

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**HUNTINGTON DIVISION**

OHIO VALLEY ENVIRONMENTAL  
COALITION, INC., and WEST  
VIRGINIA HIGHLANDS  
CONSERVANCY, INC.,

Plaintiffs,

v.

CIVIL ACTION NO. 3:07-0413

APOGEE COAL COMPANY, LLC, and  
HOBET MINING, LLC,

Defendants.

**ORDER**

Pending before the Court is Plaintiffs' Motion for an Order to Show Cause Why Defendant Apogee Coal Company, LLC, Should Not Be Found in Civil Contempt and to Schedule Hearing (Doc. 117). Also pending are various motions related to the Court's Protective Order (Doc. 97): Plaintiffs' Motion to Disclose Apogee's Designated Confidential Documents (Doc. 101); Apogee Coal Company, LLC's Motion to Seal Confidential Business Proposals (Doc. 105); Plaintiffs' Motion to Partially Lift Protective Order of July 30, 2008 (Doc. 111); Apogee Coal Company, LLC's Motion to Seal Confidential Business Information/Project Proposals (Doc. 116); and, Apogee Coal Company, LLC's Motion to Seal Photographs and Preliminary Design that Comprises Confidential Business Information (Doc. 122). For the reasons explained below, Plaintiffs' motion for civil contempt and hearing (Doc. 117) is **held in abeyance**. Plaintiffs' motion to disclose confidential documents (Doc. 101) and motion to partially lift the Protective Order (Doc. 111) are

**DENIED.** Apogee's motions to file documents under seal (Docs. 105, 116, and 122) are **GRANTED.** The Protective Order, however, shall not apply to any future submissions.

In addition, Apogee is **ORDERED** to comply with directives contained in this Order. Further, Apogee is **ORDERED** to submit monthly status reports to inform the Court of its progress; the next shall be due **January 5, 2009.**

**I. APOGEE SHALL COMPLY WITH ITS FOURTH STATUS REPORT PLAN**

On May 27, 2008, the Court entered summary judgment for Plaintiffs. *See* Doc. 70. In the memorandum opinion and order containing the decision, the Court explained that injunctive relief was appropriate. *Id.* Originally, Apogee was ordered to submit a treatment plan within thirty days and achieve compliance within an additional ninety days. *Id.* In a hearing held July 2-3, 2008, Apogee proved that compliance with these deadlines was impossible. *See* Court's Order of July 7, 2008 (Doc. 92). The Court found, however, that promising technology existed. On August 13, 2008, the Court ordered Apogee to install treatment technology at all outfalls covered by the summary judgment ruling no later than May 31, 2009 and to achieve compliance at all those outfalls by June 30, 2009. *See* Doc. 103. The Court refused to require Apogee to purchase any specific treatment technology and did not impose interim benchmarks upon the Defendant.

Thus far the Court has been lenient and has allowed Apogee to proceed at its own discretion and pace. Although the Court requested a time-line with enforceable benchmarks, it has allowed Apogee to proceed without them. For the last few months Apogee has submitted only monthly status reports to inform the Court of its progress. The flexibility given to Apogee was a result of the Defendant's repeated representations that it will comply with the final installation and compliance deadlines of May 31, 2009 and June 30, 2009.

Plaintiffs' present motion claims contempt for failure to provide interim benchmarks and argues that Apogee is no longer on track to meet the final compliance deadline. Apogee had an opportunity to moot the motion by addressing interim deadlines in its response; instead the Defendant submitted a status report with general updates on its progress. While Defendant's response to Plaintiffs' motion for contempt indicated a number of pending actions, including continued work with Mid-Atlantic Technology Research & Innovation Center ("MATRIC"), CH2M Hill, and GE Water and Process Technologies, it did not supply a plan to achieve installation of treatment by May 31, 2009 or compliance by June 30, 2009.

On December 1, 2008 Apogee submitted its most recent status report, which clarifies Defendant's path to compliance. Apogee has chosen to rely on "steel wool" or "steel foam" technology. No other treatment system could be installed before March 2010, well after the final compliance deadline. It is evident from the report that it will be difficult but not impossible for Apogee to meet the final compliance deadlines imposed by the Court. Steel wool and steel foam are unproven technologies; their development must proceed without delay to be implemented in treatment systems by May 31, 2009. Despite this, Apogee's consultants are optimistic that this deadline can be met. Having given Apogee the time and flexibility to obtain consulting assistance, review and investigate alternative treatment options, and choose its own course for compliance, the Court will hold Apogee responsible for any failure to achieve full success with the installation and compliance deadlines.

Apogee's December 1<sup>st</sup> status report contains dates and steps by which it will pursue the development of steel wool and steel foam technologies from pilot testing through full implementation. Since any delay in development may make it impossible to meet the final

compliance date, the Court will closely scrutinize the remainder of the process. Apogee is **ORDERED** to comply with the specific dates, time periods and steps identified in its Fourth Status Report and accompanying affidavits. If Apogee fails to meet any of these, it shall inform the Court immediately. The Court may assess penalties at that time. Plaintiffs' motion for contempt will be held in abeyance until further notice.

**II. FROM THIS POINT FORWARD, APOGEE'S PROGRESS SHALL BE SUBJECT TO PUBLIC AS WELL AS JUDICIAL SCRUTINY**

On July 30, 2008, the Court issued a Protective Order protecting confidential information and documents. Doc. 97. In an Order filed the following day, the Court explained that it was not selecting a treatment system or any consultant for Apogee. Doc. 98. Rather, it considered such decisions business decisions, "ultimately up to the company." *Id.* By virtue of the Protective Order and the Court's holding, Apogee was allowed to evaluate treatment technologies and review project proposals in confidence. The Court made clear, however, that once Apogee decided on a treatment technology and retained consultants, its decisions would be subject to public scrutiny. *Id.*

It is now clear, that to meet the Court imposed deadlines Apogee must rely on steel wool or steel foam technology. It has thus made a decision regarding its treatment options. Apogee has also retained MATRIC, CH2M Hill, and GE Water and Process Technologies to work on various components of its treatments system. The purposes of the Protective Order have been achieved, and the remainder of Apogee's work will be open to public as well as judicial scrutiny. The Protective Order (Doc. 97) is **VACATED** as it applies to any future submissions.

Apogee still retains an interest in the confidentiality of documents previously submitted under seal. Each contains cost estimates, potential trade secrets, and other information relevant to the business decision, but not relevant to Apogee's successful compliance with selenium limits by

June 30, 2009. As such, the Defendants' motions to file documents under seal (Docs. 105, 116, 122) are **GRANTED**. Plaintiffs' motion to unseal designated confidential documents (Doc. 101) and partially lift the Protective Order (Doc. 111) are **DENIED**.

### **CONCLUSION**

In summary, Defendant Apogee has been given substantial flexibility to pursue treatment options for meeting selenium effluent limitations as it sees fit. While the Court imposed final compliance deadlines upon Apogee, it has not subjected Apogee to interim benchmarks. It is now evident that Apogee and its consultants must be diligent and efficient in order to achieve compliance by the Court ordered date of June 30, 2009. Additional judicial and public review will be helpful in keeping the Defendant on task. Apogee must comply with the plan it submitted in its Fourth Status Report as required by this Order. Future status reports will no longer be subject to the Protective Order and shall be open for public scrutiny.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: December 8, 2008



ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE