

BEFORE THE RECLAMATION COMMISSION

BUCKEYE INDUSTRIAL MINING CO., :
: Case No. RC-06-001
Appellant, :
: Review of Chief's Order 7316;
-vs- : Permit D-2129
: :
DIVISION OF MINERAL RESOURCES :
MANAGEMENT, : FINDINGS, CONCLUSIONS
: & ORDER OF THE
Appellee. : COMMISSION

Appearances: Dean K. Hunt, Counsel for Appellant Buckeye Industrial Mining Co.; Holly Deeds Martin, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued: June 12, 2006

BACKGROUND

This matter came before the Reclamation Commission upon appeal by Buckeye Industrial Mining Company ["Buckeye"] from Chief's Order 7316. This Chief's Order disapproved Buckeye's request for release of a portion of the performance bond, posted in support of the Year 1 segment of coal mining permit D-2129. The Order alleged that Buckeye failed to repair a drain-line through the embankment of permanent Pond #001. Pond #001 is located on the Year 1 area of permit D-2129.

On April 20, 2006, this cause came on for hearing before six members of the Reclamation Commission. Prior to hearing, on April 19, 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-2129 was issued to Buckeye Industrial Mining Company on September 26, 2001, and allowed surface coal mining on 98.7 acres of land in Stark County, Ohio. The permit area consists of one yearly segment, identified as the Year 1 area. The land surface covered by permit D-2129 is owned by several landowners. Pursuant to the requirements of law, performance bond was posted in support of permit D-2129. Mining on the permit D-2129 area began after September 26, 2001, and was concluded by August 23, 2002. Of the 98.7 acres permitted, 48.3 acres were affected by mining.

2. Prior to mining, the land covered by permit D-2129 was used for agricultural purposes. The identified post-mining land use for this property is grazing land.

3. Prior to mining, a pond known as Copes Lake, existed on the property. The pond is approximately 3 acres in size. The pond has historically been used for recreational and agricultural purposes. The pond is man-made, and was not constructed to the specifications required by the Division of Mineral Resources Management or the Ohio Division of Water. After permit D-2129 was issued, but prior to mining, Buckeye was informed that a valve existed in the pond's embankment. The valve is part of the pond's "draw-down system." The valve is connected to a drain-line, and is utilized to open and close the drain-line. The drain-line extends from the inside of the pond, through the pond's embankment, and - as originally designed - discharged from the outslope of the embankment. The drain-line is, most likely, a 6-inch steel pipe. The "draw-down system," including the drain-valve and the drain-line, was designed to be utilized in lowering the pond's surface water elevation for maintenance and safety purposes. Historically, the "draw-down system" has been functional, and has been used by the landowners in the area of the pond.

4. During the mining operations, Copes Lake was utilized by Buckeye as a sediment control structure.

5. The owner of the pond at the time of mining was Mr. George Bach. In the Spring of 2001, Mr. Bach purchased the property on which the pond is located and the property to the north of the pond. Prior to the commencement of mining, Mr. Bach agreed to allow Buckeye to use the pond - identified as Pond #001 - as a sediment control structure for the mining operation. Mr. Bach also asked that Buckeye leave the pond as a permanent structure after mining. Mr. Bach expected to be responsible for the future maintenance of the pond. When Mr. Bach purchased the property, he was unaware of the pond's "draw-down system." After the drain-valve and drain-line were discovered, Mr. Bach made no private agreements with Buckeye relating to the "draw-down system," or requiring its restoration after mining.

6. In November 2002, after mining had concluded, Mr. Bach sold his property, including the pond, to Mr. Rodney Harold. Mr. Harold currently owns the property on which the pond is located, and the property surrounding the pond to the north. Mr. Harold uses the pond primarily for recreational purposes. When Mr. Harold purchased the property, the drain-valve was accessible, but the outlet of the drain-line was buried. Mr. Harold desires to have the outlet of the drain-line uncovered, in order to determine if the "draw-down system" is functional.

7. Mr. Dale Henning owns the property that is adjacent to, and south of, the pond. The pond's outlet, and the end of the buried drain-line, are located on Mr. Henning's property. Mr. Henning has used the pond's "draw-down system" in the past for agricultural purposes, specifically to obtain water to fill fertilizer tanks. Mr. Henning desires to have the drain-line uncovered and made functional.

8. Consistent with the wishes of landowner George Bach, Buckeye planned to leave Copes Lake as a permanent structure after mining was completed. In order to leave this pond as permanent, Buckeye was required to certify that the pond meets the standards set forth in Ohio law. Buckeye added earthen material to the pond's embankment, which decreased the slope of the embankment, and improved the pond's stability. The additional material would have covered the pre-existing drain-valve. However, Buckeye placed a vertical corrugated pipe over the drain-valve, so that the valve would not be buried in the material added to the pond's embankment and so that the landowner would continue to have access to the drain-valve. When adding material to the embankment, the outlet of the drain-line was buried. The outlet of the

drain-line is currently buried about 4 –5 feet from the toe of the embankment, and is covered with about 3 feet of earth. The buried outlet of the drain-line is assumed to be within a few feet of the principal spillway outlet.

9. Buckeye submitted the original certification for Pond #001 to the Division on December 20, 2001. This submission was made shortly after mining commenced. The certification was revised on January 2, 2003. The pond certification was approved by the Division on February 24, 2003, which was after mining had concluded and during the reclamation of the area. The original design certification did not show the drain-valve or the drain-line. When Buckeye submitted the original design certification, Buckeye was aware that the drain-valve and drain-line existed, but did not believe that these features needed to be shown on the certification. At this time, the Division was unaware of the existence of the "draw-down system."

10. Prior to October 2003, the Division was informed that a "draw-down system" existed on Pond #001. The Division asked Buckeye to submit a second design certification, showing the "draw-down system." On October 27, 2003, during the reclamation of permit D-2129, Buckeye submitted a second certification for Pond #001. The second certification showed the access point for the drain-valve and the assumed location of the drain-line. The second certification did not include a plan for sealing the drain-line. The second certification was approved by the Division on November 24, 2003.

11. Permit D-2129 has been successfully resoiled and revegetated.

12. Pond #001 is considered stable by the Division. The specifications of the pond's embankment and spillways comply with the mining regulations.

13. On August 5, 2005, Buckeye submitted a request for a Phase II bond release for permit D-2129. Through this request, Buckeye asked for the release of \$42,262.50, or 35% of the original posted bond amount. A bond release inspection was conducted by the Division on August 30, 2005. Another inspection was conducted on December 20, 2005.

14. On December 23, 2005, Chief's Order 7316 was issued to Buckeye. This Order disapproved Buckeye's request for a Phase II bond release. The Order stated in part:

An inspection conducted on December 20, 2005, revealed that the operator had not repaired the drain line through the embankment of Pond #001 according to the approved design.

The drain-line is viewed by the Division as an existing structure, which is part of the original design for Pond #001. The Division expects Buckeye to expose the outlet of the drain-line. With the exception of exposing the outlet of the drain-line, the Division believes that Pond #001 meets all other legal requirements.

DISCUSSION

Ohio's mining and reclamation law requires that bond be posted in support of a coal mining permit. See O.R.C. §1513.08. The purpose of this bond is to assure funds for the reclamation of areas affected by a mining operation. As reclamation progresses and is completed, the posted bond is released. See O.R.C. §1513.16.

Bond is released in three stages. Phase I bond release occurs after an operator has completed "backfilling, regrading and drainage control of a bonded area." Successful completion of Phase I requirements results in the release of 50% of the posted bond. Phase II bond release follows the resoiling and revegetation of an affected area. At the time of a Phase II release, the operator shall also insure that all permanent structures meet the requirements of the mining regulations. [See O.A.C. §1501:13-9-04(R).] If permanent impoundments are to be left, a plan must be in place for the sound future management of the impoundment either by the permittee or the landowner. [See O.A.C. §1501:13-7-05(B)(1)(b)(iv).] Successful completion of Phase II requirements results in the release of 35% of the posted bond. Phase III bond release is granted after the expiration of a five-year

vegetative maintenance period. Successful maintenance of the bonded area for the final five-year period results in the release of the remaining 15% bond. Once a Phase III bond release is granted, the operator's responsibility for a reclaimed site ceases.

Bond will be released to an operator, only upon the Division's inspection and approval of reclamation. The facts of this appeal reveal that in August 2005, Buckeye sought a Phase II bond release for permit D-2129. Inspections of the permit D-2129 area were conducted. In order for a Phase II bond release request to be approved, the Division needs to find that the operator has successfully resoiled and revegetated the affected area. In this appeal, there is no dispute that the Year 1 area of permit D-2129 has been successfully resoiled and revegetated.

In order for a Phase II bond release to be approved, the Division must also determine that all structures, intended to be left as permanent, meet the requirements of the mining and reclamation laws. Where a pond is to be left as permanent, the Division also requires an approved plan for the future management of this structure.

Buckeye intends to leave Pond #001 as a permanent structure. To this end, Buckeye reconstructed the pond's embankment in order to meet the stability requirements of O.A.C. §1501:13-9-04. The outlet of the pre-existing "draw-down system" was buried during the reconstruction of the embankment.

Significantly, the mining regulations do not require that a permanent pond be constructed with a "draw-down system." Nor do the regulations addressing pond stability specify that a pre-existing "draw-down system" must be maintained or reconstructed. Moreover, a "draw-down system," consisting of a drain-valve and drain-line, is not required for the sound future management of this impoundment. The water level in this pond can be regulated by other means.

It appears that the landowner's desire to restore the original "draw-down system," rather than a concern for pond stability, has prompted the Division to disapprove the requested Phase II bond release. Yet, in this case, all of the elements of the original "draw-down system" continue to exist. The drain-valve is in place, and is accessible. The drain-line also remains in place. Once Buckeye's responsibility for this pond ceases, the landowners can restore the original "draw-down system," if that is their desire.

The restoration of the "draw-down system" is not required by law, and is not necessary for the sound future management of Pond #001. Prior to, and during mining, Buckeye made no agreements with the landowners to restore the "draw-down system" as a part of the reclamation of this area. Under these facts, it is arbitrary and inconsistent with law for the Division to deny a Phase II bond release request based upon Buckeye's failure to restore the "draw-down system."

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is upon the Appellant Buckeye Industrial Mining Company to prove by a preponderance of the evidence that the Chief's issuance of Chief's Order 7316 was arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13(B).
2. O.R.C. §1513.08 requires the filing of a performance bond in support of a coal mining permit.

3. O.R.C. §1513.16(F)(3) provides that posted performance bond may be release to the operator by the Division upon a finding of successful reclamation. Standards for Phase II bond release are set forth as follows:

(3) The chief may release the bond or deposit if the reclamation covered by the pond or deposit or portion thereof has been accomplished as required by this chapter and rules adopted under it according to the following schedule:

* * *

(b) After resoiling and revegetation have been established on the regraded mined lands in accordance with the approved reclamation plan, the chief shall grant a release in an amount not exceeding thirty-five per cent of the original bond or deposit for all or part of the affected area under the permit. . . . No part of the bond or deposit shall be released under this division so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements of this section or until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . . Where a silt dam is to be retained as a permanent impoundment pursuant to division (A)(10) of this section, the portion of bond may be released under this division so long as provision for sound future maintenance by the operator or the landowner have been made with the chief.

4. O.A.C. §1501:13-7-05(B)(1)(b) addresses the criteria for release of Phase II performance bond:

(b) Reclamation phase II shall be determined to be completed when:

- (i) Resoiling is completed and revegetation meets the standards for success for a phase II bond release in accordance with rule 1501:13-9-15 of the Administrative Code;
- (ii) The lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of division (A)(10) of section 1513.16 of the Revised Code, these rules, permit conditions, or the mining and reclamation plan;
- (iii) With respect to prime farmlands, soil replacement has been carried out in accordance with the requirements of rule 1501:13-13-03 of the Administrative Code and division (A)(7) of section 1513.16 of the Revised Code, and soil productivity has returned to the levels of yield required by rule 1501:13-4-12 of the Administrative Code; and
- (iv) The provisions of a plan approved by the chief for the sound future management of any permanent impoundment by the permittee or landowner are implemented to the satisfaction of the chief.

5. O.A.C. §1501:13-9-04 addresses protection of the hydrologic system on a permit area, and provides in part:

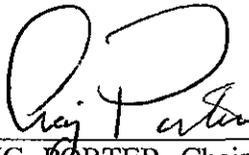
(R) Postmining rehabilitation of sedimentation ponds, diversions, impoundments and treatment facilities. Before abandoning a permit area or seeking bond release, the operator shall ensure that all temporary structures are removed and reclaimed, and that all permanent sedimentation ponds, diversions, impoundments, and treatment facilities meet the requirements of these rules for permanent structures, have been maintained properly, and meet the requirements of the approved reclamation plan for permanent structures and impoundments. The operator shall renovate such structure if necessary to meet requirements of these rules and to conform to the approved reclamation plan.

6. The issuance of Chief's Order 7316 was arbitrary and inconsistent with law, as Pond #001 meets the regulatory requirements for a permanent impoundment, and as there is no issue as to the sound future management of this structure.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **VACATES** Chief's Order 7316 and **REMANDS** this matter to the Chief to take actions consistent with this decision.

6/12/06
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:

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**BEFORE THE
RECLAMATION COMMISSION**

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|--------------------------------|---|------------------------------------|
| BUCKEYE INDUSTRIAL MINING CO., | : | |
| | : | Case No. RC-06-001 |
| Appellant, | : | |
| | : | Review of Chief's Order 7316; |
| -vs- | : | Permit D-2129 |
| | : | |
| DIVISION OF MINERAL RESOURCES | : | |
| MANAGEMENT, | : | <u>INDEX OF EVIDENCE</u> |
| | : | <u>PRESENTED AT HEARING</u> |
| Appellee. | : | |

Before: Craig Porter

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

Appearances: Dean K. Hunt, Counsel for Appellant Buckeye Industrial Mining Company; Holly Deeds Martin, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

WITNESS INDEX

Appellant's Witnesses:

| | |
|-------------|-------------------------------------------------|
| John Ramus | Direct Examination; Cross Examination; Rebuttal |
| George Bach | Rebuttal Examination; Cross Examination |

Appellee's Witnesses:

| | |
|---------------|---------------------------------------|
| David Naukam | Direct Examination; Cross Examination |
| Rodney Harold | Direct Examination |
| Thomas Wiley | Direct Examination; Cross Examination |

EXHIBIT INDEX

Appellee's Exhibits:

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|-----------------------|-----------------------------------------------------------------------------------------------------------------------------|
| Appellee's Exhibit 1 | Final Permit Map, Permit D-2129; certified 10/02/02. |
| Appellee's Exhibit 2 | Coversheet of Approved Coal Mining and Reclamation Permit D-2129; issued 09/26/01 |
| Appellee's Exhibit 3 | Inspection Report for Permit D-2129; dated 08/23/02 |
| Appellee's Exhibit 4 | Chief's Order 7316; issued 12/23/05 |
| Appellee's Exhibit 5 | Ohio Administrative Code §1501:13-7-05; effective 02/15/03 |
| Appellee's Exhibit 6 | Photograph (principal spillway outlet & corrugated pipe protecting the valve); taken 11/23/04 |
| Appellee's Exhibit 7 | Photograph (looking into the corrugated pipe protecting the valve); taken 09/21/05 |
| Appellee's Exhibit 8 | Photograph (corrugated pipe protecting the valve, flags marking drainline); taken 11/15/05 |
| Appellee's Exhibit 9 | Photograph (principal spillway outlet & corrugated pipe protecting the valve, flags marking drainline); taken 11/15/05 |
| Appellee's Exhibit 10 | Certification of Sediment Control System Construction; Pond #1, Permit D-2129; submitted 12/20/01; approved 02/24/03 |
| Appellee's Exhibit 11 | Second Certification of Sediment Control System Construction; Pond #1, Permit D-2129; submitted 10/27/03; approved 11/24/03 |

Appellee's Exhibit 12

Packet of Three Inspection Reports for Permit D-2129; dated 10/15/03, 11/10/03, 05/27/04

Appellee's Exhibit 13

Denial of Phase II bond release; dated 01/13/06;
Request for Phase II bond release; disapproved
12/29/05

Appellee's Exhibit 14

Curriculum Vitae for Thomas R. Wiley, P.E.;
dated 04/06