

EDWARD L. KIESEWETTER

IBLA 96-527

Decided February 23, 1999

Appeal from a Decision of Assistant Director of Field Operations, Office of Surface Mining Reclamation and Enforcement, affirming a Decision of Springfield Field Office, Office of Surface Mining Reclamation and Enforcement, declining to take Federal enforcement action with respect to blasting activities of a surface coal mining operation. 94-41-BLAST.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Blasting and Use of Explosives: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

OSM properly affirms a determination to take no enforcement action in response to a citizen's complaint where the complainant fails to show, by a preponderance of the evidence, that the State's finding that blasting was not the cause of damage to complainant's buildings was arbitrary, capricious, or an abuse of discretion.

APPEARANCES: Edward L. Kiesewetter, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Edward L. Kiesewetter has appealed from a September 29, 1994, Decision of the Assistant Director of Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), affirming a July 21, 1992, Decision of the Springfield Field Office (the SFO), OSM, declining to take Federal enforcement action with respect to the blasting activities of the surface coal mining operation of the Mid State Coal Company (Mid State), known as the Rapatee Mine, in Knox County, Illinois.

By letter dated May 6, 1992, Appellant initially filed a citizen's complaint pursuant to section 517(h) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1267(h) (1994), and 30 C.F.R. § 842.12. He charged that Mid State's blasting activities were causing

structural damage to his nearby private dwelling and outbuildings, which he had purchased in 1976. Pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994), OSM issued a Ten-Day Notice (TDN) to the Illinois Department of Mines and Minerals (DMM), in response to Appellant's citizen's complaint. DMM investigated the matter, concluding that the blasting had been conducted in accordance with State regulatory standards, and there was no reason to find that it had caused any damage to Appellant's buildings. Thus, the State did not take enforcement action. OSM also investigated, agreeing with DMM's findings. Based on these findings, the SFO rendered its July 1992 decision declining to take any Federal enforcement. There is no evidence in the record that Appellant sought informal review of that decision pursuant to 30 C.F.R. § 842.15.

By letter dated April 22, 1994, Appellant renewed his citizen's complaint, contending that structural damage to his private dwelling and outbuildings had been occurring since August 19, 1990, and was still continuing. On May 19, 1994, OSM inspector Perry L. Pursell, accompanied by William C. Morrison and Kenneth Eltschlager, mining and civil engineers with OSM's Eastern Support Center, inspected the buildings in the presence of Appellant. Pursell, together with Morrison and Eltschlager, also visited Mid State's mine site, on which active surface coal mining was occurring. Following the inspections, Morrison and Eltschlager prepared a July 1994 Report of Investigation (Report), detailing their analysis and conclusions.

The record indicates that Appellant's house, a one-story ranch house with a cellar, consisted of an original structure, 30 feet and 8 inches by 28 feet, which was over 50 years old, with a 28- by 28-foot addition built in 1976. There was also a barn and a small shed. During their inspection, Morrison and Eltschlager mostly observed vertical cracks through the concrete blocks and mortar joints of both the foundation of the house and the walls of the barn and shed. (Report at 2-3.) In the case of the house foundation, they attributed horizontal cracking or separation of the mortar joints to "hydraulic surcharge or \* \* \* expansion to the soils outside the building." Id. at 2. In the case of the walls of the outbuildings, they attributed the "[l]imited" horizontal cracking or separation of the mortar joints to the "drag or push of the block adjacent to the vertical crack." Id. at 3. Morrison and Eltschlager also attributed a crack in the concrete floor of the cellar to an "upward movement" of the floor, a compression crack in the living room ceiling to an upward movement and inward rotation of the walls, and various plaster cracks in the house to "twisting and stresses within the structure." Id.

Morrison and Eltschlager determined that the majority of the cracks were not typically associated with blasting since they were not horizontal or shear in nature, but vertical. (Report at 7.) Rather, they noted that the cracks were indicative of the movement of the underlying soil, owing to shrinking and swelling. Id. Morrison and Eltschlager pointed out that the soil on Appellant's property, "type 36B - Tama silt loam," was in fact susceptible to shrinking and swelling, with the introduction and loss of

water. Id. at 5. They also noted that a study conducted by Geotechnical Consultants, Inc. had determined that Appellant's soil experienced an upward movement during 1994. Id. at 6-7. Morrison and Eltschlager indicated that this was very likely to have also occurred in 1990, when Appellant first experienced damage, due to the unusually high precipitation that year, on the order of 1.63 times what fell in 1989. Id. at 6.

Morrison and Eltschlager also calculated what the impacts, in terms of ground vibrations and airblasts, would have been in 1990 and 1991 at the site of Appellant's house and outbuildings, which were, at their closest point, 6,000 feet (or 1.14 miles) from the area disturbed by Mid State's surface coal mining operations under State permit No. 132. (Report at 4, "Figure 1.") They did so based on logs kept by Mid State, which revealed a typical blast, in terms of number, position, and sizes of holes, total pounds of explosives, and other factors, conducted during that time period. Id. at 3, 4. Morrison and Eltschlager determined that Mid State's blasting activities would have generated ground vibrations and airblasts on the order of 0.10 inches per second (in/s) and 110 decibels (dB). Id. at 4, 5. They stated that these impacts would have been well below that sufficient to cause damage to any of Appellant's structures, noting that ground vibrations and airblasts must exceed 0.5 in/s and 134 dB in order to cause damage to any part of a residential structure. Id. at 4, 5, 6.

For the foregoing reasons, Morrison and Eltschlager concluded that Mid State's blasting activities were not responsible for any of the structural damage found on Appellant's property. (Report at 1.) Rather, they considered soil movement to be the "probable cause" of the damage. Id.

The SFO took no further action following Morrison and Eltschlager's July 1994 Report. By letter dated July 22, 1994, Appellant requested informal review of the SFO's July 1992 Decision, as supplemented by OSM's July 1994 Report, pursuant to 30 C.F.R. § 842.15. In his September 29, 1994, Decision, the Assistant Director affirmed SFO's decision not to take Federal enforcement action, concluding, on the basis of all pertinent information (including the Report), that Mid State's blasting activities had not caused the damage to Appellant's structures.

Appellant appealed from that Decision, contending in his October 13, 1994, Notice of Appeal that his buildings were not cracked before Mid State started its blasting activities, but are now "in total disrepair." He concludes that the Report "indicates a cover up, biased opinions in favor of the mine and shows me little or no scientific proof that damage has not been caused or aided by blasting in my area."

[1] A party objecting to an OSM decision not to enforce SMCRA in response to a citizen's complaint has the burden of proving that OSM acted in error. William H. Pullen, Jr., 132 IBLA 224, 228 (1995). To do so, Appellant in this case must thus demonstrate, by a preponderance of the evidence, that DMM's response to the TDN was arbitrary, capricious, or an abuse of discretion. See Morgan Farm, Inc., 141 IBLA 95, 100 (1997) and cases cited. For the reasons set forth below, we find that Appellant has failed to meet his burden of proof.

A surface coal mine operator in Illinois is required by section 3.13 of the Illinois Surface Coal Mining Land Conservation and Reclamation Act, Ill. Rev. Stat. ch. 96 1/2 (1991), and section 1816.67(a) of the Illinois surface coal mining regulations, Ill. Admin. Code tit. 62 (1991), to limit the manner and timing of blasting so as to "prevent \* \* \* damage to \* \* \* private property outside the permit area." In order to accomplish this, sections 1816.67(b) and (e) of the Illinois surface coal mining regulations further specify that, as a consequence of blasting, airblasts, and ground vibrations shall not exceed 134 dB (measured at a frequency of 0.1 Hertz or lower) and 0.75 in/s at any dwelling which, as was the case here in 1990-91, is located more than 5,000 feet from the blast site. Ill. Admin. Code tit. 62, §§ 1816.67(b) and (e) (1991).

DMM, corroborated by OSM, concluded that Mid State's blasting activities had satisfied those requirements during the period of time when damage was said to have first occurred (1990-91). (Mine-Site Evaluation Inspection Report, dated May 23, 1994, at 4; Report at 3-5.) Appellant has provided no evidence to the contrary. In addition, Appellant has presented no evidence that such activities did not conform to the other requirements of section 1816.67 of the State regulations.

The sole evidence offered by Appellant in support of his assertion that Mid State's blasting was responsible for the structural damage to his buildings is the fact that the initial damage coincided with the start of such activity. Appellant has not shown that OSM erred in its determination that the cracks were not associated with Mid State's blasting, since the ground vibration and airblast impacts of blasting at Mid State's mine site would not have been sufficient to cause any damage. He made no effort to demonstrate that OSM erred in its calculation of those impacts or to offer his own calculation. Nor did he present any evidence that the impacts were at any time actually greater than those determined by OSM (or approached or exceeded the damage threshold levels), or that damage would have occurred with impacts at the low levels calculated by OSM. (Copy of Report attached to Notice of Appeal at 4.)

Appellant has not carried his burden of proof by merely asserting that the evidence offered by OSM's experts, in corroboration of DMM's determination, does not, in his estimation, constitute sufficient scientific proof that damage was not caused by blasting. Nor has he carried that burden by merely expressing his disagreement with the reasoned analysis and conclusions of OSM's and DMM's experts, concerning a matter within the realm of their expertise. See Harvey Catron, 134 IBLA 244, 265 (1995), aff'd, Catron v. Babbitt, No. 96-0001-BSG (W.D. Va. Mar. 5, 1997), vacated on other grounds, No. 97-1449 (4th Cir. Dec. 22, 1997). As we said in Betty L. Tennant, 135 IBLA 217, 230 (1996), a case which likewise involved purported damage to private buildings as a result of mining operations:

It is demonstrably insufficient to merely show that the decision below might be wrong, i.e., it is possible that any damage

which [appellant's] property has suffered could be caused by mine subsidence. In order to prevail before the Board, appellant is required to show by a preponderance of the evidence that the decision below was in error, i.e., it is more likely than not that the damage which has occurred was the result of mine subsidence.

The showing required of the appellant in Tennant in order to prevail is equally applicable here, and we find that Appellant has failed to make such showing with respect to Mid State's mine-related blasting.

Appellant requests a hearing. While the Board has authority under 43 C.F.R. § 4.1286(b) to order a hearing, we will decline to do so where it has not been shown that disposition of the case hinges on the resolution of a material issue of fact. Woods Petroleum Co., 86 IBLA 46, 55 (1985). Such is the case here. Therefore, Appellant's request for a hearing is denied.

Finally, we reject Appellant's allegation that OSM's Decision was biased in favor of Mid State. He presents no evidence in support of such allegation and we find none.

Therefore, we conclude that the Assistant Director's September 29, 1994, Decision affirming the SFO's decision not to take Federal enforcement action was proper. To the extent Appellant has raised other arguments which we have not specifically addressed, they have been considered and rejected.

Accordingly, 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.

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John H. Kelly  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge

