



COALEX STATE INQUIRY REPORT - 269

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TOPIC: SURETY AS "PERMITTEE" OR "OPERATOR"

INQUIRY: After an operator's permit was revoked, a surety decided to perform the required reclamation. The surety was subsequently issued an NOV. The surety claimed that an NOV or CO cannot be issued to them because they are not an "operator" or "permittee". Are there any cases addressing this issue?

SEARCH RESULTS: A number of relevant administrative and state decisions and one Federal Register preamble were identified using the COALEX Library, other LEXIS material and prior COALEX Reports.

The retrieved material finds that sureties opting to reclaim, rather than forfeit the performance bond, are under the same obligations to properly fulfill the performance standards as the named permittee. Copies of the items listed below are attached.

INTERIOR ADMINISTRATIVE DECISIONS

IN THE MATTER OF WILLIAM H. PULLEN, 1992 IBLA LEXIS 124, IBLA 88-452 (1992).

The IBLA upheld OSM's release of Phase I bonds on lands owned by the Pullen family. American Standard Coal Co., Inc., a fifty percent owner of Jackson County Mining and guarantor on Jackson Mining's reclamation bonds, undertook reclamation when Jackson Mining went bankrupt. The Pullens challenged American Standard's application for bond release because it was not the named permittee. The IBLA found American Standard was "the real party in interest. Moreover, American Standard's involvement does not circumvent the regulatory intent to protect the landowner. The bond remains in effect until the regulatory requirements are met, regardless of whether the named permittee or a fifty percent owner/surety seeks the release."



"The Federal Register comments shed no light on whether the term 'permittee' is to be strictly construed in the context of bond release. The Department has liberally interpreted the term in the context of enforcement where it is necessary to fulfill the legislative intent to place responsibility with those who benefit from the mining operations. The Interior Board of Surface Mining Appeals ruled that 'a person who either has been granted the right to mine or reclaim an area or who is mining or reclaiming an area that would otherwise be subject to regulation is a permittee.' Jewell Smokeless Coal Co., 4 IBSMA 211, 218 (1982)* (emphasis added); see also 30 C.F.R. 701.5 . Under this broad construction, American Standard is a permittee because it took over the bankruptcy. As such, it was entitled to apply for bond release."

* Copy of this decision is attached.

STATE CASE LAW

ALLIED FIDELITY INSURANCE CO. v ENVIRONMENTAL QUALITY COUNCIL, 753 P 2d 1038 (Wyo 1988).

The court reversed the agency's finding that the right to a hearing did not inure to the surety after the operator went bankrupt. It found that the doctrine of legal subrogation extended to a surety that wanted "to replace a defunct operator to ask for a bond forfeiture hearing for the purpose of determining damages if any, and to assert policy defenses."

PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, 489 NE 2d 785 (Ohio 1986).

PSI elected to perform reclamation instead of making payments under its bond when Mack Mining, Inc. defaulted on its obligation to reclaim it mined land. Subsequently, an NOV was issued to PSI for "committing a violation of the reclamation performance standards". The court reversed the lower court's holding "that the proposed civil penalty assessment was an unconstitutional impairment of the surety contract".

"The fact that PSI was the surety for the defaulting permit holder in reality has little to do with the violation in issue. Once PSI opted to perform the reclamation work itself, it was required to undertake the reclamation in a manner consistent with preordained reclamation standards. This, it apparently failed to do.... Certainly, PSI qualifies as a 'person' which can be charged with a civil penalty under [the Ohio] statutory scheme."

PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, No. 412, slip op. (Ohio Ct. App 1985).



PSI chose to undertake reclamation on behalf of the permittee, Allied Coal Sales, rather than forfeit the performance bond. An NOV was issued to PSI for violation of reclamation provisions. The court reversed the Reclamation Board of Review's finding that imposition of civil penalties on PSI, based on an amendment to the state regulations which took effect after PSI executed a reclamation performance bond, was an "invalid retroactive application of the law".

"In the case at bar, the availability to appellant of an additional penalty to be used against a surety's improper performance under the reclamation statutes would promote public health and welfare ends."

Two additional cases are enclosed for review:

RIGHT OF WAY PAVING COMPANY, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, Penn. Environmental Hearing Board Docket No. 86-079-G, 1986 Pa. Environ. LEXIS 105 (1986).

COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND YODER, et al. v PBS COALS, INC. AND FETTEROLF MINING, INC., 534 A 2d 1130 (Pa Commonw Ct 1987).

FEDERAL REGISTER PREAMBLE

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 806.12 Terms and conditions of the bond.

In discussing the need for regulatory authority's approval for a surety's cancellation of a performance bond, the Secretary states:

"The surety's co-guarantee for reclamation work on lands that have been disturbed cannot be canceled because, even if the operator fails in business, the regulatory authority must be able to look to a financially stable and secure guarantor for performance of the reclamation obligations under the permit, including collection at the time of bond forfeiture, if necessary.

...

"This restriction [against cancellation of the bond] is based on the first principle of surety law, i.e., the surety undertakes the obligation to stand in the shoes of the principal, and his obligation may not be rescinded or terminated without the consent of the party to whom the duty is owed."

[NOTE: Part 806 was removed and replaced with Part 800. 49 FR 32932 (July 19, 1983).]

ATTACHMENTS



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

- A. IN THE MATTER OF WILLIAM H. PULLEN, 1992 IBLA LEXIS 124, IBLA 88-452 (1992).
- B. JEWELL SMOKELESS COAL CO., 4 IBSMA 211, 218 (1982).
- C. ALLIED FIDELITY INSURANCE CO. v ENVIRONMENTAL QUALITY COUNCIL, 753 P 2d 1038 (Wyo 1988).
- D. PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, 489 NE 2d 785 (Ohio 1986).
- E. PERSONAL SERVICE INSURANCE CO. (PSI) v MAMONE, CHIEF, DIV. OF RECLAMATION, OHIO DEPT. OF NATURAL RESOURCES, No. 412, slip op. (Ohio Ct. App 1985).
- F. RIGHT OF WAY PAVING COMPANY, INC. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, Penn. Environmental Hearing Board Docket No. 86-079-G, 1986 Pa. Environ. LEXIS 105 (1986).
- G. COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES AND YODER, et al. v PBS COALS, INC. AND FETTEROLF MINING, INC., 534 A 2d 1130 (Pa Commonw Ct 1987).
- H. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final Rule. 806.12 Terms and conditions of the bond.