

**BEFORE THE DIRECTOR
UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT**

In the Matter of:)	
)	Request for Informal Review of a Denial of
)	a Citizen Complaint Filed Pursuant to the
GCC Energy, Inc., King II Mine,)	Surface Mining Control and Reclamation
Colorado Permit No. C-1981-035)	Act
and Federal Permit No. CO-0106A)	
_____)	

**REQUEST FOR INFORMAL REVIEW OF A DECISION NOT TO ENFORCE UNDER
THE SURFACE MINING CONTROL AND RECLAMATION ACT**

Pursuant to 30 U.S.C. § 1267(h) and C.F.R. § 842.15, WildEarth Guardians hereby requests the Director of the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”) or his designee review a decision by Robert Postle, Program Support Division Manager for OSMRE’s Western Regional Office, declining to inspect and take appropriate enforcement action with respect to alleged violations of the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1201, *et seq.*, and SMCRA regulations, 30 C.F.R. § 700, *et seq.*

I. Background

On May 20, 2016, OSMRE received a citizen complaint filed by WildEarth Guardians pursuant to 30 U.S.C. §§ 1267(h)(1) and 1271(a)(1), and 30 C.F.R. § 842.12(a), regarding alleged violations of SMCRA and regulations implementing SMCRA with regards to GCC Energy’s King II coal mine in La Plata County, Colorado.¹ *See* Exhibit 1, WildEarth Guardians, “Citizen Complaint Under Surface Mining Control and Reclamation Act Over Violations at GCC

¹ The King II coal mine is permitted under State Permit No. C-1981-035 and Federal Permit No. CO-0106A.

Energy's King II Mine in La Plata County, CO, Colorado Permit No. C-1981-035 and Federal Permit No. CO-0106A" (May 19, 2016). The complaint alleged two primary violations: 1) That GCC Energy was operating its King II coal mine in a manner contrary to a May 21, 2007 mining plan approved by the Assistant Secretary of the U.S. Department of the Interior for Lands and Minerals Management, in violation of SMCRA rules at 30 C.F.R. § 746 (Exhibit 1 at 6), and 2) That OSMRE violated these same SMCRA rules in summarily determining that a modification to the May 21, 2007 mining plan was not warranted when GCC was permitted by the State of Colorado in 2014 to increase production to 1.3 million tons per year (Exhibit 1 at 9). The May 21, 2007 mining plan authorized the extraction of coal from federal lease number COC-62960. As alleged in Guardians complaint, the mining plan was approved on the basis that coal production from the King II mine would not exceed 610,000 tons per year. However, since that approval, GCC has regularly exceeded this level of production from federal coal lease COC-62960 and has asserted it is allowed to produce up to 1.3 million tons of coal annually from the lease. OSMRE has allowed these production increases without properly assessing whether a modification to the May 21, 2007 mining plan is warranted. WildEarth Guardians' complaint requested OSMRE inspect and take appropriate enforcement action over GCC's apparent violation of its 2007 mining plan and the own apparent failure to properly assess whether a mining plan modification was necessary.

On June 6, 2016, Mr. Postle responded to WildEarth Guardians' complaint, declining to inspect and take enforcement action. *See* Exhibit 2, Postle, B., "Response to WildEarth Guardians' Citizens Complaint and Request for Federal Inspection of GCC's King II Mine CO-0106" (June 6, 2016). In his response, Mr. Postle asserted that the violations alleged by Guardians related to duties under the U.S. Mineral Leasing Act, and therefore were not

enforceable under SMCRA or regulations implementing SMCRA. Mr. Postle claimed that violations of a mining plan “cannot form the basis of a citizen complaint under Section 517(h)(1) [30 U.S.C. § 1267(h)(1)] of SMCRA or a federal inspection under Section 521(a)(1) [30 U.S.C. § 1271(a)(1)].” Exhibit 2 at 2. Further, in response to Guardians allegations over OSMRE’s violations, he asserted the allegations were “not the proper subject of a citizen complaint under SMCRA.” *Id.* at 3. Based on these arguments, Mr. Postle declined both to assess whether GCC’s production rates constituted a violation of its 2007 mining plan and to assess whether OSMRE had violated regulations implementing SMCRA. Implicitly, he found that there was no “reason to believe” that a violation of SMCRA and/or regulations implementing SMCRA exists.

In concluding his denial, Mr. Postle stated that Guardians had the “right under 30 C.F.R. § 842.15 to request an informal review of the actions taken.” To this end, WildEarth Guardians now requests the OSMRE Director or his designee review Mr. Postle’s decision. As will be explained further, Mr. Postle’s decision ignores the plain, unambiguous language of OSMRE’s own regulations and cannot be sustained. WildEarth Guardians requests the OSMRE Director or his designee reverse Mr. Postle’s determination, find that there is reason to believe there are violations, and conduct an inspection and undertake any and all appropriate enforcement action. Below, we detail our request.

II. WildEarth Guardians is Adversely Affected by Mr. Postle’s Decision

As a threshold matter, a request for informal review can only be sustained if a person demonstrates that they are or “may be adversely affected by a coal exploration or surface coal mining and reclamation operation[.]” 30 C.F.R. § 842.15(a)(1). A “person” is very broadly defined under regulations implementing SMCRA as:

[A]n individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal State or local government.

30 C.F.R. § 700.5. WildEarth Guardians is a nonprofit incorporated in the State of New Mexico.

See Exhibit 3, WildEarth Guardians Incorporation Information (July 13, 2016), webpage

available at

<https://portal.sos.state.nm.us/BFS/online/CorporationBusinessSearch/CorporationBusinessInformation?businessId=127275>.

Thus, WildEarth Guardians meets the definition of a “person” under OSMRE’s regulations.

To this end, under SMCRA regulations, WildEarth Guardians also meets the “person having an interest which is or may be adversely affected” requirement to sustain an informal review. Under OSMRE’s regulations, a person that is or may be adversely affected is defined as any person “[w]ho uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations[.]” 30 C.F.R. § 700.5.

Through its members, WildEarth Guardians uses resources that are or may be adversely affected by GCC’s King II coal mining operations. Attached to this request are declarations from WildEarth Guardians members Paula Mathias, Frank McCue, and Julie McCue, all of whom reside near the King II mine in La Plata County, Colorado. *See* Exhibits 4 and 5. These declarations demonstrate that these individuals use resources of “economic, recreational, esthetic, or environmental value,” including their own properties, that they are currently being adversely affected as a result of surface coal mining operations at the King II coal mine, and that they may be adversely affected as a result of Mr. Postle’s decision not to inspect and enforce.

The adverse affects they are experiencing and may experience include exposure to unsightly and loud industrial activity, diminished environmental quality, degraded aesthetics, lost property value, jeopardized safety, and more. Their declarations further demonstrate that a resolution of this informal review in favor of WildEarth Guardians will

The declarations of Ms. Mathias and Mrs. and Mr. McCue demonstrate that WildEarth Guardians, as an organization, is and may be adversely affected by Mr. Postle's decision and therefore has standing for this informal review request to be sustained. To this end, these declarations confirm that the WildEarth Guardians' request for informal review is not only warranted, but compelled.

III. Mr. Postle's Decision Defies OSMRE Regulations and Must be Reversed

WildEarth Guardians requests the Director or his designee review Mr. Postle's determination that a violation of a mining plan does not constitute a violation subject to inspection pursuant to SMCRA and his determination that OSMRE's failure to appropriately assess whether a mining plan modification is necessary also does not constitute a violation subject to inspection. Based on the plain and unambiguous language of OSMRE's own regulations, his determinations are incorrect and must be reversed. Below, we explain the legal background and the basis for our request for review.

A. Legal Background

Whenever OSMRE has reason to believe, on the basis of any available information, including information presented by any person through a citizen complaint, that a violation of SMCRA is occurring in relation to a surface coal mining operation, an inspection "shall immediately" be conducted to determine whether there is, in fact, a violation. 30 U.S.C.

§ 1271(a)(1). To this end, OSMRE regulations implementing SMCRA specifically state that an inspection must be conducted whenever there is reason to believe “that there exists a violation of the [Surface Mining Control and Reclamation] Act, this chapter, the applicable program, or any condition of a permit or an exploration approval[.]” 30 C.F.R. § 842.11(b)(1)(i).² In response to a citizen complaint, OSMRE “shall have reason to believe that a violation [] exists if the facts alleged by the informant would, if true, constitute a [] violation[.]” 30 C.F.R. § 842.11(b)(2).

In referencing “this chapter,” OSMRE’s regulations plainly refer to Chapter VII regulations under Title 30 of the Code of Federal Regulations, which are set forth at 30 C.F.R. § 700, *et seq.* Thus, the agency’s regulations are clear that where there is reason to believe a violation of any regulatory requirement under Title 30, Chapter VII of the Code of Federal Regulations exists, an inspection “shall immediately” be conducted. As the U.S. Department of the Interior’s Board of Land Appeals has explained, “OSM is required to immediately conduct a Federal inspection [] when it has reason to believe that there is a violation of SMCRA, 30 C.F.R. Chapter VII[.]” *Al Hamilton Contracting Co. v. Office of Surface Mining Reclamation and Enforcement*, 172 IBLA 83, 103 (Aug. 2, 2007).

