

INTERIOR BOARD OF LAND APPEALS

Patricia A. Marsh

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PATRICIA A. MARSH

IBLA 93-118

Decided September 19, 1995

Appeal from a decision of the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement, declining to take Federal enforcement action in response to a citizen complaint. TDN 92-112-433-02.

Decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints:  
Generally—Surface Mining Control and Reclamation Act of 1977: State Program:  
10-day Notice to State—Surface Mining Control and Reclamation Act of 1977:  
Water Quality Standards and Effluent Limitations: Generally

Under West Virginia State law, an operator of a surface mining operation is required to replace the water supply of an owner of interest in real property when that owner's underground or surface source of supply is contaminated, diminished, or interrupted by such operation, unless waived by the owner. When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging a failure to continue to supply replacement water, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the owner waived the right to replacement water under West Virginia State law.

APPEARANCES: Patricia A. Marsh, pro se, Wheeling, West Virginia; Steven C. Barclay, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Patricia A. Marsh has appealed from an October 23, 1992, decision of the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement (OSM), affirming the July 21, 1992, determination of the Director of the Charleston, West Virginia, Office. That determination found that the State of West Virginia (State) had shown

good cause for not taking any action on Marsh's citizen complaint, and that no further action by OSM was required.

### Background

Patricia and Morton Marsh own surface rights to property in Marshall County, West Virginia, which was undermined by longwall mining methods used at Consolidation Coal Company's (Consol) Shoemaker Mine, permit U-146-82. In April 1983, the Marshes began experiencing substantive impacts from longwall mining near their property, including the loss of several sources of water supply.

In response to a citizen complaint filed by the Marshes with OSM in 1984, OSM issued 10-Day Notice (TDN) 84-11-18-17 to the State, pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1988), stating that Consol "has caused subsidence which has resulted in a loss of water supply at the Morton C. Marsh property." On December 4, 1984, the Director of the West Virginia Department of Natural Resources issued a Notice of Violation (NOV) stating Consol was in violation of W. Va. Code § 20-6-27(b) because it failed to replace two agricultural water supplies on the Marshes' property which had been interrupted by underground mining. Consol subsequently abated the NOV by providing replacement water to the Marshes through a metered connection from the Marshall County Public Service District. The validity of the NOV was upheld by a decision of the West Virginia Reclamation Board of Review (State RBR) on March 24, 1986. Consolidation Coal Co. v. Director, West Virginia Department of Natural Resources, Appeal Nos. 84-17-RBR, 84-18-RBR (Mar. 24 1986). Consol did not appeal the decision.

On July 23, 1985, the Marshes and other neighboring property owners jointly filed a civil action against Consol and the State of West Virginia in the Circuit Court of Kanawha County. Marsh v. Consolidation Coal Co., No. 85-C-3045 (Kanawha County Cir. Ct., filed July 23, 1985). Relief sought included, inter alia, "requiring the defendants to replace all water and water sources which have already been lost as a result of its activity." The parties entered into a "Settlement Agreement and Release in Full" (settlement) in November and December 1991, and the case was apparently dismissed on February 3, 1992. The settlement, executed by the Marshes on December 4, 1991, provided in pertinent part:

Morton Marsh and Patricia Marsh, husband and wife, \* \* \* for and in consideration of the sum of six hundred thousand dollars (\$600,000), \* \* \* do for ourselves, our heirs, charges, wards, assigns, and successors, personal representatives, and any and all persons, release and relieve, acquit and forever discharge Consolidation Coal Company \* \* \* from any and all claims, demands, actions and causes of action of whatever kind for, but not limited to, \* \* \* property loss or damage, water loss

or damage, failure to reclaim, failure to replace or restore water supplies, attorneys fees, costs and any and all other types of damages caused or contributed to or arising in any way (past, present or future) by CONSOLIDATION COAL COMPANY'S underground mining of the Pittsburgh coal seam, including specifically longwall mining, conducted prior to the date of this Agreement beneath the real properties of the undersigned, which property is located on or adjacent to Pine Hill Road in the area of Big Wheeling Creek in Marshall County, West Virginia. [Capitals in original.]

(Settlement at 1-2).

Subsequently, by copy of a January 16, 1992, letter addressed to the Marshall County Public Service District, Consol advised the Marshes that it would discontinue paying for the public water source at their property as of January 24, 1992. This letter gave rise to the citizen complaint filed by Patricia Marsh with OSM on January 31, 1992. Therein, she informed OSM of Consol's action and forwarded various related documents.

In her complaint, Marsh asserted that the settlement addressed only the issue of water sources not replaced by Consol at the time of the settlement, and had no effect on the replacement water previously provided by Consol to abate the NOV issued on December 4, 1984. Marsh also referred OSM to footnote 12 of the West Virginia Supreme Court's decision in Russell v. Island Creek Coal Co., 182 W. Va. 506, 389 S.E. 2d 194 (1989), in support of her complaint. That footnote draws a distinction between a waiver of a private right to water replacement and the public's right to assure enforcement of West Virginia's Surface Coal Mining Act.

In response to Marsh's complaint, OSM's Charleston Field Office issued TDN 92-112-433-02 on February 7, 1992, to the West Virginia Division of Environmental Protection. The TDN was limited to Consol's failure "to continue providing and paying for \* \* \* [Marsh's] public water source." The State responded to the TDN on February 10, 1992, stating "[d]ue to a settlement between the company and the citizen, no action has been taken by this authorized representative as advised by Attorney General."

By letter dated July 21, 1992, the Charleston Field Office, OSM, responded to Marsh's complaint, concluding that by signing the settlement, Marsh had "waived all rights to water replacement, including the supply of water from the Marshall County Public Service District #3 that was provided by Consol." OSM also concluded that waiver of such rights was authorized under W. Va. Code § 22A-3-24(b) (1992). Accordingly, OSM found that "the State has shown good cause for not taking any action in this case, and no further action by OSM is required."

By letter dated September 8, 1992, Marsh requested an informal review pursuant to 30 CFR 842.15, listing seven reasons why she was requesting such review. By decision dated October 23, 1992, the Deputy Director, Operations and Technical Services, OSM, affirmed the determination of the Charleston Field Office. In responding to each of the seven reasons specified by Marsh, he made clear that the only issue raised by Marsh in her request for review was whether a waiver of water supply replacement occurred. Marsh appealed the Deputy Director's decision to this Board, and submitted a request for hearing.

#### Issues on Appeal

On appeal, appellant asserts in her statement of reasons (SOR) that Consol was required to provide replacement water to her property as a result of the final State RBR decision upholding the 1984 NOV, and that requirement could not be waived by her execution of the settlement. Contending that the water replacement issue is only a side issue, Marsh argues that the basic issue includes the issuance of an invalid permit to Consol by the State, the damage to their surface property caused by subsidence, and the unconstitutional taking of their property.

In its answer, OSM argues that even if replacement of the water sources involved in the 1984 NOV was not an issue in the 1985 State civil action, the settlement is sufficiently broad to include replacement of all water supplies. Further, OSM notes that in the complaint filed in the 1985 State civil action, water replacement was part of the relief sought, but the water sources covered by the 1984 NOV were not excluded. OSM concludes that "[w]hen Marsh settled with Consol, she gave up all rights to water replacement, whether they were mentioned in the complaint or not" (Answer at 10).

OSM also contends that appellant may not raise additional complaints without supporting information after the initial citizen complaint is filed. Noting that Marsh did not raise the subsidence issue or any other issue in her initial complaint filed on January 31, 1992, OSM asserts that this appeal should be confined to the issue of water replacement.

In her reply to OSM's answer, Marsh reiterates her assertion that the State RBR decision was final and could not be waived by execution of the settlement, and argues that the settlement was never intended to refer to replacement water already supplied by Consol.

#### Analysis

We agree with OSM that the Board's review should be limited to the issue of water replacement. The record shows that appellant's initial complaint letter dated January 29, 1992, refers only to Consol's decision to discontinue providing replacement water. Later, appellant's

September 8, 1992, letter requesting informal review of OSM's denial contained additional allegations that the State failed to require minimum general performance standards under SMCRA, and that both the State and OSM ignored a State regulation regarding subsidence. However, no evidence in support of these allegations was offered in the letter. Appellant's SOR is the first document in which reference is made to other issues for which supporting evidence is submitted. As noted by OSM, before it can begin the enforcement process, it must have reason to believe that a violation exists. 30 CFR 842.11(b)(1)(i). That requirement is met "if the facts alleged by the informant would, if true, constitute a violation." 30 CFR 842.11(b)(2). In this case, the only facts alleged in the January 1992 complaint related to the issue of water replacement. Accordingly, OSM issued a TDN alleging a failure by Consol to continue providing and paying for a public water source for Marsh. The Board's review authority under 30 CFR 842.15(d) is limited to that issue.

[1] Our review of the settlement and the record indicates Marsh did, in fact, waive all rights to water replacement arising from Consol's mining operations.

The right to replacement water may be waived under West Virginia law. W. Va. Code 22A-3-24(b) provides in relevant part:

Any operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner's supply of water \* \* \* from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately caused by such surface-mining operation, unless waived by said owner. [Emphasis added.]

W. Va. Code 22A-3-3(w)(1) defines "surface-mining operation" as including "surface impacts incident to an underground coal mine."

Further, we do not find that the Russell case supports appellant's assertion that she cannot waive her rights to water replacement. On the contrary, Russell held that "the trial court properly concluded that W. Va. Code, 22A-3-24(b) [1985], which permits the waiver of private water rights, is consistent with 30 U.S.C. sec. 1307(b) (1988)." Russell, supra at 205. Footnote 12 merely notes that a private waiver "does not serve as a waiver of the public right to regulate surface mining operations." Id. at 206. The issue in this case is the waiver of a private right to water replacement, not the public's right to regulation of surface coal mining operations.

Moreover, the evidence does not support appellant's assertion that the settlement did not affect existing water replacement. The settlement releases Consol from "any and all claims \* \* \* for failure to replace or restore water supplies \* \* \* and for any and all other types of damages

caused or contributed to in any way (past present or future)" by Consol's underground mining, and contains no exclusions for any existing water replacement.

Appellant argues that the 1984 State RBR decision was a final administrative decision that cannot be waived. We cannot agree. The record indicates that the NOV affirmed by the State RBR was issued for violation of a private right which, as indicated earlier, may be waived pursuant to State statute.

Finally, in reference to appellant's request for a hearing, 43 CFR 4.1286(b) provides that the Board has discretion to refer a case to an Administrative Law Judge for a hearing on an issue of fact. We conclude that resolution of the issues in this case does not require a hearing because there are no material issues of fact.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the request for hearing is denied and the decision appealed from is affirmed.

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John H. Kelly  
Administrative Judge

I concur.

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Bruce R. Harris  
Deputy Chief Administrative Judge