



Assessment Conference Determination

Company: A & G Coal Corporation. **Permit No.:** 1101975
Penalty of: Cessation Order No. LJJ0000569 **Violation No.:** 1 of 1 (RV)
Conference: June 27, 2014 @ 9:30 AM **Location:** DMME BSG Office
Participants: Les Vincent (Company Engineer, PE); Ken Comer (DMLR Inspector); Harve Mooney (DMLR Legal Services Officer)

Summary of Conference

Les Vincent contacted the Division of Mined Land Reclamation (DMLR) Legal Services Officer Harve Mooney prior to the assessment conference. Mr. Vincent told Mr. Mooney he would not be able to attend the conference and asked if he could provide his comments by phone. Mr. Mooney allowed Mr. Vincent to provide his comments by phone. Therefore, at 9:30 a.m. Mr. Vincent was contacted by phone and the assessment conference was conducted at the DMME Big Stone Gap office via speaker phone.

Mr. Vincent stated that the initial Notice of Violation (NOV# LJJ0000475) was issued on June 25, 2013 for failure to seed the area referenced in the violation, and this date was outside of the seeding season. Mr. Vincent said if the notice of violation was issued at an earlier date within the seeding season the company could have completed the required seeding and Failure to Abate Cessation Order # LJJ0000569 would not have been issued. Mr. Vincent said the inspector extended the notice of violation abatement date from July 30, 2013 until August 15, 2013. Mr. Vincent said since the extended date was still outside the seeding season the company had no way to comply the violation during that period. Mr. Vincent explained that Cessation Order # LJJ0000569 was issued on August 15, 2013. Mr. Vincent explained that although August 15th was near the beginning of the seeding season, the date was still outside the seeding season. Mr. Vincent explained that the timing of the Cessation Order put the company in a position to be assessed \$750.00 per day even though the company could not complete the seeding until the normal seeding period had occurred. Mr. Vincent said the company would have had up to the middle of October to complete seeding under the normal seeding period. Mr. Vincent said the timing of the cessation order seemed to be inappropriate in that it was issued outside the seeding season. Mr. Vincent said the cessation order should have been issued closer to the seeding season.

Assessment Conference Recommendation

The Assessment conference was closed on July 8, 2014 after a review of the associated enforcement actions, inspection reports, DMLR Civil Penalty Assessment Manual, and the applicable sections of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR).

The information presented at the conference held on June 27, 2014 was also considered in making a decision regarding the appropriateness of the civil penalty.

The purpose of this conference is to specifically review the proposed civil penalty for Failure to Abate Cessation Order # LJJ0000569. The conference officer may not rule on the facts regarding the issuance of the violation and the validity of the cessation order. 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 # LJJ0000475 violation 1 of 2 on June 25, 2013
- Notice of Violation # LJJ0000475 violation 1 of 2 required the permittee to seed designated areas by July 30, 2013
- The abatement date of Notice of Violation # LJJ0000475 violation 1 of 2 was extended to August 15, 2013
- The permittee failed to comply Notice of Violation # LJJ0000475 violation 1 of 2 and Failure to Abate Cessation Order # LJJ0000569 was issued on August 15, 2013
- Failure to Abate Cessation Order # LJJ0000569 required the permittee to seed the areas cited in the notice of violation
- The permittee did not comply Failure to Abate Cessation Order # LJJ0000569 until September 30, 2013 and the cessation order was terminated on October 7, 2013

Given these facts, Section 4VAC25-130-845.15 sets forth the regulatory requirement regarding the assessment of Failure to Abate Cessation Order # LJJ0000569.

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.

The permittee contends that Notice of Violation # LJJ0000475 issued on June 25, 2013 for failure to seed the area referenced in the notice of violation was issued during the summer months and therefore outside of the seeding season. The permittee also contends that even though the abatement date of Notice of Violation # LJJ0000475 was extended the extended abatement date was still outside the seeding season. The permittee stated that Failure to Abate Cessation Order # LJJ0000569 was also issued outside the seeding season. The permittee contends that the timing of the Cessation Order put the company in a position to be assessed \$750.00 per day even though the company could not complete the seeding until the normal seeding period had occurred. The permittee argued that any cessation order necessary should have been issued closer to the seeding season to allow the company to comply during the seeding season.

Section 4VAC25-130-843.11(b)(1) states: *“When a notice of violation has been issued under 4VAC25-130-843.12(a) and the permittee fails to abate the violation within the abatement period fixed or subsequently extended by the authorized representative, the authorized representative of the Director shall immediately order a cessation of coal exploration or surface coal mining and reclamation operations, or of the portion relevant to the violation.”* From my review of the inspection record it is clear that the permittee failed to abate the notice of violation by the abatement date or the extended abatement date. Therefore, in accordance with the referenced section the inspector was required to issue a failure to abate cessation order immediately upon finding that the permittee failed to abate the violation within the abatement period or extended abatement period.

As stated in Section 4VAC25-130-700.5 of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR), the normal growing season is defined to be from April 15 to October 15 of each year (see definition below).

4VAC25-130-700.5. Definitions *““Growing season” means the period of year when climatic conditions are favorable for plant growth, common to a place or area. The period between April 15 and October 15 is the normal growing season.”*

The VCSMRR does not designate a break in the time period of the growing season in Virginia during the summer months. In addition, the permittee's approved detailed plans address seeding during optimum time periods as well as during adverse climate conditions. The permittee's approved detailed plans state: "*Disturbed areas will be seeded within 30 days after final grading during normal planting periods. Backfilled areas prepared for seeding during adverse climatic conditions will be seeded with an appropriate temporary cover until permanent cover can be established.*" Based on the information received during the assessment conference, the permittee was opposed to seeding with a permanent seed mixture during the summer months. However, in accordance with Section 4VAC25-130-816.113 of the VCSMRR the permittee still had an immediate obligation to establish a vegetative cover on disturbed areas following completion of backfilling and regrading. Therefore, establishing a temporary vegetative cover until a permanent cover could be established was clearly an option.

According to the inspection record the violation documented in Notice of Violation # LJJ0000475 violation 1 of 2 was not abated by the July 30, 2013 abatement date. Also, the notice of violation was not abated by the extended abatement date of August 15, 2013. Therefore, on August 15, 2013, the inspector issued Failure to Abate Cessation Order # LJJ0000569. The cessation order was not complied by the permittee until September 30, 2013 and the order was terminated on October 7, 2013. Therefore, the violation continued to remain 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 for 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.

Assessment Conference Determination:

Permit No. 1101975 CO# LJJ0000569, 1 violation (RV)

	Proposed Assessment or Reassessment	Assessment Conference Recommendation
I. History of previous violation	\$ 40.00	\$ 40.00
II. Seriousness Points	5	5
III. Negligence Points	2	2
IV. Good Faith Points	0	0
Total Points:	7	7
Base Penalty:	\$ 475.00	\$ 475.00
History Penalty:	\$ 40.00	\$ 40.00
Total Penalty:	\$ 22,500.00*	\$ 22,500.00*
<p>* Per 4 VAC 25-130-845.15(b) VCSMRR and 45.1-246H of the Code of Va., a minimum penalty of \$750 is being assessed for each day of the failure to abate the violation, not to exceed 30 days. The CO was served on 8/15/2013. The \$750/day penalty was assessed for 30 days (8/15/2013 through 09/14/2013) = \$22,500.00</p>		

Conference Officer: _____
James Meacham

Date: _____