

INTERIOR BOARD OF LAND APPEALS

Richard S. and Cathy L. Maddock (On Reconsideration)

167 IBLA 200 (November 15, 2005)

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RICHARD S. & CATHY L. MADDOCK
(ON RECONSIDERATION)

IBLA 2004-105R

Decided November 15, 2005

Motion for reconsideration of that part of the Board's order, dated April 26, 2005, in IBLA 2004-105R, reversing a decision of the Regional Director, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, on informal review of a Harrisburg Field Office determination that the Pennsylvania Department of Environmental Protection took appropriate action in response to OSM's Ten-Day Notice No. X99-121-273-001, and directing a Federal inspection into a citizen's complaint that activities of Consolidation Coal Company at its Renton Mine adversely affected the quality of the complainants' water supply.

Motion for Reconsideration granted; order set aside; appeal reinstated; briefing schedule established.

1. Rules of Practice: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

A duly promulgated regulation has the force and effect of law and the Board is bound to apply the regulations in its adjudication. Under the regulation at 43 CFR 4.1105(a)(5), the permittee of a surface coal mining operation that is the subject of a determination on informal review under 30 CFR 842.15(d) is a party entitled under 43 CFR 4.1109(a)(1) to service of a copy of an appeal by a person who is or may be adversely affected by such a determination.

APPEARANCES: Steven C. Barclay, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On April 26, 2005, the Board issued an order deciding two consolidated appeals filed by Richard S. Maddock and Cathy L. Maddock. The first appeal (docketed as IBLA 2001-252) was from a decision of the Regional Director, Appalachian Regional Coordinating Center (ARCC), Office of Surface Mining Reclamation and Enforcement (OSM), on informal review of a Harrisburg Field Office (HAFO) determination that the Pennsylvania Department of Environmental Protection (PADEP) took appropriate action in response to OSM's Ten-Day Notice (TDN) No. X99-121-273-001. OSM issued the TDN in response to a citizen's complaint filed by the Maddocks alleging that Consolidation Coal Company (Consol) had diminished their well water when drilling a borehole (borehole #10) at the Renton Refuse Pile (Coal Refuse Permit No. 02733702) in Allegheny County, Pennsylvania.

The second appeal (IBLA 2004-105) was from a May 16, 2003, decision of the Regional Director, ARCC, on informal review of a determination by HAFO that PADEP took appropriate action in response to TDN No. X02-121-148-002. OSM issued that TDN in response to the Maddocks' citizen's complaint alleging that the recently restored water from their well exhibited levels of sulfate exceeding the Environmental Protection Agency standards for drinking water, had a sour smell, and caused visible rust stains on porcelain plumbing fixtures in their house.

In our April 26, 2005, order, we affirmed the OSM decision in IBLA 2001-252, and reversed the decision in IBLA 2004-105. The consequence of the reversal in the latter case was to require OSM to conduct a Federal inspection. (Apr. 26, 2005, Order at 41.)

On July 5, 2005, OSM filed a Motion for Reconsideration of our order to the extent it adjudicated IBLA No. 2004-105. OSM explained that Consol sought judicial review of the Board's order in the United States District Court for the Western District of Pennsylvania, styled Consolidated Coal Company v. U.S. Department of the Interior, Richard Maddock and Cathy Maddock, No. 05-0731, arguing therein that the Board violated Consol's rights under the Constitution of the United States and under the regulations applicable to appeals before the Board by adjudicating the Maddocks' appeals without affording Consol "any opportunity to appear, introduce evidence or otherwise defend itself in the IBLA proceeding." (Motion for Reconsideration at 3, citing Complaint at ¶ 43.) OSM noted that under the

regulation at 43 CFR 4.1109(a)(1) appellants are required to serve a copy of their appeal on any statutory parties specified in the regulation at 43 CFR 4.1105. It asserts that under 43 CFR 4.1105(a)(5), statutory parties to appeals to the Board from decisions of OSM on informal review under 30 CFR 842.15(d)^{1/} include “the permittee of the operation that is the subject of the determination.” Accordingly, OSM claims, the Board should vacate its April 26, 2005, order insofar as it directed “OSM to conduct an investigation into the cause of the contamination of the Maddocks’ well water supply, and reopen the record on this issue in order to allow Consol to present any evidence it may possess on its behalf.”^{2/} (Motion for Reconsideration at 4.) On July 19, 2005, OSM submitted its Memorandum of Law in Support of Motion for Reconsideration.

Under the regulation applicable in this case, 43 CFR 4.21(d), reconsideration may be granted in extraordinary circumstances when, in the judgment of the Board, sufficient reason appears therefor.^{3/} The petition for reconsideration in this case presents an issue which was not raised when this case was briefed on appeal. This issue is governed by a regulatory provision that was not part of the regulations which were initially promulgated to implement the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (2000), and there is a case under the former regulations arguably suggesting a result contrary to that advocated by OSM. Consequently, we find extraordinary circumstances exist and grant the motion.^{3/}

The procedural regulations initially promulgated by the Department to implement SMCRA addressed the subject of parties to review proceedings under SMCRA in the following terms: “All persons indicated in the act as parties to

^{1/} These appeals are filed pursuant to the appeal regulations at 43 CFR 4.1280 through 4.1286.

^{2/} OSM does not seek reconsideration of our order with respect to IBLA 2001-252.

^{3/} Two other regulations dealing with reconsideration--43 CFR 4.403 and 43 CFR 4.1276--do not apply. 43 CFR 4.403 appears in Subpart E of 43 CFR, which expressly relates to “Special Rules Applicable to Public Land Hearings and Appeals,” while 43 CFR 4.1276 appears within the group of regulations (43 CFR 4.1270 through 4.1276) appearing under the heading “APPEALS TO THE BOARD FROM DECISIONS OR ORDERS OF ADMINISTRATIVE LAW JUDGES.” Because the decision for which review was sought in this case was a surface mining decision issued by the Regional Director, ARCC, OSM, neither 43 CFR 4.403 nor 43 CFR 4.1276 is applicable.

^{4/} Requests for reconsideration must be filed promptly. 43 CFR 4.21(d). In light of the circumstances of this case involving litigation filed after issuance of our order deciding this case, we find the motion for reconsideration was filed promptly.

administrative review proceedings under the act shall be considered statutory parties.” 43 CFR 4.1105(a) (1978). That regulation then identified parties in four separate subsections ((a)(1) through (a)(4)), which corresponded to the following SMCRA administrative review proceedings for which the Department promulgated regulations: (1) civil penalty review under section 518 of SMCRA, 30 U.S.C. § 1268 (2000); (2) review proceedings under section 521 (a)(2), and (a)(3) of SMCRA, 30 U.S.C. §1271(a)(2), and (a)(3) (2000); (3) review of a show cause order concerning the suspension or revocation of a permit under section 521(a)(4) of SMCRA, 30 U.S.C. § 1271(a)(4) (2000); and (4) review of alleged discriminatory acts under section 703 of SMCRA, 30 U.S.C. § 1293 (2000). Congress provided in SMCRA for hearings on the record in accordance with the Administrative Procedures Act (APA), 5 U.S.C. § 554 (2000), in each of those proceedings.^{5/} Thus, the purpose of 43 CFR 4.1105(a) was to identify those parties who would be participating in those review proceedings before Administrative Law Judges.^{6/} No attempt was made in contemporaneous rules in 43 CFR 4.1270 through 4.1276 (promulgated under the heading “Appeals to the Board from Decisions or Orders of Administrative Law Judges”) to identify parties in subsequent proceedings involving review of Administrative Law Judges’ decisions.

During that same 1978 rulemaking, the Department promulgated procedural regulations (43 CFR 4.1280 through 4.1286) governing appeals from decisions of the Director, OSM, to the Interior Board of Surface Mining and Reclamation Appeals (whose functions were later transferred to the Interior Board of Land Appeals). The regulations expressly stated that those proceedings were “not required by the Act to be determined by formal adjudication under the procedures set forth in 5 U.S.C. 554.” 43 CFR 4.1280. No provision therein, or in 43 CFR 4.1105, identified parties to such appeals as “statutory parties.”

Thereafter, the Department promulgated procedural regulations for the review of other SMCRA administrative proceedings (e.g., individual civil penalties under section 518(f) of SMCRA, 30 U.S.C. § 1268(f) (2000), at 43 CFR 4.1300 et seq.), or

^{5/} The requirement for APA hearings in review proceedings under sec. 521(a), 30 U.S.C. § 1271(a) (2000), is found in sec. 525(a)(2) and (d) of SMCRA, 30 U.S.C. § 1275(a)(2) and (d) (2000). Similar APA hearing requirements apply to civil penalty review proceedings under 30 U.S.C. § 1268(b) (2000) and employment discrimination review proceedings under 30 U.S.C. § 1293(b) (2000).

^{6/} 43 CFR 4.1109(a) provides that parties initiating proceedings in the Office of Hearings and Appeals shall serve copies of initiating documents on the Office of the Solicitor, U.S. Department of the Interior, in the state in which the mining operation at issue is located, and on “any other statutory parties under [43 CFR] § 4.1105 of this part.”

determinations made by OSM pursuant to regulation (e.g., a determination under 30 CFR 761.16 that a person does or does not have valid existing rights, at 43 CFR 4.1390 *et seq.*) and identified the persons participating in such proceedings as “statutory parties” in 43 CFR 4.1105(a)(2). *See* 52 FR 39526 (Oct. 22, 1987).

Thus, prior to the promulgation of 43 CFR 4.1105(a)(5) in 1994 the identification of “statutory parties” in 43 CFR 4.1105(a) had expanded beyond persons participating in review proceedings before Administrative Law Judges and had encompassed administrative proceedings dictated by Departmental regulation.

In 1994, the Department further expanded “statutory parties” to include

[i]n an appeal to the Board in accordance with 43 CFR 4.1280 through 4.1286 from a determination of the Director of OSM or his or her designee under 30 CFR 842.15(d) * * * the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM. [^{2/}]

43 CFR 4.1105(a)(5), 59 FR 1488 (Jan. 11, 1994).

The basis for the Department’s action in promulgating this regulation can be found in the regulations governing requests for Federal inspections (30 CFR 842.12) and addressing the review of an OSM decision not to inspect or enforce (30 CFR 842.15). ^{8/} When a request for a Federal inspection is made, the regulations impose certain obligations on OSM, including, (1) if it undertakes an inspection, then it must, within a certain period of time, send the person requesting the inspection a description of the enforcement action taken or an explanation of why no enforcement action was taken (30 CFR 842.12(d)(1)), ^{9/} and (2) if it does not inspect, send the person requesting the inspection, within the same time period, an explanation of the reasons why no inspection was made. 30 CFR 842.12(d)(2). In either case, the regulations direct OSM to provide “the person alleged to be in violation” with copies of the same materials, “except that the name of the person supplying information

^{7/} The regulation added that “[a] person who wishes his or her identity kept confidential under 30 CFR 842.12(b) is responsible for maintaining that confidentiality when serving documents in accordance with [43 CFR] § 4.1109.”

^{8/} The regulatory change was also suggested in an earlier Board decision. *Save Our Cumberland Mountains*, 108 IBLA 70, 83 n.7, 96 I.D. 146 n.7 (1989).

^{9/} If an inspection is conducted, the permittee is not entitled to any prior notice. *See* 30 U.S.C. § 1267(c)(2) (2000).

shall be removed unless disclosure of his or her identity is permitted under paragraph (b) of this section.” 30 CFR 842.12(e).

When OSM’s determination is not to inspect or enforce, “[a]ny person who is or may be adversely affected by a * * * surface coal mining and reclamation operation” may ask for informal review of such a decision, by the OSM Director or his or her designee, “with respect to any violation alleged by that person in a request for Federal inspection under [30 CFR] § 842.12.” 30 CFR 842.15(a). This regulatory provision implements that part of section 517(h)(1) of SMCRA which mandates that the Department provide any person who is or may be adversely affected by a surface mining operation alleging a violation of SMCRA at the site with an informal review of any refusal by OSM to issue a citation with respect to the alleged violation. 30 U.S.C. § 1267(h)(1) (2000). Thus, 30 CFR 842.15(a) expressly limits the right to informal review to the person who requested the inspection.^{10/} However, 30 CFR 842.15(b) provides that “[t]he person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the person who is or may be adversely affected shall not be disclosed unless confidentiality has been waived or disclosure is required” under Federal law.

Thus, while a permittee is not entitled to any notice of the inspection of a surface coal mining and reclamation operation, the regulations in 30 CFR Part 842 clearly require that once OSM is in receipt of a request for a Federal inspection under 30 CFR 842.12, the permittee (“person alleged to be in violation”) must be kept informed of the results of any inspection, whether or not enforcement action is taken, or, if no inspection is undertaken, the reasons why. 30 CFR 842.12(e). Likewise, if informal review of an OSM decision not to inspect or enforce is sought, the results of that informal review must be provided to the permittee (“person alleged to be in violation”). 30 CFR 842.15(b). In each situation, OSM is required to maintain the confidentiality of the person requesting the inspection, unless disclosure is waived or required by Federal law.

It was in this regulatory context that the Board decided the case of Dixie Fuels Co., 132 IBLA 331, 334 (1995). In that case, the Board affirmed a decision of an Administrative Law Judge affirming a cessation order (CO) issued to Dixie Fuels Company (Dixie) by OSM for conducting surface coal mining operations within 300 feet of occupied dwellings. The CO had been issued by OSM following an

^{10/} A permittee would not be adversely affected by an OSM decision not to inspect or a decision not to enforce. However, if OSM did issue an enforcement action as a result of an inspection, the permittee would be entitled to administrative review thereof pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (2000), and 43 CFR 4.1160 through 4.1187, depending on the action.

inspection ordered by this Board in a decision, W. E. Carter, 116 IBLA 262 (1990), in which we reversed OSM's determination on informal review that the Lexington Field Office, OSM, had properly declined to order a Federal inspection of a surface coal mining operation conducted by V&C Coal Company, Dixie's predecessor-in-interest, following receipt of a citizen's complaint.^{11/}

In its appeal, Dixie argued that the "failure to join it and V&C as parties to the appeal [of OSM's informal review decision] pursuant to 30 CFR 842.15(d) deprived the Board of jurisdiction." 132 IBLA 333. In support of its position, Dixie cited Moose Coal Co. v. Clark, 687 F. Supp. 244, 247 (W.D. Va. 1988), reversing Virginia Citizens for Better Reclamation, 82 IBLA 37, 91 I.D. 247 (1984). In Virginia Citizens for Better Reclamation, the Board had reversed OSM's informal review determination upholding an OSM decision not to undertake Federal enforcement action following receipt of a citizen's complaint and directed that OSM not only conduct an inspection, but that it also issue a CO and assess a civil penalty.

On judicial review, the court in Moose Coal Co., held that "the Board made its decision based on an incomplete record." 687 F. Supp. at 247. While recognizing that Moose Coal was not a statutory party under 43 CFR 4.1105(a), the court stated that "the entity whose fate was being decided, in this case Moose, should certainly be considered a party or otherwise afforded notice." 687 F. Supp. at 248. In referring to 30 CFR 842.15(d), requiring that the person alleged to be in violation receive a copy of the OSM decision on informal review of a determination not to inspect or enforce, the court queried: "Why would the regulations afford the alleged violator a copy of the informal review and yet not mandate informing him if someone appeals that review?" Id. It concluded that "Moose was a party within the meaning of § 4.1283 and should have received notice of the appeal. Because Moose did not receive notice as required by Section 4.1283, the court is of the opinion that the Board's decision is arbitrary and capricious and not based upon substantial evidence." Id.

The Board in the Dixie Fuels case found that Moose was not controlling. The Board reasoned that the court was influenced by the posture of that case. We stated that the court

reached the conclusion that the permittee was an "entity whose fate is being decided" because the Board went beyond affirming OSM's

^{11/} W. E. Carter predated the 1994 promulgation of the new regulation at 43 CFR 4.1105(a)(5). Accordingly, the Dixie Fuels decision did not address the new regulation making the permittee a party.

decision ordering a Federal inspection [^{12/}] by purporting to issue a CO. Had the Board merely ordered a Federal inspection in Virginia Citizens for Better Reclamation, *supra*, a different result would no doubt have obtained. This is what occurred in W. E. Carter. We hold that where the Board reverses a decision by OSM under 30 CFR 842.15 declining to order a Federal inspection, the Board's authority is limited to ordering such inspection. Upon completion of the inspection, it is within OSM's authority to determine whether enforcement action is warranted.

132 IBLA at 333.

We further noted that:

Where review is sought of a decision not to inspect pursuant to 30 CFR 842.15(d) what is being challenged is the determination of the Director of OSM or his designee not to order a Federal inspection. The focus of the proceeding is on OSM's lack of action. No Notice of Violation (NOV) or CO have [sic] issued as no inspection has been taken at this juncture. * * *.

Should the Director decide not to order a Federal inspection in response to a citizen complaint, neither the permittee nor operator is adversely affected. Should the citizen appeal that decision and the Board affirm, the permittee or operator remains unaffected. However, should the Board reverse, a Federal inspection will be ordered. Should that inspection result in the issuance of an NOV and/or CO, the permittee or operator is adversely affected and is a statutory party to administrative review proceedings challenging the NOV or CO pursuant to 43 CFR 4.1105. As such, the permittee or operator has a full and fair opportunity to litigate the enforcement action before an Administrative Law Judge. An appeal by regulation is provided as well to this Board.

That the permittee or operator is not adversely affected by a decision of the Director of OSM ordering a Federal inspection or a decision of the Board reversing the Director and ordering a Federal

^{12/} To the extent the quoted language in the Dixie Fuels opinion states that the Board in Virginia Citizens for Better Reclamation affirmed an OSM decision which ordered an inspection, it is incorrect. Rather, as noted above, the Board reversed an OSM decision declining to conduct an inspection and ordered OSM to issue a CO and a civil penalty. 82 IBLA at 44-45, 91 I.D. at 251-52.

inspection is evident from the fact that 30 CFR 842.15 provides no appeal rights to the permittee or operator. [^{13/}]

132 IBLA at 334. Accordingly, we held that: “Although participation by the permittee or operator is permissible and properly granted should intervention be sought pursuant to 43 CFR 4.1105(b), neither the Act nor regulations make the permittee or operator a statutory party to a 30 CFR 842.15(d) proceeding reviewing a decision not to inspect.” 132 IBLA at 334 (Emphasis added.)

While that holding was true for the pre-1994 regulations, it is clear from the language of 43 CFR 4.1105(a)(5), as set forth, supra, that the Department intended to designate the permittee of the operation that is the subject of a citizen’s complaint as a statutory party to any appeal filed with the Board from an OSM decision on informal review under 30 CFR 842.15.

It is well established that a duly promulgated regulation has the force and effect of law and is binding not only on the public at large, but on all of the constituent elements of the Department, including this Board. See, e.g., McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955); Alamo Ranch Co., Inc., 135 IBLA 61, 69 (1996). It is also true that in order for regulations to be valid, they “must be consistent with the statute under which they are promulgated.” United States v. Larionoff, 431 U.S. 864, 873 (1977). Thus, we have declined to apply a regulation which was not properly promulgated, was lacking a statutory basis, and had been consistently ignored by the Department. Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). ^{14/} Although such cases are uncommon, they ordinarily involve

^{13/} In its analysis, the Dixie Fuels decision, 132 IBLA at 334-35, quoted language from the preamble to the regulations as originally promulgated:

“OSM believes that the language of § 842.15 is sufficiently clear and in accordance with the Act so as to render further changes unnecessary. OSM agrees with the comment that a permittee does not have the right to appeal a decision to inspect its operations, since a decision to inspect or enforce does not in itself adversely affect a permittee; the permittee is protected, however, because if an enforcement action is taken during an inspection, the permittee will have appeal rights in respect to that action.”

47 FR 35620, 35629 (Aug. 16, 1982).

^{14/} In the Garland case, this infirmity was due to a lack of publication of a proposed rule providing notice and opportunity for comment as required by the APA. 5 U.S.C. § 553 (2000).

the application of regulatory sanctions which exceeded those provided by statute.^{15/} We have also held that the Board, in the exercise of its appellate adjudicatory responsibilities, has the authority to determine whether a regulation as applied to an appellant is consistent with the statutory authority on which it is based and to decline to apply a regulation to adversely affect an appellant when its application to the facts of that case would be clearly inconsistent with the statute. Alamo Ranch Co., Inc., 135 IBLA at 71. The scope of this authority has been narrowly defined, as the Board has recognized that a regulation is properly applied when it is not clearly inconsistent with statutory authority:

[w]here it is not free from all doubt that a regulation is contrary to a statute, this Board is required to resolve such doubts in favor of the regulation's validity. The authority of the Department to issue regulations must embrace the authority to issue foolish or unwise ones.

Ruskin Lines v. BLM, 66 IBLA 109, 114 (1982) (Burski, A. J., concurring).

[1] While it is clear that prior to the 1994 regulatory promulgation of 43 CFR 4.1105(a)(5), the permittee was not deemed to be a statutorily mandated party to an appeal from a decision of the OSM Director on informal review determining not to order an inspection, it does not follow that including the permittee as a party to an appeal from a decision on informal review is contrary to SMCRA. Although we found in Dixie Fuels that a permittee would not be adversely affected by a decision directing only an inspection,^{16/} we also concluded that participation by the permittee would be "permissible and properly granted" should the permittee seek to intervene

^{15/} In the case of regulations which impose a sanction more stringent than that imposed by the mining claim recordation provisions of section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (2000), we have held that filings which meet the statutory requirements but not the regulatory requirements give rise to a curable deficiency and a statutory presumption of abandonment will not be upheld in the absence of notice and an opportunity to cure the deficiency under the regulations. Harvey A. Clifton, 60 IBLA 29, 34 (1981); see Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981).

^{16/} The fact that a permittee, who is the subject of a 30 CFR 842.15(d) determination, is a statutory party under 43 CFR 4.1105(a)(5) and, therefore, must be served in accordance with 43 CFR 4.1109(a)(1), does not establish that a permittee would have the right to appeal a 30 CFR 842.15(d) determination to inspect. See 47 FR 35620, 35629 (Aug. 16, 1982).

pursuant to 43 CFR 4.1105(b). 132 IBLA at 334.^{17/} We conclude that service on “the permittee of the operation that is the subject of the determination” not to inspect or enforce, in accordance with 43 CFR 4.1109(a) and 43 CFR 4.1105(a)(5), is not contrary to SMCRA and, in fact, is consistent with the notification procedures of 30 CFR 842.12 and 30 CFR 842.15, set forth above. Therefore, we are bound to apply 43 CFR 4.1105(a)(5), a duly promulgated regulation.^{18/}

In reviewing OSM’s decision in this case, the question for consideration was whether the Regional Director, ARCC, properly concurred in HAFO’s decision that the PADEP showed good cause for not taking action on the alleged violation to require Consol to replace the Maddocks’ water supply. In our order remanding this case to OSM, we stated that:

In deciding whether the State took appropriate action or demonstrated good cause for not taking enforcement action, the State’s conduct will be judged by OSM, in its oversight role, not by what OSM would have done in the circumstances, but by whether the State acted arbitrarily or capriciously or abused its discretion under the State surface mining program law in its actions in response to the TDN.
30 C.F.R. § 842.11(b)(1)(ii)(B)(2) * * *.

(Order of Apr. 26, 2005, at 3, quoting Jim & Ann Tatum, 151 IBLA 286, 298 (2000).) In particular, we noted that the key issue is whether OSM properly found that good cause was shown by PADEP’s response to the TDN in that no violation existed because “neither the borehole, the refuse pile, nor the underground mine was the source of the elevated sulfate levels in the Maddocks’ well water.” (Order of Apr. 26, 2005, at 36.) We observed that it appeared that PADEP had effectively shifted the burden of proof under Pennsylvania law regarding the source of the Maddocks’ well

^{17/} That regulation provides that “[a]ny party claiming a right to participate as a party may seek leave to intervene in a proceeding by filing a petition to do so pursuant to [43 CFR] § 4.1110. Under 43 CFR 4.1110(c), intervention shall be granted if the petitioner (1) had a statutory right to initiate the proceeding or (2) has an interest which is or may be adversely affected by the outcome of the proceeding. Otherwise, intervention is permissible under 43 CFR 4.1110(d). One of the factors listed in 43 CFR 43 CFR 4.1110(d) to be considered in determining whether to grant intervention is “[t]he ability of the petitioner to present relevant evidence and argument[.]” 43 CFR 4.1110(d)(3).

^{18/} The fact that other Board decisions on review of OSM decisions on informal review of decisions not to inspect or enforce have not addressed 43 CFR 4.1105(a)(5) does not mean that appellants in previous cases have failed to comply or that we may ignore failure to comply with that regulation.

water contamination from the operator to the Maddocks. *Id.* at 38. “Without an explanation as to why the drilling of the borehole could not have impacted the hydrology surrounding the Maddocks[’] well so as to render it susceptible for the first time to other contamination, we do not find the coincidence theory ‘good cause’ for PADEP to absolve Consol of the statutory requirement to reconnect the Maddocks to a quality water supply.” *Id.* at 40.

These findings frame the relevant issue before us and any submissions on reconsideration should be directed to these questions.

In this context, we set aside that part of our April 26, 2005, order relating to IBLA 2004-105, reinstate the appeal, and allow Consol 30 days from receipt of this order to file an answer to the Maddocks’ appeal therein.^{19/} The Maddocks and counsel for OSM each shall have 30 days from receipt of Consol’s answer in which to file a response.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration of our April 26, 2005, order as it relates to IBLA 2004-105R is granted. That part of our order is set aside, the appeal is reinstated, and Consol and the other parties are allowed an opportunity for briefing as set forth above.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{19/} We assume that at this point Consol has copies of pleadings filed in IBLA 2004-105. If not, it should contact the Board and it shall have 30 days from receipt of copies of those pleadings within which to file an answer.

ADMINISTRATIVE JUDGE HEMMER, DISSENTING:

I would not authorize a permittee to do what the statute would prohibit -- to intrude into the process created to allow citizens to obtain an inspection if they have a reason to believe a violation of the applicable surface mining program exists. The 1994 Departmental rule, as interpreted today, tilts the statutory inspection authorized by SMCRA, the 1982 rulemaking which established the right of appeal to the Board from decisions on informal review, and Board precedent, away from protecting the public and toward protecting the permittee. I would not read the rule in such a manner.

Years ago, without a permit to do so, Consol drilled a borehole within 1,000 feet of the Maddocks' potable-quality water well, which had served their house for decades. Had Consol obtained the requisite permit, it would have first tested to obtain pre-drilling well water quality and quantity data. The Maddocks' well dried up in a day. Consol installed a "water buffalo" to provide water to the Maddocks while it cased the borehole. Eventually, water returned to the well. The Maddocks questioned whether the returning water was at pre-drilling levels or quality. Given the lack of pre-drilling testing data against which to compare the water from the recovering well, PADEP focused on whether the returning water met objective standards.

The Maddocks submitted a citizen's complaint alleging that the water volume had not fully returned. They asked OSM to inspect and issue penalties against Consol for failure to obtain a permit. On informal review, OSM refused to issue penalties or inspect. OSM acknowledged the problem but asserted that matters were ongoing and that future oversight would provide more data. We affirmed. IBLA 2001-252. The Maddocks filed an action against Consol before the Pennsylvania Environmental Hearings Board (EHB). EHB concluded, *inter alia*, that because the Maddocks did not sufficiently explain the hydrogeology of the surrounding area, they could not prove Consol responsible for water quality issues.

Subsequent testing of the well water showed intermittent violations of objective water quality standards. The Maddocks submitted another citizen's complaint asking for an inspection because they were, the Maddocks said, suffering from effects related to poor water quality. On informal review, OSM (affirming PADEP) refused to inspect, effectively because EHB had said that the Maddocks had not proved the source of potential water quality problems. The water well was fine, then suddenly depleted, but if there were problems following recovery Consol suggested they were due to an old oil and gas well or mine. The Maddocks did not show otherwise and so OSM found that they had presented no "reason to believe" a violation of applicable regulatory program requirements existed.

Neither PADEP nor OSM identified the regulatory requirement allegedly violated. I looked at the Pennsylvania code; it placed the burden on a mining

company that drills within 1,000 feet of a well without first conducting baseline studies of the water supply to prove that the company's actions are not the source of any contamination. Thus, the State code had ensured that victims of a company error should not need to become hydrogeologists or lawyers to obtain resolution. OSM and PADEP failed to address this allocation of burdens or explain why it did not pertain. In the absence of any cited regulatory program requirement, we reversed. IBLA 2004-195. OSM's conclusion that there was no "reason to believe" a violation existed could not be affirmed when OSM did not cite the program rule potentially violated. The most we could do was order a Federal inspection and direct OSM to identify the rule it was looking to in finding that the Maddocks had not provided "reason to believe" a violation existed. I had no view whether the inspection of the Maddocks' claims of smelly, reddish water would end at their house.

Enter the lawyers. Consol sought an injunction against inspection, casting itself as a victim of the SMCRA inspection procedures and the Board's appeal process. Consol asserted in court that it has due process rights that were violated because it was not provided official service by the Maddocks of their notice of appeal as a statutory party under 43 CFR 4.1105(a)(5). OSM decided that this service rule affords a permittee a right "to present any arguments it may possess on its behalf" and "exculpatory evidence" in the Secretary's process of deciding whether to conduct a Federal inspection. The majority jumps onto Consol's "due process" bandwagon, concluding that a procedural service regulation affords permittees substantive participation rights in a statutory process governing agency decisionmaking regarding whether to "inspect." For the first time, the majority requires that citizen's claim that "reason to believe" a violation exists must stand against the permittee's legal challenge to an inspection.^{1/}

I disagree. First, SMCRA citizen's complaint and inspection sections, 30 U.S.C. §§ 1267, 1271(a) (2000), provide the permittee no right to participate in the Department's consideration of a citizen's complaint requesting an inspection. Second, the majority decision governing Consol's participation "rights" is based solely on a service rule, as opposed to substantive rules addressing the process of citizen's complaints. 30 CFR Part 842. Third, by accepting Consol as a "statutory party" as defined in the cited rule, the majority opens the door to appeals by permittees from decisions on informal review to inspect – appeals the Department expressly intended to prevent. Fourth, by granting OSM's petition without ascertaining whether Consol had actual notice of the appeals pending before the Board for years, the majority allows Consol to manipulate the timing of Federal inspection, and makes the SMCRA inspection provisions a shelter from inspection for mining companies.

^{1/} The Board did not seek briefing from the Maddocks before vacating a decision in their favor. Whether they seek reconsideration remains to be seen.

To the contrary, Consol acquires participation rights only if an enforcement action is initiated. SMCRA section 517, 30 U.S.C. § 1267(c)(2) (2000), establishes that a permittee accepts inspection without notice or pre-inspection process as a permit condition. “[I]nspections by the regulatory authority shall * * * occur without prior notice to the permittee * * * except for necessary onsite meetings * * *.” Id. Section 517(h)(1), 30 U.S.C. § 1267(h)(1) (2000), provides that inspections may be instigated by the appropriate regulatory authority or by private citizens:

Any person who is or may be adversely affected by a surface mining operation may notify the Secretary [or her delegate] * * * in writing, of any violation of this Chapter which he has reason to believe exists at the surface mining site. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation. The Secretary shall furnish such persons requesting the review a written statement of the reasons for the Secretary’s final disposition of the case.

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2000), sets forth OSM’s responsibilities to conduct “immediate” Federal inspections ^{2/}:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of [SMCRA] or any permit condition required by [SMCRA], the Secretary shall notify the State regulatory authority * * *. If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *.

Under 30 U.S.C. § 1271(a)(1) (2000), if a complaint is based on information derived from a previous inspection, OSM may take enforcement action.

Thus, permittees are subject to inspections without notice, and citizens claiming harm from a permitted surface mining operation may obtain an immediate inspection upon providing the State or OSM “reason to believe” a violation exists. Whenever OSM has “information available” giving “reason to believe” a violation

^{2/} States with approved surface mining programs have primary enforcement responsibility for SMCRA, 30 U.S.C. § 1253 (2000), subject to OSM’s oversight to ensure statutory compliance. Jim & Ann Tatum, 151 IBLA 286, 298 (2000).

exists, it must notify the relevant State regulatory agency. If the State fails to act without good cause, OSM shall immediately inspect. The permittee gets no advance notice of an inspection or a right to participate in the decisionmaking process.

SMCRA required the Secretary to establish administrative review proceedings for particular agency decisions. The Department established an appeals process, including the service rule at issue here with language in place today. 43 FR 34386 (Aug. 3, 1978). The rule required service of surface mining appeals on “statutory parties,” allowing permittee involvement as such where required by SMCRA. “[A]ll persons indicated in [SMCRA] as parties to administrative review proceedings under the act shall be considered statutory parties.” 43 CFR 4.1105(a). The rule “set forth parties to the various review provisions under the act.” 43 FR 34375, 34377 (Aug. 3, 1977) (emphasis added). As SMCRA provided no “administrative review proceeding” for permittees with respect to a decision to inspect under 30 U.S.C. § 1267 (2000), the rule did not identify a permittee as a statutory party to a decision to inspect.

In 1979, the Department promulgated rules addressing citizen’s complaints. See 30 CFR 842.11, 842.12; Hazel King, 96 IBLA 216, 226, 238, 94 I.D. 89 (1987). A person may request a Federal inspection under 43 CFR 842.11(b) by sending OSM a signed, written statement giving reason to believe that a violation, condition or practice exists and that the State regulatory authority, if any, has been notified. 30 CFR 842.12(a). If OSM has reason to believe that a violation of a State regulatory program exists, OSM must issue a ten-day notice (TDN) to the State regulatory authority. Id.; 30 CFR 842.11(b)(1). Unless the State takes action or shows “good cause” for not doing so within 10 days, OSM shall conduct an immediate Federal inspection. 30 CFR 842.11(b)(1)(ii)(B)(1). Whether a “reason to believe” exists depends on information available to OSM. 30 CFR 842.11, 842.12. The permittee has no say in this process, but gets “notice” of a decision whether to inspect after it is reached. 30 CFR 842.12(e).

The Department also established a procedure for informal review by the OSM Director of a lower level decision not to inspect or otherwise take enforcement action in response to a citizen’s complaint at 30 CFR 842.15. In 1982, the Department created a right of appeal to this Board from a decision on informal review. The entire provision, entitled “Review of decision not to inspect or enforce,” states:

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Director or his or her designee to review informally an authorized representative’s decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12. The request for review shall be

in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Director or his or her designee shall conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, * * *.

(c) Informal review under this section shall not affect any right to formal review under section 525 of the Act or to a citizen's suit under section 520 of the Act. [^{3/}]

(d) Any determination made under paragraph (b) of this section shall constitute a decision of OSM within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

Only a citizen challenging a decision not to inspect or enforce may seek informal review. 30 CFR 842.15(a). The rule governing appeals from a decision on informal review is not so limited. 30 CFR 842.15(d). Nonetheless, the Department explained its intent to allow only the citizen to appeal a decision on informal review not to inspect or enforce; permittees could not appeal decisions on informal review to inspect. 47 FR 35620, 35629 (Aug. 16, 1982). This was because, as explained in Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983), the genesis of the appeal was a 1990 settlement agreement in Council of the Southern Mountains, Inc. v. Andrus, CA No. 79-1521 (D.D.C.): "OSM agreed to allow the right of appeal from Director's decisions in citizens' complaint proceedings in accordance with a memorandum issued by the OSM Director to all Regional Directors on February 4, 1980." 77 IBLA at 294. Expressly considering the permittee's role, the Department explained that "a permittee does not have the right to appeal a decision to inspect its operations, since a decision to inspect or enforce does not in itself adversely affect a permittee; the permittee is protected, however, because if an enforcement action is taken during an inspection, the permittee will have appeal rights in respect to that action." 47 FR 35629 (Aug. 16, 1982); see 30 U.S.C. § 1275 (2000). This Board has consistently held that a permittee may not appeal a decision on informal review. See, e.g., Hazel King, 96 IBLA 216, 94 I.D. 89 (1987) (right of appeal given in 1982 to the citizen to appeal decision not to inspect); Moses Tennant, 158 IBLA 293 (2003) (same).

^{3/} Section 525, 30 U.S.C. § 1275 (2000), establishes a formal administrative review proceeding for a permittee subject to enforcement under section 521(a)(2) and (3), including a notice of cessation or abatement issued after a violation is found to exist. Section 520 allows citizen's suits filed in Federal court. 30 U.S.C. § 1270 (2000).

In finalizing the 1982 rules, the Department understood the permittee to have a right to participate in an appeals process involving a citizen's complaint only if an inspection leads to enforcement. It thus made no change to the rule regarding service at 43 CFR 4.1105(a), consistent with the explanation of the permittee's lack of participatory role in inspection decisions, as opposed to enforcement actions. The permittee need not be a "statutory party" to an appeal from a decision on informal review not to inspect because it was not identified in the Act as a party to an administrative proceeding involving inspection. Conversely, the service rule required service on permittees as statutory parties in decisions involving enforcement actions under 30 U.S.C. § 1275 (2000). 43 CFR 4.1105(a)(2) (permittees are statutory parties and entitled to service of appeals under 43 CFR 4.1160-1171 and 4.1180-1187 (notices of violation and orders of cessation)).

The statutory and regulatory citizen's complaint procedure thus affords protection to citizens from potential surface-mining violations. It does not afford the permittee protection from inspection or a right to participate in the decisionmaking process leading to it. The permittee has no legal basis for opposing OSM's exercise of inspection authority. Tennessee Consolidated Coal Co. v. Andrus, 690 F.2d 588 (6th Cir. 1982); Andrus v. P-Burg Coal Co., Inc., 644 F.2d 1231 (7th Cir. 1981); S & S Coal Co. v. OSM, 87 IBLA 350, 355 (1985). This does not change if OSM does not order a Federal inspection; the permittee gains no greater participatory right in OSM's response to a citizen's complaint if the informal review decision is adverse to the citizen and is appealed. Procedures attendant on enforcement actions fully satisfy due process and are adequate to protect interests that crystalize at the time a notice of violation or cessation order (CO) is issued. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981). Consol simply has no due process rights to be protected in the Department decisionmaking process leading to inspection.^{4/}

The conclusion reached by the majority changes the statutory and regulatory construct. They allow Consol adversarial participation in our administrative process of reviewing OSM's decision, based on the information before it, that there was no reason to believe a violation existed. Based on the statute and rules, I disagree.

The basis for the majority opinion is not SMCRA or the citizen's complaint rule but the "procedural defect resulting from the Maddocks' failure to serve notice of

^{4/} Due process requires that a party receive fair notice before being deprived of a property interest. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). This Board is not empowered to determine whether Constitutional rights have been violated, or to afford any relief therefrom. Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994). Nonetheless, by championing Consol's due process assertions, OSM wrongly suggests Consol has a property right to be free of SMCRA inspection.

their appeal upon the affected permittee” under 43 CFR 4.1105(a)(5). The majority opinion purports to enforce this rule in vacating the decision in IBLA 2004-105 and, far beyond showing notice of the appeal, calling for participation from Consol. Thus, the majority’s reinvention of the long-standing administrative procedure involving informal review of a citizen’s complaint requesting inspection, as one to create a permittee right to defend itself against inspection before this Board when we review an OSM decision not to inspect, derives from a misguided “procedural” rule regarding an appellant’s service of its appeal notice.

The service rule establishes only an appellant’s (citizen’s) obligation to serve his or her appeal notice. Neither the majority opinion nor OSM grapples with this fact. If they did, presumably they would query whether Consol knew about the appeals. If Consol had notice of the appeals in some manner, it could make no showing of prejudice from a lack of de jure service.

The majority agrees, at OSM’s instigation, to sidestep the stated point of the rule (service by an appellant) to read into it something unstated (participation by the permittee in the inspection decision). See 43 CFR 4.1105(c). The majority thus gives Consol full participation rights as a statutory party before a final administrative decision on whether Consol may be inspected, as if it were an indispensable party to the decision whether to authorize it. That such a transformation of the service rule was invited by the petition for reconsideration does not mean we should accept. In fact, though citing the service rule at 43 CFR 4.1105(a), Consol’s lawsuit did not challenge our affirmance in IBLA No. 2001-252 of OSM’s decision, nor does OSM ask us to vacate that part of the decision. Thus, neither OSM nor Consol cares about de jure service, so long as we do not grant relief in the form of a Federal inspection.

After today, in every appeal from an OSM decision not to inspect on informal review under 30 CFR 842.15(d) where we are considering reversing and ordering an inspection, the Board must ensure that the permittee becomes a party to the appeal so that it may participate to champion a “right” to prevent inspection and resulting enforcement. Presumably, the majority believes that the Department required service to allow the permittee to decide whether to participate in an appeal involving inspection. The Department plainly did not think this far in promulgating the rule.

A solution more consistent with SMCRA derives from the fact that the plain words of 43 CFR 4.1105(a) reveal that Consol simply cannot be a “statutory party” “indicated in [SMCRA] as parties to administrative review proceedings under” SMCRA because no such review proceedings involving inspection “indicate” the permittee as a party. Nor is an IBLA appeal from a decision on informal review an “administrative review proceeding under the act.” See Donald St. Clair, 77 IBLA at 294, 90 I.D. at 501-02 (impetus for appeal procedure comes from judicial settlement). This should end the matter.

Moreover, the 1994 Departmental amendment of the service regulations which added 43 CFR 4.1105(a)(5) did not intend to change the participation of a permittee in the inspection decision. In 1994, the Department maintained the definition of “statutory party,” but added that, in the context of an appeal from a decision on informal review of a citizen’s complaint under 30 CFR 842.15(d) (and also in an appeal from a cessation order issued to a permittee under 843.12(i)), “statutory parties” include the “permittee.” Since 1994, 43 CFR 4.1105 has read as follows:

(a) All persons indicated in the act as parties to administrative review proceedings under the act shall be considered statutory parties. Such statutory parties include— * * * (5) In an appeal to the Board * * * from a determination of the Director of OSM or his or her designee under 30 CFR 842.15(d) or a determination * * * under 30 CFR 843.12(i), the permittee of the operation that is the subject of the determination and any person whose interests may be adversely affected by the outcome on appeal and who participated before OSM.

