



DIVISIONS
ENERGY
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MINED LAND RECLAMATION
MINERAL MINING
MINERAL RESOURCES
MINES
ADMINISTRATION

COMMONWEALTH OF VIRGINIA
Department of Mines, Minerals and Energy
Division of Mined Land Reclamation
P. O. Drawer 900
Big Stone Gap, Virginia 24219-0900
(276) 523-8100 FAX (276) 523-8148
www.dmme.virginia.gov

June 10, 2013

Mr. James C. Justice, II
A & G Coal Corporation
P. O. Box 1010
Wise, Virginia 24293

Certified Mail Return
Receipt No. 7012 2210 0002 4869 7874

Re: **Informal Hearing Decision** – Administrative Denial of Application No. 1003841

Dear Mr. Justice:

An informal hearing (§2.2-4019 Virginia Administrative Process Act) was conducted on May 8, 2013, to review the Division of Mined Land Reclamation's decision of February 14, 2013, to administratively deny A & G Coal Corporation's permit application (No. 1003841).

Based upon the attached opinion of Gavin M. Bledsoe, Informal Hearings Officer, I am affirming the decision to administratively disapprove Application No. 1003841 for A & G Coal Corporation's failure to submit the required fees, performance bond, and affidavits required under the Virginia Coal Surface Mining Control and Reclamation Act of 1979, as amended, and the Virginia Coal Surface Mining Reclamation Regulations. This decision does not preclude A & G Coal Corporation from submitting a future application for the proposed operation.

Pursuant to §§2.2-4020 and 45.1-240(B) of the Code of Virginia, as amended, and §4VAC25-130-775.11(a) of the Virginia Coal Surface Mining Reclamation Regulations, you or any person having an interest which is or may be adversely affected by this decision shall have the right to request a formal public hearing to review this decision. Please note that a prior request for formal review is no longer valid. The request for formal review must be submitted in writing within 30 days from service of this decision to the:

Hearings Coordinator
Division of Mined Land Reclamation
P. O. Drawer 900

Big Stone Gap, Virginia 24219

Please be advised that the party seeking to reverse the decision shall bear the burden of proof at the formal hearing. Should you have any questions concerning the formal hearing process, please call Harve A. Mooney, Hearings Coordinator, at (276) 523-8271.

Respectfully,

A handwritten signature in black ink that reads "Randy R. Casey". The signature is written in a cursive, flowing style.

Randy R. Casey
Division Director

c: Mark Wooten
Gregory F. Baker
Timothy A. Cox
Harve A. Mooney
Gavin M. Bledsoe
Kenneth Coomer
Randy D. Stanley



COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P. O. DRAWER 900; BIG STONE GAP, VA 24219
TELEPHONE: (540) 523-8157

Informal Hearing Determination

Company: A & G Coal Corporation **Application No.:** 1003841
Subject: Denial of Permit Application
Hearing: May 8, 2013 @ 10:00 AM **Location:** Big Stone Gap Office

Background

A & G Coal Corporation submitted a permit application under the Virginia Coal Surface Mining Reclamation Regulations (VSCMRR) for its proposed "Ison Rock Ridge Surface Mine" to the Division on or about March 28, 2007. The application was assigned tracking number 1003841. The application went through several submittals and reviews per Part 4VAC25-130-773 VCSMRR. By letter dated May 13, 2010, the Division technically approved Application No. 1003841 and informed A & G Coal Corporation that prior to final approval of the application certain fees, bond, and affidavits must be submitted to the Division.

A letter from DMLR Reclamation Program Manager Gregory Baker of October 17, 2012, informed A & G Coal Corporation that Permit Application No. 1003841 would be denied if the bond and fees required by the May 13, 2010 decision were not submitted to the DMLR by November 1, 2012.

A & G Coal Corporation submitted a letter on November 1, 2012 requesting that the decision to deny the application be delayed to provide adequate time for the company "*to remedy Applicant Violator Issues*".

A February 6, 2013 email from A & G Coal Corporation's representative to DMLR's Greg Baker requested a week to "*try and get the bond and fees together*". Mr. Baker's response was to grant additional time to 12 noon on February 13, 2013. He also noted in a follow-up to the email that DMLR could not issue the permit "*due to all the AVS violations outstanding*."

On February 7, 2013, email communication from A & G Coal Corporation's representative to Mr. Baker stated, "*we are in the process of getting all of the violations resolved soon*." Mr. Baker's response was "*I will still give you until noon on Wednesday, Feb. 13th to have the AVS and bond and fees resolved. At that point you can send me a withdrawal letter or we will deny the application*."

By letter of February 14, 2013 (sent by email and certified mail), DMLR informed A & G Coal Corporation that Application No. 1003841 was "administratively denied" because –

- The required bond and fees had not been submitted.

- A & G Coal Corporation and related companies had outstanding Cessation Orders listed in the Office of Surface Mining’s Applicant Violator System.
- Citing DMLR Guidance Memorandum No. 28-09, “*The DMLR may administratively deny applications for new permits or acreage amendments that have been submitted in excess of 24 months from the initial receipt of the application by DMLR*”.

A & G Coal Corporation submitted a request dated February 14, 2013, for DMLR to reverse its decision to administratively deny the application, citing that DMLR had not “*satisfied the EPA objections*” to the application nor was DMLR pursuing resolution of those EPA objections. A & G Coal Corporation contended that DMLR would not be able to issue the NPDES permit until EPA withdrew its objections.

A letter from DMLR Director Randy Casey to A & G Coal Corporation dated February 19, 2013, noted,

“It is our agency’s current position that, although EPA filed comments with our agency via general objection, EPA did not file a timely formal specific objection to the draft permit. Our agency did pursue resolution of comments and concerns about the draft permit identified by EPA. Our agency made changes to the final draft permit to satisfy those comments and concerns, as well as informed EPA of the changes. As a result, our agency lifted the hold item and proceeded with the request for bonds and fees.”

A & G Coal Corporation submitted a letter on February 21, 2013, requesting a formal public hearing under Section 4 VAC 25-130-775.11 of the regulations to contest the denial of Application No. 1003841.

By email notification, A & G Coal Corporation was informed by the DMLR’s Hearings and Legal Services Officer that a public informal hearing to review the denial decision would be held on May 8, 2013 at DMME’s office, in conference room 219. This was followed by the DMLR’s letter dated May 1, 2013.

The informal hearing is being conducted pursuant to §2.2-4019 of the Virginia Administrative Process Act (not §45.1-239 as listed in the DMLR’s May 1st letter).

Summary of Informal Hearing

Mr. Leslie Vincent and Mr. Mark Wooten of A & G Coal Corporation attended the informal hearing, which began at 10:00 a.m. on May 8, 2013, at the DMME’s Big Stone Gap office (Conference Room # 219).

Reclamation Program Manager for Permitting Greg Baker was present to participate on behalf of the DMLR.

Several citizens and persons associated with the Southern Appalachian Mountain Stewards (SAMS) were in attendance.

DMLR Office Services Specialist Marilyn Gates recorded the proceeding and maintained a list of the company and agency personnel and the citizens in attendance.

After providing the background summary noted above, I asked A & G Coal Corporation's representatives to go forward since the company had requested the administrative review.

Mr. Leslie Vincent, engineer for A & G Coal Corporation, submitted written comments in lieu of oral comments and requested that the hearing remain open should I have any additional questions or need clarification of the company's comments. I informed them that should the need arise to reconvene the proceeding, I would do so. With that, the company representatives requested to be excused.

The informal hearing was going to be closed for further comment when several citizens and members of SAMS requested to speak. They were informed that if they individually had an interest that was or would be adversely affected by the DMLR's decision to deny the application to please state his/her name, address, and the specific interest. Seven individuals spoke; however, none expressed any specific interest which was or would be adversely affected by the DMLR's decision of February 14, 2013.

A & G Coal Corporation Comments

The company submitted a letter with several attachments (see item #4 below) to support its position that the DMLR's February 14, 2013 decision was improper. A & G Coal Corporation contends that DMLR's action was improper because -

1. DMLR had not completed or finalized the NPDES permit.
2. The DMLR's May 13, 2010 technical approval letter included the requirement to submit \$3,000.00 in fees for NPDES outfalls; however, the DMLR did not have the NPDES permit ready at that time.
3. DMLR continued to make changes and revisions to the draft NPDES permit after May 13, 2010, in response to EPA written comments and meetings/conference calls between DMLR and EPA staff.
4. Correspondence between DMLR and EPA from February 16, 2011 through July 15, 2011 provides proof that the NPDES permit was not finalized –

- a. February 16, 2011 letter from Evelyn MacKnight (EPA) to Jackie Davis, DMLR Director outlining EPA comments.
 - b. March 2, 2011 letter from Jackie Davis, DMLR Director, to Jon Capacasa (EPA) discussing comments and agreeing to incorporate parts of EPA suggestions into the draft NPDES permit.
 - c. May 25, 2011 e-mail from Michael Smith to other DMLR staff outlining a May 13, 2011 conference call between EPA & DMLR staff regarding changes EPA wanted in the draft NPDES permit.
 - d. July 5, 2011 e-mail from Francisco Cruz (EPA) to DMLR Michael Smith requesting copies of the draft NPDES permit and fact sheet.
 - e. July 14, 2011 e-mail from DMLR Michael Smith to Francisco Cruz (EPA) transmitting requested documents which contained April 2011 versions of the preliminary draft permit.
 - f. July 15, 2011 DMLR briefing paper that noted remaining issues with EPA were being addressed by DMLR through discussions.
5. The company has no record that DMLR has finalized the draft NPDES permit or notified A & G Coal Corporation of the final draft form that would be issued if bond and fees were paid.

Review

§45.1-235 of the Code of Virginia, as amended, addresses the form and contents of a permit application and the fees which are to accompany the submittal of the permit application. §45.1-235E¹ requires the payment of application fees, which are used in the administration of the coal surface mining regulatory program. Historically, DMLR has requested the payment of these fees when the permit application has been technically approved. The fees required under this statute and §4VAC25-130-777.17 of the VCSMRR are due regardless if the permit application is approved or denied. The DMLR's technical approval of Application No. 1003841 on May 13, 2010, informed the applicant, A & G Coal Corporation, that permit fees in the amount of \$31,980.00 were due and payable.

§45.1-241A of the Code of Virginia, as amended, states in part, "*After a coal surface mining permit application has been approved, but before such permit is issued, the applicant shall file with the Director on a form prescribed and furnished by the Director, a bond for performance payable to the Commonwealth and conditioned upon faithful performance of all the requirements of this chapter and the permit.*" A & G Coal Corporation's initial permit application proposed to begin operations on 105.57 acres in Increment No. 1. On the tenth application submittal, the proposed operations for Increment No. 1 were revised to only disturb 33.91 acres with an estimated performance bond of \$102,000, as calculated under the Coal Surface Mining Reclamation Fund (45.1-270-1 et al and Part 4VAC25-130-801 VCSMRR). The DMLR's application approval of May 13, 2010, required the

¹ "Each application for a coal surface mining permit issued under this chapter shall be accompanied by a fee of \$26 per acre for the area of land to be affected by the total operation for which plans have been submitted. An anniversary payment of \$13 per acre for areas disturbed under the permit shall be payable annually on the anniversary date of the permit. All fees collected under the provisions of this chapter shall be paid into a special fund of the Department to be used for the administration of the coal surface mining regulatory program and are hereby appropriated for that purpose.

payment of \$102,000 in performance bond and \$1,000 entrance fee to the Coal Surface Mining Reclamation Fund.

Due to the length of time that it may take to render a decision on a permit application, §§4VAC25-130-778.13(j) and 4VAC25-130-778.14(d) require the permit applicant to “*update, correct or indicate that no change has occurred in the information previously submitted*”. This is handled in the completion and notarization of affidavit form DMLR-PT-240 (Ownership and Control Information and Violation History Information). §45.1-238C² of the Code of Virginia and §4VAC25-130-773.15(b) VCSMRR bars the DMLR from issuing a permit if the applicant has outstanding violations.

Prior to issuance of a permit, the applicant is required to submit an affidavit that all reclamation fees assessed under §402 of the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §1232) have been paid in full. This is handled in the completion and notarization of affidavit form DMLR-PT-244.

§45.1-254C of the Code of Virginia, as amended, requires that prior to issuance of the National Pollutant Discharge Elimination System (NPDES) permit, the applicant submit a fee of \$300 for each discharge outfall point under the permit. The DMLR’s technical approval of Application No. 1003841 on May 13, 2010, informed the applicant, A & G Coal Corporation, that NPDES outfall fees in the total amount of \$3,000 were due and payable.

Finding

Due to the complexity of the application, public participation, and other State and federal agencies coordinated reviews, it took over 3 years from the initial application submittal for the DMLR to render an approval determination regarding Application No. 1003841. The DMLR’s review and decision on Application No. 1003841 was conducted within a reasonable time under §45.1-238 of the Code of Virginia, as amended, and Part 4VAC25-130-773 VCSMRR.

On May 13, 2010, the DMLR determined that the application was complete and a joint coal surface mining operation and NPDES permit could be issued once the applicable fees, performance

² §45.1-238 C. The applicant shall file with his permit application a schedule listing any and all notices of violations of the federal act, this chapter and any law, rule or regulation of the United States or of this Commonwealth or of any department or agency in the United States pertaining to air or water environmental protection, incurred by the applicant in connection with any coal surface mining operation during the three-year period preceding the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the Director indicates that any coal surface mining operation owned or controlled by the applicant is currently in violation of the laws referred to in this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the authority, department or agency which has jurisdiction over such violation, and no permit shall be issued to an applicant after a finding by the Director after opportunity for a hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of the federal act or this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the federal act or this chapter.

bond, and affidavits were submitted. The approval and any subsequent issuance of permits is expressly delegated under §§45.1-238(A) and 45.1-254(A) of the Code of Virginia, as amended, to the Director or his authorized representative.

The DMLR's letter of May 13, 2010 was official notice that the DMLR was ready to issue the joint permit upon payment of the required fees, bond, and affidavit submittals. If A & G Coal Corporation had submitted payment of the fees, bond, and affidavits to the DMLR at any time from May 10, 2010 to February 13, 2013, the DMLR would have had the authority to issue the joint permit.

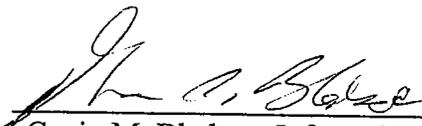
A & G Coal Corporation was informed by letter of October 17, 2012, that the permit would be administratively denied if the bonds and fees were not submitted by November 1, 2012. A & G Coal Corporation responded on November 1, 2012, by requesting additional time to remedy Applicant Violator issues. DMLR essentially allowed A & G Coal Corporation until February 13, 2013 to submit the fees, bonds, and affidavits.

As of February 13, 2013, A & G Coal Corporation had not submitted –

- payment of the application fees in the amount of \$31,980.00 under §4VAC25-130-777.17 VCSMRR to the DMLR as of this date.
- payment of the performance bond in the amount of \$102,000.00 and the \$1,000.00 entrance fee for the Coal Surface Mining Reclamation Fund per §4VAC25-130-801.12 VCSMRR to the DMLR.
- payment of the NPDES fees in the amount of \$3,000 required under §45.1-254C of the Code of Virginia, as amended, to the DMLR.
- an affidavit (properly executed form DMLR-PT-240 - Ownership and Control Information and Violation History Information) required by §§4VAC25-130-778.13(j) and 4VAC25-130-778.14(d) VCSMRR.
- an affidavit (properly executed form DMLR-PT-244) that all reclamation fees assessed under §402 of the Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §1232) have been paid in full as required under §4VAC25-130-773.15(c)(7) VCSMRR.

The failure of A & G Coal Corporation to timely submit the fees, bond, and affidavits required by the DMLR's letter of May 13, 2010 and subsequent notices resulted in the DMLR's determination of February 14, 2013 to administratively deny Application No. 1003841. That decision was proper and should be affirmed.

Reviewed by:


Gavin M. Bledsoe, Informal Hearings Officer

Date: June 10, 2013