

FRED D. ZERFOSS, ET UX.

IBLA 83-629  
IBSMA 82-36

Decided May 14, 1984

Appeal from the July 22, 1982, decision of the Pennsylvania Field Office Director, Office of Surface Mining Reclamation and Enforcement, responding to appellants' citizen complaint (No. I-PA-FSOM-02-82) that deterioration in the quality of their well water is attributable to a surface coal mining and reclamation operation.

Set aside and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Administrative Procedure: Administrative Review

When the record accompanying a decision by the Office of Surface Mining Reclamation and Enforcement responding to a citizen complaint filed pursuant to 30 CFR 721.13 provides no information upon which an objective, independent review of the basis for the decision can be conducted by the Board, the decision will be set aside and the case remanded for further consideration.

APPEARANCES: Mr. and Mrs. Fred D. Zerfoss, pro sese; Harold Chambers, Office of the Field Solicitor, U.S. Department of the Interior, Charleston, West Virginia, and Walton D. Morris, Jr., Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

This appeal is from a decision of the Pennsylvania Field Office Director, Office of Surface Mining and Reclamation (OSM), following review of OSM's investigation of citizen complaints that deterioration in the quality of their well water is attributable to a surface coal mining operation. The Field Office Director concluded that "no direct relationship could be established between the active mine and the problem area."

### Background

In November 1981 Mr. Bruce Yoder of Friedens, Pennsylvania, filed with OSM a citizen complaint (No. I-PA-FSOM-21-81) asserting that a coal mining operation in the vicinity of his residence had caused an increase in the iron content of his well water and that of several of his neighbors, including appellants. <sup>1/</sup> In response to the complaint OSM began an investigation. On February 2, 1982, OSM informed appellants of its interim findings. In this report OSM identified as a possible source of appellants' water quality problem a mining operation conducted by a company known as "PBS." OSM stated in the report:

The PBS permit in question is identified as mining permit 222-25 originally permitted in 1975. This mine was opened up in the fall of 1975 and mining continued until sometime after August 1978. The seams to be mined were the Upper, Middle and Lower Kittanings or the "C'", "C" and "B" respectively. After a few cuts the "B" coal was dropped so only the "C'" and "C" coal were being mined.

The Department of Environmental Resources reports indicate that a problem existed with proper disposal of acid bearing material on or about August 23, 1978. Associated with the "C" coal, this I believe to be the source of the high iron and associated sulfate problem. Through various drill hole logs I was able to determine that the "C" was continuous. From [sic] the mine permit to Buck Run at least. From these same drill logs I was able to determine that the coal dipped at approximately -3 degrees from the south end of the permit toward Petersburg. When I projected the coal beyond my last known coal elevation near Buck Run I found two interesting things. First, the "C" coal is continuous under Buck Run with approximately 30 feet of cover over it. I also determined that the bottoms of all the affected wells were close enough to the "C" coal to base my conclusion on the data I collected. I felt that ground water leaving PBS permit 222-25 was responsible for the high iron concentrations observed in the wells.

On Monday January 25, 1982 I met with Mr. Joe Pribelski and Mr. Joe Whittaker of PBS coals and presented them with the situation and a majority of the information I had collected. Mr. Whittaker and Mr. Pribelski listened courteously and found no major problems with my findings. They then requested until February 15, 1982, to conduct their own investigation. Upon leaving, Mr. Whittaker assured me that if PBS Coals mining operations are the cause of the problem that PBS would supply potable water to the affected people.

(Interim Citizen's Complaint Report, transmitted February 2, 1982, by John G. Mason, OSM Supervisory Reclamation Specialist).

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<sup>1/</sup> Subsequent to the filing of the Yoder complaint, appellants filed their own citizen complaint, which OSM considered together with the Yoder complaint.

After issuing the report of its interim findings, OSM apparently conducted analysis of water samples to determine if there was a correlation between drainage affected by the "PBS" mining operations and the quality of the well water about which appellants and other complained. However, there is no record of this analysis in the file. On July 8, 1982, OSM sent the report of its investigation to appellants. The report included the following information and conclusion:

Information available to assess Mr. Yoder's complaint against Cardinal Mining, consists of: discussions with Mr. Yoder and several of his neighbors on the history of their wells, their recent problems and related documents; examination of Cardinal Mining's water monitoring records; Pennsylvania State University's monitoring data from the two groundwater wells on the Summit Site (Cardinal Mining); PBS Coals, Inc., Drainage Permit; water data compiled from water samples collected by OSM in March of 1982 and other available data.

