



**Assessment Conference Determination**

<b>Company:</b>	<u>A &amp; G Coal Corporation</u>	<b>Permit No.:</b>	<u>1101914</u>
<b>Penalty of:</b>	<u>Order of Cessation No. CEV0009159</u>	<b>Violation No.:</b>	<u>1 Violation (RV)</u>
<b>Conference:</b>	<u>August 25, 2014 at 9:30 a.m.</u>	<b>Location:</b>	<u>DMME Lebanon Office</u>
<b>Participants:</b>	<u>Les Vincent (Southern Coal Corp.), Randy Stanley and Eddie Varner (DMLR)</u>		

**Summary of Conference**

One person from the public attended this assessment conference. Mr. Matthew Hepler associated with Southern Appalachian Mountain Stewards attended, but made no comments. However; Mr. Hepler did later submit internet links to newspaper articles regarding water monitoring issues that Justice permits had in other states in an e-mail to this hearings officer. Also, DMLR inspector Randy Stanley and DMLR inspector Eddie Varner attended this proceeding.

Mr. Vincent stated that it was the company’s position that FTACO # CEV0009159 for seeding should not have been issued in the summer months. He stated that the FTACO issued for the performance standard Revegetation (RV) was issued at the end of the seeding season. He stated that it was not practical to require the areas to be seeded after the end of the seeding season. He stated that it was not good to require seeding of disturbed areas during hot weather in the summer because there is a great possibility that the company would lose the entire load of seed that is applied. Mr. Vincent stated that he thought that the Division should extend these types of N.O.V.’s so that the seed could be applied in more favorable weather conditions. He stated that given the conditions that existed at the time of the issuance of the FTACO, the assessment should not list this FTACO as being in non-compliance for 30 days. He stated that the company should not be fined for a whole month as being in non-compliance.

Inspector Varner stated that the NOV # CEV0009104 required areas to be seeded by 5/2/14 and he had extended the N.O.V. to 5/15/14 to allow the company time to complete the required work.

## Assessment Conference Recommendation

This assessment conference was closed on August 29, 2014. The information presented at the hearing held on August 25, 2014, the associated inspection reports, DMLR enforcement actions, DMLR's Civil Penalty Assessment Manual and a review of the applicable Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) were evaluated in order to make a proper determination as to the appropriateness of the proposed civil penalty.

This proceeding was held to review the proposed civil penalty for FTACO # CEV0009159. 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. # CEV0009104 was issued on 4/3/14; (2) this N.O.V. required the permittee to seed those areas by 5/2/14; (3) this N.O.V. was extended to 5/15/14; (4) the permittee failed to comply the N.O.V. by the due date and FTACO # CEV0009159 was issued on 5/19/14; (5) this FTACO required the permittee to seed those areas; and (6) the permittee did not comply the FTACO until 8/7/14.

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. # CEV0009104 had not been complied by the due date and a FTACO #CEV0009159 was issued. It is also clear that the violation contained in FTACO # CEV0009159 existed for more than 30 days before being abated because the inspection report dated 8/7/14 states that *“These areas have been hydroseeded as required by the cessation order. As a result of this work, FTA/CO #CEV0009159 is hereby terminated as of 8/7/14.”*

However; the permittee contends that the FTACO should be assessed a lesser penalty. They base 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. Their argument fails to accurately interpret the regulations, their own approved seeding plan, and does not accurately describe the Division’s remedial requirements contained in FTACO # CEV0009159. 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.”*

It should be noted that N.O.V. CEV0009104 was issued on 4/3/14 and FTACO CEV0009159 was terminated on 8/7/14 (during the growing season). There is no break in the time period of the growing season in Virginia during the summer months. If seeding with a permanent seed mixture given the time of year was deemed to be risky, the permittee still had an immediate obligation to establish a temporary vegetative cover over the disturbed areas after completion of backfilling and final grading on those areas covered by the FTACO.

Given the above, it is my determination that FTACO # CEV0009159 was outstanding until the permittee completed the actions necessary to abate the violation. The record shows that the violation was not abated until 8/7/14.

Therefore; it is my decision that the proposed civil penalty was properly assessed in accordance with the requirements contained in the regulations. By regulation, the Division did not assess an additional separate civil penalty for each day the N.O.V. was unabated based on the seriousness and negligence of the violation. The permittee was assessed the minimum penalty of \$750.00 dollars for each day that the violation was not corrected for a maximum period of 30 days. Given the date that the FTACO was issued (5/19/14) and the date that the FTACO violation was abated (8/7/14), the penalty for this FTACO violation totals to \$22,500.00. It is my recommendation to affirm the proposed civil penalty amount of \$22,500.00.

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

**Assessment Conference Recommendation**

**Assessment Conference Determination:**

**Permit No. 1101914 CO # CEV0009159, violation 1 of 1 (RV)**

		<b>Proposed Assessment or Reassessment</b>	<b>Assessment Conference Recommendation</b>
I.	History of previous violation	\$200.00	N/A
II.	Seriousness Points	5	N/A
III.	Negligence Points	2	N/A
IV.	Good Faith Points	0	N/A
	Total Points:	7	N/A
	Base Penalty:	\$ 475.00	----
	History Penalty:	\$ 200.00	----
	<b>Total Penalty:</b>	<b>\$ 22,500.00*</b>	<b>\$ 22,500.00*</b>
		<p><b>* 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 5/19/2014. The \$750/day penalty was assessed for 30 days (5/19/2014 through 06/18/2014) = \$22,500.00.</b></p>	

Conference Officer: \_\_\_\_\_  
James Lowe, Conference Officer

Date: 9/5/14