

WILLIAM HELTON PULLEN, JR. ET AL.

IBLA 88-452

Decided December 19, 1989

Appeal from two decisions of the Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, approving applications for Phase I bond release. GA-002 and GA-006.

Set aside and referred for hearing.

1. Hearings--Rules of Practice: Appeals: Hearings--Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

In order to meet the requirements for a Phase I bond release under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269 (1982), and 30 CFR 800.40(c)(1), the operator must show that he has completed the backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. Where the record on appeal is incomplete and discloses material issues of fact regarding compliance with the requirements for a Phase I bond release, the Board will refer the case to an Administrative Law Judge for hearing pursuant to 43 CFR 4.1286.

APPEARANCES: Herbert E. Franklin, Jr., Esq., Trenton, Georgia, for appellants; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

William Helton Pullen, Jr., Sandra T. Pullen, William Helton Pullen, Sr., and Martha Frances Wells Pullen appeal from two decisions of the Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated May 10, 1988, approving applications for Phase I release of bonds filed in connection with surface mining operations on permits GA-002 and GA-006. The applications

for Phase I bond release were filed by the Jackson County Mining Corporation (Jackson). 1/

American Resources Insurance Company's Surety Bond No. BD400271, in the amount of \$363,000, covers 165.2 acres of land included in permit No. GA-002 issued in December 1982. American Resources Insurance Company's Surety Bond No. BD400365, in the amount of \$273,700 covers 142 acres of land embraced by permit No. GA-006 issued in December 1983. Both permit sites are located in Dade County, Georgia, north of Stephenville, Georgia.

Appellants in this case are owners of the property covered by surface mining permits Nos. GA-002 and GA-006. By letter dated January 25, 1988, American Standard Coal Company, Inc., on behalf of Jackson, informed appellants that Jackson was seeking a Phase I bond release for its GA-002 and GA-006 mines. 2/ On March 16, 1988, appellants filed a letter with the Birmingham Field Office in which they protested the release of the bonds. Appellants contended that the land had not been reclaimed as required by Federal regulations and that they opposed the release of any bond money. Appellants also requested that they be advised of OSMRE's on-site inspection of the mines and that a hearing be held pursuant to 30 CFR 800.40(f) for consideration of objections to the request for bond release.

On April 14, 1988, a "hearing" 3/ was conducted in Chattanooga, Tennessee, by Andrew Gilmore, Chief of the Office of Surface Mining Regulatory Division. Robert E. Hooper, appearing on behalf of Jackson, stated that according to the reclamation plan, Jackson feels that it has met the requirements for a Phase I bond release (Tr. 2). Counsel for appellants asserted that the land had not been restored to its approximate original contour on either permit site and that, consequently, drainage of the land had changed. He conceded that reclamation had begun, but noted that there had been no new topographical map showing the present contours (Tr. 3). He mentioned that prior to mining and reclamation, it was possible to travel on

1/ We note that on Aug. 8, 1988, the Coosa River Soil and Water Conservation District, Rome, Georgia, filed an objection to the bond release with the Board. Since there was no indication that a copy of this document was served upon the parties to the appeal, a copy of this document was served by order of the Board on all parties who were given an opportunity to respond. See 43 CFR 4.27(b).

2/ The "Notice[s] of Coal Mining Bond Release Application" which were published in the Dade County Sentinel stated that Jackson had applied for a Phase I and Phase II bond release. However, all documents in the case file refer to a Phase I bond release.

3/ The "hearing" consisted simply of the presentation of the position of the applicant supporting bond release and of the appellants opposing release by their respective representatives. Although matters of fact were raised and photographs were submitted, there was no examination or cross-examination of witnesses and no evidence was presented by OSMRE. The transcript of the entire proceeding totals 15 pages. Despite the limited requirements for a hearing set forth by the regulation at 30 CFR 800.40(f), a proceeding of this nature is of very limited utility in resolving issues of fact.

a road from one permit area to the other, but according to counsel, it is no longer possible to do this because the land has not been restored to its approximate original contour (Tr. 3-4).

Appellants' counsel further noted the presence of rocks both on and immediately below the surface. He stated that the postmining plan called for this area to be used as pasture land but that this is impossible because of the rocks (Tr. 4). Appellants' counsel also asserted there was a lack of "drainage control" on the permits, noting the presence of "a lot of ditches which haven't been properly controlled" (Tr. 5). Appellants' objections were also based on the presence of spoilage, the failure to properly back grade all high walls, and the presence of a large basin or crater on GA-002 (Tr. 5-6). Photographs were submitted by appellants to support their contentions.

Further, appellants asserted at the hearing that there was never a properly approved revision to the reclamation plan for the permits. Appellants stated their objection to a bond release based on any permit revision which was not properly approved (Tr. 8).

Subsequent to the hearing, David Dykes, OSMRE Reclamation Specialist, sent a memorandum through Andrew Gilmore to the Director of the Birmingham Field Office concerning the bond release applications. Dykes explained that on February 17, 1988, he and Wayne Stanley of the Birmingham Field Office conducted a bond release inspection. He stated that appellants were notified of this inspection but were not present. Dykes stated that there were no problems found during the inspection which would prohibit a Phase I bond release on these permits. Dykes stated that at the request of appellants another inspection was conducted on April 5, 1988, at which two of the appellants were present.

An attachment included with the memorandum provided the inspector's response to certain issues raised by appellants. With regard to the contour of the land, the inspector stated that the inspections show that the two permit areas have been returned to their approximate original contour. While some of the areas have been determined to be steeper than that of good pasture land, most of the slopes fall well into the area of good slopes for pasture land. The revised reclamation plan calls for trees to be planted on areas determined to be too steep for pasture land.

Regarding the failure to remove rocks, the memorandum explained that the operator was issued a notice of violation (NOV) for failure to pick up large rocks on the permit area, but the NOV was terminated on September 30, 1986, when the rocks were removed from the permit area. The inspector explained that rocks on the steep slopes are not required to be moved.

Respecting the "spoil" allegedly left on site, the inspector replied that the "spoilage," acid, or toxic material, has been covered and treated with lime. Regarding the challenged permit revision, the inspector responded that a permit revision was approved by OSMRE on January 27, 1987.

Further, the memorandum disclosed an NOV was issued for failure to redistribute topsoil with remedial actions to take soil samples and to submit a plan to raise productivity potential. However, the violation was terminated on April 24, 1987.

Dykes concluded the memorandum by recommending that Phase I bond release be approved for both permit areas.

On May 10, 1988, the Birmingham Field Office Director issued the two letter-decisions which are the subject of this appeal in which he stated that OSMRE had determined that the requirements for Phase I bond release had been accomplished for permit areas GA-002 and GA-006. Concerning GA-002 the Director stated that OSMRE is presently holding surety bond No. BD400271 in the amount of \$363,000. He explained that \$145,200 would be retained to ensure completion of the remaining reclamation on the permit and that \$217,800 would be released in the absence of a timely appeal. Regarding GA-006, the Director stated that OSMRE was holding surety bond No. BD400365 in the amount of \$273,700. He explained that \$109,480 would be retained to ensure completion of the remaining reclamation work and that \$164,220 would be released, provided no appeal is filed.

In their statement of reasons, appellants reiterate the objections voiced at the hearing concerning approximate original contours, back-filling, grading, drainage and erosion control, topsoil, and the presence of rocks. In addition, appellants contend that gullies and rills have not been corrected and continue to grow and multiply; that a highwall on GA-002 was improperly cut and backfilled; that an electric utility line was moved and not restored; that sediment ponds have not been properly maintained; that coal beds have not been properly recovered; and that the permit areas have not been properly identified or marked. Appellants state that the areas disturbed by strip mining have not been restored to a condition capable of supporting uses which they were capable of supporting prior to any mining.

Further, appellants contend that the Birmingham Field Office revised the reclamation plan without following proper procedures. It is asserted that this created a revised plan that forgives poor reclamation work.

Appellants assert that the pre-release hearings have been held as informal conferences without opportunity to examine witnesses and produce evidence as provided by the regulations. Appellants request a hearing pursuant to 43 CFR 4.1286.

We have advanced this case on our docket for consideration in light of the request for a hearing and the threshold question of whether a hearing is required to resolve issues of material fact.

[1] Section 519(c) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1269(c) (1982), provides in pertinent part as follows:

The regulatory authority may release in whole or in part said bond or deposit if the authority is satisfied the reclamation covered by the bond or deposit or portion thereof has been accomplished as required by this chapter according to the following schedule:

- (1) When the operator completes the backfilling, regrading, and drainage control of a bonded area in accordance with his approved reclamation plan, the release of 60 per centum of the bond or collateral for the applicable permit area.

The requirements for bond release are also set forth in the Departmental regulations at 30 CFR 800.40(c). ^{4/} That regulation provides that a bond release shall take place in accordance with the following schedule: "(1) At the completion of Phase I, after the operator completes the backfilling, regrading (which may include the replacement of topsoil) and drainage control of a bonded area in accordance with the approved reclamation plan, 60 percent of the bond or collateral for the applicable area."

The issue raised by this appeal is whether the record supports a finding that Jackson has established compliance with the requirements for Phase I bond release in accordance with 30 U.S.C. § 1269(c) (1982) and 30 CFR 800.40(c).

At the outset we note that both the Act and the regulation require that the operator complete backfilling, regrading, and drainage control of the bonded areas in accordance with the "approved reclamation plan." Section 507(d) of the Act, 30 U.S.C. § 1257(d) (1982) requires that an applicant for a permit submit to the regulatory authority as part of the permit application a reclamation plan which shall meet the requirements set forth at 30 U.S.C. § 1258 (1982). The file submitted to the Board ^{5/} contains neither the permits nor the reclamation plans. Therefore it is impossible to know whether the land has been reclaimed in accordance with the reclamation plans. We have Mining Operator's Reclamation Completion Reports signed by the operator but these are not sufficient. Also, there is a question as to whether the reclamation plans have been revised. The file does not include approved revised reclamation plans. The only information we have on a revision consists of two maps relating to the two permit areas with the description "Revision to Reclamation Plan." The following

^{4/} The provisions of this regulation regarding bonding requirements apply to surface coal mining and reclamation operations in the State of Georgia. 30 CFR 910.800.

^{5/} Although the OSMRE decisions under appeal in this case were dated May 10, 1988, there was a very substantial delay in forwarding the case file to the Board. On Sept. 22, 1988, the Board issued an order requiring production of the case file and the record was finally received on Oct. 12, 1988.

"notes" are on both maps: "Information for map preparation obtained from approved permit application site visits and OSMRE personnel." An additional note on the map for GA-006 states: "Haul road and sediment basins are temporary structures and are to be reclaimed when directed by the regulatory authority."

When an appeal is filed with the Board from a decision by an OSMRE officer under 43 CFR 4.1280, OSMRE is obliged to submit the complete original administrative record to the Board, including all original documentation in the matter. Save Our Cumberland Mountains, Inc., 108 IBLA 70, 96 I.D. 139 (1989). By order of September 22, 1988, the Board directed OSMRE to forward the case file to the Board. Although OSMRE tendered a record, it is lacking several crucial documents, *i.e.*, the permits and reclamation plans and any approved revised reclamation plans. As we stated in our order, it is impossible for this Board to engage in intelligent, objective review of the agency's decision without knowing the circumstances leading to the action and the agency's reasons for taking the action (Order at 2 citing Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982)). We also noted that, absent a complete record, this Board and a reviewing court are incapable of complying with the procedural requirements statutorily mandated by the Administrative Procedure Act (Order at 2 citing Higgins v. Kelley, 574 F.2d 789, 792 (3d Cir. 1978)).

It is clear from the record before the Board that there are several issues of material fact presented in this appeal. These involve the requirements for a Phase I bond release, *i.e.*, backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area. At the April 14, 1988, hearing appellants voiced their objection to the bond release because they felt these requirements had not been met. Neither Dykes nor Stanley who conducted the April 5, 1988, inspection testified at the hearing. Consequently, there was no opportunity for cross-examination. Appellants have requested a hearing before an Administrative Law Judge under 43 CFR 4.1286. That regulation provides that any party may request the Board to order a hearing before an Administrative Law Judge in order to present evidence on an issue of fact. Since we have determined that issues of material fact exist in this case we hereby order a hearing. *See Mr. & Mrs. William J. Hamilton*, 105 IBLA 160 (1988); *Clifford Mackey*, 99 IBLA 285 (1987). The hearing shall be held to present testimony and evidence on the issues relating to the requirements for a Phase I bond release, specifically completion of backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. The hearing will also provide an opportunity for OSMRE to produce the additional documentation necessary to resolution of this controversy.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decisions appealed from are set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge. The

decision of the Administrative Law Judge shall be final for the Department in the absence of a timely appeal by a party adversely affected.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge