

INTERIOR BOARD OF LAND APPEALS

West Virginia Highlands Conservancy

130 IBLA 295 (August 25, 1994)

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Editor's note: Reconsideration denied by Order dated Sept. 27, 1994.

WEST VIRGINIA HIGHLANDS CONSERVANCY

IBLA 94-728

Decided August 25, 1994

Appeal from a failure to conduct informal review of a decision not to inspect or take appropriate enforcement action in response to a citizen's complaint concerning a surface coal mining operation. West Virginia Permit No. S-1008-89.

Dismissed.

1. 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 when the decision specifically grants such right of appeal. The Board does not have jurisdiction to review the failure of OSM to conclude informal review within the 30-day period established in 30 CFR 842.15(b).

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., and Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for appellant; Sandra M. Lieberman, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On May 25, 1994, the West Virginia Highlands Conservancy (the Conservancy) filed a notice of appeal "[p]ursuant to 30 C.F.R. § 842.15(d) and 43 C.F.R. § 4.1282(a)" asserting that the Office of Surface Mining Reclamation and Enforcement (OSM) had "denied [the Conservancy's] requested relief by failing to conclude informal review within the time specified by the Secretary's informal review regulations. See 30 C.F.R. § 842.15(b)." 1/

1/ 30 CFR 842.15(a) provides that a person who is or may be adversely affected by a surface coal mining operation "may ask the Director or his or her designee to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12." 30 CFR 842.15(b) provides that "the Director or his or her

According to the Conservancy's notice of appeal, it "requested informal review of the failure of OSM's Charleston Field Office to conduct a federal inspection of * * * permits and operations" of LaRosa Fuel Company, Inc. (LaRosa) and then to:

(1) cite LaRosa for the ongoing violations on West Virginia Permit No. S-1008-89, issued to Frush Enterprises, Inc., but principally mined by LaRosa, (2) cite LaRosa for mining without a valid permit on the portion of Permit No. S-1008-89 that LaRosa persuaded West Virginia to add as an "incidental boundary revision," and (3) issue the notice required by 30 C.F.R. § 733.12(b) to inform West Virginia that it is failing to enforce its approved program.

OSM received the Conservancy's request on April 1, 1994, the Conservancy observes, "and therefore [OSM's] informal review decision was due on or before May 1, 1994."

In its statement of reasons (SOR) for appeal, the Conservancy contends that "OSM's failure to conduct informal review and report the results to the Conservancy within the time that the Secretary's regulations establish for doing so effectively denies the relief that the Conservancy seeks" (SOR at 2 (footnote omitted)). "Officially, neither OSM's Director nor his designee has indicated when they intend to issue an informal review decision," the Conservancy states. "OSM may not bar access to this Board, and thus to final decisions of the Secretary on inspection and enforcement matters, by violating the deadline for deciding informal review requests." *Id.* at 3 (footnote omitted). The Conservancy requests that we "treat OSM's failure to decide as a denial of requested relief and, following [our] own review of the record, order OSM to conduct a federal inspection and to provide the relief that the Conservancy requested in its complaint and petition for informal review." *Id.* at 4.

OSM responds: "If this argument is to have any merit, before the Conservancy is permitted to bypass the regulatory procedure, it should at least be required to show that the delay is unreasonable" (Brief in Response to SOR at 8).

[1] 30 CFR 842.15(d) provides that "[a]ny determination made under paragraph (b) of this section 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(b) requires the decision on informal review to be "in writing." Further, 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 where the decision specifically grants such right of appeal."

fn. 1 (continued)

designee shall conduct the [informal] review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request."

(Emphasis added.) We are bound by regulations promulgated by the Department. Western Slope Carbon, Inc., 98 IBLA 198 (1987). 2/

In this case there is no written decision by the Director or his designee. Nor can we find that a 24-day delay in complying with the requirement that OSM decide within 30 days of receiving the request is unreasonable and tantamount to a denial of the request. Under such circumstances, we may not ignore the jurisdictional requirements embodied in 43 CFR 4.1281.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

2/ We note that in the preamble to publication of the final rules governing procedures in surface coal mining hearings and appeals, the Department explained that it had expressly rejected suggestions that 43 CFR 4.1281 be changed so as to provide for Board review of unwritten decisions of the Director of OSM. Several commenters argued that "unwritten decisions of the Director of OSM should be appealable and [that] the Director of OSM should not have control over the appealability of his decisions." The Department rejected both parts of the comment. 43 FR 34385 (Aug. 3, 1978).