

# BEFORE THE RECLAMATION COMMISSION

BUCKEYE INDUSTRIAL MINING CO.,	:	Case No. RC-06-013
	:	
Appellant,	:	
	:	Review of Notice of Violation 28069;
-vs-	:	Permit D-52
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	<b><u>FINDINGS, CONCLUSIONS</u></b>
	:	<b><u>&amp; ORDER OF THE</u></b>
Appellee.	:	<b><u>COMMISSION</u></b>

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

Date Issued:

May 17, 2007

## **BACKGROUND**

This matter came before the Reclamation Commission upon appeal by Buckeye Industrial Mining Company ["Buckeye"] from Notice of Violation ["NOV"] 28069. This NOV alleges that Buckeye failed to follow its approved mining and reclamation plan by not resoiling certain areas of permit D-52 in a timely manner and by capping coal refuse with unapproved materials.

On December 19, 2006, Buckeye requested Temporary Relief in this matter. A hearing on Temporary Relief was conducted by the Chairman of the Reclamation Commission on December 28, 2006. On that date, the Chairman **denied** Temporary Relief.

On March 7, 2007, the Commission conducted a site view, with representatives of both parties in attendance. Also on March 7, 2007, this cause came on for hearing before five members of the Reclamation Commission. 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. On July 19, 1982, coal mining and reclamation permit D-52 was issued to Buckeye Industrial Mining Company ["Buckeye"].
2. During the 1960's, the area now covered by D-52 was deep mined and abandoned. Also during that time period, portions of the area now covered by permit D-52 were strip mined by Rodgers Mining Company. Pits created during this strip mining were left unreclaimed.
3. Permit D-52 covers 171.1 acres, 113 of which have been affected by Buckeye's mining operations. Buckeye has strip mined the #7A, and some #7, coal on this area. From 1991 until 1993, Buckeye also mined the #7 coal on this area by underground mining methods.
4. In 1988, permit D-52 was revised to allow for the disposal of coal refuse on this area. Buckeye's Kensington wash plant is located adjacent to permit D-52, and is separately permitted. The refuse material disposed of on permit D-52 is generated by the coal washing process occurring at the Kensington plant. This refuse is considered toxic-forming material. The refuse disposal area encompasses approximately 44 acres.

5. In July 1998, Buckeye's refuse disposal plan for permit D-52 was revised, to clarify the disposal operation. The approved refuse disposal plan provides that mining pits, both abandoned pits from previous mining and pits created by Buckeye during its operations, will be filled with refuse from the Kensington plant. Once a disposal pit is considered full, it will be capped with a non-toxic, relatively impermeable material. The plan specifically provides that the refuse will be capped with 2 feet of a clay/shale material. The clay/shale material is to be compacted with equipment, and then covered with an additional 3 feet of non-toxic material. This material will be graded to establish positive drainage, resoiled, seeded and mulched. A cross-section submitted with the disposal plan shows the final configuration of the refuse disposal site as mounds, rising to an approximate elevation of 1235 msl.

6. The refuse disposal plan for permit D-52 does not specifically provide for temporary capping of the refuse material. However, the mining and reclamation plan for permit D-52 provides in part:

There will be no temporary storage of acid-forming or toxic-forming material. Any working face which becomes inactive or which will be temporarily inactive for more than 30 days will be graded to achieve positive drainage and covered with non-toxic, non-acid producing material.

7. On September 28, 2005, Division Inspector Naukam visited the permit D-52 area. He observed that the disposal pit located on the northern portion of permit D-52 was filled with refuse to a point where the refuse material was level with the highwall in the pit and level with the surrounding ground. Based upon this observation, Inspector Naukam believed that the disposal of material in this area was complete. The Inspector also noted that the disposal pit was covered with a material composed primarily of sandstone.

8. Beginning in October 2005, and during each monthly inspection from October 2005 through October of 2006, the Division Inspector noted that the refuse disposal area at issue was not capped or reclaimed in accordance with the provisions of the approved refuse disposal plan addressing final capping of the refuse. The area which the Inspector identified as improperly capped consisted of approximately 2 acres.

9. During an inspection on March 20, 2006, Inspector Naukam, accompanied by two representatives of the Division, met with a representative of Buckeye, Rosemary Lacher, on the permit D-52 site. The Division inspection report generated from that meeting, states:

Rosemary proposed that the company submit a revised disposal plan. Basically, the cap that is now present is a temporary day cap, and would be removed so a large amount of the dry coarse refuse would be mounded up and sloped so as to provide positive drainage and then capped. The capping material would come from available spoil material to the south and western portions of the permit. The proposal seems reasonable and it was decided that the operator submit a complete, clear and detailed revised disposal plan as soon as possible.

Beginning in April 2006, and during each monthly inspection from April 2006 to October 2006, Inspector Naukam, in his written inspection reports, encouraged Buckeye to file a revised disposal plan. On September 7, 2006, Inspector Naukam set forth in his written inspection report a deadline of September 29, 2006 for the submission of the revised plan. Buckeye was reminded of this deadline in weekly inspection reports during the month of September 2006. A revised plan was not filed by September 29, 2006 and had not been filed as of the date of hearing.

10. On October 4, 2006, the Division issued Notice of Violation ["NOV"] 28069 to Buckeye. This NOV alleges a violation of O.R.C. §1513.16(A)(11) & (15) and O.A.C. §1501:13-9-13(A) and O.A.C. §1501:13-9-09(A)(1)(a), and states:

Operator has failed to follow the approved mining and reclamation plan by not resoiling in a timely manner, and not capping the coal waste with the approved material.

The NOV directed Buckeye to:

Remove the existing covering material and cap the coal refuse according to the approved coal waste disposal plan; and resoil and seed the area . . .

An abatement deadline of December 12, 2006 was established and later extended to April 2, 2007. The NOV remained unabated on the date of the merit hearing.

## DISCUSSION

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. Chapter 1513 allows for the disposal of coal mine waste on a permitted site, if such disposal is approved by the Division Chief and is conducted in accordance with the requirements of law and the terms of a disposal plan. See O.R.C. §1513.16(A)(11); O.A.C. §1501:13-9-09(A).

In the instant case, Buckeye's permit D-52 has been approved as a disposal site for coal refuse generated at the adjacent Kensington wash plant. In 1998, Buckeye filed a Coal Waste Disposal Plan (Attachment 28) with the Division. This disposal plan was part of an Application to Revise ["ARP"] permit D-52. As part of its disposal plan, Buckeye submitted a cross-section (marked at hearing as Appellant's Exhibit 1), which provides information on the final elevation of the coal refuse piles.

The basic issue presented by this appeal is: **Is Buckeye operating in violation of its approved coal waste disposal plan?** However, in order to determine this issue, two other questions must first be answered: **(1) Is the coal refuse pile at issue "complete?"** And, if the pile is found to be "complete," then one must determine: **(2) Has the completed pile been capped in the manner required under the disposal plan?**

The parties do not appear to disagree as to the capping material currently in place on the pile at issue. This material is sandstone, and does not consist of the clay/shale material required in the disposal plan for final capping of refuse. Where the parties disagree, is on the question of whether the refuse pile at issue is "complete," thus requiring the operator to undertake final capping procedures. If the pile is not "complete," then Buckeye's permit allows for the temporary capping of this refuse material.

The critical element in determining whether the refuse pile is "complete," would be the final elevation of the pile. To determine the approved final elevation, Buckeye presented to the Commission its Exhibit 1, a rather ambiguous cross-section of a single portion of the permit D-52 area. Significantly, the cross-section presented in Appellant's Exhibit 1, though representing an area near the pile at issue, does not actually show the final elevation of the pile under consideration. However, this cross-section provides the best evidence of the final elevations anticipated by Buckeye's disposal plan. The Commission was critical of the quality and detail of this cross-section. Also, the Commission believes that the Division was remiss in accepting such a vague and insufficiently detailed plan. The final elevation of the refuse pile would appear to be an important component of the disposal plan. The Commission would expect the Division to require, and Buckeye to submit, a more definitive plan, which clearly would establish, using multiple points, the final elevation of the refuse.

Before reaching the question of whether the final capping procedures were followed, the Commission must determine if the final capping procedures were due. If the refuse pile had not reached its final proposed elevation, final capping procedures would not need to be applied.

On the issue of whether the final refuse elevation had been achieved, the evidence presented through the testimony of Buckeye's witnesses John Grisham and Rosemary Lacher was that final elevation had not been reached. Certainly, as the operator on this disposal site, these representatives of Buckeye should be best equipped to determine whether final elevation had been reached. The Inspector assumed that final elevation had been achieved because the elevation of the refuse pile was level with a pit highwall in the area.

Neither party offered evidence on the critical issue of the actual elevation of the refuse pile. The burden of proof on this factual question, rests with the Division. Had the Division demonstrated that an elevation of approximately 1235 had been reached at the disposal site (the approximate final elevation as indicated on Appellant's Exhibit 1), the issuance of an NOV for failure to properly cap a finalized refuse pile would have been upheld. However, direct evidence on the elevation of the refuse pile was not presented, and thus the Division's burden of establishing that the pile was finalized was not successfully carried.

Evidence was presented at hearing, that Buckeye was to submit an Application to Revise ["ARP"] its permit D-52, addressing refuse disposal. A series of inspection reports indicate that the Division was awaiting this submission. However, the testimony indicates that Buckeye's possible ARP did not address capping procedures, but rather would have involved possible enlargements of refuse disposal sites. It appears that even though both Buckeye and the Division were discussing a possible APR, each party had a different interpretation of what this ARP would entail. The Commission finds that the proposed ARP is irrelevant to the question of final capping procedures.

Because it has not been established that the refuse pile at issue was at its final elevation, the Commission need not address the question of whether final capping procedures were followed. The Commission finds that the Appellee Division did not shoulder its burden to establish that the area at issue was a "completed" refuse pile. Therefore, the need to permanently cap this pile, in accordance with Buckeye's disposal plan, was not established.

## 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 28069 was not arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13(B).

2. O.R.C. §1513.16(A)(11) addresses the disposal of mine waste on a permitted area:

With respect to surface disposal of mine wastes, tailings, coal processing wastes, and other wastes in areas other than the mine working areas or excavations, stabilize all waste piles in designated areas through construction in compacted layers, including the use of noncombustible and impervious materials if necessary, and ensure that the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to this chapter;

3. O.A.C. §1501:13-9-09(A) addresses the general requirements for coal waste disposal, and provides in part:

- (A) Coal mine waste. General requirements.
- (1) General. All coal mine waste shall be placed in new or existing disposal areas within a permit area, which are approved by the chief for this purpose. Coal mine waste shall be placed in a controlled manner to:
    - (a) Minimize adverse effects of leachate and surface-water runoff on surface and ground water quality and quantity;
    - (b) Ensure mass stability and prevent mass movement during and after construction;
    - (c) Ensure that the final disposal facility is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use;
    - (d) Not create a public hazard; and
    - (e) Prevent combustion.
  - (2) Coal mine waste material from operations located outside a permit area may be disposed of in the permit area only if approved by the chief. Approval shall be based upon a showing that such disposal will be in accordance with the standards of this rule.

4. The issuance of Notice of Violation 28069 to Buckeye Industrial Mining Company, for non-contemporaneous reclamation and failure to cap coal refuse in accordance with the approved coal refuse disposal plan, was arbitrary, capricious or inconsistent with law.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **VACATES** the Chief's issuance of Notice of Violation 28069 to Buckeye Industrial Mining Company.

*May 17, 2007*  
DATE ISSUED

  
\_\_\_\_\_  
JAMES K. McWILLIAMS, 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 #: 91 7108 2133 3932 9127 6012  
Molly Corey, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6366

**BEFORE THE  
RECLAMATION COMMISSION**

BUCKEYE INDUSTRIAL MINING CO.,	:	Case No. RC-06-013
	:	
Appellant,	:	
	:	Review of Notice of Violation 28069;
-vs-	:	Permit D-52
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<b><u>INDEX OF EVIDENCE</u></b>
	:	<b><u>PRESENTED AT HEARING</u></b>
Appellee.	:	

**Before:** James McWilliams

**In Attendance:** Richard Cochran, Earl Murphy, Ray Rummell, Wanda Stratton and Hearing Officer Linda Wilhelm Osterman.

**Appearances:** Dean Hunt, Counsel for Appellant Buckeye Industrial Mining Co.; Molly Corey, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

**WITNESS INDEX**

**Appellee's Witnesses:**

David Naukam	Direct Examination; Cross Examination
Wayne Schalk	Direct Examination

**Appellant's Witnesses:**

John Grisham	Direct Examination; Cross Examination
Rosemary Lacher	Direct Examination; Cross Examination

## EXHIBIT INDEX

### Appellee's Exhibits:

Appellee's Exhibit A	Application to Revise A Coal Mining Permit R-0052-25, approved July 31, 1998
Appellee's Exhibit B	Attachment 28, Coal Waste Disposal Plan, part of ARP R-0052-25
Appellee's Exhibit C	Notice of Violation 28069; issued October 5, 2006
Appellee's Exhibit D	Inspection Report; inspected September 28, 2005
Appellee's Exhibit E	Inspection Report; inspected October 4, 2005
Appellee's Exhibit F	Inspection Report; inspected October 21, 2005
Appellee's Exhibit G	Photograph, permit D-52; taken October 21, 2005
Appellee's Exhibit H	Inspection Report; inspected November 8, 2005
Appellee's Exhibit I	Photograph, permit D-52; taken November 8, 2005
Appellee's Exhibit J	Inspection Report; inspected December 6, 2005
Appellee's Exhibit K	Inspection Report; inspected January 17, 2006
Appellee's Exhibit L	Inspection Report; inspected February 15, 2006
Appellee's Exhibit M	Photograph, permit D-52; taken February 15, 2006
Appellee's Exhibit N	Photograph, permit D-52; taken February 15, 2006
Appellee's Exhibit O	Inspection Report; inspected March 20, 2006
Appellee's Exhibit P	Inspection Report; inspected April 25, 2006
Appellee's Exhibit Q	Inspection Report; inspected May 16, 2006

Appellee's Exhibit R	Inspection Report; inspected June 15, 2006
Appellee's Exhibit S	Inspection Report; inspected July 6, 2006
Appellee's Exhibit T	Inspection Report; inspected July 20, 2006
Appellee's Exhibit U	Inspection Report; inspected August 16, 2006
Appellee's Exhibit V	Inspection Report; inspected September 7, 2006
Appellee's Exhibit W	Inspection Report; inspected September 15, 2006
Appellee's Exhibit X	Inspection Report; inspected September 22, 2006
Appellee's Exhibit Y	Inspection Report; inspected September 26, 2006
Appellee's Exhibit Z	Photograph, permit D-52, taken September 7, 2006
Appellee's Exhibit AA	Inspection Report; inspected October 4, 2006
Appellee's Exhibit BB - FF	Photographs, permit D-52, taken October 4, 2006
Appellee's Exhibit GG	Results from soil sampling, Ream and Haager Laboratory, ID 44888; report date March 6, 2007

**Appellant's Exhibits:**

Appellant's Exhibit 1	Drawing no. D-0052-01, Attachment 28, item 14; dated 1998
-----------------------	---