



COALEX STATE INQUIRY REPORT - 263

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TOPIC: BOND RELEASE/BOND FORFEITURE

INQUIRY: A portion of a permitted area was ripe for bond release; however, the permittee never requested release of the bond. As a result of later problems on that permitted area, the permittee was sent a notice of bond forfeiture. Can the permittee get back some of the bond for the portion of the permitted area that was ripe for release or is the entire bond forfeited?

SEARCH RESULTS: Research was conducted using COALEX, LEXIS and prior COALEX State Inquiry Reports. According to the regulations and their preambles in the Federal Register, the permittee must make a written request from the regulatory authority and follow certain regulations before any of its bond is released. While some of the decisions indicate that the amount of bond forfeited (entire versus partial or proportional) depends on the language of the bond itself, the most important factor in bond forfeiture is the permittee's need to comply with the regulations and completion of its approved reclamation plan.

Copies of the materials listed below are attached, as indicated.

COALEX REPORTS

COALEX STATE INQUIRY REPORT - 102, "Forfeiture of reclamation bonds; liability period" (1989).

COALEX STATE INQUIRY REPORT - 105. "Bond forfeiture - relationship of bond to permitted area" (1989).

Both Reports include cases that discuss forfeiture of all or only a portion of the bonds. A description of the most relevant cases follow. A copy of the Reports are attached. All of the materials included with the Reports are listed in the ATTACHMENTS section;



however, only the cases from these Reports that are discussed are included with this Report.

AMERICAN CASUALTY CO. v COMMONWEALTH OF PENNA., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 441 A 2d 1383 (Pa Commonw Ct 1982).

The court ruled that the bonds issued by American Casualty to Blue Coal Corp. were penal in nature and that DER "need not prove damages in order to collect on the bonds": "The nature of bonds must be determined from the language of the bond as well as [the Act]." The Act "requires the filing of bonds conditioned on the faithful performance of all of the Act's requirements."

MORCOAL CO. v COMMONWEALTH, 459 A 2d 1303 (Pa Commw Ct 1983).

Morcoal contended that the bonds were indemnity bonds which required DER to prove actual damages sustained in order to collect. The court agreed with DER that the intent of the Mining Act was "that the bonds are penal and, therefore, DER is not required to prove damages actually sustained in order to collect on the bonds."

COMMONWEALTH v OGDEN, 501 A 2d 311 (Pa Commonwealth Ct 1985).

The court concluded that all "bonds required by statute are 'statutory' in nature" and the bonds, here are penal in nature. However, the court stated that the "characterization of the bonds does not control; but rather the areas covered by the bonds.... We hold that each bond was issued as part of a specific permit and not as an umbrella to cover all mining being performed by the operator". It would be more appropriate for a portion of or an entire bond to be forfeited "to complete reclamation on non-permitted areas only when the permitted area is adjacent to or contiguous to the affected off-permit area or is one in which the ecological harm may be traced directly to the specifically permitted area."

ADDITIONAL DECISIONS

ROCKWOOD INSURANCE CO. v COMMONWEALTH, EHB Docket Nos. 78-168-S & 78-166-S, 1981 EHB 424 (1981).

"Rockwood raises another argument with regard to the nature of the bonds not addressed in American Casualty, supra. Rockwood correctly points out that liability accrues upon its bonds in proportion to the area of land affected at a rate set forth per acre in the bond and that liability can be released upon said bonds on a proportional basis. Rockwood argues that this is an indication that the bonds are not intended to be penal. However the rate of accrual, has no affect where, as here, the entire bonded area has been affected by mining operations. As to the release of a portion of the bond, the board notes that...an operator who has completed a separate step of his approved reclamation plan may request the release of the portion of the bond which related to the



completed portion of the reclamation plan. Conversely, unless or until released by the DER, the bonds remain in full force and effect and, of course, there is not testimony here that any portion of any of the bonds at issue has been released."

KING COAL CO. v COMMONWEALTH, EHB Docket No. 83-112-G, 1985 EHB 104 (March, 1985). KING COAL CO. v COMMONWEALTH, EHB Docket No. 83-112-G, 1985 Pa Envirn LEXIS 61, 1985 EHB 604 (July, 1985).

In the initial decision, the Board ruled that "DER is entitled to forfeit that portion of the bond which corresponds to the acreage affected multiplied by the per acre liability specified in the bond terms, whether or not a portion of the permit has been reclaimed.... Where the bond does not provide that liability shall accrue in proportion to the acreage affected, but rather provides that liability shall be for the full amount of the bond, DER is entitled to forfeit the entire amount of the bond if it is demonstrated that more than de minimis violations exist on any portion of the permit area for which the bond was posted."

In the second decision, the Board, reconsidering one of its earlier Conclusions of Law, determined that it could not establish guidelines "for deciding when declaring a bond forfeiture for a violation which was somewhat more than de minimis might be" an error.

MARTIN v COMMONWEALTH, 570 A 2d 122 (Pa Commw Ct 1990). MARTIN AND AMERICAN INSURANCE CO. v COMMONWEALTH, EHB Docket No. 85-120-R, 1988 Pa Envirn LEXIS 186 (1988).

Applying the principles of American Casualty, the court stated that Pa SMCRA "requires a reclamation plan and when the petitioner requested the return of his bonds he was required to file a report attesting to the completion of reclamation.... Because completion of reclamation and a report attesting to such completion are required by the statute and regulation upon which the bonds were conditioned, reclamation is a part of the term 'surface mining' in the context of liability, and, therefore it is the filing of the completion report which triggers the five-year period of liability after which forfeiture of the bonds would be untimely."

THE RONDELL CO. v COMMONWEALTH, EHB Docket NoI 85-136-F, 1988 Pa Envirn LEXIS 151 (1988).

The Board denied Rondell and DER's motions for summary judgment finding that DER failed to break down the violations by specific mining permits and had not specified how much acreage had been affected under each permit. Also deferred until "the end of the proceeding" was Rondell's contention that "DER was barred from forfeiting some of these bonds because its inspectors issued inspection reports recommending that the bonds be released".



CRATTY, GOWER & HYDIKE, INC. v COMMONWEALTH, EHB Docket No. 91-029-E, 1991 Pa Envirn LEXIS 110 (1991).

DER sought a ruling "that the bonds in question, though posted in increments for various phases of them mining of this site, nevertheless apply to the entire site." The Board agreed, stating "The bond contains no language indicating DER's interpretation of this language is in error. Finally, we have previously held that unless the bond is written for liability to accrue proportionally to the acreage affected, a deficiency anywhere on the bonded are caused by mining is ground for the bond's forfeiture."

The Board did not rule on CGH's assertion that "DER unconstitutionally forced it to waive the right to seek partial bond release by DER when a quantifiable portion of the site reclamation was completed" as DER failed to address the issue in its supporting brief.

REGULATORY HISTORY

The following Federal Register preambles to final rules and an OSM Directive are enclosed for background.

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Preamble -- Final rule.

Part 807: Procedures criteria and schedule for the release of bonds. Part 808 Performance bond forfeiture criteria and procedures.

45 FR 52306 (AUGUST 6, 1980). Final rules. Performance bonding.

48 FR 32932 (JULY 19, 1983). Final rule. Bonding and insurance requirements.

Sec. 800.40(a)(1). "The permittee may file an application with the regulatory authority for the release of all or part of a performance bond."

OSM DIRECTIVE, Subject No. REG-10, Transmittal No. 339, "Bond Forfeiture" (Issued 5/87).

53 FR 994 (JANUARY 14, 1988). Final rule. Bond release application.

56 FR 59992 (NOVEMBER 26, 1991). Final rule.

DOI "is amending its bonding regulations to require a written affirmation of the completion of each phase of land reclamation when bond release for that phase is being sought."

