



**Informal Hearing Determination**

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| <b>Company:</b>      | <u>A &amp; G Coal Corporation</u>  | <b>Permit No.:</b> | <u>1102042</u>               |
| <b>Subject:</b>      | <u>Order of Cessation # STJ0007335</u>   |                    | <u>Violation 1 of 1 (OT)</u> |
| <b>Hearing:</b>      | <u>May 16, 2011 @ 10:00 AM</u>   | <b>Location:</b>   | <u>Big Stone Gap Office</u>  |
| <b>Participants:</b> | <u>Mark Wooten and Joe Buchanan of A &amp; G Coal Co., Steve Jaynes (DMLR)</u> |                    |                              |

**Summary of Informal Hearing**

Mr. Buchanan stated that this natural hollow had washed material onto the railroad tracks from a storm event approximately 16 months earlier and had caused a small slip in their haulroad outslope at this same location. He stated that the company had fixed this area and they had not had any problems with the outslope until now. Mr. Buchanan stated that the inspection conducted by Inspector Jaynes on 3/23/11 did not note any problem with this road section. He stated that if it had been slipping, cracking, or having any type of saturation problem that Inspector Jaynes would have noted it in his inspection. He stated that on the next inspection Inspector Jaynes issued a Cessation Order (C. O.) for this section of haulroad. He stated that he disagreed with the issuance of the C.O. He stated that the C.O. required cessation of operations. Mr. Buchanan stated that there was nothing to cease in this area because there were no active mining operations. He stated that they had to bring equipment into the area to perform remedial work. He also disagreed with the description of the violation listed on the C. O. The C.O. stated that *“The berm and outslope of the road leading between work areas on the east end of [the] permit failed and slid off the permit onto the Norfolk Southern Railroad tracks.”* Mr. Buchanan stated that the berm was still present. He stated that the material had moved but grass was still present in this area. He stated that he walked the entire length of the small natural hollow that is approximately 400 feet in length from their haulroad to the railroad tracks and took pictures. He stated that he did not agree with the assumption that the material that had blocked the railroad tracks had come from their permit. Mr. Buchanan stated that the wind from the storm had rooted up trees and had caused trees to block the railroad. He stated that he had a meeting with railroad personnel and had told them that he believed that there were other factors that had caused the blockage of the railroad tracks. Mr. Buchanan stated that the railroad personnel did not agree and they ceased their conservations. Mr. Buchanan stated that he believed that there was not that much earthen material that had flowed onto the railroad tracks. He stated that downed trees probably blocked the railroad more than the material.

Mr. Buchanan submitted 26 pictures that he took after the violation was written. These pictures show areas from the outslope of the haulroad down the small natural hollow to the railroad tracks. These pictures are attached to this informal hearing document and are part of the file. The pictures are numbered from 1 thru 26, with pictures # 1 and # 2 showing the outslope just below the haulroad. Pictures # 3 and # 4 are about half way down the natural hollow.

Pictures # 5, # 8, # 9, # 10, # 13, # 14, # 16, and # 17 are near the bottom of the hollow, close to the railroad tracks. Pictures # 6, # 7, # 11, # 12, # 23, and # 24 show storm damage from wind located in and outside the flow path of the small natural hollow. Picture # 15 shows a slide area from the natural hillside that originated adjacent to the hollow. Pictures # 18, # 19, # 20, and # 21 shows the outslope just below the haulroad after the material had been removed and the area stabilized. Pictures # 22, and # 25 show a “rock toe” that had been placed by the railroad just above the railroad tracks. Picture # 26 shows where the railroad placed the material that washed onto their tracks.

Mr. Buchanan stated that the storm had occurred on April 12. Inspector Jaynes had issued the C.O. on April 13 and a meeting was held on April 14 to decide what to do to stabilize the area. The railroad had asked them to wait until after April 15 to work in this area due to train traffic. He stated that the work to stabilize the outslope below the haulroad berm was completed by April 18 or 19, 2011. Mr. Buchanan stated that prior to stabilizing the outslope, another 2.5 to 3 inch rain event occurred on April 15 and April 16. He stated that the material on the outslope did not move any further downslope. He stated that he did not believe that the rain falling onto the outslope from the April 12 storm caused their material to move because it didn't move during the April 15 and April 16 storm event. He stated that the material below their haulroad berm in this area (looking downslope) was located to the right of the little natural hollow. Mr. Buchanan stated that he believed that the water flow from the natural hollow caused the material on the outslope to slip by erosion/ undercutting of material in the natural drainway. He also stated that the material at the railroad track looked different from the material located on the outslope below their haulroad berm.

Mr. Buchanan was given a copy of a report from Mr. Mike Washburn (Division of Mined Land Reclamation). Mr. Washburn had prepared the report based on a site visit that he made on April 14, 2011. This report is also attached to this informal hearing and is part of the file. After Mr. Buchanan had read the report he asked Inspector Jaynes if Mr. Washburn had walked the entire hollow from the haulroad to the railroad tracks. Inspector Jaynes stated that Mr. Washburn had viewed the area from the top and also viewed the natural hollow from the railroad tracks, but he did not walk the entire natural hollow.

Mr. Wooten stated that not much material had washed out of the hollow onto the railroad tracks. He stated that picture # 16 shows that there was no mud in the drainage way of the hollow and the company had not performed any work in that area. Mr. Wooten stated that water originates in the upper portion of the natural hollow at the cliff line that is about 100 feet below their permit boundary.