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Results from chemical and physical analysis were evaluated. By converting major ions to chemical equivalents per million (EPM), the values were plotted to compare relationships of the same major ions from sample to sample. These plotted values are called a stiff diagram. The shape of the stiff diagram, if equivalent or closely similar between two samples, is a good indication of correlation between samples. If stiff diagrams are closely similar or equivalent, but plotted at different scales, the source may still be the same - only the concentrations are changed.

This computer analysis of the samples does not indicate a correlation between samples of the PBS permit, 222-25 and samples taken from the Yoder well and the general area. No samples were available from the mine pit of the PBS strip, the reclamation was completed in the fall of 1978.

#### Summary and Conclusions

Given the elevation relationships between the Yoder well and the "C" coal, a direct impact of PBS mine operations on the Yoder well is very unlikely. Possible indirect impacts cannot be assessed because of the absence of information on the hydraulic relationships between the mine and well. To obtain this type of information would require extensive drilling over a large area at a considerable cost.

The general area has been heavily mined in the past. Speculative hypothesis can be formulated which suggest that the current problems experienced by Yoder and his neighbor might be the long-term cumulative [sic] result of all the mining activity in the area. However, this can not be demonstrated with the information that has been collected to date.

In summary, existing evidence does not identify a cause-effect relationship between Summit or PBS operations and the iron yield of the Yoder well. Sufficient data control is lacking, however, to establish an unequivocal conclusion.

(Memorandum of June 17, 1982, accompanying response by John G. Mason, OSM Supervisory Reclamation Specialist, to appellants).

Appellants sought review of the above findings by OSM's Pennsylvania Field Office Director, who approved the findings and decision not to take enforcement action against PBS (Letter of July 22, 1982). This appeal followed, pursuant to the provisions of 43 CFR 4.1280 through 4.1286.

#### Discussion

OSM based its conclusion that the "PBS" coal mining operations were not directly responsible for deterioration in the quality of appellants' well water on computer analysis of "samples of the PBS permit, 222-25 and samples taken from the Yoder well and the general area." In this regard OSM acknowledged that "[n]o samples were available from the mine pit of the PBS strip; the reclamation was completed in the fall of 1978." Without drawing any conclusions as to whether the OSM decision was correct, we must find that OSM's decision is not supported by an administrative record that this Board can review independently and objectively.

Missing from the record before us is information indicating the location of the water samples from the "PBS" permit area in relation to the acid bearing material associated with the disposal problem reported by the State regulatory authority. Further, there is nothing in the record to disclose the results of the testing of these samples other than the conclusionary statement found in the opinion and quoted above. In fairness and objectivity the Board cannot merely presume that OSM collected, or otherwise obtained credible information about water samples suitable for meaningful comparison with the samples from appellants' well water. This information and information revealing the actual data and procedure used by OSM in its computer analysis must be made a part of the record. Without it, the Board cannot properly affirm OSM's decision that its analysis of the water samples did not support its earlier suspicion that the "PBS" coal mining operations may have caused or significantly contributed to the deterioration in the quality of appellants' well water.

In view of the inadequacy of the present record the Board will set aside OSM's July 22, 1982, decision and remand the case to the Pennsylvania Field Office for further consideration. If OSM determines that information previously gathered but not revealed in the record justifies its earlier conclusions, OSM shall supplement the record accordingly. If, alternatively, OSM determines that the existing information does not provide an adequate factual basis for its earlier conclusion, OSM shall conduct further investigation and, if appropriate, initiate enforcement action against "PBS." 2/

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2/ In its evaluation OSM shall give due consideration to the performance standards set forth in 30 CFR 715.17. It shall not be necessary, in order

OSM shall report in writing to appellants the results of its further consideration of appellants' citizen complaint. Appellants shall have the right to appeal OSM's decision to this Board in accordance with the provisions of 43 CFR 4.1280 through 4.1286.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (as amended at 49 FR 7564 (Mar. 1, 1984)), OSM's July 22, 1982, decision responding to citizen complaint No. I-PA-8-FSOM-02-82 is set aside and the case is remanded to OSM for further consideration.

R. W. Mullen  
Administrative Judge

We concur:

Will A. Irwin  
Administrative Judge

Gail M. Frazier  
Administrative Judge

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fn. 2 (continued)

for OSM properly to initiate enforcement action against the coal company, that OSM be able to prove conclusively a causal relationship between the company's operations and the deterioration in appellants' well water. A prima facie showing of causation from OSM's investigation is all that is required. See 43 CFR 4.1171.

