

APPOLO FUELS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-503, 90-480

Decided March 31, 1993

Appeals from decisions of Administrative Law Judge David Torbett (NX 89-39-R and NX 89-46-R) granting temporary relief from and vacating Notice of Violation No. 89-91-372-003 and Cessation Order No. 89-91-372-001.

Affirmed in part, dismissed as moot in part.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

IBLA 89-503, 90-480

125 IBLA 369

APPEARANCES: Margaret H. Poindexter, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; James R. Golden, Esq., Middlesboro, Kentucky, and Ronald D. Ray, Esq., Louisville, Kentucky, for Appolo Fuels, Inc.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from two decisions of Administrative Law Judge David Torbett (Hearings Division Docket Nos. NX 89-39-R and NX 89-46-R). The first decision, which was a bench decision and order issued on May 16, 1989, granted temporary relief to Appolo Fuels, Inc. (Appolo), from Notice of Violation (NOV) No. 89-91-372-003 and a Cessation Order (CO) No. 89-91-372-001 issued for failure to abate the NOV pursuant to section 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1988). The second decision, dated July 9, 1990, vacated the NOV and CO.

The State of Tennessee originally issued a permit to mine to Appolo on January 4, 1978, under permit No. 78-13. The permit was renewed a year later under permit No. 79-39 (Tr. 49). ^{1/} The permit site encompassed 39 acres located in the Cabin Hollow area in Claiborne County, Tennessee (Tr. 10, 11-12). In 1980 all mining was completed and the area backfilled

^{1/} All transcript references are to the hearing held on May 16, 1989, in Knoxville, Tennessee, before Judge David Torbett, unless otherwise noted.

and revegetated (Tr. 18). On December 22, 1980, the State of Tennessee, Department of Conservation, issued a release of Appolo's performance bond as to 37 of the 39 acres, retaining a \$2,000 bond on 2 acres in the permit area which contained sediment ponds (Tr. 25, Exh. R-4). The ponds were removed by April 1, 1987, and 2 years of vegetation were completed by April 1989 (Tr. 27). On March 21, 1989, OSM Inspector Glen Bartley conducted an inspection of Appolo's reclaimed surface mine and observed a slide affecting approximately 1 acre of the backfill material (Tr. 11). ^{2/} On March 28, 1989, he issued NOV No. 89-91-312-003 to Appolo for a violation of interim regulation 30 CFR 715.14 for "failure to backfill all spoil material to eliminate all highwalls and spoil piles created by a slide" (Exh. R-2).

The corrective action required by the NOV included the following: "Establish temporary sedimentation control that will prevent sediment from leaving the permit area. This should be established below the slide area. Regrade the spoil material to reduce steep slopes and to compact the spoil affected by the slide. Eliminate the highwalls on the permit created by the slide" (Exh. R-2). The time for abatement of the violations expired on April 25, 1989. On April 26, 1989, Bartley reinspected the site and issued CO No. 89-91-372-001 to Appolo for failure to abate the NOV (Exh. R-3).

^{2/} By notice published on Apr. 18, 1984 (49 FR 15496), after a hearing, OSM assumed direct Federal enforcement of the Tennessee State Regulatory program pursuant to section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1988), on a finding that the State was not adequately enforcing the Act. Subsequently, approval of the State regulatory program was withdrawn and a Federal program was promulgated for regulation of surface coal mining and reclamation operations on non-Federal lands. 49 FR 38874 (Oct. 1, 1984); see 30 CFR Part 942.

On May 10, 1989, Appolo filed an application for review of the NOV and CO along with an application for temporary relief. In its grounds for review and relief Appolo asserted inter alia that the relief sought would not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources; that OSM does not have jurisdiction over the permit site; that Appolo was not responsible for the condition which gave rise to the NOV; that there is a substantial likelihood that the applicant will prevail in the review of the CO and underlying NOV; and that Appolo should be granted temporary relief from the effect of the CO pending a decision on review.

A temporary relief hearing was held on May 16, 1989, in Knoxville, Tennessee, before Judge David Torbett. Judge Torbett rendered a decision from the bench granting Appolo Fuels temporary relief. Judge Torbett stated that he was unable to make a finding that the granting of temporary relief would not cause environmental damage or potential environmental damage, or imminent harm to people or the environment (Tr. 85-86). He declared, however, that the Government has an ongoing responsibility to "prove by a preponderance of the substantial evidence" that Appolo caused the slide and concluded that the Government had not met its burden (Tr. 86, 88).

OSM appeals Judge Torbett's ruling, asserting that Appolo is not entitled to temporary relief because it failed to demonstrate that the granting of temporary relief would not cause significant, imminent environmental harm and OSM's unrefuted proof prevented Appolo from showing that the findings of the Secretary would be favorable to it.

In response, Appolo contends that it is entitled to temporary relief because OSM is unable to make a prima facie case that any violation occurred. Appolo asserts that there is ample proof in the record that temporary relief would not result in significant, imminent environmental harm. According to Appolo, the Judge's decision and findings with respect to OSM's ability to make a case, satisfy the requirement of showing a substantial likelihood that Appolo would prevail on the merits. Therefore, Appolo concludes that the Judge's decision is proper and should be upheld. In the alternative, Appolo submits that the Board should enter the findings concerning significant, imminent harm required under 30 U.S.C. § 1275(c)(3) (1988), pursuant to its own authority, or remand the case to Judge Torbett with directions to enter such findings.

A hearing on permanent relief was held on April 23, 1990, in Knoxville, Tennessee, before Judge Torbett at which time both parties stipulated that they would stand on the record created at the May 16, 1989, hearing. However, they agreed to the admission of Exhibit A-6 by Appolo, a series of state and Federal inspection reports, and Appolo recalled Robert Chedester, a licenced civil engineer, to offer rebuttal testimony (Tr. II, 6).

In his July 9, 1990, decision on the application for review of the NOV and CO, Judge Torbett summarized the facts in this case as follows:

Respondent's evidence consisted of the testimony of Inspector Glen Bartley and OSM engineer David Lane, as well as the introduction of five documentary and photographic exhibits properly numbered and entered R-1 through R-5. Applicant's evidence consisted of the testimony of Robert

Chedester, Applicant's engineer, as well as the introduction of five documentary and photographic exhibits, numbered and entered A-1 through A-5.

Inspector Bartley testified that there had been a slide on an area of approximately one acre of Applicant's 39 acre site (Tr. 17). He testified that "... the area that had slid was some backfill material in addition to material above the permit ... [which] had been affected and slid also." (Tr. 17) The Inspector agree[d] on cross examination that in his report he had given a slightly different account of the slide (Tr. 21). In the report Inspector Bartley noted "that a slide had originated above the backfilled highwall The top of the slide was 180 feet above the permit line, and a 15 foot highwall had formed when the material above the permit had slumped. More material had slumped at the top of the backfilled highwall creating another vertical wall 8 feet in height. This slumpage of material had caused the backfilled material to move forward . . ." (R-2)

Inspector Bartley testified that the site had been reclaimed in 1980, and successfully revegetated since that date (Tr. 18). He testified that he had recommended prior to the occurrence of the slide that the site be taken off the list of inspectable units (Tr. 19). He agreed that the site had been inspected since 1979 and had never been cited for improper reclamation as to the highwall elimination or backfill stability (Tr. 23). He agreed that the bond had been released on 37 of the 39 acres in 1980, and that the two remaining acres contained ponds that were eventually eliminated in 1987 (Tr. 25, 27). He also agreed that the slide had occurred on the 37 acres that had been reclaimed and had gone through the period of extended responsibility for vegetation (Tr. 27). He agreed that the period of extended responsibility for the two acres containing the ponds would have ended in April of 1989, just after this citation was issued (Tr. 29, 30).

OSM's David Lane, a registered engineer, testified that he had inspected the site visually in May of 1989. He stated that there were two possible explanations for the slide, either that the backfill had been improperly reclaimed and had slumped due to instability, or that a slide from above the permit had fallen on the backfill with sufficient force to cause it to slump (Tr. 36, 37). He was unwilling to testify conclusively that either scenario was more likely than the other (Tr. 37, 38, 43, 46). He testified that in his opinion, and from his visual inspection, the slope probably did not have the 1.5 stability factor required of a 30 degree slope (Tr. 42, 45). He also testified that there was excess spoil on the bench that could have been used in the backfill (Tr. 43).

Robert Chedester, Applicant's engineer, who was not a registered engineer, testified that the site had been reclaimed in the Spring of 1979 (Tr. 50). He introduced Applicant's exhibit A-2, a post mining report that indicated that reclamation was completed on June 27, 1979 (A-2).

Chedester testified that he was on the site at least once a month, and that it had been reclaimed to permanent program standards (Tr. 50). He introduced A-3, Tennessee DSM's [Division of Surface Mining] Notice of Bond Release/Reduction, and testified that the site had a bond release in 1980 and a vegetative release in 1985 on the backfilled areas that encompassed the slide (Tr. 51). He testified that a request for pond removal had been submitted for the two remaining acres in 1984, and that the ponds had finally been removed in 1987 (Tr. 52). He stated that there had been no observable instabilities on the backfilled and reclaimed area (Tr. 53). He introduced A-5, his drawing and related photographs, which he testified showed the nature and composition of the slide (Tr. 54, A-5). Chedester testified that at the top of the slide, and off of the permit there was an old road fill, and that the slide was composed of the road fill dirt (Tr. 55). He testified that it was impossible to say conclusively what had caused the slide (Tr. 57-60). He noted, however, that the slide material was stratified, highly weathered material similar in nature to the material above the backfill and above the permit (Tr. 58). He agreed that at this point the entire area was moving as one (Tr. 58).

Chedester testified that the mining and reclamation had been done by a contract operation, and that the backfilling had been compacted through the process of placing one lift on top of the other (Tr. 67). He did not know whether the site had been tested for a 1.5 stability factor (Tr. 67). He testified at the second hearing that there was no excess or surplus spoil on the bench area (Tr. II, 7). He also introduced A-6, a series of 16 inspection reports between 1982 and 1985 that repeatedly described the site as well vegetated and with no observable highwall problems (Tr. II, 7; A-6).

(Decision of July 9, 1990, at 2-3).

Judge Torbett concluded that OSM had not presented a prima facie case as to the facts of violation. Judge Torbett stated that assuming arguendo that OSM had presented a prima facie case, Appolo's testimony

was sufficient to rebut it (Decision of July 9, 1990, at 5). As for OSM's jurisdiction over the site in issue, Judge Torbett found that the evidence presented showed that Appolo's 37 acres were fully reclaimed as of 1985 and that OSM's jurisdiction terminated at that time. Judge Torbett referred to 30 CFR 700.11(d)(1), the Departmental regulation which sets forth the conditions under which a regulatory authority may terminate its jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation. Judge Torbett found that the requirements of this regulation had been met and that OSM's jurisdiction had terminated (Decision of July 9, 1990, at 8).

On appeal OSM argues that despite partial bond release, OSM retains regulatory jurisdiction over the subject site. OSM notes that Tennessee implemented the bonding requirements and standards for bond release during the interim program. OSM asserts that it did not monitor these standards and has yet to approve the site for complete bond release.

OSM disagrees with Judge Torbett's finding that OSM failed to present a prima facie case that Appolo caused the slump in the backfill as a result of its failure to comply with applicable performance standards. OSM contends that it carried its burden of proof by presenting evidence that Appolo failed to satisfy several Federal performance standards set forth in 30 CFR 715.14. OSM refers to the testimony of its engineer Lane regarding the grade of the backfill and the 1.5 static factor of safety as specified in 30 CFR 715.14. OSM contends that the existence of slopes

without the requisite static factor of safety and Appolo's failure to compact the backfill during reclamation are both evidence that Appolo's mining operation caused the slide.

In response Appolo contends that OSM did not establish a prima facie case. According to Appolo, the evidence connecting its actions with a slide which occurred almost 10 years after completion of reclamation is contradictory and inconclusive at best. Appolo refers to OSM's own witness, Lane, claiming his testimony supports its contention that it is not possible to determine what caused the slide. Appolo asserts that there is ample evidence to support Judge Torbett's decision that "the cause of the slump of applicant's backfill did not occur because of any failure of the Applicant to comply with the Act and regulations," and that "the probable cause of the slide was the unique weather phenomenon" which had been described in the record (Decision at 5). Appolo notes that inspection reports of the site describe the reclamation work as "excellent" and "very successful" and that no NOV was ever written under 30 CFR 715.14 despite repeated inspections. Appolo points out that NOV No. 89-91-372-005 which cited Appolo for having "excess spoil" on the site was voluntarily vacated by OSM.

Regarding the stability factor, Appolo contends that Lane's testimony that the required static factor of safety had not been achieved was not based upon any analysis of the material in the slide itself or of Appolo's initial mining permit and subsequent inspections. According to Appolo, Lane's testimony was speculation which cannot rise to

the level of evidence necessary to establish a prima facie violation. Refuting OSM's testimony that Appolo made no attempt to compact the backfill, Appolo referred to Chedester's testimony that compaction did take place through the process of placing one lift on top of the other. Appolo contends that the entire reclamation process was assiduously inspected through the course of reclamation and at regular intervals since. Appolo reasons that for OSM to now claim that the slide was caused by failure to meet this standard some 10 years earlier is "second guessing in the face of the facts."

Appolo contends that even assuming OSM met its burden of presenting a prima facie case, Appolo presented sufficient evidence to contradict the facts of violation. Appolo asserts that it rebutted OSM's evidence on the issue of excess spoil, the static factor of safety and compaction of the backfilled material.

Appolo asserts that OSM does not have jurisdiction over it because the site is not "a surface coal mining operation" and because it was not "engaged in a surface coal mining operation." Appolo underscores its argument noting that OSM's jurisdiction ends when two events have occurred: first, the operator must have successfully completed all reclamation; second, the period of extended liability for vegetation as set forth in 30 U.S.C. § 1265 (1988), must have passed. According to Appolo, both events have occurred on this site and therefore, OSM can no longer assert jurisdiction.

[1] The jurisdictional issue in this case focuses on the applicability of Departmental regulation 30 CFR 700.11(d)(1):

A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to part 800 of this chapter to release the performance bond fully.

This regulation was challenged by the National Wildlife Federation in a case captioned National Wildlife Federation v. Lujan, No. 88-2416 (August 30, 1990) before the United States District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1988). On December 10, 1991, the United States Court of Appeals for the District of Columbia Circuit reversed the opinion of the district court which had invalidated 30 CFR 700.11(d). See 950 F.2d 765 (1991). Appellant argues that the decision of the Court of Appeals is dispositive of this appeal.

The Administrative Law Judge concluded that when the Secretary issued the final rule set forth above, 30 CFR 700.11(d), establishing standards for determining when a mine site is no longer a surface coal mining and reclamation operation and thus terminating regulatory jurisdiction, it applied in

this case. The Administrative Law Judge concluded that "bond release with an accompanying statement that the site has been reclaimed to initial performance standards is sufficient to extinguish Agency authority" (Decision at 8). He found that Appolo met the standard of the regulation by presenting evidence to show that the State of Tennessee released bond on 37 of 39 acres of its Permit 79-39 (A-3); that inspection reports on the site dating between 1982-1985 consistently noted the successful vegetation over the area and the growth of grasses and trees (A-6); that the testimony of Chedester showed that the site had been reclaimed to interim performance standards in 1980, and that Appolo had completed its 2-year extended responsibility for the area including the slide site as of 1985. For reasons which we will set forth, we agree with Judge Torbett and find that OSM had no jurisdiction over the acreage involved in the landslide.

In order to understand our holding, it is necessary to review, at some length, the rationale behind the eventual adoption of 30 CFR 700.11(d)(1). On June 26, 1987, OSM published a proposed rule with the express purpose of providing a definite standard for determinations of when regulatory jurisdiction terminated under SMCRA. See 52 FR 24092-95 (June 26, 1987). The preamble to the proposed rule recognized that nothing in SMCRA explicitly provided for the termination of regulatory jurisdiction once that jurisdiction had attached to a surface mining operation. OSM noted, however, that the general practice of State regulatory authorities had been "to terminate regulatory jurisdiction upon the final release of the performance bond, or, where no bond was required, upon a judgment by

the regulatory authority that reclamation had been completed." 52 FR 24092 (June 26, 1987). As a result, after bond release, State regulatory authorities generally stopped inspections of those sites, deeming the provisions of the State regulatory program no longer applicable and thus depriving the regulatory authorities of jurisdiction to enforce the State program at those sites.

OSM noted that, insofar as operations under the initial program and coal exploration activities were concerned, it had in the past taken the position that, since the Act did not require bonding for these operations, release of a bond required by State authorities did not terminate jurisdiction under SMCRA. See, e.g., OSM v. Calvert & Marsh Coal Co., 95 IBLA 182 (1987); Grafton Coal Co., 3 IBSMA 175, 88 I.D. 613 (1981). Moreover, OSM admitted that it had conducted oversight inspections and taken enforcement actions even at permanent program sites where the State had released the bond, which actions had resulted in generating conflicts between OSM and the States and OSM and the operators. 52 FR 24092-93 (June 26, 1987).

OSM recognized that the States objected to having OSM second-guess their determinations under the approved State permanent programs. Additionally, OSM acknowledged the concerns of operators that "without a point certain established for termination of jurisdiction, operators will be subject to perpetual liability under the Act," and noted that the operators were concerned that such liability might adversely impact upon their ability to obtain bonds on other sites. Id.

To resolve these controversies, OSM proposed to amend 30 CFR 700.11 by adding a new paragraph providing that the applicability of the regulations implementing the Act to a completed coal mining and reclamation operation would terminate when the regulatory authority made a written determination that certain conditions were met. Thus, as initially proposed, 30 CFR 700.11(d) provided, in relevant part, that "[t]he applicability of this chapter to a completed surface coal mining and reclamation operation or coal exploration operation shall terminate when: (1) The regulatory authority determines in writing that under the initial program, all requirements imposed under Subchapter B have been successfully completed * * *." 52 FR 24095 (June 26, 1987).

In justifying its proposal, OSM noted that:

The issue of jurisdiction turns on the point at which a surface coal mining and reclamation operation or a coal exploration operation has met the requirements of the Act, such that it is no longer an operation and is no longer subject to regulation. The purpose of the proposed rule is to ensure that the regulatory authority makes a conscious decision that an operation is completed and has met those requirements.

The statutory scheme of the Act envisions that mining is a temporary use of the land, which must be restored to a condition capable of supporting the uses it was capable of supporting prior to any mining or those other uses authorized by the Act. Thus although it does not clearly specify when enforcement authority ends, the Act does not contemplate perpetual regulation. It is apparent that jurisdiction under the Act must end simultaneously for State regulatory authorities and OSMRE because once the Act's reclamation requirements are completed at a site, it no longer is a surface coal mining and reclamation operation.

52 FR 24093 (June 26, 1987).

Differentiating between the release of a bond under the permanent program which did signify completion of reclamation and release of a bond under the initial program which did not necessarily correlate to a determination as to the proper completion of reclamation, OSM proposed a general rule which would be applicable to all operations "that the regulatory authority make a written determination that the operation has met the applicable requirements." Id. at 24094.

Of particular importance in the confines of the instant appeal, OSM noted that it had also considered the issue of the status of sites where mining and reclamation had ceased prior to the effective date of the proposed rule. OSM declared:

For initial program operations where a State bond was required and has been released, OSMRE would presume, absent clear and convincing evidence to the contrary, that all requirements of the Act were met upon final bond release. This also presumes that the process includes a written determination of compliance with all regulatory requirements. Such documentation could take the form of an approved bond release application or other document that the State regulatory authority has used to accompany final bond release.

Id.

The proposed regulations were the subject of comments by State regulatory authorities, coal industry representatives, and environmental groups. On November 2, 1988, the Department promulgated final rules dealing with the termination of regulatory jurisdiction under SMCRA.

See 53 FR 44356-63 (Nov. 2, 1988). In the preamble to the final rule, OSM revisited the question of whether or not termination of regulatory jurisdiction was permissible under SMCRA. While agreeing with a number of commentators who had argued that there was no specific provision providing for the termination of regulatory jurisdiction, OSM nonetheless concluded that eventual termination of jurisdiction was inherent in the Act. Thus, OSM argued:

A reclaimed site of a surface coal and reclamation operation * * * is no longer subject to regulatory jurisdiction under either a Federal or State regulatory program when all reclamation requirements of the regulatory program have been successfully completed and the period of extended liability for revegetation has expired. Nothing in the Act requires a permittee to be subject to regulatory jurisdiction beyond this point.

It was not the intent of the Surface Mining Act that the regulatory authority maintain perpetual jurisdiction over all lands that were mined. It is recognized that the Surface Mining Act does not impose requirements upon fully reclaimed land. Termination of jurisdiction may occur when reclamation is in fact accomplished and the period of extended responsibility for revegetation has run. The regulatory authority is vested with the authority to determine that reclamation has been completed. [Emphasis supplied.]

Id. at 44357.

The final rule adopted did, however, differ from the proposed rule in a number of ways. Of relevance herein was the modification of the introductory language of paragraph (d) to clarify that "successful completion of an operation and termination of regulatory authority jurisdiction may occur for the entire permit area [or] an increment within that permit area"

consistent with the provisions of 30 CFR 800.40(c) which permitted performance bond release for incremental areas within a permit area. Id.

In addition to clearly providing that regulatory authority could be terminated on an incremental basis within a single permit, 3/ OSM also added a new section, 30 CFR 700.11(d)(2), providing that:

Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph(d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

Finally, we note that, in discussing the effect of the regulatory changes with respect to the interim program, OSM took particular note of the problems which had surfaced with respect to premature bond releases:

OSMRE acknowledges that there have been some initial program final bond releases by States without full reclamation. * * * Because States have been using initial program bond releases as a mechanism for terminating regulatory jurisdiction, OSMRE recognizes the need to clarify the standard for termination. Post-bond release problems which occurred in the past support the need for such a rule. This rule will clarify what standard the States must meet to terminate regulatory jurisdiction, the mechanism to be used for future terminations, and the standard OSMRE would use to review such terminations. [Emphasis supplied.]

3/ We note that while OSM consistently characterizes the action by the State of Tennessee as a "partial" bond release, it is, in fact, correctly deemed to be a "final" bond release of an "incremental" area of the permit. See generally 30 CFR 800.40(c).

Id. at 44360. Focussing on the underlined phrase of the last sentence, OSM now argues 4/ that this regulation has no relevancy to determinations as to whether or not past State efforts to terminate regulatory jurisdiction were efficacious. Rather, OSM argues that this regulation is completely prospective and cannot serve as a basis for ratifying past actions purporting to terminate regulatory jurisdiction. See Reply Brief at 2-3; Brief of Respondent before Judge Torbett at 6-9. The logical result of this argument is that all past State efforts to terminate regulatory jurisdiction under the initial program should be considered ineffective and void. We do not agree.

First of all, there is simply nothing in either the language of the regulation or the regulatory history which evinces an intent to make this provision purely prospective. On the contrary, in the preamble to the proposed rulemaking, the Department clearly stated that "[f]or initial program operations where a State bond was required and has been released, OSMRE would presume, absent clear and convincing evidence to the contrary, that all requirements of the Act were met upon final bond release." 52 FR 24094 (June 26, 1987). Nothing in the preamble to the final rule contradicts or even brings into question this declaration. Indeed, the language

4/ OSM has now, in the face of the Circuit Court reversal of the District Court, abandoned its apparent reliance on the decision of the District Court in National Wildlife Federation v. Lujan, supra. We must, however, record our agreement with appellee that it is somewhat surprising for an agency appellant to cite a decision invalidating an agency regulation in support of its arguments before this Board when, at the same time, the Department of Justice is actively pursuing attempts, at the behest of the agency, to have that decision reversed on appeal, which attempts prove ultimately successful.

on which OSM now purports to rely actually strengthens the conclusion that past actions by State regulatory authorities to terminate jurisdiction would be recognized absent clear and convincing evidence that the reclamation requirements of SMCRA had not been met when regulatory jurisdiction was terminated.

Thus, the preamble declared that the rule clarified: (1) "what standard the States must meet to terminate regulatory jurisdiction," (2) "the mechanism to be used for future terminations," and (3) "the standard OSMRE would use to review such terminations." 53 FR 44360 (Nov. 2, 1988). We would point out that the adjective "future" is used only in reference to "the mechanism" which must be used by States to terminate jurisdiction. Far from indicating that past State attempts to terminate jurisdiction were ineffective, this actually limits OSM's jurisdiction to challenge those attempts where such a challenge is based on the failure of the State to observe the procedures delineated in the regulation. Such a challenge may only be made to "future" terminations. This interpretation is fortified by another section of the preamble.

In its brief before Judge Torbett, OSM attempted to buttress its argument that these regulations were irrelevant by citing the following sentence from the preamble to the final rule: "Accordingly, this rule is prospective only." Id. at 44362. Not only was this sentence taken out of context, it is demonstrable that, when read in context, this statement clearly undermines OSM's present argument.

One commentator had complained, in the context of coal exploration permits for which previous written determinations of reclamation had been made under an approved program, that it might be difficult for State regulatory agencies to obtain copies of these documents since they might have been archived. Responding to this concern, the Department noted:

This comment relates to an approach outlined in the proposed preamble (52 FR 24094) concerning the status of sites where mining or exploration was determined to be completed by the regulatory authority prior to the effective date of this rule. That approach, for which OSMRE specifically invited comments, suggested that if States wished to terminate jurisdiction at completed sites where no bond was required or where bond release did not include a written determination of compliance, they would need to revisit such cases and make the written determination required by this rule. OSMRE believes that the approach outlined in the proposed rule provided inadequate recognition of the fact that States already terminate jurisdiction under their approved programs and therefore no need exists for States to disturb past final determinations unless such determinations were inconsistent with the approved programs. Accordingly, the rule is prospective. It does not invalidate previous actions by State regulatory authorities to terminate their jurisdiction but instead formalizes the standards that must be incorporated into approved programs and applied thereafter. [Emphasis supplied.]

53 FR 44362 (Nov. 2, 1988). It is obvious from the foregoing that the preamble's reference to the rule's prospectivity is not fairly read as a determination that past actions by the regulatory authority operating under an approved program to terminate jurisdiction were ineffective but rather as a determination that these past actions would not be challenged so long as they were not inconsistent with the approved program.

Admittedly, this reference was made in the context of the permanent program wherein, under all approved State programs, final release of a

bond was only permissible upon a showing of successful reclamation and after the extended period of liability for successful revegetation has expired. Therefore, this analysis should not be read as automatically foreclosing any inquiry into the circumstances of bond release and termination of jurisdiction under the interim program since bond release was not necessarily constrained by the requirements attendant to bond release under the permanent program. It does, however, clearly establish that OSM's present argument that the regulation simply has no relevancy with respect to past actions by the States is simply unsustainable.

The record is clear that on December 22, 1980, the State of Tennessee issued a total bond release of 37 acres, which release was based upon a written declaration that reclamation had been successfully completed.

If OSM wishes to challenge the termination of State regulatory jurisdiction over an interim program permit which occurred prior to the adoption of these regulations such as occurred herein, OSM must establish, consistent with 30 CFR 700.11(d)(2), that the written determination was based on fraud, collusion, or a misrepresentation of material fact. 5/ OSM has totally failed to establish any sustainable basis for such a conclusion.

The documentary evidence submitted by Appolo provides absolutely no basis for any conclusion other than that reclamation occurred in accordance

5/ We note that, within the context of this provision, a "misrepresentation of a material fact" may be said to exist "[i]f an operator applies for release but has not fulfilled his obligations" under the Act. National Wildlife Federation v. Lujan, supra at 770 (quoting from the Brief for the Secretary at 27, n.11).

both with the permit and with the interim program regulations. Such is the evidence not only of the bond release but of numerous post-release inspection reports by both Tennessee and, later, OSM, which reported on revegetation in laudatory and, indeed, glowing terms. The only arguable support for any other conclusion is based solely on Lane's surmise that the reclamation appeared to have violated the minimum static safety factor. See 30 CFR 715.14(b)(2)(iii). Lane's assertion occurred in the following colloquy:

Q [By Ms. Poindexter] What was the grade approximately?

A We shot grades that were around 30% in that area, mostly in the high twenties, some were over thirty.

Q And what does the reg require?

A I noticed in one of our exhibits -- and I'm not sure which exhibit that is --

Q Well, if I may, I'll ask you to look at what's been marked as R-5 and ask if you can identify that?

A Okay. Yes, this is a cross section of the area showing both pre-mining and the contour after mining. The contour after mining here is called out to be 28 degrees with terraces and I think that those slopes were present out there. The regulations require that in slopes deeper than two to one, that the applicant -- that the permittee have a 1.5 static factor of safety. I would question whether that 1.5 was provided, just given the situation out there.

Q Why is that?

A Well, it's not stable and even if the slide above did -- was the cause, if the mass had the 1.5 factor of safety, it looked like very little weight came from above onto the slide to bring that factor safety down below one which would cause the slide.

Q So what are you saying, what came from above was not sufficient to take out this backfill?

A If they had the 1.5 factor of safety, that's just based on my observations yesterday at the amount of material from the above slide, yes.

Q It should have held even under the weight?

A Yes, with a 1.5 factor of safety.

(Tr. 41-42).

Lane's questioning of whether or not the 1.5-static safety factor had been achieved nearly a decade after reclamation had been completed at the site, based solely on his visual estimate of the volume of material which had moved from above the permit area into the permit area, must be contrasted with the consistent pattern of reports in the record, covering the years immediately following reclamation, which attest to the marked success of revegetation efforts and which never once suggest that there was anything wrong with any aspect of the reclamation which Appolo had carried out. See, e.g., Report of Kim Mowery, dated June 24, 1982 ("An excellent vegetative cover has been established on this area with an excellent stand of sericea, fescue and locust now well established"); Report of Edwin M. Atkins, dated September 25, 1984 ("The area is extremely well revegetated and stable"); Report of John D. Aday, dated September 17, 1985 ("Vegetation over the disturbed area is abundant and consist[s] of a variety of grasses and trees. No violations or environmental problems were observed during this mine site visit").

We have no difficulty in finding that Lane's testimony that he "would question" whether the required static factor had been achieved failed to establish by a preponderance of the entire evidence (much less on a basis of clear and convincing evidence as suggested in the preamble to the

proposed rule) that there had been any misstatement of a material fact by Appolo in obtaining the incremental bond release involved herein. Accordingly, we find ourselves in agreement with Judge Torbett that OSM had established no basis for voiding the termination of jurisdiction by Tennessee and further find that the 37 acres involved herein did not constitute part of a surface mining operation at the time that the NOV and CO issued. Therefore, we affirm Judge Torbett's decision dated July 9, 1990, vacating the NOV and CO. In view of the foregoing, we consider OSM's appeal of Judge Torbett's decision of May 16, 1989, granting temporary relief, docketed as IBLA 89-503, to be moot and dismiss the appeal on that basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in IBLA 90-480 is affirmed and the appeal from the decision in IBLA 89-503 is dismissed as moot.

Gail M. Frazier
Administrative Judge

I concur:

James L. Burski
Administrative Judge

