



COMMONWEALTH OF VIRGINIA
 DEPARTMENT OF MINES, MINERALS AND ENERGY
 DIVISION OF MINED LAND RECLAMATION
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DMLR
 ADMINISTRATION

Assessment Conference Determination

Company: A & G Coal Corporation **Permit No.:** 1102052
Penalty of: Cessation Order No. CEV0008799 **Violation No.:** 1 of 1 (RV)
Conference: November 6, 2013 @ 9:30 A.M. **Location:** DMLR's Big Stone Gap Office
Participants: Jon Lawson (Company's Biologist & Permit Specialist), Eddie Varner (DMLR)

Summary of Conference

Mr. Lawson stated that he did not agree with the amount of days that had been listed in the proposed assessment for the Failure to Abate Cessation Order (FTACO) # CEV0008799. He stated that the Division should not have listed this FTACO as being in non-compliance for 30 days. He stated that it was the company's position that the timing of the FTACO was wrong. He stated that the FTACO issued for the performance standard Revegetation (RV) was issued in August. He stated that it was not practical to require the areas listed in the FTACO first cited in Notice of Violation (NOV) # CEV0008746 to be seeded with permanent vegetation during the hot dry time of year. Mr. Lawson stated that the company had been issued ten (10) separate NOV's to seed at a less than an optimum time of year. He said that he believed that all the NOV's were issued in June and late July. These NOV's covered a total area of approximately 350 to 400 acres. He stated that this FTACO covered an area of approximately 65 acres. He stated that the Division required a lot of area to be seeded at a time when the seed "won't come up". He stated that their approved plans require that disturbed areas be seeded within 30 days of final regrading if regrading is completed during normal planting times. Mr. Lawson stated that June, July, and August was not normal planting times. He stated that the company decided to delay their seeding until the weather conditions were more favorable for planting operations in accordance with Section 9.4 (see attached copy) of their approved plans. He stated that the company was trying to seed all the areas listed in the ten (10) separate NOV's and seeding for the areas listed in this FTACO was completed on 10/28/13.

Inspector Varner stated that the NOV was issued to seed the areas listed after an NOV that required backfilling and grading of those areas had been abated.

Mr. Lawson stated that the company should only be fined for one day for not complying with the FTACO because it required the company to seed approximately 65 acres at a less than optimum time of year.

Assessment Conference Recommendation

This assessment conference was closed on November 15, 2013 after obtaining and evaluating the information contained in the associated inspection reports, DMLR enforcement actions, DMLR's Civil Penalty Assessment Manual, and after reviewing the applicable Virginia Coal Surface Mining Reclamation Regulations (VCSMRR). The information also presented at the hearing held on November 6, 2013 was considered in making a determination as to the appropriateness of the proposed civil penalty.

This proceeding was held to review the proposed civil penalty for FTACO # CEV0008799. As such, the Conference Officer may not rule on the validity of the violation. Therefore; facts not in dispute are (1) the permittee was in violation of failing to seed the area and N.O.V. # CEV0008746, part 2 of 3 was issued on 6/25/13; (2) this N.O.V. required the permittee to seed those areas by 7/26/13; (3) this N.O.V. was extended to 8/9/13; (4) the permittee failed to comply the N.O.V. by the due date and FTACO # CEV0008799 was issued on 8/13/13; (5) this FTACO required the permittee to seed those areas; and (6) the permittee did not comply the FTACO until 10/28/13.

Given these facts, Section 4 VAC 25-130-845.15 sets forth the regulatory requirements concerning the assessment of a FTACO:

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** (emphasis added), 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 (emphasis added). 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.”

It is clear from the record that the violation listed in N.O.V. # CEV0008746 had not complied by the due date and a FTACO #CEV0008799 was issued. It is also clear that the violation contained in FTACO # CEV0008799 existed for more than 30 days before being abated. However; the permittee contends that a non-remedial FTACO should have been issued resulting in an assessment penalty for one day. The permittee based their argument on the fact that the FTACO was written during the summer months, a time of year that is not favorable for seed germination. In fact, the permittee contends that requiring seeding during the summer months is contrary to their approved plans because their approved plans limit seeding to normal planting periods between “February 15 to April 15 and after a good rain in August until September 15” of each year.

Their argument fails to accurately interpret the regulations, their own approved seeding plan, and does not accurately describe the Division’s requirement contained in FTACO # CEV0008799. First, the regulations set forth in Section 4VAC25-130-845.15(b)(1)(i) and 4VAC25-130-845.15(b)(1)(ii) contain the only exceptions to the amount of penalties that **must** be assessed for FTACO’s. None of those exceptions listed are present in this case. Second, the regulations define the normal growing season to be from April 15 to October 15 of each year as set forth at Section 4 VAC 25-130-700.5.

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.”*

There is no break in the time period of the growing season in Virginia during the summer months. Additionally, the permittee’s approved plan states that seeding will be conducted during normal planting seasons. Based on the information conveyed during this assessment conference, the permittee was opposed to seeding with a permanent seed mixture given the time of year. However; the permittee still had an immediate obligation to establish a vegetative cover over the disturbed areas after completion of backfilling and final grading in accordance with Section 4VAC25-130-816.113 Establishing a temporary vegetative cover until a permanent cover can be established was clearly an option.

Lastly, the permittee’s reasoning that the FTACO should have been issued as a non-remedial violation is flawed. The issuance of a FTACO, by definition, means that the violation cited under the N.O.V. still exists and will require some type of action by the permittee to abate the outstanding violation. In this case, the FTACO required the permittee to seed those areas that were listed in N.O.V. #CEV0008746. It is my determination that FTACO # CEV0008799 was outstanding until the permittee completed the actions necessary to abate the violation. The record