

INTERIOR BOARD OF LAND APPEALS

Ambleside, Ltd.

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AMBLESIDE, LTD.

IBLA 93-276

Decided March 6, 1996

Appeal from a decision of the Field Office Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, following informal review, declining to take any Federal enforcement action. TDN No. 91-81-061-07 TV-1.

Affirmed as modified.

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

An OSM decision on informal review of a determination that the State response to a 10-day notice was "acceptable," which concludes that no Federal enforcement action is warranted, will be upheld when the record shows that at the time of OSM's decision on informal review conditions at the minesite, which was the subject of a citizen's complaint resulting in the 10-day notice, had improved such that no uncorrected impacts required remedial action.

APPEARANCES: F. Allen Lewis, Esq., Greene & Lewis, Pineville, Kentucky; Margaret H. Poindexter, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ambleside, Ltd. (Ambleside), has appealed from an October 14, 1992, decision of the Field Office Director, Lexington Field Office (LFO), Office of Surface Mining Reclamation and Enforcement (OSM), following informal review, declining to take any Federal enforcement action in response to a citizen's complaint filed by Ambleside alleging that surface coal mining activities at Appolo Fuels, Inc.'s (Appolo's), permit No. 807-0213 resulted in major erosion and deposition of silt in the Ambleside Development in Lick Fork, Bell County, Kentucky.

In a memorandum to the LFO Director, OSM, dated August 5, 1991, the London Area Office (LAO) Manager, OSM, requested that Kam Fok, an environmental engineer from OSM's Eastern Support Center (ESC) be assigned to evaluate a situation at Appolo's permit No. 807-0213. ^{1/} Therein, the Area Office Manager stated, in part:

Appolo Fuels, permit # 807-0213 was issued a ten day letter (TDL) on April 17, 1991. This TDL was resolved based on the issuance of a non-compliance by the State. However, as of July 31, 1991, no remedial measures have been taken to correct the violations.

We have gone through the ten day letter process. The citizen is still not satisfied and continues to call and has written another complaint letter. We feel the way to handle the situation is to have the area evaluated by the above expert.

On November 5, 1991, OSM issued Ten-Day Notice (TDN) No. 91-81-061-07 TV-1 to the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE). Therein, it described the violation as a "[f]ailure to conduct surface mining operations so as to prevent material off-site damage to private property in Lick Fork. (Ambleside Subdivision)." In a November 13, 1991, response to the TDN, the Regional Administrator, Middlesboro Regional Office, DSMRE, stated that DSMRE had previously issued a notice of noncompliance to Appolo in May 1991 for a "diversion breach on permit no. 807-0213 which was being used to divert surface runoff from approximately nine disturbed acres to sediment structure no. 100. The mining company quickly and efficiently repaired the break and the violation was abated * * *." The Regional Administrator further explained that the Lick Fork watershed above Ambleside had a surface area of approximately 1,700-1,800 acres; that Appolo's operation was about 2 miles from Ambleside; and that there were several other disturbances between Appolo's operations at that time and Ambleside, including two "pre-law" coal operations, slides of unconsolidated materials, old logging operations, present logging operations, and Ambleside's own construction. In conclusion, he stated that "[t]o imply that nine reclaimed acres which is .5% (one-half of one percent) of an 1800 acre drainage area is the sole reason for Ambleside's problem, appears to me to be frivolous. Therefore, we feel the action this office has taken on this complaint is sufficient."

^{1/} No document predating this memorandum is contained in the case file forwarded to the Board by OSM. Presumably, the "citizen" mentioned in the memorandum was Ambleside. OSM is reminded that the case record submitted to the Board in an appeal is to contain the complete, original administrative record, including all original documentation involved in the matter, presented in reverse chronological order. William Helton Pullen, Jr., 112 IBLA 218, 223 (1989); Save Our Cumberland Mountains, Inc., 108 IBLA 70, 84, 96 I.D. 139, 147 (1989). In the case of a citizen's complaint, the first document placed in the file should be the complaint.

In a December 6, 1991, memorandum to LFO, evaluating DSMRE's response, the LAO concluded that the response was inadequate because while DSMRE had "required repair of the breached diversions and seeding and mulching of the affected permit areas," it "failed to address the obvious off-site damage." It recommended "that a Federal Notice of Violation be issued to the permittee and require the removal of sediment of the portion of Lick Fork that runs through Ambleside Subdivision and additional measures to prevent additional sediment from washing downstream." There is no evidence that OSM issued a notice of violation based on this recommendation.

In a letter dated March 17, 1992, the LFO Director advised Ambleside that it was conducting a technical evaluation of the effect of Appolo's mining operation on the Lick Fork watershed and that he would provide Ambleside with a copy upon its completion. On March 23, 1992, the LFO Director received a single-page memorandum, dated March 17, 1992, from the Acting Assistant Director, ESC, summarizing the results of the "evaluation."^{2/} The Assistant Director stated that an engineer from ESC had visited the site to observe the field conditions; that he then used a "computer modeling program (SEDCAD+)," utilizing actual field data and information from the permit file, to determine sediment loads under "four scenarios;" and that "[w]hile he anticipated an increase in sediment loading in the downstream reaches of Lick Fork during the time of mining, especially at the time of diversion ditch breach, we actually found a slight reduction in sediment over pre-SMCRA [Surface Mining Control and Reclamation Act of 1977] mining conditions."^{3/}

On April 1, 1992, OSM conducted an inspection as a follow-up to TDN No. 91-81-061-07 TV-1. In the Mine Site Evaluation Report of that inspection, dated April 7, 1992, OSM reclamation specialist E. Dudley Shumate, Jr., stated:

^{2/} That memorandum states that the "investigation of the off-site damage from siltation in the Lick Fork watershed" was undertaken pursuant to a Dec. 19, 1991, memorandum from the LFO Director. That Dec. 19, 1991, memorandum is not part of the record forwarded to the Board.

^{3/} The memorandum is the only narrative discussion of the "evaluation." If ESC compiled a separate narrative report, it is not part of the record forwarded to the Board by OSM. The documents included in the file are five maps stapled to the memorandum and four multiple page computer generated printouts representing the "four scenarios." They are (1) conditions prior to SMCRA, (2) "conditions at the time of the diversion ditch breach in December 1991," (3) "conditions at the time of the diversion ditch break in December 1991," and (4) "present conditions." It is not clear from the record what the nature of the breach was in December 1991 or why it was included as one of the "scenarios."

An inspection of the alleged off-site damage from siltation in the Lick Fork watershed was conducted by Mr. Kam Fok, an environmental engineer with the Eastern Support Center.

It was determined that the surface mining operation of Appolo Fuels Inc. (KY permit #807-0213) had not contributed additional sediment to the lower reaches of Lick Fork. Therefore, TDN #91-81-061-07 TV-1 is considered resolved.

In a Mine Site Evaluation Report, dated April 8, 1992, OSM reclamation specialist Gary W. Hall stated on page eight that during a joint inspection of permit No. 807-0213 with DSMRE officials on October 31, 1991, a violation of "405 KAR [Kentucky Administrative Regulations] 16:060" was observed for "failure to prevent material damage to the hydrologic balance outside the permit area." He explained:

On May 19, 1991, a heavy rain breached diversion ditches near pond #100 and caused damage off the permit. The KY DSMRE responding to citizen complaints from Ambleside Subdivision (located in Lick Fork below permit) issued Non-Compliance #02-6364 dated 5/20/91; 405 KAR 16:080 - failure to maintain diversions BD2, BD4B and BD11. The remedial measures required repair of the diversions, and seeding and mulching of the eroded permit area but failed to address any off-site damage.

Two of the diversion breaches occurred in areas where the permittee had been cited for slides off the permit. It was still evident where the breaks had occurred and signs of excessive erosion extended from the permit area down the mountain side to the receiving stream. Excessive disposition of sediment was evident from the permit area down to the stream crossing located at the lower edge of Ambleside Subdivision.

(Report at 8-9).

However, in concluding his report, Hall stated:

On January 16, 1992, Dudley Shumate of the London [OSM] and Kam Fok, an engineer from the Pittsburgh [OSM] Office and myself conducted a partial inspection to evaluate the permit for off-site damage. Mr. Fok's final report dated 3/17/92 concludes that the mining operation has not contributed to sedimentation at Ambleside. (report attached)

Based on Mr. Fok's report, violation #3, off-site damage cannot be technically proved and the TDN #X-91-81-061-07 (TV:1) dated 11/5/91 is considered resolved.

(Report at 9).

A "Conversation Record" in the case file, dated April 8, 1992, and signed by Hall states that he called Ambleside on April 8 and advised it of Fok's report. He stated that Ambleside requested a copy. There is no indication that Ambleside was offered a copy of either the April 7, 1992, or April 8, 1992, Mine Site Evaluation Inspection Reports at that time.

In a letter dated April 14, 1992, the LAO Manager informed Ambleside that ESC had concluded that Appolo had not contributed to the flooding damage at Ambleside. He stated that OSM considered DSMRE's response to the TDN to be "acceptable" and that OSM considered the TDN resolved. He advised Ambleside of its right, pursuant to 30 CFR 842.15, to seek informal review of the action taken.

By letter dated April 23, 1992, Ambleside requested that the LFO Director conduct informal review. By letter dated May 5, 1992, the LFO Director informed Ambleside that, as a result of Ambleside's letter, he had "requested the Eastern Support Center to review your opinion and determine if modifications to their original evaluation are necessary." He also invited Ambleside to provide any additional evidence it might have to support its position that Appolo was responsible for off-site damage, so that ESC could evaluate that information.

In a Mine Site Evaluation Inspection Report, dated July 15, 1992, Hall stated that he and two employees of ESC, including engineer Fok, met with a DSMRE engineer and representatives of Ambleside at Appolo's permit area on July 7, 1992, and that "[a]s a result of this meeting and the on-site inspection, the Eastern Support Center will re-evaluate the March 17, 1992 report with regard to the Ambleside LTD. complaint." He also noted the report "to reflect outstanding TDN."

On September 4, 1992, ESC issued a report prepared by Fok, entitled "Appolo Fuels Off-Site Siltation Damage." Therein, Fok stated that, as a result of Ambleside's informal review request, additional information was gathered and two adjustments were made to two parameters used in the previous hydrologic and sedimentologic models. Utilizing that new information, Fok prepared new models and concluded on page four:

The models indicate that mining significantly impacted the sediment load and peak discharge of Lick Fork. The bulk of the sediment is attributed to the mining area above the breached collection ditch. During the May 19, 1991, storm, this sediment was transported by overland and channelized flow to Lick Fork. Sediment remained in suspension within Lick Fork until the waters overtopped the stream channel above the area of the dual 72-inch culverts. As the velocity slowed the sediment fell from suspension and some was deposited on the streets of Ambleside. [4/ A

^{4/} Fok stated on page one of his report, under the heading "Citizen's Allegations," that as a result of the flooding caused by the May 19, 1991, storm, "60 pickup trucks of sediment had to be removed by Ambleside."

large percentage of the sediment carried by Lick Fork was most likely transported past Ambleside downstream to Bennetts Run.

The sediment attributed to the mine site resulted from the breach that occurred in the collection ditch that led to pond #100 (4485 tons of sediment left the breach area). If the breach had not occurred, a majority of the sediment would have settled in the sedimentation pond. Finally, the storm occurred during a time when the mining operation's erosion and sedimentation control structures were most vulnerable: the mine area had been recently regraded, no terraces or vegetative cover existed. At the July 7, 1992, site visit, terraces had been constructed, vegetative cover[] existed, and no collection breaks were observed.

Storms of greater magnitude have occurred since the May 19, 1991, storm. According to the residents of Ambleside, similar flooding and sedimentation problems have not occurred. We attributed this to the improved conditions at the mining site.

