

# BEFORE THE RECLAMATION COMMISSION

OXFORD MINING COMPANY,	:	Case No. RC-06-008
	:	
Appellant,	:	
	:	Review of Notice of Violation 28405;
-vs-	:	Permit D-2178
	:	
	:	
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 K. Hunt, Counsel for Appellant Oxford Mining Company; Kate Mosca, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued: January 18, 2007

## BACKGROUND

This matter came before the Reclamation Commission upon appeal by Oxford Mining Company ["Oxford"] from Notice of Violation ["NOV"] 28405. This NOV alleged that Oxford failed to remove, segregate and store all available topsoil on a portion of coal mining and reclamation permit D-2178, in accordance with the approved topsoil handling plan.

On December 14, 2006, this cause came on for hearing before four members of the Reclamation Commission. Commission member Wanda F. Stratton recused herself from this appeal, and did not participate in any aspect of this case. 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-2178 was issued to Holmes Limestone Company on September 18, 2003, and allowed surface coal mining on 769.1 acres of land in Coshocton County, Ohio. Oxford Mining Company is currently operating on this permit. At the time of the violation at issue, 190 acres of the permitted area had been affected by mining.

2. The topsoil in this area is relatively thin, averaging between 3 – 5 inches in depth.

3. Permit D-2178 contains a Topsoil Handling Plan, which includes these provisions:

The average soil depths, on the areas to be affected by the proposed mining operation, will range in thickness from 3 – 5 inches, with the subsoil ranging in thickness from 12 – 24 inches.

\* \* \*

The topsoil, and any subsoil, will be removed approximately 5 – 150 days ahead of the actual mining operation.

\* \* \*

The topsoil, and any subsoil, storage areas will be located so as to minimize the possibility of contamination from water and spoil from the mining operations.

\* \* \*

The topsoil will then be uniformly redistributed with the dozers and scrapers to a minimum depth of six (6) inches.

4. On June 9, 2006, Division Inspector Stonerock, accompanied by four other Division employees, including the Division Chief, inspected the permit D-2178 area. Oxford was aware of the presence of the Division personnel and conducted its topsoil recovery operation in full view of the Inspector and his colleagues. During this visit, Inspector Stonerock observed topsoil, subsoil and spoil being removed, loaded and stored. Stonerock observed at least one load of uprooted trees, with some amount of topsoil or subsoil attached to their roots, being placed into the spoil pile.

5. On June 9, 2006, Oxford was excavating material. At that time, the material closest to the surface was saturated and soft. Working with this saturated material was difficult, and required Oxford to work "from the bottom of the pit," as opposed to pushing material from the top of the highwall. Pursuant to its topsoil handling practices, Oxford takes any trees and places them into the spoil pile. This is done because Oxford has a practice of not placing vegetative debris, such as trees and tree stumps, in its topsoil piles. Some non-spoil material may adhere to the tree roots. Oxford does not separate this non-spoil material from the tree roots. However, generally, any "brown material," including topsoil and subsoil, that does not contain tree stumps or other debris, is placed into a topsoil pile.

6. Prior to June 9, 2006, Oxford had created a large topsoil pile. On or about June 9, 2006, Oxford was starting a new topsoil pile. To provide enough material for resoiling, this pile included both topsoil and some subsoil.

7. On June 9, 2006, Oxford was not removing and segregating topsoil 5 - 150 days in advance of mining. Oxford was mining almost concurrently with topsoil removal, because there had been some confusion regarding the permit boundaries, and Oxford was extending its mining operation beyond what it initially thought were the permit limits. Oxford was removing topsoil ahead of its mining operation, although not 5 days ahead of mining. This timing of the topsoil recovery was not typical for permit D-2178, but resulted from the unexpected extension of the mining operation.

8. On June 9, 2006, Oxford was separating topsoil, subsoil, spoil and trees. As part of this operation, topsoil and some subsoil were transported to a topsoil pile for storage. Spoil, and unneeded subsoil, were placed into the spoil pile. Uprooted trees were also placed into the spoil pile. Oxford's soil segregation system included radioing truck drivers, with instructions on where each particular load of material should be placed.

9. On June 9, 2006, NOV 28405 was issued to Oxford. This NOV cited a violation of O.R.C. §1513.16(A)(5) and O.A.C. §1501:13-9-03(A) & (B), and stated:

The operator failed to remove, segregate and store all available topsoil within the watershed of pond 017 and in accordance with the approved topsoil handling plan.

NOV 28405 required the operator to:

Salvage all available topsoil approximately 5 – 150 days ahead of the mining operation. Segregate and store topsoil to prevent contamination by spoil or waste materials.

The operator was initially given two days to abate this violation. The abatement deadline was later extended to allow a total of thirteen days for abatement.

10. Between June 10 and June 26, 2006, Oxford did not change its topsoil operation on the site. Rather, this additional time allowed Oxford to expand its new topsoil pile. To abate NOV 28405, Oxford did nothing except continue its existing topsoil handling operations.

11. By June 26, 2006, NOV 28405 was considered abated, and on June 26, 2006, the NOV was terminated.

## **DISCUSSION**

Ohio's mining and reclamation law requires that topsoil be salvaged for redistribution upon reclaimed lands. See O.R.C. §1513.16 (A)(5). To salvage topsoil, this soil must be separately removed, segregated and stored. Mining is considered a temporary use of land. Reclamation is the process by which land affected by mining is returned to its pre-mining land use or another identified and approved land use. The return of topsoil to the land surface during reclamation, is an essential aspect of assuring the continued productivity of the land following mining. It is for this reason that topsoil removed during mining operations, is carefully segregated, stored and protected.

The facts of this case reveal that the topsoil on the affected areas of permit D-2178 is somewhat scarce. The topsoil handling plan states that topsoil in this area ranges in average depths from 3 – 5 inches. As the plan requires the redistribution of resoiling material on the affected areas to a depth of 6 inches, it is anticipated that some subsoil will be added to the topsoil material in order to achieve this resoiling depth. Oxford is clearly aware of the scarcity of topsoil on this area, and has an interest in assuring that all possible resoiling material is segregated, properly stored and protected.

Oxford's practice of placing vegetative debris, such as uprooted trees and tree stumps, into the spoil pile is reasonable, and reflects common mining practices. The resoiling material, which in this case consists of the available topsoil and some subsoil, is to be spread upon the land surface during reclamation. The presence of vegetative debris in this resoiling material would not allow for efficient resoiling. Therefore, placement of vegetative debris into the spoil pile is an effective practice. It is further reasonable to expect that some small amount of topsoil material may be integrally attached to the tree roots, and could conceivably be lost when the vegetative debris is placed into the spoil pile. However, the amount of topsoil lost in this process is *de minimus*, and does not negate the overall effectiveness of Oxford's topsoil handling operation.

Looking at the photographic evidence, showing Oxford's topsoil and spoil piles, clearly demonstrates that Oxford is conducting its topsoil handling operations in a manner which attempts to save and protect the topsoil available to this area.

The testimony of Oxford's witnesses, who are directly involved with the handling of topsoil and subsoil on this site, shows that Oxford appreciates its responsibility under both the law and its mining plan to protect and salvage available topsoil. Oxford's operations are consistent with typical mining practices in this regard, and do not evidence any intentional wasting of topsoil.

Oxford's topsoil handling plan also requires that topsoil be removed and segregated approximately 5 – 150 days in advance of mining. In this instance, Oxford concedes that the topsoil was being removed in advance of mining, however, less than 5 days in advance of mining. Oxford's witnesses indicated that this was not typical of the operations on permit D-2178, but occurred because of an unanticipated expansion of the mining operation. Again, the plan states that topsoil will be removed approximately 5 -150 days in advance of mining. Oxford's witnesses testified that the topsoil in this specific instance was being removed about 3 days in advance of mining. Based upon the site-specific facts of this appeal, the Commission cannot find that the timing of topsoil removal in this matter violated the topsoil handling plan or Ohio 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 Chief's issuance of NOV 28405 was not arbitrary, capricious or inconsistent with law. See O.R.C. §1513.13(B).

2. O.R.C. §1513.16(A)(5) addresses topsoil handling, and requires an operator to:

(5) Remove the topsoil from the land in a separate layer, replace it on the backfill area, or, if not utilized immediately, segregate it in a separate pile from the spoil, and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick-growing plants or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by acid or other toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation. If the topsoil is of insufficient quantity or of poor quality for sustaining vegetation or if other strata can be shown to be more suitable for vegetation requirements, the operator shall remove, segregate, and preserve in a like manner such other strata as are best able to support vegetation.

3. O.A.C. §1501:13-9-03(A) & (B) address topsoil handling and provide in pertinent part:

(A) To prevent topsoil from being contaminated by spoil or waste materials or otherwise wasted, the operator shall remove the topsoil as a separate operation from areas to be disturbed. . . . The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution. . . .

(B) Topsoil to be salvaged shall be removed before any drilling for blasting, mining, spoil or other surface disturbance.

4. The issuance of NOV 28405 was arbitrary and capricious, in that the site-specific facts of this appeal indicate that topsoil was not being wasted on the permit D-2178 area, and that Oxford's topsoil handling operation was not conducted in a manner that violated either Oxford's mining and reclamation plan or Ohio law.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **VACATES** Notice of Violation 28405, and **REMANDS** this matter to the Division Chief, with instructions to take actions consistent with this decision.

*January 18, 2007*  
DATE ISSUED

  
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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:**

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Kate Mosca, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6347

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-vs-

DIVISION OF MINERAL RESOURCES  
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**INDEX OF EVIDENCE  
PRESENTED AT HEARING**

**Before:** Craig Porter

**In Attendance:** Richard Cochran, James McWilliams, Earl Murphy and Hearing Officer  
Linda Wilhelm Osterman.

**Appearances:** Dean K. Hunt, Counsel for Appellant Oxford Mining Company; Kate  
Mosca, Assistant Attorney General, Counsel for Appellee Division of  
Mineral Resources Management.

**WITNESS INDEX**

**Appellant's Witnesses:**

Ed Warren  
Richard Barnett

Direct Examination; Cross Examination  
Direct Examination; Cross Examination

**Appellee's Witnesses:**

Robert Stonerock  
Dave Clark

Direct Examination; Cross Examination  
Direct Examination; Cross Examination

## EXHIBIT INDEX

### Appellant's Exhibits:

Appellant's Exhibit A	Board with five photographs, permit D-2178, taken 06/14/06 and 0831/06
Appellant's Exhibit B	Board with nine photographs, permit D-2178, taken 06/09/06 and 06/14/06
Appellant's Exhibit C	Map, showing permit D-2178 and application #10315

### Appellee's Exhibits:

Appellee's Exhibit A	Notice of Violation 28405, issued 06/09/06
Appellee's Exhibits B, C, D & E	Photographs, permit D-2178, taken 06/09/06
Appellee's Exhibit F	Soil Sample #1, held in a large plastic container, taken from top of spoil pile (shown in Exhibit D), collected 06/09/06
Appellee's Exhibit G	Soil Sample #2, held in a large plastic container, taken from topsoil pile (shown in Exhibit E), collected 06/09/06
Appellee's Exhibit H	Topsoil Handling Plan for permit D-2176
Appellee's Exhibit I	Inspection Report, dated 06/10/06
Appellee's Exhibit J	Inspection Report, dated 06/12/06
Appellee's Exhibit K	Inspection Report, dated 06/13/06
Appellee's Exhibit L	Inspection Report, dated 06/14/06
Appellee's Exhibit M	Inspection Report, dated 06/15/06
Appellee's Exhibit N	Inspection Report, dated 06/26/06
Appellee's Exhibit O & P	Photographs, permit D-2178, taken 06/14/06