



COALEX STATE INQUIRY REPORT - 39

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Libby Maurnenee, Assistant Attorney General
Department of Natural Resources
Tawes Office Bldg., C-4
580 Taylor Avenue
Annapolis, Maryland 21401

TOPIC: WATER REPLACEMENT, BOND RELEASE

INQUIRY: How long does the operator remain liable for water replacement under SMCRA Sec. 717(b) after the bond release? In Maryland there is a three year statute of limitations for civil action. The question arises as to (i) whether the statute of limitations would apply and (ii) whether the time period would begin at the time of injury or at the time the person discovers the injury.

SEARCH RESULTS:

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) establishes certain operator responsibilities, including water replacement under Sec. 717(b), and provides for the filing of a performance bond with the regulatory authority conditioned on the faithful performance of the requirements of the Act, the regulatory program, and the permit. The operator responsibility under the bond is for the life of the mining operation, plus an extended period, to ensure proper reclamation and success of the revegetation. (SMCRA Secs. 509, 519, 717; 30 USC Secs. 1259, 1269, 1307)

Sec. 509(b) of SMCRA provides that:

"An operator's liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with [an] operator's responsibility for revegetation requirements . . ."

The revegetation requirements of Sec. 515 state that an operator must assume liability for revegetation for 5 years after the last augmented seeding in areas where the annual precipitation is greater than 26 inches, and for 10 years in areas where annual precipitation is 26 inches or less. (SMCRA, Sec. 515; 30 USC Sec. 1265)

The Act does not specifically state whether the provisions on bonding and bond release apply to liability under the water replacement requirements of Sec. 717(b). However, Sec. 717(b) of SMCRA does not, on its face, alter the effect of bond release on the operator's liability under the Act. Therefore, the question of how long the operator remains liable for water replacement under Sec. 717(b), appears related to the issue generally of the operator's liability after bond release. For these reasons, this Report discusses primarily the effect of bond release on an operator's liability under SMCRA.

Beyond information relating to the operator responsibilities under SMCRA, the COALEX file does not include information pertaining to an operator's potential liability under state common or



civil law, or to the applicability of the state statute of limitations to such other potential causes of action. Accordingly, this Report discusses primarily issues pertaining to an operator's responsibilities under SMCRA and programs promulgated under SMCRA.

Legislative History

Although the Act does not explicitly address the question of the operator's liability after bond release, the issue was raised during Congressional debates prior to SMCRA's passage. In 1973, in the Senate, there was a discussion of liability under the Surface Mining Act. Senator Baker raised the issue as follows:

"Mr. Baker. Mr. President, there is one question I should like to ask in that connection. Legally speaking, there would be a distinction in the liability and the responsibility of the bond versus the continuing liability and responsibility of the operator. I would postulate that after 6 years in a nonarid region, suddenly we get a big slide or the failure of vegetation, is there anything in the bill that would prevent a State from requiring the operator to come back and revegetate as distinct from the bonding company?"

"Mr. Hansen. I am not aware of any provision in the bill, but the best information we have is that the limitation of liability would not extend beyond the periods that I have mentioned here. I would ask the Senator from Washington (Mr. Jackson) if he knows if a failure in a reclamation effort such as a slide were to occur after a period of 5 years' time in an area where the rainfall annually exceeded 26 inches, would there be any obligation on the mining company, the operator, to go back and make such efforts as to seem to be required to bring the reclamation effort back to where it should have been?"

"Mr. Jackson. My understanding of the bill is that the obligation runs for 5 years."

"Mr. Hansen. That was my understanding, too."

"Mr. Jackson [continuing]. And the liability on the bond. That is, the bond required runs for 5 years. I do not think that would prevent private law suits being instituted directly against the firm itself or the company. Of course, State law is applicable. We are not changing State law in any manner, shape, or form. Action would have to be brought pursuant to State law. We do not change State law. I do not know whether the Senator from Tennessee will agree."

"Mr. Baker. Yes, I agree with the distinguished chairman. I started this colloquy by making the observation that there are two liabilities involved, one the liability of the bond and the other the liability of the operator."

"Mr. Jackson. The liability on the bond stems from the provisions in this bill."

"Mr. Baker. Clearly the bond liability would expire in 5 years in my part of the country, but if State law would continue to order the operator responsible under common law nuisance or statutory law, he would still be liable, and we have not abrogated that."

"Mr. Jackson. The statute would start running from the time the damage occurred."



"Mr. Baker. Both the Senator from Wyoming and the Senator from Washington have answered my questions which I interpret that both liabilities expire in 5 years in a nonarid and 10 years in an arid region." (119 Cong. Rec. S33299 (1973))

H. Rep. No. 93-1072, contains language typical of the Congressional reports discussing the operator's responsibility under the bond. It notes that:

"[The operator is required] to post a bond, in an amount to be determined by the regulatory authority, at least sufficient for the reclamation, if performed by a third party, but in no case less than \$10,000. The bond will be posted after approval of the permit application but before the permit is issued. The bond is to cover that increment of land within the permit area which will be disturbed during the initial year of the permit and the liability will be for the duration of the operation plus time coincident with vegetation requirements." (H.R. Rep. No. 93-1072, 93rd Cong., 2d Sess., at 287 (1973))

Because P.L. 95-87 as passed in 1977, did not add any provisions to the section on operator liability, it is reasonable to assume that these 1973 discussions remain valid.

OSM Regulations

The OSM regulations continue the basic standards of the Act for bonding and for bond release, but do not further expand on the operator's responsibilities under SMCRA after bond release. In its oversight activities, OSM has apparently taken the position that an operator's responsibilities are not ended under SMCRA upon bond release if it is found that: (1) there was improper release of bond, (2) there is a significant environmental problem at the site, and (3) the problem is the direct result of a coal mining and reclamation operation.

Case Decisions

The COALEX search identified several cases where the OSM took an enforcement action against a coal operator after the operator's bond was released. A brief summary of some of the decisions follows:

BERNOS COAL/EXCELLO COAL v OSM, Docket No. NX 4-70-R (October 22, 1984), decided by ALJ Torbett; and EXCELLO COAL v DOI (March 20, 1985).

FACTS: A Tennessee state inspector issued a NOV to Bernos for alleged rill and gully violations, which was successfully contested by the company, who subsequently received bond release. OSM issued a NOV three months later for the same alleged violation after OSM took over Tennessee's program.

DECISION: According to Torbett, the action of bond release itself has no effect on eligibility of a site for further regulation. Further, OSM should not be bound by the mistakes of a state agency and is authorized to ensure compliance with the law despite the actions or inactions of a state agency. Torbett was reversed later on appeal by Magistrate Murrian in EXCELLO COAL.



The issue decided by Murrian was whether OSM was precluded from issuing a NOV for the same violation earlier issued by the state. He decided that OSM does not have the authority to reopen enforcement decisions of the state which were final, since such an interpretation would allow OSM to take over state programs and bring enforcement actions against operators for an unlimited time after the state made its decision.

TRINITY COAL CORP. v OSM, Docket No. NX 4-75-R (December 11, 1984), decided by ALJ McGuire.

FACTS: An OSM inspector issued a 10-Day Notice to the State of Virginia arising out of an alleged violation of a groundwater monitoring program. The state did not take action, stating the surface area disturbed, as a result of the underground operation, was less than 2 acres; the state subsequently released the bond. OSM issued a NOV to the operator the day after bond release.

DECISION: The action of a state RA in releasing a bond does not have the effect of ending OSM's enforcement jurisdiction, in either its dual or oversight enforcement roles.

ALTERNATE FUELS INC. v CLARK, et al., (January 3, 1985), decided by ALJ Morehouse.

FACTS: An OSM inspector issued a NOV to Alternate Fuels 20 months following full bond release by the State of Kansas for alleged violations including rill and gully standards and revegetation requirements.

DECISION: Morehouse held, under SMCRA,, that OSM did not have jurisdiction to issue the NOV after bond release by the regulatory authority in Kansas.

D & J MINERAL AND MINING, INC. v OSM, Docket No. NX 4-11-R (January 23, 1985), decided by ALJ Torbett.

FACTS: An OSM inspector issued a NOV to D & J four months following full bond release for alleged revegetation violations.

DECISION: Torbett stated that 100% bond release does not signal a "bright light" cutoff of OSM's jurisdiction. He held:

"[w]hen a bond is released OSM's oversight authority must continue for some reasonable time to ensure the state RA acted properly. Failure to act within a reasonable time should cutoff OSM jurisdiction, based simply on the rule of reason. Applying this standard, he determined that at the time of bond releases, the operation was in compliance with the revegetation standards, and thus vacated the NOV."

ATTACHMENTS:

A. Excerpt from 119 Cong. Rec., S33299 (1973).



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- B. Excerpt from HR 93-1072, 93rd Cong., 2d Sess., at 287 (1973).
- C. BERNOS COAL/EXCELLO COAL v OSM, Docket No. NX 4-70-R (Oct. 22, 1984).
- D. BERNOS COAL/EXCELLO COAL v OSM, Docket No. NX 4-70-R (April 12, 1985); and EXCELLO COAL v DOI, Civ. No. 3-84-902 (ED Tn, 1985).
- E. TRINITY COAL CORP. v OSM, Docket No. NX 4-75-R (December 11, 1984).
- F. D & J MINERAL AND MINING INC. v OSM, Docket No. NX 4-11-R (January 23, 1985).
- G. ALTERNATE FUELS INC. v CLARK, et al. (January 3, 1985).