

BEFORE THE RECLAMATION COMMISSION

BUCKEYE INDUSTRIAL MINING CO.,	:	Case No. RC-06-014
	:	
Appellant,	:	
	:	Review of Notice of Violation 28071;
-vs-	:	Permit D-52
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>FINDINGS, CONCLUSIONS</u>
	:	<u>& ORDER OF THE</u>
Appellee.	:	<u>COMMISSION</u>

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 16, 2007

BACKGROUND

This matter came before the Reclamation Commission upon appeal by Buckeye Industrial Mining Company ["Buckeye"] from Notice of Violation ["NOV"] 28071. This NOV alleges that Buckeye stockpiled coal in violation of the approved mining and reclamation plan for permit D-52.

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. On March 8, 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"]. Permit D-52 covers 171.1 acres, 113 of which have been affected by Buckeye's mining operations.

2. 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.

3. 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. . .

4. In 2005, Buckeye stockpiled some coal on the permit D-52 site, because of space constraints at the adjacent wash plant. This stockpile was not identified in the mining plan for permit D-52. The stockpile remained on the D-52 site for approximately 2 - 4 months. In 2005, the Division Inspector warned Buckeye that, in the future, such unauthorized stockpiling of coal might result in an enforcement action.

5. On August 16, 2006, Division Inspector Naukam visited the permit D-52 site. He observed a stockpile of material, with approximate dimensions of 200 feet long, by 50 feet wide and 12 feet high. The material observed by Inspector Naukam on August 16, 2006, was K-Fuel, a coal product from the State of Wyoming. This material had been brought to Ohio, and was to be transported to an Ohio power plant. Prior to transportation to the power plant, it was discovered that the K-Fuel was contaminated with non-ferrous scrap metal. Therefore, the K-Fuel needed to be screened, to remove this metal. Buckeye elected to store the K-Fuel on the permit D-52 area, as there was no available storage location at the Kensington wash plant yard. The stockpile ultimately held about 3,000 ton of K-Fuel.

6. John Grisham testified on behalf of Buckeye that K-Fuel, as well as most coal products from Wyoming, is not acid-forming or toxic-forming. K-Fuel tends to have a high calcium content, and is alkaline, rather than acid, in nature. The Division did not test the pH of this material. Buckeye did not present any test results indicating the actual pH of the K-Fuel.

7. Beginning in August 2006, and during frequent inspections in September 2006, the Division Inspector, in written inspection reports, stated that the stockpiling of this material violated the permit D-52 mining plan. The Division further stated that the improperly-stored material needed to be removed from the permit D-52 area or that permit D-52 needed to be revised to provide for such stockpiling. On September 7, 2006, the Division established a deadline of September 29, 2006 for Buckeye either to remove the material or revise the permit. The material was not removed by September 29, 2006, nor was a revision submitted to the Division.

8. On October 4, 2006, the Division issued Notice of Violation ["NOV"] 28071 to Buckeye. This NOV alleges a violation of O.A.C. §1501:13-11-02(B) and O.A.C. §1501:13-4-04(J)(31), and states:

Operator has stocked coal in violation of the approved mining and reclamation plan.

The NOV directed Buckeye to:

Remove the coal stockpile.

An abatement deadline of October 20, 2006 was established and later extended to January 2, 2007. By January 3, 2007, the Inspector visited the permit D-52 site. At that time, the stockpile had been removed, and on January 3, 2007, NOV 28071 was terminated.

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. Ohio's mining law requires that mining and reclamation activities proceed in accordance with the requirements of Chapter 1513, and that these activities be conducted 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. See O.A.C. §1501:13-4-04.

Buckeye's permit plan specifically forbids the temporary storage of any acid-forming or toxic-forming material on the permit D-52 area. Buckeye's plan also includes a map, upon which all areas being utilized for coal storage are to be identified. See O.A.C. §1501:13-4-04(J)(31).

The evidence in this matter revealed that a coal product, known as K-Fuel, was transported into Ohio from Wyoming, and was intended for use at an Ohio power plant. Because of unexpected contamination of the K-Fuel, Buckeye needed a place to store this material, until it could be cleaned. The K-Fuel was originally intended to be stored at the Kensington wash plant, to then be re-loaded and transported to the power plant. The need to store and clean the contaminated K-Fuel required more room than was available at the Kensington yard. Therefore, Buckeye made a business decision to temporarily store the K-Fuel on the permit D-52 area, which is adjacent to, and convenient to, the Kensington plant. The K-Fuel was stored on top of a gob pile. This area of permit D-52 was not an area identified for coal storage in the mining plan.

Mr. Grisham, on behalf of Buckeye, testified that K-Fuel is not an acid-forming or toxic-forming material. The Division did not produce any evidence showing this material to be acid-forming. Therefore, the storage of the K-Fuel on permit D-52 does not appear to violate the provision of the permit D-52 mining plan forbidding the temporary storage of acid-forming or toxic-forming material.

However, NOV 28071 specifically alleges that Buckeye's stockpiling of this coal violated O.A.C. §1501:13-4-04(J)(31). This regulation requires that coal storage areas be identified on the permit maps, regardless of the acidity of the coal being stored. The fact that K-Fuel is non-acid producing does not excuse its placement on an unapproved permitted area.

Buckeye has argued that the placement of the K-Fuel on the permit D-52 area was, in its opinion, the most environmentally sound location for this material. Buckeye further argues that no environmental damage resulted from the storage of this material. Again, O.A.C. §1501:13-4-04(J)(31) requires that storage areas be identified and approved by the Division, and does not limit these restrictions based upon potential for environmental harm.

Quite simply, the law requires that coal be stored only in identified and approved areas of a permit. Buckeye's placement of the K-Fuel on the permit D-52 area violated that requirement of law.

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 28071 was not arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13(B).

2. O.A.C. §1501:13-4-04(J)(31) articulates the general requirements of an application for a mining permit. This regulation requires that a permit application contain:

(J) Maps: general requirements. The permit application shall include an application map prepared by or under the direction of and certified by an engineer or a surveyor or jointly by an engineer and a surveyor, to the extent such joint certification is required by state law, showing:

* * *

(31) Each coal storage, cleaning and loading area;

3. Beginning in August 2006 and continuing through September 2006, a coal product, known as K-Fuel, was stockpiled on the permit D-52 area, in a location not identified as a coal storage area. This material was stockpiled in violation of O.A.C. §1501:13-4-04(J)(31) and in violation of the approved permit D-52 mining plan.

4. The issuance of Notice of Violation 28071 to Buckeye Industrial Mining Company, for improperly storing coal on a non-identified, and non-approved, location on permit D-52 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 28071 to Buckeye Industrial Mining Company.

May 16, 2007
DATE ISSUED



JAMES K. McWILLIAMS, 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:

Dean K. Hunt, Via FAX [859-252-4167] & Certified Mail #: 7000 0600 0028 2172 1082
Molly Corey, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6365

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DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>INDEX OF EVIDENCE</u>
	:	<u>PRESENTED AT HEARING</u>
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

Appellant's Witnesses:

John Grisham Direct Examination; Cross Examination

EXHIBIT INDEX

Appellee's Exhibits:

Appellee's Exhibit A	Annual Map, permit D-52, year 22; approved November 2, 2004
Appellee's Exhibit B	Application to Revise Coal Mining Permit R-0052-25, approved July 31, 1998
Appellee's Exhibit C	Attachment 28, Coal Waste Disposal Plan, part of ARP R-0052-25
Appellee's Exhibit D	OPEN
Appellee's Exhibit E	Notice of Violation 28071, issued October 5, 2006
Appellee's Exhibit F	Inspection Report; inspected August 16 2006
Appellee's Exhibit G	Inspection Report; inspected August 23, 2006
Appellee's Exhibit H	Photograph, permit D-52, taken August 23, 2006
Appellee's Exhibit I	Inspection Report; inspected August 31, 2006
Appellee's Exhibit J	Photograph permit D-52, taken August 31, 2006
Appellee's Exhibit K	Inspection Report; inspected September 7, 2006
Appellee's Exhibit L	Inspection Report; inspected September 15, 2006
Appellee's Exhibit M	Inspection Report; inspected September 22, 2006
Appellee's Exhibit N	Inspection Report; inspected September 26, 2006
Appellee's Exhibit O	Photograph, permit D-52; taken September 15, 2006
Appellee's Exhibit P	Inspection Report; inspected October 4, 2006