckless, knowing, or intentional conduct. From 13 to 25 penalty points may be assigned where a violation occurs through a greater degree of fault than negligence. 30 CFR 845.13(b)(3)(i)(C).

Judge McGuire affirmed OSMRE's assignment of the maximum penalty points, 25, for negligence, on the ground that M & J's conduct had demonstrated a greater degree of fault than negligence.

13/ Judge McGuire incorrectly references the civil penalty regulations at 30 CFR 723.1-.20 as controlling in this case (Decision at 10). Those regulations govern civil penalties assessed under the initial regulatory program. The applicable regulations in this case are those at 30 CFR 845.1-.21 which cover the assessment of civil penalties for CO's and NOV's issued under 30 CFR Part 843 (Federal Enforcement). The CO in this case was issued pursuant to 30 CFR 843.11(a)(1)(i). Despite the mis-citation, the regulations for point system for penalties and determination of penalties in 30 CFR Part 723 and 30 CFR Part 845 are virtually identical, and thus, Judge McGuire's reliance on the Part 723 regulations resulted in no substantive error in his decision.

M & J contends that there was no evidence of reckless, knowing, or intentional conduct. However, Judge McGuire properly found that M & J engaged in a full pillar extraction operation prior to having a permit transferred to it on March 28, 1986; that it had no approved subsidence control plan until April 25, 1986; and that it failed to notify surface owners 6 months in advance that it would be mining beneath their property, contrary to West Virginia and Federal law. ^{14/} These actions demonstrate a degree of fault greater than negligence under the above definitions.

[5] Under 30 CFR 845.13(b)(4)(ii)(A) "good faith" points may be deducted based on a showing that "extraordinary measures" were taken to achieve rapid compliance in abating the violation, and that the violation was abated before the time set. The Judge revised OSMRE's schedule by subtracting three "good faith" points based upon his conclusion that while M & J may have been diligent in abating the violation, it was by no means "extraordinary" or exceptional in effecting abatement.

M & J asserts that it filled the surface cracks caused by subsidence on "the first work day following" issuance of the CO (Petition at 3). OSMRE concedes that M & J acted "fairly promptly" in abating the violation but points out that M & J allowed a weekend to elapse before beginning work to protect the public health and safety (OSMRE Answer to Petition at 7).

A mine site evaluation inspection report (Exh. R-11) indicates that M & J had taken no action to abate by Monday, April 28, and would "start filling the subsidence cracks" at the Tarley and Dingus properties on April 29, 1986. While abatement occurred prior to the time set, no "extraordinary" measures are shown to have been taken to effect abatement. Therefore, Judge McGuire's deduction of the three good faith points will be upheld.

We conclude that Judge McGuire properly assessed civil penalties in this case. M & J has shown no reason to disturb his conclusions. See Clinchfield Coal Co. v. OSMRE, 95 IBLA 360, 370-71 (1987).

^{14/} John T. Markovich testified that he extracted coal from December 1985 to Mar. 28, 1986, without a permit, and to Apr. 25, 1986, without a proper subsidence control plan in effect (II Tr. 404-06, 409). In a notice of violation dated Mar. 27, 1986, DOE charged the permittee with violations of the West Virginia Code and regulations in having failed to notify surface owners at least 6 months prior to mining beneath their property (Exh. R-35). The notification requirement is found in Federal regulations at 30 CFR 817.122, which states that notice shall be mailed to "all owners and occupants of surface property and structures above the underground workings." While M & J could argue, as it did, that it did not mine directly below the Dingus and Tarley residences, a proper reading of 30 CFR 817.122 would include areas within the angle of draw.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge in Docket Nos. CH 6-15-R and CH 7-1-P is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

Charles B. Cates
Director, Ex Officio Member