

PATRICIA A. MEHLHORN

IBLA 94-525

Decided August 29, 1997

Appeal from a decision of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, on informal review affirming a finding that the state regulatory authority took appropriate action in that no violation of the state regulatory program was found to exist after inspection. TDN 93-121-147-04.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints:
Generally—Surface Mining Control and Reclamation Act of 1977: State Program:
10-day Notice to State—Surface Mining Control and Reclamation Act of 1977:
Subsidence

Upon review of action taken by the state regulatory authority in response to a 10-day notice, OSM is obligated to conduct an inspection unless the state takes appropriate action to cause the violation to be corrected or shows good cause for failure to do so. An OSM decision on informal review upholding a determination that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint alleging subsidence caused by an underground coal mining operation will be affirmed on appeal when a determination that there is no violation because a surface hole was not caused by permitted underground mining operations is supported by the record. The state regulatory authority's finding that a violation does not exist is properly deemed appropriate if it is not arbitrary, capricious, or an abuse of discretion.

APPEARANCES: Patricia A. Mehlhorn, pro se; Sandra M. Lieberman, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Patricia A. Mehlhorn has appealed from the December 22, 1993, Decision of the Assistant Director, Field Operations, Office of Surface Mining

Reclamation and Enforcement (OSM). This Decision was issued in response to Appellant's request for informal review of a determination by the Director of the Harrisburg Field Office (HFO), OSM, that the Pennsylvania Department of Environmental Resources (PADER) took appropriate action in response to her citizen's complaint filed on August 24, 1993, and that no further OSM enforcement action would be undertaken.

On August 24, 1993, Appellant filed a citizen's complaint with the Johnstown Area Office, OSM. She related her discovery of a hole 7 feet in diameter and 12 feet deep on her property and asserted that the hole did not exist 6 weeks previously. Her complaint set forth her suspicion that U.S. Steel Mining Company (U.S. Steel) was mining outside of its permitted area, resulting in subsidence on her property. She requested a Federal inspection pursuant to 30 C.F.R. § 842.12. On August 30, 1993, the Johnstown Area Office responded to this complaint by issuing Ten-Day Notice (TDN) 93-121-147-04 to PADER, the State regulatory authority, pursuant to section 21(a)(1) of the Surface Mining Control and Reclamation Act of 1977. 30 U.S.C. § 1271(a)(1) (1994).

In response to the TDN, the Chief, Mine Subsidence Section, PADER, examined the site on September 2, 1993, and found a flat-bottomed hole 9 feet in diameter and 7 feet deep with nearly vertical sides which were unusually rounded as if excavated by hand. He observed cinders or ashes approximately 30 feet from the hole. He speculated that the site may have been an old ventilation shaft for past mining in a coal seam which was not the seam U.S. Steel was currently mining. On September 7, 1993, PADER inspected the underground mine and found that U.S. Steel was mining within permitted boundaries. ^{1/} Further, PADER found that there was no active coal removal closer than 2,300 feet from the sinkhole area and that the nearest current mining was over 1,200 feet from the permit boundary. Thus, PADER found: "Based on these distances, it would be impossible for collapse or failure of these mine workings to result in a surface [e]ffect such as that observed on the Mehlhorn property." (Memorandum from Chief, Mine Subsidence Section, PADER, to Chief, Bituminous Mine Permit Section, PADER, Sept. 20, 1993.)

On September 20, 1993, the Chief, Bituminous Mine Permit Section, PADER, wrote a letter to Appellant informing her of the conclusion of PADER's investigation that there was no reason to believe that U.S. Steel was responsible for the subsidence on her property. The same day, PADER also reported its findings to the Johnstown Area Office, OSM, which forwarded PADER's response to the TDN to the HFO.

In view of the open hole or shaft on Appellant's property, a further investigation was conducted by OSM. On September 8, 1993, an Abandoned Mine Land (AML) Program Specialist from the Johnstown Area Office, OSM,

^{1/} On Sept. 7, 1993, also, PADER received a 10-day extension of time to complete its investigation.

examined the site and found a circular opening 9 feet in diameter and 9 feet deep. According to his September 13, 1993, investigation report, he found "coal-like" material within 20 feet of the opening. No structures were associated with the opening and Appellant and her husband could provide no history of the site except that a large rock in the hole was on the surface 6-7 weeks previously. In a September 13, 1993, memorandum to the HFO, the investigator concluded that the opening was associated with past, not current, underground mining activity, as U.S. Steel was not conducting mining operations in the area subjacent to the opening. However, he recommended that the opening be backfilled as an AML emergency project.

In a memorandum dated September 15, 1993, HFO informed the OSM Eastern Support Center (ESC) of the existence of the shaft, opining that the opening was a mine related shaft hole which posed a threat to public safety. The memorandum added that the area was mined prior to 1920 by an unknown company and there was no indication of continuing reclamation responsibility by any company or individual.

On October 5, 1993, the Director, HFO issued his determination that PADER responded appropriately to the TDN. Because PADER concluded that U.S. Steel was mining within its permitted boundaries and at a distance too great to have caused subsidence on Appellant's property, PADER found no violation by U.S. Steel. Appellant requested informal review. 30 C.F.R. § 842.15.

The Assistant Director, Field Operations, OSM, issued his Decision on December 22, 1993. He outlined PADER's response to the TDN. The OSM Decision also described the action that AML program officials at OSM undertook after inspection of the site:

ESC drilled a borehole adjacent to the subsided area. The drill was aligned to penetrate through the material directly below the subsidence at a depth of 40 to 80 feet below the surface. Solid sandstone was encountered at 59 feet and continued to the bottom of the borehole at 84.4 feet below the surface. There was no evidence that the sandstone was fractured, indicating that no subsidence could have been transferred through this unit to the surface. Solid stone under the subsided area would further indicate that current mining activities did not cause the subsidence since U.S. Steel Company is presently mining the Pittsburgh coal seam which lies approximately 450-500 feet below the ground surface in your locale. ESC filled the subsided area on October 6, 1993, to alleviate the potential danger to the public.

Based upon his review of these events and "submitted documentation," the Assistant Director determined that the HFO response to Appellant's citizen's complaint complied with OSM policies and rules concerning citizen's complaints. Therefore, he affirmed the HFO decision finding that the PADER response to Appellant's subsidence complaint was appropriate. Appellant brought this appeal.

In her statement of reasons for appeal, Appellant asserts that the single drill hole is insufficient and more testing should be conducted, as well as an underground inspection "with representatives of all concerned parties." She lists several reasons she believes something is happening under her property including noises heard by neighbors, a sinkhole, apparent changes on the surface, and uprooted trees.

Counsel for OSM filed a response, stating that OSM properly determined that the PADER response was appropriate, and OSM lacked jurisdiction to take further action. In particular, OSM asserts that there is no legal basis for requiring OSM to conduct additional testing of the sinkhole site.

[1] When it has 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. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1). Unless the state, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1). Under the relevant regulation, good cause is defined to include a finding that "[u]nder the State program, the possible violation does not exist." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i). Further, the pertinent regulation provides that "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program" shall be considered appropriate action to cause a violation to be corrected or good cause for failure to do so. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2); Ernest Back, 135 IBLA 246, 248 (1996); see In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 523 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981) ("[T]he Secretary will not intervene unless [the state's] discretion is abused").

In this case, Appellant's concerns that the subsidence was caused by mining outside the permit boundaries became the basis of the TDN issued to PADER. The record establishes that a substantial investigation was made by PADER which included both an inspection of the surface and an inspection of the nearest permitted underground mining operation. As set forth above, this investigation disclosed the underground mining operations were within the permit boundaries and too far removed from the hole which appeared on Appellant's property to have been the cause of that hole. Further, OSM's follow-up investigation by AML personnel which included core drilling in the strata underneath the hole confirmed that this hole could not have been caused by U.S. Steel mining operations. Thus, the record clearly supports the reasonableness of the PADER finding. Appellant has presented nothing which would support a finding that the PADER determination was arbitrary, capricious, or an abuse of discretion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge

