



PACIFICORP D/B/A PACIFIC POWER, *ET AL.*

187 IBLA 245

Decided March 23, 2016



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Office of Hearings and Appeals
Interior Board of Land Appeals
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IBLA 2016-82

Decided March 23, 2016

Appeal from a Decision issued by the Rawlins (Wyoming) Field Office, Bureau of Land Management, approving the reclamation cost estimate submitted by Appellant for its right-of-way grant for the Foote Creek Rim I Wind Farm. WYW-142646.

Affirmed; Petition for stay denied as moot.

1. Rights of Way: Bonds--Rules of Practice: Appeals: Burden of Proof

When contesting a bond determination, the burden falls on the appellant to establish error in BLM's determination of the reclamation costs underlying a financial guarantee. More than a conviction that BLM's estimate is excessive is necessary to prevail

2. Rights of Way: Bonds--Rights-of-Way: Generally

A bond determination will be deemed proper when BLM has accepted a reclamation cost estimate submitted by an appellant that includes costs associated with environmental liabilities, decommissioning, and reclamation of the right-of-way grant. If the appellant fails to follow BLM guidelines when preparing its reclamation cost estimate, the appellant cannot later contest the figure used.

APPEARANCES: Laine Anderson, Director of Wind Operations, PacifiCorp, Casper, Wyoming, for PacifiCorp.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

PacifiCorp (Appellant) has appealed from and petitioned for a stay of the effect of a January 8, 2016, decision (Decision) issued by the Rawlins (Wyoming) Field

Office, Bureau of Land Management (BLM). In the decision, BLM informed Appellant that, based on the reclamation cost estimate (RCE) submitted by Appellant for its right-of-way (ROW) grant for the Foote Creek Rim I Wind Farm (FCR Wind Farm), the agency had determined that the \$70,000 bond held for the project needed to be increased to \$2,043,000, and required Appellant to submit additional bonding in the amount of \$1,973,000 within 60 days. For the reasons discussed below, we affirm BLM's decision and deny Appellant's petition for stay as moot.

Background

Appellant operates the FCR Wind Farm located near Arlington, Wyoming. See RCE at unpaginated (unp.) 5. The FCR Wind Farm, authorized under ROW grant WYW-142464,¹ is located on approximately 941 acres of BLM-administered lands and consists of 35 wind turbines with 36 associated gravel pads, foundation and transformers; two met towers; and approximately 2.5 miles of access roads.² *Id.* On March 27, 2000, BLM accepted Appellant's surety bond amount of \$70,000; the bond was effective as of July 6, 1999.³ See BLM's Surety Bond Acceptance Decision, dated Mar. 27, 2000.

On August 31, 2015, BLM issued Instruction Memorandum (IM) No. 2015-138, *Solar and Wind Energy Performance and Reclamation Bonds and Reclamation Cost Estimate Review Requirements*.⁴ The IM requires BLM to review authorized solar and wind energy ROW authorizations "to ensure compliance with the BLM bonding

¹ The ROW was originally issued to ToyoWest Wyoming, LLC, in 1997. BLM approved assignment of the ROW to PacifiCorp, Eugene Water & Electric Board, and SeaWest Energy Land Associates, LLC, on Jan. 20, 1999. See Decision, Assignment of Right-of-Way Approved, dated Jan. 20, 1999.

² The FCE Wind Farm originally included 36 turbines, but one turbine was removed in 2013 due to a structural failure. See RCE at unp. 4.

³ As provided under 43 C.F.R. § 2805.12(g), BLM may require a bond or an increase or decrease in the value of an existing bond at any time during the term of a ROW grant. The initial \$70,000 bond was based on a requirement in BLM's Record of Decision approving the ROW that the bond be in the amount of \$2,000 per turbine located on public lands. See Record of Decision, July 1997, at 5.

⁴ IM No. 2015-138 can be found at: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2015/IM_2015-138.html (site last visited Mar. 22, 2016).

policies and verify that the performance and reclamation bond held by the BLM is adequate to cover the terms and conditions of the right-of-way grant.” IM No. 2015-138 at 1. As part of BLM’s review of each solar and wind ROW, the IM requires the agency to ensure that RCEs are adequate and, if not, to request that ROW grant holders provide an updated RCE. *Id.* at 2. RCEs prepared by grant holders are to include three components:

- (1) Environmental liabilities, such as the securing, removal or use of hazardous materials and substances, hazardous waste, herbicide, petroleum-based fluids, and dust control or soil stabilization materials;
- (2) The decommissioning, removal, and proper disposal, as appropriate, of any improvements and facilities; and
- (3) Interim and final reclamation, revegetation, recontouring, and soil stabilization.

Id. The IM specifically states that “salvage value for structures, equipment, or materials are not included in the [RCE],” and that “[RCEs] will be calculated as if there were no such values since these are generally based upon a transient market value for commodities.” *Id.* In limited circumstances, however, salvage values may be included in BLM’s bond determination (e.g., if there is a state mandate to recycle and salvage project materials), but only if the grant holder includes with its RCE an addendum that details the salvage and recycling value for the structures, equipment, or materials.⁵ *Id.*

Consistent with the IM, BLM requested, and Appellant prepared, an RCE for the FCR Wind Farm. See Letter from Laine Anderson, PacifiCorp, to DeShann B. Schinkel, BLM, dated Nov. 30, 2015 (transmitting RCE); RCE *generally*. In the RCE, Appellant provided detailed estimates for the decommissioning and reclamation costs for the project using the State of Oregon’s Department of Energy’s Energy Facility Siting Council Site Restoration Cost Estimating Guide as its reference, estimating that the total cost to deconstruct the turbines and associated infrastructure would be

⁵ The regulations used to determine the appropriate bond amount for Appellant’s project are found in 43 C.F.R. subpart 3809, the regulations governing mining operations. See IM No. 2015-138 at 2. These regulations require BLM to calculate a financial guarantee for reclamation work based on “the estimated costs as if BLM were to contract with a third party to reclaim operations according to the reclamation plan.” 43 C.F.R. § 3809.552(a); see also 43 C.F.R. § 3809.554(a).

\$2,043,000. RCE at unp. 4. The RCE specified that the cost estimate did not consider recycling or scrap metal values. *Id.* at unp. 12.

On January 8, 2015, BLM issued the Decision now on appeal, accepting Appellant's RCE and increasing Appellant's surety bond amount to \$2,043,000. *See* Decision at 2. As a result, Appellant was required to submit the additional bond amount of \$1,973,000 within 60 days. *Id.* Appellant timely appealed, filing a Notice of Appeal (NOA) and a request for a stay of the Decision pending appeal.⁶ BLM did not file a response to Appellant's petition for stay. *See* 43 C.F.R. § 4.21(b)(3).

Discussion

On appeal, Appellant requests that BLM either waive the additional bond or take into consideration scrap metal values in its determination of decommissioning costs. *See* NOA at 1. After careful review of the record, and as explained below, the Board finds Appellant has not met its burden to show error in BLM's decision to accept Appellant's RCE amount of \$2,043,000. We therefore affirm BLM's decision and deny Appellant's petition for stay as moot.

Appellant first states that its bond should be waived because its "standing as a publicly regulated utility, with an excellent credit rating, provides more than sufficient financial assurances as to the Company's financial commitment to repowering and/or reclaiming the FCR Wind Project at the end of the current asset life." NOA at 1. Appellant further states that it "understand[s] bonding requirements have been waived in other situations involving state regulated utility companies with investment-grade ratings." *Id.* at 2.

Appellant cites to no authority authorizing waiver of a bond requirement; nor does Appellant identify any specific instances in which BLM has waived a bond requirement. In any event, there is no evidence that Appellant submitted a request to BLM asking that the agency waive its requirement for a bond in the amount of \$2,043,000, and it appears that Appellant is for the first time requesting a waiver in its

⁶ In its NOA, Appellant states that its "Statement of Reasons is included in [its] Notice of Appeal, and as such, no separate Statement of Reasons will, or need be, filed with the United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, per 43 CFR [§§] 4.412 and 4.413." NOA at 2. We agree that Appellant's NOA sufficiently describes the reasons for appeal; Appellant therefore did not need to file a separate statement of reasons. To date, BLM has not filed an answer and its time to do so has passed. *See* 43 C.F.R. § 4.414. BLM transmitted the administrative record to the Board on February 12, 2016.

NOA submitted to the Board. Under our regulations at 43 C.F.R. § 4.21(a), however, once an appeal of a BLM decision is filed with the Board, BLM's authority to exercise jurisdiction directly relating to the subject of the appeal is suspended. *See Statoil USA E&P, Inc.*, 183 IBLA 61, 64 (2012); *McMurray Oil Co.*, 153 IBLA 391, 395 (2000). Therefore, once Appellant filed its appeal in this case, BLM no longer had jurisdiction to adjudicate any waiver request, assuming Appellant had submitted such a request to the agency. Moreover, this Board does not have authority to grant Appellant's request for a waiver; our jurisdiction is limited to deciding appeals from decisions rendered by Departmental officials. *See* 43 C.F.R. § 4.1(b)(2).

[1] Accordingly, the only issue before the Board is whether BLM erred in accepting Appellant's RCE without taking the value of scrap metal into consideration in its bond decision. We have long held that when contesting a bond determination, the burden falls on an appellant to establish error in BLM's determination of the costs of reclamation underlying a financial guarantee. As we stated in *Pilot Plant, Inc.*, 168 IBLA 193, 199 (2006), "[a]n individual challenging the amount of a reclamation bond or financial guarantee required by BLM must show error in BLM's decision. More than a conviction that BLM's estimate is excessive is necessary to prevail." (internal citations omitted). *See also Craig Monpas*, 178 IBLA 101, 105 (2009); *Mark Patrick Heath*, 175 IBLA 167, 187 (2008).

In this case, Appellant has failed to establish that BLM's decision to adopt Appellant's RCE was incorrect. In its NOA, Appellant argues that scrap metal value should be included in BLM's calculations because "it is unlikely that valuable scrap metal would be deposited in waste facilities without recovering monetary value." NOA at 1. Appellant states: "Scrap metal is valuable, relatively easy to sell and liquidate, and would be part of any prudent current reclamation program." *Id.* at 1-2. However, BLM's bond determination was based on the RCE *submitted by Appellant*. Moreover, when BLM informed Appellant that the company needed to submit an RCE, the agency provided Appellant with the requirements for preparing the RCE. *See* Letter from Nancy R. Baker, Acting Field Manager, BLM, to Travis A. Brown, PacifiCorp, undated (included as attachment to RCE).⁷ Specifically included in BLM's communication was the requirement that if Appellant wanted BLM to consider scrap metal values in its bond determination, Appellant was to submit with its RCE an addendum detailing the salvage and recycling value for the structures, equipment, or materials. *Id.* at unp. 2. BLM explained:

⁷ This letter appears to be what Appellant references in its cover letter transmitting the RCE to BLM as BLM's Oct. 27, 2015, request for Appellant to submit an RCE. The original letter, however, was not included in the materials submitted to the Board.

Salvage values for structures, equipment, or materials are not included in the RCE An addendum may be provided where the salvage and recycling value for the structures, equipment, or materials can be detailed. However, the addendum for salvage values will only be included in BLM's bond determination with adequate third-party documentation and justification for salvage or considering special circumstances, such as State mandates to recycle and salvage project materials, and at the discretion of the Authorized Officer. The addendum must include current local market information and be readily available for BLM review and consideration in making its bond determination.

Id. Appellant, however, submitted no addendum, and its RCE specifically stated that it did not consider the recycling or scrap value of metals. *See* RCE at unp. 12.

[2] Under such circumstances, we can find no error in BLM's decision to accept Appellant's own RCE without accounting for scrap metal value. Nothing in the administrative record indicates that Appellant followed BLM's guidelines to submit an addendum and request that BLM consider scrap metal value in its bond decision. Appellant cannot now contest the figure used. As we noted earlier, "[m]ore than a conviction that BLM's estimate is excessive is necessary to prevail." *Pilot Plant, Inc.*, 168 IBLA at 199. We therefore find that BLM's decision was proper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm BLM's decision and deny Appellant's petition for stay as moot.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
Silvia M. Riechel
Administrative Judge