

NEWTEX MANAGEMENT CORP.

IBLA 89-233

Decided February 13, 1991

Appeal from a decision of the Chief, Reclamation Review Section, Office of Surface Mining Reclamation and Enforcement, Knoxville, Tennessee, disapproving application for Phase II bond release. 83-C-019.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release--Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

Where OSM determines the percentage of vegetative ground cover within an area covered by a surface mining permit being reclaimed for use as pasture to be less than 90 percent, in violation of 30 CFR 942.816(f)(1), and where the permittee fails to challenge this determination or the methodology used to make it, OSM's decision disapproving the permittee's application for a Phase II bond release will be affirmed.

APPEARANCES: Steven D. Lipsey, Esq., Knoxville, Tennessee, for appellant; Charles P. Gault, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Newtex Management Corporation (appellant) has appealed from a decision of the Chief, Reclamation Review Section, Office of Surface Mining Reclamation and Enforcement (OSM), Knoxville, Tennessee, dated January 31, 1989, disapproving its application for a Phase II bond release with respect to surface coal mining and reclamation operations in Grundy County, Tennessee, under State permit No. 83-C-019.

On November 23, 1988, appellant filed its application for a release of its reclamation performance bond as to all 13 acres permitted to it,

described as "Area No. 2." ^{1/} In addition to its mining operations, the permitted area had encompassed roads, siltation structures, and a storage area.

In a "Mining Operator's Reclamation Completion Report," dated October 15, 1988, and attached to its bond release application, appellant stated that "[a]ll 13.0 permitted acres have been adequately reclaimed to meet Phase II requirements." Appellant further explained as follows in a proposed public notice of its request: "All 13.0 permitted acres have been backfilled, graded and seeded * * *. Reclamation work was completed in 1984 and 1985. The backfill areas have been stabilized with good reveg[e]tation growth."

By letter dated January 5, 1989, OSM informed appellant that its application was considered complete, that an inspection and evaluation of the reclamation work performed on the permitted area would be made on January 19, 1989, and that it was welcome to send a representative to the inspection. As scheduled, two OSM bond specialists and an OSM inspector inspected the permitted area and evaluated the reclamation work. They were not accompanied by appellant's representative.

As a basis for evaluating the reclamation work, the OSM employees assessed the extent of vegetative ground cover on the site. The details of the sampling are not fully disclosed by the record submitted by OSM. The record contains only a "Tally Form for Strip Mining Revegetation Sample" and a "Calculation Form for Ground Cover Sampling." These forms show that OSM sampled the vegetative ground cover at 72 different "sample points" on the 13-acre site. ^{2/}

^{1/} According to the record, the Indemnity Insurance Company of North America is the holder of the performance bond (No. D420532A) in the amount of \$15,500.

Newtex also requested a Phase III release of its reclamation performance bond for 1.9 acres of land subject to permit No. 83-C-019, because this land encompasses a road which has been declared to be a public right-of-way by the Grundy County Highway Department. This matter is not at issue in this appeal.

^{2/} According to the tally form, 20 "marks or pins" were examined at each sampling point to determine whether they "intersect[ed] vegetation." It thus appears that OSM examines the surface of the ground at each sampling point and tests for the presence of vegetation at 20 spots on the surface. The method for testing is unclear, but may involve examining the surface through a viewing scope set above the surface. See *OSM v. Calvert & Marsh Coal Co.*, 95 IBLA 182, 184-86 (1987). The testing method might also use a box containing a sampling grid that is set on the ground.

We note that, in *OSM v. Calvert & Marsh Coal Co.*, *supra*, we did not look favorably on OSM's vegetation sampling technique. However, our concerns there arose largely because OSM was evidently sampling only one spot per sampling point. Here, OSM sampled 20 spots per sampling point.

The number of marks or pins out of 20 that intersect vegetation is evidently determined at each sampling point. Thus, each sample point was graded from 0 to 20, depending on how many "marks or pins * * * intersected

The results of this sampling are set out in a "Reclamation Site Evaluation." That report states that all 13 acres of the permitted area were disturbed by mining, that the permit expired on March 24, 1985, and that, following mining, the entire area was backfilled and graded. The report also notes that the area was revegetated in the spring of 1985, but that the vegetative ground cover over the entire area was only 72.5 percent at the time of the inspection. Accompanying the report are photographs of the permitted area taken on the inspection date, which bear out the sparse nature of the vegetative ground cover generally at the site.

The report also states that the land was being used for its post-mining use, *i.e.*, pasture, and that a portion of the area (approximately 12 feet wide and 800 feet long) was being used by Larry Anderson as an access road for trucks and machinery to a surface minesite to the east of the permitted area. The report indicates that this access road was "bare of vegetation." Finally, the report recommends that appellant's application for a Phase II bond release be disapproved "due to inadequate vegetation and bare areas in excess of 1/16 acre."

In its January 1989 decision, OSM disapproved appellant's application for a Phase II release of its reclamation performance bond for the following reasons:

The vegetative ground cover does not meet the minimum requirements, which is 90 percent. Our evaluation and calculation shows the vegetative cover to be approximately 70 percent. ^[3/] Also, the site is presently being used by others as access to an exploration site near the east side of this permit. An area approximately 12 feet wide and 800 feet [long] is bare of vegetation due to trucks and machinery traffic to the exploration site.

OSM also stated that appellant could reapply for Phase II bond release "when successful revegetation has been established as required."

[1] In its statement of reasons for appeal (SOR), appellant states that OSM's decision to disapprove its application for a Phase II bond release "was based upon a 12' x 800' area being bare of vegetation due

fn. 2 (continued)

vegetation." A grade of 20 would designate full vegetative cover; a grade of 0 would indicate a barren surface.

The sampling of appellant's site disclosed 5 sampling points out of 72 where zero pins or marks were intersected and 15 points where all 20 pins or marks were intersected. The balance of the 72 sampling points showed between 1 and 19 intersections, with the majority showing between 10 and 19 intersections.

OSM adjusted these data using various statistical techniques not challenged by appellant and concluded that the percentage of ground cover at the site was 72.5 percent.

^{3/} As noted above, the report actually determined the percentage of ground cover to be 72.5 percent.

to truck and machinery traffic by Larry Anderson on OSM No. NOI [Notice of Intent] 88-92-046" and that, "by granting the NOI, OSM has contributed to the lack of vegetation on [appellant's] permitted area." Thus, appellant argues that OSM should not disapprove the application because OSM effectively caused the situation that resulted in disapproval.

It is undisputed that, at the time of OSM's January 1989 inspection of the area permitted to appellant, Anderson was operating under a notice of intent to explore a site adjacent to appellant's permitted area in accordance with 30 CFR 772.11 (applicable in Tennessee under 30 CFR 942.772(a)). Moreover, Anderson was using a road across the permitted area to access his site, thus resulting in the lack of vegetation along the roadway. This barren area, totalling approximately 9,600 square feet, by itself violated the reclamation performance standard set forth at 30 CFR 942.816(f)(4), which specifies that "[b]are areas shall not exceed one-sixteenth (1/16) acre in size [2722.5 square feet]."

It is unnecessary to consider whether, as appellant suggests, its noncompliance with the revegetation reclamation standard may be forgiven because of OSM's authorization of the access road across the permit area, as we are not persuaded that the noncompliance resulted solely from the presence of this access road. That is, the record indicates that, even discounting the presence of the barren access road, appellant would not have complied with the reclamation standard for revegetation. As the Reclamation Site Evaluation reveals, OSM relied not only on the fact that there was a bare area in excess of one-sixteenth acre in violation of 30 CFR 942.816(f)(4), but also on the fact that there generally was inadequate revegetation within the permitted area for post-mining use as pasture, in violation of 30 CFR 942.816(f)(1), discussed below. There is no suggestion that OSM was responsible for the inadequate vegetative ground cover generally within the permitted area. Thus, even if we assume that OSM caused the absence of vegetation in the area of the access road, there was an independent and adequate basis for its decision to disapprove appellant's application for bond release.

The applicable regulation provides that, for land developed for post-mining use as pasture, as was the case here, "the ground cover shall be at least ninety percent (90%)." 30 CFR 942.816(f)(1). Using the method described above, OSM rated the vegetative ground cover generally in the permitted area at 72.5 percent at the time of its January 1989 inspection. Appellant does not challenge OSM's technique in determining the extent of vegetative ground cover generally in the permitted area, nor its finding that such cover falls below the required percentage.

It does not appear, as suggested by appellant, that the inclusion of the barren access road, the presence of which was arguably beyond appellant's control, was responsible for appellant's failure to meet the 90-percent standard. It is not clear from the record whether OSM sampled the vegetative cover over the entire 13 acres, including the barren access road, in arriving at the 72.5 percentage. However, it is unnecessary to inquire further into this question, as it is possible to discount the effect of the presence of the barren roadway on the calculation of the percentage of revegetation.

The record indicates that there were nine sampling points where little or no vegetation was found, *i.e.*, less than 5 pins or marks of 20 were vegetated. See note 2, *supra*. It is likely that, if the road was included in the sampling, the points on the road would be represented by these barren or nearly barren sampling points. Assuming *arguendo* that these points were found on the access road, we may discount their significance by excluding them and recalculating the percentage of vegetative cover. ^{4/} Doing so results in a percentage of vegetative cover of just 79.9 percent, still substantially below the regulatory requirement. ^{5/}

At the time of the January 1989 OSM decision, appellant was required to abide by 30 CFR 942.816(f)(1). ^{6/} See 30 CFR 942.816(b); *Coal Energy, Inc. v. OSM*, 104 IBLA 24, 26 (1988). In the absence of countervailing evidence, we conclude that appellant had not satisfied the revegetation reclamation requirement set out at 30 CFR 942.816(f)(1) at the time of the January 1989 inspection. As appellant did not satisfy the revegetation reclamation performance standard, OSM could not approve its application for a Phase II bond release. Section 519(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1269(c) (1988), provides that the regulatory authority "may release in whole or in part [a performance] bond * * * if the authority is satisfied the reclamation covered by the bond * * * has been accomplished as required by [SMCRA]." See also 30 CFR 800.40(c) (applicable in Tennessee under 30 CFR 942.800(a)). Accomplishment of Phase II of reclamation, which would merit a partial release of the performance bond, is deemed to have occurred only "[a]fter revegetation has

^{4/} If, contrary to our presumption, OSM did exclude the access road when it chose the sampling points, the nine sampling points we now exclude would be barren areas on the general site, revegetation of which was fully within appellant's control. Thus, our excluding them errs, if at all, on the side of increasing the percentage of vegetative cover, which is to appellant's advantage.

Even if OSM included the road in the area it sampled, our presumption still favors appellant because it liberally excludes all barren or lightly covered sampling points, even though it is likely that some of these points were not located on the road. The road (with an area of about 10,000 square feet) constituted less than 2 percent of the total 13 acres (amounting to about 566,000 square feet). However, by presuming that the nine most barren of the sampling points are located on the road, we exclude 12.5 percent of the samples taken, a disproportionately high percentage. Again, excluding them errs, if at all, in appellant's favor, as it is unlikely that all of these sampling points are found on the road.

^{5/} Excluding the most barren of the samples, the mean number of intersections of vegetation found is 13.6 intersections per sampling point. This amounts to an unadjusted percentage of 68.1 percent. Calculating and applying the various statistical adjustments employed by OSM in its initial calculation, as demonstrated on the Calculation Form for Ground Cover Sampling, results in the percentage of 79.9 percent.

^{6/} Departmental regulation 30 CFR 942.816(f)(1) is a part of the Federal program with respect to Tennessee adopted by OSM effective Oct. 1, 1984, following OSM's withdrawal of approval of the State program, under which permit No. 83-C-019 had been issued. See 49 FR 38874 (Oct. 1, 1984).

been established on the regraded mined lands in accordance with the approved reclamation plan." 30 U.S.C. § 1269(c)(2) (1988); see also 30 CFR 800.40(c)(2).

Appellant has requested a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286. Under 43 CFR 4.1286(b), the Board has the authority to order a hearing so as to resolve a disputed "issue of fact" material to resolution of the appeal. Appellant has failed to offer any evidence, or even to allege, that OSM's decision is not based on accurate facts or methodology. Instead, appellant asserts only a legal question, which we have been able to resolve on the basis of the factual assumptions made herein. For this reason, we deny appellant's request for a hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge