

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL

FILED
MAR 12 2002

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF the petition for review)
by Rosebud Coal Sales Company of a decision by)
the Administrator of the Land Quality Division on)
Category 4 Full Incremental Bond Release)
(TFN 3 3/375))

Doc. No. 02-4200

PETITION FOR HEARING BY ROSEBUD COAL SALES COMPANY

Pursuant to Wyoming statute section 35-11-112(a)(iii) and Chapter I, General Rules of Practice and Procedure, Rosebud Coal Sales Company ("RCSC"), a Wyoming corporation in good standing, by and through its undersigned counsel, hereby petitions the Environmental Quality Council for a hearing in this case contesting the administration or enforcement of the law, rules, and regulations as represented by the attached decision (Exhibit 1) by the Administrator of the Land Quality Division dated March 5, 2002. In support of this petition, RCSC provides the following:

1. Name and address of petitioner and attorney, if any:

Rosebud Coal Sales Company
Attn: Bill Hill, Mine Manager
Black Butte Coal Company
Box 98
Point of Rocks, WY 82942

Nancy D. Freudenthal
Davis & Cannon
2710 Thomes Ave.
Box 43
Cheyenne, WY 82003-0043

2. The action, decision, order or permit upon which a hearing is requested or an objection is made:

See attached letter dated March 5, 2002, from Richard A. Chancellor, Administrator, Land Quality Division.

3. A concise statement of the facts on which the request or protest is based:

RCSC argues the following points to reverse the decision by the Administrator that RCSC's bond release package is technically inadequate, which effectively stops the review process and denies the bond release request:

a. The Administrator has no legal authority to reject a bond release package for technical inadequacies. Once the application is deemed complete and the inspection occurs (both of which have happened here), the Director (not the Administrator) must make a decision to release or not to release all or part of the bond. LQD Chapter 15, Section 4. Administrative rules and regulations have the force and effect of law. MB v. Laramie County Department of Family Services in Interest of LB, 933 P.2d 1126, 1130 (Wyo. 1997). An administrative agency is bound to strictly follow its own rules and regulations. Id. (emphasis added.) Failure to do so may result in reversal of the agency's action. Painter v. Abels, 998 P.2d 931, 200 WY 32, ¶24. The Administrator's failure to follow the properly promulgated rules is **per se** arbitrary and capricious. Bowen v. State, 900 P.2d 1140, 1142 (Wyo. 1995).

b. The Administrator is illegally attempting to enforce vegetation sampling methods which meet Appendix A procedures in the face of a permit containing different approved sampling methods and in violation of the agency's properly promulgated rules and published guidelines. There is no rule requiring bond release vegetation sampling be conducted in compliance with Appendix A. Appendix A is referenced only for

premining vegetation data collection and it was adopted long after the reclamation and RCSC's revegetation monitoring program were implemented. See LQD Ch. 2, §2(a)(vi)(C) and Ch. 4, §2(d)(x)(E)(I). Consequently, Appendix A does not apply to this bond release package. The vegetation monitoring rules for bond release require only quantitative sampling in compliance with the approved plan in the permit. LQD Ch. 2, §2(b)(vii)(C) and Ch. 4, §2(d)(xi). RCSC has met this standard and fully complied with its quantitative sampling program approved in its permit. [See timeline below, item dated 6/00] Furthermore, to change its quantitative sampling program at this late date violates Guideline 14 which directs, "[f]or the sake of consistency and data comparability among data sets, the operator should use the same methodology throughout the duration of the revegetation monitoring program." Finally, the Administrator's action rejecting this bond release package because of RCSC's sampling methodology flies directly in the face of the fact that this exact methodology has been followed with vegetation sampling for all prior annual reports filed with LQD and it was also followed in two previously-approved bond release packages (see items dated 8/99 and 8/00 below). It is important to note that the Administrator directed RCSC to review and follow these prior bond release packages for the current submittal (see item dated 2/01 below). A more thorough explanation of the use and validity of RCSC's sampling methodology is attached as Exhibit 2, in the form of a response to Comment 1 from LQD.

c. The Administrator purports to reject the Category 4 bond release package based on failing to meet permit commitments on species diversity. [See ¶2, March 5, 2002 letter] RCSC's permit makes no commitment on species diversity for Category 4 lands. [See RCSC permit, RP-42f and Section X of the Reclamation Plan]

d. The Administrator purports to reject the Category 4 bond release based on an inadequate demonstration that the reclamation has the ability to withstand grazing. By documentation dated June 13, 2000 (Sixth Round Technical Review; TFN 3 4/107), all lands included in this Category 4 bond release package are “old” Category 4 lands. As such, RCSC is only required to submit a Landowner or Lessee Statement saying the lands are capable of withstanding grazing pressure at least comparable to pre-mine conditions. [RCSC permit, RP-42] The “seven criteria” referred to by the Administrator apply only to Category 5 lands. [RCSC permit, RP-42a] Furthermore, no production data is required for these “old” Category 4 lands. [RCSC permit, RP-42] Nonetheless, RCSC has conducted a vegetation survey of the area that can be used to supplement the evaluation of whether the Category 4 area can withstand grazing. Finally, the inspection team all noted the significant presence of historical grazing on the land and its ability to withstand grazing. Under these facts, the rejection of RCSC’s bond release package for inadequate demonstration of grazing on this point is arbitrary, capricious and an abuse of discretion.

e. The Administrator references “numerous questions” that remain unresolved. RCSC has been working to address LQD’s Third Round Comments and would note that prior packages have gone through as many as six rounds of technical comments without being rejected. Rejection on the basis of unanswered questions at this time is arbitrary, capricious and an abuse of discretion.

f. The Administrator discusses the presence of “undesirable plant species” on the reclamation and recommends “possible management scenarios” prior to additional sampling. There is no dispute that RCSC implemented their approved revegetation

program. RCSC has done nothing to introduce undesirable species beyond planting the approved seed mixture and hay mulch that was certified by the State as weed-free. RCSC has met or exceeded all requirements for long-term management practices and is surprised that this new issue is surfacing after 20-25 years of inspections (following permanent seeding) with no prior mention of “undesirable plant species.” Specifically, RCSC controlled and minimized the introduction of noxious weeds into the revegetated areas for a period of five years after the initial seeding as required by LQD Chapter 4, §2(d)(xiv), and voluntarily continues to spray for weeds as a good husbandry practice. RCSC protests the suggestion that management of plant species is required at this time beyond currently implemented good husbandry practices. A more thorough explanation of the issue of “weeds in the reclamation” is attached as Exhibit 3, in the form of a response to Comment 9 from LQD.

g. By his letter dated March 5, 2002, the Administrator encourages RCSC to contact John Wagner and arrange meetings “to achieve mutual agreement on the components and format for Full Incremental Bond release applications.” RCSC questions this recommendation as John Wagner is not on the bond release team for this application. It is important to note that RCSC has had two separate team leaders for this package alone, and neither team leader was the leader for the two earlier approved bond release packages. Having a new person involved at this late date significantly compromises and undermines the stability and continuity of the bond release review process.

RCSC further offers the following narrative timeline in support of a conclusion by the Director to overturn and vacate the Administrator's decision that RCSC's application is technically inadequate:

- 3/79 Approval of RCSC's procedures for premining vegetation sampling methodology by Land Quality Division (LQD). The procedures identify the use of a 25 meter line with 125 points per line (every 20 centimeters).
- 1/83 Submittal by RCSC of Appendix D-8 on vegetation procedures for inclusion in its approved permit. Appendix D-8 describes the process of establishing a grid system for control areas and affected range sites. The grid is established by an internal grid system employed by the computer. [D8-7-D8-8] Transects used for sampling are identified as 25 meters long. [D8-8]
- 1994 Issuance of Guideline 14 to promote consistency in the design and implementation of monitoring programs on reclaimed areas. Guideline 14 states, "**For the sake of consistency and data comparability among data sets, the operator should use the same methodology throughout the duration of the revegetation monitoring program.** All sampling procedures to be used during the revegetation monitoring program should be presented to, and discussed with, WDEQ/LQD for approval and incorporation into the permit document." [p.4, emphasis in original]
- 2/96 Approval of RCSC's revegetation monitoring plan consistent with Chapter II, Sect. 2(b)(vii)(C). [RP-45a] Neither this regulation nor the permit references Appendix A. RCSC's permit also describes that cover sampling will be done using a 25 meter line. [RP-45b]
- 8/99 Approval of RCSC's bond release package for Category 4 lands (TFN 3 4/229). This Final Bond Release used the same vegetation sampling methodology as in the pending package. On vegetation sampling, several comments say, "The accepted procedure for locating sampling points is to first delineate the boundaries of the area to be sampled (in this case, the bond release area) and then locate the sample points/transects randomly within the delineated area." RCSC followed this procedure for all bond release packages including the one at issue.
- 6/00 Approval of RCSC's final bond release criteria as a permit amendment. RCSC's bond release criteria in its permit states vegetation will be sampled by the same methods and for the same parameters as were in the Baseline Evaluation (Appendix D-8 of Permit 376 T4) and the Approved Interim Revegetation Monitoring program (pages RP45a-RP46 of the Approved Reclamation Plan of Permit 376-T3). The permit continues by saying that species cover, life form cover, total revegetation cover, and total ground cover data will be taken by a Line Point Transect, with a 25 meter line and 125 Points or "hits" per line. [RP-

- 42] The permit also clearly states “[a] sampling grid (**size determined by the area of the reclaimed logical unit**) will overlay the bond release unit. The intersections will be numbered and randomly drawn for transect locations.” [RP-42d, emphasis added] Appendix A is only referenced in RCSC’s permit on methods to determine sample size (intensity), and does not control the sampling methodology. [RP-42c]
- 8/00 Approval of RCSC’s Final Bond Release Application for Category 5 Lands (TFN 3 5/299). This Final Bond Release used the same vegetation sampling methodology as in the pending package. On vegetation sampling, the comments say, “**Response acceptable**. RCSC has provided an explanation of how transects were located.”
- 1/01 Meeting between LQD and RCSC to discuss Rosebud’s anticipated 2001 bond release packages. Meeting discussed methodology for vegetation monitoring. Larry Kleinman stated that the vegetation monitoring has been done consistent with the requirements in Rosebud’s bond release evaluation document. [See letter from NDF dated 1/22/01]
- 2/01 Direction by Chancellor for the anticipated 2001 bond release packages (response to NDF letter). Chancellor’s letter specifically directs RCSC to review the past Category 4 and Category 5 packages (including comments), the permit information specifying final bond release criteria, and the LQD policy document on “How to handle Bond Release on Coal Mined Lands Affected During Various Regulatory Time Frames.” Chancellor’s letter specifically states these documents include bond release criteria for grazing, vegetation sampling, and species diversity/composition. There is no reference in the letter to Appendix A.
- 5/01 Submittal by RCSC of Category 4 Final Bond Release package (TFN 3 3/375).
- 5/01 Declaration by LQD that RCSC’s Category 4 package is complete.
- 6/01 LQD First Round Comments on RCSC’s Category 4 package.
- 7/01 Final Bond Release Inspection. No inspection report or summary of the inspection has been provided to RCSC, but copies of individual inspection reports were obtained in LQD files.
Moxley’s comments on his inspection report state “the reclaimed landscape appears well vegetated and stable with relatively few gullies evident.” He notes concern with reclamation area 89 “which exhibits significant weed infestations” (extensive patches of cheatgrass and smaller patches of thistle).
Foster’s comments state the land meets the criteria required for category 4 bond release.
Bilbrough’s comments state “in general, the vegetation was well-established with acceptable cover.” With the exception of areas with “serious weed problems”, she notes “much of the area appears to be acceptable for bond release by category

4 standards.” She notes a concern that by bond release, “LQD will be setting a standard by which all future packages are judged,” and goes on to say “LQD does not have a policy on the level of acceptable weedy species in bond release categories.”

Waitkus concludes “overall, the quality of the reclamation results are sufficient for Category 4 land.”

Giurgevich observed that plant species “appeared to be persistent and self-renewing” and that “all the reclaimed lands have been grazed for a number of consecutive years.” He further noted that reclamation was “compromised” by downy cheatgrass. On the vegetation sampling program, Giurgevich notes his questions about methodology but concludes by saying, “[t]he distribution of sample points does not appear unusual.”

7/01 Responses by RCSC to LQD’s First Round Comments.

9/01 LQD Second Round Technical Review comments.

12/01 Responses by RCSC to Second Round of LQD Comments.

2/02 LQD Third Round Technical Review comments.

3/02 Determination that RCSC’s Category 4 Bond Release package is technically inadequate.

4. Relief requested.

RCSC has sought review by the Director and is awaiting a decision on its petition. RCSC respectfully requests the Environmental Quality Council conduct a hearing in this case, and overturn and vacate the Administrator’s decision to reject RCSC’s Category 4 bond release package for technical inadequacies, as unsupported by the facts, unsupported by a binding permit, in excess of authority, without observance of the procedures required by law, arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with law.

Dated this 12 day of March, 2002.



Nancy D. Freudenthal
DAVIS & CANNON
P.O. Box 43
Cheyenne, WY 82003
(307) 634-3210 (phone)
(307) 778-7118 (telefax)

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing petition upon the following individuals by hand-delivery on this 12 day of March, 2002, addressed as follows:

Chairman
Environmental Quality Council
Herschler Building, 122 West 25th St.
Cheyenne, WY 82002

Dennis Hemmer, Director
Department of Environmental Quality
Herschler Building, 122 West 25th St.
Cheyenne, WY 82002

Mr. Richard A. Chancellor, Administrator
Land Quality Division
Department of Environmental Quality
Herschler Building, 122 West 25th St.
Cheyenne, WY 82002

John Burbridge, Attorney for Land Quality Division
Attorney General's Office
Attn: Land Quality Division
Department of Environmental Quality
Herschler Building, 122 West 25th St.
Cheyenne, WY 82002

