



**Informal Hearing Determination**

**Company:** Barnette Energy, LLC **Permit No.:** 1101978  
**Subject:** Notice of Violation HNM0003663  
**Conference:** August 9, 2010 10:00 a.m. **Location:** Mine site  
**Participants:** David Barnette (Owner); Heather McDonald-Taylor, Jim Meacham (DMLR)

**Summary of Informal Hearing**

No persons from the public attended this informal hearing.

Mr. Barnette stated that the entire permit boundary for this permit was established using the United States Geological Survey (USGS) Maps. He stated that personnel from Terra Tech Engineering had established the location of the permit markers in the field using the USGS maps and his approved permit map. Mr. Barnette stated that the permit markers were located on the center of the ridge in this area and that Mr. Chris Perry of Terra Tech had told him that he was not to disturb beyond the center of the ridge and he had not. Mr. Barnette also stated that according to Mr. Perry, the USGS maps are not always accurate. He stated that it was his understanding that in this particular area, the USGS maps were incorrect by as much as 160 feet when compared to the actual survey of the area.

Mr. Barnette stated that after the Notice of Violation (N.O.V.) was issued, his company had the area in question surveyed by certified surveyors from Terra Tech. He stated that they had established the stakes that were present in the field.

Mr. Barnette stated that for at least 2 years, the Department of Mines, Minerals, and Energy (DMME) had compared proposed permit boundaries to the information that they (DMME) have. He stated that if a difference existed in the mapping information, DMME always required the permittee to adjust the permit boundary. Mr. Barnette stated that he had not been notified by the DMME that there was a problem with the mapping in this area. He stated that the first time he was notified by DMME that there was a problem with the permit boundary was when he was issued a Cessation Order (C.O.) and this N.O.V.

Mr. Barnette stated that the surveyed markers were basically the location of the outcrop for the coal seam. He stated that his approved plans allow him to take a cut on the hillside that results in a 60 foot highwall. He stated that based on the location of the surveyed markers, no cut could be taken and no coal could be removed.

Mr. Barnette ended his comments by stating that Mr. Perry had some information/maps that he would like to submit and that he would have him to contact this hearings officer. Inspector McDonald-Taylor stated that she had used a hand-held Global Positioning (GPS) unit to locate the area in question. She also stated that the Division of Mined Land Reclamation's (DMLR) Technical Section had also used a more accurate GPS unit to locate the area. Inspector McDonald-Taylor stated that her findings, along with those of the Technical section, agree with where the survey stakes were located.

This Hearing's Officer explained that this informal hearing would not be closed until the information from Mr. Perry was obtained and evaluated, along with the permit plans, maps, and cross sections.

Later this same day, Mr. Chris Perry of Terra Tech Engineering contacted this Hearing's Officer by phone to provide additional information to consider concerning this N.O.V. Mr. Perry stated that he was not able to attend the informal hearing earlier in the day, but he wanted to provide greater detail on the mapping for this area. He stated that he had prepared maps, but that he would discuss his findings by phone in-lieu of submitting the maps.

Mr. Perry stated that the original permit boundaries were not established by survey. He stated that they established the permit boundaries using the USGS maps. He stated that when the permittee approached this particular area, the permittee had contacted him because of their concern that they were mining closer to the top of the ridge than what was shown on his maps. He stated that he traveled to this permit and looked at the area. He stated that he told the operator that the USGS maps were incorrect as to the location of the Hagy coal seam. He stated that the permit was issued to mine the Hagy seam and that the permittee was allowed to take up to a 60 foot cut. Mr. Perry referred to cross section F contained in the approved plans and said that the mining had been conducted in accordance with their approved plans. He stated that the Division should allow the permit map to be corrected. He stated that he knew that the Division would always require the maps to be corrected using State Plane Co-ordinates when an error was observed during a renewal or anniversary review, without enforcement action. Mr. Perry stated that he contacted the DMLR inspector and explained the mapping errors to her. He stated that he was surprised that the Division took enforcement action prior to allowing the maps to be corrected.

Mr. Perry stated that after the N.O.V. was issued, they surveyed the existing permit boundary using USGS mapping information. He stated that the permit boundary was located at approximately the location of the outcrop for the Hagy coal seam. He stated that he did not have aerial mapping of this particular area, but that it was obvious that the mapping was incorrect for this permit. He stated that he compared certain other areas (i.e., Grundy airport) using aerial flight mapping information to the USGS maps. Mr. Perry stated that he determined that in the areas that he evaluated, the USGS maps were as much as 160 feet off horizontally when compared to the more accurate aerial mapping. He stated that he prepared maps of the areas he evaluated as examples to show the difference in the location of features on the ground using aerial flight photography mapping compared to USGS mapping information.

## Informal Hearing Recommendation

This informal hearing was closed on August 12, 2010 after obtaining comments from Terra Tech, DMLR's Permit Supervisor, DMLR's Mapping Supervisor, and upon completion of my review and evaluation of the information included in the N.O.V., inspection reports, cross section and permit plans, maps, and applicable Virginia Coal Surface Mining Control and Reclamation Laws (VCSMCRL) and Virginia Coal Surface Mining Reclamation Regulations (VCSMRR).

The issue that must be decided is whether or not the permittee was in violation of mining outside his approved permit. The permittee argues that there is no violation because he obtained a valid permit to mine the Hagy coal seam in the area covered by the N.O.V. He further argues that he mined the area in accordance to his approved plans and there was no intent to mine any area contrary to those approved plans. He insisted that the Division should have allowed the permit map to be adjusted without enforcement action since the original maps were developed based on the information contained in the USGS maps.

A review of the permit plans and cross sections confirm that the permittee was allowed to mine the Hagy coal seam. The approved cross sections and operation plans are consistent with the actual mining cut that was taken pursuant to creating a 60 foot highwall prior to backfilling. These facts, in and by themselves, do support the actions of the permittee.

However, the question of whether or not the permittee exceeded his permit boundary must be examined in detail. In doing so, one must refer to the Virginia laws and regulations to determine how permit areas are to be governed. Section 4 VAC 25-130-773.17(a) of VCSMRR contains the requirement that the permittee shall conduct surface coal mining and reclamation operations **only on those lands** that are specifically **designated as the permit area on the maps submitted with the application and authorized for the term of the permit**. The definition of a permit area is further clarified in Section 45.1-229 of the VCSMCRL and at Section 4 VAC 25-130-700.5 of the VCSMRR. Both sections make it clear that the area of land indicated on the approved application map submitted by the permittee is the area of land upon which the permittee intends to conduct surface coal mining and reclamation operations. The approved permitted area is the area for which all the mining operation plans and cross sections apply. This is also the area to be covered by the permittee's performance bond. The Virginia laws and regulations mirror the intent of federal regulation. In fact, the pre-amble to the **FEDERAL REGISTER** contained at **48 FR 44344** dated **September 28, 1983** states for:

### *SECTION 773.17(a)*

*Section 773.17(a), which is the same as previous Sec. 786.27(c) with appropriate changes in citations, **limits surface coal mining and reclamation operations to approved and bonded areas shown on the permit application map.***

*... this section... was adopted as proposed.[emphasis added]*

These regulations make it clear that the permit area is the area that has been established by the permittee and approved by the Division. A review of the mapping information shows

that the existing southern permit boundary above the watershed for pond #11 does not go to the top of the ridge. In fact, the approved permit boundary is approximately 100 to 140 feet below the top of the ridge. The area determined to be outside the approved permit boundary was 1.7 acres. **It is established that the permittee exceeded the approved permit boundary.**

With these regulation requirements in place, can any consideration be given to less accurate USGS mapping? As stated by the permittee in this informal hearing, there is no question that the mapping information for this area contained on the USGS maps was incorrect as to the actual location of the Hagy coal seam. The permittee points out that the note on the USGS maps state that the information contained on the maps can be in error by 40 feet horizontally and 20 feet vertically. The permittee also provided information that certain areas that he evaluated based on comparisons with the more accurate aerial photography maps were off as much as 160 horizontally. Incorrect mapping is an issue that must be handled consistently. The Division's Permit supervisor and Mapping supervisor were contacted to obtain information concerning how maps are reviewed and how errors are corrected. According to this information, it is the Division's procedure to compare the application map with the information contained in the Virginia Base Map Program ("VBMP"). This program contains high-resolution digital orthophotography, digital terrain models, and ancillary data. If a difference is observed between the proposed application map and the more accurate VBMP information, a comment is issued to the applicant to correct the proposed map. However, in addition to requiring the applicant to correct the map, a comment is also made to the inspector along with a map that shows the discrepancy. Upon receipt of this information, it is the responsibility of the enforcement inspector to take the appropriate enforcement action. The appropriate action may be to ensure that the maps are revised to permit the disturbed areas for non-coal removal areas. However, for unreclaimed coal removal areas outside approved permit boundaries, the Division has been issuing C.O.s and N.O.V.s that require the permittee to cease mining on those areas until a permit application has been approved. Reviews of Division records confirm that the Division has been consistent in taking enforcement actions to address these situations.

In summary, it is the responsibility of the permittee to establish his permit boundary as accurately as possible. The permittee, in this case, failed to do so. The permittee was in violation of 4 VAC 25-130-773.17(a) by conducting mining operations for coal removal on areas outside the approved permit boundary. The permittee should have submitted a revision to DMLR as allowed by Section 4 VAC 25-130-774.13 to include the area of the Hagy coal seam prior to conducting mining activities in the area. The permittee is correct in that he was permitted to mine the Hagy coal seam. However, he was only allowed to mine the Hagy seam in those areas for which he had obtained a valid permit. He had not obtained a permit for the area that is the subject of this informal hearing. . Therefore, it is my finding that the permittee had exceeded his permit boundary and that a violation did exist in the area referenced by N.O.V. # HNM0003663. It is my recommendation that the N.O.V. be affirmed as written.

Conference Officer: \_\_\_\_\_  
James Lowe, Conference Officer

Date: 8/16/10