

**BEFORE THE WESTERN REGIONAL 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
Tri-State Generation and Transmission)	Surface Mining Control and Reclamation
Association’s Self-Bonding for Coal Mines in)	Act
Colorado and Wyoming)	
_____)	

REQUEST FOR INFORMAL REVIEW OF A DECISION NOT TO INSPECT AND 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 Western Regional Director of the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”) or his designee review a decision by Jeffrey Fleischman, Denver Field Division Chief 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.*, SMCRA regulations, 30 C.F.R. § 700, *et seq.*, and applicable permit conditions.

I. Introduction

On April 2, 2018, WildEarth Guardians filed a Citizen Complaint and Request for Inspection with OSMRE pursuant to 30 U.S.C. §§ 1267(h)(1) and 1271(a), and 30 C.F.R. § 842.12(a). The complaint alleged violations of SMCRA and regulations implementing SMCRA with regards to Tri-State Generation and Transmission Association’s (hereafter “Tri-State”) self-bonding of coal mining operations in Colorado and Wyoming. *See* Exhibit 1, WildEarth Guardians, “Citizen Complaint Under Surface mining Control and Reclamation Act Over Tri-State Generation and Transmission Association’s Self-bonding in Colorado and Wyoming”

(April 2, 2018).

Tri-State is the full or partial guarantor for self-bonds at four coal mines: the Colowyo mine in Colorado (Permit No. C-1981-019), the New Horizon and New Horizon North mines in Colorado (Permits Nos. C-1981-008 and C-2010-089), and the Dry Fork mine in Wyoming (Permit No. PT0599). In total, the company self-bonds more than \$120 million. WildEarth Guardians' complaint alleged that Tri-State was violating SMCRA and SMCRA regulations governing self-bonding because the company has failed to properly account for its self-bonding guarantees and therefore has failed to demonstrate that it meets the criteria for self-bonding under 30 C.F.R. § 800.23.

On May 16, 2018, Mr. Fleischman responded to WildEarth Guardians' complaint, declining to inspect and take enforcement action. *See* Exhibit 2, Fleischman, J., "Citizen Complaint Alleging Tri-State Self-bonding Violations Related to Coal mining Operations in Colorado and Wyoming" (May 16, 2018). Mr. Fleischman asserted that Guardians' complaint provided "no reason to believe a violation of SMCRA, federal regulations, or the federally approved Colorado or Wyoming coal regulatory programs is occurring." *Id.* at 2.

Below, we detail the legal shortcomings in Mr. Fleischman's response and the basis for requesting informal review. However, due to the fact that the New Horizon and New Horizon North coal mines are no longer producing coal and that reclamation is proceeding at these mines, our Request for Informal Review only relates to Mr. Fleischman's decision as it regards the Colowyo and Dry Fork mines. This is not to say that we agree with Mr. Fleischman's decision as it relates to the New Horizon and New Horizon North coal mines. We do not. We simply believe it is more prudent that SMCRA self-bonding requirements be enforced first and foremost at the producing Colowyo and Dry Fork mines.

II. WildEarth Guardians is Adversely Affected by Mr. Fleischman'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 (Dec. 5, 2017), 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.

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 surface coal mining operations at the Colowyo and Dry Fork Mines. Attached to this request is a declaration from WildEarth Guardians, Jeremy Nichols. *See* Exhibit 4, Declaration of

Jeremy Nichols (June 8, 2018). This declaration demonstrates that Mr. Nichols uses resources that are or may be adversely affected by surface coal mining and reclamation operations at coal mines where Tri-State is the full or partial guarantor of self-bonds. The declaration demonstrates that WildEarth Guardians' members use public lands near the Colowyo and Dry Fork coal mines for recreational, aesthetic, and educational purposes, and these interests are adversely affected by surface coal mining and reclamation operations at these mines. Further, these interests may be adversely affected by surface coal mining and reclamation operations at these mines due to Tri-State's failure to ensure adequate reclamation bonding, which could lead to delayed or inadequate restoration of these mining areas to pre-mining uses. The adverse effects that WildEarth Guardians members are experiencing and may experience include exposure to unsightly industrial development, loud and smelly industrial activity, diminished air quality, degraded environmental quality, and lost aesthetic value of public lands used for recreational, aesthetic, and educational purposes.

III. Mr. Fleischman's Decision is Contrary to SMCRA, SMCRA Regulations

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 take action. 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).

Here, Mr. Fleischman’s decision failed to comply with these basic requirements of SMCRA and SMCRA regulations.

A. Mr. Fleischman Failed to Review Whether the Facts Alleged by WildEarth Guardians, if True, Would Constitute a Violation

Fundamentally, Mr. Fleischman’s decision is not based on a review of whether WildEarth Guardians’ request alleges facts that, if true, would constitute violations of SMCRA or SMCRA implementing regulations. Consequently, his decision is not based on the standard of review required to be applied by 30 C.F.R. § 842.11 and must be reversed.

Guardians alleged in its Citizen Complaint that Tri-State was violating SMCRA regulations regarding self-bonding at 30 C.F.R. § 800.23 due to the company’s failure to properly account for its self-bonding liabilities. As highlighted by Guardians, although Tri-State has been authorized to rely on self-bonds to guarantee its reclamation obligations for the Colowyo, Dry Fork, and New Horizon and New Horizon North mines, the company has no tangible financial commitment backing its self-bonds. *See* Exhibit 1 at 3-4. As documented in Guardians’ complaint, the company is not reporting its self-bonding obligations as actual

liabilities to the U.S. Securities and Exchange Commission, meaning the company has no legitimate financial commitment backing its self-bonds. *Id.* In fact, Tri-State reports that it only has a little more than \$53 million in total reclamation liabilities for all of its assets (including coal mines, power plants, transmission lines, etc.), far less than the \$120 million supposedly bonded for its coal mine reclamation. *Id.* at 3.

Effectively, the self-bonds for the Colowyo, Dry Fork, and New Horizon and New Horizon North coal mines are façades. This means that if Tri-State were to be unable to complete reclamation, there would be no actual financial backing available that would enable mine regulators to perform all outstanding reclamation at the company's mines. This violates SMCRA's requirement that companies post a bond "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture[.]" 30 U.S.C. § 1259(a).

The issue here is that Tri-State's self-bonds are an empty promise. With no tangible financial backing or accounting for the liabilities of self-bonds, the company has failed to post a bond sufficient to assure the completion of reclamation. At a minimum, this violates the requirements of SMCRA at 30 U.S.C. § 1259 and SMCRA regulations at 30 C.F.R. § 800.23, and should have triggered an inspection.

Here, Mr. Fleischman inappropriately presumed that WildEarth Guardians allegations were false and that Tri-State had posted adequate performance bonds consistent with SMCRA and SMCRA regulations. However, as the Citizen Complaint clearly alleged, Tri-State's self-bonds are not properly accounted for and therefore are sham bonding commitments. Mr. Fleischman's response indicates he disagrees with WildEarth Guardians and believes that Tri-

State has adequately accounted for its self-bonds. *See* Exhibit 2 at 3. Mr. Fleischman is not allowed to second-guess or disagree with allegations in a citizen complaint.

Mr. Fleischman asserted there is no requirement under SMCRA that companies account for self-bonds as liabilities or otherwise assure any financial backing of self-bonds. *See* Exhibit 2 at 2-3. According to Mr. Fleischman, so long as Tri-State qualifies for self-bonding pursuant to the criteria set forth at 30 C.F.R. §§ 800.23(b)(1)-(3) and (d), there is no violation of SMCRA's bonding requirements. *Id.* at 3-7. Mr. Fleischman's review ignored the core of WildEarth Guardians' arguments and disregarded the allegations in the Complaint.

Fundamentally, Tri-State is self-bonded in word only, but not in terms of a tangible financial commitment. This means there is no real financial assurance that any bonding amount can or will be satisfied in the event of forfeiture. Regardless of whether Tri-State meets the criteria for self-bonding, if the company has made a disingenuous financial commitment with regards to its self-bonds, it is contrary to SMCRA. In fact, under SMCRA, "false statement[s], representation[s], or certification[s]" are prohibited and subject to criminal penalties. 30 U.S.C. § 1268(g); *see also* 30 C.F.R. § 847.11(c). Thus, while Mr. Fleischman may disagree with the allegations presented by WildEarth Guardians, if read to be true, they would represent violations of SMCRA and SMCRA regulations and should have compelled Mr. Fleischman to grant Guardians' Citizen Complaint.¹

B. Mr. Fleischman Inappropriately Solicited and Relied Upon Information Submitted by State Regulatory Authorities to Deny Guardians' Citizen Complaint

¹ As the IBLA has held, "the threshold for determining whether a citizen complaint affords OSM[RE] sufficient reason to believe a violation exists is very low." *Kenneth and Gwen Thompson, et al.*, 144 IBLA 257, 267 (1998).

Further undermining the legality of Mr. Fleischman's determination is that it was made after soliciting and reviewing information submitted to OSMRE by the state regulatory authorities in Colorado and Wyoming. OSMRE received responses from Colorado and Wyoming on April 20, 2018 and April 16, 2018, respectively, more than 10 days after Guardians' April 2, 2018 Complaint was submitted. Under SMCRA regulations, OSMRE is not allowed to deny Citizen Complaints after soliciting and relying upon information submitted by state regulatory authorities. Such solicitation and review of information can only come after a Citizen Complaint is granted and OSMRE makes a determination as to whether the submitted information provides "good cause" for not taking appropriate action. 30 C.F.R. § 842.11(b)(1)(ii)(B)(I).

Here, the information submitted to OSMRE by Colorado and Wyoming played critical roles in Mr. Fleischman's decision rejecting WildEarth Guardians' Citizen Complaint. Their responses are cited and quoted extensively and Mr. Fleischman heavily relies on them in asserting that the Complaint provides no reason to believe that violations of SMCRA and SMCRA regulations exist. This reliance is inappropriate and outside the bounds of the standard of review for a Citizen Complaint.

In response to a Citizen Complaint, if OSMRE believes that the allegations therein require an inquiry with state regulatory authorities, the agency must first issue ten-day notice letters pursuant to 30 C.F.R. § 842.11(b)(1)(ii)(B)(I). *See* 30 U.S.C. § 1271(a)(1). In such situations where OSMRE seeks out the opinion of state regulatory authorities, the agency clearly would have to first conclude there is reason to believe violations exist based on the allegations in the Complaint. OSMRE is not allowed to conduct an end-run around its regulations and seek out the opinions of state regulatory authorities before making its own determination as to whether a

Citizen Complaint provides reason to believe that violations exist. This is especially true given that OSMRE's regulations require the agency to review only the "facts alleged by the informant" to determine whether there is reason to believe that violations exist in response to a Citizen Complaint. 30 C.F.R. § 842.11(b)(2).

IV. Conclusion

For the aforementioned reasons, we request the Regional Director or his designee reverse Mr. Fleischman's rejection of WildEarth Guardians' April 2, 2018 Citizen Complaint and decision not to inspect to determine whether there are, in fact, violations of SMCRA and SMCRA regulations in relation to Tri-State Generation and Transmission Association's self-bonding at the Colowyo, Dry Fork, and New Horizon and New Horizon North coal mines.

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 8th day of June, 2018.



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