

PACIFIC COAST COAL CO., INC.

IBLA 90-201

Decided March 28, 1990

Appeal from a decision of the Office of Surface Mining Reclamation and Enforcement disapproving an application to revise OSMRE permit No. WA 0007A.

Appeal dismissed, referred to the Hearings Division.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Expedited Review: Generally--Surface Mining Control and Reclamation Act: Federal Program: Permits--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for Pacific Coast Coal Company, Inc.; John R. Kunz, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Pacific Coast Coal Company, Inc. (Pacific Coast), appeals from an October 30, 1989, decision of the Chief, Federal Programs Division, Office of Surface Mining Reclamation and Enforcement (OSMRE), in Denver, Colorado, disapproving an application to revise OSMRE permit No. WA 0007A for the John Henry No. 1 Mine in King County, Washington. Pacific Coast applied for a revision in the reclamation plan for the mine to allow creation of a "final-cut lake," *i.e.*, to reclaim Pit 1 as a permanent impoundment.

OSMRE's decision stated that Pacific Coast "may appeal \* \* \* under the procedures set out in 43 CFR 4.1280 to 4.1286." Accordingly, Pacific Coast hand delivered a notice of appeal to OSMRE on November 21, 1989, and mailed a copy to the Board. 43 CFR 4.1282. After requesting an extension of time to do so, Pacific Coast filed its statement of reasons on January 8, 1990.

On January 24, 1990, counsel for OSMRE requested an extension of time to file its answer. In his covering letter, counsel stated that OSMRE was "still in the process of compiling the administrative record for this case" and expressed the hope that OSMRE would be able to file the record with the Board "before the first part of next week." The record was filed on February 6, 1990. See 43 CFR 4.1107(h). It was received by the Board and the appeal was docketed on February 13, 1990.

On February 9, 1990, OSMRE filed a motion for the Board to dismiss the appeal and refer the matter to the Hearings Division on the grounds that the regulations found at 43 CFR 4.1370-.1379 govern an "appeal" of the disapproval of an application for a permit revision, "notwithstanding \* \* \* OSM[RE]'s inadvertent notification to the contrary." OSMRE stated that its "sole desire is that this matter be heard by the correct forum under the appropriate set of procedures." OSMRE also requested us to give the matter expedited consideration "[b]ecause of the nature of this motion," and we have done so.

Pacific Coast responded to the motion on February 22, 1990, noting that it is a small coal operator and cannot afford to spend time "seek[ing] redress before multiple forums." Pacific Coast stated it preferred that the case remain with the Board and that the Board render an expedited decision, but "[i]f the subject appeal must be dismissed, it is requested that expedited consideration be accorded and that any prospective remand to the Hearings Division be without prejudice."

[1] The regulations at 43 CFR 4.1280-.1286, cited by OSMRE in its decision and followed by Pacific Coast in filing its appeal, are applicable to "appeals from decisions of the Director of OSM[RE] concerning small operator exemptions under 30 CFR 710.12(h) and to other appeals which are not required by the Act to be determined by formal adjudication under the procedures set forth in 5 U.S.C. 554." 43 CFR 4.1280. The regulations at 43 CFR 4.1370-.1379 referred to by OSMRE in its motion, "set forth the procedures for obtaining review of decisions by OSM[RE] concerning permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permits." 43 CFR 4.1370.

We conclude that the proper procedures to be followed in reviewing the disapproval of Pacific Coast's application for a revision of its permit are those set forth in the latter regulations.

OSMRE considered that Pacific Coast's application was for a significant revision. See 30 U.S.C. § 1261(a)(2) (1982); 30 CFR 774.13. Accordingly, it processed the application "in accordance with the public notice and hearing provisions of §§ 773.13, 773.19(b)(1) and (2), and 778.21 and of Part 775." 30 CFR 947.774(b)(1). Pacific Coast published notice of its application for 4 weeks in a newspaper in the vicinity of the mine, 30 CFR

773.13(a), and OSMRE held an informal conference in response to written objections to the application, 30 CFR 773.13(c). 30 CFR 775.11(a) provides that an applicant for a permit revision may request a hearing on the reasons for a decision within 30 days after he is notified of the decision, and 30 CFR 775.11(c) provides that all hearings under a Federal program for a state on an application for a permit revision "shall be of record and governed by 5 U.S.C. 554 and 43 CFR Part 4."

Because the regulations found at 43 CFR 4.1280 apply to appeals that do not require a hearing in accordance with 5 U.S.C. § 554 (1982), review under them would be inappropriate in this case. Pacific Coast's notice of appeal should be treated as a request for review pursuant to 4.1370. We therefore refer this matter to the Hearings Division, without prejudice, with instructions that Pacific Coast be afforded the opportunity to amend its "appeal" to supplement its filings with the items required under 43 CFR 4.1373 which have not already been provided, if any.

As noted, Pacific Coast requested that expedited consideration be accorded if this matter is referred to the Hearings Division. We observe that several weeks were lost while OSMRE compiled the administrative record, and remind the agency of the proper procedures for assembling such records. See Save Our Cumberland Mountains, Inc., 108 IBLA 70, 84-85 (1989); Harriett B. Ravenscroft, 105 IBLA 324, 330-32 (1988). While the current version of 43 CFR 4.1379 allows for expedited review, proposed regulations require that, unless waived by the parties, a hearing in the matter shall commence within 30 days of the date of filing the request for review (in this case, within 30 days of the date of this decision), and an Administrative Law Judge shall issue a written decision within 30 days of the date the hearing record is closed. See 43 CFR 4.1364, 4.1368, 54 FR 9653, 9654 (Mar. 8, 1989). See also 43 CFR 4.1369 (Mar. 8, 1989).

By memorandum of the Director, Office of Hearings and Appeals, dated April 21, 1989, the Hearings Division and the Board were instructed to comply with the time frames set forth in the proposed regulations pending final rulemaking. Thus, Pacific Coast will receive expedited review.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal filed with the Board by Pacific Coast is dismissed and the matter is referred to the Hearings Division for proceedings consistent with this opinion.

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Wm. Philip Horton  
Chief Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge