

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

WILDEARTH GUARDIANS,)	
)	IBLA No. 2019-017
Appellant)	
)	Notice of Appeal, Decision on Request for
)	Informal Review of Denial of Citizen
)	Complaint Regarding Tri-State Generation
)	and Transmission Association, Inc.’s
)	Self-Bonding of Colowyo (Permit No.
)	C-1981-019) and Dry Fork (Permit No.
)	PT0599) Coal Mining Operations,
)	Colorado and Wyoming
)	

STATEMENT OF REASONS AND REQUEST FOR ORAL ARGUMENT

This appeal is about the U.S. Office of Surface Mining Reclamation and Enforcement’s (“OSMRE’s”) premature and inappropriate denial of WildEarth Guardians’ (hereafter “Guardians”) Citizen Complaint, filed pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”). In spite of the fact that Guardians made allegations that, if read to be true, would constitute violations of SMCRA, OSMRE denied Guardians’ Citizen Complaint and subsequent Request for Informal Review, filed with the Western Regional Director of OSMRE. *See generally* Exhibit 1, Berry, D., “Response to Request for Informal Review of May 16, 2018 Denver Field Division Determination – Citizen Complaint and Request for Inspection – Tri-State Generation and Transmission Association, Inc.” (Sept. 28, 2018) (hereinafter “RD Decision”).

On October 11, 2018, Guardians filed a timely Notice of Appeal in this proceeding. Pursuant to 43 C.F.R. §§ 4.25 and 4.1282(d), we now hereby file the following Statement of Reasons, Request for Oral Argument and request for the Interior Board of Land Appeals (“IBLA”) to reverse OSMRE and direct the agency to grant Guardians’ Request for Informal Review and Citizen Complaint.

INTRODUCTION

This proceeding is about whether OSMRE reviewed Guardians' Citizen Complaint according to the standard of review set forth under SMCRA and SMCRA regulations and whether the agency appropriately assessed whether Tri-State Generation and Transmission Association, Inc. (hereafter "Tri-State") has satisfied reclamation bonding requirements under SMCRA.

On April 2, 2018, Guardians filed a Citizen Complaint pursuant to 30 U.S.C. §§ 1267(h)(1) and 1271(a)(1), and 30 C.F.R. § 842.12(a) over alleged violations of SMCRA with regards to Tri-State's reclamation bonding. *See generally* Exhibit 2, WildEarth Guardians, "Complaint and Request for Inspection over Tri-State Generation and Transmission Association's Self-bonding in Colorado and Wyoming" (April 2, 2018) (hereinafter "Complaint"). Reclamation bonding is paramount under SMCRA and it is critical to sufficiently guarantee the performance of coal mine cleanups. *See* 30 U.S.C. § 1259.

Tri-State is the full or partial guarantor for self-bonds at four coal mines, although only two are at issue here¹: the Colowyo mine in Colorado (Permit No. C-1981-019) and the Dry Fork mine in Wyoming (Permit No. PT0599). Self-bonding is a form of performance bonding whereby a mining company offers an IOU in lieu of a surety or other form of financial commitment. *See* 30 C.F.R. § 800.23. In total, the company is self-bonded for at least \$95.5 million at Colowyo and \$14.7 million at the Dry Fork mines. Guardians' Complaint alleged that Tri-State was violating SMCRA and SMCRA regulations because the company has failed to

¹ The New Horizon and New Horizon North coal mines in Colorado are no longer producing coal and reclamation is proceeding at these mines. We do not challenge Tri-State's self-bonding relative to these mines, although we do believe that the company's self-bonding at these mines remains problematic.

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. *See* Complaint at 3. Guardians' Complaint requested OSMRE inspect and take appropriate enforcement action over Tri-State's apparent violation of SMCRA. *Id.* at 4. However, OSMRE has continued to allow Tri-State to self-bond without properly assessing whether the entity is in violation of applicable laws and has also declined to inspect the ongoing violations at the Dry Fork and Colowyo mines.

During the time that the Denver Field Division ("DFD") was reviewing the Complaint, both state regulatory agencies, the Colorado Division of Reclamation Mining and Safety ("DRMS") and the Wyoming Department of Environmental Quality ("DEQ") provided information related to the Complaint to OSMRE. This information was submitted April 20, 2018 and April 16, 2018, respectively, more than 10 days after Guardians submitted its Complaint. The DFD considered this information and it weighed heavily in the decision not to inspect or enforce. *See* Exhibit 3, Fleischman, Jeffrey, "OSMRE Response to Citizen Complaint Alleging Tri-State Self-bonding Violations Related to Coal mining Operations in Colorado and Wyoming," (May 16, 2018).

On May 16, 2018, more than a month after Guardians filed its Complaint, Jeffrey Fleischman, Chief of Denver Field Division, declined to inspect and take enforcement action. *Id.* 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.

In response to Guardians' allegations, the DFD reviewed Guardians' Complaint, "and other available information" and found "there is no reason to believe that a violation of SMCRA, federal regulation, or the federally approved Colorado or Wyoming coal regulatory programs is

occurring.” *Id.* at 2. In declining to inspect, the DFD based its refusal on the assertion that it had no reason to believe that Tri-State was out of compliance with self-bonding requirements. *Id.*

On June 8, 2018, Guardians filed a Request for Informal Review to OSMRE’s Western Region Office (“WRO”). The Request asserted that the DFD’s response was contrary to SMCRA and its implementing regulations and that an inspection was required under 30 C.F.R § 842.11(b)(2). *See* Exhibit 4, Guardians, “Request for Informal Review” (June 8, 2018), (hereinafter “Request”). In its Request, Guardians asserted the DFD did not consider the information provided under the proper standard of review and failed to assess whether the facts alleged in Guardians’ Complaint would, if true, constitute a violation, as required by 30 C.F.R § 842.11(b). Guardians requested the WRO Director or his designee overrule the DFD and direct an inspection of the alleged violations. *Id.* Guardians provided evidence that OSMRE had the requisite authority to determine whether WildEarth Guardians’ allegations were true, and to take appropriate action. *Id.* Additionally, Guardians indicated that regardless of whether Tri-State met the criteria for self-bonding, if the company had made “disingenuous financial commitments[s] with regards to its self-bonds, it is contrary to SMCRA.” *Id.* at 7. Finally, Guardians argued that DFD’s decision could not have been based on extra-regulatory information provided by Colorado DRMS and Wyoming DEQ. *Id.* at 7-8. Despite these arguments, on September 28, 2018, the WRO regional director, David Berry, affirmed the DFD’s decision and declined to inspect. *See* Exhibit 1.

REQUEST FOR ORAL ARGUMENT

Pursuant to 43 C.F.R. § 4.25, Guardians hereby requests the opportunity to present oral argument to the IBLA in this proceeding. We believe the opportunity to present oral argument in person to the IBLA will aid the Board in its review and understanding of this case, as well as

provide an opportunity for Guardians and the other parties to provide more robust, in-person arguments.

STATEMENT OF STANDING

To sustain an appeal of an OSMRE decision, a party must demonstrate that it is a “person who is or may be adversely affected by a written decision of the Director of OSMRE or his delegate.” 43 C.F.R. § 4.1281. Guardians more than meets this threshold requirement.

First, Guardians meets the regulatory definition of a “person.” SMCRA regulations define “person” 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. Here, Guardians is a nonprofit organization incorporated in the State of New Mexico, and as a “corporation” fits within the “person” definition.²

Second, 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 surface coal mining operations at the Colowyo and Dry Fork mines. This is reflected in the attached

² See WildEarth Guardians Corporate Business Information, 2018, web page available at: <https://portal.soWestElk/BFS/online/CorporationBusinessSearch/CorporationBusinessInformation?businessId=127275> (last visited Oct. 31, 2018). A copy of this webpage was also attached to Guardians’ Request for Informal Review as Exhibit 3.

declaration by Guardians member, Jeremy Nichols. *See* Exhibit 5, Declaration of Jeremy Nichols (October 31, 2018).

