



COMMONWEALTH of VIRGINIA
Department of Mines, Minerals and Energy

P.O. Drawer 900
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Big Stone Gap, Virginia 24219-0900
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May 2, 2019

Mr. J. Mark Campbell
Apex Energy, Inc.
24044 State Highway 194E
Feds Creek, KY 41524

Certified Mail Return
Receipt No. 7018 1830 0001 4691 8670

Re: Informal Hearing Decision - Issuance of Cessation Order GWS0012484 (1 Violation) and Cessation Order GWS0012483 (1 Violation) for Apex Energy, Inc., Permit Number 1101762.

Dear Mr. Campbell:

An informal hearing was held on April 30, 2019, to review the issuance of the above captioned enforcement actions. Based upon the attached opinion of the Informal Hearing Officer, the following decision is hereby rendered.

Cessation Order GWS0012484 (reclamation of Fill 4) was properly issued and therefore is hereby affirmed.

Cessation Order GWS0012483 (sediment structure maintenance) was not reviewed as the company withdrew its request for the hearing.

Pursuant to §4VAC25-130-843.16(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) have the right to request a formal public hearing to review this decision. The request must be submitted in writing within 15 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 requesting formal review shall bear the burden of proof at the formal hearing. Should you have any questions concerning the formal hearing process, please call Darlene Gibson, Hearings Coordinator, at (276) 523-8150.

Respectfully,



Gavin M. Bledsoe
Reclamation Services Manager

c: Chris Stanley
Tim Browning, Artemis Consulting
Gary Shifflett, Area Inspector
Thomas Mackey, Area Supervisor
Harve Mooney, Hearings Officer



Informal Hearing Determination

Company: Apex Energy, Inc **Permit No.:** 1101762

Subject: Cessation Order #GWS0012484

Conference: April 29, 2019 @ 10:00 a.m. **Location:** Lebanon DMME

Participants: Chris Stanley-Apex Energy, Tim Browning, PE -Artemis Consulting, Gary Shifflett-DMME, Robert Yates -DMME

An informal hearing was conducted today at the Lebanon office of the Virginia Department of Mines, Minerals and Energy. The hearing was requested by Mr. Chris Stanley on behalf of Apex Energy and Clintwood Elkhorn Mining, LLC. Representing the company were Mr. Chris Stanley and Professional Engineer Tim Browning of Artemis Consulting. The DMME was represented by Inspectors Robert Yates and Gary Shifflett. There were no attendees from the general public.

Summary of Informal Hearing

The enforcement action to be addressed in this hearing was Cessation Order No. GWS0012484, violation 1 of 1. This action was written to Apex Energy LLC's permit number 1101762 for failure to abate Notice of Violation No. GWS0012001; specifically the violation noted that the permittee has failed to perform reclamation of disturbance at hollow fill HF-4 as contemporaneously as practical concurrent with mining operations.

Mr. Tim Browning began by noting that the company's arguments about this violation centered around three key issues. He stated the first issue was worker safety and equipment safety. Mr. Browning stated that the company has contended for several months that the toe of the fill was too soft for equipment to work. Initially, the problem was worker safety but the ground began to dry out; they could begin to put equipment on it. Specifically, he noted that equipment such as excavators would be able to work in the area, but personnel in charge still felt that the use of bulldozers would be an unsafe measure.

Mr. Browning noted that the second thing he wished to discuss was the amount of work that had been done. He produced a number of photos of the fill areas to demonstrate that work had indeed been done on the fill areas. The photographs addressed two fills, fill 2 and fill 4. Mr. Browning asserted that while both fills were noted in the original violation, the company had completed the work on fill 2, and it had also worked on fill 4.

Mr. Browning produced certifications for fill 4. He noted that the only remaining work on the fill was the grading of the toe, constructing the terraces and drainage on the fill.

The third key issue of the cessation order was the amount of rainfall received since the time of the NOV. Mr. Browning stated that rainfall had been the crux of the many extensions requested for this violation. He noted that the violation was written in June, 2018. Mr. Browning stated that since that time the permit had received 36.24 inches of rain. The average amount of rainfall was 28.8. He noted that they were 8 inches above average at that point. Since that time they have received 52 inches of rain. The intensity in the amount of rainfall in that period made it difficult to comply the violation. Despite the amount of rainfall the company was still able to complete fill 2 and partially complete fill 4.

A fourth item deals with contemporaneous effort to mining. Mr. Browning provided a mining map and noted that the company had mined close to the fill 4. The company had taken a pit in August, 2018. The company foreman had noted that he wouldn't be placing any more material in the fill and that had spurred the original violation. In view of this additional mining, the company questioned whether or not the violation of not being contemporaneous had merit.

Mr. Chris Stanley noted that it all went back to their reclamation superintendent. The company did work on the fill last year. The company moved a lot of material from the toe of the fill. He stated that the wet winter inhibited their work in that area. He noted that in cleaning out the pond, they had gotten an excavator stuck, which required a second piece of equipment to free it.

Mr. Stanley noted that the company was currently working on the upper area of the fill, but his superintendent has told him that he could not recommend using a bulldozer at the toe of the fill for safety concerns at this time. He also reiterated his concerns that the work could not be done due to the significant rainfall. There were a number of days where they encountered significant rainfall and could not work on the fill for safety reasons.

Mr. Tim Browning also noted that extension requests that were granted also documented the rainfall events. There was a request to this hearings Officer to view the extensions that were requested. The company stated they would provide these. Inspector Shifflett also noted that the dates of the extensions were in the laptop system.

Inspector Shifflett noted that his inspection report would speak for itself. He noted that the violation was issued in June 2018. The violation did include fill 2 and fill 4. He noted that he had spoken with company representatives. He noted that each portion of the violation was equally obligated to be corrected. He stated that the company was responsible to provide the necessary resources to work on each part of the violation. Even though the two fills were separate structures, they were part of the same violation to avoid issuance of a separate violation. While hollow fill 2 was worked on during that period, hollow fill 4 was not.

In reference to the contemporaneous question Mr. Shifflett agreed there was a conversation with the company representatives. He was told that there would be no more material placed in the fill areas. He noted unless he was mistaken there has been no additional material placed in the fill 4. Whether or not there was material being generated nearby, it was immaterial since none of the material was placed in the fill. Mr. Shifflett noted that the fill photos provided show the minimum amount of work done on the fill. In his interpretation, that demonstrated a lack of diligence and reclamation of the fill.

The inspector was on the site on 15 April 2019 and he spoke with Tim Evans. There was a bulldozer working on the fill. The bulldozer was working on the top terrace of the fill. As far as the inspector could tell, little work had been done since the issuance of the cessation order. This concluded the discovery portion of the hearing for Cessation Order No. GWS0012484.

Informal Hearing Recommendation

Cessation Order No. GWS0012484, violation 1 of 1, was issued to the operator on March 12, 2019, because the permittee failed to abate violation 1 of 3 of Notice of Violation No. GWS0012001. Specifically, NOV# GWS0012001 required the permittee to, as expeditiously as possible complete grading; establish terraces and perimeter ditches and seeding for hollow fill 4. The standard for this violation is addressed within the **Virginia Coal Surface Mining Reclamation Regulations**, which addresses environmental protection of areas on or adjacent to an approved permit, as well as the issuance of cessation orders. Specifically, **Section 4VAC25-130-816.100 (a) of the Virginia Coal Surface Mining Reclamation Regulations** states,

Reclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations, except when such mining operations are conducted in accordance with a variance for concurrent surface and underground mining activities issued under 4VAC25-130-785.18.

It is the company's position that various issues were significant in hampering the required reclamation on fill 4. The evidence provided by the company in reference to the precipitation during the period after the issuance of the original notice of violation (GWS0012001) does demonstrate a wetter than normal period in comparison to previous years. Indeed, the inspector did grant extensions of the notice of violation until the February 8, 2019 request for extension of the abatement date.

The company also cites safety concerns as rationale for delays in the reclamation of fill 4 in specifically the toe area of the fill. The safety of workers is always a concern on the site. However, it is the responsibility of the company to determine a method to fulfill its reclamation obligation per its approved plans.

Finally, there is the question of whether the operator was attempting to do the required reclamation as contemporaneously as possible. The company representatives and the inspector have both noted that conversations between the inspector and foreman led to the conclusion that no additional material would be placed in the hollow fill 4. Information from the company notes that additional mining did occur in relative proximity to the fill. However, this hearings officer must agree with the inspector that that mining was immaterial since none of the material from that cut was placed in fill 4.

It should be noted that foremost in remedial measures to abate a violation is the act of due diligence. While the company has certainly raised some valid issues that could warrant extension of the abatement date, ultimately the granting of any extension to the abatement date lies in the

discretion of DMME. The agency through its representative can only grant extensions through **Section 4 VAC 25-130-843.12(c) of the Virginia Coal Surface Mining Reclamation Regulations** which states,

(c) An authorized representative of the director may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by the permittee's lack of diligence. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in subsection (f) of this section. An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

The Inspector has determined that the company did not exhibit due diligence in attempting to abate the Notice of Violation No. GWS0012001, violation 1 of 3. **Section 4 VAC 25-130-843.11(b) (1) of the Virginia Coal Surface Mining Reclamation Regulations** addresses the next step,

(b)(1) 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.

Upon receipt of the company's request of February 8, 2019 for an additional extension DMME denied the request. Since the abatement date was reached, and no request was granted, the agency must issue Cessation Order No. GWS0012484, violation 1 of 1. It is this hearings officer's opinion that Cessation Order No. GWS0012484, violation 1 of 1, was properly issued, and that the order should be affirmed.

Informal Hearings Officer:

Harold J. Perry Date: 05/02/19



Informal Hearing Determination

Company: Apex Energy, Inc **Permit No.:** 1101762
Subject: Cessation Order #GWS0012483
Conference: April 9, 2019 @ 10:00 a.m. **Location:** Lebanon DMME
Participants: Tim Browning, PE; Chris Stanley (Apex Energy); Gary Shifflett, Robert Yates (DMME)

An informal hearing was conducted today at the Lebanon office of the Virginia Department of Mines Minerals and Energy. The hearing was requested by Mr. Chris Stanley on behalf of Apex Energy and Clintwood Elkhorn Mining, LLC. Representing the company were Mr. Chris Stanley and Professional Engineer Tim Browning of Artemis Consulting. The DMME was represented by Inspectors Robert Yates and Gary Shifflett. There were no attendees from the general public.

Summary of Informal Hearing

Cessation Order No. GWS0012483, violation 1 of 1, was issued to the operator on March 12, 2019, for failure to abate Notice of Violation No. GWS0012383, violation 1 of 1 (SS). NOV GWS0012383 was issued on February 4, 2019 for failure to maintain sediment basins SB-14 and SB-14a in accordance with the approved plans. The operator was given an abatement date of March 6, 2019 to abate the NOV GWS0012383.

Informal Hearing Recommendation

At this proceeding, the company representative Chris Stanley stated that the company wished to withdraw their request for a hearing. No decision was made regarding this Failure to Abate Cessation Order GWS0012483.

Informal Hearings Officer: Shane A. Morgan Date: 05/02/19