

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF MINES, MINERALS AND ENERGY  
DIVISION OF MINED LAND RECLAMATION**

**IN RE: VIRGINIA FUEL CORPORATION,  
NOTICE OF VIOLATION NO. RDS0009028 - VIOLATION NO. 3 of 3  
PERMIT NO. 1702073**

**HEARING OFFICER'S DECISION**

A formal public hearing was held on April 11, 2014 at Conference Room, Department of Mines, Minerals and Energy, 219 Buchanan-Smith Building, 3405 Mountain Empire Rd., Big Stone Gap, Virginia to review the issuance of Notice of Violation No. RDS0009028, Violation No. 3 of 3, issued March 19, 2012 to Virginia Fuel Corporation, Permit No. 1702073. At such Formal Hearing the following appeared:

Counsel for Virginia Fuel Corporation .....	Dustin Deane, Esq.
VFC Party Representatives .....	Mr. Leslie Vincent and Mr. Robert Burton,
Counsel for DMME/DMLR .....	Matthew Gooch, Esq. (Office of the Attorney General)
DMME/DMLR Party Representative .....	Mr. Harve Mooney,
Witnesses .....	Leslie Vincent
	Robert Burton
	Jon Lawson
	John Jones
	Randy Stanley

The transcript of the hearing consists of 1 volume and is referred to herein as "Tr. \_\_\_" with the page number inserted at the "\_\_\_". By agreement of the parties, exhibits were admitted *en masse*.<sup>1</sup> By agreement of the parties, written closing arguments/proposed findings, conclusions, and statements of reasons therefor were submitted on June 16, 2014, the close of record date.

**FINDINGS OF FACT:**

01. On March 19, 2012 Division of Mined Land Reclamation ("DMLR") inspectors John Jones and Randy Stanley conducted an inspection of a site operated by Virginia Fuel Corporation ("VFC"), Permit No. 1702073, located in Lee County, Virginia. The operation was active and coal handling was in progress.<sup>2</sup>

02. Located on the northwest side of the permit was Pond 1A, an approved sediment control structure. During the March 19, 2012 inspection it was noted a diversion ditch had been constructed along the east side of Pond 1A which diverted water flow directly into a stream thus bypassing Pond 1A.<sup>3</sup>

03. The diversion ditch allowed drainage to leave the permit area without passing through Pond 1A, a sediment control structure. The diversion ditch intercepted and diverted from Pond 1A what the operator identifies as acid mine drainage from an abandoned underground mine and intercepted and diverted surface drainage from approximately 20 disturbed acres from above the pond. The diversion ditch and the subsequent diversion of drainage is not addressed in or a part of the approved plan under the permit.<sup>4</sup>

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<sup>1</sup> Tr. 9.

<sup>2</sup> Ex. 3.

<sup>3</sup> Tr. 178, 185, Ex. 3.

<sup>4</sup> Tr. 10, 177, 178, 185, Ex 3, Ex 11.

04. The Division of Mined Land Reclamation's Inspection Report regarding the March 19, 2012 inspection indicated, in pertinent part:

It was noted at this inspection a diversion ditch has been constructed around the east side of Pond 1A to intercept what the operator identifies as acid mine drainage from an abandoned underground mine. However, construction of this ditch and subsequent diversion of the drainage in question is not addressed in the approved plan. In addition, the ditch intercepts surface drainage from approximately 20 disturbed acres from above the pond allowing drainage to leave the permit without passing through a sediment control structure. Therefore, Notice of Violation RDS0009000 was issued at this inspection and expires April 2, 2012 instructing the operator to direct all drainage, including the acid mine drainage, into Pond 1A in accordance with the approved plans. Flow in the diversion ditch was approximately 200 gpm. The pH was 6.0, Mn was 1.0 mg/l and Fe was off the scale of the Hatch field test kit, probably in the 9-10 mg/l range. A grab sample was taken and sent to EMI for analysis for metals. The area above is mostly vegetated to some degree with the exception of haulroad HR-E. Without the acid mine drainage off-site impacts would be considered as minor to moderate but with it the downstream and off-site impacts can be considered as significant.<sup>5</sup>

Error/typo in the above Inspection Report as to the NOV Number was addressed at hearing. "Notice of Violation RDS0009000" was stated in error in the Inspection Report and was corrected to indicate "Notice of Violation RDS0009028".<sup>6</sup>

05. In January 2012 Mr. John Jones and Mr. Randy Stanley met with Mr. Leslie Vincent, an employee of the Justice Corporation/Virginia Fuel Corporation.<sup>7</sup> Mr. Stanley was the new inspector on the site and had noted the violation addressed in Violation 3 of 3. The purpose of the meeting was to discuss the diversion ditch and afford an opportunity for matters to be corrected. The parties discussed the diversion ditch, what could be done to correct the situation, and Virginia Fuel Corporation was afforded a period to correct the violation. However, matters discussed were not corrected by VFC prior to issuance of Notice of Violation RDS0009028 ("NOV").<sup>8</sup>

06. On March 19, 2012, after having determined the violation was not corrected, Virginia Fuel Corporation (Permit No.1702073) was issued Notice of Violation Number RDS0009028 by the Department of Mines Minerals and Energy, Division of Mined Land Reclamation. The Notice of Violation addressed 3 Violations including Violation 3 of 3 which indicated, in pertinent part:

Location: Sediment Pond 1A located on the NW side of the permit. A diversion ditch has been constructed along the east side of this pond so as to intercept what the operator identifies as abandoned underground mine acid mine drainage. However, this has not been addressed in the approved plans and the diversion ditch also intercepts surface drainage from approximately 20 disturbed acres above Pond 1A allowing this drainage to leave the permit area without passing through a drainage control structure.

The Notice of Violation ("NOV"), under *Affirmative Obligation(s)/Remedial Action Required*, stated, "The operator is hereby instructed to eliminate the said diversion ditch so as to direct all drainage, including the acid deep mine drainage, into Pond 1A in accordance with the approved plans. Additionally, the NOV indicated an abatement date of 6/25/13 as to Violation 3 of 3."<sup>9</sup>

07. Permit No. 1702073 was transferred to Virginia Fuel Corporation in December of 2011. Virginia Fuel Corporation was the operator when the permit was transferred and had been since about September of 2010. As stipulated by the parties, the December 2, 2011 transfer of Permit 1702073 to Virginia Fuel Corporation was "as is" and "without modifications".<sup>10</sup>

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<sup>5</sup> Ex. 11, Inspection report.

<sup>6</sup> Tr. 185.

<sup>7</sup> Tr. 16 and Tr. 81.

<sup>8</sup> Tr. 219-222.

<sup>9</sup> Ex. 3. (Notice of Violation), Tr. 219-220.

<sup>10</sup> Tr. 10, 18-19.

08. DMME has conducted a technical investigation to determine where certain seeps around Pond 1A are coming from. However, the technical investigation was inconclusive.<sup>11</sup>

09. At hearing, the parties stipulated the diversion ditch was not in the approved plans and the December, 2011 permit transfer was "as is" and "without modifications".<sup>12</sup>

10. Prior to construction of the diversion ditch, two sources of water were entering Pond 1A, surface flow and seepage from underneath the pond and/or outside the pond.<sup>13</sup> Seepages contributed to rising iron, manganese and other levels within the pond.<sup>14</sup>

11. Virginia Fuel Corporation has, subsequent to the issuance of Notice of Violation Number RDS0009028, applied for a revision to the permit to add the diversion ditch. This revision is pending (as of the hearing date) with the division.<sup>15</sup>

### CONCLUSIONS OF LAW:

#### **Virginia Administrative Code:**

**4 VAC 25-130-773.15** provides, in pertinent part:

(a) General.

(2) The applicant for a permit or revision of a permit shall have the burden of establishing that the application is in compliance with all the requirements of the regulatory program.

(c) Written findings for permit application approval. No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the division finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following: ....

**4 VAC 25-130-773.17** addressing permit conditions provides, in pertinent part, as follows:

Each permit issued by the division shall be subject to the following conditions:

(b) The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the division otherwise directs in the permit.

(c) The permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and the requirements of this chapter.

(e) The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit, ....

**4 VAC 25-130-774.11** DIVISION REVIEW OF PERMITS provides, in pertinent part:

(b) After the review required by Paragraph (a) of this section, or at any time, the division may order reasonable revision of a permit in accordance with 4VAC25-130-774.13 to ensure compliance with the Act and the regulatory program.

(c) Any order of the division requiring revision of a permit shall be based upon written findings and shall be subject to the provisions for administrative and judicial review in Part 775. Copies of the order shall be sent to the permittee.

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<sup>11</sup> Tr. 189 -190.

<sup>12</sup> Tr. 10.

<sup>13</sup> Tr. 20-21.

<sup>14</sup> Ex. 11.

<sup>15</sup> Tr. 84, 187-188, Ex. 1, Ex. 12

**4 VAC 25-130-774.13** provides, in pertinent part as follows:

(c) Criteria for approval. No application for a permit revision shall be approved unless the application demonstrates and the division finds that reclamation as required by the Act and the regulatory program can be accomplished, applicable requirements under 4VAC25-130-773.15(c) which are pertinent to the revision are met, and the application for a revision complies with all requirements of the Act and the regulatory program. ....

**4 VAC 25-130-774.17(f)** provides, in pertinent part as follows:

(f) Continued operation under existing permit. The successor in interest shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with the Act, the regulatory program, and the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit as provided in this Subchapter.

**4 VAC 25-130-780.21**. Hydrologic information, provides:

(b) Baseline information. The application shall include the following baseline hydrologic information, and any additional information required by the division.

(1) Ground-water information. The location and ownership for the permit and adjacent areas of existing wells, springs, and other ground-water resources, seasonal quality and quantity of ground-water, and usage.

(2) Surface-water information. The name, location, ownership, and description of all surface-water bodies such as streams, lakes, and impoundments, the location of any discharge into any surface-water body in the proposed permit and adjacent areas, and ...

**4 VAC 25-130-780.29**. Diversions, provides:

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with 4VAC25-130-816.43.

**4 VAC 25-130-816.43(a)(1)**, addressing Diversions, provides in pertinent part:

(a) General requirements.

(1) With the approval of the division, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of 4VAC25-130-816.46 for siltation structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the division under 4VAC25-130-816.41(i).

**4 VAC 25-130-816.46**. Hydrologic balance; siltation structures, provides:

(b) General requirements. ...

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (b)(5) or (e) of this section.

**Notice of Violation:**

On March 19, 2012 DMLR Inspectors John Jones and Randy Stanley inspected the site operated by Virginia Fuel Corporation (Permit No. 1702073). The permit, located in Lee County Virginia, contains a drainage control plan providing for water drainage designed to flow into Pond 1A, a sediment control structure. The operation was active and coal handling was in progress.<sup>16</sup>

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<sup>16</sup> Ex. 3.

Inspectors noted a diversion ditch around the east side of Pond 1A which intercepted what the operator identifies as acid mine drainage from an abandoned underground mine and also intercepted surface drainage from approximately 20 disturbed acres from above the pond allowing drainage to leave the permit without passing through a sediment control structure. The diversion ditch was not in the approved plan.<sup>17</sup>

Discussion was held with VFC concerning the diversion ditch and what could be done to correct the matter. VFC was given time to correct matters, however, matters were not corrected.<sup>18</sup> On March 19, 2012 Notice of Violation No. RDS0009028 - Violation No. 3 of 3 was issued to Virginia Fuel Corporation, Permit No. 1702073 addressing the diversion ditch which was not in the approved plans. The NOV's *Affirmative Obligation(s)/Remedial Action Required* instructed operator to eliminate the diversion ditch so as to direct all drainage, including the acid mine drainage, into Pond 1A in accordance with the approved plans.

**Permit:**

Permit No. 1702073 was a transfer from James A Sigmon, permittee, to Virginia Fuel Corporation occurring in December of 2011.<sup>19</sup> Virginia Fuel Corporation was the operator when the permit was transferred and had been since approximately September, 2010. The transfer of permit to Virginia Fuel Corporation was "as is" and "without modifications".<sup>20</sup> The plans at the time of transfer are the approved permit plans for the new permit. VFC assumed the liability and reclamation responsibilities of the existing permit and is required to be in full compliance with the terms and conditions of the existing permit, unless it has obtained a new or revised permit.<sup>21</sup>

The permittee is charged with identifying the locations and descriptions for all surface water sources and ground water sources.<sup>22</sup> The permit contains a drainage control plan with Pond 1A designed to capture drainage.<sup>23</sup> The permit also has a number of identified seeps including two seeps above and one seep adjacent to Pond 1A.<sup>24</sup> Prior to the December 2011 permit transfer a Surface Water Hydrology--Operations Map dated May 2006 and referencing Permit No: 1501065 - Application No. 1001691 was on file with DMLR as it was included with the permit application.<sup>25</sup> This map indicates a number of seeps locations and their relationship to Pond 1A.

The approved plans, unless changed during the permit transfer are the approved permit plans for the new permit. VFC is required to conduct operations in full compliance with the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit.<sup>26</sup> However, the diversion ditch was not a part of any approved plan. A revision was not submitted prior to the NOV for changes in the approved plans to allow a diversion by-passing Pond 1A. VFC, subsequent to the issuance of the NOV, has asked for a revision to the permit to add the diversion ditch. Matters are pending as of the hearing date.<sup>27</sup>

**Diversion:**

Virginia Fuel Corporation acknowledges the diversion ditch was not a component of the approved permit plans at the time the Notice of Violation was issued. Both surface water and seepage drain into

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<sup>17</sup> Stipulation, Tr. 10.

<sup>18</sup> Tr. 219-222.

<sup>19</sup> Tr. 10, 18.

<sup>20</sup> Tr. 10, 18-19.

<sup>21</sup> 4 VAC 25-130-774.17(f).

<sup>22</sup> 4 VAC 25-130-780.21.

<sup>23</sup> Tr. 11.

<sup>24</sup> Ex. A, Ex. B, Tr. 36-37.

<sup>25</sup> Tr. 34-35, Ex. B.

<sup>26</sup> 4 VAC 25-130-774.17(f).

<sup>27</sup> Tr. 84, 187-188, Ex. 1, Ex. 12

Pond 1A.<sup>28</sup> The ditch intercepted surface drainage from approximately 20 disturbed acres from above the pond allowing drainage to leave the permit without passing through a sediment control structure. The interception of surface drainage was not contested. After issuance of the NOV, Virginia Fuel Corporation took corrective action as to the surface drainage to insure the drainage ditch did not divert surface drainage from the approximately 20 acres.

VFC contends, per 4 VAC 25-130-816.43, it has authority to divert seepage (which it holds is AML water). VFC contends it received verbal approval from Mr. Leslie Vincent, who was working for DMLR at the time, and this verbal approval provided the requisite "approval of the division". VFC also notes there is no requirement within 4 VAC 25-130-816.43 for the approval to be in writing.

Mr. Vincent indicated he gave a verbal approval for the ditch while still working for DMLR and after having had discussed matters with DMLR staff. Mr. Vincent testified, "...I advised Mr. Burton that they could construct a ditch around that, intercept AML mine works, or the seepage from the AML mine works, and divert it around their pond ...".<sup>29</sup>

DMLR contends an oral approval from an employee does not provide the requisite "approval of the division" as is addressed in 4 VAC 25-130-816.43 and any oral approval by Mr. Vincent was *ultra vires*. Furthermore DMLR contends, as the diversion ditch was not a part of any approved permit plans, both VFC and DMLR remain subject applicable regulatory provisions and these regulations are not negated by the provisions of 4 VAC 25-130-816.43.

There is no evidence of a document granting approval for a diversion ditch by Mr. Vincent or by DMLR nor evidence of any writing confirming or acknowledging such approval being given or received.<sup>30</sup> There was a DMLR inspection report dated 6/30/11 which stated, "It was noted that a diversion ditch was constructed around basin 1A to divert water from an old deep mine around basin 1A."<sup>31</sup>

There is no evidence of Mr. Vincent having a right or power to grant orally the approval of the division nor evidence of a delegation to Mr. Vincent of the right or power to grant orally the approval of the division for a diversion ditch not in the approved plans. The actions, rights, and powers of DMLR and its employees are governed by laws and regulations.

DMME/DMLR interprets regulations as requiring a permit revision for the diversion ditch as it was not provided for in the approved plan. This interpretation appears reasonable under the circumstances and facts presented in this case and consistent with law and regulations.

4 VAC 25-130-816.43 does not supersede, negate, or create exception to certain requirements of other regulatory provisions including, but not limited to, requirements that:

- The permittee shall conduct operations only as described in the approved application, except to the extent that the division otherwise directs in the permit.
- The permittee is required to comply with the terms and conditions of the permit.  
The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit. (4 VAC 25-130-773.17)
- The applicant for a permit or revision of a permit shall have the burden of establishing the application is in compliance with all requirements of the regulatory program.

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<sup>28</sup> Tr. 125.

<sup>29</sup> Tr. 61.

<sup>30</sup> Tr. 143.

<sup>31</sup> Ex. C.

Approval of an application for a significant revision of a permit is required to have certain written findings made by the Division. (4 VAC 25-130-773.15);

- The permittee shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with the Act, the regulatory program, and the terms and conditions of the existing permit, unless the applicant has obtained a new or revised permit. (4 VAC 25-130-774.17(f))

4 VAC 25-130-780.29 provides that each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with 4 VAC 25-130-816.43.

VFC is required to either comply with its permit or seeking a revision. A permit revision, not merely a verbal approval by an employee to construct the diversion ditch is required. The diversion ditch is not in accord with the approved plan or any approved revision. A permit revision is required and that permit revisions must be approved in writing.

4 VAC 25-130-816.43 doesn't only indicate that with the approval of the division a flow may be diverted but also indicates the requirement that all diversions must be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area, and to assure the safety of the public. The 3/19/12 inspection report stated the pH was 6.0, Mn was 1.0 mg/l and Fe was off the scale of the Hatch field test kit, probably in the 9-10 mg/l range. The inspection report found, "Without the acid mine drainage off-site impacts would be considered as minor to moderate but with it the downstream and off-site impacts can be considered as significant".<sup>32</sup>

The parties disagree as to the character of the seepage and/or "what the operator identified as being acid mine drainage from an abandoned underground mine" being in fact AML water. While VFC contends the seepage is AML water, DMLR contends the exact origins of the seepage is not known. The evidence indicated that without extensive investigation it would be speculation as to where seepage is coming from.<sup>33</sup>

DMME has conducted a technical investigation to determine where certain seeps around Pond 1A are coming from. However, the technical investigation was inconclusive.<sup>34</sup> There is a known pre-SMCRA (Surface Mining Control and Reclamation Act of 1977) deep mine in the area and another deep mine, in the same seem, that is a post-SMCRA mine. Testimony also addressed other possible seepage sources including a rock quarry and an exposed open pit with no allowed drainage that could be recharging works in the area through fissures and cracks.<sup>35</sup> As provided in the NOV the ditch did divert surface waters. The nature of the seep water diverted by the ditch is not conclusive found to be AML. There is insufficient evidence to determine whether the source(s) for any the seepages is AML, is non-AML, or is a comingling of the two.

**R.O.N.:**

VFC contends a Revision Order Notice should have been issued in lieu of the Notice of Violation. During the term of a permit, the permittee may submit an application to the Division for a revision of the permit. Valley Fuel Corporation at the time of the issuance of the NOV had not submitted an application for a revision of permit.

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<sup>32</sup> Ex. 11, Inspection report.

<sup>33</sup> Tr. 180-181.

<sup>34</sup> Tr. 189-190.

<sup>35</sup> Tr. 180-183, 222.

4 VAC 25-130-774.11(b) provides the Division may order reasonable revision of a permit. The regulatory language utilizes the permissive "may" and mandatory language as "shall" or "must". At issue is not a plan being inadequate but the issue presented is that a diversion ditch was constructed which was not provided for in the drainage control plan. The approved plan was being affected by the addition of the ditch which was diverting of water from a sediment control structure. There is no requirement for a Revision Order Notice to be issued in this case in lieu of the Notice of Violation.

Upon consideration of the evidence in this case and for the reasons stated above, it is the decision of the Hearing Officer that Notice of Violation No. RDS0009028, Violation No. 3 of 3 was properly issued and is hereby **affirmed**.

Respectfully submitted this 14<sup>th</sup> day of July, 2014.



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Lorin A. Costanzo, Hearing Officer