The Secretary of the Department of Interior is responsible for authorizing the surface mining of federal coal leased by the U.S. Bureau of Land Management. *See* 30 C.F.R.

§ 740.4(a)(1).^{3, 4} This authorization is provided through the issuance of a “mining plan.” The

² OSMRE’s regulations similarly state that whenever, on the basis of an inspection, a violation of “the [Surface Mining Control and Reclamation] Act, this chapter, the applicable program or any condition of a permit or an exploration approval” is found, that OSMRE “shall issue a notice of violation.” 30 C.F.R. § 843.12(a)(1).

³ “Surface coal mining operations” include both activities conducted on the surface of lands in connection with a surface coal mining operation and the surface operations and surface impacts incident to an underground coal mining operation. 30 C.F.R. § 700.5.

authority to issue a mining plan was initially set forth under the Mineral Leasing Act, which states that before any entity can take action on a federal leasehold that “might cause a significant disturbance of the environment,” an operation and reclamation plan must be submitted to the Secretary of Interior for approval. 30 U.S.C. § 207(c).

SMCRA ultimately incorporated and reasserted this Mineral Leasing Act requirement. *See* 30 U.S.C. § 1273(c). Accordingly, OSMRE promulgated regulations governing the process for the “review and approval, disapproval or conditional approval of mining plans on lands containing leased Federal coal.” 30 C.F.R. § 746.1. Above all, OSMRE’s regulations provide that, “[n]o person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved [a] mining plan” and that “[s]urface coal mining and reclamation operations on lands containing leased Federal coal shall be conducted in accordance with this subchapter [D], any lease terms and conditions, and the approved mining plan.” 30 C.F.R. § 746.11. What’s more, OSMRE’s rules are clear that a mining plan “shall be binding on any person conducting mining under the approved mining plan.” 30 C.F.R. § 746.17(b).

A “mining plan shall remain in effect until modified, cancelled or withdrawn[.]” 30 C.F.R. § 746.17(b). The Secretary must modify a Mining Plan where, among other things, OSMRE determines that there is “[a]ny change in the mining plan which would affect the conditions of its approval pursuant to Federal law or regulation[,]” “[a]ny change in the location or amount of coal to be mined, except where such change is the result of [] [a] minor change in the amount of coal actually available for mining from the amount estimated, or “[a]ny change

⁴ “Leased Federal coal means coal leased by the United States pursuant to 43 CFR part 3400[.]” 30 C.F.R. § 740.5(a).

which requires the preparation of an environmental impact statement under the National Environmental Policy Act[.]” 30 C.F.R. §§ 746.18(d)(1), (d)(3), and (d)(5).⁵ Where a mining plan modification may be required, a permittee may not commence mining of federal coal until OSMRE determines a modification is not required or a modification is approved by the Secretary. 30 C.F.R. § 746.18(c).

Ultimately, while the duty to review and, as appropriate, approve and/or modify mining plans stems from the Mineral Leasing Act, this duty has also been clearly codified and imposed by rule pursuant to SMCRA.⁶ In referring to violations of “this chapter,” 30 C.F.R. § 842.11(b)(1)(i) refers to Chapter VII regulations, which include regulations set forth under 30 C.F.R. § 746. This means that if OSMRE has reason to believe that a violation of any provision of 30 C.F.R. § 746 is occurring, the agency must conduct an inspection pursuant to 30 C.F.R. § 842.11(b)(1)(i).

B. Mr. Postle’s Response Ignores OSMRE’s Own Regulations

In denying WildEarth Guardians complaint and refusing to undertake an inspection, Mr. Postle claimed that the alleged violations represented violations of the U.S. Mineral Leasing Act, and therefore could not form the basis of a citizen complaint or a federal inspection under SMCRA. Mr. Postle’s claims are categorically incorrect.

With respect to GCC Energy’s alleged violations of its mining plan, Mr. Postle responded:

Your complaint also claims a SMCRA violation occurred because of the mine’s violation of its MLA [Mineral Leasing Act] mining plan. Allegations of MLA violations are not properly the subject of a citizen complaint under Section 517(h)(1) of SMCRA, which

⁵ An environmental impact statement is required whenever a major federal action “[s]ignificantly [a]ffect[s] [t]he quality of the human environment.” 40 C.F.R. § 1502.3.

⁶ It is notable that in promulgating 30 C.F.R. § 746, OSMRE expressly cited “ 30 U.S.C. § 1201, *et seq.*,” which is SMCRA, as authority.

only applies to persons who may be adversely affected by alleged violations of SMCRA. [] As you are aware, mining plans are not issued under SMCRA but instead are issued under the MLA.

Exhibit 2 at 2. Similarly, Mr. Postle stated that, with regards to Guardians allegations that OSMRE failed to properly assess whether a mining plan modification was warranted, “it is not the proper subject of a citizen complaint under SMCRA.” Exhibit 2 at 3. Based on this rationale, Mr. Postle declined to determine whether there was “reason to believe” that a violation of GCC Energy’s 2007 mining plan existed or that OSMRE had violated SMCRA regulations, as alleged by WildEarth Guardians in its complaint. Mr. Postle’s determinations, however, are not in accord with OSMRE’s regulations.

As explained above, regulations implementing SMCRA at 30 C.F.R. § 746 require that surface coal mining operations on lands containing leased Federal be conducted “in accordance with [] the approved mining plan” and that a mining plan “shall be binding on any person conducting mining under the approved mining plan.” 30 C.F.R. §§ 746.11 and 746.17(b). To this end, if surface coal mining is not conducted in accordance with an applicable and approved mining plan, this would represent a violation of regulations at 30 C.F.R. § 746. Because 30 C.F.R. § 842.11(b)(1) plainly compels OSMRE to inspect whenever there is “reason to believe” that a violation of Title 30, Chapter VII of the Code of Federal Regulations exists, a violation of 30 C.F.R. § 746 arising as a result of a mining plan violation can form the basis of a citizen complaint and a federal inspection.⁷

Similarly, OSMRE’s duty to properly assess whether a mining plan modification is necessary is expressly set forth under 30 C.F.R. § 746.18. To this end, if OSMRE fails to properly assess whether a mining plan modification is necessary, this would represent a violation

⁷ Further, if an inspection finds a violation of 30 C.F.R. § 746 arising as a result of a mining plan violation, OSMRE is compelled to enforce. *See* 30 C.F.R. § 843.12(a)

of SMCRA implementing regulations. Again, because 30 C.F.R. § 842.11(b)(1) plainly compels OSMRE to inspect whenever there is “reason to believe” that a violation of Title 30, Chapter VII of the Code of Federal Regulations exists, a violation of 30 C.F.R. § 746 arising as a result of a failure of OSMRE to properly assess whether a mining plan modification is necessary can form the basis of a citizen complaint and a federal inspection.

In its complaint, Guardians clearly spelled out for OSMRE how a violation of a mining plan and how OSMRE’s failure to properly assess whether a mining plan modification was necessary represented violations of 30 C.F.R. § 746, and was therefore subject to inspection and enforcement. The complaint explained how 30 C.F.R. §§ 746.11 and 746.17 require compliance with mining plans (WildEarth Guardians Complaint at 3-4), stated how 30 C.F.R. § 746.18 requires OSMRE to review several factors to determine whether a mining plan modification is necessary (Complaint at 4), pointed out how GCC Energy’s 2007 mining plan was “binding” on the company in accordance with 30 C.F.R. § 746.17(b) (Complaint at 6), detailed how OSMRE failed to properly assess whether a mining plan modification was warranted in accordance with the criteria set forth under 30 C.F.R. § 746.18(d), explicitly alleged that by operating outside the bounds of its 2007 mining plan, GCC Energy was violating 30 C.F.R. §§ 746.11 and 746.17 (Complaint at 11), and pointedly alleged that by failing to properly assess whether a mining plan modification was necessary, OSMRE violated 30 C.F.R. § 746.18. The complaint also pointed out the obvious, which is that 30 C.F.R. § 842.11(a)(1) expressly compels OSMRE to inspect on the basis of a violation of SMCRA implementing regulations, and to appropriately enforce any such violations.

In his response, Mr. Postle did not even mention SMCRA regulations at 30 C.F.R. § 746, let alone address the fact that WildEarth Guardians’ complaint alleged violations of these

regulations. While Mr. Postle acknowledged that OSMRE is compelled to inspect and enforce where there is reason to believe a violation of SMCRA exists, he effectively denied that this duty extends to violations of SMCRA implementing regulations. This denial not only contravenes OSMRE's regulations, but represents an irrational, unreasoned, and unsupported response to WildEarth Guardians' complaint.⁸

C. Mr. Postle's Erroneous Determination is not Harmless

Mr. Postle's denial is not a harmless error or overlookable mistake. Guardians' complaint presented factual allegations that, if true, would constitute violations of SMCRA regulations. For instance, by producing more than 610,000 tons of coal annually (and up to 1.3 million tons annually), GCC Energy would be operating the King II mine outside the bounds of its 2007 mining plan. As Guardians explained in its complaint:

Under SMCRA regulations, a mining plan is "binding" on any entity conducting mining under the approved plan. 30 C.F.R. § 746.17(b). This requirement is echoed by the 2007 Mining Plan modification for the King II mine, which states, "This mining plan approval shall be binding on any person conducting coal development or mining operations under the approved mining plan[.]"

In the 2007 Mining Plan modification, the Secretary of the Interior stated that, "[t]he operator shall conduct coal development and mining operations only as described in the complete permit application package, and approved by the Office of Surface Mining Reclamation and Enforcement[.]" [] At the time of the federal permit and 2007 Mining Plan modification, the King II mine was authorized to produce a maximum of 610,000 tons of coal per year. Thus, in mining more than 610,000 tons of coal per year for every year since 2011 and without any further mining plan approvals, GCC has been and continues to operate in violation of SMCRA.

It may be argued that any production increases at the King II mine have been approved by the State of Colorado through a permit revision, and therefore are appropriate under

⁸ Particularly given that Mr. Postle acknowledged offering his determination "in accordance with 30 C.F.R. § 842.12," his determination is all the more unbelievable. 30 C.F.R. § 842.12 explicitly states that a citizen complaint may be filed whenever there is reason to believe that there is a violation referred to under 30 C.F.R. § 842.11(b)(1)(i). 30 C.F.R. § 842.11(b)(1)(i) expressly states that violations subject to complaint and inspection include violations of SMCRA regulations.

SMCRA. However, these production increases were not disclosed as part of the permit application package reviewed by OSMRE when the 2007 Mining Plan modification was approved. Such production increases could not possibly be construed as operating “as described in the complete permit application package” that was considered in 2007. GCC therefore appears to be clearly conducting its operations outside the bounds of the 2007 Mining Plan modification.

Exhibit 1 at 6. That the 2007 mining plan limits GCC’s production is underscored by the fact that neither OSMRE nor the BLM prepared any analysis of the impacts of mining more than 610,000 tons per year pursuant to NEPA. In fact, as WildEarth Guardians pointed out, in recommending approval of the 2007 mining plan, OSMRE relied on an Environmental Assessment (“EA”) prepared by the BLM in 2001 that only analyzed the environmental impacts of mining up to 300,000 tons of coal per year. *See* Exhibit 1 at 10. Fundamentally, if WildEarth Guardians was correct that that GCC would violate its mining plan if production at the King II mine exceeded 610,000 tons per year, then there exists a violation of SMCRA implementing regulations at the King II mine. This should have given OSMRE reason to believe that a violation exists and prompted an inspection and appropriate enforcement action.

Further, with regards to WildEarth Guardians’ allegations that OSMRE failed to properly determine whether modification of the 2007 mining plan was required after GCC received approval from the State of Colorado to increase coal production to 1.3 million tons annually at the King II mine, these allegations would certainly represent violations of SMCRA regulations if true. As Guardians documented in its complaint, not only did an unauthorized OSMRE employee determine that a mining plan modification was not necessary, but OSMRE failed to even acknowledge, let alone address, all the factors required to be considered under 30 C.F.R. § 746.18(d) when assessing whether a mining plan modification is required. Exhibit 1 at 7-9. If WildEarth Guardians is correct, then a violation of SMCRA regulations would exist over OSMRE’s failure to properly assess whether a mining plan modification was or was not

required. Again, this should have given OSMRE reason to believe that a violation exists and prompted an inspection and appropriate enforcement action.

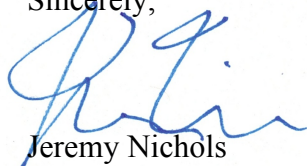
IV. Conclusion

For the aforementioned reasons, we request the Director or his designee reverse Mr. Postle's rejection of WildEarth Guardians' May 20, 2016 citizen complaint and decision not to inspect to determine whether there are, in fact, violations related to GCC Energy's King II coal mine, and to enforce any such violations. Mr. Postle's decision not only defies OSMRE's own regulations, but his response simply failed to acknowledge the plain language of the agency's regulations and WildEarth Guardians' complaint. An inspection would have confirmed whether or not GCC Energy is operating its King II coal mine out of compliance with its 2007 mining plan and SMCRA implementing regulations and/or whether or not OSMRE violated SMCRA when determining a modification to the 2007 mining plan was not required when GCC received state approval to mine up to 1.3 million tons of coal annually.

In accordance with 30 C.F.R. § 842.15(b), we look forward to a response to this request for informal review within 30 days.

Respectfully submitted this 15th day of July, 2016.

Sincerely,



Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
2590 Walnut St.
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org