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BEFORE THE RECLAMATION COMMISSION

BUCKEYE INDUSTRIAL MINING CO., :

Appellant, :

-vs- :

DIVISION OF MINERAL RESOURCES
MANAGEMENT, :

Appellee. :

Case No. RC-06-007

Review of Notice of Violation 28058;
Permit D-928

**FINDINGS, CONCLUSIONS
& ORDER OF THE
COMMISSION**

Appearances: Dean Hunt, Counsel for Appellant Buckeye Industrial Mining Co.; Mark G. Bonaventura,
Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued:

October 5, 2006

BACKGROUND

This matter came before the Reclamation Commission upon appeal by Buckeye Industrial Mining Company ["Buckeye"] from Notice of Violation ["NOV"] 28058. This NOV alleges that Buckeye has not backfilled and regraded an affected area of mining permit D-928 in a contemporaneous manner. Accompanying Buckeye's notice of appeal was a Request for Temporary Relief.

A hearing on Temporary Relief was conducted by the Chairman of the Reclamation Commission on July 6, 2006. On that date, the Chairman **granted** Temporary Relief, conditioned upon this matter proceeding to merit hearing in August 2006.

On August 17, 2006, this cause came on for hearing before six members of the Reclamation Commission. Prior to hearing, on August 16, 2006, the Commission conducted a site view of the area in question. Representatives of both parties attended and participated in the site view. At hearing, the parties presented evidence and examined witnesses appearing for and against them. After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Permit D-928 was issued to Buckeye Industrial Mining Company ["Buckeye"] on February 14, 1991, and allowed coal mining on 307.3 acres of land in Columbiana County, Ohio. The permit was renewed in 1996 and 2001. Under permit D-928, both surface and underground mining occurred. Most of the coal from this site was produced by underground mining methods. Permit D-928 expired on February 13, 2006. The area at issue in this appeal consists of 15.9 acres, situated on the eastern side of State Route 45. Located on these 15.9 acres are: an old mine pit, sediment pond #001 and its associated diversion ditches, a coal transfer yard, a pole building and a haul road.

2. The post-mining land use for permit D-928 is identified as pastureland.

3. Under the original reclamation plan for permit D-928, backfilling and rough grading was to follow mining by 60 days.

4. A fly ash disposal site is located immediately adjacent to the permit D-928 area. The land covered by the disposal operation is owned by Buckeye Industrial Mining Company, but has been leased to Redbud Company, Inc. ["Redbud"]. The fly ash disposal operation is permitted by the Ohio Environmental Protection Agency ["EPA"].

5. In or around the late 1990's or the early 2000's, Buckeye exposed a partially-reclaimed highwall on the permit D-928 area. This highwall had been created by previous mining in the 1970's. Buckeye developed the highwall as a "face-up" area for its underground mining operation, and installed a portal into the highwall. Underground mining took place in this area between the late 1990's and early 2000's. By 2001, the underground mining operation had ceased. When underground mining concluded, the old pit filled with water. The old pit is currently being utilized for water storage. Water from the old pit is pumped to Buckeye's pond #001. From pond #001, water is loaded into trucks. This water is utilized on Redbud's adjacent fly ash disposal site.

6. Pond #001 is approximately 20 feet by 150 feet in size. This pond was constructed as part of the drainage control system for permit D-928. Pond #001 is identified as a temporary structure. Water from pond #001 is currently being utilized on Redbud's fly ash disposal site. Approximately 150,000 gallons of water is used every day on the fly ash disposal site.

7. When the old pit was excavated to create a portal for underground mining, the spoil from this old pit area was utilized to develop a coal transfer yard. The coal yard covers approximately 4 acres. In the late 1990's and early 2000's, coal from the permit D-928 site, and from other sites, was processed on the coal transfer yard. Sizing, screening, loading and transportation of coal occurred on this area. Trucks transported coal from the coal transfer yard to nearby power plants. These trucks then brought fly ash from the power plants to Redbud's fly ash disposal site. In or about June 2005, coal transfer activities ceased on this site. Currently, coal is not being brought onto the transfer yard for processing, and the yard is utilized primarily in association with Redbud's fly ash disposal operation.

8. A haul road exists on the permit D-928 site. Portions of this haul road are permitted under permit D-928. However, most of this road is permitted by the Ohio EPA in association with Redbud's fly ash disposal operation. This haul road is considered a temporary structure under mining permit D-928.

9. A pole building / garage was constructed on the permit D-928 area in the late 1990's. This building was originally used by Buckeye's underground miners. The building is located adjacent to the coal transfer site. Currently, the building is being used for equipment maintenance, repair and storage, associated with Redbud's fly ash disposal operation.

10. All mining on the permit D-928 area concluded in or about 2001. After that time, coal transfer activities continued on the coal transfer yard. Coal transfer activities ceased in or about 2005.

11. On March 22, 2004, an Application to Revise ["ARP"] permit D-928 was approved by the Division. Through this ARP, Buckeye requested a delay in reclamation. Buckeye's ARP indicated that the 15.9 acres of permit D-928 at issue would be used in association with the adjacent fly ash disposal operation and in association with Buckeye's coal transfer operation. In its ARP, Buckeye projected that these uses would continue until approximately 2020. The ARP specifically stated:

In accordance with 1501:13-9-13(A)(6)(c), a variance to delay reclamation on the area shown on the attached map is required. The entire area is currently being used as a support area for the adjacent West Point Facility of Redbud Company, Inc. (OEPA permits 3IN00247, 02-16520). The pit impoundment created by the deep mine operations is used for water storage. The pole building adjacent to the pit is used for equipment maintenance and storage. The stockyard, created with the spoil from the deep mine pit, is used as a coal transfer facility to complement the Redbud ash facility. The retention pond for Redbud abuts the northern edge of the coal yard. Sediment Pond 001 is utilized for the filling of Redbud's water trucks. The majority of the haul road is permitted under Redbud's OEPA permit.

All of the above activities are essential for the operation of Redbud's facility. These activities will continue for the life of the site which is currently projected to last until 2020.

The Division Chief approved the ARP, thus delaying reclamation on the 15.9-acre area, without specifically stating a timetable for reclamation, and without conditioning the approval on any specific activity.

12. The Division conducted inspections of the 15.9-acre portion of permit D-928 in 2005 and 2006. These inspections noted that the coal transfer activities had ceased, and that reclamation of the 15.9 acres would be required.

13. On May 17, 2006, the Division issued Notice of Violation ["NOV"] 28058 to Buckeye. This NOV alleges a violation of O.R.C. §1513.16(A)(15) and O.A.C. §1501:13-9-13(A)(1), and states:

The permittee has failed to complete backfilling and grading within sixty days of the expiration of permit D-928 on the pit left from the deep mine and the associated coal yard in Section 16, Madison Township, Columbiana County; on the southern half of the affected acreage east of St. Rt. 45, on property owned by Buckeye Coal Mining Company.

The NOV directed Buckeye to begin backfilling and grading of the described area by June 2, 2006 and to complete backfilling and grading of the area by July 14, 2006.

14. All drainage from the 15.9-acre area is controlled, and no adverse off-site impacts from this area have been identified.

DISCUSSION

Ohio's mining and reclamation law requires that reclamation follow mining in a contemporaneous manner. See O.R.C. §1513.16(A)(15). Generally, the law requires that backfilling and regrading of an affected area, follow contour mining by 60 days. See O.A.C. §1501:13-9-13(A)(1). This time frame can be adjusted, depending upon on-site activities and only with the approval of the Division Chief. See O.A.C. §1501:13-9-13(A)(6).

In the instant case, Buckeye's original mining and reclamation plan called for backfilling and rough grading to commence within 60 days after the conclusion of mining. However, Buckeye requested that its mining and reclamation plan be amended to extend this reclamation timetable. Buckeye's application to revise its permit ["ARP"] stated that an extension of the 60-day reclamation timetable was necessary as: (1) features on this area were essential to the operation of Redbud's fly ash disposal operation, and (2) portions of the area were utilized as part of a coal transfer operation. Buckeye suggested that these activities would continue until 2020. The ARP was approved by the Division Chief on March 22, 2004. The Chief's approval did not specify a due date for backfilling and regrading of the area, and did not specifically identify the grounds upon which the approval was granted.

Mining on the D-928 area at issue has ceased. Indeed, Buckeye has allowed permit D-928 to expire, indicating the unequivocal conclusion of excavation activities associated with mining. Until 2005, coal transfer activities occurred on at least a portion of the area at issue. Coal transfer activities qualify as a "coal mining operation," as that term is defined under O.R.C. §1513.01(H). Currently, the D-928 area at issue, and the features located on this area, are utilized entirely in association with a fly ash disposal operation located immediately adjacent to the D-928 area. This fly ash disposal operation is permitted and monitored through the Ohio EPA. The Division of Mineral Resources Management has no enforcement authority over the adjacent fly ash disposal operation.

Once mining under D-928, including the coal transfer activities, had ceased, the Division – despite Buckeye's reference in its ARP to an extension of reclamation until 2020 – began to encourage Buckeye to commence the backfilling and grading necessary to reclaim this affected area. It is Buckeye's contention that, based upon the approved ARP, Buckeye can continue to utilize the unreclaimed portions of D-928 at issue until 2020, without the need to commence reclamation. The Division contends that, as mining activities have concluded and permit D-928 has expired, reclamation is now due and owing.

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. O.R.C. §1513.02 addresses the general scope of the Division Chief's authority. This authority is both defined and limited by statute. The Division Chief's scope of authority addresses coal mining operations. Thus, the Division Chief's permitting and enforcement authority covers only items associated with a coal mining operation.

Clearly, the Chief's approval of the ARP extending the reclamation timetable was predicated upon the assumption that some type of mining activities would continue on this site, to justify the Chief's exercise of jurisdiction over this area. The coal transfer activities which occurred on this area from approximately 2001 through 2005 qualified as a "coal mining operation," and thus were under the Division Chief's jurisdiction and authority. However, once all mining-related activities concluded, the Chief correctly recognized the limitations of his authority and ordered that the area be reclaimed.

It is unfortunate that the Chief's approval of the ARP extending the reclamation timetable did not specify that this approval was based upon the continuation of coal transfer activities on this site. However, without such coal-related activities, the Division Chief has no enforcement authority over this area. Therefore, the Division correctly identified the limitations of its regulatory functions, and mandated the reclamation of an area no longer associated with a mining operation.

The Commission recognizes the usefulness of these 15.9 acres, and the features located thereon, to the adjacent fly ash disposal operation. The Commission would encourage Buckeye, or Redbud, to seek other avenues to preserve the usefulness of this facility. However, allowing the area to remain as an unreclaimed coal mining operation until the 2020 is not an option allowed under Chapter 1513.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is upon the Appellee Division of Mineral Resources Management to prove by a preponderance of the evidence that the issuance of Notice of Violation 28058 was not arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13(B).

2. O.R.C. §1513.16(A)(15) requires that reclamation follow mining in a contemporaneous manner:

Ensure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with coal mining operations, . . .

3. O.A.C. §1501:13-9-13(A) sets forth a timetable for reclamation:

(1) Contour mining. Backfilling and rough grading shall be completed within sixty days of one thousand five hundred linear feet following coal removal, whichever occurs first.

4. O.R.C. §1513.02 specifies the powers, authority and duties of the Division

Chief:

(A) The division of mineral resources management shall administer, enforce, and implement this chapter [Chapter 1513].

The chief of the division of mineral resources management shall do all of the following:

(1) Adopt, amend, and rescind rules:

(a) To administer and enforce this chapter;

(b) To implement the requirements of this chapter for the reclamation of lands affected by coal mining, including such rules governing mining practices and procedures, segregation and placement of soil and topsoil, backfilling, grading, terracing, resoiling, soil conditioning and reconditioning, planting, establishment

of drainage patterns, construction of impoundments, and the construction, maintenance, and disposition of haul roads, ditches, and dikes, as may be necessary or desirable, under varying conditions of slope, drainage, physical and chemical characteristics of soil and overburden, erodability of materials, season, growth characteristics of plants, and other factors affecting coal mining and reclamation, to facilitate the return of the land to a condition required by this chapter; to prevent pollution or substantial diminution of waters of the state, substantial erosion, substantial deposition of sediment, landslides, accumulation and discharge of acid water, and flooding, both during mining and reclamation and thereafter; to restore the recharge capacity of the mined area to approximate premining conditions; and to ensure full compliance with all requirements of this chapter relating to reclamation, and the attainment of those objectives in the interest of the public health, safety, and welfare to which these reclamation requirements are directed;

5. O.R.C. §1513.01(H) defines a coal mining operation in the following manner:

(1) Activities conducted on the surface of lands in connection with a coal mine, the removal of coal from coal refuse piles, the surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal at or near the mine site. . . .

(2) The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities, and for hauling, and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, holes or depressions, repair areas, storage areas, 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. . . .

5. The Chief did not act arbitrarily, capriciously or in a manner inconsistent with law in requiring the reclamation of an area affected by coal mining, after all mining operations had ceased and after the mining permit had expired.

6. The issuance of Notice of Violation 28058 to Buckeye Industrial Mining Company, for non-contemporaneous reclamation, was not arbitrary, capricious or inconsistent with law.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** Chief's issuance of Notice of Violation 28058 to Buckeye Industrial Mining Company.

10/05/06
DATE ISSUED



CRAIG PORTER, Chairman
Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas, within thirty days of its issuance, in accordance with Ohio Revised Code §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:

Dean K. Hunt, Via FAX [859-252-4167] & Certified Mail #: 7000 0600 0028 2172 1884
Mark G. Bonaventura, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6288

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INDEX OF EVIDENCE PRESENTED AT HEARING

Before: Craig Porter

In Attendance: Richard Cochran, James McWilliams, Earl Murphy, Wanda Stratton, John Veley and Hearing Officer Linda Wilhelm Osterman.

Appearances: Dean Hunt, Counsel for Appellant Buckeye Industrial Mining Co.; Mark G. Bonaventura, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

WITNESS INDEX

Appellee's Witnesses:

Tom Butch

Direct Examination; Cross Examination

Appellant's Witnesses:

Mike Madison
Rosemary Lacher

Direct Examination; Cross Examination
Direct Examination; Cross Examination

EXHIBIT INDEX

Appellee's Exhibits:

Appellee's Exhibit 1	Coal Mining & Reclamation permit D-928, issued 02/14/91; permit D-928 renewal, issued 01/22/96; permit D-928 renewal, issued 02/15/01.
Appellee's Exhibit 2	Year 5 Annual Map, permit D-928, submitted 05/15/96.
Appellee's Exhibit 3	Copy of Reclamation Plan for permit D-928, page 23 (from original permit application); approved 02/14/91.
Appellee's Exhibit 4	Application to Revise permit D-928, Application # R-0928-22, approved 03/22/04.
Appellee's Exhibit 5	Division Inspection Report, permit D-928, dated 06/15/05.
Appellee's Exhibit 6	Division Inspection Report, permit D-928, dated 01/05/06.
Appellee's Exhibit 7	Division Inspection Report, permit D-928, dated 03/27/06.
Appellee's Exhibit 8	Division Inspection Report, permit D-928, dated 04/20/06.
Appellee's Exhibit 9	Notice of Violation 28058, issued 05/18/06.
Appellee's Exhibits 10 - 16	Photographs, permit D-928, taken early 08/06.

Appellant's Exhibits:

Appellant's Exhibit 1	Copy of O.A.C. 1501:13-9-13 [contemporaneous reclamation
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