



**Informal Hearing Determination**

**Company:** Virginia Fuel Corporation **Permit No.:** 1202070

**Subject:** Notice of Violation JRJ0002471

**Conference:** February 9, 2016 **Location:** DMME Lebanon Office

**Participants:** Mark Wooten (Virginia Fuel Corporation – Chief Engineer); John Jones (DMLR Inspector); Matthew Hepler (Southern Appalachian Mountain Stewards SAMS)

**Summary of Informal Hearing**

Mr. Wooten explained that Notice of Violation JRJ0002471 was issued for failure to submit corrections to Permit Release Application No. 1009359. Mr. Wooten said the company’s failure to submit corrections by the deadline of August 28, 2015 noted in the Division’s comment letter regarding the review of application No. 1009359 does not constitute a violation of the Virginia Coal Surface Mining Control and Reclamation Act of 1979 or of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR). Mr. Wooten said there is no law or regulation that requires the permittee to resubmit information requested on any kind of application.

Mr. Wooten explained that the application referenced in NOV JRJ0002471 was a bond release application and did not address any other issues. Mr. Wooten explained that the bond release application was filed by the permittee for the benefit of the permittee. Mr. Wooten stated that the Division did not require the bond release application to be filed and did not have any hand in having this application filed. Mr. Wooten said since no law or regulation has been violated there is no justification to issue a notice of violation. Mr. Wooten therefore request that Notice of Violation JRJ0002471 be vacated.

Mr. Wooten said a Division response letter dated August 7, 2015 regarding the review of the bond release application imposed an August 28, 2015 deadline for the company to respond to review comments. Mr. Wooten said there is no basis in the regulations for imposing this deadline. Mr. Wooten explained that prior to the Division imposing this deadline the permittee could have withdrawn the application. Mr. Wooten said if he had withdrawn the application a notice of violation would not have been issued.

John Jones explained that after the issuance of the notice of violation the permittee did withdraw the bond release application and the notice of violation was terminated.

## Informal Hearing Recommendation

The hearings officer conducted a review of the history of bond release application # 1009359 and the associated Division of Mined Land Reclamation (DMLR) inspection records. The hearings officer also conducted a review of the applicable sections of the Virginia Coal Surface Mining Control and Reclamation Act of 1979, the applicable sections of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR), and pertinent sections of the pre-ambule to the Code of Federal Regulations. After completing this review, the hearing was closed on February 11, 2016.

The issue in question is whether or not the Division can require the resubmittal of bond release application #1009359. Under the authority granted in Title IV of the Virginia Administrative Code, DMLR is responsible for protecting the environment from adverse effects of surface coal mining operations. As part of DMLR's responsibilities, any person(s) that intends to conduct coal mining in Virginia must submit information that addresses the details of each phase of the proposed mining operation, including reclamation of disturbed areas. The detailed information must be electronically submitted through an application that addresses such items as baseline environmental information, geologic information, engineering designs, operation plans, and reclamation plans that will achieve the proposed final post mining land use. It is the responsibility of the Division to review the information included in an application and require the permittee to resubmit additional information necessary to meet the minimum regulatory requirements prior to permit issuance. The requirement referenced above is addressed in § 4VAC25-130-773.15 of the VCSMRR. Additionally, § 4 VAC25-130-774.13 of the VCSMRR allows for the revision of surface mining permits providing the proposed revision complies with applicable requirements of the regulations.

Each regulatory requirement has a specific section within the VCSMRR that sets forth how compliance must be achieved. However, as Mr. Wooten stated, there is no specific law or regulation that requires the permittee to resubmit information requested on a bond release application. Mr. Wooten explained that the application referenced in Notice of Violation JRJ0002471 was a bond release application, and the application was submitted for the benefit of the permittee. Mr. Wooten stated that the Division did not require the application be filed and did not have any hand in having this application filed. Mr. Wooten said since no law or regulation has been violated there is no justification to issue a notice of violation.

The final authority governing the necessary information that each surface mining permit must address from permit issuance until bond release is contained within the Virginia Coal Surface Mining Control and Reclamation Act of 1979 and the Virginia Coal Surface Mining Reclamation Regulations. In this case, Notice of Violation JRJ0002471 is only a valid violation if there is a specific regulatory requirement to submit a bond release application and if there is a regulatory requirement to resubmit needed corrections to the bond release application in a timely manner.

Section 4VAC-130-800.40 of the VCSMRR addresses bond release applications and the requirements to release performance bonds. § 4VAC25-130-800.40 (a) (1) states "*the permittee may file an application with the division for the release of all or part of a performance bond.*" The regulation referenced does not specifically state that a permittee is required to submit a bond release application, but allows a permittee the opportunity to submit a bond release application at their own discretion if they wish to obtain a partial or complete bond release. Also, in order to

provide guidance in the bond release process, the Division has developed procedures and documents which include Bond Release Procedure 2.3.09 and a Guide to Bond Reduction/Release. It should be noted that § 45.1-230.A1 of the Virginia Coal Surface Mining Control and Reclamation Act of 1979 does authorize the Director to compose and distribute interpretative, advisory or procedural bulletins or guidelines pertaining to permit applications. However, § 45.1-230.A1 also makes it clear that any such **guidelines and documents do not have the force of regulations**.

As Mr. Wooten explained the permittee submitted bond release application # 1009359 on May 27, 2015. Upon receipt of the application, Division staff conducted a review of the information contained in the bond release application. Upon conclusion of the review the Division mailed a letter to the permittee dated August 7, 2015. The letter stated, *“consideration was given to your plans; however, prior to final approval the following additional information must be supplied to fully meet all requirements”*. The letter also stated, *“these corrections have a resubmittal deadline of August 28, 2015”*.

As noted above, the Division set a due date as to the time the additional information regarding the bond release application was to be resubmitted. Therefore, this hearings officer conducted a review of Virginia’s laws and regulations to determine when the Division has the authority to impose due dates on applications and revisions. In this particular case, there are two (2) sections of the Virginia Coal Surface Mining Reclamation Regulations that address the setting of due dates on applications. Specifically, § 4VAC 25-130-773.15(a)(1) and § 4 VAC 25-130-774.13 (b)(1) provides the Division with the authority to establish time periods for final approval or disapproval when reviewing and processing officially submitted permit applications and permit revisions for surface coal mining operations. However; time periods required under the referenced sections only apply to permit applications and permit revisions that **must be submitted in order to meet a specific regulatory requirement**. Notice of Violation JRJ0002471 cited § 4 VAC 25-130-773.17(c) as the regulation violated and the notice required the comments from application # 1009359 be resubmitted. This section states, *“the permittee shall comply with the terms and conditions of the permit, all applicable performance standards of the Act, and the requirements of this chapter.”* As previously noted, application # 1009359 was submitted at the will of the permittee for the purpose of obtaining a bond release for permit number 1202070. The application was not submitted for the purpose of obtaining regulatory compliance of a specific permit requirement or condition as required by § 4 VAC 25-130-773.17(c). Therefore § 4 VAC 25-130-773.17(c) is not an appropriate regulation for the notice of violation referenced. In addition, imposing due dates for resubmittal of a bond release application does not apply.

Upon concluding my review of the applicable regulations cited above regarding the Division’s authority to impose deadlines, this hearings officer reviewed the Code of Federal Regulations that address applicable regulatory sections. Similarly, the federal regulations also require that certain time periods must be adhered to in reviewing and processing permit applications and permit revisions. The pre-amble to the Code of Federal Regulations beginning at 48 FR 44344 dated September 28, 1983 provides guidance as to what a complete application/revision **must** address and requires applications/revisions to be approved/disapproved within a set time period. However, the Code of Federal Regulations does not require submittal of permit materials that are not addressed in a specific section of the Code of Federal Regulations.

Although § 4VAC-130-800.40 of the VCSMRR does not give authority to the Division to impose due dates for the resubmittal of information on bond release applications, this section does specify a time limit as to when the Division must make a decision to approve or disapprove a bond release application. Section 4VAC-130-800.40 (b)(2) states, “*within 60 days from the filing of the bond release application, if no public hearing is held pursuant to paragraph (f) of this section, or, within 30 days after a public hearing has been held pursuant to paragraph (f) of this section, the division shall notify in writing the permittee, the surety or other persons with an interest in the bond collateral who have requested notification under 4VAC25-130-800.21(c), and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond*”. Therefore, if the permittee does not submit all additional information determined necessary to satisfy the requirements of a bond release application this regulation gives the Division the authority to disapprove the application within 60 days from the filing of the bond release application.

It should be noted that instead of submitting the corrections to bond release application No. 1009359 the permittee chose to withdraw the application. Since the application was not required by the Division but was submitted at the discretion of the permittee, the permittee was within its rights to withdraw the application. Upon receiving notice that the application was withdrawn the inspector terminated Notice of Violation JRJ0002471 in an inspection report dated February 2, 2016. In the violation termination report the inspector stated that since the application was withdrawn the corrections to the bond release application are no longer necessary. It has also been noted that if the permittee had withdrawn the bond release application before the August 7, 2015 comment letter a notice of violation would not have been issued.

Upon conclusion of my review, I find that the Virginia Coal Surface Mining Control and Reclamation Act of 1979 and the VCSMRR do not authorize the Division to impose resubmittal deadlines on bond release applications submitted at the discretion of the permittee. Therefore, it is my decision that Notice of Violation JRJ0002471 issued for the operator’s failure to submit corrections to bond release application No. 1009359 by the imposed due date of August 28, 2015 was improperly issued and should be vacated. Based on the findings and conclusion of this informal hearing decision, it is the recommendation of this hearings officer that the Division no longer impose resubmittal deadlines on bond release applications submitted at the discretion of the permittee. If a permittee does not submit all additional information determined necessary to satisfy the requirements of a bond release application Section 4VAC-130-800.40 (b)(2) of the VCSMRR grants the Division the authority to disapprove the application within 60 days from the filing of the bond release application. Therefore, if all additional information determined necessary to satisfy the requirements of the bond release application is not submitted, the Division should, in accordance with § 4VAC-130-800.40 (b)(2), disapprove the application. It is further recommended that the permittee be notified that if the bond release application is disapproved full bond must be maintained on the permit and the permittee would continue to be liable for the entire permitted acreage. However, if the permittee requests that the bond release application be withdrawn the disapproval of the application would be unnecessary. It should be noted that if the application was withdrawn or disapproved the permittee could resubmit a new application for bond release at a later date.

Informal Hearings Officer: James D. Meacham Date: 02/09/2016

