COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
SOUTHWEST REGIONAL OFFICE

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO BARNETTE ENERGY, LLC

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 62.1-44.15 (8a) and (8d), between the State Water Control Board and Barnette Energy, LLC for the purpose of resolving certain violations of the State Water Control Law and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meanings assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.

2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent Special Order.

6. "Company" means Barnette Energy, LLC, certified to do business in Virginia and its affiliates, partners, subsidiaries and parents.

7. "Facility" means the Company's Mill Creek No. 1 Surface Mine and associated activities, located one mile east of Clinchco, in Dickenson County, Virginia.

8. "SWRO" means the Southwest Regional Office of DEQ, located in Abingdon, Virginia.

9. "Permit" or "VWP Permit" means Virginia Water Protection Permit, either an individual permit or coverage under the VWP General Permit.

10. "Regulations" or "VAC" means Virginia Administrative Code.

11. "USACOE" means U.S. Army Corps of Engineers.

12. "NOV" means Notice of Violation.

SECTION C: Findings of Facts and Conclusions of Law

1. On June 26, 2007, DEQ SWRO staff members were made aware of unauthorized stream impacts that had occurred due to mining activities in an unnamed tributary to Mill Creek, in Dickenson County. This information was received from the Department of Mines, Minerals and Energy's ("DMME"'s) Division of Mined Land Reclamation ("DMLR"), located in Big Stone Gap, Virginia. These impacts were the result of mining operations by Barnette Energy, LLC at the Company's Mill Creek No. 1 Surface Mine.

2. A total of 3,064 linear feet of an intermittent unnamed tributary to Mill Creek had been either permanently or temporarily impacted by the construction of Pond No. 3 (a temporary instream impoundment, construction of which began August 10, 2006), and later by construction of Pond No. 2 (another temporary instream impoundment) and Landform Fill No. 1 (placement of permanent fill within the stream channel). These impacts occurred at the Company's Mill Creek No. 1 Surface Mine.

3. Surface water monitoring at the site, conducted since 1997 as a requirement of a DMLR permit, indicates that the unnamed tributary is a USACOE jurisdictional area.

4. Although the Company had submitted an application to the USACOE for authorization to both impound and place permanent fill within jurisdictional waters of the U.S., no authorization had been given. These impacts, as described in Item C.2 above, were not authorized by a USACOE Nationwide No. 21 Permit. Without Federal Section 404 authorization, Virginia Section 401 water quality certification is not waived, and coverage under the Virginia Water Protection ("VWP") permit program is required. No VWP permit had been issued for the impacts described.

5. The State Water Control Law, at § 62.1-44.5, states "Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions".

6. Regulation 9 VAC 25-210-50, states "Except in compliance with a VWP permit, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical or biological properties of surface waters, excavate in wetlands, or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions".

7. The State Water Control Law addresses Virginia Water Protection Permits, stating at § 62.1-44.15:20. Virginia water protection permit. A. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.

8. By impacting 3,064 linear feet of stream by both impounding and filling without authorization under an individual VWP Permit, the Company has violated the statutory and regulatory provisions cited in paragraphs C. 5, 6 and 7 above.

9. DEQ staff met with Company officials and DMLR staff August 2, 2007 to resolve these issues. NOV No. NOV-018-0807-WA was issued to the Company August 23, 2007 for violating the statutory and regulatory provisions cited in paragraphs C 5, 6 and 7 above.

10. DEQ received submittal of an "Aquatic Resources Mitigation Plan" from a consultant, on behalf of the Company, on September 21, 2007. This mitigation plan is being reviewed by DEQ Staff.

SECTION D: Agreement and Order

By virtue of the authority granted it pursuant to Va. Code § 62.1-44.15 and upon consideration of Va. Code § 10.1-1186.2, the State Water Control Board orders the Company, and the Company agrees, to perform the actions described below and in Appendices A and B of this Order. In addition, the Board orders the Company, and the Company voluntarily agrees, to a civil charge of $19,880.00 in settlement of the violations cited in this Order, to be paid as follows:

1. The Company shall pay $1,988.00 of the civil charge within 30 days of the effective date of this Order. Payment shall be made by check or money order payable to the "Treasurer of Virginia", and delivered to:

   Receipts Control
   Department of Environmental Quality
   Post Office Box 1104
   Richmond, Virginia 23218

   The payment shall include Barnette Energy, LLC's Federal Identification Number and shall identify that payment is being made pursuant to this Order.

2. The Company shall satisfy $17,892.00 of the civil charge by satisfactorily completing the Supplemental Environmental Project ("SEP") described in Appendix B of this Order.

3. The net project cost of the SEP to the Company shall not be less than the amount set forth in Paragraph D.2. If it is, the Company shall pay the remaining amount in accordance with Paragraph D.1 of this Order, unless otherwise agreed to by the Department. "Net project costs" means the net present after-tax cost of the SEP, including tax savings, grants and first-year operating cost reductions or other efficiencies realized by virtue of project implementation. If the proposed SEP is for a project for which the party will receive an identifiable tax savings, grants, or first-year operations cost reductions or other efficiencies, the net project cost shall be reduced by those amounts. The costs of those portions of SEPs that are funded by state or federal low-interest loans, contracts, or grants shall be deducted.

4. By signing this Order the Company certifies that it has not commenced performance of the SEP before DEQ identified the violations in this Order and approved the SEP.

5. The Company acknowledges that it is solely responsible for completing the SEP project. Any transfer of funds, tasks, or otherwise by the Company to a third party, shall not relieve the Company of its responsibility to complete the SEP as described in this Order.

6. In the event it publicizes the SEP or the SEP results, the Company shall state in a prominent manner that the project is part of a settlement for an enforcement action.

7. The Department has the sole discretion to:
   a. Authorize any alternate SEP proposed by the Company; and
   b. Determine whether the SEP, or alternate SEP, has been completed in a satisfactory manner.

8. Should the Department determine that the Company has not completed the SEP, or alternate SEP, in a satisfactory manner, the Department shall so notify the Company in writing. Within 30 days of being notified, the Company shall pay the amount specified in Paragraph D.2., above, as provided in Paragraph D.1., above.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of the Company, for good cause shown by the Company or on its own motion after notice and opportunity to be heard.

2. This Order addresses only those violations specifically identified herein. This Order shall not preclude the Board or Director from taking any action authorized by law, including, but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Facility as may be authorized by law; and/or (3) taking subsequent action to enforce the terms of this Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, the Company admits the jurisdictional allegations contained herein. The Company neither admits nor denies the factual findings and conclusions of law contained herein.

4. The Company consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. The Company declares it has received fair and due process under the Administrative Process Act, Code § 2.2-4000 *et seq.*, and the State Water Control Law, and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by the Company to comply with any of the terms of this Order shall constitute a violation of an Order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. The Company shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other act of God, war, strike, or such other occurrence. The Company must show that such circumstances resulting in noncompliance were beyond its control and not due to a lack of good faith or diligence on its part. The Company shall notify the Director of the SWRO in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of this Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;
   b. the projected duration of such delay or noncompliance;
   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

   Failure to notify by phone the Director of the SWRO within 24 hours of learning of any condition listed above, which the Company intends to assert will result in the impossibility of compliance, shall constitute waiver of any claim of inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees, and assigns, jointly and severally.

10. Any plans, reports, schedules or specifications attached hereto or submitted by the Company and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

11. This Order shall become effective upon execution by both the Director or his designee and the Company. Notwithstanding the foregoing, the Company agrees to be bound by any compliance date which precedes the effective date of this Order.

12. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to the Company. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the Company from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

13. The undersigned representative of the Company certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind the Company to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of the Company.

14. By its signature below, the Company voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 11th day of April, 2008.

Dallas R. Sizemore, Regional Director
Department of Environmental Quality

Barnette Energy, LLC voluntarily agrees to the issuance of this Order.

Name: _____
Mr. W. David Barnette

Title: President
President

Date: 11-2-07

State of Virginia

City/County of Wise

The foregoing instrument was acknowledged before me this 2 day of November, 2007, by W. David Barnette, who is President of Barnette Energy, LLC on behalf of Barnette Energy, LLC.

Timothy R. Bolling
Notary Public

My commission expires: 2-28-2010

TIMOTHY R. BOLLING
Notary Public
Commonwealth of Virginia
7020224
My Commission Expires Feb 28, 2010

APPENDIX A

In order to comply with the provisions of the State Water Control Law and Regulations, the Company agrees to implement the following actions by the dates noted below:

1. The Company shall report to the SWRO any unauthorized discharges or unusual or extraordinary discharges, or any noncompliance which may adversely affect state waters or may endanger public health immediately upon discovery (within 24 hours).

2. The Company shall maintain temporary control structures (Ponds No. 2 and 3, both temporary instream impoundments) until completion of mining activities and implementation of the mitigation plan requires removal.

3. A mitigation plan has been submitted, but not yet approved. Approval of the mitigation plan shall be obtained prior to any additional construction activities in impact areas, identified as "Intermittent Stream to be Affected" by the Environmental Resource Map, Sheet 2 of 4 dated 06-06, Appendix D, Item B of the mitigation plan. The mitigation plan shall include a schedule for implementation and completion of all mitigation activities. Upon approval, the mitigation plan will become an enforceable part of this Order. The Company shall respond to DEQ comments in a timely manner, including submittal of a schedule for implementation and completion of all mitigation activities, and secure approval of the mitigation plan on or before **December 15, 2007.**

4. The Company shall submit quarterly reports detailing progress and present status of all requirements of the mitigation plan. The first report will be due **January 10, 2008**, with subsequent reports due **April 10**, **July 10** and **October 10** of each year, until completion of the mitigation plan is achieved.

5. All reports to be submitted to the SWRO shall be mailed to the attention of Ruby Scott, Compliance Auditor, P. O. Box 1688, Abingdon, VA 24212.

APPENDIX B

The Company shall perform the SEP identified below in the manner specified in this Appendix.

1. The SEP to be performed by the Company is to provide financial assistance to the Dickenson County Public Service Authority for construction of small, decentralized sewer systems in the Buffalo Creek area, which would eliminate a number of "straight pipe" and cesspool discharges of untreated sewage to state waters. The Company shall deliver to the Dickenson County Public Service Authority a check or money order made payable to the Dickenson County Public Service Authority in the amount of $17,892.00.

2. The SEP payment, as identified in Item 1 above, shall be paid within 30 days of the effective date of the Order.

3. Within 10 days of making the SEP payment to the Dickenson County Public Service Authority, the Company shall submit documentation to DEQ confirming that the payment has been made.

4. The Company shall submit a written final report on the SEP, verifying that the SEP has been completed in accordance with the terms of this Order, and certified either by a Certified Public Accountant or by a responsible corporate officer or owner. The Company shall submit the final report and certification to the Department within 270 days of the effective date of the Order.

5. If the SEP has not or cannot be completed as described in the Order, the Company shall notify DEQ in writing no later than 30 days from the effective date of the Order. Such notification shall include:
   a.) an alternate SEP proposal, or
   b.) payment of the amount specified in Paragraph D.2. as described in Paragraph D.1.

6. The Company hereby consents to reasonable access by DEQ or its staff to property or documents under the Company's control, for verifying progress or completion of the SEP.

7. Documents to be submitted to the Department, other than the civil charge payment described in Section D of the Order, shall be sent to: Ruby Scott, Dept. of Environmental Quality, Southwest Regional Office, P. O. Box 1688, Abingdon, VA 24212.