

INTERIOR BOARD OF LAND APPEALS

Kenneth and Gwen Thompson, et al.

144 IBLA 257 (June 8, 1998)

Title page added by:
ibiadecisions.com

KENNETH AND GWEN THOMPSON, ET AL.

IBLA 95-587

Decided June 8, 1998

Appeal of a Decision issued by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, upholding a Casper Field Office response to a citizen complaint objecting to disposal of noncoal waste on permitted sites. 95-14-DRC.

Affirmed.

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

When an appeal is taken from an OSM response to a citizen complaint, only the issues raised in the original complaint and addressed in OSM's decision are ripe for consideration on appeal.

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

An OSM decision finding no further action necessary in response to a citizen complaint alleging that a state solid waste disposal permit allowing the disposal of noncoal waste on permitted sites without the construction of bottom and side water barriers violates state and Federal regulations will be affirmed when the record demonstrates that the permit provisions allowing disposal of inert noncoal waste does not violate applicable Federal and state regulations.

APPEARANCES: Tom Fitzgerald, Esq., Frankfort, Kentucky, for Appellants; John S. Retrum, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Kenneth and Gwen Thompson (the Thompsons) and the Dakota Resource Council (Council) (referred to collectively as "the Complainants") appealed

a March 30, 1995, Decision issued by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), upholding the Casper Field Office response to a citizen complaint objecting to the failure to construct bottom and side water barriers at permitted sites for disposal of noncoal waste.

The State of North Dakota assumed primary responsibility for the regulation of surface coal mining lands within the State on December 15, 1980, and the North Dakota Public Service Commission (Public Service Commission) was designated as the authority responsible for the regulation of surface coal mining and reclamation operations subject to the State program. See 30 C.F.R. § 934.10. Since 1982 Basin Cooperative Services (Basin) has been the operator responsible for surface coal mining and reclamation operations at the Glenharold Mine in Mercer and Oliver Counties, North Dakota, and has operated under surface coal mining permits issued by the Public Service Commission. Basin ceased extracting coal from the Glenharold Mine and began conducting reclamation operations in June 1993.

Basin's coal mining permits incorporated inert solid waste management Permit No. SU-028, issued by the North Dakota State Department of Health (State Department of Health) pursuant to State Department of Health solid waste management rules. That permit authorized Basin to bury inert noncoal mine and construction waste in mined out pits beneath overburden materials returned to the pits. Various permit renewals enlarged the approved disposal area as mining progressed and, with the last permit renewal, issued in December 1991, the approved disposal area was about 1,700 acres in size and included land owned by the Thompsons.

The December 1991 permit renewal defines the term "inert waste" as

nonputrescible, nonwater soluble solid waste that will not in any way form a contaminated leachate. Inert waste includes but is not limited to: (1) construction and demolition material (such as wood, bricks, masonry, concrete (cured) and metal) resulting from the demolition or razing of buildings, roads or other structures; (2) trees and tree branches; (3) metal wastes that do not contain oils, solvents, PCB's or other similar materials; (4) bottom ash from coal-fired boilers; and (5) waste coal fines from air pollution equipment.

(Permit No. SU-028 at 4.) The permit renewal specifically prohibited disposal of "waste oil; PCB waste/oils; hazardous wastes * * *, hazardous materials; sludges; * * * or infectious wastes" in the approved areas. Id.

On August 16, 1994, the Thompsons and the Council filed a citizen complaint asking OSM to inspect the Glenharold Mine without prior notice to Basin. The Complainants alleged that for more than 12 years Basin had been disposing of waste in the Glenharold Mine under an illegal State Department of Health permit. They claimed that the State Department of Health permit violated OSM and the Public Service Commission performance

standards for waste disposal by allowing virtually unsupervised dumping into an unlined pit. The Complainants contended that the waste disposal at the mine included disposal of noncoal waste, which was governed by the performance standards set out in N.D. Admin. Code § 69-05.2-19-04 (Public Service Commission regulation 69-05.2-19-04). According to the Complainants, that regulation required construction of appropriate water barriers on the bottom and sides of noncoal waste disposal sites. They also maintained that statements in Basin's March 3, 1989, permit renewal application that no clay or synthetic liners had been placed in the disposal pits and that none would be constructed in the future was an admission that clearly demonstrated that none of the mandated barriers existed on the lands subject to Permit No. SU-028.

The Complainants asserted that

[t]his illegal permitting of a disposal site on the Glenharold Mine, and the subsequent waste disposal itself, not only has resulted in a technical violation of performance standards. It has also resulted in the largely unsupervised dumping of a wide variety of materials over a vast expanse of land, and consequently in a loss of public confidence in both the good will of the coal industry and [the] competence of regulatory agencies. The [Public Service Commission] has shunted its waste disposal inspection responsibilities to the [State Department of Health]. In turn, [State Department of Health's] only 1993 inspections of the site occurred in response to citizen complaints about the dumping of hazardous waste, including oil and grease, at the site. [1/] The purpose of North Dakota's performance standard

^{1/} This inspection is apparently a Sept. 8, 1993, Department of Health investigation of eight violations at the Glenharold Mine alleged by Local 9702 of the United Mine Workers of America (UMWA). See Sept. 9, 1993, Public Service Commission Inspection Report at 1. The UMWA also filed a citizen complaint with OSM and the Public Service Commission on Aug. 31, 1993, asserting repeated dumping of oil sludge at the margin of a wetland at the south end of the mine permit area, in violation of Permit No. SU-028 and Public Service Commission regulation 69-05.2-19-04, which require storage of oil sludge in designated permit areas and mandate design and construction of appropriate water barriers at disposal sites. The OSM Casper Field Office reviewed the complaint and issued a 10-day notice. After inspection, the Public Service Commission issued a Sept. 9, 1993, report addressing the alleged oil sludge dumping. The report concluded that, although there was no evidence that Basin had deposited oil sludge on the margins of the wetland, Basin had dumped solid residue contaminated with oil and/or grease, noting that clean-up under State Department of Health direction was in progress. The report further indicated that Basin had failed to take adequate containment or protective measures or properly dispose of solid wash bay residue. On Sept. 14, 1993, the Public Service Commission issued a State notice of violation, citing Basin for failure

69-05.2-19-04 appears to be to prevent the leaching of waste into groundwater and to make regular and effective inspection possible. The result of the permitting practice that was followed at the Glenharold mine has been to ignore the possibility of waste leaching into the groundwater and to render effective inspection nearly impossible.

(Citizen Complaint at 2.) The Complainants asked OSM to order an immediate cessation of all noncoal waste disposal on land subject to Permit No. SU-028 and all other places on the mine site and direct removal of all noncoal waste previously disposed on the permit for deposition in a landfill outside the permit area.

On August 18, 1994, personnel from the OSM Field Office, the Public Service Commission, the State Department of Health, the Thompsons, and representatives of the Council jointly inspected areas subject to surface coal mining Permits BCGH-8801 and CCGH-8003, issued by the Public Service Commission. ^{2/} The Field Office also reviewed the Public Service Commission mining permits, State Department of Health Permit No. SU-028, the performance standards set out in Public Service Commission regulation 69-05.2-19-04 and comparable requirements in 30 C.F.R. § 816.89, the State Department of Health's report, and the Public Service Commission's inspection report and response to the complaint.

In its August 24, 1994, response, the Public Service Commission acknowledged that performance standards for the disposal of noncoal waste

fn. 1 (continued)

to place and store noncoal wastes containing hydrocarbons in a controlled manner or in an approved permit area, and for failing to protect an undisturbed wetland area from runoff from coal stockpiles and noncoal waste. The Field Office vacated its 10-day notice on Sept. 14, 1993, noting that the Public Service Commission had issued a notice of violation, and that all of the soil residue from the wash bay disposal site had been properly removed and deposited in a satisfactory disposal site. After obtaining and reviewing additional information regarding Basin's waste disposal practices, the Public Service Commission vacated the State notice of violation on Sept. 29, 1993, concluding that Permit No. BCGH-8204 allowed disposal of soil residue at the wash bay disposal site in an area disturbed by mining in the 1960's, and that water samples taken by the Public Service Commission showed no wetlands contamination. On Oct. 26, 1993, OSM determined that the Public Service Commission's decision to vacate the notice of violation was not arbitrary, capricious, or an abuse of discretion, but required continued Public Service Commission monitoring by testing water quality from wells. Apparently, UMWA did not challenge OSM's determination.

^{2/} The site of the inspection was the W¹/₂SW¹/₄ sec. 10, the NW¹/₄ sec. 15, and the NW¹/₄ sec. 16, T. 143 N., R. 84 W., Fifth Principle Meridian, Oliver County, North Dakota.

required construction of "appropriate" water barriers on the bottom and sides of disposal sites. The Commission stated that Basin had disposed of inert noncoal waste on the Thompsons' land pursuant to Permit No. SU-028, issued by State Department of Health, adding that the North Dakota surface coal mining program mandated that all noncoal waste materials disposed within coal mining permit areas be permitted and deposited in accordance with mining performance standards and State Department of Health solid waste management rules. The Public Service Commission explained that the only materials that could be placed on the site pursuant to Permit No. SU-028 were inert materials which, by definition, would not contaminate water or form contaminated leachate. Therefore, the State Department of Health did not require impermeable liners for sites where inert waste was disposed. The response found that Public Service Commission regulation 69-05.2-19-04 was in conformance with 30 C.F.R. § 816.89 and was designed to prevent surface and ground water pollution. The State regulation required construction of "appropriate" water barriers and, because inert waste materials would neither contaminate water nor form contaminated leachate, no water barriers were required. Thus, the Public Service Commission concluded that the regulation did not mandate construction of liners or barriers within Permit No. SU-028, and that no liners or barriers were deemed necessary or appropriate. The report also stated that various inspections had revealed no evidence that Basin had disposed anything other than inert material within the permit area.

Responding to the Thompsons' charge that a portion of their land had been included in disposal areas authorized by Permit No. SU-028, the Public Service Commission stated that, even if the Thompsons were unaware that the permit included their land, their participation in an informal conference on Basin's application for Permit BCGH-8801 addressing burial issues was evidence that the Thompsons knew that Basin intended to dispose of mine wastes in the permitted area. The Public Service Commission response concluded that, when the State Department of Health did not require construction of water barriers, it did not violate the waste disposal performance standards set out in Public Service Commission regulation 69-05.2-19-04.

In its August 26, 1994, response to the citizen complaint, the Field Office acknowledged that Basin's permits did not require construction of water-proof barriers for the authorized waste disposal within the permit area. The Field Office noted, however, that because neither the Public Service Commission nor the State Department of Health considered inert waste to be toxic or hazardous, they did not require waterproof barrier installation. Based on its review of the description of the disposal methods and the materials authorized by Permit No. SU-028, the Field Office agreed that the allowed materials did not appear to be toxic or hazardous, adding that it had no evidence that materials other than approved wastes had been disposed within the permit area. The Field Office further stated that the Public Service Commission had the authority under Public Service Commission regulation 69-05.2-19-04 and the approved State program to determine when a barrier was needed, and that the Public Service Commission had adequately explained the reasoning for not requiring barriers in this

case. Accordingly, the Field Office determined that no violation of the North Dakota program existed and that no further action was warranted.

The Complainants did not seek informal review of the Field Office's determination until January 17, 1995. In the interim, the Complainants and the Field Office exchanged correspondence concerning sworn affidavits of six former mine employees stating that they had been ordered to dump grease, oil, and other hazardous material at the site. The Complainants expressed their opinion that these affidavits undercut the Field Office's assertion that it lacked evidence that anything other than inert waste had been disposed at the Glenharold Mine. ^{3/} The Complainants made it clear, however, that, although the affidavits contained information the Complainants deemed sufficient to warrant OSM investigation and enforcement action, the affidavits were not part of their citizen complaint. See Oct. 24, 1994, Council Letter. In a February 15, 1995, letter submitted after their request for informal review, the Complainants restated their position that, contrary to OSM's apparent misconception, the complaint did not rest upon the information in the affidavits, but centered upon the fact that the noncoal waste disposal permitting process completely ignored the pertinent provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994). See Feb. 15, 1995, Council Letter at 2.

In the request for informal review, the Complainants added three issues to their original argument that the permitting of the vast, unlined, and largely unmonitored noncoal waste disposal sites within the Glenharold Mine violated Public Service Commission regulation 69-05.2-19-04. The Complainants contended that both the Public Service Commission and the Field Office had allowed the State Department of Health to exceed its authority and adopt standards for noncoal waste disposal on mine permit areas in

^{3/} The six affidavits were executed in June 1994 and submitted to the Oliver County Board of Commissioners in a proceeding resulting from a letter written by Gwen Thompson, one of the parties to this action, alleging that Basin had been dumping wastes at the mine without a proper County permit. After an investigation and hearing to determine whether Basin had violated a County zoning ordinance by operating a solid landfill without obtaining a County permit, the County fined Basin \$15,000 but made no explicit findings of fact. Basin appealed. Relying on the extremely deferential standard of review for appeals from County zoning decisions mandated by State court precedent, the State district court judge upheld the fine, but noted that Basin had presented the affidavits of 12 current employees denying knowledge of grease or oil being disposed of at the mine and that, from a practical standpoint, it would have been impossible for Basin to open the old pits to disprove the allegations in the affidavits of six former employees. Basin Electric Power Cooperative v. Oliver County Board of County Commissioners, Case No. 33-94-C-1461 (N. Dak. District Court June 20, 1995), Memorandum Opinion at 1, 4.

reckless disregard of the fact that SMCRA did not differentiate between inert and noninert material. They maintained that, assuming arguendo, the side and bottom water barrier requirement could be waived in appropriate circumstances, the Public Service Commission and OSM had not demonstrated that waiver was appropriate in this case. The Complainants specifically challenged the lack of a waste characterization study proving that the waste disposed pursuant to Permit No. SU-028 would not contaminate groundwater and the lack of consideration of aquifers underlying and abutting the permitted disposal area or surface drainage into which surface runoff flowed. The Complainants further argued that importing noncoal wastes from outside the Glenharold Mine for disposal constituted an unlawful trespass exceeding any agreement between Basin and the landowners, because 30 C.F.R. § 816.89(a) allowed only the disposal of noncoal wastes generated by surface mining activities. ^{4/} The Complainants suggested that Basin had disposed nonmining asbestos waste, contrary to assertions made to the Thompsons, and averred that the State Department of Health had no authority to permit asbestos disposal, that the Public Service Commission and the Field Office had violated SMCRA by allowing that practice, and that Basin had breached the terms of its permit and committed an unlawful trespass. ^{5/}

In a Decision dated March 30, 1995, the Assistant Director, OSM, upheld the Field Office's response to the citizen complaint. He identified the issues before him as the disposal of noncoal waste, including materials not related to mining activities, on the Thompsons' property and throughout the permitted sites without the construction of appropriate bottom and side water barriers, and the relationship between the State Department of Health waste management rules and the Public Service Commission surface mining regulations. The Assistant Director found that, although the Public Service Commission's review of mining permit applications involved input from other State agencies such as the State Department of Health, the Public Service Commission exercised total control over all aspects of Basin's permit application and retained the final authority and responsibility for accepting or rejecting any State Department of Health comments. He further noted that the mining permits approved by the Public Service Commission specifically addressed and allowed disposal of noncoal waste materials on the permitted sites, which included the Thompsons' property.

^{4/} We question the relevance of 30 C.F.R. § 816.89(a). That regulation addresses noncoal mining wastes such as "grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber and other combustible materials generated during mining activities" and requires that such waste be stored in a controlled manner and placed in a designated portion of the permit area. Permit No. SU-028 specifically prohibits disposal of those wastes identified in 30 C.F.R. § 816.89(a).

^{5/} The only reference to asbestos in the record is found in Basin's Mar. 3, 1989, permit renewal application which lists asbestos wastes as one type of material to be deposited at the site. Permit No. SU-028 does not authorize disposal of asbestos waste, and the record contains no evidence that any asbestos was buried at the site.

The Assistant Director stated that State Department of Health permit No. SU-028 limited disposable material to inert products and found that no evidence of disposal of materials other than those specified in that permit had been verified. Acknowledging the conflicting allegations made by the Complainants and Basin regarding burial of oil products on the permit sites, he concluded that the backfilling and grading completed on the sites rendered any further surface inspection of the backfilled and graded area futile. He observed, however, that the State Department of Health had agreed to establish water monitoring points near the perimeter of the Thompsons' property to detect illegally buried oil products and provide a factual basis for any future enforcement action, if necessary.

The Assistant Director determined that Public Service Commission regulation 69-05.2-19-04 allowed disposal of materials not related to mining in permitted areas when disposal of unrelated waste was allowed in the approved surface coal mine permit, and that this was the circumstance in the case of Basin's surface coal mining permits. He noted that "[p]aramount to the North Dakota issue was a decision that (1) the disposition of materials unrelated to mining would not negatively impact the hydrology or reclamation of the area, and (2) compliance with all surface mining regulations would be afforded." (Decision at 2.) He explained that the requirement in Public Service Commission regulation 69-05.2-19-04 that disposal sites must have appropriate bottom and side water barriers was clearly intended to preclude hydrological damage. Noting that the approved State Department of Health waste disposal permit allowed disposal of only those noncoal waste materials identified as inert, the Assistant Director found that the Public Service Commission's conclusion that the liner requirement was not applicable to Basin's disposal sites was reasonable and justified as a way to simultaneously reduce unnecessary administrative costs and permittee expense and satisfy the intent of the regulation. He therefore concluded that the Field Office's response to the citizen complaint was appropriate.

In their Statement of Reasons for Appeal, the Complainants argue that the Field Office failed to properly and thoroughly investigate their citizen complaint that there was improper disposal of noncoal mine wastes at the Glenharold Mine, linking their complaint for the first time to the September 9, 1993, Public Service Commission report documenting the results of the inspection of the mine conducted in response to the UMWA citizen complaint and the affidavits submitted by the six former Basin employees in the County zoning proceeding. See notes 1 and 3, supra. The Complainants contend that the information in the report and the affidavits more than sufficed to trigger OSM's statutory and regulatory duty to investigate possible improper waste disposal activities at the mine, and that the agency's refusal to further investigate the allegations of improper waste disposal was arbitrary, capricious, and otherwise inconsistent with law.

The Complainants further maintain that OSM failed to appropriately investigate and assure a suitable design of the waste disposal areas.

Citing the requirement in 30 C.F.R. § 816.89(a) that noncoal mine waste disposal sites are to be designed and constructed in a manner to ensure that leachate and drainage from the waste do not degrade surface or underground water, the Complainants contend that noncoal waste must be placed in a discrete, controlled, and managed area rather than spread throughout the approximately 1,700-acre permit area at the Glenharold Mine. According to the Complainants, the lack of a designated waste disposal area violated OSM and Public Service Commission regulations and allowed the entire permit area to be turned into the functional equivalent of an open dump. The Complainants object to OSM and Public Service Commission reliance on the State Department of Health permit's classification of the waste as inert as the basis for their conclusion that no barriers were needed, asserting that OSM and the Public Service Commission were obligated to independently scrutinize and analyze the wastes to prove that the wastes lacked the potential to create leachate before deciding whether barriers were unnecessary.

On appeal, the Complainants maintain that authorization of disposal of noncoal waste incidental to mining in Basin's coal leases with the Thompsons does not include a right of entry for the disposal of wastes generated outside the permit area which are not incidental to the mining operation. They argue that, because the surface mining laws do not authorize importation of noncoal wastes onto a mine site for disposal without the express consent of the surface owner, OSM erred when it failed to properly investigate whether Basin had the right of entry to dispose of wastes generated outside the permit area. The Complainants claim that OSM and the Public Service Commission must review the right of entry information and conduct an inquiry into whether Basin violated the Thompsons' rights by burying waste generated outside the permit area on the Thompsons' land. The Complainants conclude that OSM erroneously declined to conduct the thorough investigation into known and suspected unauthorized waste disposal necessary to assure groundwater protection and compliance with State and Federal regulations.

In its Answer, OSM avers that it did not abuse its discretion when it determined that there was insufficient reason to believe that a violation of Public Service Commission regulation 69-05.2-19-04 had occurred at the mine. It asserts that Basin's construction of waste disposal pits without water barriers did not violate that regulation because Permit No. SU-028 allowed disposal of only those materials which were inert and incapable of forming a contaminated leachate, rendering the installation of water barriers designed to prevent leachate and runoff from degrading surface or ground water unnecessary. In short, OSM maintains that it, the Public Service Commission, and the State Department of Health reasonably concluded that, under Permit No. SU-028, no water barrier was the appropriate barrier and that Basin, therefore, had not violated Public Service Commission regulation 69-05.2-19-04. Further, OSM contends that it adequately investigated allegations that Basin disposed of oil products at the mine in violation of the regulation and properly concluded that insufficient evidence of improper disposal existed. After noting that the Complainants had failed to provide OSM with any information on their belated claim that disposal of materials from outside the mine constituted an unlawful trespass

on the Thompsons' land, OSM points out that neither Public Service Commission regulation 69-05.2-19-04 nor Permit No. SU-028 explicitly prohibits the disposal of such materials at the mine. Accordingly, OSM concludes that it properly exercised its discretion in determining that insufficient information and reason to believe that a violation of Public Service Commission regulation 69-05.2-19-04 existed, and that it appropriately declined to take further action on the citizen complaint.

[1] As an initial matter, we note that the Complainants' original complaint has been enlarged throughout the course of this proceeding to include items not raised in the original August 16, 1994, citizen complaint. The Complainants stated in that complaint and repeatedly emphasized in later correspondence with OSM that their complaint focussed solely on the propriety of the State Department of Health's issuance of Permit No. SU-028 authorizing the disposal of noncoal wastes at the Glenharold Mine without requiring the water barriers specified in Public Service Commission regulation 69-05.2-19-04. On appeal, the Complainants raise additional allegations of improper waste disposal activities violating the permit, citing the September 9, 1993, Public Service Commission report documenting the inspection conducted in response to the UMWA citizen complaint and employee affidavits submitted during County zoning proceeding, and claims of trespass.

When OSM initiates an investigation based on allegations raised in a citizen complaint,

[t]he scheme of investigation, enforcement, and review must necessarily be limited to the set of facts alleged in the complaint and cannot be expanded to include items the complainant wishes to add after investigation and response by the State regulatory authority. Allowing periodic amendment or amplification of a complaint would clearly serve to undermine the comity considerations which are at the heart of the [10-day notice] process.

Foster E. Sword, 138 IBLA 74, 80 (1997); Betty L. and Moses Tennant, 135 IBLA 217, 226-27 (1996). Additional allegations might provide an independent basis for issuance of one or more 10-day notices but cannot be the basis for review of the State response to an initial 10-day notice. Foster E. Sword, *supra*. In this case, the only issue properly before us is whether Permit No. SU-028 allowing Basin to dispose of inert noncoal waste in unlined pits, on its face, violates Public Service Commission regulation 69-05.2-19-04.

[2] The performance standard for noncoal waste disposal set out in Public Service Commission regulation 69-05.2-19-04 directs that noncoal waste disposal sites be designed and constructed with appropriate water barriers on the bottom and sides. The comparable Federal regulation, 30 C.F.R. § 816.89(b), provides that

[f]inal disposal of noncoal mine wastes shall be in a designated disposal site in the permit area or a State-approved solid waste disposal area. Disposal sites in the permit area shall be designed and constructed to ensure that leachate and drainage from the noncoal mine waste area does not degrade surface or underground water.

The Federal regulation does not mandate water barriers; it focuses instead on the protection of surface and ground water systems and allows alternative techniques approved by the State regulatory authority. See 48 Fed. Reg. 43956, 44026 (Sept. 26, 1983).

Permit No. SU-028 authorized Basin to dispose of inert noncoal waste incapable of forming a contaminated leachate. Based upon this limitation, the Public Service Commission and the State Department of Health concluded that, under the circumstances, no water barrier would be required. In reviewing the State's determination that Permit No. SU-028 did not violate Public Service Commission regulation 69-05.2-19-04, OSM found the State's conclusion reasonable and declined to take any further action on the citizen complaint. Although the Complainants object to this finding, they have offered no evidence even suggesting that deposition of "nonputrescible, nonwater soluble solid waste that will not in any way form a contaminated leachate" will degrade surface or underground water.

A party objecting to an OSM decision not to enforce SMCRA in the face of a citizen complaint has the burden of establishing that OSM acted in error. See Morgan Farm, Inc., 141 IBLA 95, 100 (1997), and cases cited. The Complainants have not shown error in OSM's conclusion that allowing the disposal of nonputrescible, nonwater soluble solid waste that will not in any way form a contaminated leachate in unlined pits will not conflict with the goal of minimizing surface and ground water pollution animating both Public Service Commission regulation 69-05.2-19-04 and 30 C.F.R. § 816.89. Nor have the Complainants demonstrated that further investigation into their complaint is warranted. The issue raised in the citizen complaint does not rely on factual matters. The sole question raised by the complaint is whether, on its face, Permit No. SU-028 violates Public Service Commission regulation 69-05.2-19-04. 6/ We find no error in OSM's finding that, as issued, the permit does not violate applicable Federal and state regulations. We therefore uphold OSM's conclusion that no further action was warranted on the complaint.

6/ We agree with the Complainants that the threshold for determining whether a citizen complaint affords OSM sufficient reason to believe a violation exists is very low. See 30 C.F.R. § 842.11(b)(2). The OSM misstatement of the burden in its Answer does not undermine the validity of OSM's decision that the citizen complaint need not be investigated any further. The Complainants did not base their citizen complaint on discrete factual allegations provable during the course of an inspection of the site.

To the extent not specifically addressed herein, the Complainants' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur.

James L. Burski
Administrative Judge