



Informal Hearing Determination

Company: A & G Coal Corporation **Permit No.:** Multiple Permits
Subject: Notice of Violation DMLRRSM1
Conference: November 21, 2014 @ 9:30 AM **Location:** Lebanon DMME Office
Participants: Leslie Vincent, PE

On November 21, 2014, an informal hearing was held at the Lebanon office of the Department of Mines Minerals and Energy, in reference to the fact of violation for Notice of Violation DMLRRSM1. Representing A & G Coal Corporation was Mr. Leslie Vincent, PE. The hearings officer was Harve Mooney. Mr. Vincent was afforded the opportunity to provide comments and/or information during the informal hearing. Mr. Marley Green was present for Southern Appalachian Mountain Stewards at this hearing.

Summary of Informal Hearing

Notice of Violation DMLRRSM1 was issued to the permittee on October 10, 2014 for failure to submit an acceptable financial statement required by Section 45.1-270.3C of the Code of Virginia, as amended, and Section 4 VAC25-130-801.13(a)(2) of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) on the applicable anniversary dates in 2011, 2012, 2013 or 2014. There were twenty permits addressed in the notice of violation that was issued. All twenty violations were addressed within this informal hearing.

Mr. Leslie Vincent of Southern Coal Corporation began by stating that he had begun working for the Justice companies in August 2011. He stated he knew that there had been at least one financial statement (either 2011 or 2012) that the Department of Mines Minerals and Energy (DMME) had accepted. He stated the permitting supervisor accepted the report.

Mr. Vincent stated that the requirement of submittal of the report is to demonstrate that the Justice Companies (James Justice) as a whole has a net worth of at least one million dollars. He stated that nowhere in the statute of Virginia does it require submittal of the financial statement on the anniversary date. He stated that DMME can require an annual statement at any time during the year. The violation is unsupported by the regulations as it is stated.

Mr. Vincent stated that the violation was not issued on an approved form. He stated that it (the violation) was not issued in the appropriate format. Mr. Bledsoe should have known that the form was not appropriate. The company was unaware of their rights of appeal. It would be

difficult for a third party to determine if the violation was a single violation or several due to the form(letter) that DMME used in the issuance and in the hearing request acknowledgement letter.

Mr. Vincent stated that if you looked at 4 VAC 25-130-800.11 of the Va Coal Surface Mining Reclamation Regulations (Bonding Requirements), there is an Attorney General's (AG) opinion associated with the regulation (as a footnote). He stated the AG opinion did not normally go in the regulations. When the self-bond regulations were approved, this opinion was added to the regulation. The AG's opinion reads as followed,

Attorney General Opinions

The statute authorizing these regulations does not confer on the agency the power to require annual certification by an independent certified public accountant that an operator which has given a reclamation bond without surety is able to meet its obligations under the proposed reclamation plan; the statute merely permits the acceptance of such a bond if the operator meets the net-worth standard set out in the statute, and the statute does not permit consideration of the assets of the parent where the operator is a subsidiary corporation. 1984-1985 Va.Rep.Atty.Gen.180, Op.Atty.Gen. 1984 WL 184516 Oct. 18, 1984.

Mr. Vincent stated that the agency can only require a new financial statement if they (DMME) suspect the companies' net assets have fallen below \$1,000,000.00. DMME never cited A & G Coal Corporation under Jerry Wharton. DMLR had never required statements on every anniversary before.

Mr. Vincent stated that the violation should be vacated based on the improper format of the violation and the Attorney General's opinion. The letter says one violation so there should only be one assessment if the violation is upheld. The letter did not specify a violation number or performance code and was therefore improperly written. The opinion of the Attorney General is in conflict with the regulation cited and the opinion should override the regulation, and the violation, as written is not in agreement with the regulations.

Informal Hearing Recommendation

Notice of Violation DMLRRSM1 (violation 1 of 1) was issued to the permittee because the permittee failed to submit an acceptable financial statement required by Section 45.1-270.3C of the Code of Virginia, as amended, and Section 4 VAC25-130-801.13(a) (2) of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) on the applicable anniversary dates in 2011, 2012, 2013, or 2014. As a matter of clarification, for assessment purposes, the agency has issued a single violation to address the failure to submit the financial statement.

Authority to issue enforcement action is governed under Chapter 19 of the Code of Virginia, specifically 45.1-245B, and 4 VAC 25-130-843.12 of the Va Coal Surface Mining reclamation Regulations. The section of the Code states,

Whenever the Director or his authorized representative determines that any permittee is in violation of any requirement of this chapter or any regulation

thereunder, or any permit condition, but such violation does not create an imminent danger to the health or safety of the public, or cannot reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, the Director or his authorized representative shall issue a notice of violation to the permittee or his agent setting a reasonable time but not more than ninety days for the abatement of the violation and provide an opportunity for public hearing.

Section 45.1-241C of the Code of Virginia and Section 4VAC25-130-801.13 of the VA Coal Surface Mining Reclamation Regulations set forth the requirements for implementation of self-bonding and the submission of an unqualified opinion from a Certified Public Accountant.

Section 45.1-241 C states that,

“ The Director may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the Director, pursuant to regulations, the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount. “

Subsection (a) (2) notes the division may accept a self-bond from the applicant if,

“ The applicant has a net worth, certified by an independent Certified Public Accountant in the form of an unqualified opinion appended to the financial statement submitted, of no less than \$1 million after total liabilities are subtracted from total assets. If the applicant is a subsidiary corporation, the applicant's parent organization's net worth need only be certified by the independent Certified Public Accountant, if the applicant uses or includes any assets or liabilities of the parent organization in computing or arriving at the applicant's net worth. Where the division has a valid reason to believe that the permittee's net worth is less than required by this subsection, it may require a new Certified Public Accountant's statement and certification.”

Mr. Vincent's assertion that the form used to issue the notice of violation to the company was improper cannot be supported. Section 4 VAC 25-130-843.12 notes that any authorized representative of the Director shall issue a notice of violation if, on the basis of an inspection, finds a violation of the action. Subsection (b) states the following,

(b) A notice of violation issued under this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

- (1) The nature of the violation;*
- (2) The remedial action required, which may include interim steps;*
- (3) A reasonable time for abatement, which may include time for accomplishment of interim steps; and*
- (4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.*

There is no specific form given to a notice of violation issued except to provide all of the information noted in Subsection (b). The notice of violation also addressed the additional requirement noted in 45.1-245B. The opportunity and instructions to request a review of the violation are specified according to the Code of Virginia.

The Company is accurate in their assertion that DMLR had received a financial statement from the company in 2011. An additional financial statement was tendered earlier this year. However, review of that 2011 particular statement by an independent accountant revealed that the statement was not an unqualified statement, and therefore unacceptable. Pursuant to 4 VAC 25-130-800.13(a) (2), the DMME may require the financial statement at its discretion. It is reasonable and prudent to assume the statement can be requested at the anniversary date.

The company's representative has argued that the statute in the Code of Virginia (45.1-240C) and the regulation (4 VAC 25-130-800.11(a) (2)) are in conflict with the Attorney General's October 18, 1984 opinion. The opinion states that the statute authorizing these regulations does not confer on the agency the power to require annual certification by an independent certified public accountant that an operator which has given a reclamation bond without surety is able to meet its obligations under the proposed reclamation plan; the statute merely permits the acceptance of such a bond if the operator meets the net-worth standard set out in the statute, and the statute does not permit consideration of the assets of the parent where the operator is a subsidiary corporation.

While the AG opinion bears some merit, it cannot supersede any statute in the Code of Virginia. Indeed, a review of the complete Attorney General's opinion was conducted by this hearings officer. The opinion addressed a requirement by this regulation to do calculations to assure there were enough resources to achieve reclamation of the site. The opinion stated,

By adopting regulation V809.13 (a) (2), the Board would require the certification contemplated by § 45.1-270.3(C) to contain more than a mere statement of net worth equivalent to one million dollars. It also requires an accountant to provide a determination of the applicant's ability to satisfactorily meet all obligations and costs under the proposed reclamation plan for the life of the mine. The plain language of the statute does not admit of such a requirement which necessarily involves engineering calculations and predictions in addition to financial calculations...

The AG opinion does not refer to the requirement to submit the annual financial certification but a former requirement to assure that the operator had enough resources to complete reclamation on the sites. The opinion found the agency would have overstepped its authority in that matter.

Based on the findings of this hearing, it is this hearings officer opinion that this violation was properly issued, and it is recommended that the violation be affirmed.

Informal Hearings Officer: _____ Date: _____