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ENERGY  
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MINERAL MINING  
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MINES  
ADMINISTRATION

# COMMONWEALTH of VIRGINIA

*Department of Mines, Minerals and Energy*

P.O. Drawer 900  
3405 Mountain Empire Road  
Big Stone Gap, Virginia 24219-0900  
(276) 523-8100  
www.dmme.virginia.gov

December 20, 2013

Mr. James C. Justice II  
P.O. Box 1010  
5957 Windswept Boulevard  
Wise, VA 24293

Certified Mail Return  
Receipt No. 7013 1090 0001 0523 7403

**Re: Assessment Conference Request – Civil Penalty of Cessation Order JRJ0001101, Violation 1 of 1 (RV) issued to A & G Coal Corporation, PN 1101954**

Dear Mr. Justice:

An assessment conference (4 VAC 25-130-845.18(a) VaCSMRR) was held on November 7, 2013, to review the civil penalty determination of Cessation Order JRJ0001101, 1 violation (RT). Based upon the attached opinion of Conference Officer James Meacham, the **civil penalty determination has been affirmed.**

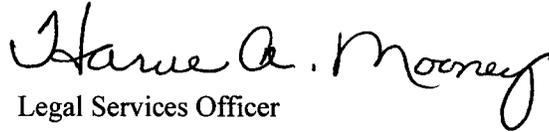
Please be advised that you may request a formal public hearing under 4 VAC 25-130-845.19(a) of the regulations to contest the penalty determination(s) of Cessation Order JRJ0001101. Your written request must be submitted with payment of the civil penalty to this office within 30 days from your receipt of this decision. The penalty payment would be placed in escrow pending final administrative/judicial review.

Regardless of whether you wish to contest the civil penalty determination or fact of issuance of the notice or order, the penalty amount will be due and payable within 30 days from your receipt of this decision. Should a timely appeal result in the vacation or reduction of the penalty, the Division would refund the applicable amount with accrued interest (calculated from date of payment).

Please submit payment of the penalty in the form of cash, money order, or check. A money order or check (company, cashier's, or certified) must be made payable to the "Treasurer of Virginia". To expedite our receipting of the penalty payment, please note the violation and permit numbers with your payment.

Should you have any questions concerning the formal hearing or payment processes, please call me at (276) 523-8271.

Respectfully,

  
Legal Services Officer

c: John Jones, Area Inspector  
Kenneth Coomer, Area Supervisor  
James D Meacham, Conference Officer



COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF MINES, MINERALS AND ENERGY  
DIVISION OF MINED LAND RECLAMATION  
P. O. DRAWER 900; BIG STONE GAP, VA 24219  
TELEPHONE: (276) 523-8157

### Assessment Conference Determination

<b>Company:</b>	<u>A &amp; G Coal Corporation</u>	<b>Permit No.:</b>	<u>1101954</u>
<b>Penalty of:</b>	<u>Cessation Order No. JRJ0001101</u>	<b>Violation No.:</b>	<u>1 of 1 (RV)</u>
<b>Conference:</b>	<u>November 7, 2013 @ 10:00 A.M.</u>	<b>Location:</b>	<u>DMLR's Big Stone Gap Office</u>
<b>Participants:</b>	<u>Les Vincent (Company Engineer, PE); John Jones (DMLR Inspector)</u>		

### Summary of Conference

Les Vincent contacted Harve Mooney on November 4, 2013 and asked if the assessment conference could be changed to another date. The assessment conference had already been scheduled for November 7<sup>th</sup>, participants had been notified and the public notice had been provided. Therefore, the conference was held on November 7, 2013. Les Vincent contacted Harve Mooney just prior to 10:00 a.m. on November 7<sup>th</sup> and told Mr. Mooney that due to unforeseen circumstances the company could not have a representative at the conference. Mr. Vincent asked Mr. Mooney if the company could submit written comments by e-mail. Mr. Mooney told Mr. Vincent that the Division of Mined Land Reclamation (DMLR) would allow the company to submit written comments regarding the assessment of Cessation Order JRJ0001101.

On November 14, 2013 Les Vincent submitted a letter by e-mail with written comments regarding the referenced cessation order. The letter contained the following comments. Mr. Vincent requested that the proposed assessment of \$22,500.00 be reduced. Mr. Vincent stated, in determining the civil penalty the DMLR had not considered that the company and its affiliates were actively seeding several different areas. Mr. Vincent explained that the company and affiliates had extensive areas to seed in multiple states. Mr. Vincent stated, the DMLR did not take into account the feasibility of seeding the multi-state areas simultaneously but rather issued a blitz of notices of violation for failure to vegetate. Mr. Vincent explained that the DMLR knew the company could not meet the abatement dates of the notices of violation which resulted in the issuance of a number of cessation orders. Mr. Vincent believes that a one day assessment of \$750.00 would be fair.

### Assessment Conference Recommendation

The cessation order and associated reports were reviewed. The DMLR Civil Penalty Assessment Manual and applicable sections of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) were also reviewed. The assessment conference was closed on November 15<sup>th</sup> after receiving and evaluating the company's written comments.

The purpose of this conference is to specifically review the proposed civil penalty for Cessation Order JRJ0001101. The conference officer may not rule on the facts regarding the issuance of the violation and the validity of the cessation order. Mr. Vincent argued that the DMLR did not take into account the feasibility of seeding extensive areas in multiple states and therefore issued a blitz of violations which resulted in a number of cessation orders for failure to abate. Although the DMLR may have cited revegetation violations on a number of permits, the issuance or reason for issuance of enforcement actions on other operations permitted by A & G Corporation or associated companies cannot be considered in this conference. Therefore, the facts which are not in dispute at this conference are:

- The permittee was in violation of failing to seed in accordance with the approved plans which resulted in the issuance of Notice of Violation JRJ0001016 violation 1 of 2 on July 1, 2013
- Notice of Violation JRJ0001016 violation 1 of 2 required the permittee to seed the designated areas by August 1, 2013
- The abatement date of Notice of Violation JRJ0001016 violation 1 of 2 was extended to August 15, 2013
- The permittee failed to comply Notice of Violation JRJ0001016 violation 1 of 2 and Cessation Order JRJ0001101 was issued on August 15, 2013
- Failure to Abate Cessation Order JRJ0001101 required the permittee to seed the areas cited in the notice of violation
- The permittee did not comply Cessation Order JRJ0001101 until October 21, 2013

Section 4VAC25-130-845.15 sets forth the regulatory requirements regarding the assessment of Cessation Order JRJ0001101.

**4VAC25-130-845.15. Assessment of separate violations for each day.**

*“(a) The division may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the division shall consider the factors listed in 4VAC25-130-845.13 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which has been assigned a penalty of \$5,000 or more under 4VAC25-130-845.13, the division shall assess a penalty for a minimum of two separate days.*

*(b) In addition to the civil penalty provided for in subsection (a) of this section, whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or as subsequently extended pursuant to §45.1-245B of the Act, a civil penalty of not less than \$750 shall be assessed for each day during which such failure to abate continues, except that:*

*(1)(i) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under §45.1-249C of the Act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the Director or his authorized representative issues a final order with respect to the violation in question; and*

*(ii) If the person to whom the notice or order was issued initiates review proceedings under §45.1-251B of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to §45.1-251B of the Act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court;*

***(2) Such penalty for the failure to abate the violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30 day period, the division shall take appropriate action pursuant to §§45.1-245 and 45.1-246 of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate."***

According to the inspection record the violation documented in Notice of Violation JRJ0001016 violation 1 of 2 was not abated by the August 1, 2013 abatement date. Also, the notice of violation was not abated by the extended abatement date of August 15, 2013. On August 15, 2013, the inspector issued Cessation Order JRJ0001101. The Cessation Order was not complied by the permittee until October 21, 2013. Therefore, the violation continued to go unabated for more than 30 days. In accordance with Section 4VAC25-130-845.15(b) a civil penalty of not less than \$750.00 was assessed for each day during which the failure to abate continued. In accordance with Section 4VAC25-130-845.15(b)(2) the permittee was assessed \$750.00 for each day the violation was not corrected for a maximum of 30 days. Therefore, the total civil penalty was \$22,500.00. Section 4VAC25-130-845.15(b)(1)(i)(ii) of the VCSMRR contain the only exceptions to the amount of the civil penalty which must be assessed for failure to abate cessation orders. None of the exceptions listed in this section are present in the cessation order under review. Therefore, it is my decision that the proposed civil penalty was properly assessed in accordance with the referenced regulations. It is my recommendation to affirm the proposed civil penalty amount of \$22, 500.00. Also, it should be noted that good faith is not being considered because good faith credit cannot be awarded for a failure to abate cessation order.