

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS**

WILDEARTH GUARDIANS,)	
)	IBLA No. 2018-0133
Appellant)	Appeal of Denial of
)	Request for Informal Review,
)	Citizen Complaint Regarding West
)	West Elk Coal Mine,
)	Permit No. C-1980-007, Gunnison
)	County, Colorado
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STATEMENT OF REASONS

Pursuant to 43 C.F.R. § 4.1282(d), WildEarth Guardians files the following Statement of Reasons in support of its May 7, 2018 Notice of Appeal.

In this Appeal, Guardians asks the Interior Board of Land Appeals (“IBLA”) to address the issue of whether it was legally appropriate for the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”) to deny taking appropriate action to address alleged violations of the Surface Mining Control and Reclamation Act (“SMCRA”) at Arch Coal’s West Elk coal mine in Gunnison County, Colorado.¹

Here, OSMRE rejected a request for a federal inspection (often described as a “Citizen Complaint”) filed by Guardians pursuant to SMCRA and OSMRE’s SMCRA regulations. Although the allegations in the Complaint, if read to be true, would constitute violations of SMCRA, OSMRE denied Guardians’ Complaint. In response to a Request for Informal Review filed over OSMRE’s rejection of Guardians’ Citizen Complaint, the agency asserted that it

¹ The West Elk mine is operated by Mountain Coal Company, a subsidiary of Arch Coal.

lacked authority to even assess whether the West Elk mine was in compliance, and that it further lacked authority to enforce the alleged violations.

As we will explain further, OSMRE completely ignored the standard of review required when reviewing a Citizen Complaint under SMCRA. Appropriate actions in this matter would have been to grant WildEarth Guardians' Complaint, conduct an inspection to verify whether alleged violations actually exist at the West Elk mine, and take appropriate action. However, OSMRE denied the complaint on the basis of specious claims regarding its perceived authorities to inspect air quality violations.

For the following reasons, WildEarth Guardians requests the IBLA set aside OSMRE's denial of Guardians' Request for Informal Review and direct the agency to grant Guardians' Citizen Complaint, conduct an inspection, and take appropriate action to resolve ongoing violations of SMCRA at the West Elk coal mine.

BACKGROUND

On October 20, 2017, Guardians filed a Citizen Complaint pursuant to SMCRA, 30 U.S.C. §§ 1267(h)(1) and 1271(a)(1), and SMCRA implementing regulations, 30 C.F.R. § 842.12(a), regarding alleged violations at Arch's West Elk mine in Gunnison County, Colorado. *See generally* Exhibit 1, WildEarth Guardians, "Complaint and Request for Inspection Over Failure of West Elk Mine, Permit Number C-1980-007, to Comply with Applicable State and Federal Coal Mining Laws and Regulations" (October 20, 2017) (hereinafter "Complaint").

Guardians' Complaint alleged that Arch's methane venting operations at the mine, which constitute surface coal mining operations, were violating (and continue to violate) State and Federal air quality laws and regulations, thereby violating the conditions of its SMCRA mining permit requiring compliance with State and Federal air quality laws and regulations. As detailed

in WildEarth Guardians' complaint, the West Elk mine's methane venting activities are intensive and involve the drilling and operation of dozens of methane venting wells above the underground mine. *See* Ex. 1 at 2-9. As alleged in the Complaint, in the process of venting large amounts of gas from the mine, Arch not only releases methane, but also other related gases that are regulated as volatile organic compounds ("VOCs") under State and Federal air quality laws and regulations. *See* Ex. 1 at 9-11. According to Arch Coal's own data, these VOCs include propane, benzene, toluene, butane, and other compounds. *Id.* at 1.