ATTACHMENTS



1. COALEX STATE INQUIRY REPORT - 102, "Forfeiture of reclamation bonds; liability period" (1989).
 - A. "Regulating Financial Responsibility For Bankrupt Operators", Douglas F. Brennan, July, 1987.
 - B. *COMMONWEALTH v OGDEN, 501 A. 2d 311 (Pa. Commw. Ct. 1985)
 - C. PERSONAL SERVICE INSURANCE CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1986) [No. 85 CA 1, Fourth Appellate Dist.]
 - D. PERSONAL SERVICE INSURANCE CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1985) [No.418, Fourth Appellate District]
 - E. PERSONAL SERVICE INSURANCE CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1985) [No. 419, Fourth Appellate District]
 - F. PERSONAL SERVICE INSURANCE CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1985) [No. CA-85-1, Fifth Appellate District]
 - G. PERSONAL SERVICE INSURANCE CO. v MAMONE, Slip Opinion (Ohio Ct. App. 1985) [No. CA-85-4, Fifth Appellate District]
 - H. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET v INTEGRITY INSURANCE CO., 759 S.W. 2d 67 (Ky. Sup. Ct. 1988)
 - I. ALLIED FIDELITY INSURANCE CO. v ENVIRONMENTAL QUALITY COUNCIL, 753 P. 2d 1038 (Wyo. Sup. Ct. 1988)
2. COALEX STATE INQUIRY REPORT - 105. "Bond forfeiture - relationship of bond to permitted area" (1989).
 - A. COALEX STATE INQUIRY REPORT - 102 and its attachments
 - B. 30 C.F.R. Sec. 800.50 Forfeiture of bonds
 - C. 30 C.F.R. Sec. 800.40 Requirements to release performance bonds
 - D. 30 C.F.R. Sec. 800.11 Requirement to file a bond
 - E. 25 Pa. Code Sec. 86.182 Procedures
 - F. 25 Pa. Code Sec. 86.171 Procedures for seeking release of bond
 - G. 25 Pa. Code Sec. 86.172 Criteria and schedule for release of bond
 - H. PERSONAL SERVICE INSURANCE CO. v CALL, 459 N.E.2d 1307 (1983)
 - I. TIGER CORP. v CALL, 456 N.E.2d 554 (1982)
 - J. STATE OF TENNESSEE v GULF AMERICAN FIRE & CASUALTY CO., 680 S.W.2d 455 (1984)
 - K. *MORCOAL CO. v COMMONWEALTH OF PENNSYLVANIA, 459 A.2d 1303 (1983)
 - L. *AMERICAN CASUALTY CO. v COMMONWEALTH OF PENNSYLVANIA, 441 A.2d 1981 (1982)
 - M. AMERICAN DRUGGISTS INSURANCE CO. v COMMONWEALTH OF KENTUCKY, 670 S.W.2d 485 (1984)
 - N. SOUTHWEST PENNSYLVANIA NATURAL RESOURCES, INC. v COMMONWEALTH OF PENNSYLVANIA, 465 A.2d 108 (1983)
 - O. CITY OF INDEPENDENCE v MAYNARD, 495 N.E.2d 444 (1985)

[NOTE: Only the asterisked items are included with the Reports.]



3. ROCKWOOD INSURANCE CO. v COMMONWEALTH, EHB Docket Nos. 78-168-S & 78-166-S, 1981 EHB 424 (1981).
4. KING COAL CO. v COMMONWEALTH, EHB Docket No. 83-112-G, 1985 EHB 104 (March, 1985).
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8. THE RONDELL CO. v COMMONWEALTH, EHB Docket Nol 85-136-F, 1988 Pa Envirn LEXIS 151 (1988).
9. CRATTY, GOWER & HYDIKE, INC. v COMMONWEALTH, EHB Docket No. 91-029-E, 1991 Pa Envirn LEXIS 110 (1991).
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