



Assessment Conference Determination

Company:	<u>Virginia Fuel Corporation</u>	Permit No.:	<u>1602078</u>
Penalty of:	<u>Cessation Order No. JRJ0001054 (cofta)</u>	Violation No.:	<u>1 of 1 (RV)</u>
Conference:	<u>February 19, 2014 @ 10:30AM</u>	Location:	<u>DMLR's Big Stone Gap Office</u>
Participants:	<u>John Jones (DMLR Inspector)</u>		

Summary of Conference

No one from the general public or the permittee attended this assessment conference. However; the hearings officer and the DMLR Inspector was present at the place, date, and time listed above for this informal conference. Inspector Jones and the hearings officer contacted the permittee by phone to see if they were going to attend this conference. Mr. Les Vincent (Engineer for the permittee) stated that they would not be attending the conference but would submit written information concerning the proposed assessment on this date (February 19, 2014). The permittee did submit written information on February 19, 2014 concerning this FTACO as to why the permittee wanted a reduction in the proposed civil penalty amount (see below for a copy of the letter) from Mr. Jon Lawson, Compliance Director.

SOUTHERN COAL CORPORATION

February 19, 2014

James Lowe
Division of Mined Land Reclamation
P.O. Drawer 900
Big Stone Gap, VA 24219

Re: Informal Assessment Conference
Virginia Fuel Corporation, Permit 1602078
NOV # JRJ0001054

Dear Mr. Lowe:

Virginia Fuel Corporation (VFC) is requesting that the Civil Penalty Assessment for to FTACO # JRJ0001054 on P.N. 1602078 assessed by Mr. Mooney on be reduced. VFC had contested the fact of violation. VFC was concurrently issued violations that spanned a number of permits and locations. A plan of action was then created to abate these violations. Although seeding was progressing towards the Permit 1602078 area, the violation was brought to a FTACO. Efforts were being made, assembling our own hydroseeding crew and pulling gentlemen off of their regularly scheduled duties to comply with this violation. These efforts should be considered in the evaluation of this assessment for Cessation Order. A great amount of time and funds were applied to abate the violation, which were procured prior to the issuance of the FTACO. This fact alone was grounds enough to extend the violation instead of issuing the FTACO. Therefore, it is requested that the total days be reduced to one.

Thank you for your consideration.

Sincerely;

Jon Lawson

Jon Lawson, Compliance Director

P.O. BOX 1010, WISE, VIRGINIA 24293

Assessment Conference Recommendation

This assessment conference was closed on February 27, 2014 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 written information submitted on February 19, 2014 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 # JRJ0001054. 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. # JRJ0000988, violation 1 of 2 was issued on 6/12/13; (2) this N.O.V. required the permittee to seed those areas by 7/15/13; (3) this N.O.V. was extended to 7/30/13 to allow the permittee additional time to abate the violation; (4) the permittee failed to comply the N.O.V. by the due date and FTACO # JRJ0001054 was issued on 7/31/13; (5) this FTACO required the permittee to seed those areas; and (6) the permittee did not comply the FTACO until 9/19/13.

Given these facts, it is clear from the record that the violation listed in N.O.V. # JRJ0000988 had not complied by the due date and FTACO #JRJ0001054 was issued. It is also clear that the violation existed for fifty-one (51) days (July 31, 2013 to September 19, 2013) as outlined in FTACO #JRJ0001054 before being abated. 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.”*

Therefore; in accordance with the regulatory requirements, the violation contained in FTACO # JRJ0001054 was assessed a minimum penalty of \$750.00 each day for 30

days. This amounts to a total proposed civil penalty amount of \$22,500.00.

However; the permittee contends that the violation listed in the FTACO for this permit should be considered as being in violation for only one day and should only be assessed a penalty for one day. The permittee based their argument on the fact that the company spent large funds and made considerable efforts to abate other violations on other permits as quickly as possible. It is acknowledged that the permittee assembled a hydroseeding crew by pulling workers off their regularly scheduled duties to abate violations prior to the issuance of this FTACO. However; the time it took the permittee to abate violations on other permits cannot be considered when determining the time it took to abate the violation contained in the FTACO on this permit. The regulations set forth in Section 4VAC25-130-845.15(b)(1)(i) and 4VAC25-130-845.15(b)(1)(ii) (listed above) contain the only **exceptions** to the amount of penalties that are assessed for FTACO' s. There are no facts of violation hearings pending concerning this Revegetation violation so none of those exceptions listed apply. It is the responsibility of the permittee to ensure that this permit complies with revegetation requirements at all times as outlined in the regulations. In this case, the violation existed for an extended period of time after the issuance of the FTACO. There is no justification for a reduction in the proposed number of days that the violation existed nor is there any justification to reduce the proposed civil penalty assessment.

Therefore; it is my decision that the proposed civil penalty was properly assessed in accordance with the requirements contained in the regulations. NOTE: The proposed assessment also evaluates and sets forth points assigned for the seriousness and negligence of the violation in order to determine if the civil penalty should be increased above the minimum amount for each day that the violation existed. The proposed evaluation shows that the penalty per day should not be increased. I agree with that assessment. It is my recommendation that FTACO # JRJ0001054 was outstanding from July 31, 2013 to September 19, 2013 and the proposed civil penalty assessment of \$22,500.00 is affirmed.

Good faith credit is not considered and cannot be awarded for a failure to abate cessation order.

Assessment Conference Determination:

Permit No. 1602078 CO# JRJ0001054, 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 daily penalty is assessed for 30 days. The CO was served on 7/31/2013. The \$750/day penalty was assessed for 30 days (7/31/2013 through 8/30/2013) = 30 X 750 = \$22,500.00.</p>		

Conference Officer:

James Lowe

Date: 2/27/2014