Due to the VOC emissions, State of Colorado air quality regulatory agents have reported the West Elk mine has released VOCs at levels exceeding air quality permitting and reporting thresholds. As alleged in Guardians' complaint, Colorado air quality regulators have consistently documented these violations since 2012. *See* Ex. 1 at 9-14. In spite of consistent documentation of these violations clear evidence that regulated VOCs are being released from the West Elk mine, Arch Coal has not properly reported its VOC emissions nor secured legally required air quality permits to authorize the release of these emissions.

Guardians' complaint alleged that, due to these violations of State and Federal air quality laws and regulations, Arch Coal was in violation of at least four conditions of its state-issued SMCRA mining permit, including Conditions C.1, C.3, C.8, and C.9 of Permit No. C-1980-007. *See* Ex. 1 at 14-15. These Conditions require compliance with State and Federal air quality laws and regulations as Arch Coal engages in surface coal mining activities, including methane venting.

On November 28, 2017, OSMRE's Denver Field Branch Manager, Howard Strand,

responded to Guardians' complaint and declined to inspect and take enforcement action.² See Exhibit 2, Strand, H., "Response to WildEarth Guardians' Citizens Complaint and Request for Federal Inspection" (Nov. 28, 2017). In response to Guardians' allegations, Mr. Strand found that Guardians' Complaint "[did] not provide reason to believe a violation exists under SMCRA, the Colorado State program or the state-issued SMCRA permit." *Id* at 1. In declining to inspect, Mr. Strand based his refusal on the assertion that he did not believe that OSMRE had the authority to inspect or to make a finding that Arch was violating its permit by failing to comply with applicable state and federal clean air laws and regulations. *Id* at 2. Accordingly, Mr. Strand asserted he had no reason to believe the West Elk mine was in violation of its mining permit.

On December 6, 2017, Guardians filed a Request for Informal Review with OSMRE's Western Region Office ("WRO"). See Exhibit 3, WildEarth Guardians, "Request for Informal Review" (Dec. 6, 2017). The Request for Informal Review detailed how Mr. Strand's response was contrary to SMCRA and its implementing regulations, and that an inspection was required at the West Elk mine pursuant to 30 C.F.R § 842.11(b)(2). *Id.* Guardians explained that Mr. Strand failed to consider the information provided in the October 20, 2017 Complaint and determine whether the facts alleged in the Complaint would, if true, constitute violations under SMCRA and SMCRA regulations. *Id.* at 3-5. Guardians also provided further information from Arch Coal demonstrating that regulated VOCs are, in fact, being released in the course of venting methane at the West Elk mine. *Id.* at 10-11.

On April 18, 2018, the WRO Director, David Berry, affirmed Mr. Strand's decision and declined to inspect and take appropriate action to address the alleged violations at the West Elk

² It is critical to note that while SMCRA regulations require that citizen complaints be responded to no later than 15 days following receipt (*see* 30 C.F.R. § 842.12(d)), the Denver Field Branch Manager issued his decision 38 days after receipt.

mine. *See generally* Exhibit 4, Berry, D., Response to Request for Informal Review of November 28, 2017 Denver Field Branch Decision – Citizen Complaint and Request for Inspection – West Elk Mine (April 18, 2018).³ The response to the Request for Informal Review from Mr. Berry largely echoed the response from Mr. Strand, but further attempted to justify OSMRE’s claim that rejection of WildEarth Guardians’ complaint was appropriate based on the agency’s belief that it lacked authority to inspect or take any enforcement action in relation to the alleged violations.

Mr. Berry’s decision provided for the right to appeal to the IBLA. *See* Ex. 4 at 8. Accordingly, on May 7, 2018, WildEarth Guardians timely filed a Notice of Appeal. This Notice of Appeal was concurrently served upon the WRO Director, the IBLA, the Office of the Regional Solicitor, and upon Arch Coal (i.e., Mountain Coal Company) and the West Elk mine.

STATEMENT OF STANDING

As an initial matter, Guardians has standing to sustain this Appeal. IBLA regulations state that, “[a]ny person who is or may be adversely affected by a written decision of the Director of OSMRE or [her] delegate may appeal to the Board where the decision specifically grants such right of appeal.” 43 C.F.R. § 4.1281.

Here, Guardians meets the regulatory definition of a “person” as defined by the SMCRA regulations:

[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

³ It is critical to note that while SMCRA regulations require that requests for informal review be decided within 30 days of receipt (*see* 30 C.F.R. § 842.15(b)), the WRO Director issued his decision more than 130 days after receipt.

government.

30 C.F.R. § 700.5. Guardians is a nonprofit organization incorporated in the State of New Mexico and as such fits within the definition of a “person” as defined by SMCRA regulations.⁴

Additionally, Guardians is a “person having an interest which is or may be adversely affected.” 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, Guardians uses resources that are or may be adversely affected by Arch’s West Elk coal mining operations, as reflected by Guardians member, Jeremy Nichols’ declaration. *See* Exhibit 5, Declaration of Jeremy Nichols (May 29, 2018). Mr. Nichols’ declaration demonstrates that he uses resources of “economic, recreational, esthetic, or environmental value,” that are currently being adversely affected as a result of surface coal mining operations at the West Elk mine. His declaration further demonstrates that these same resources may be adversely affected as a result of the Regional Director’s decision affirming the decision not to inspect and enforce alleged SMCRA violations at the mine.

The adverse effects Mr. Nichols is experiencing and may experience in the future include, but are not limited to: exposure to unsightly and loud and smelly industrial activity, diminished environmental quality, degraded aesthetics, jeopardized safety while recreating in the area due to poisonous gas, and ill health effects from poor air quality in the region. His declaration further demonstrates that a resolution of this informal review in favor of Guardians

⁴ WildEarth Guardians’ corporate records can be accessed through the New Mexico Secretary of State’s website at <https://portal.sos.state.nm.us/BFS/online/CorporationBusinessSearch>.

will diminish or eliminate adverse effects to the resources used.

STATEMENT OF REASONS FOR APPEAL

The IBLA must reverse the WRO Director's decision affirming OSMRE's denial of Guardians' Citizen Complaint. The Director failed to comply with the standard of review imposed by SMCRA regulations and further misconstrued the nature of the agency's authorities under SMCRA and the agency's ability to address violations of SMCRA as they relate to air quality matters. For the following reasons, the IBLA must set aside and remand the WRO Director's decision.

I. The WRO Director Failed to Presume Guardians' Allegations to be True

In response to a Citizen Complaint, OSMRE must conduct an inspection 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); *see also* 30 U.S.C. § 1271(a)(1). Where a state regulatory authority is involved, such an inspection shall be conducted only after the state has been notified and the regulatory authority given "ten days" to take appropriate action or to show good cause for the failure to act. 30 C.F.R. § 842.11(b)(1)(ii)(B). 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). *See also Southern Appalachian Mountain Stewards*, 188 IBLA 310, 316 (2016), *rev'd on other grounds*, *S. Appalachian Mountain Stewards v. Zinke*, No. 2:16-CV00026, 2017 WL 4171391, (W.D. Va. Sept. 20, 2017). OSMRE is not permitted to second-guess allegations provided in a Citizen Complaint. Rather, in determining whether a Citizen Complaint provides reason to believe that there exists a violation, the agency must "look at the information supplied by the informant and make a judgment

whether that information provided ‘reason to believe’ a violation existed.” *West Virginia Highlands Conservancy, et al.* 152 IBLA, 158, 194 (2000).

In Guardians’ October 20, 2017 Complaint, detailed factual information was provided to OSMRE demonstrating that, due to the release of unpermitted and unreported regulated VOC gases from methane venting operations, Arch Coal was violating air quality laws and regulations at the West Elk mine, thereby violating at least four conditions of the company’s SMCRA permit. *See* Ex. 1 at 9-15. This information included detailed information from State of Colorado air regulatory authority, including findings of non-compliance and enforcement recommendations, assessments of VOC emissions, and conclusions regarding Arch Coal’s compliance with various state laws and regulations. *Id.* at 11. The Complaint specifically cited conclusions by state air inspectors that Arch Coal was “out of compliance” and that enforcement action should be taken. *See* Ex. 1 at 13. If read to be true, then the allegations presented in the Complaint would indicate that Arch Coal is violating air quality laws and regulations, thereby violating Conditions C.1, C.3, C.8, and C.9 of Permit No. C-1980-007 (dated July 31, 2011).

In his response to Guardians’ Request for Informal Review, the WRO Director stated that he “do[es] not question the factual assertion that you make that the West Elk Mine may be emitting VOCs.” Ex. 4 at 7. He further stated that, based on the information in Guardians’ complaint, “issuance of a TDN [ten day notice] might be appropriate.” *Id.* Nevertheless, he rejected Guardians’ Request for Informal Review, arguing that:

[T]he DFB [Denver Field Branch] and I are aware of other information that not only contradicts but also outweighs both the conclusion of that inspector that MCC [Mountain Coal Company] is out of compliance and your statement that ‘the Colorado agency charged with regulating air quality—has confirmed that West Elk is ‘out of compliance’ with applicable State and Federal clean air laws and regulations....

Ex. 4 at 7. This response squarely violates the agency’s duty under 30 C.F.R. § 842.

While OSMRE claimed that “other information” existed which the agency believed “contradict[ed]” and “outweigh[ed]” the allegations made in Guardians’ Complaint (this issue will be addressed further below), Mr. Berry’s response clearly indicates OSMRE did not look at the information supplied by Guardians and make a judgment as to whether that information provided “reason to believe” a violation existed in accordance with 30 C.F.R. § 842.11(b)(2). Rather than read the allegations in Guardians’ Complaint to be true, OSMRE read the allegations made in Guardians’ Complaint to be false on the basis of information not even presented to the agency, then denied the complaint. The agency is not permitted to engage in such second-guessing and refusal to read allegations made in a Citizen Complaint to be true.

According to the agency’s rules, OSMRE’s review of a Citizen Complaint must be limited to the four corners of the complaint itself. *See* 30 C.F.R. § 842.11(b)(2) (stating “reason to believe” that a violation exists is based on a review of the “facts alleged by the informant”). OSMRE’s “perception of the ‘complexity’ of the issues [...] [does not justify] a refusal to address the site-specific allegations of violations in a citizen’s complaint.” *West Virginia Highlands Conservancy, et al.*, 152 IBLA 158 (2000). The agency is not allowed to engage in its own investigation in response to a Citizen Complaint and then proceed to deny on the basis of that investigation. If a Citizen Complaint provides reason to believe that a violation exists, OSMRE must grant the complaint and then proceed to investigate consistent with 30 C.F.R. § 842.11(b). Indeed, allowing OSMRE to rely on information not provided in a Citizen Complaint, particularly information gathered subsequent to receipt of a Citizen Complaint, would render the agency’s citizen complaint and inspection regulations meaningless. *See West Virginia Highlands Conservancy, et al.* at 194 (IBLA finding that OSMRE action to undertake contemporaneous investigation of a violation in an effort to deny Citizen Complaint would

represent an illegal endorsement of an exception to the Citizen Complaint regulations). Guardians additionally alleged facts pertaining to the environmental harms and public safety issues that could flow from the continued unfettered emissions of methane and VOCs at the mine. *See* Ex. 1 at 12. Therefore, under the regulations, the Regional Director had adequate evidence that a violation implicating environmental and public harm was occurring at the West Elk Mine, sufficient to warrant inspection.

Accordingly, Mr. Berry's response to WildEarth Guardians' Request for Informal Review violates OSMRE regulations and must be reversed. The agency must be directed to grant Guardians' Complaint and conduct an inspection in accordance with SMCRA.