This declaration demonstrates that Mr. Nichols uses resources that are or may be adversely affected as a result of the Regional Director's decision affirming the DFD's decision not to inspect and enforce alleged SMCRA violations at the Colowyo and Dry Fork mines. The declaration provides that Mr. Nichols is specifically affected by surface coal mining and reclamation operations at coal mines where Tri-State is the full or partial guarantor of self-bonds. *See* Nichols Decl. ¶¶ 10-14.

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 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. *Id.* 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. Mr. Nichols' declaration further demonstrates that a resolution of this informal review in favor of Guardians will diminish or eliminate adverse effects to the resources used, not just by him, but by many Guardians members. *Id.* at ¶ 17.

Finally, the Regional Director's decision specifically granted adversely affected parties the right to appeal pursuant to 30 C.F.R. § 842.15(d), stating that any appeals would need to be filed with the Board within 30 days after publication of the decision.

STATEMENT OF REASONS

Legal Background

This case involves provisions of SMCRA and SMCRA implementing regulations regarding performance bonding at coal mines and the citizen complaint process. To aid the IBLA's review, we provide the following legal background.

I. The Surface Mining Control and Reclamation Act

SMCRA requires that coal mining operations meet minimum environmental protection performance standards, to safeguard the health of communities and the environment. 30 U.S.C. §§ 1201 to 1328. SMCRA established a “nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and governs coal mining and reclamation on all lands, including Federal public lands.” 30 U.S.C. §§ 1202(a), 1273.

Among other things, SMCRA aims to “wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations”, including financially. *Id.* § 1202(m). SMCRA created OSMRE within the Department of the Interior to administer programs created by the Act and to assist states in developing state programs. *Id.* at § 1211(a,b). Accordingly, SMCRA implements a “cooperative federalism” approach to regulating coal mining. While minimum standards for coal mining are established through federal law and regulation, states are largely delegated authority to implement the law. Where states fail to meet minimum standards, or otherwise choose not to seek delegated authority, OSMRE retains authority to implement its provisions. Congress intended this “cooperative effort” as “necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.” 30 U.S.C. § 1201(k). SMCRA

regulations also created specific obligations for the Secretary and OSMRE related to the development of federally owned coal. 30 C.F.R. §§ 740.1 *et seq.*; 30 C.F.R. §§ 746.1 *et seq.*

A. SMCRA's Self-bonding Requirements

Under SMCRA, before a company can mine, the company is required to post performance bonds covering the full cost of reclamation. *See* 30 U.S.C. § 1259 and 30 C.F.R. § 800.11. Companies generally post surety bonds or collateral to ensure the costs of reclamation can be covered, however, SMCRA allows companies to post self-bonds, agreements between companies and regulatory authorities that guarantee the costs of reclamation will be covered but do not require any up-front funds or collateral. *See* 30 C.F.R. § 800.23; 30 C.F.R. § 800.5(c) (defining a self-bond as an “indemnity agreement” between permit applicants, any guarantor, and the regulatory authority).

Regulatory authorities have complete discretion to reject applications from companies to self-bond. *See* 30 C.F.R. § 800.23(b). If a regulatory authority allows self-bonding, however, it can only do so if the guarantor has allocated sufficient funds to cover the bond obligation. As a self-bond is an “indemnity agreement in a sum certain,” it requires a guarantor to demonstrate it is capable of paying the cost of the bond if mining operations are abandoned. *Id.*

Self-bonding is allowed only where a company meets certain criteria set forth at 30 C.F.R. §§ 800.23(b)-(e). *See* Complaint at 4-6. If a company cannot demonstrate that it can meet these criteria, it is not allowed to continue to self-bond at its mining operations. Some of these criteria include: 1) providing evidence of an “A” credit rating by either Moody’s Investor Service or Standard and Poor’s Financial Services, LLC, or 2) providing evidence that the company has a net worth of least \$10 million, including a liabilities-to-net-worth ratio of less than 25% and assets-to-liabilities ratio of at least 1.2 times, or 3) providing evidence of fixed assets of at least

\$20 million, including a liabilities-to-net-worth ratio of less than 25% and assets-to-liabilities ratio of at least 1.2 times. *Id.* Additionally, the company must submit accurate financial statements providing such information is complete. *Id.* And finally, if at any time when the self-bond is posted, the financial conditions of the applicant changes such that the previous-application requirements are no longer satisfied, the company is required to notify the regulatory authority immediately and post an alternate financial surety within 90 days. *See* 30 C.F.R. § 800.23(g).

II. SMCRA’s Citizen Complaint Process.

SMCRA provides that whenever OSMRE, on the basis of a citizen complaint, has reason to believe that a violation of SMCRA or any condition of a mining permit is occurring in relation to a surface coal mining operation, OSMRE “shall” conduct an inspection to determine whether there is, in fact, a violation after first giving the relevant state regulatory authority 10 days to take appropriate action. 30 U.S.C. § 1271(a)(1); 30 C.F.R. § 842.11(b)(1)(i); *see also Al Hamilton Contracting Co. v. Office of Surface Mining Reclamation and Enforcement*, 172 IBLA 83, 103 (Aug. 2, 2007). If an inspection reveals a violation of “[SMCRA], this chapter, the applicable program or any condition of a permit or an exploration approval,” OSMRE “shall issue a notice of violation.” 30 C.F.R. § 843.12(a)(1).

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); *See also S. 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).

SMCRA requires the U.S. Secretary of the Interior (the “Secretary”) to provide for informal review of any “refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation.” 30 U.S.C. § 1267(h)(1). SMCRA regulations specify that:

[A]ny person who is adversely affected by a [] 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.

30 C.F.R. § 842.15(a); *see also* 30 U.S.C. § 1267(h)(1). Upon receipt of such a request for informal review, the OSMRE “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.” 30 C.F.R. § 842.15(b); *see also* 30 U.S.C. § 1267(h)(1) (requiring the Secretary to provide written statement of reasons for final disposition of informal review). The Director’s decision on a request for informal review “constitute[s] a decision of OSMRE” and can be appealed to the Board. 30 C.F.R. § 842.15(d).

Factual Background

Tri-State is a non-profit generation and transmission cooperative, providing wholesale power and transmission services to 43 rural electric cooperatives in Colorado, Nebraska, New Mexico and Wyoming. In total, these members groups serve nearly one million customers, largely in rural communities. Most of the company’s electricity, 1,832 megawatts, is generated by coal-fired power plants in Colorado, Arizona, New Mexico, and Wyoming. The company also

has ownership in five coal mines, including the Colowyo mine in northwest Colorado and the Dry Fork mine in northeast Wyoming.³

Tri-State utilizes self-bonds to guarantee reclamation at its mines, including at Colowyo and Dry Fork. While these mines generally fuel Tri-State's own coal-fired power plants, a portion of coal is also shipped to other customers. *See* Exhibit 6, Olalde, M., "Mine cleanup funds at risk as coal power suppliers lose customers," Energy News Network (Aug. 20, 2018), available at <https://energynews.us/2018/08/20/west/minecleanup-funds-at-risk-as-coal-power-suppliers-lose-customers/>, (Tri-State has posted corporate "self-bonds" in the amount of \$108,025,721 for the Colowyo mine and \$14,800,000 for the Dry Fork Mine.), (last visited October 30, 2018).

Generally, environmental reclamation of the coal industry in the United States is backed by performance bonds, which guarantee rehabilitation will occur even where a company abandons a mine. Nationwide, close to \$10 billion is held in these bonds. Self-bonds held by utility companies or other entities in the electricity industry account for \$815 million of that, more than 8 percent. *See* Exhibit 6. These guarantees are backed neither by cash nor by third parties. Under SMCRA regulations, Tri-State has obligations for reclamation activities it must account for, including specific criteria related to financial well-being and reporting. Self-bonding is only allowed where a company meets certain criteria set forth at 30 C.F.R. §§ 800.23(b)-(e).

³ *See* Tri-State Generation and Transmission Association, Inc.'s Annual 10-K report to the U.S. Securities and Exchange Commission, available online at <https://www.tristategt.org/sites/ts/files/PDF/2017-SECfilings/10K-EOY-123117.pdf> (last visited Oct. 31, 2018). This report was also attached to Guardians' Citizen Complaint as Exhibit 2.

Tri-State has more than \$110 million in self-bonding obligations between its Colowyo coal mine in Colorado (Permit No. C-1981-019), and the Dry Fork coal mine in Wyoming (Permit No. PT0599).

Guardians' Complaint alleged that Tri-State has not properly accounted for its self-bonding guarantees, nor demonstrated that it meets the criteria for self-bonding as set forth under SMCRA, 30 U.S.C. § 1259, and SMCRA implementing regulations at 30 C.F.R. §§ 800.23(b)(3) and (d). *See* Complaint at 3. The Complaint provided evidence that self-bonding is not explicitly accounted for in the company's statement of liabilities to the U.S. Securities and Exchange Commission ("SEC") and that in fact, self-bonding is not even mentioned in the company's reports to the SEC. *Id.* As specified in Guardians' complaint, although the company identifies "Asset Retirement Obligations" among its liabilities, which supposedly includes full reclamation of all of its facilities, these obligations amounted to only \$53,396,000 at the end of 2017. *Id.* This is less than half of what it would owe on Dry Fork and Colowyo were they to be abandoned.

Argument in Support of Guardians' Appeal

The IBLA must reverse the Regional Director's decision affirming OSMRE's denial of Guardians' Citizen Complaint. The Regional Director wrongly affirmed the DFD's decision not to inspect or take enforcement action, relying on an inappropriate standard of review under SMCRA and relying on an erroneous interpretation of SMCRA's self-bonding requirements.

I. Guardians' Citizen Complaint Was Not Reviewed in Accordance With SMCRA

Fundamentally, the Regional Director's decision is not based on a review of whether WildEarth Guardians' April 2, 2018 Citizen Complaint alleged facts that, if read to be 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.

A. OSMRE Failed to Read Guardians' Allegations to be True

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). Here, the Regional Director did not presume Guardians’ allegations were true, thereby applying an improper standard of review to determine whether an inspection was necessary.

Here, Guardians’ Citizen Complaint did not simply allege facts regarding a violation that lacked support. Guardians provided evidence that Tri-State was not disclosing its self-bonding liabilities in its official filings with the SEC, raising concerns that the company has not accounted for self-bonding as an actual financial commitment. This raises concerns that the company has not accurately disclosed its net worth nor accurately informed credit rating agencies of its financial obligations, and that the company may not qualify for self-bonding under 30 C.F.R. § 800.23. More importantly, it raises concerns that Tri-State’s self-bonding commitments are pure fiction. Effectively, while Tri-State has offered a financial guarantee in the form of a self-bond, the company has no tangible backing of that guarantee. The company is essentially saying they are “good for the money,” when in actuality, they do not have the money.

If a guarantor of a performance bond is lying to OSMRE and/or state coal mining regulators regarding its financial commitment, this would represent a violation of SMCRA and SMCRA implementing regulations. Such a situation would mean the bond’s performance is not possible and therefore does not satisfy bonding requirements under 30 U.S.C. § 1259 and 30

C.F.R. § 800. Fundamentally, such a situation would mean that a company has failed to 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).⁴ *See also* Exhibit 4 at 5-7.

In his response, the Regional Director asserted that Tri-State qualified for self-bonding under 30 C.F.R. § 800.23 and therefore there was no reason to believe a violation existed. *See* Exhibit 1, RD Decision at 6. However, the Regional Director ignored the fundamental allegations made in Guardians’ Complaint, which were that Tri-State had no tangible financial backing of its self-bonding commitment and therefore failed to meet SMCRA’s core requirement that bonds be posted “sufficient to assure the completion” of reclamation. Although the Regional Director asserts that Tri-State qualifies for self-bonding, it would be absurd if OSMRE lacked authority to address disingenuous or sham self-bonds that actually do not provide sufficient assurance of performance. While the Regional Director claims that 30 U.S.C. § 1259(c) allows for self-bonding, this provision does not bar the agency from taking appropriate action to ensure meaningful financial commitments are made to sustain self-bonds.

If read to be true, the allegations made by Guardians in its Complaint would mean that Tri-State has no tangible financial commitment backing its self-bonds and would therefore be in violation of SMCRA and SMCRA implementing regulations. In denying the Complaint and Guardians’ Request for Informal Review, OSMRE and the Regional Director therefore violated SMCRA.

B. The Regional Director Inappropriately Relied Upon Information Submitted After the Filing of Guardians’ Complaint

⁴ Furthermore, if a company is not being truthful about a financial commitment related to a self-bond it could violate SMCRA’s prohibition on “false statement[s], representation[s], or certification[s].” 30 U.S.C. § 1268(g); see also 30 C.F.R. § 847.11(c).

Further undermining the legality of the Regional Director's determination is that it agreed with the DFD's decision to rely upon information seemingly solicited by OSMRE and submitted by state regulatory authorities in response to Guardians' Complaint. 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. Subsequently, the DFD's determination not to inspect relied heavily on this new information. As stated in our Request for Informal Review, this is an inappropriate review and under SMCRA regulations, OSMRE is not allowed to deny Citizen Complaints after relying upon subsequently submitted information. 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).

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 does seek out the opinion of state regulatory authorities, OSMRE would have to first conclude there *is* reason to believe violations exist. In response to a citizen complaint, OSMRE is not allowed to base its decision not to inspect on a quasi-inspection of post-complaint submissions of information. *See* 30 C.F.R. § 842.11(b)(2).

In his response, the Regional Director asserts that in response to a Citizen Complaint, OSMRE is allowed to rely upon "any information available" in determining whether there is reason to believe a violation exists. Exhibit 1, RD Response at 7. However, 30 C.F.R. § 842.11(b)(2) is clear that in response to a citizen complaint, a determination of whether there is "reason to believe" a violation exists is based exclusively on the facts alleged in the complaint.

This is echoed by 30 C.F.R. § 842.12(a), which requires OSMRE to conduct an inspection in response to a citizen complaint if the complaint (or statement) “giv[es] the authorized representative reason to believe that a violation [] exists[.]”

The Regional Director cites SMCRA’s general enforcement provision under 30 U.S.C. § 1271(a)(1), which requires OSMRE to take appropriate action if there is reason to believe a violation exists on the basis of “any information available.” To be sure, OSMRE has an overarching duty to take action when “any information” indicates there is reason to believe a violation exists, regardless of whether the agency receives a citizen complaint, and this is echoed at 30 C.F.R. § 842.11(b)(1)(i). However, SMCRA regulations are clear that when OSMRE is presented with a citizen complaint, its duty is to review solely the facts alleged in the complaint when assessing whether there is reason to believe violations exist.

The Regional Director asserts that Guardians’ interpretation of OSMRE’s duties under SMCRA creates an unacceptable conflict between 30 C.F.R. §§ 842.11(b)(1)(i) and 842.11(b)(2). *See* Exhibit 1, RD Decision at 7. This is not the case. Read together, these regulatory provisions exude harmony and simply mean that OSMRE has a broad duty to be responsive to “any information” and that when that “any information” is presented in the form of a citizen complaint, the agency must be responsive where the complaint alone provides “reason to believe.”

Certainly, after granting a citizen complaint, OSMRE can solicit and rely upon all manner of information to determine what, if any, appropriate action should be taken. However, at the complaint stage, the agency’s is limited to relying upon the information within the four corners of the citizen complaint. While this may mean OSMRE faces a low bar, the IBLA has confirmed, “the threshold for determining whether a citizen compliant affords OSM[RE]

sufficient reason to believe a violation exists is very low.” *Kenneth and Gwen Thompson, et al.*, 144 IBLA 257, 267 (1998).

Accordingly, the Regional Director erred in upholding the DFD’s reliance upon information submitted to OSMRE following the submission of Guardians’ Citizen Complaint and violated SMCRA.

CONCLUSION AND REQUESTED REMEDY

For the aforementioned reasons, Guardians requests the IBLA: 1) Reverse the Regional Director’s decision on Guardians’ Request for Informal Review; 2) Find that a federal inspection of Tri-State’s self-bonding commitments relative to the Colowyo and Dry Fork coal mines is warranted; and 3) Direct that appropriate action be taken to remedy any violations.

Respectfully submitted on this 31st day of October, 2018.



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CERTIFICATE OF SERVICE

I certify that on October 31, 2018, I served this Statement of Reasons by U.S. Postal

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