



Informal Hearing Determination

Company:	<u>Virginia Fuel Corporation</u>	Permit No.:	<u>1702073</u>
Subject:	<u>Notice of Violation RDS0009028</u>	Violation No.:	<u>1 and 3 of 3 (EF,SS)</u>
Conference:	<u>July 26, 2012 @ 11:00 AM</u>	Location:	<u>Office- Wise VA</u>
Participants:	<u>Jon Lawson-Biologist, Mark Wooten-Chief Engineer, Les Vincent-Field Engineer ; DMLR Inspector John Jones</u>		

Summary of Informal Hearing

Company information concerning part 1 of 3 of N.O.V. for Effluent (EF) violation:

Mr. Lawson stated that this permit was a transfer from Sigmon Coal Company, Inc. P.N. 1501065. He stated that Technical Water Labs took the water samples for Sigmon and there were no reported water issues for the permit. He stated that when Southern Coal acquired the company, the monitoring lab was changed to Environmental Monitoring Incorporated (EMI) in April of 2011. Mr. Lawson stated that EMI started getting the data for the 2nd quarter of 2011. He stated that the data was turned in to DMLR for 2nd quarter of 2011 and it was after the end of the next quarter (3rd quarter) before the sample results were known by the company based on the DMLR report.

Mr. Vincent stated that there was not a problem prior to EMI lab analysis. He stated that it was not until EMI took the samples and analyzed them that they started to get the bad results. He stated that once the company knew of the water issues, they worked to try to fix the problems but it has taken some time. Mr. Vincent stated that the company still had problems with effluent discharges thru 2nd quarter of 2012. He stated that they are continuing to work to keep the discharges of ponds 9, 10, and 17 in compliance. Mr. Vincent went on to state that the water monitoring reports for the quarter must be turned into DMLR within 30 days after the end of the quarter. However, the DMLR reports for a particular quarter don't come out until much later. He stated that the lab would notify them of bad sample results so that it could be reported, but the company did not get routine lab reports that would show what the average discharge was for a particular point.

Mr. Lawson stated that the company has been taking additional samples since last September to try to keep the averages in compliance. He also stated that field work is being conducted, including re-routing drainage to try to improve water quality.

Mr. Vincent stated that the company was also looking for trends based on reports from EMI of any effluent discharges that exceeded the limits. He stated that this problem didn't happen overnight. Mr. Vincent stated that the company reacted to the limited data but they were not able to solve the problem quickly.

Inspector Jones stated that when he obtained the information from the Division's Water Quality section, he issued the N.O.V. based on their report.

Company information concerning part 3 of 3 of N.O.V. for Sediment Structure (SS) violation:

Mr. Vincent stated that they were not contesting the part of the violation that stated that surface drainage from disturbed areas was by-passing pond 1A. He stated that they were contesting the part of the N.O.V. that stated that they were in violation by directing AML drainage around the pond. He stated that the AML seep was shown on a 2006 map contained in Revision # 1001691. (A portion of this map had been enlarged to show the location of three (3) seeps.) He stated that this seep was present prior to expansion of the impoundment and that other old maps of the area showed seeps and abandoned mine works in this area. Mr. Vincent stated that the company had requested a meeting with DMLR prior to construction of the ditch in early 2011. He stated that the company was advised by DMLR to divert the water around pond 1A. He stated that they constructed an open ditch down and around the pond in a manner that would not drain into the pond. He stated that after the diversion ditch was constructed, another DMLR field visit occurred to discuss the work. Mr. Vincent stated that the only issue that DMLR had was that the open ditch should not be blocked but it should be covered to prevent a safety hazard. He stated that the ditch had been constructed for approximately one (1) year before a violation was issued. He stated that, after the N.O.V. was issued, the company filed an AML complaint to get this drainage from the flooded AML mine works taken care of to prevent a possible blow-out.

Mr. Vincent stated that there are additional seeps in this area and there has been a change in the flow rate from 2006 to the present. He stated that the flow rate change might be because of a regulated underground mining discharge located near this area or a possible build up of AML drainage that could result in a blow out. Mr. Vincent stated that no one can say that their pond was not also getting some AML drainage. He stated that the Wilson coal seam outcrops in this area and it is known to have acid mine drainage associated with the seam. He stated that these seeps are not Virginia Fuel seeps and they are not responsible for them. He stated that the only water Virginia Fuel is responsible for in this area is the impoundment water. Mr. Vincent stated that a Revision Order Notice (R.O.N.) should have been issued to show the diversion of the AML water; not a N.O.V. He stated that the policy is ready, aim, shoot. However; in this case, the policy was ready, shoot, aim because the Division's thinking was that the impoundment might be leaking. He stated that the Division's Technical section has yet to make that determination and the issuance of a N.O.V. was premature. Mr. Vincent went on to state that when OSM identified a plan violation, they recommended that a R.O.N. be issued.

Mr. Wooten stated that he knew that there were other DMLR permits with AML drainage diverted around the permit. He stated that this was what was being done in this case and that it should be allowed.

Inspector Jones stated that the approved plans do not discuss the origin of the water and the diversion ditch was not included in the plans. He also stated that no one at this time can say for sure what the source of water is. He stated that in accordance with the regulations, drainage within the permit boundary must pass thru a sediment structure unless otherwise addressed. He stated that the water was on Virginia Fuel's permit and was not being properly directed and that is why the N.O.V. was written.

Informal Hearing Recommendation

This hearing was closed on August 1, 2012 after obtaining additional information from DMLR's Technical section. The approved NPDES permit requirements, the associated inspection reports and DMLR enforcement actions, and the applicable Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) and the Virginia Coal Surface Mining Control and Reclamation Laws (VCSMCRL) were reviewed. A decision was made as to whether the issuance of part 1 for effluent violations (EF) and part 3 for sediment structure violations (SS) contained in Notice of Violation RDS0009028 was proper.

Decision on Part 1 of 3 for Effluent violations (EF) listed in N.O.V. # RDS0009028:

The issuance of the EF violation will be evaluated first. Section 4 VAC 25-130-827.12 (c) requires that all discharges from preparation plants meet the requirements of Section 4 VAC 25-130-816.41 and 4 VAC 25-130-816.42, including any other applicable State or Federal law. Specifically, Section 4 VAC 25-130-816.42 requires that discharges from NPDES permits be in compliance with effluent limitations set forth in 40CFR Part 434 promulgated by EPA. The Division used EPA's definitions in determining when a discharge from an NPDES permit is in Significant Non-Compliance as well as Chronic Non-Compliance. This criterion is outlined in DMLR memorandum #8-85. DMLR memorandum #8-85 also establishes the fact that SNC or CNC discharges from NPDES permits are considered to be in violation of Section 45.1-254 of the Virginia Coal Surface Mining Control and Reclamation Laws (VCSMCRL) and are subject to enforcement action.

The inspector issued precisely such a violation for the reported Significant and/or Chronic effluent non-compliances for **2nd Quarter 2011** from ponds 17 (MPID 0004191), Pond 9 (MPID 1285872), and Pond 10 (MPID 1285873) for the parameters listed in the N.O.V. The N.O.V. also covered the reported Significant and/or Chronic effluent non-compliances for **3rd Quarter of 2011** from Pond 1A (MPID 1270029), Pond 9 (MPID 1285872), Pond 10 (MPID 1285873), and Pond 17 (MPID 0004191) for the parameters listed. It is clear based on the water monitoring records that the operator was in violation of NPDES permit requirements. It is also clear based on the regulatory sections listed above that the discharges from those ponds were subject to enforcement action. The permittee did not contest the fact that the points were in Significant and Chronic Non-Compliance. Instead, the permittee argued that the company did not know that they had a problem and had no chance to adjust pond discharges. Additionally, the company argued that DMLR was partly at fault because the water monitoring report that showed the monthly average discharges from each NPDES point was not sent to the company until two (2) quarters later. I find that this is not a defense at all. There is no time limit for evaluating water monitoring data. Neither is there a time limit for issuing N.O.V.'s for those violations. Based upon the regulation requirements, I find that the violation did exist and recommend that

N.O.V. # RDS0009028 be affirmed. However; I also find that the inspector listed the incorrect quarters on the N.O.V. The quarters that this violation covered were for the **3rd and 4th quarters of 2011**; not the 2nd and 3rd quarters. Therefore, it is my recommendation that part 1 of 3 for EF of N. O. V. # RDS0009028 be modified to state the correct quarters that this violation covers.

Decision on Part 3 of 3 for Sediment Structure violations (SS) listed in N.O.V. # RDS0009028:

On August 1, 2012 information was obtained from the Technical section concerning their investigation of Complaint # 1200062. The focus of their investigation will be on whether a possible blow-out could occur in the area of the seeps. Their investigation has not been completed but they have identified abandoned underground mine works in the Wilson seam near the pond level. They are looking at various factors that may be influencing the seeps, including the AML mine, to see if there is a possibility of a blow-out.

The question that this hearing must address is whether or not the seeps are the responsibility of the permittee. There is a long history associated with this site. This permit (P.N. 1702073) was transferred from Sigmon P.N. 1501065 on 12/28/11. All of the former plans, unless changed during the permit transfer process, are the approved permit plans for the new permit as required by Section 4 VAC 25-130-774.17(f).

In my reading of the regulations, Section 4 VAC 25-130-780.21 requires the permittee to identify the locations and provide quality descriptions for all surface and ground water sources. The information regarding the seeps contained in the existing plans refers back to the former permit (P.N. 1501065). Those are the plans that must be evaluated in reaching a decision concerning the issuance of the violation. During this hearing the coal company pointed out that the seeps were present in 2006. The drainage map contained in approved revision number 1001691 for Sigmon P.N. 1501065 clearly shows the seep locations and those seeps are shown flowing into Pond 1A. Section 4 VAC 25-130-816.43 does allow flows from abandoned mined areas and other sources to be diverted from disturbed areas by means of diversion ditches with the approval of the Division.

The permittee contends that they obtained verbal approval from the Division in the early part of 2011. Section 4 VAC 25-130-774.13 does allow permit revisions to be submitted, but any revision must gain DMLR written approval. There is no record that a revision was ever submitted to change the plans to allow the drainage to by-pass the pond. The only written documentation was an inspection report dated 6/30/11 which notes the fact that the permittee had diverted the drainage.

Another argument presented by the company was that a Revision Order Notice (R.O.N.) should have been issued; not a N.O. V. This position cannot be supported. The regulations at Section 4 VAC 25-130-774.11 (b) require that when a plan is found to be inadequate, the plan must be revised to ensure compliance with the Act and the regulatory program. In this case there was no plan inadequacy.

Section 4 VAC 25-130-773.15 requires that the permittee has the burden of establishing that their permit is in compliance with all the requirements of the regulatory program (including not adversely affecting the hydrologic balance within and outside the permit area. The existing approved plan meets regulatory requirements. It shows that the water from the seeps was to enter

a properly designed and certified structure to ensure that drainage from the disturbed surface area was properly treated prior to leaving the permit area. Therefore; no plan modification is required. It is my decision that violation # RDS0009028 (part 3 of 3) was properly issued requiring the seeps to be passed thru siltation structures prior to leaving the disturbed areas in accordance with the existing approved plan and recommend that it be affirmed.

Informal Hearings Officer: _____
James Lowe

Date: 8/2/12