II. The WRO Director Misinterpreted SMCRA in Responding to Guardians' Citizen Complaint

The WRO Director's response to WildEarth Guardians' Request for Informal Review further misinterprets and misapplies the agency's duties and authorities under SMCRA as they relate to air quality.

In response to Guardians' Request for Informal Review, Mr. Berry effectively asserted OSMRE had no authority to address the alleged SMCRA mining permit violations because, from his perspective, the agency has no authority to address air quality matters. Mr. Berry's response can be summed up as follows:

- Mr. Berry believed that, due to the existence of information outside of Guardians' complaint, there is disagreement over whether Arch Coal follows State and Federal air quality laws and regulations. In particular, Mr. Berry believed that there has been no independent determination by an air regulatory agency that Arch Coal is in violation of air quality laws and regulations, and therefore no formal determination of noncompliance has been made. *See* Ex. 4 at 7;
- That due to this disagreement, Mr. Berry believed this means OSMRE must resolve the matter of whether Arch Coal follows State and Federal air quality laws and regulations. *See* Ex. 4 at 7-8; and

- That Mr. Berry believed OSMRE has no authority to resolve whether Arch Coal complies because, according to Mr. Berry, OSMRE lacks authority to investigate and confirm whether surface coal mining operations are or are not complying with State and Federal air quality laws and regulations. *See* Ex. 4 at 8.

This response is squarely at odds SMCRA. It is important to first point out that Mr. Berry's response inappropriately presumed that resolving Guardians request would somehow require OSMRE to assert itself as an air quality regulator. This was not the nature of Guardians' Complaint. Rather, Guardians requested that OSMRE conduct an inspection within its authorities to regulate surface coal mining to determine whether violations of Arch Coal's SMCRA mining permit existed on the basis of evidence strongly indicating that air quality-related violations existed. Given that the conditions of Arch Coal's SMCRA mining permit variously require compliance with State and Federal air quality laws and regulations, this request was fully within this scope of OSMRE's authority.⁵ Accordingly, Mr. Berry's response was contrary to SMCRA and SMCRA regulations.

Furthermore, Mr. Berry is simply incorrect that OSMRE lacks any authority to even make inquiries as to the air quality compliance of a surface coal mining operation. He cites 30 U.S.C. § 1292(a)(4) and asserts that this provision of SMCRA "prohibit[s]" the agency from resolving disputes regarding air quality compliance. Ex. 4 at 8. However, this statutory provision of SMCRA simply says that nothing in the law "supersed[es], amend[s], modif[ies], or repeal[s]" the federal Clean Air Act. While this may mean that OSMRE cannot assert itself as a direct air quality regulator (or make decisions that somehow supersede the authority of air quality

⁵ For instance, Condition C.1 of Arch Coal's SMCRA mining permit requires that the company comply with Colorado Mined Land Reclamation Board regulations, which require, among other things, "Each person who conducts surface coal mining ("MLRB") and reclamation operations [] shall conduct such operations in such a manner so as to comply with all applicable State and Federal air quality statutes and regulations." MLRB Rules, Section 4.17.

regulators), nothing in this statutory provision prevents OSMRE from asking questions of air quality regulators, requesting information from surface coal mine operators, and otherwise pressing the appropriate authorities to make determinations regarding air quality compliance in order to determine whether a company is operating in compliance with its SMCRA mining permit. As Guardians stated in its Request for Informal Review:

[A] determination of whether Arch Coal is conducting surface coal mining operations in compliance with applicable State and Federal clean air laws and regulations would not have required an extra-jurisdictional determination from OSMRE. It would have simply required that OSMRE take appropriate action to investigate the matter, which could have included requesting emission information from Arch Coal, verifying APCD [Colorado Air Pollution Control Division] inspection reports, discussing the matter with APCD inspectors, or even conducting its own collection and testing of emissions data.

Ex. 3 at 10. Given that Arch Coal's SMCRA mining permit explicitly requires compliance with State and Federal air quality laws and regulations, OSMRE was well within its authority to take such appropriate action.

Additionally, the WRO Director cites *In re Permanent Surface Mining Regulation Litig. I, Round II*, 1980 U.S. Dist. LEXIS 17660, *40-45 (D.D.C. May 16, 1980) and asserts this ruling further stands for the proposition that OSMRE has no authority to regulate surface coal mining in relation to air emissions. See Ex. 4 at 6-7. This is an incorrect reading of *In re Permanent Surface Mining*.

Indeed, *In re Permanent Surface Mining* does not stand for the proposition that OSMRE cannot regulate surface coal mining such that it complies with State and Federal air quality laws and regulations. Rather, the Court in that case held that OSMRE lacked authority to promulgate regulations related to fugitive dust from mining operations because OSMRE based its authority to do so on a provision of SMCRA that only controls air pollution related to erosion. *In re Permanent Surface Mining* at *41-42. In that case, OSMRE relied on 30 U.S.C. § 1265(b)(4),

which requires coal operators to, “stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to effectively control erosion and attendant air and water pollution.” OSMRE incorrectly interpreted the phrase “attendant air and water pollution” to refer to pollution related to all activities associated with coal mining, rather than just pollution resulting from erosion. After reviewing the legislative history pertaining to 30 U.S.C. § 1265(b)(4), the Court determined Congress intended that provision to allow only an erosion performance standard to limit air and water pollution from erosion of spoil piles. *Id.* at *42-43.

If Guardians requested that OSMRE set emission limits for VOC emissions pursuant to 30 U.S.C. § 1265(b)(4) or otherwise cited this statutory provision as authority for OSMRE to regulate VOC emissions related to methane venting operations at the West Elk mine, then the agency would be correct that it has no authority to take such action. Guardians did not request this, however. The Complaint simply asked that OSMRE inspect and take appropriate action to address violations of Arch Coal’s SMCRA mining permit.

The WRO Director makes much of perceived “uncertainty” around whether Arch Coal is in violation of State and Federal air quality laws and regulations. Although Guardians’ Complaint presented evidence demonstrating that State of Colorado air inspectors had determined the West Elk mine was “out of compliance” and recommended enforcement action be taken, Mr. Berry claims a subsequent letter indicates the West Elk mine complies. *See Ex. 4 at 7-8.* This claim is baseless. The letter in question, a January 11, 2017 letter from an official with the Colorado Department of Public Health and Environment, did not claim that the West Elk mine complies. *See Exhibit 6, Letter from Martha Rudolph, Colorado Department of Public Health and Environment, to Kathy Welt, Arch Coal (January 11, 2017).* Rather, the letter stated

the Department of Public Health and Environment was exercising its discretion and declining to take enforcement action related to the violations, a fact that even Mr. Berry acknowledged. *See* Ex. 4 at 7. Although the letter asserted that “issues” remain unresolved in relation to VOC emissions at the West Elk mine, no determination was made regarding the mine’s compliance status.

In spite of this, Mr. Berry asserted that because of the January 11, 2017 letter, OSMRE is somehow barred from determining that there is reason to believe that violations of SMCRA exist at the West Elk mine. There is no support for this assertion. Mr. Berry stated that, “Until the APCD [Colorado Air Pollution Control Division] as an agency determines whether these emissions constitute a violation of an applicable state and federal air quality law, I do not have reason to believe that SMCRA or a permit condition is being violated[.]” Ex. 4 at 8. Mr. Berry’s response is completely arbitrary. Critically, it is unclear what Mr. Berry was referring to when he claimed that a decision by “an agency” is required before OSMRE can have reason to believe that violations of a SMCRA mining permit exist in relation to air quality. If Mr. Berry is suggesting that unless an air regulatory agency issues a decision that violations exist, OSMRE cannot conclude there is reason to believe Arch Coal is violating its SMCRA mining permit, that is unsupported. Otherwise, if he is suggesting that an air regulatory agency take enforcement before OSMRE can conclude there is reason to believe Arch Coal was in violation of its SMCRA mining permit, that is further unsupported. Neither SMCRA nor SMCRA regulations indicate that OSMRE must wait for an air regulatory agency to make an undefined determination or enforcement before it has reason to believe that violations of a SMCRA mining permit exist in relation to air quality matters.

The case here is very similar to the one resolved by the IBLA in *West Virginia Highlands*

Conservancy in 2000. In that case, OSMRE attempted to argue that “complex issues” and the agency’s desire to conduct “policy review and outreach” justified a finding that a Citizen Complaint filed to provide reason to believe that violations existed. *West Virginia Highlands Conservancy* at 174-175. The IBLA rejected the agency’s arguments, finding there is “nothing in the regulations, precedent, or the statute which provide[d]” such an exemption to OSMRE in responding to Citizen Complaints. *Id.* at 186. Similarly, here, OSMRE is essentially making an identical argument. Rather than respond to Guardians’ Complaint consistent with its regulations, the agency is arguing that perceived “uncertainty” and a lack of authority prevents it from finding there is reason to believe that violations exist at the West Elk mine. While the perception of “uncertainty” and lack of authority is unfounded in this case, OSMRE is nevertheless not permitted to impose the excuse of “uncertainty” or lack of authority to avoid determining whether a Citizen Complaint provides reason to believe that a violation exists consistent with 30 C.F.R. § 842.11(b)(2).

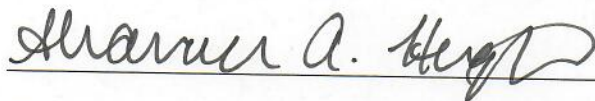
Mr. Berry finally justifies his denial of WildEarth Guardians’ Request for Informal Review by claiming, “there is nothing we could find in the course of a federal inspection that would lead us to identify a violation of SMCRA or a permit condition.” Ex. 4 at 8. This argument most effectively encapsulates the flawed logic relied upon by OSMRE in denying Guardians’ Complaint. For one, nothing in OSMRE’s regulations allow the agency to deny Citizen Complaints on the basis of a belief that an inspection would not lead to the identification of violations of SMCRA or a SMCRA mining permit. If an inspection would truly be futile, this can only be determined after granting a Citizen Complaint and giving a state regulatory authority a chance to provide a showing of “good cause” for not taking appropriate action. 30 C.F.R. § 842.11(b)(1). Most importantly, however, Mr. Berry’s response is simply incorrect as a matter of

law. As discussed earlier, OSMRE was authorized to undertake a number of actions to ascertain whether Arch Coal was in violation of its SMCRA mining permit in relation to its duty to comply with State and Federal air quality laws and regulations at the West Elk mine. At a most basic level, OSMRE could have made an inquiry with State of Colorado air regulators to provide more details and more conclusive information regarding Arch Coal's compliance with air quality laws and regulations. Mr. Berry's extreme assertion that a federal inspection would not yield any information whatsoever that would identify a violation of Arch Coal's SMCRA mining permit was completely unjustified.

CONCLUSION

For the aforementioned reasons, Guardians requests the IBLA reverse the WRO Director's decision denying WildEarth Guardians' Request for Informal Review. We request the IBLA direct OSMRE to grant Guardians' Citizen Complaint and to take appropriate action consistent with SMCRA.

Respectfully submitted on this 29th day of May, 2018.



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CERTIFICATE OF SERVICE

I certify that on May 29, 2018, I served this Statement of Reasons by U.S. Postal Service

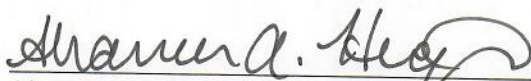
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