



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

174 IBLA 262

Decided April 29, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

PACIFIC COAST COAL COMPANY

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2008-58

Decided April 29, 2008

Petition for discretionary review of a decision of Administrative Law Judge Andrew S. Pearlstein reversing a decision of the Office of Surface Mining Reclamation and Enforcement denying an application for a permit revision. DV-2006-1 PR.

Petition for discretionary review granted; Administrative Law Judge's decision reversed.

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

When OSM denies a significant revision of a permit and its decision is challenged by the permittee, OSM bears the burden of going forward to establish a prima facie case as to failure to comply with applicable requirements of SMCRA, 30 U.S.C. §§ 1201-1328 (2000), or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application. 43 C.F.R. § 4.1366(d)(1).

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

Where OSM presents a prima facie case that an application for a significant permit revision is not consistent with the requirement for contemporaneous reclamation, and where the permittee fails to overcome that case by a preponderance of the evidence, the

Administrative Law Judge's ruling to the contrary is properly reversed, and OSM's denial of the permit revision application is properly upheld.

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 ROBERTS

Pursuant to 43 C.F.R. § 4.1369(a), the Office of Surface Mining Reclamation and Enforcement (OSM) has filed a petition for discretionary review (PDR) of the December 7, 2007, decision of Administrative Law Judge (ALJ or Judge) Andrew S. Pearlstein reversing the July 27, 2006, decision of the Chief, Denver Field Division, OSM, denying an application filed by Pacific Coast Coal Company (PCC) for a significant revision of its permit for the John Henry No. 1 Mine (Mine) in King County, Washington.<sup>1</sup> Judge Pearlstein ruled that OSM had not presented a prima facie case that PCC's revision application failed to comply with the Surface Mining Control and Reclamation Act of 1977 (SMCRA or Act), 30 U.S.C. §§ 1201-1328 (2000), and implementing regulations at 30 C.F.R. Part 774. The revision, if approved, would allow, during a renewed 5-year permit period ending in 2011, PCC's importation of 500,000 cubic yards (cy) of non-mining "clean" waste materials from sources outside the permit area for permanent disposal in Pit 1 on the Mine. As explained below, we reverse Judge Pearlstein's decision.

#### *I. BACKGROUND*

Since 1985, PCC has operated the Mine under a series of permits, granted for 5-year terms pursuant to SMCRA. From the beginning, PCC's mining operations have centered on Pits 1 and 2, with overburden excavated from these Pits stored in four "spoilpiles." PCC's plan provides that the overburden stored on these spoil piles will be used to backfill the pits and restore the permit area to its approximate original

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<sup>1</sup> The Mine permit area consists of 422 acres, northwest of the City of Black Diamond, Washington (City or Black Diamond). The southeast corner of the Mine permit area, about 45 acres, is situated within the City boundaries. This part of King County, on the outskirts of the Seattle metropolitan area, is rapidly growing. There are residential subdivisions in close proximity to the Mine permit area boundaries on the northwest, southwest, and east. ALJ Decision at 3; Government Exhibit (Gov. Ex.) C-4; Tr. 33-34, 172-74.

contour (AOC).<sup>2</sup> Originally, the reclamation plan did not provide for the importation of any materials from offsite onto the Mine or Pit 1. Gov. Ex. B at Plate III-8a. As explained below, PCC's permit renewal application approved in 2001 was revised to allow up to 500,000 cy of clean soil from approved sources to be imported to the Mine and backfilled into Pit 1 during the 2001-2006 permit term. Gov. Ex. B at 3-38, 47, 50-52; Gov. Ex. C-4; Tr. 57-63; see ALJ Decision at 4-6.

From 1986 into 1999, PCC actively mined coal from Pits 1 and 2 at the Mine. Tr. 41, 43-44; Gov. Ex. B at 3-4, Table III-3. However, due to poor market conditions for the sale of coal, mining from Pits 1 and 2 dropped off dramatically in 1997 and ceased altogether in 1999. Tr. 46-47; Gov. Ex. B at 3-14, Table III-3. Since 1999, no coal mining has occurred at the Mine. Tr. 48, 59-60; Gov. Ex. GG at 3-15, Table III-3. While the approved reclamation plan estimated that final reclamation of the eastern part of Pit 1 would be achieved by 2001, very little reclamation of the Mine has been achieved. Tr. 53-56, 58-60, 288. OSM allowed the pits to remain open and unreclaimed to accommodate PCC's intent to mine coal from the pits in the future. Tr. 118, 190-91, 283.

In 1999, to offset the loss of income from coal sales, PCC entered into contract agreements with third parties for the disposal of "clean" waste materials from sources off the permit area, and used Pit 1 on the Mine as the site for permanent disposal of the materials. Tr. 65-67, 337; Gov. Ex. OO. PCC began importing offsite waste materials for permanent disposal at the Mine without OSM's knowledge or permission. Over the course of a number of years, OSM issued a series of three notices of violation (NOVs) and a permit revision order (PRO) concerning PCC's waste disposal operations, all of which are described by the Board in *Pacific Coast Coal Company v. Office of Surface Mining Reclamation and Enforcement (PCC v. OSM)*, 158 IBLA 115, 119-22 (2003).

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<sup>2</sup> In 1989, PCC submitted an application to revise the approved reclamation plan to reclaim Pit 1 as a permanent impoundment, and to reclaim the spoilpiles to no greater than 33% slopes when mining operations cease under the permit. OSM denied the revision application and PCC requested review. See *Pacific Coast Coal Co.*, 113 IBLA 384 (1990). Judge Ramon M. Child approved the parties' stipulations allowing Pit 1 to be reclaimed as a permanent impoundment. He determined that PCC's revision application regarding reclamation of the spoilpiles was legally deficient because it failed to comply with the AOC requirements of section 515(b) of SMCRA, 30 U.S.C. § 1265(b)(3) (2000), and 30 C.F.R. § 816.102. The Board affirmed Judge Child's decision, ruling that PCC's "proposal to retain Spoil Pile Nos. 1 and 2, and a portion of Spoil Pile No. 3, as permanent topographical features . . . is clearly inconsistent with the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102." *Pacific Coast Coal Co.*, 118 IBLA 83, 118, 98 I.D. 38, 57 (1991).

In *PCC v. OSM*, 158 IBLA at 125, 130, the Board affirmed with slight modification Judge William E. Hammett's decision that OSM had jurisdiction under SMCRA to regulate PCC's waste disposal operations because they impacted reclamation of the Mine and because OSM was obligated, under SMCRA, to ensure that PCC's mine reclamation activities met applicable statutory and regulatory environmental standards and did not endanger the public health and safety. Moreover, the Board ruled that "OSM may properly restrict the sources of fill material that may be disposed on a site to achieve those purposes." *Id.* at 127. The Board's decision was upheld by the U.S. District Court for the Western District of Washington. *PCC v. OSM*, No. 03-0260Z (W.D. Wash. Feb. 2, 2004).

In affirming the three NOV's and PRO, the Board observed PCC's "history of indifference to compliance with Federal regulations, disregard of specific orders from OSM to cease its practice of the unauthorized disposal of waste materials, and disregard of its permit terms regarding disposal activities." *PCC v. OSM*, 158 IBLA at 129. The Board observed that OSM's "closer scrutiny" of PCC's disposal activities through the PRO was "warranted, because PCC persisted in unpermitted disposal activity at the Mine, even after being informed that specific authorization was needed," *id.* at 136, and further that "PCC has unfortunately demonstrated a tendency to stray from the terms of its permit when conducting its disposal activities." *Id.* at 140.

The permit under which OSM issued the three NOV's and the PRO was set to expire on August 22, 2001. PCC timely submitted an application for permit renewal for an additional 5-year term (August 2001 to August 2006). PCC's proposed mining operation plan for the renewal permit indicated that "0 acres" were scheduled for mining coal from Pit 1 through 2005. Gov. Ex. B at 3-16, Table III-5. Rather than planning to mine coal from the pit, PCC proposed that "clean" waste materials from "external," *i.e.*, offsite, sources be placed in Pit 1 at the rate of up to 100,000 cy per year, for a maximum total of 500,000 cy (subject to OSM's prior approval of a permit revision for each source of materials). Gov. Ex. B at 3-15 to 3-16, Table III-5a. At an average load of 18 cy, the permit would allow the disposal of over 20 truckloads of waste material per day at the Mine. Gov. Ex. B at 3-15 to 3-16, 17a-18; Tr. 163-64. On or about June 13, 2001, OSM approved PCC's application for permit renewal, including the part requesting disposal of the offsite materials in Pit. 1. Tr. 47. Thus, the permit renewal application that OSM approved for the 5-year term from 2001 through 2006 contemplated absolutely no mining of coal—only the importation of up to 500,000 cy of waste material for disposal in Pit 1.

Despite what OSM refers to as "PCC's history of unauthorized disposal activities" (Answer at 9), OSM approved several applications for minor permit

revisions to allow the disposal of offsite materials in Pit 1 on the Mine.<sup>3</sup> By letter dated October 17, 2002, OSM approved PCC's application for permit revision to dispose of glacial till in Pit 1. At this time, OSM expressed concern that PCC was not meeting its obligations for contemporaneous reclamation at the Mine. OSM stated that its approval of the glacial till materials for disposal did "not relieve [PCC] of its obligation of contemporaneous reclamation as required at 30 CFR 816.100." Gov. Ex. U. OSM declined to order reclamation of Pit 1, however, because of the eventual possibility that PCC might resume mining coal and because OSM did not, at that time, perceive disposal of the approved amounts of offsite materials as inconsistent with PCC's reclamation plan for Pit 1. Tr. 118, 190, 284.

On November 11, 2004, PCC submitted an application for a permit revision for the disposal of materials from the Sound Transit Beacon Hill tunnel project in Seattle. In this revision application, PCC proposed that the 500,000 cy limitation be increased by 200,000 cy to 700,000 cy. Tr. 110-11; Gov. Ex. AA at 1-2. The City objected to this application. By letter dated February 15, 2005, OSM determined that disposal of up to 700,000 cy of Sound Transit Beacon Hill materials constituted a significant permit revision that would be processed as such with public notice and hearing in accordance with 30 C.F.R. § 774.13(b). OSM explained that this was a significant revision because (1) the additional 200,000 cy of material constituted "a significant percentage (nearly 20%) of the total backfill planned for reclamation to the approved post mine topography" and "ha[d] the potential to alter the approved reclamation plan, and (2) disposal of materials beyond the volumes approved in the 2001 permit appeared to be inconsistent with PCC's intent to leave Pit 1 open for future mining." Gov. Ex. CC at 2; see Tr. 115-18. OSM further noted that if PCC could dispose of offsite materials into Pit 1, then PCC should be able to commence backfilling Pit 1 with onsite materials from the spoilpiles as required by the reclamation plan. Gov. Ex. CC at 2.

By letter dated March 9, 2005, PCC responded to OSM's decision to process the November 11, 2004, application as a significant permit revision. PCC stated that it would "limit [the Sound Transit Beacon Hill] material along with other approved customers to ensure that we comply with the quantity limitations during the balance of the permit term." Gov. Ex. DD at 2. OSM interpreted PCC's letter to mean that PCC had modified its application so as not to exceed the 500,000 cy limitation. Tr. 121-22. Accordingly, by letter dated March 21, 2005, OSM informed PCC that it

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<sup>3</sup> PCC's applications were treated as "minor" permit revisions because the volume of materials approved for disposal did not conflict with the approved reclamation plan. Tr. 118, 190, 283; Gov. Exs. K (20,000 cy of refuse materials from a housing project), U (50,000 cy of glacial till from a sewer and tunnel project), and Z (10,000 cy of moist silt from a water filtration plant).

would treat the November 11, 2004, application as a request for a minor permit revision based upon PCC's assurance that it would stay within the 500,000 cy limitation imposed by the 2001 permit. Gov. Ex. EE at 2.

PCC's 2001 permit was set to expire on August 22, 2006. By letter dated February 1, 2006, OSM gave PCC notice of the pending expiration and stated that while PCC had a right under 30 C.F.R. § 744.15(a) to renewal of its permit to mine coal, no such right existed for PCC's disposal of offsite materials at the Mine. OSM informed PCC that the disposal activities approved under the current 2001 permit "do not carry over to the new permit" and "end at expiration of the current permit." Gov. Ex. FF at 2.

On April 20, 2006, OSM received PCC's application for permit renewal of mining operations at the Mine for another 5-year term (August 2006 - August 2011). Tr. 129. The application requested approval of the disposal in Pit 1 of additional "clean fill" waste materials from offsite sources at the rate of up to 100,000 cy annually with a maximum amount of 500,000 cy during the 5-year term of the permit. Gov. Ex. GG at 3-16. The application did not include a proposal to mine coal.

James Fulton, Chief of the Denver Field Division, OSM, reviewed PCC's application for permit renewal. Tr. 184. By letter dated May 11, 2006, he advised PCC that its request for the disposal of 500,000 cy of additional offsite materials would be treated as an application for significant permit revision separate and apart from PCC's application for permit renewal. Gov. Ex. HH at 2-3; see Tr. 137-39, 210-11, 241-43, 265-66, 276-77. Fulton stated that the additional material "constitutes a significant additional volume to the total backfill planned for reclamation, and to the approved post mine topography," and that "this quantity has the potential to alter the reclamation plan as currently approved in your permit application package." *Id.* at 2. Accordingly, OSM processed PCC's request as an application for significant permit revision. Tr. 249-52.

By letter dated July 27, 2006, Fulton, on behalf of OSM, denied PCC's application for a significant permit revision for the renewed 5-year permit period. He denied the application because the proposed waste disposal activities (1) conflict with the approved reclamation plan for the Mine with regard to reclamation timing and elimination of spoil piles; (2) are inconsistent with PCC's intent to leave Pit 1 open for future mining operations; (3) conflict with the purposes of SMCRA, which are to protect society and the environment through regulation from the adverse impacts of surface coal mining operations and not of waste disposal operations;

and (4) would, without any mandate or justification under SMCRA, increase OSM's administrative burdens. *Id.*<sup>4</sup>

In its Request for Review, PCC argued that OSM erred in determining that, under 30 C.F.R. § 774.15(a), PCC did not have a right of successive permit renewal regarding its waste disposal activities at the Mine. Request for Review at 4. In addition, PCC asserted that OSM incorrectly determined that its request to dispose of up to 500,000 cy of offsite waste materials in Pit 1 conflicted with the approved reclamation plan for the mine. *Id.* at 4-5. As relief, PCC sought an order directing OSM to process its request for disposal of offsite materials as part of OSM's process for the application for permit renewal. In the alternative, if it were determined that OSM could properly process PCC's request for disposal of offsite materials separate from PCC's request for permit renewal, OSM should be directed to provide PCC with a technical deficiency letter explaining why PCC's continued disposal of clean soil materials conflicts with PCC's approved reclamation plan. *Id.* at 6.

A hearing on PCC's Request for Review was held before Judge Pearlstein on September 6-7, 2006, in Black Diamond, Washington. On the afternoon of September 7, 2006, Judge Pearlstein accompanied the parties and several of their representatives on a visit to the Mine site. At the hearing, PCC was represented by David Morris, General Manager of PCC, and OSM was represented by John Retrum, Esq., Office of the Field Solicitor, Denver, Colorado.

## II. JUDGE PEARLSTEIN'S DECISION

Judge Pearlstein's decision begins with a summary that clearly articulates his holdings. He ruled that OSM "failed to establish a prima facie case that the application of [PCC] to dispose of 500,000 [cy] of clean soil from offsite sources in Pit 1 on the [Mine] will prevent reclamation from being accomplished by [SMCRA],

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<sup>4</sup> PCC filed a Request for Review and Temporary Relief (Request for Review) from OSM's July 27, 2006, decision. By Order Granting Temporary Relief, Judge Pearlstein allowed PCC to continue, beyond expiration of the permit on Aug. 22, 2006, its disposal of offsite materials at the Mine at the rate of 100,000 cy per year, up to the maximum amount of 500,000 cy authorized under the 2001 permit, pending a final Departmental decision in this proceeding. On Dec. 14, 2006, Judge Pearlstein issued an Order Clarifying and Continuing Temporary Relief allowing PCC to apply to OSM, under the same procedures authorized under the prior permit, for a minor permit revision to receive clean fill from a new source, with the effect that pending the outcome of these proceedings, PCC was authorized to continue to receive waste material from offsite sources, so long as it does not exceed the quantitative or qualitative limits previously set in the expired permit.

30 U.S.C. §§ 1201-1328 [(2000),] and regulatory program, or will fail to meet any other applicable regulatory criteria.” ALJ Decision at 1. He ruled further that since the Board confirmed in *PCC v. OSM* that “waste disposal activity [is] a ‘surface coal mining and reclamation operation’ as defined by the Act, OSM does not have discretion to deny approval of that activity without a supportable technical or regulatory basis.” *Id.* He determined that OSM had not shown a technical or regulatory basis for denying PCC’s application for a significant permit revision,<sup>5</sup> and that PCC had shown that it is “entitled to approval of its application to continue its waste disposal activity.” *Id.* He directed “OSM to reverse its previous decision and grant approval of PCC’s application in conjunction with renewal of its SMCRA permit for the Mine for another 5-year term.” *Id.*

Judge Pearlstein found OSM’s rejection of PCC’s application as deficient for “only assert[ing] . . . that the importation of additional waste ‘conflicts with’ or ‘alters’ the approved reclamation plan,” rather than showing that importation of the offsite waste material “would prevent reclamation [from being] accomplished as required by SMCRA, or that this activity would otherwise fail to meet any other requirement of the Act or regulatory program.” *Id.* at 13-14. He addressed OSM’s reasons for denying PCC’s application under two categories, *i.e.*, (1) “technical or quasi-technical” and (2) “legal, policy-related, or almost philosophical.” ALJ Decision at 11. We now briefly review Judge Pearlstein’s analysis of these “two categories.”

#### A. “Technical” or “Quasi-Technical” Reasons for OSM’s Disapproval

Judge Pearlstein characterized “Pit 1, where the imported waste is being used as backfill, [as], for all intents and purposes for the foreseeable future, a bottomless pit.” *Id.* at 14. He stated that “the only physical effect of adding another 500,000 cy to Pit 1 is to reduce the depth of the final cut lake from an extremely deep 135 feet to a very deep 105 feet.” *Id.* He was of the view that “[t]hat effect, however, does not mean that reclamation as required by the Act, and as required by PCC’s current permit cannot be properly accomplished.” *Id.* “If anything,” he stated, “the record shows that a shallower lake would be more environmentally desirable.” *Id.* He concluded that “[t]he mere alteration of a reclamation plan does not provide a valid basis for OSM to deny a revision application” and “would not prevent reclamation

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<sup>5</sup> As an initial matter, Judge Pearlstein stated that OSM was justified in processing PCC’s application to dispose of 500,000 cy of additional waste material as a significant permit revision. ALJ Decision at 12. He reasoned that because the regulations do not define “permit revision” or provide criteria for distinguishing between “minor” and “significant” permit revisions, “OSM has discretion to apply appropriate procedural requirements to application for permit revisions pursuant to 30 C.F.R. § 774.13.” *Id.*

from being properly accomplished or conflict with any other applicable criteria for approval cited in 30 C.F.R. § 774.13(c).” *Id.*

Judge Pearlstein rejected OSM’s determination that PCC’s application to dispose of 500,000 cy of additional waste disposal could interfere with the reclamation and use of “significant spoilpiles” that remain on the Mine site. He was persuaded by the direct testimony of Morris, PCC’s General Manager, that “the timing of the resumption of coal mining and reclamation of the spoilpiles is dependent solely on market conditions, and completely unaffected by the waste disposal operation in Pit 1.” *Id.* at 15. He was struck by what he termed the “surprising lack of familiarity with the potential effects of PCC’s proposal” exhibited by Joseph Wilcox, OSM’s witness. *Id.*; see Tr. 197-201, 239-40. He observed that Wilcox “could not explain any effect that the importation of additional fill would have on reclamation of existing spoilpiles.” ALJ Decision at 15. In Judge Pearlstein’s opinion, “[t]his strongly suggests that OSM did not have any real technical basis to deny PCC’s application.” *Id.*

As for the testimony of Fulton, Judge Pearlstein stated that “[h]e straightforwardly declared OSM’s desire that PCC get back into the business of mining coal rather than engaging in waste disposal.” *Id.* at 15-16; see Tr. 286-87. He characterized as “quasi-technical” Fulton’s assertion that PCC’s waste disposal activity “conflicts with the purpose of SMCRA to ‘assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.’” ALJ Decision at 16, quoting 30 U.S.C. § 1202(e) (2000).<sup>6</sup> Judge Pearlstein was persuaded by Morris’ explanation “that the reclamation plan, as shown in the existing permit and current permit applications, does not call for the backfilling of the pits with those spoilpiles until the conclusion of mining,” that “[s]poilpiles 1 and 3 are planned to remain as noise barriers until final reclamation,” and that “[s]poilpile 2 will be used to partially backfill both pits, but must remain until near the conclusion of mining to maintain access to coal seams in Pit 2 and to keep access roads open.” ALJ Decision at 16; Govt. Ex. B at 3-38-39; Govt. Ex. GG at 3-42-43; Tr. 326-28. He stated: “They must remain until after mining resumes – when market conditions warrant – and is then finally completed.” ALJ Decision at 16.

#### *B. “Policy” or “Philosophical” Bases for OSM’s Disapproval*

Judge Pearlstein stated that “OSM’s objection to regulating what it characterizes as a waste disposal . . . activity does not constitute a sufficient legally supportable reason to deny PCC’s application.” *Id.* He rejected OSM’s claim that PCC’s waste disposal activity imposes an administrative burden on OSM, stating

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<sup>6</sup> The ALJ Decision inadvertently cites this provision as 30 U.S.C. § 1201(e) (2000).

rather that “[i]t is entirely appropriate that OSM monitor this activity to ensure that only clean, non-hazardous material is placed in Pit 1.” *Id.* at 18 (footnote omitted). He stated: “So long as this material is being used to fill that pit, in accordance with the expiring permit and pending permit application, it is a reclamation activity on an active mine site that falls within OSM’s regulatory jurisdiction.” *Id.*

Judge Pearlstein rejected Fulton’s opinion that “Congress promulgated SMCRA to regulate coal mining, not waste disposal,” stating: “The problem with this argument is that it directly contradicts the key holding in *PCC v. OSM*, 158 IBLA at 124-125 (2003).” He explained that “[i]n [*PCC v. OSM*], the Board upheld OSM’s argument that this precise activity, the disposal at the Mine of fill material from offsite, constitutes a ‘surface mining and reclamation activity’ as defined by SMCRA and its implementing regulations.” ALJ Decision at 19. He asserts that “OSM, having achieved confirmation of its authority to regulate this activity, now seeks to effectively renounce that authority,” and that “[i]t is startling to see . . . how both parties, with the same cast of characters, have now essentially reversed the positions they took in the case before Judge Hammett.” *Id.* at n. 4.

Judge Pearlstein ruled that “PCC may properly continue its waste disposal operation as a regulated reclamation activity, so long as it remains consistent with SMCRA requirements, while waiting for market conditions to again favor resumption of coal mining.” *Id.* at 20. “[A]ctual mining,” he stated, “has been temporarily suspended for an extended period.” *Id.* He held that the regulations “do not confer discretion on OSM to deny an application if it meets all regulatory criteria for approval.” *Id.* at 21. He found “no support in the Act, regulations, or any precedent, that would allow OSM to deny an application because it would prefer that the applicant conduct its business differently or because of the administrative burden imposed on OSM.” *Id.* He concluded that “the only logical way to resolve this proceeding, upon the complete record, is to grant the only effective relief sought by PCC – to direct OSM to approve PCC’s application.” *Id.* at 23. He directed “OSM . . . to rescind its disapproval of PCC’s application and to then approve it in conjunction with PCC’s application for a renewal of its permit for the Mine for a new 5-year term.” *Id.*

### III. OSM’S PDR

In its PDR, OSM argues that Judge Pearlstein was wrong in ruling that OSM failed to establish a prima facie case for denial of PCC’s application for permit revision. OSM begins by putting PCC’s waste disposal activity into the context of section 511(a)(2) of SMCRA, 30 U.S.C. § 1261(a)(2) (2000), which provides in relevant part: “An application for revision of a permit shall not be approved unless the regulatory authority finds that reclamation as required by [the Act] and the State or Federal program can be accomplished under the revised reclamation plan. . . .”

PDR at 16; *see* 30 C.F.R. § 774.13(c); *see also* section 515(b)(3) and (5) of SMCRA, 30 U.S.C. § 1265(b)(3) and (5) (2000); 30 C.F.R. §§ 780.18(a) and (b), 947.780(a), 816.22, 816.102, and 816.133.<sup>7</sup>

OSM contends that it “denied PCC’s application for permit revision because PCC did not . . . demonstrate that its disposal of off-site waste materials on the Mine would accomplish reclamation ‘as required’ by . . . the Act and program . . .” *Id.* at 18. OSM asserts that PCC’s failure to show how its waste disposal activities “would accomplish reclamation ‘as required’ by the Act and regulatory program” is the “principal aspect” of OSM’s case. *Id.* However, OSM complains that Judge Pearlstein ignored this “primary reason for denial of the application, *i.e.*, that PCC did not, as required by 30 CFR 774.13(c), demonstrate that waste disposal would accomplish ‘reclamation as required’ by the Act and the Washington Federal program.” *Id.* at 19-20. OSM asserts that “[n]othing in [Judge Pearlstein’s] Decision addressed this issue or showed that OSM was wrong for denying PCC’s application for permit revision on this basis.” *Id.* at 20.

OSM disputes Judge Pearlstein’s determination that it “(1) sought to renounce its authority to regulate PCC’s waste disposal activities on the Mine that was confirmed by the Board in *PCC*, *supra*; (2) attempted to re-argue the issue resolved in *PCC*; (3) took the opposite position that it took in *PCC*; and (4) ‘directly contradict[ed] the key holding in *PCC v. OSM*, 158 IBLA at 124-25 (2003).’” *Id.*, quoting ALJ Decision at 19. OSM states that, to the contrary, it “wholly agrees” with the Board’s ruling in *PCC v. OSM*, explaining as follows:

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<sup>7</sup> PCC’s April 2006 permit renewal application contained a reclamation plan that contemplated the following phases:

Under the approved plan, soil and overburden materials removed by PCC to access coal seams were placed in spoil piles on the permit area. *See* Gov. Ex. B at page 3-16. When allowed by the plan, the spoil materials were to be returned to the mined-out areas. *Id.* at pages 3-38 to 3-39 to 3-50. The surface of the land was to be backfilled and graded to restore approximate original contour, with a final-cut lake in Pit 1. *Id.* at pages 3-47 to 3-52. The land was to be restored to a condition that would support the approved postmining land use of forestry and, in the lake areas, fish and wildlife habitat. *Id.* at pages 3-24 to 3-25, 3-51 to 3-52. Final reclamation was to be achieved as contemporaneously as practicable with mining operations. *Id.* at pages 3-12, 3-13, 3-38 to 3-39, 3-41, Table III-1, Table III-10, and Plate III-8a. No additional materials from offsite sources were needed to accomplish final reclamation.

PDR at 17.

Nothing in *PCC* stands for the proposition that merely because an activity incidentally impacts reclamation and, thus, is subject to regulation under SMCRA, it will, on that basis alone, accomplish reclamation as required by the Act and regulatory program. Thus, *PCC* does not resolve the issue here, namely, whether OSM has authority and discretion under 30 CFR 774.13(c) to deny *PCC*'s application for permit revision on the basis that it does not demonstrate that the waste disposal activities will accomplish reclamation as required by the Act and regulatory program. The Board certainly did not, in *PCC*, hold or suggest that OSM lacked the authority or discretion to deny such an application. If anything, in noting that "OSM has shown some flexibility in allowing [*PCC*'s disposal] activity to take place," it suggested that OSM not only has the discretion to deny the activity, but that, in the case before us, OSM had been liberal in allowing it. [158 IBLA] at 140.

PDR at 21-22. OSM states that contrary to Judge Pearlstein's determination, "OSM did not, in its decision and case for denial of *PCC*'s application for permit revision, renounce, re-argue, or take the opposite position that it took in *PCC*, and nothing in OSM's decision or case was 'superseded' by the Board's decision in *PCC*." *Id.* at 22.

OSM disputes Judge Pearlstein's conclusion that "*PCC* may properly continue its waste disposal operation as a regulated reclamation activity, so long as it remains consistent with SMCRA requirements, while waiting for market conditions to again favor resumption of coal mining." *Id.* at 23, quoting ALJ Decision at 20. In particular, OSM questions Judge Pearlstein's statement that *PCC* may continue importing offsite waste material onto the Mine until "market conditions again favor resumption of coal mining," stating that it is unaware of any authority for "creation of this standard," which, states OSM, "is wholly Judge-made." PDR at 23. OSM argues that, "[a]s acknowledged by Judge Pearlstein, *PCC*'s waste disposal business is 'lucrative' for *PCC*." *Id.*, quoting ALJ Decision at 11. OSM asks: "As long as its disposal business is more profitable than coal mining, what market conditions would ever 'favor' the resumption of coal mining? How, under this standard, would OSM challenge *PCC*'s discretion?" *Id.* at 23-34.

Finally, OSM asserts that Judge Pearlstein ordered OSM to approve *PCC*'s application for permit revision without requiring OSM to conduct the technical review and render written findings in accordance with 30 C.F.R. § 773.15.<sup>8</sup> OSM

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<sup>8</sup> This regulation provides, *inter alia*:

No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively

(continued...)

contends that its “denial of PCC’s application for permit revision on the basis that it failed to demonstrate that the waste disposal activities would accomplish reclamation ‘as required’ by the Act and the Washington Federal program preempted any need to conduct the technical review and prepare written findings required by 30 CFR 773.15.” *Id.* at 28-29. For this reason, OSM asserts, it “did not conduct a full review or prepare written findings.” *Id.* at 29. OSM states that “[a]lthough Judge Pearlstein was highly critical . . . of OSM witnesses because they failed to conduct the technical review and prepare written findings required by 30 CFR 773.15, he nonetheless ordered OSM to approve PCC’s application in the absence of the same review and findings.” *Id.* OSM argues that if the Board does not reverse Judge Pearlstein’s decision, it should remand the case back to OSM with the order to process PCC’s application in accordance with 30 C.F.R. § 773.15. *Id.* at 20.

#### IV. ANALYSIS

[1] As noted, under section 511(a) of SMCRA, 30 U.S.C. § 1261(a) (2000), “[a]n application for a revision of a permit shall not be approved unless the regulatory authority finds that reclamation as required by [SMCRA] and the State or Federal program can be accomplished under the revised reclamation plan.” Similarly, the implementing regulation provides:

No application for a permit revision shall be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and the regulatory program can be accomplished, applicable requirements under § 773.15 [permit approval] which are pertinent to the revision are met, and the application for a revision complies with all requirements of the Act and the regulatory program.

