

INTERIOR BOARD OF LAND APPEALS

William H. Pullen, Jr., et al.

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WILLIAM H. PULLEN, JR. ET AL.

IBLA 94-838 Decided March 16, 1998

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

Affirmed.

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

A Phase II bond release may be upheld when the record supports a finding that revegetation has been established on the regraded mine lands in accordance with the requirements of 30 C.F.R. Part 816.

APPEARANCES: Herbert E. Franklin, Jr., Esq., Trenton, Georgia, for Appellants; Charles 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 GRANT

William Helton Pullen, Jr., Sandra T. Pullen, William Helton Pullen, Sr., and Martha Frances Wells Pullen have appealed from two Decisions of the Acting Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), dated December 22, 1993, approving applications for Phase II release of bonds filed in connection with surface mining operations on permits GA-002 and GA-006.

This is the third appeal involving release of the surety's liability on bonds securing reclamation of these permit sites under section 519 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1269 (1994). In the initial appeal from a Decision approving Phase I bond release and decreasing the amount of the bond by 60 percent, we noted the existence of issues of material fact regarding compliance of the operator with the requirement to complete backfilling, regrading, and drainage control of the bonded areas in accordance with the "approved reclamation plan." William Helton Pullen, Jr., 112 IBLA 218 (1989). Consequently, we

referred the case to an administrative law judge for an evidentiary hearing and decision on the question of whether the legal predicates for a Phase I release had been satisfied. Id. at 223. After holding a hearing, the administrative law judge found that Phase I reclamation bond releases had been properly approved by OSM. The administrative law judge's Decision was in turn appealed to this Board. We affirmed this Decision. William H. Pullen, Jr., 132 IBLA 224 (1995). Now before us is the appeal from the OSM Decision approving Phase II bond release.

American Resources Insurance Company's Surety Bond No. BD400271, issued in the original amount of \$363,000, covers 165.2 acres of land included in permit No. GA-002 issued in December 1982. Of that amount, \$217,800 has been previously approved for Phase I bond release. The Acting Director approved a Phase II release in the amount of \$90,750. American Resources Surety bond No. BD0400365, issued in the original amount of \$273,700 covers 142 acres of land embraced in permit No. GA-006 issued in December 1983. Of that amount, \$164,220 has been previously approved for Phase I bond release. The Acting Director's Decision approved a Phase II release in the amount of \$68,425. Both permit sites are located north of Stephenville, Georgia, in Dade County.

Appellants in this case are owners of the property covered by surface mining permits Nos. GA-002 and GA-006. By letter dated October 1, 1993, Appellants were informed that Jackson County Mining Co. (Jackson) was filing an application with OSM for release of 25 percent of the performance bond on GA-002. Similarly, Appellants were informed of the filing of an application for release of 25 percent of the performance bond on GA-006 by a letter dated October 4, 1993. While the letters did not specify that the applications were for Phase II bond releases, they were treated as such by OSM. Moreover, legal notice was published in the Dade County Sentinel for 4 weeks, beginning October 6, 1993, informing interested parties that Jackson had filed Phase II bond release applications with OSM for permits GA-002 and GA-006 and that objections or requests for informal conferences were to be sent to OSM by November 26, 1993.

An inspection of both permits was conducted on October 27, 1993, by OSM employees David Dykes and Wayne Stanley. The inspection report notes that landowners Bill Pullen, Bill Pullen, Jr., Mrs. Bill Pullen, and Darrell Gass were present along with their attorney James Franklin and Department of the Interior Solicitor's Office attorney Charles Gault. The report reflects that during the inspection concerns raised by the landowners were addressed. These concerns included the types of plants used in revegetating the area, the presence of active erosion gullies, the presence of rocks, the lack of topsoil, the presence of low spots that retained water, and the need for road maintenance. 1/

1/ The landowners also expressed concern about the approximate original contour and location of a road. These concerns were addressed at the hearing before the administrative law judge on Phase I bond release. This issue was further reviewed by the Board in our Decision affirming Phase I bond release. William H. Pullen, Jr., 132 IBLA at 230-31.

It appears from a cover memorandum in the file dated December 21, 1993, from David Dykes, OSM reclamation specialist, to the Director, Birmingham Field Office, recommending approval of Phase II bond release, that OSM received a letter from the landowners' attorney opposing the bond release on November 22, 1993. ^{2/} The Dykes memorandum in the record further indicates that on November 23, 1993, the bonding company corrected the problems presented by several actively eroding rills. In the December 21, 1993, memorandum, Dykes stated that all of the landowners' concerns had been considered and addressed. Accordingly, he recommended that a Phase II bond release be approved on both permits as the sites were 97 percent covered in forage grasses and legumes, and the reclamation conformed to the permit requirements.

On December 22, 1993, the Birmingham Field Office Acting Director issued the two Decisions which are the subject of this appeal in which he stated that OSM had determined that the requirements for Phase II bond release had been accomplished for permits GA-002 and GA-006. Concerning GA-002, the Acting Director approved a Phase II bond release in the amount of \$90,750, leaving \$54,450 to be retained pursuant to 30 C.F.R. § 800.40(c)(3). Regarding GA-006, the Acting Director approved the release of \$68,425 for Phase II and retained \$41,055 pursuant to 30 C.F.R. § 800.40(c)(3).

In their Statement of Reasons (SOR) for appeal, Appellants, through counsel, make numerous assertions regarding the sufficiency of the reclamation of the permit sites. ^{3/} Many of Appellants' assertions are conclusory in nature (and at least one is speculative), rather than raising matters of fact which would contradict the finding of OSM. Several of the assertions also raise issues which we addressed previously in our Decision affirming, after an evidentiary hearing, the approval of Phase I bond release for the permits. William H. Pullen, Jr., supra. ^{4/} Among those issues, which will not be revisited herein, are the propriety of the revision of the permits and reclamation plans, the contention that topsoil has not been replaced or restored, and the presence of rocks which interfere with pastureland management.

Appellants' other assertions basically challenge the adequacy of the revegetation of the reclaimed area, including the ability to support the planned postmining use as pastureland and the existence of a vegetative cover in accordance with the approved reclamation plan. Appellants also

^{2/} A copy of the letter itself is not in the file.

^{3/} Appellants have been represented by different counsel at different times in this case. Previous counsel, the firm of Grant, Konvalinka, and Harrison, P.C., has filed a motion to withdraw their appearance on behalf of Appellants, and that motion is granted.

^{4/} The appeal and SOR regarding Phase II bond release were filed prior to our Decision affirming Phase I release after the hearing before the administrative law judge.

assert the presence of uncontrolled erosion, challenge compliance with the required standard of success for vegetation, and contend that the postmining capability of the land is not as good as the premining capability. Appellants also submitted two reports as a supplemental SOR in July 1996. One was prepared by Ken Lewis, a consulting soil scientist, in July 1996. The other was written by Larry T. West, a soil scientist and associate professor at the University of Georgia, based on observations made on May 25, 1996, and June 25, 1996. Appellants have also requested another evidentiary hearing before an administrative law judge.

[1] The issue in this case is whether OSM was justified in partially releasing the reclamation bonds for permits GA-002 and GA-006 on the ground that the requirements for Phase II bond release had been accomplished in accordance with SMCRA, 30 U.S.C. § 1201-1328 (1994), and its implementing regulations. Section 515(b)(2) of SMCRA, 30 U.S.C. § 1265(b)(2) (1994), generally requires a permittee, during the entire course of reclamation, to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood." See also 30 C.F.R. § 816.133. In the case of a Phase II release, OSM must be satisfied that revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan. 30 U.S.C. § 1269(c)(2) (1994) 5/

In determining whether reclamation has been properly completed, a permittee conducting surface coal mining operations in the State of Georgia must be judged by the applicable performance standards set forth in 30 C.F.R. Part 816. See 30 C.F.R. § 910.816(a). The general requirements for revegetation are found at 30 C.F.R. § 816.111 which includes the requirements that the vegetative cover be in accordance with the approved permit and reclamation plan. The regulation also requires that the vegetative cover be diverse, effective, and permanent, and that it be comprised of species that achieve the postmining land use. In addition, the vegetation must be capable of stabilizing the soil surface from erosion and capable of self-regeneration and plant succession.

Prior to mining, the land in GA-002 and GA-006 was forested, but it was determined that it would be reclaimed as pasture to support grazing. (Mine Plan Approval Package at 48.) Therefore, the success of revegetation is judged by the standards set out at 30 C.F.R. § 816.116(a) and (b)(1). These standards state that success of revegetation is to be judged on the effectiveness of the vegetation for the approved postmining land use as well as the extent of cover compared to the cover occurring in natural vegetation of the area. Under 30 C.F.R. § 816.116(b), standards for success for areas developed for use as grazing land or pasture require that "the ground cover and production of living plants on the revegetated area

5/ These requirements are reiterated in 30 C.F.R. § 800.40(c)(2), which is applicable to surface coal mining and reclamation operations in the State of Georgia under 30 C.F.R. § 910.800.

shall be at least equal to that of a reference area or such other success standards approved by the regulatory authority." The regulations relating to land use define "pastureland or land occasionally cut for hay" as land "used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed." 30 C.F.R. § 701.5.

Dykes' report, along with the Mine-Site Evaluation Inspection Reports in the file, contradict Appellants' statements that revegetation has failed. The various reports by OSM describe vegetation as "great" or "very good" over a 16-month period which contradict Appellants' claims that the vegetative cover is not effective or permanent. Dykes found 80 percent fescue in the bond release inspection. In March 1983, Appellants had requested that the reclaimed land be planted in fescue and clover, presumably because they believed those plants would support the postmining use as pasture. On August 18, 1988, OSM approved a permit revision to plant clover, fescue, and abruzzi rye (a temporary vegetation). The permit revision also approved the amount and type of lime, fertilizer, and mulch to be used on the sites. Appellants have provided no evidence to show that improper seed was used or that fertilization was not done in accordance with the permit. While Appellants speculate that water on the permits may be acidic, Appellants have not provided any evidence to support that conclusion. On the other hand, the numerous reports from OSM found both sites to be in compliance with all hydrologic elements including effluent limitations and drainage of acid-toxic materials.

As noted above, prior to the Acting Director's Decisions approving the Phase II bond release, an inspection was conducted with several of the landowners present. The report of this inspection, prepared by Dykes, stated that fescue covered 80 percent of both permit areas. Dykes noted that on permit GA-002 there had been several active erosion gullies, but that they had been corrected, and that other gullies had stabilized and defined themselves as drainage ways. In regard to permit GA-006 Dykes found no rill and gully problem that would interfere with grazing. In his report on permit GA-002, Dykes stated that OSM was concerned only when there was an abundance of rills and gullies that were actively eroding and causing sedimentation problems or that were interfering with the postmining use. In these areas he found neither problem.

Dykes observed that there were few rocks on the sites and that as part of the inspection a Chevrolet Suburban was driven over approximately 90 percent of the reclaimed area without problems. He stated that the few rocks would not interfere with the postmining use as pasture. Dykes also noted that topsoil had not been saved as required and therefore most of the area of both sites had no topsoil. A violation had been issued in response to that failure, and the company had been required to amend the spoil material for maximum vegetative success. He concluded that the success of the amendments was shown by the 97-percent successful vegetative cover. Dykes acknowledged that there were some areas on both permits that had blackberry vines, sumac, and volunteer pines but that was to be expected on a site

this large. He also declared that such growth is common on areas that are being actively grazed, and the growth would not interfere with the postmining use.

In addition to Dykes' report on the bond release inspection, the file has 15 Mine-Site Evaluation Inspection Reports on permit GA-002 starting from September 1992 and running to January 1994. All of these reports found the vegetation results were very good. No highwalls were found, and the site was described as following the reclamation plan. There are also 17 Mine-Site Evaluation Inspection Reports for permit GA-006 beginning September 1992 and ending January 1994. The site was described as looking very good or great, with no highwalls and in compliance with the reclamation plan.

The report prepared by Lewis, who testified on behalf of Appellants in the prior hearing before the administrative law judge, noted discrepancies between the surface contours of the permit lands and the 1986 reclamation plan. His report further notes the presence of a slope too steep for modern machinery and a change in the drainage pattern. Professor West examined the upper-level soil horizons at various points along irregular transects of the permitted lands. He noted the presence of some relatively steep slopes as well as some lands terraced to prevent erosion in a way which would make operation of farm machinery difficult. The existence of about a 10-percent cover of small stone fragments was observed on the surface. Professor West concluded that the soils created in the reclamation process of GA-002 "have limited utility for production of agronomic, grass, or tree crops."

Much of these reports is devoted to issues such as changes in surface contours and drainage modifications which were dealt with in our prior decision after a hearing upholding Phase I bond release. Thus, the modification of the reclamation plan to allow some relatively steep slopes which would be devoted to forest rather than pastureland as a postmining use was upheld. William H. Pullen, Jr., 132 IBLA at 234 n.12. Although the adequacy of the surface soil to support vegetation has been challenged, the facts of record as noted above support the OSM Decision. We have recognized that a hearing is properly granted when the record presents issues of material fact incapable of resolution on the existing record which require an evidentiary hearing to resolve. William Helton Pullen, Jr., 112 IBLA at 223. Based on the record before us, we conclude that no issue of material fact requiring an evidentiary hearing has been presented. Accordingly, the request for a hearing in this appeal is denied.

A party challenging a determination by OSM that a permittee is entitled to a bond release on the basis that OSM erroneously concluded that the permittee has satisfied the requirements for a release set forth in section 519(c) of SMCRA bears the ultimate burden of proving that OSM incorrectly granted a release of the bond. William H. Pullen, Jr., 132 IBLA at 229. Thus, Appellants bear the burden of proving that the permit areas have not been adequately reclaimed for purposes of a Phase II bond release. We find that they have failed to carry that burden.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge