

INTERIOR BOARD OF LAND APPEALS

William Phillips

152 IBLA 47 (March 7, 2000)

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WILLIAM PHILLIPS

IBLA 95-152

Decided March 7, 2000

Appeal from a decision by the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, in response to a request for informal review, requesting reconsideration of the determination by the Lexington Field Office that the Commonwealth of Kentucky had shown good cause for not taking enforcement action in response to a 10-day notice of a citizen's complaint alleging property damage caused by an underground coal mining operation. TDN 92-83-052-052.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--  
Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--  
Surface Mining Control and Reclamation Act of 1977: Subsidence: Generally

A decision in response to a request for informal review of a decision on a citizen's complaint, conducted pursuant to 30 C.F.R. § 842.15 and 43 C.F.R. § 4.1280, will be affirmed on appeal where the Appellant fails to offer evidence to demonstrate error in the decision which was based on an investigation which resulted in preparation of a technical report containing opinions of Departmental experts finding that the alleged damage did not result from surface impacts of underground mining.

APPEARANCES: Miller Kent Carter, Esq., Pikeville, Kentucky, for Appellant; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By letter dated February 22, 1992, William and Christine Phillips filed a complaint with the Office of Surface Mining Reclamation and Enforcement (OSM), West Prestonsburg, Kentucky, Area Office, alleging that McCoy Elkhorn Coal Corporation (McCoy Elkhorn Coal) was responsible

for damage to their property. On February 25, 1992, the Prestonsburg Area Manager, advised McCoy Elkhorn Coal and Mr. and Mrs. Phillips that their citizen's complaint, received on February 24, 1992, was transmitted via Ten-Day Notice (TDN) No. 92-83-052-052 to the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE).

Mr. and Mrs. Phillips stated in their citizen's complaint:

This property is located at the base of a mountain. We have water damage, there is orange water seepage in different locations on the property.

The mountain has breaks in behind us, also we show damage to our house and Beauty Shop. Cracks are in the foundation and the bricks.

We think McCoy Elkhorn Coal Co. is responsible for this condition.

The property is located on Grapevine Creek in Pike County, Kentucky.

The TDN served on DSMRE by OSM alleged that McCoy Elkhorn Coal was in violation of the following provisions of Title 405 of Kentucky Administrative Regulations: 405 KAR 18:060 (General hydrologic requirements), 405 KAR 7:040 (General obligations of operators and permittees), and 405 KAR 18:210 (Subsidence control). (TDN No. 92-83-052-052, dated February 25, 1992.)

By letter dated March 16, 1992, DSMRE reported to the Prestonsburg Area Office that Mr. and Mrs. Phillips had been informed "that the water seeps and slides are currently the subject of an on-going investigation being done by OSM" <sup>1/</sup> and that it had "found and documented subsidence crack(s) and notified the company via a Mine Inspection Report that subsidence has occurred and that they have thirty (30) days in which to take mitigating action. We took no enforcement action at this time."

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<sup>1/</sup> By letter dated Oct. 7, 1991, the Lexington Field Office (LFO) sought assistance from the Eastern Support Center (ESC), OSM, to determine if DSMRE had thoroughly considered the hydrology system related to McCoy Elkhorn Coal's above-drainage underground mine in the Pond Creek area near Mr. and Mrs. Phillips' home and property. Mr. and Mrs. Phillips' complaint was one of several filed with the Prestonsburg Area Office concerning slides adjacent to McCoy Elkhorn Coal's Permit No. 698-5092. The LFO sought the assistance of the ESC in conducting the review to determine if DSMRE's decision not to take action in response to the citizen's complaints was appropriate. (Memorandum dated Oct. 7, 1991, and entitled "Request for Hydrologic Technical Assistance, McCoy Elkhorn Coal Company, Permit Number 698-5092," to Carl Close, Assistant Director, ESC, from William J. Kovacic, LFO Director, at 1.)

OSM's Inspection Report dated February 16, 1993, completed by the Prestonsburg Area Manager and a staff Reclamation Specialist contains the following Addendum:

After numerous site visits and State and OSM investigations these violations alleged on pending TDN 92-083-052-052 were addressed by State NC#05-9226 and NC#05-9173.

OSM technical center could not relate alleged property damage to underground mine drainage. The seeps, slides, and subsidence problems were cited by DSMRE.

This Ten-Day Notice #92-083-052-052 will therefore be resolved effective February 16, 1993.

By memorandum dated February 2, 1993, the Assistant Director, ESC, OSM, advised the Director, LFO, that the McCoy Elkhorn Mine seepage and landslide investigation in Pike County had been completed, and attached a copy of the final investigative report, dated January 1993, and captioned "McCoy Elkhorn Citizen Complaint Along Grapevine Creek, Pike County Kentucky [(Report)]." The Report was prepared by a civil engineer, a mining engineer and an hydrologist. It contains the analysis and conclusions regarding complaints filed with OSM by several residents with properties along Grapevine Creek in Pike County.

The Report examines the water-related problems reported by Mr. and Mrs. Phillips in their citizen's complaint and concludes that "[t]he seeps and associated ponded water areas in [Phillips' yard] have not resulted in property damage." (Report at 2.) The Report continues:

OSMRE-ESC concludes that the primary cause of the surface water related problems in the [yard] of the \* \* \* Phillips [residence] is the topography. The change in topography from a steep hillside to a flat yard along a floodplain causes water to pond in the residents' [backyard] following precipitation events. While it is possible that the McCoy-Elkhorn mine slightly increases the volume of ground-water flow during low flow conditions \* \* \*, the seeps do not constitute the major source of the ponded water and the chemistry of the seeps are [sic] not at issue. A significant portion of the recharge to those seeps, present in the [yard], is however, from the McCoy-Elkhorn mine.

Id.

The Report included a comparison of projected premining data to current data for Mr. and Mrs. Phillips' water well which concluded that the

well had elevated sulfate and metal concentrations caused by drainage from the McCoy Elkhorn mine. (Report at 2.)<sup>2/</sup>

The Report identified the following structural damage on the Phillips property:

- (1) Separation of the poured concrete walkway and driveway from the house: separation of the front concrete stairs from the front porch by forward rotation: cracks in the driveway;
- (2) Vertical cracks in brick veneer on both sides of the house, below the windows near the front corners and horizontal mortar separations near the back sliding glass door. Three gages (AVONGARD Tell Tales) were attached to the house which measure, in millimeters, any movement \* \* \*. These gages were installed on July 16, 1992, by Ms. Murphy [mining engineer] over existing small cracks in the bricks and mortar joints;
- (3) There is no damage in the house except alleged cracking in the rear corners of the fire-box in the fireplace. There are no signs of corresponding cracks on the exterior walls; and
- (4) Cracks in the concrete block structure housing the beauty parlor.

Id. at 20.

The Report further provides a seven-point analysis of the alleged structural damage to the Phillips property and concludes: "The minor damage that has occurred at the Phillips residence is the result of the construction practices used and poor storm water management. OSMRE-ESC concludes that the damage is not mining related." Id. at 22.

The results and conclusions of the Report were communicated to Mr. and Mrs. Phillips by letter dated February 26, 1993, from the Director,

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<sup>2/</sup> OSM undertook an enforcement action against McCoy Elkhorn Coal for damage to subsurface hydrology as reflected in the increased sulfates in Mr. and Mrs. Phillips' well water. The enforcement case was concluded by a settlement agreement under which McCoy Elkhorn Coal reimbursed Mr. and Mrs. Phillips for the cost of acquiring a water supply. That case is not a part of this appeal. See Consent Decision, signed by Administrative Law Judge David Torbett, Office of Hearings and Appeals, U.S. Department of the Interior, dated Mar. 28, 1994, (Docket No. NX 94-1-R and NOV 93-83-052-001), incorporating by reference the settlement agreement and constituting the final order of the Secretary of the Interior.

LFO, along with OSM's determination that no further action was required by OSM. By letter dated March 22, 1993, Counsel for Mr. Phillips requested informal review of OSM's February 26, 1993, determination.

Informal review was conducted by the Assistant Deputy Director, OSM. Her decision dated June 7, 1993 (Decision), reviewed the merits of Appellant's request for informal review. Therein, the Assistant Deputy Director considered Appellant's allegations that water seepage caused damage to his home as a result of the underground mining activities by McCoy Elkhorn Coal. The letter continues:

A review of the records in this case show[s] that on October 7, 1991, as a result of previous complaints by Mr. Phillips' neighbors \* \* \* the LFO requested the OSM Eastern Support Center (ESC) investigate the complainants' property to determine if the damage to their homes and surrounding property was related to McCoy Elkhorn Coal Corporation's adjacent underground mine. Mr. Phillips' complaint was incorporated into the ongoing investigation.

Upon receipt of Mr. Phillips' complaint, LFO issued TDN 92-83-052-052 to DSMRE. \* \* \* DSMRE found some evidence of cracks in the earth behind the Phillips' and Anderson's residences, and McCoy Elkhorn was given 30 days in which to repair the subsidence cracks. No violations were issued at that time. Subsequent ESC inspections showed there was no evidence of subsidence on the Phillips' property.

In January 1993, the ESC investigation report was completed and contained the following conclusions as related to Mr. Phillips in a February 26, 1993, letter from LFO:

- \* The damage to the Phillips home is not related to mining but to construction practices and inadequate storm water management.
- \* The water in wet area behind the Phillips house exhibits some mine water characteristics. However, it would be extremely difficult to quantify whether the increased amount of water in the yard is due to mining. The report noted that the water would not be a problem if the backyard were properly drained.
- \* The McCoy Elkhorn mine drainage has caused increased levels of sulfate and metals in the Phillips' well water. Currently, LFO and DSMRE are reviewing the regulatory requirements concerning this issue and will notify Mr. Phillips in the future as to whether the regulations support an enforcement action.

I am enclosing a copy of ESC's investigation for your information.

Based on the foregoing and a review of all submitted documentation, I find that the technical review's focus on the drainage of the backyard does not address the central issue: whether the operator [McCoy Elkhorn Coal] is responsible for surface problems from increased seepage. The homeowner should not be expected to construct a backyard drainage system, if the operator is responsible for the increased water which necessitates a new drainage system. Therefore, I request that ESC reconsider and clarify its findings as to seepage (groundwater outflow), and report its conclusions to the LFO by June 21, 1993. [3/]

(Decision at 1-2.) In conclusion, the Assistant Deputy Director advised Appellant: "[i]f you do not agree with this decision, concerning your complaint, you have the right under 43 CFR 4.1281 et seq. to appeal to the Office of Hearings and Appeals." Id. at 2.

In a Memorandum to the Director, LFO, dated June 25, 1993, entitled "McCoy-Elkhorn Coal Informal Appeal," the Assistant Director, ESC, responded in accordance with the decision by the Assistant Deputy Director regarding the question of the Operator's liability for surface problems from increased seepage. The Memorandum of the Assistant Director ESC states, in pertinent part:

Our office was contacted during the informal review regarding clarification of Phillips' property damage discussed in the technical report, that served as the basis for your decision. The Assistant Deputy Director \* \* \* stated that the [ESC] would respond \* \* \* to your office. The questions and concerns have been addressed \* \* \*.

Attached to the Memorandum of June 25, 1993, is a two-page response to the Assistant Deputy Director's Comment and Question. The response reads, in pertinent part, as follows:

As stated on page 11 of the report entitled "McCoy Elkhorn Citizen Complaint Along Grapevine Creek, Pike County, Kentucky," the McCoy Elkhorn underground mining operation has

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3/ The Assistant Deputy Director also instructed the LFO to determine, by June 14, 1993, "whether the mine drainage degradation of the well water should have been the subject of an enforcement action." For the resolution of this issue, see footnote 2, supra.

theoretically increased the recharge to the ground-water system along Grapevine Creek. However, the only ground-water discharge pointed out by Mr. Phillips during the 06/08-10/92, site visit, was an extremely low volume seep (less than a tenth of a gallon per minute) located adjacent to the well house. The seep had discolored vegetation with an orange (iron) color in a circle of approximately two feet in diameter. The discharge from the seep disappeared prior to flowing into a ditch in the backyard.

An additional discharge area, located behind the former beauty shop was noted during the same site visit. The discharge was from a flat area that was being drained by a ditch. In retrospect, the discharge at this site was approximately two to three gallons per minute. Considerable precipitation had fallen prior to the site visit to the Phillips residence which would influence the volume of discharge noted. Additionally, both the Office of Surface Mining Reclamation and Enforcement and Kentucky Department of Surface Mining Reclamation and Enforcement (KYDSMRE) staff indicated that during later site visits (when it had not been raining) the flow volume was significantly less. In a subsequent site visit, the KYDSMRE sampled the seep with the analyses indicating characteristics of mine drainage. It was reported that the ditch was constructed by the landowner (Phillips) to convey the water to another ditch between his property and the Anderson property. The ground-water discharges were being effectively dealt with by the ditches constructed by the landowner.

To determine if the McCoy-Elkhorn mine had caused the additional seepage that was causing the wet areas in the yards would require a comparison of premining recharge and discharge rates to postmining recharge and discharge rates. Although it would be extremely difficult to quantify the current or postmining recharge and discharge rates at the Phillips' property; [sic] it would be impossible to establish a value for the premining recharge and discharge rates, since no measurements of these types were required prior to mining. Assuming that no (zero) seepage existed at the current discharge sites, the potential seepage increases probably would be in the one gallon per minute or less category. This discharge estimate is based solely on the current ground water discharge areas and not on surface water contributions. If premining ground-water discharge zones had existed at these sites, the proof of increased contribution becomes even more difficult.

Id. at 1-2.

On June 28, 1993, Phillips, through counsel filed a notice of appeal from the decision of the Assistant Deputy Director, OSM with the Board, stating that he disagreed with her decision. In his Statement of Reasons (SOR) filed July 19, 1993, Appellant asserts that the decision did not go far enough in identifying the inadequacies of the Report. In his SOR, he argues that the earlier investigation conducted by ESC which resulted in the Report "appears inaccurate or incomplete" and "the conclusions are inconsistent." (SOR at 1.) Further, he asserts that:

There are many large mountain breaks behind Mr. Phillips's home and in the immediate area. A few hundred yards down the road from Mr. Phillips the side of the mountain blew out and ran orange water. The hill behind Warren Coleman's house, \* \* \* also developed a small blow out and an extreme amount of water flow where [none] had been before.

(SOR at 1.)

Phillips avers that "[i]t seems clear to us that the amount of water on the Phillips property which percolates up in places, and in fact, the excess water in the whole immediate area must be directly attributable to the McCoy Elkhorn operation." (SOR at 1.) Phillips argues that his home and those of his neighbors "stood many years without damage and existed with adequate drainage until the buildup of water in the McCoy Elkhorn works blew out and otherwise reached the surface." (SOR at 1.)

Subsequently, OSM filed an answer arguing therein, that the investigation of Appellant's citizen's complaint was proper and thorough and was carried out by "experts in the field of slide causation, hydrology, and water damage caused by underground mining." (Answer at 8.) OSM asserts that Appellant's statements describing damage to his property are speculative and fail to establish a causal relationship between the underground mining that occurred in the vicinity of his property and damage to his property. (Answer at 8.)

While OSM acknowledges that Appellant identified two new water seeps on his property that OSM determined were likely caused by "changes in the local hydrologic balance resulting from the underground mining," OSM asserts that the volume of the seeps on the property did not "rise to the regulatory threshold of material damage," identified at 30 C.F.R. § 817.41. (Answer at 9.) OSM supports its conclusion that the seeps do not constitute "material damage" by relying on the following rationale:

- a. The seeps involved a minor amount of water.
- b. No quantification was possible because of the lack of pre-mining data.

- c. OSM could not determine the extent to which precipitation variability contributed to the seeps.
- d. OSM could not determine the extent to which the lack of withdrawal of the subsurface water, due to local residents conversion to utility water, contributed to the seeps.
- e. The water from the seeps was being carried away by existing ditches.
- f. The quality of the water emanating from the seeps was acceptable.
- g. No adverse human or wildlife impacts were identified.

(Answer at 9-10.)

OSM relies upon the aforementioned rationale to assert that Appellant's citizen's complaint did not provide a sufficient factual basis to establish that there was reason to believe that a violation existed and thus failed to meet the standard for enforcement identified at 30 C.F.R. § 842.12(a). (Answer at 10.) Our review of the record confirms that the Appellant has failed to provide any evidence to support a challenge to OSM's determination.

[1] The Assistant Deputy Director, OSM, advised Appellant in his June 7, 1993, decision of his right to appeal the determination upon informal review. Therein, she found that the ESC technical review relied on by LFO had failed to address "the central issue: whether the operator is responsible for surface problems from increased seepage." Id. at 2. The Assistant Deputy Director specifically requested that "ESC reconsider and clarify its findings as to seepage (groundwater outflow), and report its conclusions to the LFO by June 21, 1993." Id. at 2.

Thus, in a letter to Appellant's counsel dated November 5, 1993, the Director, LFO advised, "this letter is to inform you that we have concluded our reevaluation of our original findings involving Ten-Day(TDN) # 92-83-052-052 \* \* \*," in accordance with the June 7, 1993, Decision of the Assistant Deputy Director. Therein, the Director acknowledges that "ESC has not made a determination of whether or not the water seepage constitutes material damage, only that the current ditch constructed by Phillips appears adequate to transport the water from the property." With respect to quality of the seep water, OSM determined that "it is in compliance with the Kentucky Pollutant Discharge Elimination System \* \* \* effluent limits." Id. The Director LFO determined that the "seep is not causing material damage to the hydrologic balance based on":

- 1) ESC's observation that natural conditions (i.e. rain) increase the amount of seepage which suggest the need for the drainage ditch even if there was not any mine seepage,

- 2) ESC's observation that the existing ditch appears adequate to convey the possible mine seepage,
- 3) The uncertainty of the pre-mining extent of seepage, and
- 4) The seep does not exceed KPDES effluent limits.

Mr. and Mrs. Phillips in their initial complaint alleged damage to their property resulting from the underground mining activities of McCoy Elkhorn Coal in the nature of water damage, orange water seepage, and damage to their house and Beauty Shop indicating there were cracks in the foundation and the brick. In his supporting SOR, Appellant describes mountain breaks behind his home and in the immediate area resulting in water flowing where it had not before, concluding that the problem of inadequate drainage and percolating water must be directly attributable to the mining activities of McCoy Elkhorn Coal. The basis for Appellant's conclusions is his assertion that his property stood for years without damage and drainage problems.

In Ronald Maynard, 130 IBLA 260, 266 (1994), the Board held that it was the Appellant's burden to establish that OSM erred in its good cause determination based on a showing that the state response to a TDN was arbitrary, capricious, or an abuse of discretion.

Appellant has not offered any persuasive evidence to establish that OSM erred in its determination or to contradict the underlying opinions of OSM's experts. Appellant presents only unsupported opinions and theories with respect to the nature of and responsibility for damage to his property, and neglects to point out any flaws in the analysis and conclusions of OSM technical experts. Appellant's failure to provide any expert opinion or other evidence to contradict OSM warrants a finding that he failed to carry their burden. See Ronald Maynard, supra.

Accordingly, pursuant 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.

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Gail M. Frazier  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge