



COALEX STATE INQUIRY REPORT - 105
February 6, 1989

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TOPIC: Bond forfeiture - relationship of bond to permitted area

INQUIRY: The Environmental Hearing Board issued an Adjudication on the forfeiture of surface mining bonds. The Board found numerous violations of Pennsylvania Surface Mining Act and Regulations on the site. However, the Board held that the DER had failed to meet its burden to show what bond instrument covered liability for the site where the violation existed, the Board then vacated the DER bond forfeiture action. Locate any case law which explains that once violations of law are proven at a mine site, the bonds must be forfeited.

SEARCH RESULTS: Using both COALEX and LEXIS, searches were conducted in state and federal regulations and in state case law.

A list of the regulations and case law identified as a result of the research and the topics they address follows. Copies of the materials are enclosed. A copy of State Inquiry Report - 102, which discusses a similar issue, is also enclosed. The relevant cases from Report 102 are discussed in the main body of this report.

FEDERAL AND STATE REGULATIONS

30 C.F.R. 800.50 FORFEITURE OF BONDS DESCRIBES THE PROCEDURES TO FOLLOW WHEN THE RECLAMATION IS NOT PERFORMED AND THE REGULATORY AGENCY TAKES ACTION TO FORFEIT THE BONDS.

800.50(a) "If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the regulatory authority shall take the following action to forfeit all or part of a bond or bonds for any permit area or an increment of a permit area:...."

800.50(a)(2)(ii) "The regulatory authority may allow a surety to complete the reclamation plan, or the portion of the reclamation plan applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the regulatory authority may approve partial release authorized under section 800.40, no surety liability shall be released until successful completion of all



reclamation under the terms of the permit, including applicable liability periods of section 800.13."

800.50(c) "Upon default, the regulatory authority may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in section 800.11(b), bond liability shall extend to the entire permit area under conditions of forfeiture."

30 C.F.R. 800.40 REQUIREMENTS TO RELEASE PERFORMANCE BONDS.

800.40(a)(2) "...The advertisement shall be considered part of any bond release application and shall contain the permittee's name, permit number and approval date, notification of the precise location of the land affected, the number of acres, the type and amount of the bond filed and the portion sought to be released, the type and appropriate dates of reclamation work performed, a description of the results achieved as they relate to the permittee's approved reclamation plan...." [emphasis added]

800.40(b) "Inspection by regulatory authority. (1) Upon receipt of the bond release application, the regulatory authority shall...conduct an inspection and evaluation of the reclamation work involved."

800.40(c) "The regulatory authority may release all or part of the bond for the entire permit area or incremental area if the regulatory authority is satisfied that all the reclamation or a phase of the reclamation covered by the bond or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III:...." [emphasis added]

30 C.F.R. 800.11 REQUIREMENTS TO FILE A BOND.

800.11(b)(1) "The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit."

800.11(b)(2) "As surface coal mining and reclamation operations on succeeding increments are initiated and conducted within the permit area, the permittee shall file with the regulatory authority an additional bond or bonds to cover such increments in accordance with this section."

800.11(b)(3) "The operator shall identify the initial and successive areas or increments for bonding on the permit application map submitted for approval as provided in the application...and shall specify the bond amount to be provided for each area or increment."

25 PA. CODE 86.182 PROCEDURES.

86.182(c) "The Department will forfeit all bond deposited for a permit area, including all designated phases of a permit area and amended permit areas, except for such portion of bond which has been released as provided in Part 4 of this subchapter. Liability on every bond posted



for a permit area, designated phase of a permit area, or an amendment thereof, [will] shall cover any violation within the permit area or resulting from mining of the permit area."

25 PA. CODE 86.171 PROCEDURES FOR SEEKING RELEASE OF BOND.

86.171(b) "Newspaper advertisement of application.... The application shall: (3) show the precise location and the number of acres of the lands subject to the application; (4) show the total amount of bond in effect for the permit area and the amount for which release is sought;" [emphasis added]

86.171(d) "The Department will inspect and evaluate the reclamation work involved...."

25 PA. CODE 86.172 CRITERIA AND SCHEDULE FOR RELEASE OF BOND.

86.172(a) "The Department will not release any portion of the liability under bonds applicable to a permit area or designated phase of a permit area until it finds that the permittee has accomplished the reclamation schedule of this section." [emphasis added]

STATE COURT DECISIONS I

The decisions described in this section stipulate that part of the bond must be released if specified portions of the permit land have been fully reclaimed. The relevant portions of the opinions are quoted below.

PERSONAL SERVICE INS. CO. v CALL, 459 N.E.2d 1307 (1983).

- a. "R.C. 1513.16(F) expressly requires a determination by the chief as to which acres shown on the annual or final maps have been reclaimed, and which have not, in considering a request for partial or full release of the bond. R.C. 1513.16(F) further expressly provides that '[the] chief shall order the release of that proportion of the bond, cash, or certificates of deposit which are on deposit to assure reclamation of those acres which he finds to have been reclaimed in the manner required by Chapter 1513.'"
- b. "Prejudice, however, depends upon whether there is evidence of fully reclaimed acres on the land partially bonded by PSI, since there may be instances where the chief may properly find that none of the affected area has been fully reclaimed."
- c. "Release of the surety relating to the rest of the permit area, however, cannot be determined without resolution of the question of whether any of those areas has been fully reclaimed.... For the foregoing reasons...this cause is remanded to [the Franklin County Court of Common Pleas] with instructions to reverse the order of the Board of Review and to remand this cause to that board for further proceedings in accordance with law consistent with this opinion."

COMMONWEAL OF PENNSYLVANIA v OGDEN, 501 A.2d 311 (1985). [Report 102 - Attachment B].



- a. "The bonds in the instant matter can certainly be considered as 'penal' in nature, as DER need not prove actual damages where an operator has breached the condition of the surety.... The characterization of the bonds does not control; but rather the areas covered by the bonds."
- b. DER, the Petitioner, argued that Coal Hill, the Respondent, should forfeit all of the bonds because Coal Hill had "mined off the permitted area and [had] refused to complete reclamation of this affected area." The Court found "...that each bond was issued as part of a specific permit and not as an umbrella to cover all mining being performed by the operator..." In interpreting 25 Pa. Code Sec. 86.1 the Court held "...the off-permit mining and/or the failure to reclaim this area does not justify the forfeiture of all the bonds posted for the other permitted areas. It is more appropriate that a portion of the bond or the entire bond be forfeited to complete reclamation in a non-permitted area only when the permitted area is adjacent to or contiguous to the affected off-permit area, or is one in which the ecological harm may be traced directly to the specifically permitted area."

PERSONAL SERVICE INS. CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1986) [No. 85 CA 1, Fourth Appellate District] [Report 102 -Attachment C].

- a. "Instead of releasing 50% of each bond, area by area, however, [the Chief of the Division of Reclamation] released the entire amount...from the surety bonds.... The chief was following an unpublished Division policy of releasing surety bonds before the operator's collateral bonds, and 'floating' the remaining security over the entire permit area." The Court affirmed the lower court ruling that "the Chief may not 'float' the surety's obligation over areas of the permit bonded by the operator...."
- b. "Both the [lower court] order and R.C. 1513.16(f) provide for release of bond for reclaimed areas prior to forfeiture of bond for unreclaimed areas."

PERSONAL SERVICE INS. CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1985) [No. 418, Fourth Appellate District] [Report 102 - Attachment D].

"While miners and sureties have rights to a full inspection and a proportional release of the bond after termination orders, no such rights exist after disapproval orders. Appellant will have to wait until the chief makes a termination order before appellant can be partially released from the bond."

TIGER CORP. v CALL, 456 N.E.2d 554 (1982).

As required by R.C. 1513.16(F), an order of the Division of Reclamation must "locate with sufficient specificity the land not reclaimed." The Court determined "Because the order specifies that Tiger failed to reclaim the entire 18.2 acres mined, it does locate with sufficient specificity the land Tiger failed to reclaim."

STATE DECISIONS II

The following opinions hold that reclamation bonds are penal in nature and, therefore, the entire amount of the bond must be forfeited upon its breach.



STATE OF TENNESSEE v GULF AMERICAN FIRE & CASUALTY CO., 680 S.W.2d 455 (1984).

AMERICAN CASUALTY CO. v COMMONWEALTH OF PENNSYLVANIA, 441 A.2d 1383 (1982).

AMERICAN DRUGGISTS INS. CO. v COMMONWEALTH OF KENTUCKY, 670 S.W.2d 485 (1984).

STATE DECISIONS III

These cases address the issue of res judicata, as applied to administrative actions and hearings.

SOUTHWEST PENNSYLVANIA NATURAL RESOURCES, INC. v COMMONWEALTH OF PENNSYLVANIA, 465 A.2d 108 (1983).

"The [Environmental Hearing] Board's regulation on rehearings and reconsiderations provides as follows:

"The Board may on its own motion or upon application of counsel...grant reargument before the board en banc. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:

"(1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

"(2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing. 25 Pa. Code Sect. 21.122(a)"

CITY OF INDEPENDENCE v MAYNARD, 495 N.E.2d 444 (1985).

From the syllabus: "While res judicata does apply to administrative hearings, it should be applied with flexibility and only where the administrative proceeding has been of a judicial nature and the parties have had an adequate opportunity to litigate the issues in the proceeding."

ALLIED FIDELITY INS. CO. V. ENVIRONMENTAL QUALITY COUNCIL, 753 P.2d 1038 (1988) [Report 102 - Attachment I].

"Whatever res judicata is occasioned by the requested administrative action, it would seem preferable to the agency than final disposition by civil lawsuit."

ATTACHMENTS

A. STATE INQUIRY REPORT - 102 and its attachments.



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- B. 30 C.F.R. Sec. 800.50 Forfeiture of bonds.
- C. 30 C.F.R. Sec. 800.40 Requirements to release performance bonds.
- D. 30 C.F.R. Sec. 800.11 Requirement to file a bond.
- E. 25 Pa. Code Sec. 86.182 Procedures.
- F. 25 Pa. Code Sec. 86.171 Procedures for seeking release of bond.
- G. 25 Pa. Code Sec. 86.172 Criteria and schedule for release of bond.
- H. PERSONAL SERVICE INSURANCE CO. v CALL, 459 N.E.2d 1307 (1983).
- I. TIGER CORP. v CALL, 456 N.E.2d 554 (1982).
- J. STATE OF TENNESSEE v GULF AMERICAN FIRE & CASUALTY CO., 680 S.W.2d 455 (1984).
- K. MORCOAL CO. v COMMONWEALTH OF PENNSYLVANIA, 459 A.2d 1303 (1983).
- L. AMERICAN CASUALTY CO. v COMMONWEALTH OF PENNSYLVANIA, 441 A.2d 1981 (1982).
- M. AMERICAN DRUGGISTS INSURANCE CO. v COMMONWEALTH OF KENTUCKY, 670 S.W.2d 485 (1984).
- N. SOUTHWEST PENNSYLVANIA NATURAL RESOURCES, INC. v COMMONWEALTH OF PENNSYLVANIA, 465 A.2d 108 (1983).
- O. CITY OF INDEPENDENCE v MAYNARD, 495 N.E.2d 444 (1985).