Inspector Jaynes stated that Norfolk and Southern called and told him that they had cleaned material and trees off their tracks the previous night (April 12). He stated that the tracks were cleaned prior to his arrival on April 13, 2011. He stated that he saw a lot of trees down from wind damage and there was a good stream of water running out of the hollow. He also stated that the berm had “sat down” and the outside slope of the berm had broken and slipped down slope. Inspector Jaynes stated that he was concerned that additional material would slide down the hill and put railroad personnel in danger. He stated that even though it had been 16 months between slips, the first slip event may have contributed to this last slip event.

Both Inspector Jaynes and Mr. Buchanan agree that material from the outslope of the haulroad had slipped on and off the permit. Both Mr. Buchanan and Inspector Jaynes agreed that not much material (excluding trees) had flowed onto the railroad tracks.

### **Informal Hearing Recommendation**

This informal hearing was closed on May 18, 2011 after reviewing the report from DMLR's Mike Washburn, and upon completion of my review and evaluation of the information included in the C.O., inspection reports, and applicable Virginia Coal Surface Mining Control and Reclamation Laws (VCSMCRL) and Virginia Coal Surface Mining Reclamation Regulations (VCSMRR).

The facts presented at this informal hearing are briefly summarized as follows: A severe storm event occurred on April 12, 2011. The haulroad berm "settled down" and some material placed on the fill portion of the haulroad slid down and off the permit. Most of the material from the road fill that broke loose remained on the upper part of the slope. There were trees and soupy earthen material deposited onto the railroad tracks. Please refer to the inspection report dated 4/13/11 from Inspector Jaynes and the report from Mike Washburn dated 4/15/11 that establishes these facts. Additional facts that must be considered were obtained from the pictures and information presented by the permittee. These facts are as follows: The natural hollow was severely scoured during the storm by heavy rainfall and strong winds. Material from the natural hollow, including trees, washed onto the railroad tracks.

The permittee disagrees that material from their permit slid onto the railroad tracks. The permittee contends that the soupy earthen material on the railroad tracks came from the scouring of the natural hollow and not from the outslope of the haulroad. Based on the evidence submitted at this hearing, that is a reasonable argument. It is also a reasonable argument that the trees blocking the railroad tracks did come from the natural hollow and not from the permit area. I agree with the permittee on both of these issues.

However, the purpose of this informal hearing centered on whether or not the inspector should have issued C.O. # STJ0007335. The question that must be answered is: Did an imminent danger to the health and safety of the public exist? Section 45.1-245 of the Virginia Coal Surface Mining Control and Reclamation Laws (VCSMCRL) and Section 4VAC 25-130-843.11(a)(1) of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR) addresses the issuance of Cessation Orders. In particular, Section 4 VAC 25-130-843.11(a)(1) of VCSMRR states, "*An authorized representative of the Director shall immediately order a cessation of a coal exploration or a surface coal mining and reclamation operation or of the relevant portion thereof, if the representative finds, on the basis of any inspection, any condition or practice, or any violation of the Act, this chapter, or any condition of a permit or an exploration approval imposed under the Act, or this chapter which:*

*(i) Creates an imminent danger to the health or safety of the public."*

The definition of imminent danger to the health or safety of the public is defined at Section 4VAC25-130-700.5 of VCSMRR. It reads "*Imminent danger to the health and safety of the public means the existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which could reasonably be expected to cause substantial physical harm to persons outside the permit area*

*before the condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practice giving rise to the peril, would avoid exposure to the danger during the time necessary for abatement.”*

The definition of imminent danger is clear in its intent to protect members of the public outside the permit area. If an imminent danger existed from the surface coal mining operation; then the issuance of a Cessation Order would be proper and indeed necessary. In order to determine if imminent danger was present, all actual field conditions that existed at the time of the slide must be considered. The permittee had widened an existing haulroad by placing road fill material onto a steep slope. The outslope of this fill material was lying on an extreme steep slope above a railroad. Most of the material in this location had broken loose from the road bed and was in a very unstable condition. Some of the material after breaking loose slid down slope and off the permit area. The area was experiencing heavy rain storms. It is reasonable to conclude, given these conditions, that the haulroad fill material settling and sliding down the slope would soon reach the flow path of the natural hollow. Persons outside the permit area were indeed at risk as a result of the conditions that existed. Therefore, it is my determination that the issuance of a cessation order under these circumstances is warranted and that Section 4 VAC 25-130-843.11(a)(1)(i) be added to the C.O.

The company was cited for being in violation of Section 4 VAC 25-130-816.99 (b). A review of the regulations found at Section 4 VAC 25-130-816.99 (b) makes it clear that the operator must notify the Division any time that a slide occurs that has the potential to adversely affect public property, health, safety, or the environment. There was no information presented at this hearing that the permittee notified the Division. In fact, the Division notified the permittee. It is my determination that the permittee was in violation of this section. It is my recommendation that the C.O. be modified to include Section 4 VAC 25-130-843.11(a)(1)(i) also as stated above.

The C.O. states that the outslope of the road failed and slid off the permit onto the Norfolk Southern Railroad tracks. It is also my recommendation that the C.O. be modified to state that the road outslope has broken and has slid down a steep outslope and the material is posing an imminent danger to the railroad located below this area.

Informal Hearing Officer: \_\_\_\_\_  
James Lowe

Date: 5/23/11