

Editor's Note: Rconsideration denied by order dated June 12, 2003.

MOSES TENNANT

IBLA 98-242, 98-432, 99-55, 99-125

Decided March 11, 2003

Appeals from various actions of the Director, Charleston Field Office, and the Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, taken in response to the remand directive in this Board's decision, Betty L. and Moses Tennant, 135 IBLA 217 (1996).

IBLA 98-242, 98-432, and 99-55 dismissed. Decision appealed in IBLA 99-125 affirmed.

1. Appeals: Jurisdiction--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

Under 43 CFR 4.1281, any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board, if the decision specifically grants such right of appeal. A letter from OSM to a person who has filed a citizen complaint informing him of preliminary results of a reinvestigation of his complaint relating to methane contamination of his water supply, which does not grant the right of appeal, is not an appealable decision under 43 CFR 4.1281.

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

An appeal from an OSM decision closing its reinvestigation of a citizen complaint relating to methane contamination because the complainant would not authorize OSM to enter his property for the purposes of

completing that reinvestigation will be affirmed when the appellant fails to establish any error in OSM's decision.

APPEARANCES: Moses Tennant, Fairview, 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 DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Board presently has docketed four appeals filed by Moses Tennant relating to actions taken by the Office of Surface Mining Reclamation and Enforcement (OSM). The factual background for each of those actions begins on September 11, 1990, when Tennant contacted the Morgantown, West Virginia, Area Office, OSM, to complain about subsidence on his private property and the presence of methane in his water well, both allegedly caused by underground mining activities conducted by Peabody Coal Company and/or Eastern Associated Coal Corporation (EACC) under state permit U-2-83.

Following an investigation of that complaint, the Director, Charleston Field Office (CHFO), OSM, issued a March 13, 1992, letter to Tennant stating, with respect to the complaint of methane problems, that he recommended that an aeration system be installed to treat the well water before usage to reduce or eliminate the methane and that an appropriate vent should also be installed at the well. Regarding subsidence, the Director concluded that Tennant's home did not show any apparent structural damage that could be attributed to mine subsidence. The Director further informed Tennant that no additional action would be taken relative to his complaint and advised him of his right to seek informal review of the actions taken under 30 CFR 842.15. On March 18, 1992, Tennant filed a request for informal review with the Assistant Deputy Director, Operations and Technical Services, OSM. By letter dated April 2, 1992, the Assistant Deputy Director affirmed the March 13, 1992, letter. Tennant filed an appeal with this Board.

In a decision dated April 16, 1996, styled Betty L. and Moses Tennant, 135 IBLA 217, the Board affirmed OSM's determination not to take any further action regarding Tennant's subsidence complaint, but it set aside and remanded OSM's decision not to take any further action on the methane complaint, 1/ stating at 231-32, as follows:

1/ The Board also adjudicated in that decision an appeal filed by Betty L. Tennant, the mother of Moses Tennant, which is not relevant to our present consideration.

The sole issue remaining relates to the presence of methane in Moses Tennant's water supply. As our recitation of the facts of this case makes clear, there is no dispute that there was methane contamination of appellant's water well which EACC had originally drilled to replace appellant's water supply. See generally Patricia A. Marsh, [133 IBLA 372 (1995)]; Martha & Roy A. McBride, 129 IBLA 112 (1994). The record is equally clear that OSM determined that EACC was responsible for the methane in appellant's well. This is documented both in the January 9, 1991, letters from OSM to WVDOE [West Virginia Department of Energy] and appellant, respectively, as well as the November 21, 1991, letter from OSM to appellant. We note that nothing in the record documents or supports any OSM reconsideration of this conclusion. Indeed, the record indicates that WVDEP [West Virginia Division of Environmental Protection] may have reached a similar conclusion since it had determined to require EACC to vent appellant's well. See Letter of Nov. 21, 1991, from OSM to appellant ("It is our understanding that DEP verified the presence of methane at you[r] new well and was prepared to require [EACC] to vent the well head"). In light of the foregoing, it seems clear to us that OSM's subsequent determination not to address the problem of the presence of methane in appellant's water supply in his home can simply not stand.

The Ehler report prepared for the Eastern Support Center [by W. C. Ehler, a staff geologist] makes it absolutely clear that the source of the methane in appellant's water supply was methane contamination at the well head. See Ehler Report at 1 ("The methane occurs in [Tennant's] water well"). The report also noted that the "amount of combustible gas that is dissolved in the well water is significant and * * * [d]angerous levels of combustible gas could potentially exist in appliances such as a dishwasher or clothes washer" (Ehler Report at 3). The report concluded that an aeration system to treat the well water would reduce or eliminate the problem.

It seems to us almost tautological that, to the extent that OSM had determined that EACC was responsible for the methane at the well head and was properly required to vent the well, EACC must necessarily be responsible for the methane dissolved in the water, itself, and equally responsible for the installation of an aeration system to eliminate the danger which the levels of methane in the water posed. OSM's refusal to direct corrective action in this regard can simply not be justified on the present record. Accordingly, we hereby set aside the determination of OSM that no further action could be taken with respect to the presence of methane in the water and remand this issue

to OSM for further consideration consistent with the foregoing analysis.
[Footnote omitted.]

Following remand, OSM did not direct corrective action. Instead, it reopened its investigation of the contamination of Tennant's water supply. For the reasons stated below, we hold that: (1) under the circumstances, reinvestigation of Tennant's complaint was reasonable and not violative of our remand order; (2) Tennant's appeals docketed as IBLA 98-242, 98-432, and 99-55 must be dismissed; and (3) the decision appealed from in IBLA 99-125 is affirmed.

IBLA 98-242

By letter dated September 5, 1997, the Morgantown Area Office Manager, OSM, informed WVDEP that it was reopening Ten-Day Notice (TDN) Number 90-11-17-11, which had been the subject of Tennant's September 11, 1990, citizen complaint, but that "[o]nly that portion of the TDN relating to quality and quantity of well water is being reopened." The Morgantown Area Office Manager notified Tennant by letter dated September 22, 1997, to the same effect. Thereafter, on October 22, 1997, OSM and WVDEP representatives conducted an investigation at Tennant's residence to determine if methane was still present in his well and water.

In a letter to Tennant dated February 27, 1998, the Director, CHFO, stated that the investigation had confirmed the existence of methane in his well and his water, "in varying quantities depending on where the sample was taken," but that they were "not able to determine the source of the methane." He explained that "additional investigation will be necessary in order to determine if a violation has occurred and to collect evidence necessary to support an enforcement action." He anticipated that drilling would need to be conducted to determine the source of the methane. He enclosed a copy of the investigation report. Tennant filed an appeal of that letter with this Board.

Three days earlier, on February 24, 1998, the Director, CHFO, sent a letter to Tennant responding to a February 10, 1998, request by Tennant that OSM review and investigate allegedly improper core drilling done by the State to determine whether damage to structures on his property was caused by subsidence. 2/ The Director responded that "regardless of the merits of your allegations, they do not warrant OSM's review of the drilling operation * * *." The Director stated that OSM's determination that subsidence had not caused damage had been affirmed by the

2/ CTL Engineering of WV, Inc. conducted the drilling at the request of WVDEP. The results of that drilling are included in a report dated Jan. 22, 1998 (CTL Report).

Board in 135 IBLA 217, and, “[t]herefore, this issue is closed.” Tennant also appealed that letter to this Board. ^{3/}

Both of Tennant’s appeals were docketed with this Board as IBLA 98-242. OSM has moved to dismiss each of those appeals. OSM’s motions are granted because neither of OSM’s letters to Tennant is appealable to this Board.

[1] Under 43 CFR 4.1281, “[a]ny person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal.” OSM’s February 27, 1998, letter relating to methane contamination informed Tennant of preliminary results of the reinvestigation of his well and water and stated that further tests were necessary. The letter did not grant the right of appeal. For that reason alone, it is not appealable.

While this Board in Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983), exercised jurisdiction to review the denial of a citizen complaint requesting enforcement action, even though the decision did not grant a right of appeal, because OSM had previously agreed in settlement of litigation to provide a right of appeal from the denial of citizen complaints, ^{4/} OSM’s letter at issue here did not decline to take enforcement action. In fact, it explained that the continuing reinvestigation was for the purpose of determining if a violation occurred and “to collect evidence necessary to support an enforcement action.” Thus, it did not constitute a “written decision.” It did not decide anything; it was merely informational and was written for the purpose of keeping Tennant informed concerning an on-going reinvestigation.

^{3/} OSM also cited as a basis for its action a document executed by Tennant on Dec. 8, 1993, entitled “Release of all Claims with [C]onfidentiality Provisions” (Release), which OSM represented was an agreement between Tennant and EACC whereby Tennant agreed to release EACC from any liability resulting from coal mining occurring on or before the date of the release. The Release was not included in the case file forwarded by OSM to the Board.

^{4/} That settlement resulted in the promulgation of 30 CFR 842.15, which establishes a procedure for informal review of an authorized representative’s decision not to inspect or take appropriate enforcement actions in response to a request for Federal inspection under 30 CFR 842.12. 30 CFR 842.15(a). The Director, OSM, or the Director’s designee is to conduct the review and issue a written decision. 30 CFR 842.15(b). The regulation provides that that decision “shall constitute a decision of OSM within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR part 4.” 30 CFR 842.15(d).

For the reasons set forth above, Tennant's appeal of OSM's February 27, 1998, letter must be dismissed.

Likewise, OSM's February 24, 1998, letter is not an appealable decision under 43 CFR 4.1281, and Tennant's appeal of that letter must also be dismissed. The letter is not a decision declining to take enforcement action. It did not grant a right of appeal. If it were a decision declining to take enforcement action, it would be subject to the procedures established by 30 CFR 842.15, which include 30 CFR 842.15(d), requiring decisions issued thereunder to grant the right of appeal in accordance with 43 CFR 4.1281.

Assuming that OSM's letter could be considered to be a written decision declining to take enforcement action, which would be appealable under 30 CFR 842.15(d), the doctrine of administrative finality would bar consideration of the appeal.

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, dictates that once a party has had an opportunity to obtain administrative review of an agency decision within the Department and the decision has been upheld on appeal, the decision may not be reconsidered in subsequent proceedings, except upon a showing of compelling legal or equitable reasons. Gifford H. Allen, 131 IBLA 195, 202 (1994). However, a precondition for the application of the principle of res judicata is that the matter raised in the subsequent proceeding was one distinctly put in issue and directly determined in the earlier litigation. State of Alaska, 140 IBLA 205, 211 (1997).

The issue of subsidence originally raised in Tennant's September 11, 1990, complaint was fully litigated in 135 IBLA 217. Therein, we stated, with respect to Tennant's residence, that Tennant "has simply failed to show the existence of any damage to his residence sufficient to even give rise to a presumption that subsidence had occurred." 135 IBLA at 230. While we found that damage to Tennant's outbuilding had been shown and that "a rebuttable presumption could arise that the damage was caused by mine subsidence," we concluded that the evidence in the record provided "more than sufficient factual grounds on which to conclude that the rebuttable presumption had been overcome." Id.

The Board's conclusions are not contradicted by the CTL Report, which was the basis for Tennant's February 10, 1998, request that OSM investigate the improper core drilling. According to the CTL Report:

The results of our level survey showed that the garage portion of the residence was relatively level, while the residential portion of house was continuously sloped to the southwest. The differential elevations

along the foundation [were] a total of 4.204" from the inside garage wall to the southwest end of the house. This type of condition would indicate that the house foundation was constructed out of level or settled during construction. If the house was recently subjected to movements of 4"[+ or -], major tension cracks and separations would be readily apparent. No excessive structural displacements were observed anywhere in the residence.

(CTL Report at unnumbered 9-10.)

Therefore, we find no compelling legal or equitable considerations that would support reconsideration of our prior determination on the subsidence issue. Assuming Tennant had a viable appeal of OSM's February 24, 1998, letter, it would be barred by administrative finality.

IBLA 98-432

We now turn to IBLA 98-432, which is Tennant's appeal from a letter issued by the Director, CHFO, on July 1, 1998. That letter notified Tennant of OSM's proposal "to conduct additional more detailed investigations at your property" to help identify the source of the methane problem. OSM proposed a soil gas survey "to identify the methane that you reported to have measured around your property." OSM stated that the survey would involve the collection of "two suites of gas samples from your property, neighboring properties, and other potential sources of gas to more accurately characterize your problem." OSM also proposed taking water samples from Tennant's well and an abandoned well "to obtain dissolved methane samples." OSM enclosed a right of entry form for Tennant's signature, stating:

[I]t is imperative that we have access to your property in order to take samples and proceed with the remainder of our investigation. If, as you have indicated in previous conversations, you decide not to allow OSM access to your property, we will be forced to abandon any further efforts to determine whether an enforcement action can be supported."

OSM's letter is not an appealable decision under 43 CFR 4.1281, and Tennant's appeal of that letter must also be dismissed. The letter is not a decision declining to take enforcement action. It merely informs Tennant of OSM's proposed actions to be undertaken "to determine whether an enforcement action can be supported." Thus, what OSM was seeking through its proposed action was to gather sufficient evidence to support any possible enforcement action. It did not grant the right of appeal. If it were a decision declining to take enforcement action, it would be subject to the procedures established by 30 CFR 842.15, which include 30 CFR

842.15(d), requiring decisions issued thereunder to grant the right of appeal in accordance with 43 CFR 4. 1281.

IBLA 99-55

Tennant next challenged an October 22, 1998, decision issued by the Director, CHFO. That decision stated:

On July 1, 1998, this office provided you a letter describing the additional actions we proposed to take in order to establish the origin of the gas contained in your water. Our letter also contained a right of entry form giving us permission to enter your property and conduct the required investigation.

During a conversation with Mr. Thomas Morgan of this office, you stated that you would contact your attorney and have the right of entry form reviewed. You indicated that following that review, you would let us know your decision about providing access to your property.

To date, you have not contacted our office or provided the signed right of entry form to allow us to complete our investigation. Since we are unable to complete our investigation without your consent, we are closing your complaint and intend to take no further action.

Although you have filed an appeal of our previous actions in your case with the Office of Hearings and Appeals, you have the right under 30 CFR 842.15 to request an informal review of this decision by the Regional Director of the Appalachian Regional Coordinating Center.

In response to that decision, Tennant properly filed a request for informal review with the Regional Director. However, he also filed an appeal with this Board, which was docketed as IBLA 99-55. That appeal must be dismissed, because it fails to conform to the procedure dictated by 30 CFR 842.15. See n.4, supra.

IBLA 99-125

The Regional Director addressed Tennant's request for informal review by decision dated December 2, 1998, wherein he upheld the decision to close Tennant's complaint and take no further action due to Tennant's failure to provide access to his property. In his decision, the Regional Director explained at pages 2-3:

You have indicated in your request for review that you believe the IBLA, in its decision of April 16, 1996, directed OSM to cite Eastern for

contaminating your well with methane. I disagree with your assessment of IBLA's decision. In its decision, IBLA set aside OSM's determination that no further action could be taken with respect to the presence of methane in your water and remanded the issue for further consideration consistent with its analysis. OSM has acted on IBLA's order by reopening the investigation. An additional study, conducted on October 22, 1997, could not conclusively identify the source of the methane, leading OSM to conclude that additional investigation is necessary. OSM's investigative work completed to date cannot conclusively prove that Eastern's mining activities are the source of the methane. The additional proposed study is necessary to prove the source of the methane, so that OSM may support any possible enforcement actions.

The methane measurements and readings taken to date indicate that the methane concentrations have not reached explosive levels. The fact that methane is present in your water is not a violation of the Surface Mining Control and Reclamation Act (SMCRA) or of the West Virginia program. Neither the West Virginia program nor SMCRA or its implementing Federal regulations have standards for acceptable levels of methane. Even if further testing concludes that the mining caused the methane in your water, there are simply no provisions in Federal or State law or regulations that support a violation for methane gas contamination of a water supply. However, should the methane reach explosive levels, or if further testing indicates that methane concentrations are increasing in your house and could conceivably reach explosive levels, OSM could take action by issuing a cessation order to Eastern for causing an imminent danger to the health or safety of the public. As I stated earlier, enforcement actions against Eastern could only be taken if OSM has evidence that Eastern's mining activities were the source of the methane. I strongly urge you to permit the additional testing requested by OSM personnel. This testing will hopefully allow OSM to determine the source of the methane and whether the concentrations of methane are at the point where an imminent harm enforcement action by CHFO could be sustained.

In summary, the Regional Director held that the CHFO's decision to close the investigation was proper because Tennant failed to sign a right-of-entry form. He stated that the signed form was necessary to allow OSM access to Tennant's property in order "to determine if a violation exists and if so, who is responsible." (Decision at 3.) He added: "If you sign the revised right-of-entry form and provide the necessary access to your property, your case will be reopened."

Tennant filed an appeal of that decision which was docketed by this Board as IBLA 99-125. In his statement of reasons Tennant's principal argument was, as in all the other appeals considered herein, that none of OSM's actions was necessary because this Board concluded in 135 IBLA 217 that EACC was responsible for methane contamination of his well and water. In response, OSM asserts that, upon remand, it found in the record a lack of evidence to support an enforcement action against EACC, particularly in light of the fact that the West Virginia Code section, which had previously been utilized in enforcement actions involving methane contamination, § 22A-3-24, was determined by the West Virginia Supreme Court in 1995 not to apply to underground mining operations. That section of the West Virginia Code (recodified at § 22-3-24), which is based on section 717(b) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1307(b) (2000), requires an operator to replace the water supply of an owner of real property when such supply has been affected by contamination, diminution or interruption "proximately caused by such surface mining operation." As OSM explained:

In Rose v. Oneida Coal Company, Inc., [195 W.Va. 726] 466 S.E.2d. 794 (1995), the Court found that W. Va. § 22-3-24(b), like its Federal counterpart at section 717(b) of SMCRA, 30 U.S.C. § 1307(b), applies only to surface mines. In support of its ruling, the Court cited National Wildlife Federation v. Hodel, 839 F.2d 694,754 (D.C. Cir. 1988), wherein the United States Court of Appeals for the District of Columbia held that section 717(b) of SMCRA was applicable to surface mine operators, but not to operators of underground mines. 466 S.E.2d at 798. [5/] Since EACC's operations clearly constituted underground mining, they are outside the jurisdiction of the water supply requirements of W. Va. Code § 22-3-24.

(OSM's Answer, IBLA 99-125, at 6-7.) OSM explains that, rather than issue a defective enforcement action on remand, it sought to gather additional evidence through a reinvestigation.

5/ The Hodel court stated that "[t]he issue of whether underground mine operators are covered by the water damage provision arises because of the confusing terminology used by the drafters of the SMCRA." 839 F.2d at 753. After explaining the confusing nature of the terminology, the court concluded that "[t]he most natural reading of the statute as a whole, and the definition in § 701(28) [30 U.S.C. § 1291(28)] in particular, then suggests that 'surface coal mining operations' encompasses both surface effects of underground coal mines; but that the term "surface coal mines," by contrast, does not include underground operations or their surface effects." Id. at 753-54.

Thus, while our previous decision reached certain conclusions regarding EACC's responsibilities regarding methane contamination of Tennant's water supply and remanded the case to OSM for further consideration, we find that OSM was without the legal authority to require EACC, the operator of an underground coal mine, to replace Tennant's water supply because, during the time Tennant's previous appeal was pending before the Board, the Supreme Court of West Virginia interpreted the State water replacement regulation to be consistent with SMCRA, thereby excluding underground mine operators from its scope. Accordingly, OSM undertook a reinvestigation of Tennant's water supply to determine if there were any violations of SMCRA, the permanent program regulations, or the approved State program regulations, which would require enforcement action on its part. Under the circumstances, we find such a procedure to be appropriate and not violative of our remand order.

For that reason, we find that Tennant has failed to show any error in OSM's decision to close the investigation into the methane contamination of his water supply, absent a signed right-of-entry form from him. Tennant clearly has the choice to allow the investigation to go forward. As the Regional Director stated in his decision at page 3: "If you sign the revised right-of-entry form and provide the necessary access to your property, your case will be reopened." There is no evidence in the present record, however, showing that Tennant signed the revised right-of-entry form to provide OSM access to his property. Therefore, we must affirm OSM's decision to close its investigation. ^{6/} If Tennant executes the consent form, OSM will reopen and complete its investigation. It should then provide Tennant with the results of its investigation, including the actions it will or will not be taking as a result thereof in a decision format, which should include the right of appeal to this Board under 43 CFR 4.1281.

^{6/} In an order dated Dec. 17, 1998, this Board directed that OSM supplement the record in Tennant's appeal by providing a copy of the Release. See n.3, supra. On Jan. 4, 1999, OSM submitted a copy of that Release, and, both OSM and Tennant responded to the question posed in that order whether the Release "renders further proceedings relating to the methane contamination of the water supply moot with respect to EACC's obligations to undertake any additional corrective action." (Order at 1-2.) We need not address the effect of the Release given our disposition in this case. However, it is clear that any agreement between Tennant and EACC would not affect OSM's obligations under SMCRA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Tennant's appeals docketed as IBLA 98-242, 98-432, and 99-55, are dismissed. OSM's decision appealed in IBLA 99-125 is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge