

KENNETH MARSH

IBLA 83-616

Decided July 2, 1984

Appeal from the decision of the Regional Director, Office of Surface Mining Reclamation and Enforcement, Charleston, West Virginia, declining to take enforcement action in response to citizen complaint I-PA-FSOM-14-81.

Affirmed.

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

The Office of Surface Mining may properly decline to take enforcement action on a citizen's complaint alleging improper restoration of the citizen's land under 30 CFR 721.13 where multiple inspections fail to confirm the allegations made.

APPEARANCES: Kenneth Marsh, pro se; Anna M. Norton, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

By letter decision dated August 4, 1981, the Regional Director, Office of Surface Mining Reclamation and Enforcement (OSM), Charleston, West Virginia, advised Kenneth Marsh that enforcement action would not be taken by OSM on Marsh's May 1981 complaint alleging improper reclamation of his property following surface mining activities by H & H Coal Company under permit 1348-4. 1/ Marsh initially complained that his land had not been restored to its approximate original contour and later alleged excessive gulying and inadequate revegetation.

Following receipt of the complaint, OSM initiated an investigation. The Complaint Investigation Report concluded:

In summary then, while the measurements taken seem to show a slight elevation of the southeast quarter at the expense of the

1/ The permit was issued on June 1, 1977, under the Commonwealth of Pennsylvania's Surface Mining Conservation and Reclamation Act. Under the terms of the permit, H & H Coal Company's reclamation plan was approved for restoration to approximate original contour.

central area, the differences are small, lying mostly within the margin of error of the maps and equipment used. The two differences which are potentially significant still lie well within the 5% tolerance generally accepted in Pennsylvania. Visually the spoil along the Fleck road appears to have settled about one foot; all other edges have been well tied into original ground. Admittedly a small change in contour and configuration could effect a sizable change in the soil's drainage characteristics on this topographically low-lying site; this situation would not necessarily be reflected on either the original permit map or postmining slope measurements. However, both John Moore's statement and the SCS aerial photographs clearly show most of this land was in substantially nonproductive uses prior to mining; both John Moore and the SCS Soil Survey indicate pre-existing drainage problems on much of the site. Currently the entire site is farmable within the limitations of the seasonally wet Cavode soils; no gullies exist that could not be easily removed by agricultural tillage implements. H & H has agreed to fix problems originating on their 1348-4 permit and Fetterolf Mining has agreed to do the same with respect to their 1928-2 permit. No further action by OSM is recommended at this time.

Marsh was notified of the investigation results by letter dated June 19, 1981, and thereafter sought informal review by the OSM Regional Director, who concurred in the investigation findings by letter on August 4, 1981. Marsh appealed asserting that more fill was taken out by the Pennsylvania Department of Transportation in 1977 than coal over the life of the permit 2/, that reclamation was not done within 5 percent tolerance, and that he cannot plow because of swampy conditions. He did not document his allegations.

In response to the appeal, OSM reviewed the matter again and reaffirmed its original conclusion that enforcement action was not warranted. It noted that the fill removal complained of appeared to predate OSM jurisdiction. See Memorandum of Dennis Rice, Reclamation Specialist, dated Sept. 16, 1981.

Following review of the appeal by this Board, 3/ we sought additional information from the parties. As part of its submission, OSM obtained various documents pertaining to permit 1348-4 from the Commonwealth of Pennsylvania Department of Environmental Resources (DER), including:

1. DER Completion Report No. 6341, dated April 9, 1979, filed by H & H Coal Company stating that backfilling, grading, and leveling had been

2/ A bridge over Clear Shade Creek on Route 160 washed out during flooding in July 1977. The Pennsylvania Department of Transportation removed shale from that part of appellant's land which was under permit to H & H Coal Company. The shale was used in construction of a temporary emergency crossing.

3/ The appeal was filed with the Interior Board of Surface Mining and Reclamation Appeals. By Secretarial Order No. 3092 dated Apr. 26, 1983, the Secretary of the Interior transferred all of the functions and responsibilities delegated to that Board to the Interior Board of Land appeals. 48 FR 22370 (May 18, 1983).

completed in conformance with the operator's approved reclamation plan, but planting had not been completed.

2. DER's Inspection Report for Completed Surface Mine Operation, dated June 22, 1979, showing that reclamation was completed but recommending bond release on the backfilling only because, although planting was accomplished, no growth had yet occurred.

3. DER Release of the bond on backfilling and leveling, July 19, 1979.

4. DER Release of the bond on planting, November 18, 1981.

Appellant submitted no further information to support his complaint.

[1] After careful review and consideration of appellant's complaint, the various reports of actions taken by OSM, and the information submitted in response to our order, we find that OSM properly responded to the complaint in accordance with its obligations under 30 CFR 721.13 and, therefore, we affirm the August 4, 1981, decision of the OSM Regional Director. In the absence of specific evidence to the contrary, the DER documents and OSM field reports establish that appellant's land was properly restored.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, as amended (49 FR 7564 (Mar. 1, 1984)), the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

James L. Burski

Administrative Judge

Gail M. Frazier

Administrative Judge

