

BEFORE THE RECLAMATION COMMISSION

MARIETTA COAL COMPANY,	:	Case No. RC-08-006
	:	
Appellant,	:	
	:	Review of Notice of Violation 28363;
-vs-	:	Permit D-216
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>FINDINGS, CONCLUSIONS</u>
	:	<u>& ORDER OF THE</u>
Appellee.	:	<u>COMMISSION</u>

Appearances: C. Keith Plummer, Counsel for Appellant Marietta Coal Company; Mark G. Bonaventura, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued: March 19, 2009

BACKGROUND

This matter came before the Reclamation Commission upon appeal by Marietta Coal Company ["Marietta"] from Notice of Violation ["NOV"] 28363. This NOV alleged that Marietta had failed to post adequate full-cost performance security in support of coal mining permit D-216. The permit D-216 area includes an idle coal preparation plant and coal loading facilities.

Accompanying the Appellant's Notice of Appeal was a Request for Temporary Relief. On April 16, 2008, a Temporary Relief hearing was conducted in Cambridge, Ohio. Temporary Relief was **granted** for a ninety-day period. Temporary Relief was ultimately **extended** until January 9, 2009.

On June 18, 2008, the Commission conducted a site view of areas relevant to this appeal, including the interior of the preparation plant at issue. Representatives of both parties were in attendance, and participated in the site view.

On June 19, 2008, this cause came on for hearing before five members of the Reclamation Commission. The hearing resumed on July 22, 2008 and concluded on July 23, 2008. At hearing, the parties presented evidence, and examined witnesses, appearing for and against them.

At the conclusion of the presentation of evidence, the Commission left the Record open for the Appellant's submission of a report [the "Skousen Report"] and the Division's response thereto [the "Craven Response"]. On December 4, 2008, the parties jointly submitted the Skousen Report and the Craven Response, which were made a part of the Record of this proceeding and are identified as Appellant's Exhibit 12 and Appellee's Exhibit 11, respectively.

On December 11, 2008, the Commission issued to the parties a written interrogatory, addressing a factual issue. On January 13, 2009, both parties submitted responses to the Commission's interrogatory and written closing arguments. On January 21, 2009, the Commission heard oral closing arguments. After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

HISTORY OF THE SITE

1. Marietta Coal Company holds coal mining and reclamation permit D-216, covering 10.2 acres of ground in Belmont County, Ohio. The permit area is located in Bellaire, Ohio, and is situated along the Ohio River. As the site runs along the Ohio River, a lengthy seawall is associated with the site. The permit area consists of a coal preparation plant and coal loading facilities. Structures existing on the site include the coal preparation plant, scales and a scale house, a railroad siding, railroad loading facilities, conveyors, thickener basins, and two riverside barge-loading facilities, known as the southern load-out and the northern load-out. Because of the site's use as a coal preparation and loading facility, much of the 10.2 acres is covered with coal fines. The preparation plant is currently idle. Coal loading still occurs at the southern load-out.

2. The 10.2-acre permit area is part of a larger 32-acre site. For more than one hundred years, this site has been used for industrial purposes. In the early 1900's, Carnegie Steel Company developed this site for steel production. From the 1930's through the 1980's, the Seabright family used this site as a sand & gravel yard. From 1942 through 1982, the Seabrights operated a cement block plant on this site. From 1998 through 2006, concrete block production resumed on this site. From 1942 through 1992, a ready mix plant operated on this site. From 1995 through 2001, the ready mix plant resumed operations on this site.

3. Beginning in the 1960's, this site was used as a trans-loading facility between the surface and barges, handling commodities such as sand & gravel, coal, mulch, road salt and limestone.

4. In 1967, Marietta began loading coal at the southern load-out.

5. In 1968, Marietta leased a 2.2-acre parcel on this site, and operated a portable coal crusher. In 1972, Marietta installed certain coal-related structures on the site.

6. Eventually, 22 acres of the 32-acre site were sold to Marietta, or to persons or entities associated with Marietta.

7. In 1979, Marietta built the preparation plant, which now stands on the site. Marietta also installed an underground hopper for the loading of coal. During this time, Marietta improved the barge-loading facilities along the riverbank, by installing pilings.

8. The preparation plant operated on the permit D-216 area from 1979 through 2005. In July 2005, Marietta ceased operations at the preparation plant, and the plant now stands idle. The seawall along the Ohio River has fallen into disrepair in various areas.

9. Presently, the site is used as a loading facility for barges on the Ohio River, utilizing the south load-out.

THE PERFORMANCE SECURITY REQUIREMENTS

10. Prior to 1982, a coal mining and reclamation permit was not required to operate coal preparation plants, or stand-alone coal transport and loading facilities. In 1982, permit D-216 was issued to Marietta, for 10.2 acres. The post-mining land use for this area is identified as "industrial." The reclamation plan calls for the return of the site to its previous use as a loading and storage facility. The reclamation plan requires the removal of all structures from this site. (See Appellee's Exhibit 6.) As the declared post-mining land use specifies that the site will be returned to an "industrial" use, any structures, features or property unfit for this future use must be removed during the reclamation process.

11. In 1982, as part of the permitting process, Marietta was required to post a reclamation bond in support of permit D-216. The statutory bond amount at that time was \$2,500 per acre. Marietta posted bond in the amount of \$25,500 in support of this 10.2-acre permit. This bond remains in place.

12. On December 20, 2006, House Bill 443 was passed by the Ohio legislature. House Bill 443 amended the security requirements for coal mining and reclamation operations. House Bill 443 became effective on April 6, 2007. The amended security law required that "full cost" performance security be posted on "associated facilities," such as preparation plants, and coal loading and transport facilities, not located on an mine site where coal is excavated. Full-cost security for "associated facilities" was to be posted by April 4, 2008 (approximately one year from the effective date of House Bill 443).

13. Between December 20, 2006 and April 4, 2008, the Division communicated several times with the regulated industry, including Marietta, regarding the amended requirements of the security law and the procedures to be followed in implementing the amended law.

14. On March 2, 2007, the Division issued Procedure Directive Performance Security 2007-01 ["PD 2007-01"] to the regulated community, including Marietta. (See Appellee's Exhibit 1.) This document provided background on the new security requirements. The document defined "full-cost security" as security, which would cover the State's cost to perform the reclamation of a site in the event of forfeiture. PD 2007-01 set a June 30, 2007 deadline for permittees to submit Applications to Revise ["ARPs"] their mining permits, revising the amount, or type, of performance security supporting a permit.

15. On March 27, 2007, a workgroup convened, which included persons from the Division, from the Office of Surface Mining ["OSM"], from the regulated industry and from the environmental community. The purpose of the workgroup was to develop procedures for implementing the amended security law, including establishing the methodology for estimating reclamation costs under the requirement for full-cost security.

16. On April 6, 2007, House Bill 443 became effective and the language of O.R.C. §1513.08 was revised.

17. On April 12, 2007, the Division sent correspondence to Marietta, reminding Marietta that it would need to file an Application to Revise ["ARP"] permit D-216, revising the performance security supporting permit D-216.

18. June 30, 2007 was the deadline, established in PD 2007-01, for permittees to submit ARPs, revising the performance security in support of a permit, and to provide an estimate of the full cost of reclamation of the permitted area in the event of forfeiture. Marietta did not meet this deadline.

19. On July 30, 2007, Marietta submitted ARP R-216-52, proposing that the existing bond supporting permit D-216 was adequate for full-cost reclamation. The existing bond was \$25,500, which represented a cost of \$2,500 per acre for this 10.2-acre site.

20. On October 1, 2007, the Division issued to the regulated community, including Marietta, Procedure Directive Performance Security 2007-02 ["PD 2007-02"]. This document was developed with input from the workgroup formed to address the new bonding requirements. PD 2007-02 set forth the procedures, which would be employed in calculating performance security for new and existing permits. The procedures set forth in PD 2007-02 provide: (1) that an operator would be required to submit an ARP, estimating the full cost of reclamation, (2) that the Division would review the estimate provided in the ARP, (3) that the Division would propose its estimate, based upon the information contained in the revised permit, and (4) that the permittee could contest the Division's estimate by requesting an informal conference with the Division. The document also stated that full-cost security would be based upon the "worst-case scenario" at a mining site, meaning that security would be calculated as if the bond forfeiture occurred at a time when reclamation liability was at its greatest. PD 2007-02 also described the methodology to be utilized in arriving at the estimated cost of reclamation, including the use of accepted engineering principles, the use of cost estimate spreadsheets, the use of certain unit prices (based upon the Division's historical experience with reclamation of forfeited sites), and the use of environmental assessments of costs associated with possible environmental hazards. PD 2007-02 also provided that the full-cost security amount would be subject to yearly review and adjustment.

21. On December 17, 2007, the Division informed Marietta, that the Division would consider Marietta's ARP filed on July 30, 2007 (suggesting that the existing bond of \$25,500 be considered as adequate full-cost security), in making a determination of the appropriate amount of full-cost security for permit D-216. The Division indicated that it was revising the timeline for approving the ARPs to January 30, 2008 (the original deadline was September 30, 2007). The Division did not meet the January 30, 2008 deadline.

22. On January 16, 2008, a Division inspector and a Division engineer visited the permit D-216 site. During this visit, the Division inspector and engineer looked at the outside of the preparation plant to determine its dimensions, looked at the length of the conveyor systems on the site, and looked at the seawalls associated with the northern and southern barge load-out facilities. The Division inspector and engineer did not request, nor gain, access to the interior of the preparation plant, and did not actually measure the seawalls.

23. On February 8, 2008, the Division issued to Marietta its **first estimate** of the cost to reclaim the permit D-216 area. This estimate was for **\$2,065,000** (or \$1,309,000 if an environmental assessment were filed and no hazardous materials were present). The first estimate provided for the total removal of the infrastructure on the site, including the scales and scale house, the conveyors, the railroad siding, the railroad loading facility, and the repair of approximately 1,500 linear feet of seawall. The Division invited Marietta to submit a Phase I Environmental Assessment by February 29, 2008, to provide evidence that there were no hazardous wastes, lead paint or asbestos, requiring remediation, on the site or that the projected cost of remediation provided by the Division was inaccurate.

24. On February 23, 2008, Marietta corresponded with the Division. Marietta contested the Division's first full-cost security estimate. Marietta asserted that certain on-site features would not require reclamation, as they could be left as part of the post-mining land use. Marietta suggested that asbestos and lead paint were unlikely to be found in the preparation plant. Marietta indicated that it could not meet the February 29, 2008 deadline for submission of a Phase I Environmental Assessment, and requested an additional 90 days to make this submission. The Division denied the requested extension, and Marietta did not meet the February 29, 2008 deadline for submission of a Phase I Environmental Assessment.

25. On March 6, 2008, the Division requested that Marietta submit contact information for the site's landowner, and that Marietta submit an itemized list of structures and property, which could be left on the site, as part of the post-mining land use. A deadline of March 24, 2008 was established for submission of this information. Marietta met this deadline as to the submission of landowner contact information.

26. On March 19, 2008, Marietta submitted the requested ownership information to the Division, but did not provide an itemized list of structures and property on the site, which could be left following reclamation. Regarding ownership, Marietta indicated that Marietta leased the property covered by permit D-216 from Rayle Coal Company. Marietta further indicated that the language of the lease did not require removal of structures. John Nicolozakes, the President of Marietta Coal Company, is also the President of Rayle Coal Company.

27. On March 27, 2008, the Division provided Marietta with its **second estimate** of full-cost reclamation. Based upon the ownership information submitted by Marietta on March 19, 2008, the Division deleted from the estimate: (1) the cost of reclamation of certain structures, which could be left as part of the post-mining land use, (2) the cost of repair to all areas of the seawalls, which were not located on permitted ground, and (3) the cost of reclamation of the railroad load-out facility. The Division's full-cost security estimate was reduced from \$2,065,000 to **\$1,537,000**. The Division reminded Marietta that the deadline for submission of full-cost security was April 4, 2008.

28. April 4, 2008 was the statutory deadline for submitting full-cost security for the permit D-216 area. Marietta did not meet this deadline.

29. On April 8, 2008, the Division issued to Marietta, Notice of Violation ["NOV"] 28363, which alleged:

The permittee failed to provide performance security in the amount of \$1,511,500 [\$1,537,000 minus the \$25,500 already on file].

NOV 28363 required Marietta cease all coal mining activities on the Permit D-216 site and to remain ceased until adequate performance security was filed. An abatement deadline of April 11, 2008 was set for posting the required performance security. This NOV is the subject of the immediate appeal.

30. On April 9, 2008, Marietta requested an informal conference with the Division to dispute the Division's \$1,537,000 estimate of full-cost security.

31. On April 10, 2008, Marietta filed a Notice of Appeal with the Reclamation Commission. This appeal was assigned case number RC-08-006.

32. Between April 10 & 14, 2008, Marietta contacted Norris Demolition, who then contacted Liberty Environmental Services, requesting that a Phase I Environmental Assessment be conducted to address any asbestos hazards on the site.

33. On April 14, 2008, Liberty Environmental Services conducted an asbestos hazard inspection of the permit D-216 area. Liberty's report stated in part:

On April 14, 2008 ... Liberty Environmental Services, LLC conducted a Preliminary Visual Asbestos Building Survey located at Marietta Coal Company (Coal Tipple) ... [Liberty] has determined that no suspect Asbestos Containing Materials were present within the listed structure however, it is noted that a Category I Non-friable gasket material was inaccessible to sample throughout the areas where connections of pipe [were] located on all levels of the listed structure. If the steel pipe is to be renovated it is the determination of [Liberty] that further additional bulk samples should be collected for laboratory analysis.

34. On April 16, 2008, a Temporary Relief hearing was conducted in this appeal. On April 17, 2008, the Commission **granted** Temporary Relief, which was ultimately **extended** until January 9, 2009.

35. On April 9, 2008, Marietta had requested an informal conference with the Division, in accordance with the procedures set forth in PD 2007-01 and amended O.R.C. §1513.08(E). On May 21, 2008, the Division conducted the informal conference with Marietta. At the conference, Marietta contested the Division's \$1,537,000 security estimate, and submitted the Liberty Environmental Report to the Division.

36. On June 12, 2008, based upon the information, which Marietta submitted at the informal conference, the Division provided its **third estimate** of the cost of reclamation for this site. The estimate was reduced from \$1,537,000 to **\$1,309,892**. The reduction in the estimate resulted from a reduction in the amount of seawall requiring repair from 1,500 linear feet to 200 linear feet. The estimate also represented an increase in the amount of Smaller Than Type D RCP needed to reclaim the area, from 5,754 tons to 6,171 tons.

37. In early June 2008, Marietta contracted with Eslich Wrecking ["Eslich"] to obtain an estimate of demolition costs for the permit D-216 site. On or about June 10, 2008, Kenneth Rankin of Eslich visited the permit D-216 area. Eslich estimated the cost of demolition on the site to be approximately \$150,000. However, according to Eslich's estimate, the scrap value of the materials on site would off-set the demolition costs, and result in a \$7,500 credit to Marietta. Eslich valued the scrap at \$400 per ton for ferrous material, which reflected scrap values in June 2008. The Eslich estimate was first presented to the Division at the Commission's June 19, 2008 hearing.

38. Sometime in May or early June 2008, Marietta contracted with Dr. Jeff Skousen to conduct an environmental assessment on the permit D-216 site. On June 9, 2008, Skousen conducted a site inspection of the permit D-216 area, for the purpose of producing a Phase I Environmental Assessment. On June 11, 2008, Skousen submitted his report to Marietta. (See Appellant's Exhibit 12.) The Division became aware of the Skousen Report during the Commission's July 22, 2008 hearing. The Skousen Report addressed the presence of asbestos, hazardous waste and lead paint on the site. The Report is inconclusive as to the presence of these materials. The Skousen Report also provided soil information for the site, and stated that the site is largely covered with a veneer of coal, with underlying sand & gravel, and that the ground on this site is, generally, stable.

39. After reviewing and considering the Skousen Report, the Division issued the Craven Response thereto. (See Appellee's Exhibit 11.) The Craven Response indicated that, based upon the information contained in the Skousen Report relating to soils and ground stability, the Division would be willing to reduce its \$1,309,892 full-cost security estimate, to reflect that a lesser amount of Smaller Than Type D RCP would be necessary to reclaim this site than originally anticipated. Based upon the Craven Response, the Division's current \$1,309,892 full-cost security estimate, which includes the application of 6,171 ton of Smaller Than Type D RCP (covering 10.2 acres), could be reduced by as much as \$152,581, reflecting that only 302.5 ton of Smaller Than Type D RCP (covering .5 acre) would be necessary for reclamation. This reduction, if applied, would result in a full-cost security estimate of \$1,157,311.

DISCUSSION

GENERAL

Coal mining operations are permitted and regulated by the Chief of the Division of Mineral Resources Management under the authority of Ohio Revised Code Chapter 1513. Ohio's mining law requires that mining and reclamation activities proceed in accordance with the requirements of Chapter 1513, and consistent with the provisions of a mining and reclamation plan approved by the Division of Mineral Resources Management. See O.R.C. §1513.02; O.R.C. §1513.07. To this end, an operator must submit a permit application, setting forth in detail, its plans for mining and reclamation. A "coal mining operation" is defined by statute to include the cleaning, concentrating, processing or preparation of coal. See O.R.C. §1513.01(H). Therefore, a coal preparation plant is considered a mining operation, subject to the permitting, bonding and reclamation requirements of Chapter 1513.

A major focus of Ohio's mining law is ensuring adequate reclamation of all areas affected by mining. Ohio's mining and reclamation law requires that performance security be posted in support of a coal mining permit. See O.R.C. §1513.08. The performance security provides a guarantee that funds will be available to complete the reclamation of a site, in the event that the permittee fails to do so. The failure of a permittee to complete the reclamation of a mine site results in the forfeiture of the performance security. The forfeited funds are then available to the State, to be utilized in the reclamation of the site.

Historically, reclamation bonds were required to be posted in the amount of \$2,500 per acre. However, in the event of a forfeiture, this bond amount had frequently fallen short of the actual cost necessary to accomplish reclamation. Therefore, in 2007, Ohio's bonding requirements were amended by the Ohio General Assembly (House Bill 443) to require the posting of full-cost performance security in support of a permit.¹

¹ O.R.C. §1513.08, as amended, provides coal operators two alternatives for posting security. Many of the coal mining operations are given the option to post security by either: 1) posting the "estimated cost of reclamation as determined by the chief" [full-cost security], or 2) posting \$2,500 per acre plus an additional per ton severance tax on coal. However, the option of posting \$2,500 per acre plus severance tax is only available to operations where coal is produced. Preparation plants, that are not located on a mine site where coal is being excavated, do not have the option of paying a per ton severance tax. Therefore, these permitted sites are required to post security in the estimated amount of the full cost of reclamation.

The new performance security provision is addressed in O.R.C. §1513.08(B), which now provides:

Using the information contained in the [coal mining and reclamation] permit application; the requirements contained in the approved permit and reclamation plan; and, after considering the topography, geology, hydrology, and revegetation potential of the area of the approved permit, the probable difficulty of reclamation; the chief shall determine the estimated cost of reclamation under the initial term of the permit if the reclamation has to be performed by the division of mineral resources management in the event of forfeiture of the performance security by the applicant.

(Emphasis added.)

STATUTORY RESPONSIBILITY

1. Under the statute, it is the sole and unilateral responsibility of the Division Chief to estimate the cost of reclamation. The statute instructs the Chief to look to the approved mining and reclamation plan, and certain other specified items, when determining this cost. Yet, even in light of this clear statutory directive, the Division has shifted the responsibility for estimating the cost of reclamation to the operator. PDs (Procedure Directives) 2007-01 and 2007-02 require an operator to submit to the Division its estimate of reclamation costs, through the filing of an ARP (an application to revise a permit).

2. Procedure directives are useful tools. These documents provide guidance to the regulated industry, by articulating the procedures, which the Division intends to apply regarding certain aspects of the Division's enforcement authority. The directives also help to ensure consistent enforcement of the law, by providing the Division inspectors with information relating to how the various provisions of Chapter 1513 will be applied and enforced. However, procedure directives do not carry the force and effect of statutory law or of properly promulgated regulations. Therefore, even though these directives may be helpful, they are not legally enforceable. PD 2007-01 and PD 2007-02 set forth the Division's plans for implementing the new statutory language of O.R.C. §1513.08. And while these directives are instructive, they merely provide guidance and not legally enforceable standards or provisions.

3. Through PDs 2007-01 and 2007-02, the Chief required operators to file ARPs, revising existing permits, in order to aid the Division in reaching appropriate estimates of reclamation costs. However, O.R.C. §1513.08(B) requires that the Chief base his estimates upon information contained in the permittee's approved mining and reclamation plan. Consideration must also be given to topography, geology, hydrology and revegetation potential, along with the probable difficulty of reclamation. O.R.C. §1513.08(B) directs the Chief to use the existing permit and plans, and does not require a permittee to revise existing permit information. Through the PDs, Chief shifted the estimation responsibility to the operators. Through these PDs, the Chief required operators to revise existing permits in order to address certain performance security concerns. This is not supported by the law.

INSPECTION

4. The facts of this appeal reveal that the Division did not exercise due diligence in performing its statutory obligation to estimate the cost of reclamation. On January 16, 2008, the Division conducted an inspection of the D-216 permit site for the purpose of determining the cost of reclamation. The most prominent feature on the D-216 site is the idle preparation plant. Yet, the Division inspector and engineer did not even attempt to gain access to the interior of this structure. Rather, the Division noted the general dimensions of the plant, and then made several broad-based assumptions regarding the plant's interior. These assumptions led to a cost estimate, which included reclamation costs associated with the remediation of possible environmental hazards, alleged by the Division's engineer to be present at the plant, relating to lead paint and asbestos. The Division has yet to prove that these environmental hazards actually exist within the plant. Remarkably, these unproven and unsupported costs account for approximately 33% of the Division's last estimate at hearing.²

² \$327,245 (asbestos) + \$115,014 (lead paint) = \$442,259; $\$442,259 \div \$1,309,892 = 33.7\%$.

5. During the January 2008 inspection, the Division also observed the seawall associated with the site's barge loading facilities. Costs relating to the stabilization of the seawall constitute a significant portion of the Division's cost estimate. However, the evidence indicated that the Division inspector and engineer did not even measure the relevant portions of the seawall during their January 2008 inspection. This is of significant concern, given the fact that the Division's cost estimate for reclamation of the seawall, was based upon the linear feet of the wall requiring repair or replacement. (See Appellee's Exhibit 5, page 5.)

6. The Division's unwarranted failure to conduct a meaningful inspection of the permit site impeded the process of reaching a supportable estimation of reclamation cost. By failing to adhere to the statutory requirement that the Chief calculate reclamation costs from permit data and site-specific engineering estimates, the Division has placed Marietta in the position of expending resources to disprove speculative environmental hazards and site conditions.

WORST-CASE SCENARIO

7. The "worst-case scenario" standard applied by the Division is not found in the statute. This standard is presented in PD 2007-02. Using this standard, which is not set forth in the applicable law, the Division has attempted to justify certain portions of its estimate based upon the "worst-case scenario" standard.

8. O.R.C. §1513.08(E) provides in pertinent part:

The amount of the estimated cost of reclamation determined under division (B) of this section and the amount of a permittee's performance security provided in accordance with division (C)(1) of this section may be adjusted by the chief as the land that is affected by mining increases or decreases or if the cost of reclamation increases or decreases.

The Division, in PD 2007-02, indicates that adjustments to the security estimates will be made on an annual basis. Therefore, the estimated cost of reclamation is a dynamic number, which is anticipated to vary based upon changes in conditions at a mine site, changes in reclamation costs or changes in the nature of the reclamation required. The fact that the cost estimate is subject to frequent review and adjustment renders inapplicable a highly speculative "worst-case scenario" standard to this process.

9. In the immediate case, permit D-216 is basically an idle site. Besides deterioration of the structures on site, the condition of this area is unlikely to change dramatically. For this reason, it would appear that the Division should have been able to reach a cost estimate that is reality-based as opposed to speculative. In light of the fact that the condition of the D-216 site is not actively changing, the Division should be able to estimate the reasonable reclamation costs based upon site-specific conditions. The application of a "worst-case scenario" standard is unnecessary and inappropriate in this case.

ARBITRARY, CAPRICIOUS AND UNLAWFUL ACTIONS

10. The Commission is aware that estimating the cost of reclamation for full-cost security is a new procedure, and that both the industry and the Division are new to this process. However, the Division's failure to conduct a meaningful inspection of this site and its structures, the Division's application of broad-based assumptions and the "worst-case scenario" standard (despite the presence of site-specific information) and the Division's application of unsound engineering practices, establish that the Division's actions in this matter are arbitrary.

11. The Division's shift of the responsibility for estimating the cost of reclamation to the operator is inconsistent with the statutory mandate contained in O.R.C. §1513.08, which requires that Division Chief determine the estimated cost of reclamation, based upon the information contained in the mining and reclamation plan and upon other specified items.

12. The evidence in this matter established that the Division's initial estimate of reclamation costs for permit D-216 was \$2,065,000. By the conclusion of the Commission's hearing, the estimate had been reduced to \$1,309,892, with further reductions anticipated. While these actual, and promised, reductions show the Division's willingness to adjust the cost estimate when relevant information impacting reclamation costs is presented, to date the initial cost estimate has been reduced by more than 36%, and still contains \$442,259 for asbestos and lead paint remediation, which conditions have not been shown to actually exist. The fact that the estimated reclamation costs have changed to this extent demonstrates that the estimates were not based on site-specific conditions or prudent engineering practices, and were arbitrary.

13. The Craven Response to the Skousen Report indicates that the Division intends a further reduction of its most-recent (at hearing) \$1,309,892 estimate. The anticipated reduction would reflect new information regarding ground stability on this site. However, issues still exist regarding demolition costs, the speculative presence of asbestos and lead paint, and the amount of seawall requiring repair. Until these issues are properly addressed by the Division, a reasonable estimate of reclamation costs for this permit, cannot be determined.

14. Marietta initially asserted that the existing bond of \$25,500 would be sufficient full-cost security. By the conclusion of the hearing, Marietta had adjusted its suggested security amount to \$32,972. (See Appellant's Exhibit 4.)

15. The Commission is not persuaded that either party's estimate reflects accurate reclamation costs for this permit area. Moreover, based upon the ever-changing Record in this appeal, it is impossible to determine the actual extent of reclamation necessary on this site. And, without a site specific determination of the amount and nature of reclamation work necessary, a reasonable and supportable estimate of reclamation costs cannot be ascertained by the Division.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in the appeal of Notice of Violation 28363 is upon the Appellee Division of Mineral Resources Management to prove by a preponderance of the evidence that the issuance of this enforcement action was not arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13; O.A.C. §1513-3-16(B)(1).

2. O.R.C. §1513.01(H) defines a "coal mining operation" to include:

- (1) Activities conducted on the surface of lands in connection with a coal mine, the removal of coal from coal reuse piles, and surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal, other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal....

- (2) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas include . . . processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities
....

3. O.R.C. §1513.08(A) provides:

After a coal mining and reclamation permit application has been approved, but before the permit is issued, the applicant shall file with the chief of the division of mineral resources management, on a form prescribed and furnished by the chief, the performance security required under this section.

4. O.R.C. §1513.08(B) provides:

Using the information contained in the permit application; the requirements contained in the approved permit and reclamation plan; and, after considering the topography, geology, hydrology, and revegetation potential of the area of the approved permit, the probable difficulty of reclamation; the chief shall determine the estimated cost of reclamation under the initial term of the permit if the reclamation has to be performed by the division of mineral resources management in the event of forfeiture of the performance security by the applicant. The chief shall send written notice of the amount of the estimated cost of reclamation by certified mail to the applicant. The applicant shall send written notice to the chief indicating the method by which the applicant will provide the performance security pursuant to division (C) of this section.

5. O.R.C. §1513.08(C)(2) provides:

An applicant shall provide performance security in accordance with division (C)(1) of this section in the full amount of the estimated cost of reclamation as determined by the chief for a permitted coal preparation plant or coal refuse disposal area that is not located within a permitted area of a mine. A permittee shall provide the performance security not later than one year after April 6, 2007, for a permitted coal preparation plant or coal refuse disposal area that is in existence on April 6, 2007, and that is not located within a permitted area of a mine.

6. Permit D-216 covers a coal preparation plant and associated loading facilities. O.R.C. §1513.08 required that full-cost performance security be posted in support of this permit by April 7, 2008.

7. O.R.C. §1513.08(B) requires the Division Chief to determine the estimated cost of reclamation for a permit area. O.R.C. §1513.08 further requires the Division Chief to notify a permittee, or permit applicant, of the amount of the estimated cost of reclamation.

8. Notice of Violation 28363 was issued to Marietta for failure to provide adequate performance security in support of permit D-216 by April 7, 2008.

9. The issuance of Notice of Violation 28363 was arbitrary, capricious and inconsistent with law, in that: (1) the Chief did not follow the mandates of O.R.C. §1513.08 for determining the estimated cost of reclamation; (2) contrary to law, the Chief shifted his burden to determine the estimated cost of reclamation to Marietta; (3) pursuant to PD 2007-02, the Chief set forth a standard for determining the cost of reclamation based upon a "worst-case scenario," which standard is not supported by the statutory language of O.R.C. §1513.08; and (4) the Chief did not, in fact, make a reasonable and accurate determination of the estimated cost of reclamation for the permit D-216 site.

ORDER

Based upon the findings of fact and conclusions of law, the Commission hereby **VACATES** Notice of Violation 28363 and **REMANDS** this matter to the Chief to take actions consistent with this decision and consistent with O.R.C. §1513.08.

3/19/09
DATE ISSUED


CRAIG N. PORTER
Chairman, Reclamation Commission

INSTRUCTIONS FOR APPEAL

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

DISTRIBUTION:

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Mark G. Bonaventura, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6497

**BEFORE THE
RECLAMATION COMMISSION**

MARIETTA COAL COMPANY,	:	Case No. RC-08-006
	:	
Appellant,	:	
	:	Review of Notice of Violation 28363;
-vs-	:	Permit D-216
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>INDEX OF EVIDENCE</u>
	:	<u>PRESENTED AT HEARING</u>
Appellee.	:	

Before: James McWilliams; Craig Porter.

In Attendance: Richard Babb, Gene Branstool, Richard Cochran, Sean McCarter, James McWilliams, Craig Porter, Ray Rummell and Hearing Officer Linda Wilhelm Osterman.

Appearances: C. Keith Plummer, Counsel for Appellant Marietta Coal Company; Mark G. Bonaventura, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

WITNESS INDEX

Appellant's Witnesses:

Kenneth Rankin	Direct Examination; Cross Examination
John Nicolozakes	Direct Examination; Cross Examination

Appellee's Witnesses:

Greg Mills	Direct Examination; Cross Examination
Jason Craven	Direct Examination; Cross Examination

EXHIBIT INDEX

Joint Exhibits:

Joint Exhibit 1	Annual Map, Year 6, Permit D-216 (January 3, 1990)
Joint Exhibit 2	Notice of Violation 28363 (April 8, 2008)

Appellee's Exhibits:

Appellee's Exhibit 1	Letter with Procedure Directive 2007-01; Kell to Ohio Coal Mine Operators and Consultants; dated March 2, 2007
Appellee's Exhibit 2	Letter with Procedure Directive 2007-02; Kell to All Coal Applicants, Permittees & Consultants; dated October 1, 2007
Appellee's Exhibit 3	Curriculum Vitae; Jason C. Craven, PE
Appellee's Exhibit 4	Unit Prices Used by the ODNR, DMRM to Compute the Performance Security as Required in ORC 1513.08(B)
Appellee's Exhibit 5	Performance Security Worksheet
Appellee's Exhibit 6	Application to Revise a Coal Mining Permit ; Permit D-216; filed May 18, 1987
Appellee's Exhibits 7 A - Q	Photographs; Permit D-216; taken January 16, 2008 or June 11, 2008
Appellee's Exhibits 8	Documents Exchanged between DMRM and Marietta: March 2, 2007 - Procedure Directive Letter April 12, 2007 - Performance Security Notifications Application to Revise, R-216-52;

submitted July 23, 1007
October 1, 2007 – Procedure Directive
Performance Security
2007-02 Letter
December 17, 2007 – Letter, from
Husted to Marietta
February 8, 2008 – Letter, from
Husted to Marietta
Performances Security Data Input
Section – Prep Plant Area,
dated February 8, 2008
February 23, 2008 – Letter, from
Nicolozakes to Husted
February 25, 2008 – Letter,
Nicolozakes to Husted
March 6, 2008 – Letter, Husted to
Nicolozakes
March 18, 2008 – Letter, Clark to
Nicolozakes
March 19, 2008 – Letter, Nicolozakes
to Clark
Performance Security Data Input
Section, dated March 26,
2008
March 27, 2008 – Letter, Husted to
Marietta

Appellee's Exhibit 9 Extended Spreadsheet (Hazardous Waste
Computations, etc.)

Appellee's Exhibit 10 Spreadsheet for Scrap Metal Value

Appellee's Exhibit 11 Jason Craven's Response to Skousen Report,
submitted on October 20, 2008

Appellant's Exhibits:

Appellant's Exhibit 1 Letter; Request for Proposal; Rankin to; dated
June 17, 2008

Appellant's Exhibits 2 Photographs; Permit D-216; taken June 10, 2008

Appellant's Exhibit 3 Letter; Beegle to Norris; dated May 21, 2008

Appellant's Exhibit 4 Estimate; March 25, 2008

Appellant's Exhibit 5	Photograph; 1946
Appellant's Exhibit 6	Photograph; 1942
Appellant's Exhibit 7	Photograph; 1969
Appellant's Exhibits 8	Photographs; (A) 1974, (B) – (D) 1979
Appellant's Exhibit 9	Photograph (from air over river)
Appellant's Exhibit 10	Photograph (from air over river)
Appellant's Exhibit 11	Framed Photograph
Appellant's Exhibit 12	Phase I Environmental Site Assessment; Skousen; dated June 11, 2008