

LONESOME PINE ENERGY CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
(ON RECONSIDERATION)

IBLA 95-62R

Decided January 25, 2002

Appeal from a decision by Administrative Law Judge David Torbett affirming issuance of Notice of Violation No. 93-130-157-01 and Cessation Order No. 93-130-157-01. Hearings Division Docket Nos. NX 93-17-R and NX 93-36-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Standing--Surface Mining Control and Reclamation Act of 1977: Ten-Day Notice to State

Because the regulation at 30 CFR 842.11(b)(1) (ii)(B) establishes the ten-day notice process as a formal communication between OSM and a State's designated regulatory authority, an applicant/ operator's vehicle to pursue a complaint against OSM's issuance of a ten-day notice is to seek administrative review of the resulting notice of violation and cessation order pursuant to 30 CFR 843.16 and 43 CFR 4.1161.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSM. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSM meets its burden of establishing a

prima facie case. OSM makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation has occurred. However, where the operator fails to meet its burden, the notice of violation will be sustained.

3. 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

An operator's assertions of OSM's lack of jurisdiction over a portion of its mine site based on permit revisions approved by the state regulatory authority will be rejected where the record establishes the existence of violations of regulations governing topsoil, revegetation, and the 1 to 3 static safety factor on the mine site, which resulted from use of the mine site as a dump area for spoil from a road reconstruction project.

APPEARANCES: Elsey A. Harris III, Esq., Norton, Virginia, 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 FRAZIER

Lonesome Pine Energy Co., Inc. (Lonesome Pine) has appealed a September 13, 1994, Decision of Administrative Law Judge David Torbett, sustaining Notice of Violation (NOV) No. 93-130-157-01 and Cessation Order (CO) No. 93-130-157-01, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to Lonesome Pine for violations of the regulations governing topsoil, revegetation, and achievement of the 1-3 static safety factor at the Lonesome Pine #6 mine. ^{1/}

Background

A review of the record provides the history of this case culminating in the issuance of the NOV and CO. During the Memorial Day weekend of 1990, a landslide occurred, causing the outer lane of State Route 646

^{1/} Lonesome Pine filed a timely Notice of Appeal of Judge Torbett's Decision, but failed to timely file a brief in support of its appeal. By Order dated December 29, 1994, this Board dismissed Lonesome Pine's appeal, pursuant to 43 CFR 4.1273. Upon receipt of the Board's Dismissal Order,

between the towns of Wise and Coeburn, Virginia, to slide down Guest Mountain.

One lane of the road was immediately closed to traffic and within two months, the entire road was closed. The Commonwealth of Virginia Department of Transportation (VDOT) contracted with Estes Brothers Construction, Inc. (Estes Brothers) to reconstruct the highway. (Exhibit (Ex.) R-5).

During construction, Estes Brothers sought to use a nearby site on which to dispose of excess dirt and rock. ^{2/} On February 26, 1991, Joseph W. McReynolds, owner of the property upon which the Lonesome Pine #6 mine is situated, signed a contract, for \$20,000 consideration, granting Estes Brothers "permission to dispose of excess materials [related to the building of State Route 646] on my property * * * on the old strip bench * * * adjacent to Rt. 646." (Ex. A-6, at 1.)

Subsequently, the landowner, Estes Brothers, and officials from VDOT approached John Bolling, Secretary/Treasurer of Lonesome Pine, and asked him to submit an application to revise the operational/reclamation plan in permit 1101062 to allow part of the site to be used as a highway construction spoil placement area. (See testimony of John Bolling, Tr. 92-94.) On February 28, 1991, Lonesome Pine filed a permit revision application along with an Engineering Report captioned "Highway Construction Spoil Placement Area" with the Commonwealth of Virginia, Department of Mines, Minerals and Energy, Division of Mined, Land Reclamation (DMLR). The description of the proposed revision states:

The purpose of this revision will be to allow a contractor for the Virginia Department of Transportation to place excess spoil from State highway construction onto the permitted area.

Approximately 100,000 cu. yds. of material is expected to be placed in the area shown on the enclosed map. The material will be generated during highway reconstruction activities on State Route 646 adjacent to the permitted area. Enclosed is a copy of plans submitted by Estes Brothers Construction, Inc. to the Virginia Department of Transportation.

fn. 1 (continued)

counsel for Appellant Lonesome Pine filed a Motion for Reconsideration, which we granted for good cause shown by Order dated March 28, 1995.

^{2/} VDOT's general practice and policy is to require contractors to locate and obtain permission from private property owners to use their properties for the disposal of excess waste from highway construction sites. Sometimes, however, VDOT will locate a disposal site and require that the contractor use it. VDOT will also assist a contractor in obtaining permission to use a disposal site when it is in the "common public benefit". (See letter dated May 19, 1993, from Resident Engineer Branham to Danny R. Brown, Director, Virginia Division of Mines, Minerals & Energy, at 2).

It is understood that the spoil placement will be conducted in accordance with Virginia Department of Transportation practices and that construction and maintenance of the spoil will be the responsibility of the Department of Transportation. It is also understood that existing drainage control systems will be unaffected by the construction and that drainage routing and control for the spoil area will be [the] responsibility of the Department of Transportation or its contractor.

No adverse effects on environmental, historical or public resources, public safety or changes in the cost of reclamation are anticipated as a result of this revision.

(Ex. R-12.)

The application was reviewed by DMLR Inspector Harve Mooney, who determined that the revision application constituted an insignificant departure from the permit. He set forth his recommendation as follows:

I see no problem. The revision will allow placement of waste rock from the road reconstruction of rte 646. No problems are anticipated from placement of [these] materials. I recommend rapid approval of this revision as the site will soon be needed.

(Ex. R-12, Application at 2.) The permit revision was approved on March 6, 1991. Id.

By letter dated March 6, 1991, to Virginia's Department of Mines, Minerals and Energy, W. L. Branham, Resident Engineer, VDOT, formally requested permission "to utilize a portion of [the Lonesome Pine #6,] an existing coal surface mine which is under permit and has been reclaimed for a disposal area of surplus rock and soil from [the reconstruction of State Route 646]." (Ex. A-4 at 15.) The letter also recited the history of the road closure and reconstruction project design:

The design requires the removal of large quantities of rock and soil in order to place the new roadway back into the mountain and on solid material. The removal of this soil and rock will be predominately excess material, and will, therefore, require disposal areas for the same.

* * * * *

The requested disposal area is in close proximity to the removal of a sizeable portion of the excess material and will expedite the contractor[']s progress toward completion of the project and reopening [State Route 646] to the traveling public.

* * * * *

We will appreciate your review of this request and if approval can be granted for this disposal site, we will issue a disposal permit to Estes Bros. Const[.], Inc., and will require them to be fully responsible for the placement of the material.

Id. at 15-16.

In a letter dated April 29, 1991, Branham advised Estes Brothers that subject to certain conditions, use of the site for disposal was approved as requested. On June 7, 1991, Branham informed Estes Brothers that the project, as authorized by the Chief Engineer, was completed to his satisfaction on June 4, 1991. (Ex. A-3 at 1.)

On October 7, 1992, Lonesome Pine filed an application for reduction of bond on 21.7 acres of the land under permit 1101062 with DMLR. The application was supported by the following narrative:

A bond reduction is requested for Increments Nos. 1 and 2 for a combined total of 21.7 acres. Increment No. 1 consisting of 17.1 acres has sufficient ground cover and a stocking rate of 470 ± 35 . Woody plants present are primarily white pine, black locust, and autumn olive. Increment No. 2 was utilized as a highway construction spoil placement area. In an agreement between DMLR, VDOT, and the operator, the bond for this area was to be released following construction.

(Ex. A-1 at 6.)

By letter dated December 10, 1992, the Permit Supervisor, DMLR, notified Lonesome Pine that the DMLR had reduced the amount of bond on Permit 1101062 "from \$72,000.00 to \$45,000.00" in accordance with the bond release provisions of the Virginia Surface Mining Rules, 480-03-19.801.18. (Ex. A-1 at 19.)

In January 1994, Lonesome Pine filed a Deletion Request. The supporting Narrative states:

The purpose of this revision is to delete the portion of area utilized by the Virginia Department of Transportation for road construction spoil disposal. The spoil was placed on completed mining area in accordance with Revision No. 9104695 approved on 03/06/91 and vegetated to Virginia Department of Transportation standards. The performance bond for this area was released. This request is being sought as a result of a suggestion presented in the transcript of an informal public hearing held on September 23, 1993, at the [O]ffice of Surface Mining, Big Stone Gap Field Office.

No adverse effects on environmental, historical or public resources, or public safety are anticipated as a result of this revision.

(Ex. A-8 at 6.)

On February 17, 1994, DMLR Inspector Mooney made the following comments and recommendation in response to the Deletion Request, Permit Revision Application:

I see no problem with this revision. The area to be deleted has been utilized by the Va. Dept of Transportation. The operator had already reclaimed the area before the fill was placed. Please route this revision to permitting and technical for further review.

(Ex. A-8 at 4.) The Permit Revision Deletion Request was approved on February 18, 1994. Id.

On January 21, 1993, prior to DMLR's approval of the Permit Revision Deletion Request, the OSM Field Office in Big Stone Gap, Virginia, received a citizen's complaint letter describing conditions at Lonesome Pine's mine site #6 and alleging violations the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On January 26, 1993, OSM issued a Ten-Day Notice (TDN) to the Commonwealth of Virginia describing seven violations with references to the provisions of the Virginia Surface Mining Rules believed to have been violated:

1. The permittee has failed to redistribute topsoil on areas disturbed by mining, (19.816.22(d));
2. The permittee has failed to restore affected areas to approximate original contour, (19.816.102(A)(1));
3. The permittee has failed to eliminate all high walls affected by the mining operation, (19.816.102(A)(2));
4. The permittee has mined within 100' of state route #646 without the required approvals, (19.761.11(d));
5. The permittee has failed to revegetate all affected areas in a timely manner, (19.816.113);
6. The permittee has failed to backfill the area in a manner that achieves the required 1.3 static safety factor, (19.816.102(a)(3)); and
7. The permittee has disturbed lands above the highwall without DMLR finding the disturbance will facilitate compliance with the environmental protection standards, (19.816.107(c)).

(See Ex. R-1 at 4-5.)

On February 9, 1993, DMLR, filed a response to the TDN explaining the rationale for its action taken and not taken to address the alleged violations. With respect to alleged Violations #1 & #5 the DMLR response stated that these two violations "concern the excess spoil fill for the road construction. The maintenance of this area with regard to these standards is the responsibility of the Va. Department of Transportation as per the approved revision." (Ex. R-1 at 10.) The DMLR response with respect to violation #6, the instability of the backfill, stated:

There is no evidence of apparent instability in the backfill onsite. Approved plans assume a 1.3 static factor. The only slide areas around are not on the permit area, and it is noted that a geologist investigated the original slide that resulted in the closure of the state road 646. The technical report revealed that the mining operation was not responsible for the failure of the slope under the road.

Id. at 11.

After its evaluation of the response and an onsite inspection, OSM determined that DMLR failed to take appropriate action to correct these three violations. DMLR requested informal review of OSM's Decision pursuant to 30 CFR 842.11(b) on April 1, 1993. In a May 5, 1993, Decision on informal review issued on behalf of the Deputy Director, OSM concluded that the DMLR response to the TDN was "arbitrary, capricious and an abuse of discretion" and ordered a Federal Inspection. The Federal Inspection conducted on May 20, 1993, by OSM Inspector Ronnie Vicars resulted in issuance of NOV No. 93-130-157-01. The NOV applies to "[t]he portion of the mining operation near State Route #646 on which a fill was constructed further described as the northeastern portion of the area disturbed by mining pursuant to permit #1101062 and adjacent mined areas." (Ex. R-8 at 3.) The NOV described each violation, the provision of the Virginia Surface Mining Rules violated, and the corrective action required:

[1.] The person has failed to redistribute topsoil or approved topsoiling materials on disturbed areas in a manner that achieves an approximately uniform stable thickness consistent with the approved post mining use.

19.816.22

19.816.22(d)

The person must apply topsoil or approved topsoiling materials on the disturbed area which has not been adequately topsoiled.

[2.] The person has failed to plant during the first normal period for favorable planting conditions after replacement of the plant growth medium and has failed to establish a diverse, effective and permanent cover at least equal in extent of cover to the natural vegetation of the area.

19.816.113

19.816.111

19.816.116

The person must apply seed, fertilizer and mulch during the first normal planting period for favorable planting conditions after replacement of the plant growth medium.

[3.] The person has failed to demonstrate that the current backfill configuration has a 1.3 long-term

static safety factor. The approved permit backfill configuration of 1.3 is not representative of the current configuration.

19.816.102

The person must calculate the static safety of the revised backfill configuration and provide certification of the calculations by a Registered Professional Engineer (RPE). Should the long-term static safety factor not meet or exceed the required 1.3 factor of safety, the backfill/fill configuration must be reworked and an RPE provide a certification that [the] backfill meets the required long-term 1.3 static factor of safety.

Id. at 3-5.

The time set for abatement was July 23, 1993, at 8:00 a.m. On August 24, 1993, OSM issued the CO.

Pursuant to Section 525 of SMCRA, 30 U.S.C. § 1275 (1988), Lonesome Pine filed an Application for Review of NOV No. 93-130-157-01 on June 17, 1993 and an Application for Review of CO No. 93-130-157-01 on September 21, 1993. The case was assigned to Administrative Law Judge David Torbett, who held a hearing on July 14, 1994, in Abington, Virginia.

Decision on Appeal

In his Decision, Judge Torbett summarized the evidence presented at the hearing. In the section of the Decision captioned Findings, Discussion, Conclusion, Judge Torbett set forth the legal basis and rationale for his Decision:

In review of § 521 Notices of Review and Cessation Orders, the Respondent has the burden of going forward to establish a prima facie case as to the validity of the notice. The ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171 (1993)

A prima facie case is shown when sufficient evidence is presented to establish sufficient facts which, if not contradicted, will justify a finding in favor of the party presenting the case. If evidence sufficient to present a prima facie case is not rebutted, the violation will be sustained. S&M Coal Co., 79 IBLA 350 (1984); Tiger Corp. 4 IBMSA 202 (1982).

In this case, the Respondent has presented prima facie evidence that violations exist in static safety ratio, topsoil, and revegetation requirements. The Applicant has not rebutted this evidence, but has presented the argument that the area in question is no longer a part of the Applicant's permit.

There is no question that after the landslide the State revised the Applicant's permit to allow a fill of road construction materials on the mine site. The State has a right to revise permits under its regulations. However, a state may not revise permits in violation of the Surface Mining Act. 30 [CFR] 774.13 (1993). This area does not meet the requirements for the 1 to 3 static safety factor. 30 [CFR] 816.102 (1993). Photographs demonstrate an area of boulders with a lack of topsoil and vegetation. These three conditions are in violation of the surface mining reclamation laws.

The State didn't totally release the Applicant's bond or delete this incremental section from the Applicant's permit before allowing the fill construction. Once an area of land has been disturbed by mining it becomes a surface coal mining operation and can only be released from regulation when all reclamation standards have been met and the liability period has expired. See 30 [CFR] 700.11 (1993). Therefore, OSM did not lose its jurisdiction over this site. The area at issue here remained a part of the Applicant's surface coal mining operation and the State's revision did not enforce the requirements for static safety, revegetation, and topsoil coverage.

(Decision at 7-8.)

Judge Torbett noted in his decision the unfortunate position of Lonesome Pine, which having completed mining and moved its operation, was subsequently "caught in the middle of this agreement between two state agencies and the landowner." (Decision at 8.) Even so, he concluded that these circumstances did not change the fact that OSM acted appropriately and within its oversight responsibility when it issued the NOV and CO. Accordingly, he held that NOV No. 93-130-157-01 and CO No. 93-130-157-01 were properly issued. Id.

Arguments on Appeal

Lonesome Pine asserts that the ALJ's Decision was not in accordance with the regulations or the law governing the issues raised by the appeal. However, appellant fails to provide a legal basis to demonstrate error in the ALJ's Decision.

Lonesome Pine makes four arguments on appeal:

- (1) The State's action in approving the amendment for the landfill was not arbitrary and capricious.
- (2) DMME possessed the regulatory authority to alter the post-mining land use.
- (3) State-funded highway construction is exempt from OSM's jurisdiction pursuant to 30 U.S.C. 1278.
- (4) The deletion of the areas from the permit constituted abatement of the NOV's and Cos. [sic]

(Applicant's Brief on Appeal at 3.) These arguments are essentially the same as those arguments made in Appellant's post-hearing brief, which were considered and rejected by Judge Torbett in his Decision of September 13, 1994.

In response, OSM asserts that Lonesome Pine's appeal raises two issues:

1. At the time of OSM's inspection, was the portion of the mine site where the waste material was dumped still part of a regulated surface coal mining operation?
2. Was the portion of the mine site where the waste material was dumped in violation of program standards at the time of OSM's inspection?

(OSM Reply Brief at 7.)

The Commonwealth of Virginia has not entered an appearance in this case.

[1] Section 503 of SMCRA, 30 U.S.C. § 1253 (1994), provides that states, like Virginia, with approved programs have the primary responsibility for enforcing SMCRA. However, while Virginia has been granted primary enforcement authority, OSM retains a significant oversight role to ensure compliance with SMCRA's mandates. In this case, OSM had reason to believe that Lonesome Pine was in violation of a state regulatory program based on a citizen's complaint. Therefore, OSM was required to issue a TDN to the appropriate state regulatory authority. See 30 U.S.C. § 1271(a)(1) (1994); 30 CFR 842.11(b)(1). We note that the TDN process contemplates a formal communication between OSM and the state regulatory authority. See *Patrick Coal Co. v. OSM*, 661 F. Supp. 380, 384 (W.D. Va. 1987). Thus an operator's only vehicle to complain about issuance of a TDN is to obtain administrative review of any resulting enforcement action pursuant to 30 U.S.C. § 1271(a)(1) (1994) and 30 CFR 842.11(b)(1)(ii)(B)(1). The applicable regulation requires the state to take "appropriate action" to cause the violation to be corrected or show "good cause for the failure to do so" within 10 days of receiving the TDN. Otherwise, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. See *Ernest Back*, 135 IBLA 246, 248 (1996); *Ambleside, Ltd.*, 135 IBLA 51, 57 (1996). The applicable regulation, defines "appropriate action" to include "enforcement or other action authorized under the State program to cause the violation to be corrected" (30 CFR 842.11(b)(1)(ii)(B)(3)(1993), and lists five situations which are considered to constitute "good cause" for a failure to take enforcement action. ^{3/} See *Morgan Farm*, 141 IBLA 95,

^{3/} Situations constituting good cause under the regulations include: where, under the state program, the possible violation does not exist; where the State regulatory authority requires reasonable and specific

100 (1997); Ambleside, Ltd., *supra* at 58. The action deemed appropriate by the State in response to the TDN with respect to these three violations was to take no action. As a result, OSM issued the NOV and CO. Appellants' arguments that either the NOV and CO was improperly issued or that OSM was without jurisdiction to act is not supported by the record.

[2] In a proceeding concerning an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSM. 43 CFR 4.1171(a); *see Dean Trucking Co.*, 1 IBSMA 229, 237, 86 I.D. 437, 441 (1979). OSM makes a prima facie case when it presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. Alpine Construction Co. v. OSM, 114 IBLA 232, 235; S & M Coal Co. v. OSM, 79 IBLA 350, 354; 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982). Although the ultimate burden of persuasion rests with the applicant for review, the NOV will be affirmed only where OSM meets its burden of establishing a prima facie case. *See Turner Brothers, Inc. v. OSM*, 98 IBLA 395, 398 (1987); Calvert & Marsh Coal Co. v. OSM, 95 IBLA 182, 191 (1987). Where the applicant for review fails to meet its burden of persuasion to overcome OSM's prima facie case with a preponderance of evidence, the NOV and CO will be sustained. *See Roblee Coal Co. v. OSM*, 130 IBLA 268, 284 (1994). Further, as the party seeking relief on appeal Appellant has the burden of showing error in Judge Torbett's decision. Farrell-Cooper Mining Co. v. OSM, 141 IBLA 72, 74 (1997).

[3] On appeal, Appellant raises issues it believes to be determinative of the proceedings before the ALJ. Appellant frames these issues to debate the existence of OSM's jurisdiction over the mine site. However, Appellant presents no evidence to alter the findings by the ALJ that Lonesome Pine's mine site #6 was under the regulations and subject to OSM's jurisdiction. The record shows that after the landslide in May 1990, the DMLR revised Lonesome Pine's permit to allow highway construction spoil to be deposited on the mine site which resulted in the cited violations. However, the Commonwealth of Virginia's authority to revise permits is limited by state rules and federal regulations which do not include the authority to approve permit revisions that result in violations of SMCRA. *See Virginia Surface Mining Regulation §480-03-09.774.13 and 30 CFR 774.13 (1993)*. The record supports the ALJ's finding that OSM established a prima facie case of violation under regulations promulgated pursuant to SMCRA.

fn. 3 (continued)

additional time to determine whether a violation exists; where the State regulatory authority lacks jurisdiction under the state program over the violation; where the State regulatory authority is precluded by administrative or court order from acting on the possible violation; or where, with respect to an abandoned site, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program. 30 CFR 842.11(b)(1)(4)(1993). None of these situations are present in this appeal.

The initial permit revision approved March 6, 1991, authorized the placement of spoil, dirt, and rock from the road reconstruction project to be deposited on the mine site that was subject to regulations. While the record indicated that Appellant had initiated reclamation on the area, it is clear that after its permit was revised to authorize use of the mine site as a dump site for spoil from the road construction project, the mine site area did not meet the required performance standard. See 43 CFR 816.22(d); 43 CFR 816.116; and 43 CFR 816.102. The road project was completed in June 1991, and when OSM inspected the site in response to the citizen's complaint in 1993, it found top soil, revegetation, and static safety violations.

Based on our review of the record, we find that OSM presented evidence showing the existence of violations which resulted from the placement of excess spoil from the road construction project on the mine site; that at the time of dumping on the mine site the area was subject to the Federal and Commonwealth of Virginia surface mining rules pertaining to the 1 to 3 static safety ratio, topsoil replacement, and revegetation. (See Respondent's Exhibits R-8, R-9, R-10, and R-11.) The evidence of record confirms OSM's finding on its inspection. The fact that these conditions existed and had not been corrected as of the date of the inspection clearly amounted to a violation of 30 CFR 816.22, 816.111, 816.113, 816.116, and 816.102(a)(3). We are satisfied that Judge Torbett fully considered the evidence, thoroughly analyzed the issues, and applied the correct law to reach a proper result. Appellant presented no evidence on appeal to demonstrate error in Judge Torbett's decision. We have considered Appellant's arguments to the contrary and rejected them. ^{4/}

We agree with Judge Torbett's finding that OSM established a prima facie case that a violation of Federal and Virginia surface mining regulations existed, and that Lonesome Pine failed to meet its burden of persuasion as required by 43 CFR 4.1171(b).

^{4/} We find no merit to Appellant's argument that DMLR's partial release of its bond with respect to that portion of mine site #6 used for the placement of spoil in connection with the road project warrants a finding that OSM no longer has jurisdiction in this matter. As we said in OSM v. Calvert & Marsh Coal Co., 95 IBLA 182, 189 (1987):

"Neither the Act nor Departmental regulations implementing the Act contain provisions which operate to release a mine site from regulation because a reclamation bond is released. On the contrary, the Act provides that the miner shall be liable under the performance bond 'for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation.' 30 U.S.C. § 1259(b) (1982)."

See also The West Virginia Highlands Conservancy, 152 IBLA 158, 197-199 (2000).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

John H. Kelly
Administrative Judge