



MYSTIC BROOKE DEVELOPMENT, INC.

175 IBLA 209

Decided July 22, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

MYSTIC BROOKE DEVELOPMENT, INC.

IBLA 2008-34

Decided July 22, 2008

Appeal from a decision by the Acting Regional Director, Appalachian Region, Office of Surface Mining Reclamation and Enforcement, determining, on informal review, that the Pennsylvania Department of Environmental Protection had taken appropriate action in response to two Ten Day Notices. TDN No. 06-121-146-001 and TDN No. 06-121-377-001.

Set aside and remanded.

1. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Record--Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals--Surface Mining Control and Reclamation Act of 1977: Citizens Complaints--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

It is incumbent upon OSM to ensure that its decision is supported by a rational basis which is explained in the written decision, and that it is substantiated by the administrative record accompanying the decision. The recipient of an OSM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. An OSM decision that fails to meet this basic requirement is properly set aside and the case remanded.

APPEARANCES: Robert P. Ging, Jr., Esq., Confluence, Pennsylvania, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE PRICE

Mystic Brooke Development, Inc. (Mystic), has appealed a September 25, 2007, decision by the Acting Regional Director, Appalachian Region, Office of Surface Mining Reclamation and Enforcement (OSM), affirming, on informal review, a determination made by OSM's Pittsburgh Field Division that there was no violation of 25 Pa. Code § 90.116a<sup>1</sup> and no basis for ordering a Federal inspection. Administrative Record (AR) 27 at 9. The Pittsburgh office had informed Mystic that it accepted as "appropriate" the responses of the Pennsylvania Department of Environmental Protection (PADEP) to two Ten Day Notices (TDNs) issued by OSM after receiving Mystic's citizen's complaint<sup>2</sup> asserting that the water supply on its property in Center Township, Indiana County, adjacent to the Helvetia Lucerne Mine No. 6 and the Helvetia Refuse Disposal Area No. 1, which were operated pursuant to PADEP permits nos. 32841303 and 3274310, respectively, had been contaminated by mine drainage.<sup>3</sup> AR 1, 2, 25.

The Board finds that procedural deficiencies and the omission of numerous relevant documents from the record require that the Acting Regional Director's decision be set aside and remanded.

*Applicable Law*

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is comprehensive legislation designed to "establish a nationwide program to protect

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<sup>1</sup> The regulation states that "[a]n operator who conducts coal refuse disposal and adversely affects a water supply by contamination, pollution, diminution or interruption shall comply with § 87.119 (relating to water rights and replacement)." Section 87.119(a) provides that an operator "who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternative source, adequate in water quantity and water quality, for the purpose served by the water supply." See 30 U.S.C. § 1307(b) (2000), 30 C.F.R. § 816.41(h). Quotations of and citations to the Pennsylvania Code are based upon internet resources which are believed to be reliable and current but cannot be attributed to specific print publications.

<sup>2</sup> The complaint and contemporaneous documents used the name Mystic Brooke Development, L.P.

<sup>3</sup> Although Helvetia Coal Company (Helvetia) appears to be the operator, copies of the permits were not submitted, and thus the Board is not certain who the permittee or permittees might be.

society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. § 1202(a) (2000). A State with a regulatory program approved by the Department obtains primary responsibility for regulating surface coal mining and reclamation operations. 30 U.S.C. § 1253 (2000); *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981). Pennsylvania’s regulatory program was conditionally approved in 1982 and has been subsequently amended. 30 C.F.R. §§ 938.10, 938.15. Even after a State is granted primary enforcement responsibility, however, the Department retains significant oversight authority to ensure that the State’s administration of its program complies with SMCRA, including the authority to conduct inspections. 30 U.S.C. § 1267(a) (2000); see *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d at 521 (“Congress did not withhold powers that the Secretary might require in his efforts to safeguard federal interests.”); *Annaco, Inc. v. OSM*, 119 IBLA 158, 162-64 (1991).

Any person may request a Federal inspection by filing with OSM what is known as a “citizen’s complaint,” which provides information indicating there is a violation, condition, or practice that requires correction and that the State regulatory authority has been notified. 30 U.S.C. § 1267(h) (2000); 30 C.F.R. § 842.12(a). If the facts alleged provide OSM a reason to believe there is a condition, practice, or violation of SMCRA, Departmental regulations, the applicable regulatory program, or any condition of a permit or exploration approval, or that there exists a condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources, OSM must immediately conduct a Federal inspection, unless there is a State regulatory authority enforcing the State program. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1), (2). If there is a State administered regulatory authority, OSM must issue a notice allowing the State 10 days to take appropriate action to cause the violation to be corrected or show good cause for not doing so. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); *West Virginia Highlands Conservancy*, 152 IBLA 158, 184 (2000) (“[n]either the statute nor an implementing regulation gives OSM discretionary authority to do otherwise; the issuance of a TDN should be automatic”). “Good cause” is defined to include five situations when the State may decline to take action to have a violation corrected, including, of relevance in this appeal, the situation in which, “[u]nder the State program, the possible violation does not exist.” 30 C.F.R. § 842.11(b)(1)(ii)(B)(4).

The State must respond within 10 days of receipt of the notice and OSM has a responsibility to evaluate the State’s response and determine that it was not arbitrary, capricious, or an abuse of discretion because the State either took an appropriate action to have the violation corrected or provided OSM a reason for not doing so

under the State regulatory program constituting “good cause.” *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59, 73-77 (1995); *Powderhorn Coal Co. v. OSM*, 129 IBLA 22, 24 (1994). If the State does not provide a satisfactory response, or does not respond at all, OSM is required to immediately order a Federal inspection. 30 U.S.C. § 1271(a)(1) (2000); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); see *Central Ohio Coal Co. v. OSM*, 140 IBLA 1, 6-9 (1997). The statute does not allow OSM to delay undertaking an inspection by withholding a determination on the State’s response to the TDN, although an inspection may be deferred pending a State’s informal request for review. *Robert L. Clewell*, 123 IBLA 253, 265-67, 99 I.D. 100, 107-09 (1992) (discussing 30 C.F.R. § 842.11(b)(1)(iii)(B)).

OSM must inform the person who filed the citizen’s complaint of its response to the complaint. 30 C.F.R. § 842.12(d). If OSM decides not to inspect the site or otherwise take appropriate enforcement action with respect to the alleged violation, a person adversely affected by the surface coal exploration, mining, or reclamation operation may seek informal review by the Director of OSM. 30 C.F.R. § 842.15(a). The Director’s decision is subject to appeal to the Board. 30 C.F.R. § 842.15(d). A party challenging a decision finding that the State’s response to a TDN was “acceptable” has the burden of establishing that OSM erred; it does so by showing that the State’s regulatory action or response to the TDN was arbitrary, capricious, or an abuse of discretion. *Danny Crump*, 163 IBLA 351, 358 (2004).

### *Procedural Background*

Mystic’s citizen’s complaint, dated September 7, 2006, stated that it owns property adjacent to the Helvetia Lucerne No. 6 Mine and the Helvetia Refuse Disposal Area, operated under PADEP permits, and had “determined that the water supply on the property had been contaminated by mine drainage.” AR 1. Mystic enclosed copies of two letters it had sent to PADEP. One, dated August 29, 2006, informed PADEP that samples from a well on Mystic’s property had levels of sulfates “indicative of contamination by mining.”<sup>4</sup> *Id.* Mystic invoked a portion of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (Penn Act) that creates a presumption that an underground mine operator is responsible for the contamination, diminution, or interruption of a water supply within the area above its mine. Under the Penn Act, a mine operator must provide a temporary water supply within 24 hours of receiving notice from the landowner that the existing water supply has been contaminated by mine drainage. Mystic provided a copy of the

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<sup>4</sup> Under cover letter dated Oct. 12, 2006, Mystic sent PADEP the results of samples taken in 1985, 1991, and 2006. AR 9.

August 29 letter to Helvetia.<sup>5</sup> *Id.* Mystic requested that PADEP “take immediate steps to assure that the water supply servicing this property is replaced, with sufficient water for potable and other needs on the property.” *Id.*

The second letter to PADEP, dated August 31, 2006, was a Notice of Intention to Sue pursuant to a number of Pennsylvania statutes. *Id.* Mystic asserted that Helvetia was “contaminating the surface waters and groundwater which flow across, under and through” Mystic’s property by discharging untreated mine drainage and untreated acid mine drainage from its deep mine onto Mystic’s property without authorization and in violation of Helvetia’s Permit No. 32841303. *Id.* Mystic also asserted, *inter alia*, that Helvetia had also violated Permit No. 32743710 for the refuse disposal area by discharging untreated mine water; by failing to maintain and “properly operate all facilities and systems for the collection and treatment of mine drainage which are installed or used by the permittee for water pollution control and abatement”; by allowing its treatment facilities to be bypassed; and by failing to monitor discharges of untreated acid mine drainage onto Mystic’s property. *Id.*

After receiving Mystic’s complaint, OSM issued two TDNs. It issued TDN No. 06-121-146-001 for the Helvetia Lucerne Mine No. 6. AR 12. PADEP responded, stating that mining had ceased in 1971, prior to the enactment of any State law requiring replacement of affected water supplies, and that “OSM accepted the response as appropriate because PADEP demonstrated there was no violation.” AR 12.<sup>6</sup> OSM also issued TDN No. 06-121-377-001, dated September 13, 2006. AR 2. It identifies Helvetia as the operator of a refuse disposal site under Permit No. 32743710 and described the violation as “alleged water supply contaminated by mine drainage and water supply not replaced after notification of company,” stating that the site was covered by 25 Pa. Code § 90.116a “which refers to 87.119(a) for water rig [sic].” *Id.* OSM sent Mystic a copy of the TDN, noting in the cover letter that Mystic had agreed in a telephone conversation that the TDN was to be “limited to contamination of the water supply” and that the additional matters raised in

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<sup>5</sup> Mystic cited “53 P.S. §1406.5(a).” Although 52 Pa. Stat. Ann. § 1406.5a (West 1998) requires a mine operator to restore or replace a water supply affected by contamination, diminution or interruption, the presumption Mystic invoked seems to be provided at 52 Pa. Stat. Ann. § 1406.5b(c) (West 1998) and by administrative regulation at 25 Pa. Code § 87.119(b).

<sup>6</sup> The TDN, PADEP’s response, and OSM’s letter of acceptance are not part of the record before the Board. The information is taken from AR 12, which is an internal OSM memorandum dated Oct. 30, 2006, addressing “Final Resolution of Mystic Brooke Ten Day Notices.”

Mystic's August 31, 2006, Notice of Intention to Sue could be raised at a later date.  
AR 4.

PADEP conducted inspections on September 13 and 20, 2006, and described its findings in a September 22, 2006, letter to Consol Energy, Inc. (Consol).<sup>7</sup> AR 6. Summarized, PADEP's observations were as follows:

1. "Effluent from treatment facility for the deep mine and coal refuse pile has a bypass that leaves your permitted area and enters a diversion ditch on the Mystic Brooke property" and a "15-inch underground pipe that carries the effluent from the final polishing pond to the 001 outfall has an apparent restriction." Consol had agreed to hire a pipe cleaning company to attempt to remove the restriction.

2. "[T]wo acid seeps with field pH's under four are emanating below the final polishing pond for the AMD [acid mine drainage] treatment facility on property owned by Mystic Brooke" and Consol had agreed to investigate. "These discharges also enter the diversion ditch on Mystic's property and are conveyed, along with the effluent bypass, to a 6-inch seep collection borehole on Mystic's property that drains into the Lucerne 6 Mine."

3. PADEP had issued a permit for the 6-inch seep collection borehole on July 21, 1998, and Consol had agreed to research its files to determine whether Mystic was correct that the borehole had been installed without the landowner's permission.

4. The results of the samples PADEP had collected had not been received.<sup>8</sup> "The water supply is within 500 feet of the AMD treatment facility polishing pond." Consol had agreed to research its files for information about the water supply.

PADEP responded to TDN No. 06-121-377-001 in an October 16, 2006, letter to OSM reporting that: (1) Consol had "performed work to eliminate a bypass from their mine water treatment facility" and no violation existed; (2) Consol had provided

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<sup>7</sup> The record does not state or explain the relationship, if any, between Consol and Helvetia.

<sup>8</sup> Subsequent internal memoranda refer to an attached Sept. 22, 2006, response from PADEP providing its field investigation results. AR 7, 11. The attachments are not part of the record sent to the Board. The Board notes that PADEP does not refer to monitoring reports it may have received. See 25 Pa. Code §§ 87.116, 90.116.

an “access document they executed with CQ<sup>9</sup> at the time they amended their coal mining activity permit to install two boreholes on the CQ property” and there was no violation;<sup>10</sup> and (3) PADEP had collected “two sets of water samples of the drinking water supply at Mystic Brooke and these samples confirm[ed] the water supply is contaminated. AR 10. Secondary drinking water standards for total dissolved solids is exceeded in both samples.” *Id.* The letter also states that the sample results had been sent to OSM, Mystic, and Consol and that Consol had been asked to provide, by October 31, 2006, a plan and schedule for replacing the water supply. *Id.*

By letter dated October 30, 2006, OSM informed PADEP that its response to TDN No. 06-121-377-001 had been “appropriate in accordance with 30 CFR 842.11 because the Department [PADEP] has taken action to have the violation corrected” and asked for “copies of any further correspondence [with Consol] and reports regarding replacement of the water supply.” AR 13. By a letter of the same date, OSM informed Mystic that it had received PADEP’s response “that concludes contamination of the water supply was a result of surface activities of the underground mine” and that PADEP had advised Consol “to submit a plan and schedule for replacement of the drinking water supply” by October 31, 2006. AR 14. OSM also informed Mystic that “[b]ecause PADEP has taken action to cause the violation to be corrected, we accept their response as appropriate under 30 C.F.R. § 843.12” and would “take no further action at this time,” but would “continue to monitor the final resolution of this issue.” *Id.*

Consol did not submit a plan and schedule for replacing the drinking water supply. Instead, by letter dated October 31, 2006, it informed PADEP that the Helvetia had provided non-potable water to a previous owner and Consol had been informed by the Indiana County Fire Association, the land owner before Mystic, “that it never used on-site sources of water for drinking water, and never received any type of water for use at this site from Helvetia.” AR 17.<sup>11</sup> Consol further stated that, “[t]o the best of our knowledge this facility used only bottled water for drinking water,” and that it was “not aware of any on-site water supply being used for drinking water at this site since it was built circa 1979.” *Id.* Consol pointed out that the Pennsylvania rule provides that the presumption of responsibility for replacing a

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<sup>9</sup> “CQ” is not identified in the record except as a previous owner of the property. AR 22 (Water Investigation Report dated Apr. 19, 2007) at 3; AR 27 at 2.

<sup>10</sup> The letter states that a copy of the “agreement” was enclosed, but it is not part of the record sent to the Board. AR 10.

<sup>11</sup> Consol’s letter refers to and quotes from an Oct. 16, 2006, letter from PADEP to Consol. That letter is not in the record before the Board.

water supply “does not apply in the case of any permit issued by [PA]DEP prior to February 16, 1993” and it asserted that “the facility in question was permitted prior to the amendments to the law which gave rise to the presumption.”<sup>12</sup> *Id.*

By letter dated November 6, 2006, PADEP informed Consol that it agreed “that Consol is not subject to the presumption of liability for Mystic Brooke’s water supply,” and that it would investigate to “determine if Helvetia [h]olds any liability for contamination of the water supply for Mystic Brooke Development, Inc.” *Id.* By letter dated November 28, 2006, OSM informed PADEP that it was changing its assessment of PADEP’s response to the TDN from “appropriate” to “good cause” to allow 90 days to conduct an investigation of the water supply. AR 21; see 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(ii).

Mystic saw matters quite differently. Its November 1, 2006, letter to PADEP declared that Consol had “simply offered excuses why it should not have to replace the contaminated water supply.” AR 15 at 1. Mystic asserted that the water samples it had provided showed a steady degradation of the water supply, that Helvetia “is within the presumptive distance under the Surface Mine Conservation & Reclamation Act,” and that Helvetia was operating under a permit revised on May 18, 2006, “and is subject to the presumption.” *Id.* Mystic also argued that no statutory or regulatory authority “allows a coal company, even one of Consol’s stature, to pollute groundwater and discharge the polluted water on the property of another.” *Id.* at 2. PADEP replied in a November 8, 2006, letter to Mystic’s attorney, explaining that it had “initiated a request for a hydrologic study of the water supply to determine if it has been contaminated and if so the cause of the contamination” and that, because the presumption of liability does not apply, “conducting an investigation is a necessary next step to address your client’s claim.” AR 18.

In addition, Mystic complained in a November 2, 2006, letter to OSM that “two point source discharges and numerous non-point source discharges of acid mine drainage exist on the Helvetia Coal Company site,” that the “discharges flow onto and contaminate” Mystic’s property, and that the matter had not been addressed. AR 16 at 1. Mystic asserted that Consol’s failure to provide a plan and schedule for replacing the water supply had been “an inappropriate response” to PADEP’s letter and, if the State failed to issue a compliance order or take other binding action, Mystic would consider the State’s response to have been “inappropriate.” *Id.*

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<sup>12</sup> The provision states: “A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)–(i), but is subject to subsections (a) and (j).” 25 Pa. Code § 87.119(k).

Furthermore, Mystic stated, “[i]n the absence of a formal binding order, which absolutely requires Consol to replace this water supply,” it anticipated that PADEP would reverse its position. *Id.* at 1-2. Mystic requested informal review of OSM’s determination that PADEP’s response had been “appropriate.” *Id.* at 2.

After receiving a copy of PADEP’s November 6, 2006, letter to Consol, Mystic again wrote to OSM, stating in a November 9, 2006, letter that it disagreed with PADEP’s conclusion “that Consol is not subject to the presumption of liability.” AR 19. Mystic argued that the term “surface mine operation” as used in 25 Pa. Code § 87.119(k), which provides the exception for permits issued prior to February 16, 1993, is defined to mean open pit mines and that, in contrast, Consol’s activities at the coal refuse disposal area and mine are “surface mining activities” and, consequently, “the presumption would apply to the activities being conducted at the Helvetia No. 6 Mine.” *Id.* In addition, Mystic argued that, even if PADEP “would continue to insist that the exception applies” and the activities at the mine site are a “surface mine operation,” they “are being conducted pursuant to current permits issued by the Department in 2006.” *Id.*

The investigation took some time. Under cover letter dated April 19, 2007, PADEP sent Mystic a copy of a report, stating that “[a]s you can see . . . the underground mining cannot be linked to your water problems.” AR 22.<sup>13</sup> Three months later, OSM sent Mystic a response to its citizen’s complaint. In a letter dated July 23, 2007, OSM informed Mystic that TDN No. 06-121-146-001, addressing “the allegation that underground mining operations of Helvetia Coal Company’s Lucerne No. 6. Mine had contaminated the water supply,” had resulted in a determination “that underground mining operations occurred in 1971, this predated passage of the applicable water supply replacement provisions” and that OSM had found PADEP’s response to be “appropriate, as explained in our September 27, 2006, letter.” AR 25 at 1.<sup>14</sup> In regard to TDN No. 06-121-377-001, “issued in response to your allegations that refuse disposal activities at the Helvetia Coal Company’s permit number 32743710 had contaminated the water supply,” OSM informed Mystic that PADEP had “found that the source of the sulfate contamination could not be linked with mining activities and that there were no violations of Pennsylvania coal mining laws or regulations.” *Id.* Turning to 25 Pa. Code § 87.119(a), OSM explained that PADEP

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<sup>13</sup> Mystic filed an appeal with Pennsylvania’s Environmental Hearing Board. AR 23. The record provides no information about its fate.

<sup>14</sup> The only letter dated Sept. 27, 2006, in the record before the Board extends the time for PADEP to respond to TDN No. 06-121-377-001 to Oct. 19, 2006, “to allow additional time needed to complete the field investigation of the complaint.” AR 8.

had “advised us that the water supply was developed, after the adjacent coal mining facilities had been established, for industrial purposes, and that those purposes are maintained even at the increased sulfate levels.” *Id.* at 2. OSM stated that, because “[t]here is no evidence that the water supply was ever a potable supply, or expected to serve as a drinking water supply . . . there is no violation of the Pennsylvania coal mining program.” *Id.* OSM also informed Mystic that PADEP “withdrew the presumption [of liability] when it was determined the permit was issued prior to February 16, 1993,” that Federal law does not “contain a presumption of responsibility, and PADEP’s interpretation of this requirement is not subject to review by OSM.” *Id.* OSM concluded by stating that it “accepted PADEP’s response to this TDN as appropriate because they demonstrated that no violation of the Pennsylvania approved regulatory program exists.” *Id.*

By letter dated August 3, 2007, Mystic requested informal review of OSM’s July 23, 2007, letter as it pertained to both TDNs. AR 26. Mystic objected to OSM’s limited focus on potable water and pointed out that the definition of a “water supply” in 25 Pa. Code § 87.1 includes water for “commercial, industrial, or other uses.” AR 26 at 1. In regard to 25 Pa. Code § 87.119(a), Mystic asserted that the data it had provided “clearly shows that the water supply . . . has been contaminated and polluted by mining activities.” *Id.* Mystic also contended that the sulfates constituted pollution under 35 Pa. Stat. Ann. § 691.1 (West 2003). *Id.* at 2. Finally, Mystic complained that PADEP had failed to determine the source of the pollution on Mystic’s property and had excused the mining company “without conducting a thorough investigation.” *Id.*

The Acting Regional Director then issued the September 25, 2007, decision that is the subject of this appeal. Briefly stated, the decision accepts that water samples taken in 1985, 1991, and 2006 show the presence of elevated levels of sulfates in the water supply at Mystic’s property, but rejects the claim that they are a contaminant. AR 27 at 6-7. However, because “[s]ulfates are not a regulated parameter within the approved Pennsylvania mining program for water supplies, except with respect to supplies used as drinking water,” and “there is no evidence that the water supply was developed for, or was ever used for, drinking water,” the Director rejected “drinking water standards as the regulatory benchmark for determining whether the water supply has been adversely affected.” *Id.* at 7-8. Because there was no evidence that the “water supply was established or used for drinking water purposes” and showed that “the supply had been used for bathing, flushing toilets, cleaning, and fire suppression,” and nothing in the record showed that such uses had been impaired by the high sulfate levels, the Director found that “the water supply can continue to support industrial uses.” *Id.* at 8.

In answer to Mystic's assertion that PADEP had failed to conduct an investigation "to definitely determine the source of the increase of sulfates," the Director stated that "PADEP's decision to not conduct the investigation was not arbitrary, capricious or an abuse of discretion," because the source of the sulfates would be relevant only "if sulfates were a regulated parameter of water quality" and Pennsylvania "does not regulate sulfate levels except as they apply to drinking water standards." *Id.* The Director also rejected Mystic's contention that the level of sulfates constituted "pollution" under Pennsylvania law because, even if Mystic were correct that they meet the State's definition, "the water supply still serves its only intended use, which is for industrial purposes" and "no replacement is necessary." *Id.* at 8-9. Because no replacement of the water supply was needed, the Regional Director concluded that "no violation of 25 Pa. Code 90.116a has occurred" and he agreed there had been no violation of the Pennsylvania regulatory program and no basis for ordering a Federal inspection. *Id.* at 9.

Mystic's Notice of Appeal (NOA) was received by the Board on October 24, 2007. It is a single page with attachments. Mystic states that it relies upon the reasons set forth in its request for informal review and "believes that a violation of 25 Pa. Code § 90.116(a) has occurred, in that the permittee did contaminate Appellant's water supply."

#### *Resolution of the Appeal*

[1] Upon review, the Board concludes that several procedural deficiencies and numerous omissions of documents from the record require that the Acting Regional Director's decision be set aside and remanded. In *The Pittsburgh & Midway Coal Mining Co. v. OSM*, 140 IBLA 105 (1997), the Board explained OSM's responsibility for providing a decision that is supported by a rational basis which is substantiated by the administrative record:

[W]e note that it is incumbent upon the administrative adjudicator at OSM to ensure that the decision is supported by a rational basis, and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. See *U.S. Oil & Refining Co.*, 137 IBLA 223, 232 (1996); *Larry Brown & Associates*, 133 IBLA 202, 205 (1995); *Eddleman Community Property Trust*, 106 IBLA 376, 377 (1989); *Roger K. Ogden*, 77 IBLA 4, 7, 90 Interior Dec. 481, 483 (1983). Thus, we have held that the recipient of a decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. *Kanawha & Hocking Coal*

& Coke Co., 112 IBLA 365, 367-68 (1990); *Southern Union Exploration Co.*, 51 IBLA 89, 92 (1980). An administrative decision is properly set aside and remanded if it is not supported by a case record providing the information necessary for an objective, independent review of the basis for the decision. *Shell Offshore, Inc.*, 113 IBLA 226, 233, 97 Interior Dec. 73, 77 (1990); *Fred D. Zerfoss*, 81 IBLA 14 (1984). . . .

140 IBLA at 109; *see also Samedan Oil Corp.*, 163 IBLA 63, 70 (2004); *The Navajo Nation*, 152 IBLA 227, 234 (2000). For the reasons that follow, we conclude that OSM has failed to meet this basic standard.

First, the record provides insufficient documentation of PADEP's response to TDN No. 06-121-377-001. The Director's decision describes OSM's July 23, 2007, letter to Mystic as having explained "how your citizen's complaint . . . was resolved" and that OSM had "accepted the response issued by PADEP that no violation of the Pennsylvania approved regulatory program exists." AR 27 at 5. The July 23, 2007, letter, however, simply states that OSM had received a response from PADEP on May 17, 2007. No such response appears in the record. The letter also says that PADEP's response "consists of a water supply investigation report . . . and supplemental information provided to OSM June 21, 2007," but neither the report nor the supplemental information constitutes a response to the TDNs. AR 25 at 1. The report is a memorandum to the "file" which appears to have been researched and written by one person, identified as a hydrologist. AR 22, Report at 1. It may have been prepared as a consequence of Mystic's citizen's complaint, but it does not purport to be PADEP's response to the TDNs. The record also does not provide any documentation showing that PADEP accepted the report, made any findings or conclusions based upon it, or used it to support a response to OSM. The cover letter that accompanies the copy of the report in the record sent to the Board is addressed to Mystic, not OSM. AR 22. Presumably the "supplemental information" is the three-page document consisting of 18 questions and answers included in the record, but the document lacks identifying information as to who asked the questions, who answered them, and why the Board should consider the responses credible. AR 24.

Second, the Director's decision describes the report as having "concluded [that] the problems with Mystic Brooke's water supply could not be linked to the underground mining." AR 27 at 5. Although PADEP's November 6, 2006, letter to Mystic said that the purpose of a hydrologic study was "to determine if it has been contaminated and if so the cause of the contamination" (AR 18), the report makes no such findings. Its opening sentence states: "The following memo describes why Helvetia Coal Company is not responsible for replacing the water supply at the Mystic Brooke Development, Inc. property." AR 22, Report at 1. The report more

specifically concludes that “the active adjacent mining company is not responsible for providing a permanent replacement drinking water supply” for five reasons, and that “[t]he water supply was not historically used as a potable water source.” *Id.* at 6. The Director’s statement may have been taken from OSM’s July 23, 2007, letter, which stated that “PADEP found that the source of the sulfate contamination could not be linked with mining activities,” or it may have come from PADEP’s cover letter transmitting a copy of the report to Mystic, which stated: “As you can see from the report, the underground mining cannot be linked to your water problems.” AR 25 at 1. Because the report does not address the source of the contaminants on Mystic’s property, the absence of a “link” seems to mean, at best, that the water supply has never been potable, a matter Mystic does not dispute.<sup>15</sup> The Director did not regard the report as a factual investigation of the source of the contamination; instead he affirmed “PADEP’s decision to not conduct the investigation” because the origin of the sulfates was not relevant. AR 27 at 8.

Third, the record does not provide a basis for understanding the Director’s statement that OSM had “accepted the response issued by PADEP that no violation of the Pennsylvania approved regulatory program exists” and his affirmation of OSM’s determination “that no violation of the Pennsylvania program exists.” AR 27 at 5, 9. The record does not include a copy of TDN No. 06-121-146-001 issued for the Helvetia Lucerne Mine No. 6. Mystic’s citizen’s complaint claimed that its water supply was being contaminated by drainage from the adjacent mine and refuse disposal area. AR 1. Mystic’s November 2, 2006, letter requesting informal review specifically claimed that “two point source discharges and numerous non-point source discharges of acid mine drainage exist on the Helvetia Coal Company site, and these discharges flow onto and contaminate” its property. AR 16 at 1. Mystic’s August 3, 2007, request for informal review objected to the focus on potable water supplies, asserted that 25 Pa. Code § 87.119(a) applied, and again claimed that the water supply on its property “has been contaminated and polluted by mining activities.” AR 26 at 1. These factual allegations do not seem to have been addressed.

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<sup>15</sup> According to the report, the primary water supply “consists of a concrete manhole, collection lines, and sump with pump that provides water to the buildings and fire suppression system.” AR 22, Report at 1, 3. Water from one of three ponds on Mystic’s property is used as a secondary water supply. *Id.* at 3. Water collected from seeps on Mystic’s property is injected “into the Lucerne No. 6 underground mine pool” and the mine pool water is pumped and treated at ponds adjacent to Mystic’s property. *Id.* at 4. Although these facts do not identify the source of the contaminants in Mystic’s water supply, they certainly appear to “link” the water on Mystic’s property to the adjacent property.

It appears that PADEP contacted Consol because it is either the owner of the Helvetia Lucerne Mine No. 6. or the holder of Permit No. 32841303. AR 6. Until Consol asserted that the presumption provided by 25 Pa. Code § 87.119(b) does not apply because its mining operation had been permitted prior to 1993 (AR 17), PADEP seems to have believed, and OSM seems to have accepted, that the contamination of Mystic's water supply was the result of surface activities associated with the underground mine. AR 13, 14. TDN No. 06-121-377-001 was issued to address the allegation of contaminated discharge from the refuse disposal area operated under Permit No. 32743710, but the record does not show that PADEP ever contacted Helvetia about that TDN. If Consol was the proper party for PADEP to contact regarding both TDNs, the Board is at a loss to understand PADEP's November 6, 2006, letter informing Consol that it was not subject to the presumption of liability and that PADEP would investigate "to determine if Helvetia [h]olds any liability." AR 17. The hydrologist's report, however, does not discuss Mystic's broader assertions about contamination and addresses only Helvetia's responsibility (or lack thereof) for bringing the water supply up to drinking water standards. OSM's July 23, 2007, letter to Mystic states that it had "accepted PADEP's response to this TDN as appropriate," but the record lacks not only a response from PADEP addressing TDN No. 06-121-377-001 and potential violations of Pennsylvania's regulatory program, but also an OSM document explaining why the response was "appropriate."<sup>16</sup> 30 C.F.R. § 842.11(b)(1)(ii)(B)(1) (OSM is to "determine in writing whether the standards for appropriate action or good cause for such failure have been met"). The most recent document addressing the status of PADEP's response to the TDN is OSM's November 28, 2006, letter notifying PADEP that OSM was changing the rating of PADEP's response from "appropriate" to "good cause" in order to allow time to conduct an investigation of the water supply. AR 21.

Fourth, the absence of documents impedes our understanding of additional matters. OSM's July 23, 2007, letter states that PADEP's interpretation of the presumption of liability in 25 Pa. Code § 87.119(b) and (c) "is not subject to review by OSM" (AR 25 at 2), but the record does not include an interpretation by PADEP or other Pennsylvania authority. *Cf. OSM v. Thompson Brothers Coal Co.*, 148 IBLA 148, 157-58 (1999) (quoting interpretation by the Pennsylvania Commonwealth

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<sup>16</sup> The Board assumes that the documents exist and were simply omitted from the record. If they do not, the appropriate action would be to require OSM to undertake an immediate Federal inspection because Pennsylvania failed "to take appropriate action to cause said [alleged] violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary." 30 U.S.C. § 1271(a)(1) (2000).

Environmental Hearing Board). The statement may refer to OSM's understanding that PADEP "withdrew the presumption when it was determined the permit was issued prior to February 16, 1993." AR 25 at 2. The record shows that PADEP agreed with Consol that the presumption of liability does not apply to the Helvetia Lucerne Mine No. 6 because mining operations were conducted under a permit issued prior to 1993, and were apparently completed by 1971. AR 17. Agreement about application of the exception, however, is not an interpretation of the regulation and, assuming Consol and PADEP were correct, 25 Pa. Code § 87.119(k) provides that the operation is still subject to 25 Pa. Code § 87.119(a). More significantly, it is not apparent that the date on which the underground mining operations were conducted and the date or dates permits were issued for those operations has any bearing on whether operations at the Helvetia Refuse Disposal Area No. 1, which presumably have been subject to permits issued since 1993, are subject to 25 Pa. Code § 87.119(a) and other provisions of the Pennsylvania regulatory program.

In addition, OSM's use of the term "appropriate" is inapt. OSM does not determine whether a State's response to a TDN is appropriate. As described above, the regulatory structure allows a State to make either of two responses to a TDN. It can take "appropriate action to cause the violation to be corrected" or it can "show good cause for such failure." 30 C.F.R. § 842.11(b)(1)(ii)(B). OSM reviews the State's response to determine that it was not arbitrary, capricious, or an abuse of discretion because the action would result in correction of the violation or because OSM agrees there was "good cause" under the State regulatory program for not taking action, including the possibility that there was no violation. 30 C.F.R. § 842.11(b)(1)(ii)(B); see *Marion Docks, Inc. v. OSM*, 168 IBLA 47, 51-52 (2006), discussing *Pittsburgh & Midway Coal Mining Co. v. OSM*, 132 IBLA 59; *Ronald Maynard*, 130 IBLA 260, 265-66 (1994), quoting 53 Fed. Reg. 26732, 26735 (July 14, 1988). OSM may have determined that PADEP had established good cause under 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i) by showing that no violation of the Pennsylvania regulatory program was occurring, but neither PADEP's response setting forth its position nor OSM's analysis of it are part of the record before the Board.

Given the circumstances presented here, an order calling for supplemental documentation would not be an efficient means of resolving the appeal. Mystic must be allowed an opportunity to address the expanded record, and the appeal could not proceed without serving the Director's decision, Mystic's NOA, and any additional submission on the parties holding permits and potentially others. The Director was required to provide "[t]he person alleged to be in violation" a copy of his decision on informal review. 30 C.F.R. § 842.15(b). His decision indicates only that a copy was

sent to the Office of the Solicitor in Pittsburgh.<sup>17</sup> In addition, the Board held in *Richard S. & Cathy L. Maddock (On Reconsideration)*, 167 IBLA 200, 205, 208 (2005), that in promulgating 43 C.F.R. § 4.1105(a)(5), “the Department intended to designate the permittee of the operation that is the subject of a citizen’s complaint as a statutory party to any appeal filed with the Board from an OSM decision on informal review under 30 CFR 842.15.” In accordance with the regulation at 43 C.F.R. § 4.1105(a)(5) a statutory party in an appeal from a Director’s decision issued under 30 C.F.R. § 842.15(d) is “the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM.” The certificate of service accompanying Mystic’s NOA shows only that copies were sent to the two OSM offices specified in the Director’s decision; it does not show service on a permittee. Copies of the permits for the Helvetia Lucerne Mine No. 6 and the Helvetia Refuse Disposal Area No. 1 are not part of the record, so the Board does not know who those permittees might be. Nor can it ascertain, based on the limited record it received, whether other parties should be served because they participated in the proceedings before OSM.

#### *Conclusion*

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 September 25, 2007, decision of the Acting Regional Director is set aside and remanded.

\_\_\_\_\_/s/\_\_\_\_\_  
T. Britt Price  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

<sup>17</sup> The record was submitted to the Board by an attorney in the Pittsburgh office under a cover letter which stated that “the Appellee will not be filing an Answer, but rather will stand on its September 25, 2007, decision on informal review.”