



Informal Hearing Determination

Company: A & G Coal Corporation **Permit No.:** 1101954
Subject: DMLR Determination of Bond Forfeiture **Violation No.:** N/A
Conference: June 27, 2014 @ 9:30 AM **Location:** BSG DMME office
Participants: Harve Mooney (Hearings Officer), Ken Coomer (DMLR Area Supervisor), Leslie Vincent (Company Representative)

An informal hearing was conducted on June 27, 2014 at the Big Stone Gap Office of the Va Department of Mines Minerals and Energy at 2:00 PM, This informal hearing was requested by the company to contest the determination of bond forfeiture by the Virginia Department of Mines Minerals and Energy (DMME) for A & G Coal Corporation permit number 1101954. Present at the hearing were DMME personnel Area Supervisor Ken Coomer and this hearings officer Harve Mooney. Representing the company via telephone was Leslie Vincent, PE. Also present were Adam Hooper, Rebecca Quesnell, and Alex Beer, representatives of Southern Appalachian Mountain Stewards.

Summary of Informal Hearing

The purpose of this informal hearing was to address DMME’s action of the bond forfeiture determination for permit 1101954. On May 6, 2014, DMME sent by certified mail notification of a determination of grounds for forfeiture of a bond on A & G Coal Corporation Permit No. 1101954. Within the letter the agency noted the following reasons for its determination:

Bond Forfeiture is being initiated due to the permittee’s failure to reclaim the disturbed areas in a contemporaneous manner per the approved permit plans. The permittee has failed to comply with—

- (a) Notice of Violation No. JRJ0001179 (violation 1 of 1) issued on October 8, 2013, requiring the operator to backfill all existing highwall required to be eliminated, regrade and seed all disturbed areas on the permit. The abatement date to comply with Notice of Violation JRJ0001179 was January 8, 2014. A & G Coal Corporation has not complied Notice of Violation No. JRJ0001179, violation 1 of 1.*
- (b) Cessation Order JRJ0001356 (violation 1 of 1) issued on January 14, 2014 for failure to comply with Notice of Violation No. JRJ0001179, Violation 1 of 1.*
- (c) Revision Application No. 1009098 was to be re-submitted to the Division by April 25, 2014. The application has not been submitted.*

The letter from DMME also noted the grounds by which bond forfeiture could be avoided as well as the rights of the permittee to review of the bond forfeiture decision.

Mr. Leslie Vincent, PE spoke on behalf of the company in this informal hearing. He noted that there was policy and procedure established by the Agency (DMME) in reference to any bond forfeiture by the agency. Mr. Vincent referenced the Virginia Division of Mined Land Reclamation (DMLR) policy number 03.03.09 and he asked that that policy be made a part of the record.

Mr. Vincent stated that it was the company's position that DMLR had not followed the policy in making the finding of grounds for bond forfeiture. He noted that under DMLR Procedure 3.3.09 the agency (DMLR) had to identify one of four reasons for bond forfeiture. The reasons were identified as:

A permit is subject to bond forfeiture if the permittee under (4 VAC 25-130-800.50) -

- *fails to abate expired NOV's or CO's.*
- *fails to comply with the Terms of Issuance of the permit.*
- *defaults on the conditions under which the bond was accepted.*
- *fails to comply with Director's orders to reclaim the permit site as a result of permit revocation.*

If the permittee fails to abate expired NOV's or CO's, the Field Inspector shall initiate Show Cause Order proceedings within 5 days of the Notice/Order's expiration date (see Procedure #3.3.10).

Mr. Vincent stated that A & G Coal Corporation had never received a Show Cause Order as a result of the violations noted in the May 6, 2014 letter noting the determination of Bond Forfeiture. Therefore, the determination by DMME of grounds for bond forfeiture did not exist. Since the grounds for forfeiture did not exist, the company requested that the May 6, 2014 letter be rescinded. The company also requested that any demand letter to the surety company be recalled as well.

Mr. Vincent noted that the Revision Application 1009098, a bonding application had been re-submitted and was under revision. Mr. Vincent also noted that currently the company was actively engaged in reclamation operations on the mine site. Mr. Vincent stated that the company would be meeting with agency representatives to discuss the permit. Mr. Ken Coomer confirmed that there was reclamation activity onsite. There was no additional comment from any other participant to this informal hearing. The record was closed.

Informal Hearing Recommendation

This informal hearing concerning the determination of whether grounds exist for bond forfeiture for A & G Coal Corporation Permit number 1101954 was conducted pursuant to 4 VAC 25-130-800.51 of the Virginia Coal Surface Mining Reclamations (VaCSMRR) and 2.2-4019 of the Virginia Administrative Process Act. Appropriate sections of the regulations were reviewed as

was the procedures noted by the company to be made a part of the hearing record. Here are the findings of this hearing officer.

Section 45.1-247A of the Code of Virginia and Section 4 VAC 25-130-800.50 of the VaCSMRR sets forth regulatory grounds for the determination of potential bond forfeiture. Under the Code of Virginia, Section 45.1-247 states,

A. The Director shall promulgate regulations, consistent with regulations promulgated by the Secretary, establishing procedures, conditions, criteria, and schedules for the forfeiture or release of performance bonds or deposits required under this chapter; however, no bond shall be fully released until all reclamation requirements of this chapter and the regulations thereunder are fully met.

Section 4 VAC 25-130-800.50 of the VaCSMRR states,

(a) If the permittee refuses or is unable to conduct reclamation of an unabated violation, fails to comply with the terms of the permit, or defaults on the conditions under which the bond was accepted, the division shall take the following action to forfeit all or part of a bond or bonds for the permit area or a portion of the permit area:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, informing them of the determination to forfeit all or part of the bond, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to--

(i) Agreement by the permittee or another party to perform reclamation operations in accordance with a compliance schedule acceptable to the division, which meets the conditions of the permit, the reclamation plan, and demonstrates that such party has the ability to satisfy the conditions; or

(ii) The division may allow a surety to complete the reclamation plan if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan. Except where the division may approve partial release authorized under 4VAC25-130-800.40, no surety liability shall be released until successful completion of all reclamation under the terms of the permit, including applicable liability periods of 4VAC25-130-800.13.

(b) In the event forfeiture of the bond is required by this section, the division shall:

- (1) *Proceed to collect the forfeited amount as provided by Virginia law for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if rights of appeal, if any, have not been exercised within a time established by the division, or if such appeal, if taken, is unsuccessful.*
- (2) *Use funds collected from bond forfeiture to complete the reclamation plan on the permit area.*
- (c) *Upon default, the division may cause the forfeiture of any and all bonds deposited to complete reclamation for which the bonds were posted. Unless specifically limited, as provided in 4VAC25-130-800.11(b)(3), bond liability shall extend to the entire permit area under conditions of forfeiture.*
- (d)(1) *In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the permittee shall be liable for the remaining costs. The division may complete, or authorize completion of, reclamation of the bonded area and may recover from the permittee all costs of reclamation in excess of the amount forfeited.*
- (2) *In the event the amount of performance bond forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned by the division to the party from whom they were collected.*

A review of the DMLR Procedure 3.3.09 revealed the following information in the procedure to address bond forfeiture. Procedure 3.3.09 states,

PROCEDURES :

Identifying Grounds For Bond Forfeiture - *A permit is subject to bond forfeiture if the permittee (4 VAC 25-130-800.50) -*

- * *fails to abate expired NOV's or CO's.*
- * *fails to comply with the Terms of Issuance of the permit.*
- * *defaults on the conditions under which the bond was accepted.*
- * *fails to comply with Director's orders to reclaim the permit site as a result of permit revocation.*

If the permittee fails to abate expired NOV's or CO's, the Field Inspector shall initiate Show Cause Order proceedings within 5 days of the Notice/Order's expiration date (see Procedure #3.3.10).

Indeed, the company's position on the bond forfeiture determination being invalid hinges on the fact that the DMLR did not issue a Show Cause Order prior to sending the May 6, 2014 letter of bond forfeiture. The validity of the Notice of Violation No JRJ0001179 or Cessation Order JRJ0001356 is not in question. Both violations are final.

Section 4 VAC 25-130-800.50 of the VaCSMRR sets forth the grounds for bond forfeiture determination. In this regulation, the actions necessitated by the agency (DMME) are clearly specified under subsection (a). In the May 6, 2014 letter to the company, DMME did identify the expired enforcement actions of NOV JRJ0001179 and CO JRJ0001356. The certified letter also addressed the alternative measures to avoid bond forfeiture, and it was copied to the surety company to advise them of the situation. Finally, the company was advised of its rights of appeal.

While Procedure 3.3.09 is a procedure approved and in use by the DMME, it is merely procedure and it does not carry the weight of regulation. Indeed, there is no regulation with the Virginia Coal Surface Mining Reclamation Regulations that mandates the issuance of a Show Cause prior to bond forfeiture.

Based on my review of the file and the comments from the participants at this informal hearing, it is my determination that the DMME action was correct in accordance with Section 4 VAC 25-130-800.50 of the VaCSMRR and that the determination of bond forfeiture is affirmed.

Informal Hearings Officer: Harve A Mooney

Date: 07/02/2014