The Assistant Director, ESC, by cover memorandum dated September 10, 1992, transmitted Fok's report to the LFO Director. By decision dated October 14, 1992, the LFO Director advised Ambleside of the completion of OSM's informal review and the findings of the ESC reevaluation. He stated on pages one and two:

The report notes that there may have been some scouring of the channel below the breach, but ESC feels that it is not possible to differentiate between natural channel formation and mine-induced scouring. With regard to sediment deposits at the Ambleside Development, it is my understanding that Ambleside Development has already removed the sediment that was deposited outside the stream bank.

It should be noted that ESC concluded that the sediment deposit was in part caused by the double 72-inch culverts and the flat slope area at the Ambleside Development. ESC informs us that their assessment found that the culverts may be undersized for the watershed.

He concluded that Federal enforcement action was not warranted. Ambleside filed a timely appeal of that decision.

Prior to that filing, on October 22, 1992, Appolo filed objections with OSM to the September 4, 1992, report, providing additional information regarding the situation. Therein, Appolo stated that it would have provided such information at the July 1992 on-site visit "if it had been contacted." As a result of Appolo's information, OSM again adjusted its computer models. In a memorandum dated December 7, 1992, the Chief, Program Support Division, ESC, reported the results to the LFO Director.

He stated that the "revised models show a significant reduction in flooding and siltation attributed to the breach of a diversion ditch on the Appolo mining operation from that of previous models." However, he stated that "we continue to find that a considerable tonnage of sediment left the Appolo site via the breach in the diversion ditch. If the breach had not occurred, most of the sediment would have been trapped in the sediment pond onsite." He concluded that because the September 4, 1992, report had not recommended any remedial measures, "no remedial measures are suggested herein." In a letter dated December 24, 1992, Ambleside objected to the changes reported in the December 7, 1992, memorandum. It requested the basis for the changes and stated that it would request its experts to review the revisions. By letter dated March 9, 1993, ESC provided the requested information and an explanation for the analysis directly to one of Ambleside's experts. The record contains no further submissions from Ambleside.

In its statement of reasons for appeal, Ambleside argues that the LFO Director's decision is inconsistent with the September 4, 1992, report because the report makes no mention that sedimentation was in part caused by the double 72-inch culverts and the flat slope area at Ambleside Development. It also cites error for failure to direct Federal enforcement. It charges that off-site damage directly attributable to the May 1991 surface mining violation remains uncorrected; that Ambleside continues to experience siltation problems not experienced prior to May 1991; and that the May 1991 violation "caused a washout of a portion of the stream bank of Lick Fork directly behind Ambleside resident Bill Keene Jr.'s backyard, causing Mr. Keene to lose a portion of his backyard."

[1] The Department promulgated the regulations found at 30 CFR 842.11 to implement OSM's oversight enforcement authority over state programs as set forth in section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994). The regulation at 30 CFR 842.11(b)(1)(ii)(B)(1) provides, in pertinent part, that an authorized representative of the Secretary shall immediately conduct a Federal inspection when that representative has reason to believe on the basis of information available to him or her that a violation exists and

[t]he authorized representative has notified the state regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. After receiving a response from the State regulatory authority, before inspection, the authorized representative shall determine in writing whether the standards for appropriate action or good cause for such failure have been met.

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause" are to be measured by whether the state regulatory authority's action or response to a TDN is arbitrary, capricious, or an abuse of discretion under the state program. ^{5/} "Appropriate action," as defined at 30 CFR 842.11(b)(1)(ii)(B)(3), "includes enforcement or other action authorized under the State program to cause the violation to be corrected." 30 CFR 842.11(b)(1)(ii)(B)(4) "lists five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 FR 26735 (July 14, 1988). 30 CFR 842.11(b)(1)(ii)(B)(4) states:

Good cause includes: (i) Under the State program, the possible violation does not exist; (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist; (iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation; (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met; or (v) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

