

Appeal from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, refusing to take action on a citizen complaint. TDN 91-83-135-51.

Motion to dismiss denied.

1. Appeals: Jurisdiction--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Board of Land Appeals

Pursuant to 43 CFR 4.1282(a), notice of appeal is filed with the office of the OSM official whose decision is appealed and a copy is at the same time filed with the Board of Land Appeals. Nonetheless, 43 CFR 4.1107(c) requires that notice of appeal need only be filed with the Board. This apparent conflict between rules governing notices of appeal from OSM decisions is resolved in favor of the appellant who files only with the Board.

2. Appeals: Jurisdiction--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

An appeal from an OSM decision mailed to this Board within 30 days after issuance of the decision at issue is timely filed pursuant to 43 CFR 4.1107(g).

APPEARANCES: John M. Rosenberg, Esq., Prestonburg, Kentucky, for appellant; J. Nicklas Holt, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Billy R. Shelton, Esq., Pikeville, Kentucky, for Coal-Mac, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Marion A. Taylor filed a notice of appeal with this Board from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), refusing to take further action on a citizen complaint filed by Taylor. The OSM decision took the position that the Kentucky Department for Surface Mining Reclamation and Enforcement had

properly declined to take action on the Taylor complaint because it involved adjudication of a property dispute. The notice of appeal was filed in response to a letter dated August 20, 1991, from the Director, OSM, informing Taylor that no further action would be taken by OSM concerning his complaint and informing him that an appeal could properly be taken directly to this Board.

Counsel for OSM and for Coal-Mac, Inc. (Coal-Mac), the permittee concerned, have moved to dismiss the appeal because it was filed late and because it was not filed with the deciding OSM official. Counsel for OSM admits that there is no proof that the notice of appeal was not timely filed, but argues that appellant should be obliged to establish that it was timely. Counsel for Coal-Mac joins in these arguments. For the rea-sons stated below the motion is denied.

[1] There is an apparent conflict in rules governing appeals from OSM decisions: although 43 CFR 4.1282(a) requires that notice of appeal is given by filing notice with OSM and "at the same time" sending a copy of the notice to this Board, 43 CFR 4.1107(c) requires only that notices of appeal in such cases as this be filed with the Board. Because of the conflict in these regulations it is doubtful that an appellant could know with certainty which rule to follow. Under these uncertain circumstances, we cannot dismiss this appeal for failure to follow the more burdensome of the two rules.

[2] The regulation governing appeals from OSM decisions to this Board provides that "[t]he effective filing date for a notice of appeal * * * filed with the Board shall be the date of mailing. The burden of establishing the date of mailing shall be on the person filing the document." 43 CFR 4.1107(g). The OSM decision here under review was issued August 20, 1991. The notice of appeal is dated as received by the Board on September 23, 1991, but because "filing" is accomplished by mailing, the postmark on the envelope bearing the notice is critical. The postmark is September 18, 1991, within 30 days of the decision from which appeal was taken. Neither moving party has shown that there has been any prejudice to either the Government or Coal-Mac as a result of the filing of the Taylor notice of appeal with this Board and none is apparent on the record. The Board will consider this case on the merits.

Counsel for Coal-Mac has requested a "telephonic pretrial conference" to enable the parties to "discuss all outstanding issues in this case." This request is also denied. Proceedings before the Board are generally conducted in writing served on all interested parties and no reason has been shown to require that we depart from our customary practice. Counsel may therefore answer the statement of reasons filed by Taylor: simultaneous answers shall be filed by OSM and Coal-Mac within 60 days from receipt of this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss is denied.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge