



COALEX STATE INQUIRY REPORT - 257

June 1993

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TOPIC: BOND RELEASE: PRESENCE OF AMD SEEP

INQUIRY: In the course of bond release proceedings, evidence of an acid mine drainage (AMD) seep was discovered. If the operator undertakes treatment for the seep can the bond still be released? Is it acceptable to create a wetland to treat the AMD?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. The materials retrieved in response to the Inquiry are discussed below; copies are attached.

One DIRECTIVE was identified that provides OSM's policy regarding bond release in situations where wetlands are used in treating acid mine drainage. Eight federal, state and state administrative decisions were identified; seven of these are from Pennsylvania. Some of these decisions specifically discuss the denial of bond release due to AMD seepages (HALFWAY COALYARD, THOMPSON & PHILLIPS CLAY decisions and C & K COAL). In the remaining decisions (AMERICAN MINING CONGRESS, NORTH CAMBRIA FUEL and CAMBIA COAL), the discussion of bond release and AMD is not directly related to the issues of the case. Four Federal Register Notices are included for background.

INTERIOR DIRECTIVE

OSM DIRECTIVE TSR-10, Transmittal No. 468, "Use of Wetland Treatment Systems for Coal Mine Drainage" (Issued September 8, 1988). [Excerpts.]

"Section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3) provide that no bond shall be fully released until all reclamation requirements of the Act and the permit are fully met. While wetlands have demonstrated potential in treating acid mine drainage, they have not yet been proven effective for all parameters or on a long-term basis. Also, their effectiveness appears to decrease over time. Therefore, applications for final bond release which rely on the use of wetland treatment systems for permanent control of acid mine drainage shall not be granted at this time."



FEDERAL CASE LAW

AMERICAN MINING CONGRESS, et al. v U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), 965F 2d 759 (9th Cir 1992). [Excerpts.]

In this challenge of EPA's Clean Water Act storm water discharge rule and National Pollutant Discharge Elimination System permit application regulations, under section E.1., "Mines reclaimed under SMCRA's 'Interim Program'", the court discussed bonding requirements:

"The final SMCRA program also requires the posting of a performance bond. 30 C.F.R. Sec. 800.11 (1991). Release of this bond indicates that the regulatory authority is satisfied that reclamation is complete and the site is no longer likely to produce contaminated runoff. See Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs, 30 C.F.R. Sec. 800.40 (1991); 46 Fed. Reg. at 3,125."

STATE CASE LAW

THOMPSON & PHILLIPS CLAY CO. (T & P) v DEPT. OF ENVIRONMENTAL RESOURCES, 136 Pa Commw 300, 582 A 2d 1162 (Pa Commw Ct 1990).
THOMPSON & PHILLIPS CLAY CO. v DEPT. OF ENVIRONMENTAL RESOURCES, Docket No. 86-275-W, 1990 Pa Envirn LEXIS 16 (Pa EHB February 9, 1990).
THOMPSON & PHILLIPS CLAY CO. v DEPT. OF ENVIRONMENTAL RESOURCES, Docket No. 86-275-W, 1989 Pa Envirn LEXIS 56 (Pa EHB March 15, 1989).

T & P were refused a bond release because of drainage seeping from its mine. The court upheld previous decisions which ruled that finding the source of polluted water was not "critical to finding liability under Section 315(a) of [Pennsylvania's Clean Streams Law]...the decisive factor is the discharge."

NORTH CAMBRIA FUEL CO. v DEPT. OF ENVIRONMENTAL RESOURCES, 621 A 2d 1155 (Pa Commw Ct 1993).

This case, also, held that a mine operator is responsible for all polluting waters even though its operation was not the source. In a footnote distinguishing this case from a previous decision, the Environmental Hearing Board (EHB) stated:

"Before a surface mine operator can commence operations the operator must post a bond with the Department to ensure that the operator will reclaim the area after mining, as well as to abate polluting mine discharges....Bonds are released if the operator has accomplished the appropriate state of reclamation for the site and where no pollution or potential pollution of the commonwealth waters exist. 52 P.S. Sec. 1396.4(j)."

STATE ADMINISTRATIVE DECISIONS



CAMBIA COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), Docket No 82-071-H, 1983 EHB 30 (PA EHB March 11, 1983).

Cambia appealed DER's refusal to grant it a mine permit for 18 acres already under permit to Lechene Coal Co. The EHB found DER's denial of the permit, in this particular instance, an abuse of its discretion. In discussing Lechene's reclamation work and bond release, the EHB stated:

"[S]ince the Lechene bond covers not only the 18 acre tract in issue but also a contiguous area which had been mined by Lechene and from which acid mine drainage (AMD) is (allegedly) being discharged, DER will not release Lechene's bond even after Lechene has completed all work necessary to reclaim the 18 acre tract in question unless and until the AMD discharge ceases...."

C & K COAL CO. v COMMONWEALTH OF PENN. , DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-138-E (Consolidated), 1992 Pa Envirn LEXIS 128 (Pa EHB September 30, 1992).

SYNOPSIS:

"....Since DER did not sustain its burden of proving there was a hydrogeologic connection between the discharge [emanating in the right-of-way of a public road and running along the boundary of the permitted area] and appellant's permitted area, DER's order to appellant directing it to treat the discharge was an abuse of DER's discretion. Likewise, as the only reason for DER's denial of the appellant's application for bond release was this discharge, DER's denial of bond release was an abuse of its discretion."

HALFWAY COALYARD, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 83-133-W (Consolidated), 1993 Pa Envirn LEXIS 6 (Pa EHB January 26, 1993).

Halfway, remaining on land owned by the Commonwealth and leased to it by DER, was held liable for treatment of AMD emanating from its permitted site: DER denied Halfway's request for bond release due to an "alleged breach in a treatment ditch resulting in a discharge not in compliance with 25 Pa. Code Sec. 87.102, as well as a non-complying discharge from a final treatment pond".

FEDERAL REGISTER NOTICES

46 FR 3136 (JANUARY 13, 1981). Proposed Regulation. EPA 40 CFR Part 434. Effluent limitation guidelines.



"The release of bond by the appropriate SMCRA authority signifies that the coal mine operator has carried out its responsibilities under SMCRA, and that post-mining pollution problems are therefore abated and can be reasonably expected not to recur."

48 FR 43956, 43979 (SEPTEMBER 26, 1983). Final rules. Parts 701, 779, 780, 783, 784, 816 and 817. Sections 816/817.41(e) Surface-water monitoring.

"Under the final rules for bond release, the regulatory authority must determine that disturbance to the hydrologic balance has been minimized in the permit and adjacent areas and that material damage has been prevented outside the permit area. While the performance standards for surface- and ground-water monitoring allow a regulatory authority to modify monitoring requirements based on certain showings, nevertheless it retains the responsibility to determine that the regulatory requirements have been met prior to bond release."

53 FR 44356, 44361 (NOVEMBER 2, 1988). Final rule. Part 700 Termination of Jurisdiction.

Under the discussion of 30 CFR 700.11(d)(1)(ii) Permanent Program Operations:

"OSMRE recognizes the potential for unanticipated events to occur after final bond release which may have adverse environmental consequences. The occurrence of such an event, however, is not automatically a basis for a regulatory authority to disturb an administratively final decision to release a bond and to terminate regulatory jurisdiction. Whether reclamation was in fact successfully completed by a permittee and whether jurisdiction must be reasserted by the regulatory authority are factual questions, the answers to which are dependent upon particular circumstances. In the example provided by the commenter, the occurrence of an acid seep subsequent to bond release does not, by itself, establish the cause of the seep, whether reclamation had been completed, whether intervening events occurred, or the circumstances surrounding bond release."

Included for Background:

48 FR 32932 (JULY 19, 1983). Final rule. Parts 800, 801, 805-809.

New Section 800.40 Requirements to release performance bonds.

ATTACHMENTS

- A. OSM DIRECTIVE TSR-10, Transmittal No. 468, "Use of Wetland Treatment Systems for Coal Mine Drainage" (Issued September 8, 1988). [Excerpts.]
- B. AMERICAN MINING CONGRESS, et al. v U.S. ENVIRONMENTAL PROTECTION AGENCY, 965 F 2d 759 (9th Cir 1992). [Excerpts.]



- C. THOMPSON & PHILLIPS CLAY CO. (T & P) v DEPT. OF ENVIRONMENTAL RESOURCES, 136 Pa Commw 300, 582 A 2d 1162 (Pa Commw Ct 1990).
- D. THOMPSON & PHILLIPS CLAY CO. v DEPT. OF ENVIRONMENTAL RESOURCES, Docket No. 86-275-W, 1990 Pa Envirn LEXIS 16 (Pa EHB February 9, 1990).
- E. THOMPSON & PHILLIPS CLAY CO. v DEPT. OF ENVIRONMENTAL RESOURCES, Docket No. 86-275-W, 1989 Pa Envirn LEXIS 56 (Pa EHB March 15, 1989).
- F. NORTH CAMBRIA FUEL CO. v DEPT. OF ENVIRONMENTAL RESOURCES, 621 A 2d 1155 (Pa Commw Ct 1993).
- G. CAMBIA COAL CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), Docket No 82-071-H, 1983 EHB 30 (PA EHB March 11, 1983).
- H. C & K COAL CO. v COMMONWEALTH OF PENN. , DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 91-138-E (Consolidated), 1992 Pa Envirn LEXIS 128 (Pa EHB September 30, 1992).
- I. HALFWAY COALYARD, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, EHB Docket No. 83-133-W (Consolidated), 1993 Pa Envirn LEXIS 6 (Pa EHB January 26, 1993).
- J. 46 FR 3136 (JANUARY 13, 1981). Proposed Regulation. EPA 40 CFR Part 434. Effluent limitation guidelines.
- K. 48 FR 43956, 43979 (SEPTEMBER 26, 1983). Final rules. Parts 701, 779, 780, 783, 784, 816 and 817. Sections 816/817.41(e) Surface-water monitoring.
- L. 53 FR 44356, 44361 (NOVEMBER 2, 1988). Final rule. Part 700 Termination of Jurisdiction.
- M. 48 FR 32932 (JULY 19, 1983). Final rule. Parts 800, 801, 805-809. New Section 800.40 Requirements to release performance bonds.