In this case, in response to TDN No. 91-81-061-07 TV-1, DSMRE stated that it had previously issued a noncompliance and that Appollo had abated the violation. DSMRE essentially denied that Appollo's mining operation was responsible for the off-permit damage in the Ambleside Development. OSM's initial analysis of that response by its LAO was that the response was inadequate because DSMRE failed to consider off-permit damage and LAO recommended issuance of a Federal notice of violation to require cleanup of off-permit damage and additional measures to prevent further downstream sedimentation. There is no explanation in the record of why that recommended action was not taken. However, OSM did undertake its own evaluation of the situation by calling on its ESC staff. The initial ESC evaluation was that mining had resulted in "a slight reduction in sediment over pre-SMCRA mining conditions." Despite the unlikely nature of that conclusion, especially given LAO's description of the off-permit damage in its December 6, 1991, memorandum to LFO, OSM informed Ambleside by

^{5/} The regulation states:

"(2) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so."

letter dated April 14, 1992, that Appolo's operation had not contributed to the flooding damage at Ambleside and that it considered DSMRE's response to be "acceptable" and that the TDN had been "resolved."

Ambleside challenged that action and OSM considered the TDN to be reinstated (see Mine Site Evaluation Inspection Report, dated July 15, 1992). On reevaluation, following input only from Ambleside and not Appolo, OSM decided in a September 4, 1992, ESC report that "mining significantly impacted the sediment load and peak discharge of Lick Fork." While he accepted that conclusion, the LFO Director, nevertheless, declined to take any Federal enforcement action because there were "no uncorrected impacts which require remedial action."

After Ambleside filed this appeal, OSM conducted another evaluation based on information provided by Appolo, not Ambleside, concluding that while there was a "significant reduction in flooding and siltation attributed to the breach of a diversion ditch," "a considerable tonnage of sediment left the Appolo site via the breach in the diversion ditch" (Dec. 7, 1992, Memorandum).

Ambleside has provided no basis for overturning the determination that no Federal enforcement action is warranted. While the LFO Director's determination not to take enforcement action is a tacit finding that DSMRE took appropriate action in this case, it is clear that such a conclusion could not have withstood scrutiny at the time DSMRE filed its response in November 1991. In fact, at that time LAO recommended Federal enforcement action, stating that DSMRE had failed to address "obvious off-site damage." Nevertheless, it appears that the passage of time improved both on-site and off-site conditions to the extent that at the time the LFO Director issued his decision no Federal enforcement action was necessary. ^{6/}

However, we agree with Ambleside that the LFO Director's statements in his October 14, 1992, decision that the sediment deposit was "in part caused by" the 72-inch culverts and the flat slope area at the Ambleside Development are not consistent with the September 4, 1992, reevaluation. That reevaluation does not specifically state that the deposition was "in part caused by" the culverts or a flat slope area. In fact, there is no mention in the reevaluation of a "flat slope area." While the reevaluation does reference the culverts, it does so as a landmark to describe where the flood waters overtopped the stream channel. In addition, the LFO Director stated in his decision that "ESC informed us that their assessment found that the culverts may be undersized for the watershed" (Decision at 2). That statement is not supported by the record. It is not found in the reevaluation report, and if the LFO was "informed" of that fact at a later date, there is no written record memorializing it in the record transmitted

^{6/} As the LFO Director noted in his decision, "Ambleside Development has already removed the sediment that was deposited outside the stream bank."

to this Board. Accordingly, we modify the LFO Director's decision finding that the first paragraph on page two thereof discussing the culverts and a flat slope area is without support in the record.

Although Ambleside alleges continuing problems in its statement of reasons, it has failed to contradict with any specificity the statement in the September 4, 1992, reevaluation report on page four that storms of greater magnitude had occurred since May 19, 1991, but "[a]ccording to the residents of Ambleside, similar flooding and sedimentation problems have not occurred."

Finally, the allegation that an individual lost part of his backyard as part of the flooding in May 1991 has no relevance to whether the LFO Director's decision is in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

John H. Kelly
Administrative Judge