30 C.F.R. § 774.13(c).

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<sup>8</sup> (...continued)

demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

(a) The application is complete and the applicant has complied with all requirements of the Act and the regulatory program.

(b) The applicant has demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.

. . . .

30 C.F.R. § 773.15.

The burdens of proof in a proceeding to review a decision on an application for revision of a SMCRA permit are established in 43 C.F.R. § 4.1366(d), as follows:

In a proceeding to review the approval or disapproval of an application for a permit revision . . . (1) If the applicant is seeking review, [OSM] shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations, and the applicant requesting review shall have the ultimate burden of persuasion as to entitlement to approval of the application . . . .

A prima facie case is made when sufficient evidence is presented to establish the essential facts which, if not contradicted, will justify a finding in favor of the party presenting the case. *E.g.*, *Al Hamilton Contracting Co. v. OSM*, 172 IBLA 83, 110 (2007);<sup>9</sup> *S & M Coal Co. v. OSM*, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984). To establish a prima facie case, OSM must present “sufficient evidence . . . to establish the essential facts and which will justify, but not compel, a finding in favor of [OSM].” *Peabody Coal Co. v. OSM*, 123 IBLA 195, 207 (1992); *S & M Coal Co. v. OSM*, 79 IBLA at 354. Thus, OSM was required to introduce evidence that PCC’s permit revision application does not comply with applicable requirements of SMCRA and the regulations. We conclude that OSM more than met this burden.

[2] OSM maintains that PCC’s proposal *not* to mine coal for the next 5-year permit renewal period, but to import an additional 500,000 cy of offsite waste material for disposal in Pit 1, does not comport with PCC’s responsibility to reclaim disturbed areas as contemporaneously as practicable with its mining of coal. *See* 30 U.S.C. § 1265(b)(16) (2000) and 30 C.F.R. § 816.100. In OSM’s view, PCC’s application for a significant permit revision failed to demonstrate that reclamation as required by SMCRA and the regulatory program can be accomplished. Thus, in its Post-Hearing Opening Brief, OSM emphasized that “merely because [waste disposal activity] impacts reclamation and is therefore subject to regulation does not mean that it accomplishes ‘reclamation as required by the Act and the regulatory program.’” Opening Brief at 18, *quoting* 30 C.F.R. § 774.13(c). OSM argued: “Reclamation as required by the Act and the regulatory program involves the restoration of lands disturbed by coal mining operations. Waste disposal is not coal mining. The whole purpose of the Act is unrelated to waste disposal.” *Id.*

Citing the definition of “surface coal mining operations” in section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (2000), and 30 C.F.R. § 700.5, OSM concluded that “[n]othing in the Act or regulations . . . requires that OSM must accommodate PCC’s waste disposal business during mining or prior to final reclamation through permit

<sup>9</sup> Action for judicial review filed Aug. 29, 2007, Civ. No. 07-212 J (W.D. Pa.).

revision.” *Id.* at 19-20. Moreover, OSM maintained, “[t]he mere fact that OSM has, in the past, approved permit revisions to accommodate PCC’s waste-disposal business at the Mine does not mean that OSM must continue to do so in the future.” *Id.* at 20.

OSM further contended that PCC’s application to import an additional 500,000 cy of offsite waste material must be reviewed in the context of “[t]he Act’s environmental protection performance standards that require that topsoil and overburden materials removed to access coal seams be placed in on-site backfill areas and that, after mining operations are completed (or abandoned), the material be used, and all spoil piles be eliminated, to restore the land to AOC.” *Id.* at 21, *citing* section 515(b)(3) and (5) of SMCRA, 30 U.S.C. § 1265(b)(3) and (5) (2000). Therefore, among the central reasons for OSM’s denial of PCC’s revision application was that the requested disposal of offsite waste materials at the Mine would delay reclamation and interfere with PCC’s incentive to mine coal and reclaim the land. Opening Brief at 21.

OSM maintained that “[a]pproval of PCC’s application would clearly interfere with PCC’s obligation to reclaim lands disturbed by mining as contemporaneously as possible with mining operations,” within the parameters of the reclamation schedule set forth in PCC’s approved permit application package. Opening Brief at 22; *see* Gov. Ex. B at 3-38, Table III-10, Plate III-8a.<sup>10</sup> In its PDR to this Board, quoting the Board’s decision in *Alabama By-Products Corp. v. OSM*, 103 IBLA 264, 272-73 (1988), OSM argues that “[w]hether particular reclamation work is ‘timely’ must be

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<sup>10</sup> OSM established at the hearing that “[a]pproval of PCC’s application would require changing the reclamation plan’s approved contours of the final-cut lake for Pit 1 . . . because importing the additional 500,000 cubic yards of off-site waste materials for disposal at the site, as requested by PCC, would increase the volume of backfill materials used for reclamation by 13.9 percent.” *Id.*, *citing* Tr. 189-90, 203, 284-85. OSM presented evidence that “[t]o accommodate this increased volume of backfill materials, the approved reclamation plan would have to be changed to either: (1) reduce the amount of materials removed from the spoil piles for reclamation; or (2) alter the contours of the final-cut lake in Pit 1 to make it shallower.” Opening Brief at 22, *citing* Tr. 189, 227-28, 276. PCC’s proposal involves altering the contours of the final-cut lake in Pit 1, requiring OSM’s review and approval of PCC’s reclamation plan for the Mine. Tr. 243; Gov. Ex. GG, 3-55 to 3-56, Tables III-15 and 16. OSM suggested that “there is no reason why PCC could not . . . take 500,000 cubic yards of overburden materials from the spoil piles to achieve contemporaneous reclamation of the said three areas of Pit 1 without jeopardizing future mining from the pit,” Opening Brief at 22, and PCC should direct its efforts at contemporaneous reclamation of the spoilpiles rather than continuing to import offsite waste materials to the Mine for another 5-year period.

determined taking into account the overall circumstances of a surface coal mining and reclamation operation.” PDR at 25. OSM argues:

Judge Pearlstein’s Decision gives PCC a strong incentive to delay the resumption of coal mining, because: (1) it allows PCC to conduct significant waste disposal activities at the Mine into the future until PCC determines that market conditions favor the resumption of coal mining; (2) PCC’s waste disposal business is lucrative for PCC; and (3) as long as PCC’s waste disposal business is more profitable than its mining business, PCC is unlikely to determine that market conditions favor the resumption of mining. . . . This strong incentive to delay the resumption of coal mining will, in turn, delay any advancement of contemporaneous reclamation, because, under PCC’s approved reclamation plan, reclamation may await PCC’s resumption of coal mining. . . .

*Id.* OSM argues that this scenario, effectively endorsed by Judge Pearlstein, conflicts with SMCRA “because it perpetuates PCC’s incentive to delay the resumption of coal mining which, in turn, delays reclamation as mandated by SMCRA.” *Id.* at 26.

We agree with OSM’s analysis in all of these respects. Judge Pearlstein’s ruling seems based upon the idea that if a function constitutes “reclamation operations” so as to come with OSM’s regulatory function, OSM has no authority or discretion to not continue to permit it, even in the absence of actual mining, unless OSM can show that it would violate a statutory or regulatory prohibition. This reasoning reflects a misreading of this Board’s decision in *PCC v. OSM*, 158 IBLA at 125. In that case, the Board held that

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 (1998). . . . Thus, OSM may properly approve a permit revision to ensure that fill material directly or indirectly utilized in mine reclamation meet 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.

158 IBLA at 125.

We fail to see how this ruling can be construed to mean that OSM is without authority to deny a permit revision application that contemplates the continued importation of offsite waste material to an area disturbed by surface mining, particularly when such activity is determined to conflict with the intent of SMCRA and the regulations. The fact that PCC's waste disposal activity is subject to SMCRA and the regulations in no way undercuts OSM's position that PCC's proposal to continue its waste disposal business, with no projected end to it, is contrary to PCC's reclamation plan. The Board did not say that an operator whose activity meets the definition of "surface coal mining and reclamation operations" has *carte blanche* to continue a particular reclamation-related activity that actually delays ultimate reclamation until some unknown future date after cessation of future mining that may or may not occur, or viewed in the obverse, that OSM is precluded from considering whether its approval of continued interim reclamation would necessarily delay PCC's resumption of mining and final reclamation. We believe that Judge Pearlstein erred in holding that the Board's ruling means that because PCC's importation of offsite waste material is subject to SMCRA and the implementing regulations, PCC has the right to continue that activity until PCC, in its own discretion, deems it more profitable to mine coal at the John Henry Mine. The effect of Judge Pearlstein's holding is to limit OSM's authority regarding PCC's waste disposal business to ensuring that the offsite material imported to the Mine is "clean," and to transfer to PCC the discretion to decide when to reclaim the Mine. We reject that holding as contrary to SMCRA and the implementing regulations.

When OSM approved PCC's permit renewal for the 5-year period beginning in 2001, PCC offered as a plausible basis for not mining the dire market conditions for coal at that time. However, we are now at a point 5 years later and PCC still has no plans to mine for coal. In fact, the *only* activity proposed by PCC is to continue to import waste material from offsite sources to the Mine. We are hard-pressed to find a definition of the term "as contemporaneously as practicable" that supports Judge Pearlstein's opinion that PCC may reclaim the existing spoilpiles at some indefinite future time of PCC's election. Judge Pearlstein correctly holds that whether OSM should treat PCC's revision application as minor or significant is a discretionary matter, then ironically strips OSM of any discretion whatever in determining whether that significant revision is consistent with SMCRA.

We conclude that Judge Pearlstein incorrectly ruled that OSM failed to present a *prima facie* case that PCC's permit revision application would not accomplish reclamation "as required by" section 511(a)(2) of SMCRA, 30 U.S.C. § 1261(a)(2) (2000), and 30 C.F.R. § 774.13(c). Judge Pearlstein's decision was premised upon an overbroad interpretation of this Board's ruling in *PCC v. OSM* and upon his opinion that because Pit 1 is purportedly a "bottomless pit" the importation of 500,000 cy of offsite waste material is irrelevant to eventual reclamation of Pit 1. PCC did not carry its ultimate burden of persuasion to demonstrate that it is entitled

to the disputed significant permit revision. PCC, as does Judge Pearlstein, ignores the fact that the spoilpiles that were created as a result of past coal mining remain, many years after, virtually untouched. We reject the notion that OSM is without authority to deny PCC's application to continue to dispose of waste material at the Mine. Accordingly, we reverse his decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, OSM's PDR is granted and Judge Pearlstein's decision is reversed.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge