

PACIFIC COAST COAL COMPANY
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2002-249 and 2002-250

Decided January 6, 2003

Petition for discretionary review of a decision of Administrative Law Judge William E. Hammett affirming in part and reversing in part a Permit Revision Order issued by the Office of Surface Mining Reclamation and Enforcement, and appeal from a decision of the Judge affirming issuance of Notices of Violation, Nos. 99-141-244-001, 00-141-244-001, and 01-141-244-01. Hearings Division Docket Nos. DV 99-8-R, DV 2001-3-R, DV 2001-4-R, and DV 2001-5-R.

Petition for discretionary review granted; Administrative Law Judge's decision on permit revision order adopted as the opinion of the Board; Administrative Law Judge's decision on application for review of notices of violation affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally--Surface Mining Control and Reclamation Act of 1977: Tipplers and Processing Plants: At or Near a Minesite

Where disposal on a mine site of clean fill from off-site sources is not authorized by the permit then in effect, such disposal constitutes a violation. However, where the permit is ambiguous as to whether on-site disposal of coal processing waste stockpiled at a coal processing plant was authorized, the ambiguity will be resolved in favor of the permittee.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

The use of fill material from sources external to a mine site for reclamation of the mine site constitutes a "surface mining and reclamation activity" subject to the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations.

3. Surface Mining Control and Reclamation Act of 1977:
Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Permits: Public Health and Safety: Generally

A permittee is required to strictly adhere to the specific terms of the authorization set out in its approved permit. The Office of Surface Mining may properly approve permit modifications to ensure that fill material directly or incidentally utilized in mine reclamation meets applicable statutory and regulatory environmental standards and does not endanger the public health and safety, such as by restricting the sources of fill material that may be disposed on a site. Where a permittee places fill material from sites that are not approved in its permit on its mine site, a violation has occurred.

4. Surface Mining Control and Reclamation Act of 1977:
Permits: Revisions

OSM is authorized to order the "reasonable revision" of a permit where it is reasonably designed to "ensure compliance with the Act and the regulatory program."

5. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977:
Permits: Revisions

When the Office of Surface Mining orders the revision of a permit and its decision is challenged by the permittee, the Office of Surface Mining bears the burden of presenting a prima facie case that the revision is reasonable and designed to ensure compliance with the Surface Mining Control and Reclamation Act of 1977 or

regulatory program, whereupon the burden devolves to the permittee who has challenged the revision to overcome that case by a preponderance of the evidence. 43 CFR 4.1366(b). Where the record contains ample evidence demonstrating the need for additional permit provisions governing disposal of materials on site and specifying how to ascertain the content of such materials, and where the permittee fails to show otherwise, OSM's permit revision order is properly affirmed.

APPEARANCES: David J. Morris, General Manager, Pacific Coast Coal Co., Black Diamond, Washington, for the Pacific Coast Coal Co.; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pursuant to 43 CFR 4.1271(a), the Pacific Coast Coal Company (PCC) has appealed from a February 21, 2002, decision of Administrative Law Judge William E. Hammett denying its application for review of and affirming Notices of Violation (NOV) Nos. 99-141-244-001, 00-141-244-001, and 01-141-244-001. ^{1/} We will refer to this decision as the "NOV decision." The NOV's were issued by the Office of Surface Mining Reclamation and Enforcement (OSM), concerning PCC's surface coal mining and reclamation operations under Permit No. WA-0007C (Permit) for the John Henry No. 1 Mine (Mine). (Ex. A-2.) The NOV's alleged violations of the provisions of 30 CFR 773.17(b) occurring on August 19, 1999, November 16, 2000, and January 22, 2001, respectively. The appeal from the NOV decision was docketed as IBLA 2002-250.

In addition, pursuant to 43 CFR 4.1369(a), PCC has filed a petition for discretionary review (PDR) of a February 21, 2002, decision of Judge Hammett affirming in part and reversing in part a December 15, 2000, Permit Revision Order (PRO) No. 1 issued by OSM. We will refer to this decision as the "PRO decision." The PDR of the PRO decision was docketed as IBLA 2002-249.

^{1/} We note that, although OSM filed a response to PCC's PDR on Apr. 15, 2002, the case file does not include proof of service of the PDR on OSM. We therefore do not know the date on which OSM received it. We also do not know when the City of Black Diamond, Washington (the City), was served. Thus, we cannot determine the deadlines set forth in 43 CFR 4.1369(c) and (d). However, we find nothing in SMCRA or the Department's regulations which precludes us from now addressing the merits of the PDR.

We also note that on May 23, 2002, PCC requested temporary relief pursuant to 43 CFR 4.1367. That request was withdrawn on June 5, 2002, after OSM granted another minor permit revision.

Because they arise from the same set of facts and raise related questions of law and fact, we hereby consolidate PCC's PDR and appeal for final disposition by the Board. We have reviewed the record and arguments of the parties and conclude that Judge Hammett's decisions capably determined the facts based on the evidence before him and that he correctly applied the law to the issues presented. However, for the reasons stated infra, we have determined that his NOV decision as it pertains to the first NOV (No. 99-141-244-001) should be modified. In all other respects, Judge Hammett's NOV decision is affirmed. The PRO decision is appended as Attachment 1 and is adopted as the opinion of this Board.

Both cases concern off-site soil and other materials disposed of at PCC's Mine and OSM's efforts to regulate and control such disposal activity. PCC has been conducting surface coal mining and reclamation operations at the Mine under its OSM Permit since June 12, 1986. The Mine is situated in King County, Washington, on private land in T. 21 N., R. 6 E., Willamette Meridian, Washington, and is partially within the municipal limits of the City, not far from the metropolitan Seattle area. 2/

On August 18, 1999, OSM personnel observed trucks hauling material to the Mine site and disposing of it on top of a backfilled spoil slope. PCC personnel identified that material as a sand-based waste product from a sand and gravel mining operation called Lakeside Industries (Lakeside) near Issaquah, Washington. The material was light brown and appeared to be a sand/clay mix. Later that day, PCC personnel indicated that the material came from a "belt filter process that the sand and gravel operator was unable to put back in their [sic] mine" and that the disposal had been going on for about 3 weeks prior to the inspection. (Ex. R-3.) 3/

On August 19, 1999, OSM personnel returned to the site and observed other trucks hauling a different waste product and disposing of that material in the same general area as the sand-based waste material. PCC personnel said it was coal processing waste from a nearby property known as the Palmer Coking Coal (Palmer) property. 4/ Later that day, Palmer's

2/ The City and the Mine share the Lake Sawyer watershed, which includes Ginder and Rock Creeks. These creeks receive drainage from the permitted Mine site, flow out of the site into and/or through the City, converge, and eventually discharge into Lake Sawyer. (PRO Decision at 11.)

Judge Hammett granted the City permission to intervene as a full party in both administrative proceedings.

3/ PCC later described the material as "silt" and indicated that it came from Lakeside and the Hayes Sand & Gravel (Hayes) pit in Maple Valley, Washington.

4/ The Palmer property is also referred to as the McKay coal processing plant or McKay plant. The McKay plant formerly processed coal mined from the John Henry Mine. PCC's permit as originally approved provided for

representative explained that the material came from the processing of coal from the PCC Mine, apparently having been generated in years past and stockpiled on the Palmer property. The OSM inspector noted that OSM had approved the disposal of coal processing waste generated by PCC from its processing plant in pits on its Mine site, but that there was no approval to bring waste onto the site from other areas. Id.

The first NOV (NOV No. 99-141-244-001) was issued on August 19, 1999, alleging a violation of 30 CFR 773.17(b) and (c) because PCC had disposed of waste on the Mine both from sand and gravel operations and from the Palmer property. OSM directed PCC to (1) cease disposal of the waste; (2) remove the material or obtain approval to dispose of the waste on the Mine by submitting an application to OSM to modify the Mine plan and get approval thereof; and (3) obtain approval to dispose of the waste from all applicable State and local agencies.

PCC submitted a draft request for a minor permit revision 5/ on August 20, 1999 (Ex. R-10). OSM advised PCC by letter dated August 26, 1999, that its request was silent with regard to the disposal of coal processing waste that had been trucked in from the Palmer property. (Ex. R-11.) By letter dated September 8, 1999, PCC provided a discussion of the coal waste trucked in from the Palmer property, describing it as "less than 300 yards of fine coal processing waste mixed with topsoil," which "was primarily fine coal (buckwheat) derived from [PCC's] prior washing operations at the Palmer Coking Coal wash plant [the McKay plant]." PCC explained that, "[u]nder the terms of the final reclamation of that plant, [PCC] was allowed to store this material at Palmer's site in anticipation of eventually selling it." It noted that some of that material had been "contaminated with soil and [was] not marketable," and that it was that material that had been "hailed to the Pit 1 backfill area on August 17." PCC requested that, "under the requirements of 30 CFR 816.81(b), * * * it be allowed to remove and backfill up to 3,000 total [cubic] yards of this external coal processing waste in Pit 1." (Ex. R-12 at 6.)

However, by letter dated September 14, 1999, PCC withdrew its request for minor permit revision as it related to the "buckwheat coal that [it had] stockpiled at the site of Palmer Coking Coal Company's wash plant." Instead, it requested "the retroactive approval of a one time disposal of approximately 300 cubic yards of coal and soil from the base of the buckwheat stockpile." (Ex. R-13.) It appears that this decision not to pursue

fn. 4 (Continued)

disposal of coal processing waste from the McKay plant in pit backfill at the Mine site.

5/ "Significant" permit revisions must be processed as if they are new permit applications, which requires public notice and participation, the right to an administrative hearing on the decision concerning the application, and the right to judicial review of the action taken by the administrative hearing authority. 30 CFR 774.13(b) and 947.774(b) (1).

a permit revision to allow disposal of coal processing waste was made with OSM's knowledge and consent.

PCC continued to seek a minor permit revision to allow disposal of clean fill at the site. By letter dated September 30, 1999, signed by Michael W. Conaboy, PCC's business manager, PCC submitted a request for a minor permit revision. Conaboy's letter referred generally to PCC's "practice of accepting clean fill from external sources and disposing of it in the backfill." It included the following proposed language for the permit revision: "During the final two years of this permit term up to 175,000 cubic yards of clean soil from external sources will be placed directly into the backfill and not stockpiled on-site. For additional information see correspondence from [PCC] to OSM dated Sept. 30, 1999." (Ex. A-27.)

PCC submitted a second letter, also dated September 30, 1999, but signed by David J. Morris, PCC's General Manager. The letter specified the source of the fill material as silt "from the Hayes Sand & Gravel's pit in Maple Valley or from Lakeside's sand and gravel operation located in Issaquah." (Ex. A-26.)

On October 5, 1999, OSM approved PCC's requested minor permit revision as WA-0007C-I-05. (Ex. R-15.) OSM's "Findings for Approval" of the minor permit revision expressly noted that PCC had requested OSM to allow it to accept clean fill from local sand and gravel operations in annual volumes from 50,000 to 100,000 cubic yards, with no stockpiling of material (Ex. R-15 at 2), to facilitate mining operations at the Mine site.

Later in October 1999, PCC wrote OSM to inquire whether it was necessary to "get OSM's permission for each new source of clean fill." (Ex. R-16.) OSM replied by letter dated November 22, 1999, that "a permit revision would be required if other sources of clean fill are used[,] along with laboratory analysis of the material." (Ex. R-17.)

On January 8, 2000, PCC requested that OSM reconsider its position regarding the requirement of a permit revision for each source of off-site fill material (Ex. R-21), and, on January 18, 2000, OSM responded that its position was unchanged. (Ex. R-22.)

On May 18, 2000, PCC submitted a one-page letter requesting a minor permit revision which would allow PCC to accept material from two construction sites. (Ex. R-18). OSM did not act on that request, apparently because PCC indicated in June 2000 that it would address the matter further in August 2000 as part of a revised reclamation plan. (Exs. R-19 and R-20.)

On November 15, 2000, a mine inspection disclosed that PCC was disposing of off-site construction material at the Mine from a construction site located at "Kent-Kangley Road and 132nd." (Ex. A-68.) Accordingly,

on November 16, 2000, OSM served the second NOV (No. 00-141-244-1) on PCC. OSM directed PCC to stop dumping fill from a non-approved site; to provide volume or trip tickets from contracts for all unpermitted fill; to provide information showing where "illegal" fill had been placed in the mine; to provide laboratory analysis of the "illegal" fill; and to provide information as to the source of the fill. (Ex. R-4.)

On November 21, 2000, the City wrote to OSM regarding what it characterized as a "pattern of violations" relative to disposal of unpermitted material at the Mine. (Ex. A-73.) On December 15, 2000, noting the City's concerns, OSM issued the PRO, which required PCC to submit a plan demonstrating compliance with four elements pertaining to PCC's disposal of off-site material at the Mine:

- a. Monthly submission of all trip tickets for the month. Individual trip tickets for each truck delivering material for disposal at the mine shall show:
 1. The origin of the material.
 2. The volume of material hauled in the truck.
 3. The time and date the truck dumped the clean fill.
 4. The trucking company name, PUC number, vehicle tag number, and vehicle number.
 5. A legible signature, of an authorized representative of [PCC], accepting delivery of the clean fill.
- b. Assurance that the hours of operation will be only Monday - Friday 6 a.m. to 6 p.m.; and
- c. OSM's approval, in part, was that the volume of imported clean fill was not to exceed 100,000 cubic yards per year. It is our understanding that PCCC applies a 40% reduction to its volume calculations due to the amount of water in the clean fill. PCCC must submit data to justify the 40% reduction in volume. If PCCC can not justify the 40% reduction, OSM will reapply the 40% to PCCC's reported volumes to determine the total yardage disposed at the mine during the calendar year.
- d. The individual trip tickets for each truck delivering material for disposal at the mine and a total volume accepted by the mine for that month will be sent to [OSM] * * * by the [1]5th [day] of the following month.

(Ex. R-25.)

OSM replied to the City's November 21, 2000, letter on January 18, 2001, advising that it had determined that additional control measures were necessary to ensure that disposal of off-site materials was conducted in a manner that protects the environment and public health and safety. (PRO Decision at 3.)

On January 19 and 22, 2001, mine inspections revealed that PCC was yet again disposing of off-site construction material at the Mine. (Ex. R-5.) Those inspections resulted in issuance of the third NOV (No. 01-141-244-1) on January 22, 2001, which enumerated three separate violations, one for each source of off-site fill material found on the Mine site. (Ex. R-5.) As before, OSM required PCC to stop dumping fill from non-approved sites and to provide information about the source and content of the material.

[1] When OSM charges a permittee with having violated the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (2000) (SMCRA) and/or its implementing regulations, and the permittee files an application for review of a notice of violation, OSM bears the burden at the hearing of presenting a prima facie case that the permittee committed the violation, whereupon the burden devolves to the permittee to overcome that case by a preponderance of the evidence. 43 CFR 4.1171(a) and (b); Rith Energy, Inc. v. OSM, 119 IBLA 83, 86 (1991). Judge Hammett found that OSM had presented a prima facie case that disposal of the material violated applicable regulatory and/or statutory provisions, 6/ and he further found that PCC had failed to overcome OSM's case by a preponderance of evidence. He therefore sustained the three NOVs in their entirety.

On appeal, PCC does not dispute that off-site soil and material were disposed of at the Mine on the dates at issue. Accordingly, the facts are not in dispute. However, with respect to the first NOV, PCC argues that Judge Hammett erred in concluding that its Permit as originally approved in 1986 did not expressly authorize the disposal of coal processing waste generated at the McKay plant on the Palmer property. 7/

We agree with PCC. The record confirms that such disposal is permitted by PCC's original Permit. Section 3.4.8.5 of the Permit provides:

6/ The first NOV charged a violation of 30 CFR 773.17(b) and (c), the second alleged a violation of 30 CFR 773.17(b), and the third charged a violation of section 521(a) (3) of SMCRA, 30 U.S.C. § 1271(a) (3) (2000), and 30 CFR 773.17(b).

7/ PCC does not challenge the Judge's decision to the extent that he found that it had violated 30 CFR 773.17(b) by disposing of "clean soil" at the Mine site, as cited by OSM in NOV No. 99-141-244-001. (Notice of Appeal in IBLA No. 2002-250.) The "clean soil" violation is by itself enough to support the validity of that NOV. However, we address the validity of the "coal processing waste" violation in this NOV because it may be relevant in assessing any civil penalty.

Permanent Disposal of Coal Processing Waste in Pit Backfill

Coal processing waste will be permanently disposed in the pit backfill from two sources. One source will be the coal processing waste stored in the temporary spoil-piles, the second source will be coal processing waste hauled directly from the coal preparation plant. [Emphasis added.]

(Ex. A-3 at 6-7.) In addition, section 3.4.8.2 of the Permit noted that the coal processing waste stockpiled on the Permit site and at the McKay plant had been extensively sampled and tested and found not to contain acid or toxic-forming materials. *Id.* at 1-4.

However, when the first NOV was issued, PCC was still hauling coal processing waste from the stockpile at the McKay plant on the Palmer property to the Mine site for disposal, long after the McKay plant had been dismantled and the property reclaimed to SMCRA standards, and long after the termination of the plant's separate SMCRA permit in June 1996. (Tr. 36-37; Ex. A-17.) In issuing the first NOV, OSM concluded that, given these facts, the disposal of coal processing waste from the McKay plant no longer was authorized by PCC's 1986 Permit. (Tr. 35-37, 341-42, 489-90, 563-66, 570, 577-81, 622-26.) On appeal, PCC argues that, since the Permit as originally approved authorized disposal of coal processing waste from the site of the former processing plant, because there was no evidence that PCC had applied for a minor permit revision application to change the terms of the approved Permit, and no showing that OSM had issued a PRO to compel a revision of the Permit, OSM necessarily failed to present a prima facie case with respect to disposal of such coal processing waste. OSM's position is that, given the passage of time since the plant was closed and dismantled and the Palmer property was reclaimed to SMCRA standards, the characteristics of the waste from the remaining stockpiles were no longer known; the stockpiles were not even known to contain coal processing waste from coal that had been processed by the once-permitted McKay plant.

Nonetheless, the fact remains that PCC's permit explicitly authorized disposal of coal processing waste hauled directly from "the coal preparation plant" for use as pit backfill. (Ex. A-3, secs. 3.4.8.4, 3.4.8.5, 3.4.8.5.1, and 3.4.8.5.2.) Like Judge Hammett, we find nothing in the Mine Permit that expressly limits disposal of coal processing waste from the McKay preparation plant to the time when the plant was itself permitted. *See* NOV Decision at 15. On the other hand, PCC's Permit also does not expressly authorize disposal of coal processing waste generated by from the former coal processing plant after it ceased operating.

While the Permit clearly presupposed the existence of a coal preparation plant at some point in time, it did not anticipate that stockpiles of coal processing waste generated in compliance with SMCRA's

provisions and regulations and the terms of PCC's Permit would remain on the plant site after the plant no longer was permitted. As set forth above, section 3.4.8.5 of PCC's Permit stated that coal processing waste from two sources would be "permanently disposed in the pit backfill." One source was "temporary" stockpiles, and the other was "coal processing waste hauled directly from the coal preparation plant." Moreover, section 3.4.8.2 also expressly acknowledged the existence of stockpiles of coal processing waste on the plant site which had been tested and found to be free of toxic substances. The Government's witnesses admitted that they had not reviewed PCC's Permit before issuing the NOV as it pertained to the coal processing waste, and they agreed that this issue is not free from doubt. The question is, as the Judge noted, a close one, but it is also one that was within OSM's authority to resolve by either directing PCC to file a request for a minor permit revision or issuing another PRO. In the circumstances, we think that the ambiguity must be resolved in PCC's favor, and find that PCC has preponderated on the limited issue of whether disposing of the coal waste from the McKay plant in 1999 violated the terms of its Permit. Judge Hammett's decision sustaining the first NOV insofar as it pertains to disposal of coal processing waste hauled from the former McKay plant stockpiles is therefore modified accordingly. 8/

[2] As to the second and third NOV's (both of which were issued after the October 1999 permit revision PCC requested), PCC reiterates its assertion that "[t]he excavation and transportation of clean soil at a site that [is] not at PCC's mine cannot be considered surface mining and reclamation activity and OSM has no authority to extend its jurisdiction to such sites by requiring PCC to revise its permit for each potential customer." (Statement of Reasons (SOR) at 5-6.) Thus, PCC suggests that OSM had no authority to issue the NOV's or the PRO. 9/ Judge Hammett correctly determined that the use of fill material 10/ from sources external to the Mine site for reclamation of the Mine site constitutes a "surface mining and reclamation operation" that is subject to SMCRA and implementing

8/ As noted above in n.6, PCC does not dispute that disposal of clean fill in 1999 was unauthorized. Issuance of the first NOV on this basis was proper, and accordingly, it is affirmed.

9/ Despite this line of argument, PCC did not disavow Conaboy's acknowledgment of PCC's "practice of accepting clean fill from external sources and disposing of it in the [Mine] backfill. [Emphasis added.]" (Ex. A-27.) We note also that PCC did not object to OSM's description of the requested minor permit revision as entailing a request to "accept clean dirt/soil from local sand and gravel operations to facilitate mining operations at their John Henry Mine." (Ex. A-28 at 2.)

10/ PCC objects to Judge Hammett's use of the term "mineral material" to generally describe the substances disposed of at the Mine. We note that PCC used the term "mineral commodity" in its minor permit revision application. Use of the term "mineral material" is of no consequence, however, because there is no question that this appeal concerns sand-based waste containing clay and silt and coal processing waste.

regulations. PCC's argument that OSM is attempting to extend its jurisdiction to non-mining activities and preempt State and local law regulating excavation and disposal of clean soil plainly misstates the issue and ignores the fact that what triggered OSM's issuance of the NOV's was the unpermitted use of off-site material to backfill and reclaim the Mine site.

[3] Under section 506(a) of SMCRA, a person is required to have a permit authorizing him to engage in "surface coal mining operations" before undertaking any such operations. 30 U.S.C. § 1256(a) (2000). Each permit applicant is required to submit and obtain approval of a plan for reclaiming the land affected by such operations. 30 U.S.C. §§ 1257(d), 1258(a), and 1260(a) and (b) (2000). However, having such a permit does not authorize any and all activity. Thus, when a person engages in an activity which can be construed as an aspect of "surface coal mining and reclamation operations," as defined by section 701(27) of SMCRA, 30 U.S.C. § 1291(27) (2000), and its implementing regulation, 30 CFR 700.5, but which is not authorized by any permit, that person has violated SMCRA. P & K Co., Ltd. v. OSM, 142 IBLA 247, 253-55 (1998); Rith Energy, Inc., 101 IBLA 190, 194 (1988). A permittee is required to strictly adhere to the specific authorization in an approved permit. See 30 CFR 773.17(b) and (c). As we observed in Turner Brothers Inc. v. OSM, 101 IBLA 327, 332 (1988):

In enforcing SMCRA, [OSM] is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved and an operator's failure to obtain written documentation of permit changes from [the] * * * regulatory [authority] exposes a permittee to liability under the Act. [Emphasis added.]

Thus, OSM may properly approve a permit revision to ensure that fill material directly or incidentally utilized in mine reclamation meets applicable statutory and regulatory environmental standards and does not endanger the public health and safety, such as by restricting the sources of fill material that may be disposed on a site. Where a permittee places on its site fill material from sites that are not approved in its permit, a violation has occurred.

PCC contends that disposal of fill material from off-site sources was permitted under the October 1999 permit revision, arguing that the revision clearly stated that appellant intended to accept clean soil from "external sources," not from Hayes and Lakeside only. To bolster this argument, PCC claims that the Conaboy and Morris letters should not be considered part of its application for permit revision or establish the basis on which the revision was approved. (SOR at 15-16.)

PCC's contentions with respect to the October 1999 permit revision are simply not sustainable on the record before us. Although PCC now finds

it convenient to characterize the Conaboy and Morris letters as merely "external correspondence" (SOR at 18), it is apparent that they were submitted and intended to convey the particulars of the minor permit revision PCC sought in order to authorize disposal of off-site fill material on the Mine site. The draft application was submitted on August 20, 1999, and it specifically identified the Hayes and Lakeside operations as the only off-site sources of material to be used in Mine reclamation. (Ex. R-10.) A revised application was submitted by PCC on September 8, 1999, and it included a request that PCC be allowed to dispose of coal processing waste, as well as clay and silt from the Hayes and Lakeside operations. (Ex. A-20.) However, that request was withdrawn by PCC on September 14, 1999. (Ex. R-13.)

On September 30, 1999, Conaboy and Morris submitted their letters. Among other things, Conaboy's letter stated that, in accordance with OSM's request, the language of permit WA-0007C had been modified "to reflect the practice of accepting clean fill from external sources and disposing of it in the backfill" (Ex. R-14 at 1); five copies of revised page 3-12 of PCC's original Permit application package were enclosed with the letter. That revision stated:

During the final two years of this permit term up to 175,000 cubic yards of clean soil from external sources will be placed directly into the backfill and not stockpiled on-site. For additional information see correspondence from [PCC] to OSM dated Sept. 30, 1999.

(Ex. R-14 at 2.)

The Conaboy letter contained nothing further regarding how PCC intended to conduct its disposal operation or the sources of the material to be disposed of at the Mine. Consistent with Conaboy's reference, those details were found in the companion Morris letter. Thus, Morris' letter recited that its purpose was to request a minor permit revision and provided information regarding sources of material, the operational plan, chemical characteristics, volume, flocculent, etc. (Ex. A-26.) Notably, only the Hayes and Lakeside operations were identified as the off-site sources, and only Hayes' material was chemically analyzed and compared to the clay material found on the Mine. OSM's written approval of the requested permit revision on October 5, 1999, specifically cited PCC's September 30, 1999, request for a permit revision. 11/

11/ Moreover, PCC's present construction of the permit revision is belied by PCC's subsequent inquiries regarding the need to obtain permit revisions for sources "other than the two we specifically identified in our application." (Exs. R-16 and R-21.) The two specifically identified were the Hayes and Lakeside operations, i.e., the two that "precipitated the initial permit revision pertaining to this case." (Ex. R-21.)

We agree with Judge Hammett that, in these circumstances, the reference in the Findings for Approval to "local sand and gravel operations" does not constitute a general authorization to accept clean soil or fill from any and all local sand and gravel operators. Instead, the term must be squared with the statements that PCC made in its permit revision request. PCC identified the two off-site sources as Hayes and Lakeside, and it provided the necessary technical and chemical data to demonstrate that the soil/fill from those operations in fact was clean and safe to support that request. Nothing further was said or suggested in the Conaboy and Morris letters which could possibly be understood or interpreted as a request for approval of the practice of accepting clean soil/fill from any external source PCC chose. Accordingly, Judge Hammett correctly found that the minor permit revision approved only the two sources identified by PCC in its request.

[4, 5] We now turn to the PRO decision. OSM properly may at any time require a reasonable permit revision to ensure that fill material directly or incidentally utilized in mine reclamation meets applicable statutory and regulatory environmental standards and does not endanger the public health and safety. 30 CFR 774.11(b). Further, OSM may properly restrict the sources of fill material that may be disposed on a site to achieve those purposes. See 30 CFR 774.11(b). Judge Hammett affirmed requirements (a) and (d) of the PRO, but reversed requirements (b) and (c). Noting that Morris' September 30, 1999, letter explicitly stated that off-site material would be hauled "five days a week," rather than Monday through Friday, the Judge ruled that OSM had not established a prima facie case that requirement (b) in the PRO was appropriate. (PRO Decision at 7.) In addition, regarding requirement (c), he found that the evidence did not support OSM's claim that PCC in fact was applying a 40 percent reduction in volumes of off-site fill material delivered to the Mine in a "scheme" to exceed the annual limit of 100,000 cubic yards, ruling that OSM had not established a prima facie case that the requirement was appropriate. (PRO Decision at 9.) 12/

OSM is authorized by section 511(c) of SMCRA and its implementing regulation 13/ to order the "reasonable revision or modification" of a permit, 30 U.S.C. § 1261(c) (2000), where it is designed to "ensure compliance with the Act and the regulatory program," 30 CFR 774.11(b). When OSM orders the revision of a permit and that decision is challenged by the permittee under 43 CFR 4.1360 and 4.1361, OSM bears the initial burden of presenting a prima facie case that the revision is reasonable and designed to ensure such compliance, whereupon the burden devolves to the permittee who has challenged the revision to overcome that case by a preponderance of the evidence. 43 CFR 4.1366(b).

12/ OSM did not seek review of the Judge's determination to reverse the PRO in part.

13/ The regulation was then designated as 30 CFR 774.11. It was redesignated as 30 CFR 774.10 as of Jan. 18, 2001. 65 FR 79582, 79667 (Dec. 19, 2000).

In its petition for discretionary review of the PRO decision, PCC does not challenge OSM's authority to order the revision of a SMCRA permit, but contends that OSM is not authorized to place reporting restrictions on the disposal of off-site material within the boundaries of the permitted Mine site, because it has not been demonstrated that they are necessary to ensure compliance with SMCRA and/or its implementing regulations. According to PCC, OSM failed to link the conditions of the PRO with any alleged failure by PCC to comply with any specific environmental performance standard of SMCRA or its implementing regulations. (PDR at 14.)

Judge Hammett correctly ruled on PCC's arguments regarding the nature and extent of OSM's statutory and regulatory authority and the manner in which it was exercised in issuing the PRO. We find no reason to disturb his findings and decision to reject two of the four requirements set forth in the PRO, and we will not belabor the matter here, except to briefly touch on two 14/ arguments PCC has pursued on PDR.

PCC argues that OSM's PRO was not based on "written findings," as specified by section 511(c) of SMCRA and 30 CFR 774.11(c), noting that it can find no support in OSM's "technical reviews." 15/ (Petition at 19-21.) While it is true that the technical reviews do not contain written findings explicitly pertaining to the reporting requirements ultimately formulated and adopted, it is not correct that the PRO was not supported by written findings, nor is it correct that OSM's "technical reviews" (Ex. A-77) 16/ do not support the required revision.

The record contains two such technical reviews, both dated in December 2000. Each technical review contains the following sections:

Title of the revision ("Hydrologic Reclamation Plan: Imported Fill Material" and "Disposal of Off-site materials," respectively);

14/ We acknowledge a third contention. PCC states that "PUC" numbers are not required by the State of Washington for trucks. We found nothing in the record which explains this nomenclature. However, the status of "PUC" numbers in the State of Washington furnishes no reason to reverse the Judge's findings with respect to the PRO. This is just one element of an overall method of obtaining accurate information about disposal of off-site materials on the Mine on a continuing basis. Should OSM subsequently initiate enforcement action specifically alleging a violation of the PUC requirement, nothing herein prevents PCC from demonstrating that the requirement is not relevant in the circumstances then actually presented. 15/ The regulation, 30 CFR 774.11(c), states that "[a]ny order of the regulatory authority requiring revision of a permit shall be based upon written findings and shall be subject to the provisions for administrative and judicial review in part 775 of this chapter."

16/ OSM documents its review of a proposed permit revision in a document titled the "Technical Review Stage (TS) Review." According to testimony at the hearing, these reviews are designed to ensure compliance with SMCRA. See Transcript at 734-36, 738-60, 765-66.

Citations of regulatory authority establishing the technical review criteria;

The specific material reviewed (this included correspondence from PCC, the City, and the public, summary information regarding clean fill disposal and contract truckers, truck load tickets for a four-week period, and the facts supporting the third NOV);

A statement of the deficiency (the box indicating a "Deficiency(s) [sic] for which a Determination of Regulatory Compliance cannot be made" was checked in both reviews), consisting of a description of the deficiency, a discussion of it, and recommendation(s);

The relevant permit condition(s) affected; and

The technical evaluation (the reviews identified additional monitoring of the chemical quality of the fill materials and PCC's proposed post-mining backfilling and stockpiling activity, respectively).

Based on our review, there can be no question that these technical reviews demonstrated a need for more information regarding the makeup of the fill material being disposed of on the Mine site to determine whether PCC was in compliance.

We similarly find little merit in the assertion that the PRO was not premised upon written findings. OSM's December 15, 2000, PRO identified the predicate for issuing the order, specifically referring to the City's November 21, 2000, letter, comments from the public, and "observed events that resulted in the issuance of * * * NOV 00-141-244-1 * * * on November 16, 2000." The PRO further stated that, "[b]ased on the above events, OSM has determined that additional control measures are necessary in order to ensure that disposal of off-site fill materials is conducted so as to protect the environment and safeguard the public's health and safety." (PRO at 1.) While the PRO could have been drafted or constructed differently, we are unwilling to mechanically prescribe a format for establishing the basis for a decision to require a minor permit revision. In a different case, this argument could prove compelling, but on the record before us, we find the contention unpersuasive. Here, closer scrutiny clearly is warranted, because PCC persisted in unpermitted disposal activity at the Mine, even after being informed that specific authorization was needed. The PRO merely requires more detailed information reasonably necessary to monitor PCC's activity and ensure that it fully complies with the terms of its Permit and governing law. There is ample evidence in the technical reviews and record showing the need and basis for the PRO that was issued to address this situation. Accordingly, in this case, it is appropriate to reject PCC's argument.

To the extent not addressed, all other arguments and errors asserted by PCC have been considered and rejected as immaterial or contrary to the facts or law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for discretionary review of Judge Hammett's February 2002 PRO decision is granted, the decision on the PRO is adopted as the opinion of the Board, and Judge Hammett's decision on application for review of the notices of violation is affirmed as modified.

T. Britt Price
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

PACIFIC COAST COAL COMPANY,)	DOCKET NO. DV 2001-4-R
Applicant,)	
)	Revision Order No. 1
vs.)	OSM Permit WA-007C-H-01
)	
OFFICE OF SURFACE MINING,)	
RECLAMATION AND ENFORCEMENT,)	
Respondent.)	
)	
CITY OF BLACK DIAMOND, WASHINGTON,)	
Intervenor)	
)	

DECISION

This case involves a Permit Revision Order (hereinafter, PRO) which Respondent Office of Surface Mining, Reclamation, and Enforcement (hereinafter, OSM) issued to Applicant Pacific Coast Coal Company (hereinafter, PCC) on December 15, 2000. A hearing was held on May 1-4, 2001, which in part concerned this PRO. ^{1/} The parties then filed post-hearing briefs, with the last brief filed on August 29, 2001. Because this case involves a PRO, PCC's request for review is being adjudicated in accordance with 43 C.F.R. §§ 4.1360 to 4.1369, as well as the more general provisions found at 43 C.F.R. §§ 4.1100 through 4.1141. The PRO at issue in this case is Exhibit R-25 in the record.

PCC has conducted surface coal mining and reclamation operations at the John Henry Mine, subject to the terms of an OSM surface mining permit, since June 13, 1986. The PRO was issued after OSM reassessed its earlier decision to allow PCC to import and dispose of certain mineral material at the mine site. The PRO essentially requires PCC to provide certain information to OSM concerning PCC's disposal activities.

OSM asserts that the PRO is reasonable and that it was issued to ensure compliance with SMCRA. See 30 C.F.R. § 774.11(b). PCC, on the other hand, raises a number of arguments challenging the reasonableness of the PRO requirements and OSM's legal basis for the PRO.

^{1/} The hearing also concerned three consolidated Notice of Violation cases, all of which are related to the PRO at issue in this decision. The decision for those NOV cases is being issued concurrently as a separate document.

The record consists of the testimony as set forth in a four volume transcript, the exhibits accepted into evidence at the hearing, and the statement of facts set forth in this forum's decision denying OSM's Motion for Summary Judgment on the NOV's, to the extent the parties have stipulated to those facts. See Order Denying Motion for Summary Judgment pp 2-7, Tr 8.

Having considered the record for this case, and for the reasons set forth below, this forum has decided that conditions "a." and "d." in the PRO should be affirmed, while conditions "b." and "c." in the PRO should be reversed.

Background

The background section for this forum's concurrent decision in the consolidated NOV cases (Docket numbers DV 99-8-R, DV 2001-3-R, and DV 2001-5-R) is hereby incorporated by reference. This section will address only those facts which are relevant to the PRO and which were not set forth in the NOV decision.

On November 8, 1999, the City of Black Diamond (hereinafter, the City), wrote OSM expressing concern that PCC was disposing of potentially hazardous material on the mine site. Ex I-1. The City asked a number of questions about the nature of the material being disposed of on the mine site. Ex I-1, p 2.

OSM responded on November 23, 1999, answering each of the City's questions. Among other things, OSM assured the City that OSM had only authorized the disposal of "clean fill" and that it had sampled the material being authorized and found it free of contaminants. Ex I-2. OSM also informed the City that the only hazardous material OSM had identified on the site, "fly ash" from a steam plant, had been removed from the mine site. Ex I-2 p 2.

On November 21, 2000, the City of Black Diamond (hereinafter, the City) wrote OSM again. The City expressed concern over what it considered to be a "very unfortunate pattern of violations relating to the disposal of unpermitted materials" within the mine site. Ex I-3, p 1. The City noted that it had received complaints from citizens "with regard to unidentifiable materials entering the mine site." Id. The City further noted its concern about the possible impacts of unauthorized materials, and essentially asked OSM to further regulate or discontinue PCC's practice of disposing of material on the mine site, asking:

If [OSM] is to continue to allow the disposal of permitted material at the John Henry Mine site, how will OSM ensure that the public health and safety of the citizens of Black Diamond is protected from future instances of unpermitted waste disposal?

Ex I-3 p 3.

OSM responded to the City's letter on January 18, 2001, informing the City that OSM had issued a permit revision order on December 15, 2000 "concerning the issues raised in your letter." Ex I-4. OSM informed the City that:

OSM determined that additional control measures were necessary in order to ensure that disposal of off-site materials is conducted so as to protect the environment and to safeguard the public's health and safety.

Ex I-4 p 1. OSM then answered the City's questions, relying in part on the PRO.

The PRO is based on OSM's reassessment of its October 5, 1999 order "authorizing the import and disposal of clean fill material." Ex R-25; See NOV Decision, pp 4-5. According to OSM, the reassessment was based on the City's November 21, 2000, letter, and on the NOV issued on November 16, 2000. Ex R-25, p 1. It requires PCC to submit a plan demonstrating compliance with four requirements in relation to PCC's practice of accepting and disposing of material from locations outside of the permit boundary. They are as follows:

a. Monthly submission of all trip tickets for the month. Individual trip tickets for each truck delivering material for disposal at the mine shall show:

1. The origin of the material.
2. The volume of material hauled in the truck.
3. The time and date the truck dumped the clean fill.
4. The trucking company name, PUC number, vehicle tag number, and vehicle number.
5. A legible signature, of an authorized representative of [PCC], accepting delivery of the clean fill.

b. Assurance that the hours of operation will only be Monday - Friday 6a.m. to 6p.m.

c. OSM's approval, in part, was that the volume of imported clean fill was not to exceed 100,000 cubic yards per year. It is our understanding that [PCC] applies a 40% reduction to its volume calculations due to the amount of water in the clean fill. [PCC] must submit data to justify the 40% reduction in volume. . . .

d. The individual trip tickets for each truck delivering material for disposal at the mine and a total volume accepted by the mine for that month will be sent . . . by the 5th of the following month.

Discussion

The PRO was issued under the authority of 30 C.F.R. § 774.11(b) which provides in part:

[T]he regulatory authority may, by order, require reasonable revision of a permit in accordance with § 774.13 2/ to ensure compliance with the [Surface Mining Control and Reclamation Act] and the regulatory program.

Therefore, the PRO will be evaluated to determine whether it is reasonable and whether it ensures compliance with SMCRA.

The regulations concerning review of PROs are found at 43 C.F.R. §§ 4.1360 to 4.1369. The burden of proof is initially on OSM to establish a prima facie case “that the permit should be revised.” 43 C.F.R. § 4.1171(a). OSM must show that a condition in a PRO is “an appropriate response to a failure of the permit application to satisfy a requirement of SMCRA or its implementing regulations or that it is otherwise appropriate.” Peabody Coal Co. v. OSM, 123 IBLA 195, 207 (1992). In order to determine whether a condition meets this standard, the context of the permit is relevant. Id. If OSM meets this burden, the burden of persuasion shifts to the person who has filed the application for review – in this case PCC. 43 C.F.R. § 4.1366(b).

1. OSM has established a prima facie case that conditions “a” and “d” are reasonable and are directed toward ensuring compliance with SMCRA and the regulatory program, but has not established a prima facie case that conditions “b” and “c” are reasonable and are directed toward ensuring compliance with SMCRA and the regulatory program.

As set forth above, the requirements for a permit revision order are that it must be reasonable and ensure compliance with SMCRA and its regulatory program. OSM asserts that the PRO and each of its requirements meets these conditions. See OSM’s Opening Brief, pp 31-34; OSM’s PRO Reply Brief. This forum will analyze each of the conditions in turn.

A. Recordkeeping and Reporting (PRO conditions “a” and “d”)

OSM asserts that the appropriateness of the requirements designated as “a.1-5.” in the PRO, which require OCC to submit individual trip tickets containing certain information on a monthly basis, must be viewed in the context of the history of PCC’s disposal activities. OSM’s PRO Reply Brief, pp 2-8. OSM points to the issuance of the first NOV, the subsequent application and approval of a minor permit revision to allow some disposal, OSM’s clarification

2/ This section addresses procedures and criteria for permit revision applications.

of that permit revision, and the second NOV. ^{3/} OSM's PRO Reply Brief, pp 4-5; See NOV Decision pp 3-7. At the time OSM issued the second NOV, it considered revoking its authorization for PCC to conduct disposal activities. OSM's PRO Reply Brief, p 5; Tr 153. Instead, OSM designed record keeping and reporting requirements to help it monitor the disposal activities more effectively. OSM's PRO Reply Brief, p 6; Tr 154-55.

OSM asserts that "the amount of paperwork required by the record-keeping requirements is reasonable and easily manageable." OSM's PRO Reply Brief, p 9. OSM relies in part on the following testimony:

Q (Mr. Morris). Now, have you discussed with Mr. Aiken the amount of time it takes him to prepare all these documents that are required?

A (Mr. Waugh). I would say he discussed it with me. Yes.

Q. And is that – in the scheme of things as far as the John Henry mine and Mr. Aiken's responsibilities is it taking a little bit of time or a whole lot of time?

A. I would say that based on my experience if it was done on a regular basis for a month at a time it's not that cumbersome of a situation. It's very difficult to do one entire year in one chunk. But on a monthly basis it would take a little effort, but I don't think it's overwhelming.

Tr 671.

At the hearing, Mr. Wilcox discussed the need for each of the five pieces of information required on trip tickets. OSM wanted the origin of the material to be reflected on trip tickets so that it could verify that PCC was only importing material from approved sites. Tr 147. Similarly, the requirement to show volume was intended to verify that PCC was staying within the permit's annual volume requirements. Tr 147-48. The time and date of disposal allows OSM to respond to citizen complaints. Tr 148. The information concerning the trucking company facilitates OSM's monitoring, because it allows OSM to know which trucking companies are conducting permitted disposal. Tr 149. Finally, the signature of an authorized representative of PCC helps ensure that PCC is itself monitoring the disposal of material. Tr 150.

PCC argues that OSM failed to establish a prima facie case with regard to the submission of trip tickets. PCC's Opening PRO Brief, pp 5-7. Essentially, PCC argues that the type of

^{3/} OSM also appears to rely on the third NOV as well. However, as the third NOV was issued after the PRO was issued, the third NOV cannot provide a basis for determining whether the PRO was appropriate at the time it was issued. This forum does not rely on the third NOV for its findings in this decision.

information OSM wishes to know could be provided in an annual or quarterly report, and that PCC could maintain trip tickets at its office. Id., p 6.

Especially in light of this forum's decision affirming NOV 1 and NOV 2, this forum finds that OSM has established a prima facie case that the reporting requirements in the PRO are appropriate. PCC has unfortunately demonstrated a tendency to stray from the terms of its permit when conducting its disposal activities, and OSM's efforts in increasing its ability to monitor and verify PCC's disposal activities are therefore reasonable. The reporting requirements accomplish this goal, because they provide a means of verifying the legality of each act of disposal, and because they provide OSM with the "raw data" needed to verify that overall requirements, such as the annual volume requirement, are being met. It is also reasonable PCC be required to have a representative on site while the disposal activities are taking place – this provides OSM with an extra layer of assurance and increases accountability.

B. Assurance Concerning Operating Hours (PRO condition "b.")

In its application for a permit revision, which was filed after the first NOV, PCC stated: "Silt is hauled into the site between the hours of 6 [a.m.] and 6 p.m., five days per week." Ex A-26, p 2. PRO condition "b" requires: "Assurance that the hours of operation will only be Monday - Friday 6a.m. to 6p.m." OSM clarifies that the PRO does not establish hours of operation, but only asks for assurance that PCC will meet certain hours of operation. OSM's PRO Reply Brief, p 14.

OSM asserts that this requirement is necessary because of PCC's history of "unauthorized disposal activity," and because the City and its citizens have expressed concern about PCC's disposal activities, especially with regard to the hours. OSM's PRO Reply Brief, pp 15-16. OSM argues that "a legitimate concern exists" that PCC may conduct disposal during weekend or night time hours, when detection would be difficult, and that "[l]imitation of [PCC's] hours of operation for disposal activities to normal business hours" would help to ensure PCC's compliance with its permit. PCC argues that OSM has failed to establish a prima facie case with regard to this issue, because OSM lacks the authority to set operating hours.

This is an unusual requirement, because at first glance it amends the permit to require PCC to provide assurance that it will comply with one of the conditions already contained in the permit. It therefore seems redundant, but if all the condition did was to require assurance that a pre-existing permit condition would be followed, this forum would probably allow it. Essentially, although the restriction's effectiveness would be questionable, the burden on PCC would be minimal – requiring only a short letter or perhaps even phone call to OSM.

Nevertheless, and despite OSM's argument to the contrary, what this requirement actually does is require assurance of compliance with a permit condition that has not been approved by OSM. This forum agrees, as discussed in the NOV decision, that Mr. Morris' September 30, 1999 letter was part of PCC's application for a permit revision to conduct disposal activities. NOV Decision, pp 16-18. However, Mr. Morris' letter specifically states

that material would be hauled into the site “five days per week.” The PRO, on the other hand, requires assurance that PCC will only allow disposal to take place “Monday - Friday.” This forum finds that it is not reasonable to require PCC to assure compliance with a condition which is not in the permit. Under PCC’s permit, for example, PCC would be perfectly justified in disposing of material on Saturday through Wednesday, so long as it did so between 6 a.m. and 6 p.m. ^{4/} If OSM wishes to change the provisions of PCC’s permit, it should do so in a direct and straightforward manner. Therefore, OSM has not established a prima facie case that requirement “b.” in the PRO is appropriate.

C. Justification of Reduction in Volume Due to Water Content

Requirement “c.” in the PRO is based on OSM’s “understanding that [PCC] applies a 40% reduction to its volume calculations due to the amount of water in the clean fill.” Ex R-15, p 2. The requirement notes that PCC may not dispose of more than 100,000 cubic yards per year, and informs PCC that unless PCC can justify a 40% reduction, OSM will “reapply” the 40% figure to PCC’s previously reported volume.

PCC challenges this condition by saying that it never proposed a 40% reduction in volume. PCC’s PRO Brief, at 7. OSM replies that requirement “c” addresses a “scheme” by PCC to dispose of material in excess of the 100,000 cubic yards per year limit. OSM’s PRO Reply Brief, p 11. OSM cites to Ex R-15, which is OSM’s approval of PCC’s application for a permit revision to allow it to dispose of waste. This establishes the 100,000 cubic yards per year limit, but does not establish PCC’s “scheme” to exceed that amount. Nor do OSM’s citations to its own briefs. OSM further states:

Pursuant to PCC’s theory, after the filtercake materials are disposed of at the mine, water in it drains away, which reduces the volume of the remaining materials by up to either 25% or 40% (the record is ambiguous on which percentage).

OSM’s PRO Reply Brief, pp 11-12. OSM cites to Tr 141-45, and Tr 155-57, but again, this testimony does not establish any plan on the part of PCC to apply a reduction in volume based on water content, at least before the PRO was issued (see discussion of Ex A-84, Infra, p 8).

OSM next cites to Ex R-24, which is a technical report authored by OSM employee Karen Jass. This report states in part:

OSM’s October 5, 1999 permit revision approval allowed for the disposal of “clean soil” fill in Pit 1, not to exceed a maximum **volume** of 100,000 loose cubic

^{4/} Whether disposal on the weekend would comply with state or local laws is beyond the scope of this proceeding; it would, however, comply with the permit so long as PCC did not conduct disposal activities more than five days in a week.

yards (lcy) per year, or 500,000 lcy over the 5-year permit term. The approval did not address the moisture content of the material being hauled, it simply specified the maximum volume approved for disposal in the pit.

Lakeside Industries staff (as well as [PCC] staff) have indicated that the “clean soil” fill material from the filter press is composed of about 40% water. Hauling 1 yard of this material would then be 60% soil and 40% water. By volume, a measured 1 yard container of the filter press material would be the same as 1 measured yard of dry sand, at 100% soil, yet [PCC] is disregarding the amount of water in each hauled load of fill material.

[PCC] asked for, and was granted, approval to import a specific volume of material. [PCC] has determined that the inherent water in the saturated soil material doesn't count as part of the actual volume and has disregarded [its] presence in the volumetric calculations. As a result, the volume of material being disposed of in Pit 1 is actually 40% higher than the truck records indicate.

Ex R-24, pp 4-5. At the most, this report establishes that PCC at one point informed OSM that the material being disposed of was composed of “about 40% water.” This is not far from PCC's statement in its permit revision application that “[a]verage moisture content of the filter-cake is in the 25-35 percent range.” Ex A-26 p 2. These statements do not show that PCC was actually using the moisture content to reduce volumes. Although Ex R-24 contains conclusory statements (set forth in the third paragraph in the above quote), it does not show the basis for these conclusions.

The only piece of evidence cited by OSM that actually shows any sort of plan on the part of PCC to use water content to reduce volumes is Ex A-84. This exhibit is a letter from PCC to OSM dated February 1, 2001. This letter, issued after OSM issued the PRO, could not have been relied on by OSM when it issued the PRO.

An exhibit entered into the record by PCC does show that PCC was, as of September 1, 2000, using water content to reduce the reported volume. In a letter with that date, Mr. Morris wrote OSM and stated in part:

Also attached is a summary of yards delivered in the second quarter. These are net yards that are based on average gross yards at 16 yards per truck and pup. This material contains on average about 40% moisture as it is delivered. I am basing the net calculation on 12 cubic yards per truck and trailer although we think it will eventually compress to much less than that. Our preliminary observations show that the material loses about 25% of its volume in an uncompressed state as the water drains. It should compress more from weight over time.

Ex A-63. This is evidence that PCC was applying a 25% reduction in volume, but not a 40% reduction. It is possible that OSM confused PCC's estimate of water content with the actual reduction PCC applied. At any rate, PCC is correct that the record does not support a determination that PCC was utilizing a 40% reduction in volume.

Therefore, OSM's requirement that PCC justify a 40% reduction in volume cannot be upheld. It is unreasonable to require PCC to justify something it is not doing or that it has not proposed. Nor will this forum undertake to rewrite the PRO for OSM by changing the 40% number to 25%. Under these circumstances OSM has not established a prima facie case that requirement "c." was appropriate.

This forum does agree with OSM that PCC's permit does not provide for any reduction of the annual 100,000 cubic yard limit based on water content. Therefore, PCC should not mistake this holding as an endorsement of PCC's use of a 25% reduction in volume, or, for that matter, any reduction in volume. If PCC wishes to use a reduction in volume based on water content, it must first seek a revision of its permit, and OSM would be perfectly justified in requiring an explanation for any proposed reduction.

2. PCC has not met its burden to show that the record keeping and reporting requirements are inappropriate.

PCC raises a number of arguments in support of its position that the record keeping and reporting requirements in the PRO are inappropriate. These are addressed in turn.

A. OSM's authority

PCC argues that OSM has no authority to permit each source of material, and that the reporting requirements related to the source of the material are irrelevant. PCC's PRO Brief, p 5. However, the action OSM is permitting is the disposal of material within the permit boundary. OSM has the authority to regulate what type of material is placed on site, and therefore is entitled to information about the material being disposed of on site. The source of material is an important piece of information. For one thing, it allows OSM to view the source and obtain more information about the material. See, e.g., Ex R-4 p 5 (narrative p 3) (Describing visit to reported source of material to obtain further information). For another, it provides OSM with an opportunity to verify PCC's reports. Therefore, OSM is entitled to information about the source of material being deposited on site.

B. Alternatives to the PRO's Reporting Requirements

PCC next argues that even if OSM has the authority to obtain information about sources, it could just as easily acquire this information by requiring annual or quarterly reports. PCC's PRO Brief, pp 6-7. OSM responds by arguing that PCC's proposal does not provide OSM with enough information to verify PCC's activities, and makes verification more difficult.

OSM's PRO Response Brief, p 10. Furthermore, OSM argues, PCC's proposal does not include having a PCC employee onsite to oversee disposal, and is unacceptable on that basis.

Especially in light of PCC's history and this forum's decision affirming the NOV's, this forum finds that although PCC has proposed a less onerous alternative, it has not proposed a alternative which accomplishes the same goals as well as OSM's reporting requirement. The raw data as represented by signed trip tickets provides OSM with information which allows OSM to attempt to verify that PCC is conducting its disposal activities as permitted, and gives OSM an opportunity to verify each separate act of disposal. Furthermore, as OSM points out, PCC has not provided evidence to show that providing individual trip tickets is an unreasonable burden on PCC. Therefore, this forum finds that PCC's alternative does not show that OSM's reporting requirements are unreasonable.

C. Consistency with SMCRA

PCC argues that OSM's actions are inconsistent with the purposes and objectives of SMCRA, stating: "one of the stated purposes of SMCRA is to create a level playing field by imposing a minimum set of regulations that all surface coal mining operations would have to comply with." PCC's PRO Brief, p 8. PCC argues that OSM's requirements place PCC at a disadvantage relative to "other clean soil disposal sites." *Id.* However, PCC does not provide any support for the proposition that SMCRA is concerned with creating a level playing field for businesses which conduct disposal activities. To the extent PCC is at a "competitive disadvantage," it is because PCC is conducting disposal activities within its SMCRA permit boundary area. OSM has shown some flexibility in allowing this activity to take place, and is not required by SMCRA to ensure that PCC is on a level playing field with other disposal businesses.

D. Conditions as "New Regulations"

Next, PCC argues that OSM has created new rules by requiring PCC to "permit each individual source of clean soil." PCC's PRO Brief, p 8. PCC argues that OSM requires "the name of the contractor, the address of the site, and chemical test results from samples taken from the site," and that these requirements, as well as the conditions in the PRO, constitute new regulations. *Id.* pp 8-9.

In the first place, it is important to clarify the subject of this forum's decision. Although it is true that OSM has informed PCC of the type of information it would require for a permit revision to allow the disposal of material from additional sources (See Ex R-22), those requirements are not at issue in this proceeding. Rather, only the requirements actually included in the PRO under appeal are at issue.

The PRO requirements are not regulations. They are not of general effect, but are specific to PCC and its permit. They represent an exercise of OSM's authority under existing regulations. OSM has the current regulatory authority to require the revision of permits under

certain circumstances. 30 C.F.R. § 774.11(b). Therefore, PCC's argument that OSM has violated Administrative Procedure Act requirements related to rulemaking is based on the wrong premise. Similarly, PCC's arguments concerning the Small Business Regulatory Enforcement Fairness Act of 1996 are misplaced, because this Act applies to regulations, and not to the type of adjudicatory actions at issue in this proceeding.

E. Purpose behind restriction

PCC argues that the "real purpose" behind the PRO conditions is political. PCC's PRO Brief, pp 11, 13-16. PCC's argument is based on the Board's holding in the Peabody case. In Peabody, the Board found that OSM's primary motivation for a permit condition was to protect Indian water right claims. Peabody, supra, 123 IBLA at 208. The Board found that "[s]uch considerations are beyond OSM's authority under SMCRA and implementing regulations." Id.

However, in this case, OSM's concerns relate directly to the reclamation of the mine. OSM's requirements address its concern that PCC has shown a propensity to dispose of material inside the permit boundary without providing OSM with information about the material. OSM has expressed concern over the effect such material might have on hydrology, revegetation, and approximate original contour – which are all important factors in achieving proper reclamation. See, e.g., Tr 172-73. Therefore, this case is distinguishable from Peabody.

It is true that the PRO was partially motivated by concerns expressed by the City. However, Peabody does not stand for the proposition that a PRO may not be partially motivated by concerns from a local government. In light its proximity to the mine, and in light of the fact that the City and the mine share a watershed, the City has a legitimate interest in ensuring that the mine is properly reclaimed. The key is that the concern OSM responded to, proper reclamation, is well within OSM's authority.

F. Conformity with Technical Reviews

PCC argues that the reporting requirements do not conform with OSM's technical reviews, which, PCC asserts, support random testing rather than the PRO's reporting requirements. PCC's PRO Brief, pp 12-13. PCC does not cite any authority for the proposition that the conditions in the PRO must strictly conform to recommendations in a technical review. At any rate, the PRO's reporting requirements are consistent with the goals of the technical reviewers, to help ensure that OSM is aware of what materials are being deposited on site.

Conclusion

For the above reasons, conditions "a." and "d." in the PRO, relating to record keeping and reporting requirements, are hereby **AFFIRMED**. Condition "b," requiring assurance of certain hours of operation, and condition "c," requiring justification for a 40% reduction in reported volume, are hereby **REVERSED**.

Pursuant to 43 C.F.R. § 4.1369, all parties have the right to seek review of this order. This regulation provides:

(a) Any party aggrieved by a decision of an Administrative Law Judge may file a petition for discretionary review with the Board within 30 days of receipt of the decision or, in the alternative, may seek judicial review in accordance with 30 U.S.C. 1276 (a)(2) (1982). A copy of the petition shall be served simultaneously on the Administrative Law Judge who issued the decision, who shall forthwith forward the record to the Board, and on all other parties to the proceeding.

(b) The petition shall set forth specifically the alleged errors in the decision, with supporting argument, and shall attach a copy of the decision.

(c) Any party may file a response to a petition for discretionary review within 20 days of receipt of the petition.

(d) The Board shall issue a decision denying the petition or granting the petition and deciding the merits within 60 days of the deadline for filing responses.

43 C.F.R. § 4.1369. The parties should also take note of procedural regulations found at 43 C.F.R. §§ 4.1100 to 4.1116, which are also applicable to any petitions for review.

The parties should take particular notice of a recent change in the regulations. Because the Interior Board of Land Appeals has moved to a different location, the regulations have recently been amended to reflect a new address for the Board. See 67 Fed. Reg. 4367 (January 30, 2002). Of particular relevance, the address set forth in 43 C.F.R. § 4.1107(c) has been amended to read:

Board of Land Appeals
Office of Hearings and Appeals
801 North Quincy Street
Arlington, Virginia 22203.

A copy of any petition for review should be provided to this forum.

Issued at Sacramento, California, February 21, 2002.

William E. Hammett
Administrative Law Judge

I hereby certify that a copy of the "Decision" was sent by certified mail, return receipt requested, on February 21, 2002 to each of the parties set forth below.

(Editor's Note: The names and addresses have intentionally been deleted.)

Dated February 21, 2002 at Sacramento, California.

Virginia M. Waldrop
Legal Clerk