(Emphasis added.) While the 1994 rule includes as a “statutory party” a permittee in an appeal of a decision on informal review refusing to inspect in response to a citizen’s complaint under 30 CFR 843.15(d), the definition of a “statutory party” continues to exclude permittees who are identified in the act only as parties to an administrative enforcement proceeding.^{5/}

The history of the amendment demonstrates it derived from a problem generated by a citizen’s complaint requesting enforcement. The Department proposed subparagraph (a)(5) in 1991 in response to a footnote in Save Our Cumberland Mountains (SOCM), 108 IBLA 70, 83 n.7, 96 I.D. 139 (1989). 56 FR 2142 (Jan. 22, 1991). There SOCM had filed a citizen’s complaint asking for enforcement and appealed the denial of that request on informal review. 108 IBLA at 72. The decision on informal review cited a separate OSM proceeding involving a

^{5/} A rule must adequately provide notice to the public of its intent, yet advertence to this CFR provision would confuse a lawyer. Language discrepancies in rules should be harmonized with statutory purpose. Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996). I would find a permittee to be a “statutory party” only where a permittee is identified in SMCRA as a party to an administrative proceeding: that is, in the case of enforcement and not inspection. Where the Board has construed regulations lacking in statutory support and that were consistently ignored by the Department in practice, this Board has refused to give vitality to such portions of rules. See Alamo Ranch Co., Inc., 135 IBLA 61, 66 (1996), citing Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981); Merit Productions, 144 IBLA 156, 164 (1998) (Burski, A.J., concurring) (citations omitted).

permit action as having resolved SOCM's "concern regarding initiation of appropriate enforcement action." Id. at 76-77. The Board complained that the permittee had not been included in the appeal because it was not a statutory party under 43 CFR 4.1105(a), but would have been served and included had SOCM chosen to appeal the decision on permit modification. SOCM n.7. The Board was perturbed that SOCM (the citizen) seemingly could manipulate whether the permittee was served with an appeal, by choosing which action to appeal, either of which could have resulted in penalizing the permittee. The Board invited regulatory change.^{6/}

The Department responded with a proposed amendment to include permittees as statutory parties in appeals from decisions on informal review under 30 CFR 842.15(d). It did not consider the facts of SOCM and thereby did not distinguish inspection from enforcement, both of which may be requested in a citizen's complaint and required on informal review under 30 CFR 842.15(a). In the latter case, identifying the permittee as a "statutory party" to an appeal would be consistent with SMCRA's administrative review proceedings for enforcement actions. In a case involving inspection, SMCRA does not contemplate that the permittee will be involved in pre-inspection decisionmaking. Had the Department undertaken more than a cursory review of SOCM n.7, it would have considered these distinctions. It did not. After adopting a confidentiality provision, 59 FR 1488 (Jan. 11, 1994), the rule was finalized, without further discussion. 59 FR 54362 (Oct. 28, 1994).

The next year, however, the Board construed "statutory party" in 43 CFR 4.1105(a), deliberately undertaking the analysis absent from the 1994 rulemaking. Dixie Fuels, Inc., 132 IBLA 331 (1995). That decision, if applied to subparagraph (a)(5), properly would confine service only to cases where the decision on informal review appealed to the Board was one refusing to take enforcement action, because permittees may not be statutory parties in appeals from informal review decisions not to inspect under 30 CFR 842.15.

That the permittee or operator is not adversely affected by a decision of the Director of OSM ordering a Federal inspection or a decision of the Board reversing the Director and ordering a Federal inspection is evident from the fact that 30 CFR 842.15 provides no appeal rights to the permittee or operator. The Department's response to comments on proposed changes to 30 CFR 842 tracks our conclusion here.

^{6/} SMCRA requires permittee participation in administrative review of a decision to grant, deny, or modify a permit. 30 U.S.C. § 1264(c) (2000). It contains similar administrative provisions for enforcement actions. 30 U.S.C. §§ 1268, 1275 (2000).

One commentator suggested editorial changes to paragraph (a) to track more closely the language of section 517(h)(1) of the Act, and two other commentators supported the appeal provisions of paragraph (d). One of these commentators stated that the final preamble should clarify that the right to appeal does not grant a permittee the right to appeal a decision to inspect.

OSM believes that the language of § 842.15 is sufficiently clear and in accordance with the Act so as to render further changes unnecessary. OSM agrees with the comment that a permittee does not have the right to appeal a decision to inspect its operations, since a decision to inspect or enforce does not in itself adversely affect a permittee; the permittee is protected, however, because if an enforcement action is taken during an inspection, the permittee will have appeal rights in respect to that action.

47 FR 35620, 35629 (Aug. 16, 1982).

Neither Dixie nor its predecessor, V&C, was a statutory party or the equivalent of an indispensable party to the 30 CFR 842.15(d) review proceeding * * *.

132 IBLA at 334-35 (emphasis added). Dixie Fuels thus construed “statutory party” in 43 CFR 4.1105(a) as excluding the permittee in an appeal from a decision on informal review not to inspect. SMCRA section 517, 30 U.S.C. § 1267 (2000), allows inspections without prior notice and, in the 1982 rulemaking, the Department provided a permittee no right of appeal. Without such “rights,” “the permittee or operator is not adversely affected by a decision of the Director of OSM ordering a Federal inspection or a decision of the Board reversing the Director and ordering a Federal inspection.” 132 IBLA at 334.

The argument that a 30 CFR 842.15(d) review proceeding decides the fate of the permittee or operator where the Director orders an inspection or the Board reverses the Director and orders a Federal inspection * * * misconstrues 30 CFR 842.15(d). Where review is sought of a decision not to inspect pursuant to 30 CFR 842.15(d) what is being challenged is the determination of the Director of OSM or his designee not to order a Federal inspection. The focus of the proceeding is on OSM’s lack of action. No Notice of Violation (NOV) or CO have issued as no inspection has been taken at this juncture.

Id. The Board thus carefully extricated inspection decisions from the service rule.

Dixie Fuels construed 43 CFR 4.1105(a) in a manner true to SMCRA and the 1982 rule. I believe the Board expected to harmonize even the 1994 rule with such authority. The majority rejects the logic of Dixie Fuels here because it addressed only the version of 43 CFR 4.1105(a) in place prior to 1994. I do not think it plausible that the 1995 Board was unconscious of the import of its holding to the rule as amended. While avoiding reference to 43 CFR 4.1105(a)(5), the Board nonetheless restricted the rule's application to the extent the issue was inspection as opposed to enforcement. Notably, in the decade after Dixie Fuels, the Board never required service on a permittee of an appeal of a decision on informal review or addressed 43 CFR 4.1105(a)(5) in any context.

I submit that Dixie Fuels has effectively interpreted 43 CFR 4.1105(a)(5). I would follow its import today. Doing so would square the 1994 amendment with the statute and existing rules. And not doing so is far more significant than the majority acknowledges. This is so because declaring a permittee to be a "statutory party" to an appeal from a decision on informal review not to inspect means that it is a statutory party to a decision to inspect. By defining a permittee as "indicated in the act as a party to administrative review proceedings" when a citizen requests inspection, the majority cannot avoid reopening the question of who may appeal when OSM issues a decision on informal review to inspect.

I appreciate the majority's effort to block any suggestion that such an appeal would be countenanced because a permittee's interests may not be adversely affected by a decision of OSM to inspect. See Majority Opinion at n.16. But I must discount such efforts. The "statutory party" definition presumes the party has administrative rights founded in law, a conclusion at odds with SMCRA where inspection is at issue. Declaring a "statutory party" to have no right of appeal is unlikely to be as successful as the majority hopes because 30 CFR 842.15(d), quoted above, does not on its face limit the appeal right to one by the citizen. Rather, our case law reaches this conclusion based upon the preamble to the 1982 rule and its logic. Dixie Fuels fully comprehended the syllogism that a permittee is not adversely affected by inspection for which it gets no notice because it is not "indicated in the act as a party to a review proceeding" involving inspection. Concluding that permittees are, by definition, "indicated in the act as parties to administrative review proceedings under the act," the majority defines them as generally indispensable. In fact, Dixie Fuels stated that the very fact that a permittee does not have a right of appeal shows it is not a statutory party. 132 IBLA at 332. Today's ruling defeats the syllogism. By defining the permittee as a statutory party and creating for a permittee the participatory rights of an indispensable party, I think the majority deludes itself in concluding that we can continue to construe silence in 30 CFR 842.15(d) as precluding permittee appeals from OSM decisions to inspect.

Exposing the Board to a potential extension of the appeal regulation at 30 CFR 842.15(d), and erosion of the plainly stated intent of the preamble to the 1982 rule, makes dissonant what Dixie Fuels harmonized. In fact, consistent with prior precedent, the Board there noted that a permittee can be an intervenor in an appeal from a decision on informal review not to inspect. 132 IBLA at 334; SOCM 108 IBLA at 84 (permittee granted intervention); Donald St. Clair, 77 IBLA at 291 (same).^{6/} The distinction between allowing permissive intervention and declaring a permittee to have (indispensable) statutory party status would seem critical to maintaining the protection of the appeal right only for the citizen, as intended by the Department in creating 30 CFR 842.15(d). It is also critical to my view that Consol has no “right” to mount a defense to an OSM inspection, as opposed to stating, as intervenor, its position on the “information available” to OSM forming “reason to believe,” or not, that a violation existed. No authority heretofore has suggested that a permittee may inject a legal defense to the possibility of inspection or enforcement into what was to be a “reason to believe” analysis; such a “right” is antithetical to the statutory purpose of requiring the Department to make a quick determination of whether to inspect for surface mining violations on the basis of citizen’s information.^{7/}

If OSM found a violation and took enforcement action, Consol would undoubtedly have a right to present evidence.^{8/} Reopening the Maddocks’ appeal now “to allow Consol to present any evidence it may possess on its behalf” (Motion for Reconsideration at 4), presumes that such procedures are required before

^{6/} Under 30 CFR 842.15(b), the permittee receives notice of a decision on informal review. Appeals are not secrets. A permittee may ask OSM if an appeal is filed to decide whether to intervene. Admittedly, this process was complicated by the fact that OSM did not notify the Board of either Maddocks appeal for months after OSM was served. The question remains whether Consol asked, and, if it was aware of the appeals, why it did not seek timely to intervene.

^{7/} The majority opinion relies for such authority on Moose Coal Co., 687 F. Supp. at 247. As the majority acknowledges, Dixie Fuels, 132 IBLA at 333, found that the Moose Coal Co. decision was not controlling where only inspection is at issue. I disagree with the majority’s rejection of that logic now. Under the majority opinion, a permittee would be “an entity whose fate is being decided” when we decide whether OSM was correct in refusing to inspect after a citizen’s complaint presenting reason to believe an inspection should take place. A permittee agrees to inspection without notice when accepting a SMCRA permit. Its fate is decided if the inspection reveals information justifying enforcement action.

^{8/} In such a case, a permittee would be a party in an appeal because it is adversely affected. However, it would also be a statutory party to an “administrative review provision under [SMCRA]” within the meaning of 43 CFR 4.1105(a).

inspection. This conclusion does not derive from the service rule, and should not be construed to be found within it. I would not allow inspection to come to a standstill for the service rule. Whether or not the point of the 1994 rulemaking may have been, in response to SOCM n.7, to require service of notices of appeal on all permittees from informal review decisions, the majority saves that purpose with respect to appeals from decisions on informal review not to inspect only at the expense of a sensible regulatory history showing that a permittee's administrative participation begins at the time of an enforcement action.

Nor should the Board or the Court shield Consol from inspection now. First, the nature of any potential inspection of Consol's operation is debatable; inspection may go no further than the Maddocks' premises if they can verify no effects (rust-colored porcelain, odor) or other evidence of water-quality issues. Second, in our order, we addressed PADEP's and OSM's failure to clarify the regulatory provisions they considered. "This lack of correspondence between their discussions and the particular Pennsylvania code provisions against which they were purportedly comparing the adequacy of Consol's actions makes it almost impossible to determine whether their conclusions were arbitrary." (Order at 39.) On remand, OSM would address these questions in the first instance. Consol should not be allowed to "brief" issues before us that should have been addressed first and foremost by OSM.^{2/} Third, as noted above, neither Consol nor OSM asserts that Consol was unaware of the IBLA proceedings. The Maddocks were unabashedly vocal in their views and sought multiple opportunities to pursue concerns before this Department and State agencies; Consol was aware of these events. Under 43 CFR 845.15(b), Consol was notified of OSM decisions on informal review. The Maddocks made no effort to shield their identity. I seriously question the suggestion that, in the 5 years since the Maddocks served their first appeal on OSM, Consol was not fully aware of the appeals. If it was aware and chose not to act, assuming OSM would prevail, I object to permitting even a "statutory party" to choose the timing of its participation.

Finally, our role in an appeal of a decision on informal review not to inspect should be to determine whether OSM acted rationally on the basis of "information available." Only after we conduct our review of a decision on informal review not to inspect, reverse, and order an inspection, and OSM then inspects and issues an NOV,

^{2/} OSM queries a Pennsylvania code provision cited in our order. (Memorandum at 1 n.1.) It was the lack of OSM's citation to the law against which it was judging Consol's compliance that motivated our reversal. My expectation was that OSM would clarify the appropriate law once the matter was returned to its jurisdiction, not that it would ask us further to construe authority it ignored in the first instance. I would not allow Consol to brief this to the Board first. Consol's interest in proper application of controlling authority is protected by OSM's actually addressing it.

should the permittee be allowed to present evidence against the enforcement action in a hearing before an administrative law judge. The majority opinion subverts the process, accepting a permittee's evidence and argument in defense to inspection (which should not be considered) and to enforcement (which belongs elsewhere).

Citizens like the Maddocks are property owners pushed into the world of regulation by events beyond their control. In deference to the fact that a private citizen who believes his property is at risk from mining activity should not be compelled to expend his resources to protect himself, Congress allowed the citizen to prevail on OSM to protect him from harm based upon information he provides to OSM. SMCRA makes the citizen a supplicant to OSM as protector. The majority's opinion converts the protective SMCRA citizen's complaint process into litigation between the mining company and the citizen. The practicalities now make hiring counsel the only reasonable course for the citizen. For most, the cost will eradicate the value of the appeal altogether. Nor do I think the process we create here fully represents a meeting of the minds between the parties in 1982 when the Department settled litigation by agreeing to provide a right of appeal by the citizen. Donald St. Clair, 77 IBLA at 294.

I would construe 43 CFR 4.1105(a)(5) consistently with Dixie Fuels and with SMCRA. The permittee is offered no participation in a decision whether to inspect. Because only inspection is at issue, Consol was not a statutory party. Even if I were to agree with the majority and find, however, that Consol was entitled to service under that rule, I would demand a statement by Consol regarding whether it had de facto notice of the appeals at issue here, and, if Consol was aware of the appeals, I would not further delay the inspection to provide process to accomplish what was available to Consol all along – a right to permissibly intervene in a limited manner to state a view regarding “information available” to OSM. Finally, even if Consol was entitled to service and had no knowledge of the appeals, I would simply allow a brief on intervention as described above. I would not find that Consol is entitled to participate as an indispensable party, because the service rule did not address the expansive participation the majority now affords.

I dissent.

Lisa Hemmer
Administrative Judge