

# BEFORE THE RECLAMATION COMMISSION

HAROLD D. & CATHY BELL,

Appellants,

-vs-

DIVISION OF MINERAL RESOURCES  
MANAGEMENT,

Appellee,

and

SIDWELL MATERIALS, INC.,

Intervenor.

Case No. RC-10-020

Review of Chief's Decision;  
Permit IM-1089 (Sidwell Materials, Inc.)

## FINDINGS, CONCLUSIONS & ORDER OF THE COMMISSION

Appearances: Mark A. Thomas, Eric M. Gordon, Counsel for Appellants Harold D. & Cathy Bell; George Horvath, Megan DeLisi, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Scott D. Eickelberger, Counsel for Intervenor Sidwell Materials, Inc.

Date Issued: November 16, 2011

## BACKGROUND

On November 23, 2010, Appellants Harold D. & Cathy Bell filed with the Reclamation Commission a notice of appeal from a letter, dated October 22, 2010, and issued by the Chief of the Division of Mineral Resources Management [the "DMRM"]. The Chief's October 22, 2010 letter addressed several concerns, raised by the Bells, associated with Sidwell Materials, Inc.'s ["Sidwell's"] reclamation of the Bell property pursuant to Industrial Minerals ["IM"] permit IM-1089.

On March 17, 2011, Sidwell was **granted** intervenor status in this appeal. On July 6, 2011, a site view was conducted in this case.

This cause came on for hearing before the Reclamation Commission on November 2, 2011. At hearing, the Appellants presented evidence. Appellee and Intervenor did not present any evidence.

After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

## **FINDINGS OF FACT**

1. The Bells own property in Belmont County, Ohio, located at 55259 Trough Run Road, Bellaire, Ohio. This property consists of 38 acres of land, 26 acres of which are located on the north side of Trough Run Road, and 12 acres of which are located on the south side of Trough Run Road. The Bell's residence is located on the north side of Trough Run Road.

2. The Bell home was built by Mr. Bell's great grandfather. In 1994, the Bells took possession of the property through a land contract. In 2004, the Bells completed the land contract, and obtained fee simple title to this property. In 1995, the Bells engaged in construction activities, adding a deck to the north-east side of the house and constructing an addition on the north-west side of the house, which addition "squared off" the back (north side) of the house. When constructing the additions, the Bells installed a French drain along the north side of the house's foundation. The French Drain directs surface drainage to the front of the home and towards Trough Run Road.

3. Prior to 1994, limestone mining occurred on the Bell property. This area was initially mined by Widmor Coal. The mining was conducted pursuant to mining permit IM-1089. Permit IM-1089 was transferred by Widmor Coal to another operator. The permit was ultimately transferred to Sidwell Materials.

4. Mining on the Bell property occurred on the north, east and west sides of the Bell residence. The primary mining area was located to the north of the Bell residence. During the late 1990's, a mining-related highwall<sup>1</sup> was created approximately 300 feet north of the Bell residence. The highwall was originally about 60 feet high, but was "filled in" during reclamation, to create its current height of approximately 30 feet. Mining came to within a few feet of the Bell residence. A haul road was located less than 14 feet behind (north of) the Bell home and downslope of the highwall.

5. In late 2000 or early 2001, mining concluded on the Bell property. Thereafter, Sidwell engaged in the reclamation activities on this property.

6. During reclamation, the haul road (located within 14 feet of the north side of the Bell residence) was removed. A drainage ditch, associated with this haul road was also removed.

7. The Bells have had problems associated with surface drainage coming from the highwall area behind their residence and flowing towards the north side of their home. The land behind the Bell residence was graded by Sidwell. However, the testimony as to exactly what was specifically graded near the residence was unclear. The grade of this ground is now such that the land behind the Bell home slopes from the highwall area towards the back of the Bell home. During rainfall events, surface water collects behind (on the north side of) the Bell home. During rainfall events, surface water also enters portions of the Bell home. "Piping" along the north foundation of the Bell home is evident, indicating that surface drainage is infiltrating the ground along the northern foundation of the Bell home.

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<sup>1</sup> "Highwall" is defined at O.A.C. §1501:14-1-01(V) as: "the steeply inclined unexcavated face of exposed consolidated materials or exposed consolidated overburden in an open cut of a surface mine."

8. On or before 2003, the Bells approached the DMRM with concerns regarding surface drainage from the area being reclaimed by Sidwell, which drainage was reaching their residence. In 2003, at the direction of DMRM, Sidwell installed a French drain at the toe of the slope behind the Bell residence. Also, during 2003, the Bells placed approximately two tons of gravel behind their residence, in an attempt to mitigate the amount of drainage from the reclaimed area that was reaching their home.

9. Prior to 2008, the Bells made several complaints to the DMRM regarding the reclamation of permit IM-1089.

10. In March 2008, the performance bond posted to ensure the reclamation of permit IM-1089 was released to Sidwell.<sup>2</sup> The Bells were not aware of this release of bond until October 2010.

11. Sometime in 2008, Division personnel and representatives of Sidwell met with the Bells at their property. Dave Clark, of the Division, instructed Sidwell to install a diversion ditch approximately 100 feet behind the Bell home. The purpose of this ditch was to collect surface runoff from the reclaimed area and direct that drainage away from the Bell home.

12. Between 2008 and 2009, DMRM personnel and representatives of Sidwell, met with the Bells on at least four occasions, to discuss reclamation concerns raised by the Bells. These concerns included: (1) the stability of the highwall located approximately 300 feet behind the Bell residence (the Bells reported that rocks and trees from the highwall area were falling towards their home), (2) the surface drainage that was flowing towards, and into, the Bell home from the highwall area, and (3) the lack of topsoil and vegetation in certain areas behind the Bell home.

13. In 2009, the Bells placed another ton of gravel behind their home, in an attempt to lessen the surface drainage reaching their home.

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<sup>2</sup> The parties stipulated that bond was released on this area in March 2008. No evidence was presented regarding the DMRM's evaluation of the property at the time of bond release or regarding any factual determinations made at the time of release.

14. After filing a written complaint with the Department of Natural Resources,<sup>3</sup> on October 22, 2010, the Bells received a letter from DMRM Chief John Husted. This letter was the Bells' first indication that reclamation performance bond on their property had been released by DMRM. The October 22, 2010 letter addressed reclamation concerns raised by the Bells and indicated that Sidwell would perform additional "maintenance work" on the reclaimed property behind the Bell home. The Chief's October 22, 2010 is the action of the Chief under appeal.<sup>4</sup>

15. On March 9, 2011, consultant Robert Darren Whitlock visited the Bell property. At hearing, Mr. Whitlock was qualified as an expert in geology and hydrology. It was raining at the time of Mr. Whitlock's inspection of the Bell property. Mr. Whitlock noted the following:

- The Bells' back yard was saturated with surface drainage.
- Surface drainage was entering the Bell house via the back porch.
- Rocks had collected in the ditch (constructed by Sidwell), located at the base of the highwall.
- Rocks and surface drainage were present in the ditch (constructed by Sidwell), located between the highwall and the Bell home (approximately 100 feet north of the Bell home). However, water was not "flowing" in this ditch, indicating that the ditch was not fully functional.
- The reclaimed ground on the north side of the Bell home was sloped from the highwall towards the Bell home. Water was flowing from the reclaimed area behind the Bell house towards, and into, the home.
- The ground behind the Bell house was hard-packed, with pieces of shale, rock and clay present. The ground directly behind the Bell house was not well vegetated, and barren or sparsely-vegetated areas existed.

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<sup>3</sup> The Ohio Department of Natural Resources is the "umbrella" organization for several agency divisions, including the Division of Mineral Resources Management.

<sup>4</sup> This letter, while attached to the notice of appeal, was never introduced as an exhibit at hearing and was never entered into evidence.

Mr. Whitlock testified that to remedy the drainage problems on the north side of the Bell's home, the ground behind the home would need to be regraded, so that the ground would slope away from the house, and a swale (or some other physical barrier) would need to be created between the toe of the hill and the relatively flat area behind the Bell home, in order to divert runoff away from the north side of the Bell home.

16. Mrs. Cathy Bell testified at hearing that the following problems currently exist on her property, which problems she attributes to Sidwell's mining and reclamation operations:

1. A barren area, approximately 4 acres in size exists on the north side of the Bell's home. Mrs. Bell testified that topsoil was not replaced in this area, and that Sidwell did not successfully revegetate this area. The Bells do have dogs, which use this area. For the past several years, the Bells have applied seed, fertilizer and mulch to this area, but cannot achieve vegetative growth.

2. Debris from the highwall behind the Bell's home, including rocks and trees, have fallen from the highwall towards the Bell home. A ditch had been installed by Sidwell (possibly in 2003) at the base of the highwall to catch errant rocks and debris. A second ditch, installed by Sidwell to control drainage (in 2008), was also available to catch errant rocks and debris. However, Mrs. Bell testified that some debris still "misses" both ditches and approaches the area of the Bell home and back yard.

3. The grade of the reclaimed ground behind the Bell house, slopes from the highwall towards the Bell house. Surface drainage, following a rainfall event, flows towards the north side of the Bell home, saturating the yard behind the home and entering the back of the Bell house. Sidwell had constructed a diversion ditch approximately 100 feet behind the Bells' home (between the highwall and the house), which ditch collects some drainage. Drainage not caught by the diversion ditch, or drainage off ground located downslope of the diversion ditch, flows towards the Bells' home. The Bells have attempted to mitigate damages to their home caused by surface drainage, by installing double French drains along the northern side of the home, hand-digging ditches behind their home to divert drainage, and placing rock behind their home to try and create a barrier to the flow of drainage. Ultimately, the Bells' attempts to divert surface drainage away from their home have not corrected the problem.

17. Activities conducted by Sidwell on the Bell property after March 2008, include, but are not limited to, (1) installation of the "second drainage ditch" between the Bell residence and the highwall area, (2) removal of two culverts in the area of the reclaimed access road, and (3) construction of a berm at the toe of the highwall.

## DISCUSSION

Industrial minerals ["IM"] mining operations are permitted and regulated by the Chief of the Division of Mineral Resources Management under the authority of Ohio Revised Code Chapter 1514. Ohio's mining law requires that mining and reclamation activities proceed in accordance with the requirements of Chapter 1514, and consistent with the provisions of a mining and reclamation plan approved by the DMRM.<sup>5</sup> *See O.R.C. §1514.02.*

A major focus of Ohio's mining law is ensuring adequate reclamation of all areas affected by mining. Ohio's mining and reclamation law requires that performance bond be posted in support of a IM mining permit. *See O.R.C. §1514.04.* The purpose of this bond is to ensure the successful and timely reclamation of properties affected by mining. Performance bonds supporting IM permits are released in two "phases." One-half of the bond is released after the operator has successfully performed all reclamation, with the exception of vegetation. The remaining bond is released after the operator has established a successful diverse vegetative cover, which has survived for two growing seasons. *See O.R.C. §1514.04; O.A.C. §1501:14-3-10(D).* In this case, the Commission set forth in its Order of October 19, 2011, that the time period for appealing the bond release had lapsed. Therefore, the Chief's decision on bond release can no longer be appealed, and issues relating to the release of Sidwell's performance bond are not before the Commission in this appeal.

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<sup>5</sup> The mining and reclamation for permit IM-1089 was not introduced into evidence at hearing. Therefore, the Commission is unfamiliar with the site-specific requirements of this plan.

No specific notice of bond release is required to be provided to landowners under Chapter 1514. The Chief's October 22, 2010 letter under appeal, provided the Bells with their first notice that bond had been released this portion of the permit IM-1089 area in March of 2008. Even after the release of performance bond for permit IM-1089, both DMRM and Sidwell continued to be "involved" with the Bell property. Meetings between the Bells, DMRM and Sidwell were conducted after the release of bond, and Sidwell engaged in "maintenance work" to address concerns raised by the Bells, specifically regarding surface drainage and highwall safety. It is reasonable to conclude that the continued involvement of DMRM in this site after bond release means that further reclamation may have been required. After bond release, the continuing jurisdiction of the DMRM at this site is in question.

Here, the Bells have appealed to the Reclamation Commission a decision by the DMRM Chief. This decision was announced through an October 22, 2010 letter, addressing the DMRM's investigation of the Bells' a citizen complaint regarding Sidwell's reclamation.

In this appeal, the Bells shoulder the burden of proving that the DMRM Chief's decision, as articulated in the October 22, 2010 letter, was arbitrary, capricious, or otherwise inconsistent with law. *See O.A.C. 1513-3-16(B)(3)*.

At hearing, the Bells called witnesses Cathy Bell and expert Robert Darren Whitlock. Mrs. Bell testified to the historic and current conditions on the Bell property, and to some of Sidwell's reclamation efforts on this property. Mrs. Bell also testified to actions which she and her husband had taken to attempt to mitigate damages to her home, which damages she believes have been caused by Sidwell's mining and reclamation operations. Mr. Robert Darren Whitlock was qualified as an expert witness in geology and hydrology, and testified to the conditions of the Bell property during his inspection of the property on March 9, 2011.

No witnesses were called at hearing by the DMRM or by Intervenor Sidwell.

The evidence did establish that water issues exist at the Bell residence and that rocks and trees have come down-grade from the highwall. The evidence further established that this property was mined and reclaimed by Sidwell Materials.

The Bells did not present any meaningful evidence regarding the actions taken by DMRM, which are the subject of this appeal. The Bells did not introduce into evidence the October 22, 2010 letter, which is the Chief's "decision" that is the basis for this appeal. The presentation of evidence by the Bells failed to address the controlling legal issue presented in this appeal, which is: whether or not the Chief's "decision," as set forth in the October 22, 2010 letter, was arbitrary, capricious or otherwise inconsistent with law. *See O.R.C. §1513.13 (B)*.

In this case, the majority of the evidence presented related to issues with surface water problems at the Bells' residence. What was not presented was any evidence that the water, or the rocks and trees from the highwall, constituted improper reclamation pursuant to any specific requirements of O.R.C. Chapter 1514. It is not enough to present evidence that a problem exists; an appellant has the burden of establishing that the problem constitutes a violation of the applicable regulatory standards for the particular situation under appeal. In doing this, it is the appellants' burden to prove that the "decision" under appeal is arbitrary, capricious or otherwise inconsistent with law. *See O.R.C. 1513.13 (B)*. No evidence was presented at hearing to establish, based upon the facts of this case, that the actions set forth in the Chief's October 22, 2010 letter constituted arbitrary or capricious conduct by the Chief. Nor was any evidence or argument made that established the Chief's actions, as set forth in the October 22, 2010 letter, to be inconsistent with law. The Appellants' failure to specifically address the Chief's actions set forth in the October 22, 2010 letter at hearing is a fatal flaw.

Moreover in pre-hearing motions, the DMRM argued that the October 22, 2010 letter was a non-appealable decision. The Commission, in its October 19, 2011 Order, set forth that the Chief's October 22, 2010 letter could be an appealable decision if the Chief's letter affected a substantial right. Obviously, the Bells had the burden to establish at hearing that the specific actions taken by the Chief in the October 22, 2010 letter affected a substantial right. No such evidence was presented. Again, the October 22, 2010 letter was not even introduced into evidence. Without any development of the evidence regarding the Chief's actions set forth in the October 22, 2010 letter, it is impossible for the Commission to even determine if the letter affected a substantial right and whether the Chief's letter constituted an appealable "decision." *See Keller Mines v. Division (May 14, 1986), Mahoning App. No. 84 CA 82.*

While the Commission has concerns, particularly regarding the water situation at the Bells' property, it is impossible, based upon the factual record presented at hearing, to conclude that the Chief's October 22, 2010 letter is inconsistent with law, arbitrary or capricious.

## CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this appeal is upon the Appellants Harold D. & Cathy Bell to prove by a preponderance of the evidence that the DMRM Chief's October 22, 2010 decision regarding reclamation of the Bell property pursuant to permit IM-1089 was arbitrary, capricious or otherwise inconsistent with law. *See O.A.C. §1513-3-16(B)(3)*.

2. O.R.C. §1513.13(B) provides:

The commission shall affirm the notice of violation, order, or decision of the chief unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the commission may modify the notice of violation, order, or decision or vacate it and remand it to the chief for further proceedings that the commission may direct.

3. No evidence was presented to establish that the October 22, 2010 letter under appeal is a final appealable order that affects substantial rights of the Bells. *Keller Mines v. Division (May 14, 1986), Mahoning App. No. 84 CA 82.*

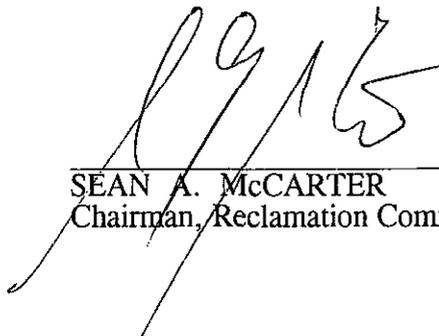
4. No evidence was presented to establish that the October 22, 2010 letter was contrary to law. *O.R.C. §1513.13(B)*.

5. No evidence was presented to establish that the actions set forth in the October 22, 2010 letter were arbitrary or capricious. *O.R.C. §1513.13(B)*.

## ORDER

WHEREFORE, the Commission FINDS that the Appellants have failed to establish that the Chief's October 22, 2010 letter is a final appealable decision, and further FINDS that the Appellants have failed to establish that the actions of the Chief in this matter are contrary to law, or that these actions constitute arbitrary or capricious conduct. Therefore, the Commission FINDS that the Chief's actions were appropriate, and are hereby AFFIRMED.

11/16/11  
DATE

  
SEAN A. McCARTER  
Chairman, Reclamation Commission

### INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas, within thirty days of its issuance, in accordance with Ohio Revised Code §1514.09 and §1513.14 and Ohio Administrative Code §1513-3-22. If requested, copies of these sections of the law will be provided to you from the Reclamation Commission at no cost.

### DISTRIBUTION:

Mark A. Thomas, Via Fax [740-695-9336] & Certified Mail #: 91 7108 2133 3936 6718 6785  
Eric M. Gordon, Via Fax [304-845-9055] & Certified Mail #: 91 7108 2133 3936 6718 6778  
George Horvath, Megan DeLisi, Via Fax [614-268-8871] & Inter-Office Certified Mail #: 6650  
Scott D. Eickelberger, Via Fax [740-454-6975] & Certified Mail #: 91 7108 2133 3936 6718 6761

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DIVISION OF MINERAL RESOURCES  
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**INDEX OF EVIDENCE  
PRESENTED AT HEARING**

**Before:** Sean A. McCarter, Chairman.

**In Attendance:** A. Thomas Althausser, Richard Cappell, Craig Porter and Hearing Officer  
Linda Wilhelm Osterman.

**Appearances:** Mark A. Thomas, Eric M. Gordon, Counsel for Appellants Harold D. &  
Cathy Bell; George Horvath, Megan DeLisi, Assistant Attorneys  
General, Counsel for Appellee Division of Mineral Resources  
Management; Scott D. Eickelberger, Counsel for Intervenor Sidwell  
Materials, Inc.

**WITNESS INDEX**

**Appellants' Witnesses:**

Kathy Bell  
Robert Darren Whitlock

Direct Examination; Cross Examination  
Direct Examination; Cross Examination

## EXHIBIT INDEX

### Appellants' Exhibits:

NO.	DESCRIPTION	Notes
1	Two photographs; northwest corner of the Bell residence; taken in the late 1990's or early 2000's (excavator setting on an area that used to be a haul road); taken by Kathy Bell	1 page
2	Two photographs; Bell backyard, north side of the Bell home, directly behind the screened porch; taken by Kathy Bell	1 page
3	Two photographs; Bell back porch, with standing water; taken by Kathy Bell	1 page
4	Two photographs, back of Bell home (addition) and Bell back yard; taken by Kathy Bell	1 page
5	Two photographs, behind Bell home; taken by Kathy Bell	1 page
6	One photograph, rock in Trough Run Road, taken in June 2011; taken by Kathy Bell	1 page
7	Photograph, north side of Bell home; taken from highwall; taken by Kathy Bell	1 page
8	Curriculum Vitae; Robert Darren Whitlock	3 pages
9	Photograph, north side of Bell house, area behind Bell house; taken by Robert Whitlock on March 9, 2011	1 page