



**COALEX STATE INQUIRY REPORT – 130**  
**October 25, 1989**

G. Milton McCarthy  
Assistant Attorney General  
Alabama Surface Mining Commission  
P.O.B. 2390  
Jasper, Alabama 35501

**TOPIC: SET-OFF OF CIVIL PENALTIES FROM BOND PROCEEDS**

**INQUIRY:** An operator, who has a final civil penalty assessment, successfully completes a phase of reclamation and is entitled to a reduction or release of a reclamation bond. Is it permissible to set-off the penalty amount from the bond proceeds in the absence of specific statutory authorization? If so, what is the authority for doing so?

**SEARCH RESULTS:** The COALEX Library and the state and federal decisions in LEXIS were used to conduct this research. No SMCRA or related cases were identified which address the issue of the set-off of civil penalties against the proceeds of bonds due to be released as a result of successful reclamation. In the Administrative Law Judge (ALJ) consent decision attached it is clear that payment of the civil penalties is separate and distinct from the release of bonds.

---

**CARBONEX COAL CO. v OSM, Docket Nos. TU 5-58-R, TU 5-68-R, TU 5-74-R, TU 5-86-R, TU 5-100-R, TU 5-105-R, TU 5-110-R, TU 6-1-R, TU 6-38-R, TU 6-47-R (Feb. 10, 1989 [Amends Sept. 23, 1988 Decision]).**

In this consent decision, Carbonex agreed to pay the negotiated sum "in full and complete settlement of all civil penalties". Carbonex remained "liable for the full and successful reclamation of the...mine site" until "bond release or bond substitution and permit transfer is approved".

Related to the issue of this report is the question of the termination of a state's authority over a surface mining operation. On November 2, 1988, OSM issued a final rule [30 CFR Sec. 700.11(d)] clarifying "the circumstances whereby a regulatory authority may terminate regulatory jurisdiction under a regulatory program" approved under SMCRA (53 FR 44356). As described in the preamble:

"This final rule requires the regulatory authority either to make a written determination that the permittee has met all reclamation requirements, or to decide to release fully a permanent program performance bond before regulatory jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, or of a coal exploration can be terminated."



"The regulatory authority is vested with the authority to determine that reclamation has been completed."

"An operator's obligations...and regulatory authority jurisdiction...simultaneously terminate at the time of proper final bond release...because the period of extended responsibility will have run, all reclamation obligations will have been met successfully and, by definition in the statute, as surface mining and reclamation operation no longer exists. Liability...for a failure of reclamation, however, may be subject of a Secretarial or regulatory authority inquiry or a civil suit...[A] regulatory authority will be required to reassert jurisdiction if it can be shown that the bond release was based upon fraud, collusion, or any other misrepresentation of a material fact at the time of bond release."

Two ALJ decisions issued prior to the rule just mentioned may also be of interest:

**NEW BIG CREEK MINING, INC. v OSM, Docket No. NX 1-49-P (1985).**

The ALJ affirmed the jurisdiction of OSM to issue a cessation order (CO) after bond release because the notice of violation (NOV) was issued before the state released the bond.

"Release of a bond by the state regulatory authority does not in and of itself terminate the jurisdiction of [OSM]."

**D & J MINERAL AND MINING, INC. v OSM, Docket No. NX 4-11-R (1985).**

"[A] 100% bond release does not signal a 'bright line' cutoff of [OSM's] jurisdiction. Rather, the question of when is a site released from regulation is answered by stating that as each stage of reclamation is successfully attained, the site is released from further regulation pertaining to that stage of reclamation, with final release coming when revegetation has been successfully accomplished and the liability period has expired. When a bond is released, [OSM's] oversight authority must continue for some reasonable time to insure that the state regulatory authority acted properly in determining that reclamation has been completed. To do otherwise would render [OSM's] oversight jurisdiction meaningless. Failure to act within a reasonable time, however, should cutoff [OSM's] jurisdiction, not as a matter of estoppel, but simply as an application of the rule of reason when dealing with [OSM's] oversight jurisdiction."

[NOTE: Additional information on bond release may be found in STATE INQUIRY REPORTS 105 ("Bond forfeiture - relationship of bond to permitted area") and 102 ("Forfeiture of reclamation bonds; liability period").]

**ATTACHMENTS**

- A. CARBONEX COAL CO. v OSM, Docket Nos. TU 5-58-R, TU 5-68-R, TU 5-74-R, TU 5-86-R, TU 5-100-R, TU 5-105-R, TU 5-110-R, TU 6-1-R, TU 6-38-R, TU 6-47-R (Feb. 10, 1989 [Amends Sept. 23, 1988 Decision]).
- B. 53 FR 44356 (NOVEMBER 2, 1988).
- C. NEW BIG CREEK MINING, INC. v OSM, Docket No. NX 1-49-P (1985).



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

D. D & J MINERAL AND MINING, INC. v OSM, Docket No. NX 4-11-R (1985).