

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**RANDY HUFFMAN,  
Secretary, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellant/Cross-Appellee,**

v.

**Appeal No. 34138  
Kanawha County Circuit Court  
Civil Appeal No. 07-AA-27  
Judge Louis H. Bloom**

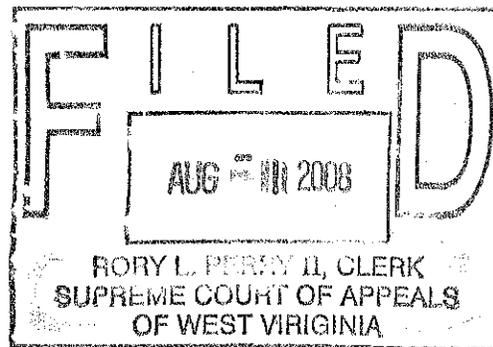
**GOALS COAL COMPANY,**

**Appellee,**

and

**COAL RIVER MOUNTAIN WATCH,**

**Appellee/Cross-Appellant.**



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**RESPONSE TO APPELLANT'S BRIEF**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING .....</b>	<b>1</b>
<b>II.</b>	<b>STATEMENT OF FACTS.....</b>	<b>4</b>
<b>III.</b>	<b>RESPONSE TO ASSIGNMENT OF ERROR.....</b>	<b>6</b>
<b>IV.</b>	<b>POINTS AND AUTHORITIES.....</b>	<b>6</b>
<b>V.</b>	<b>DISCUSSION OF LAW.....</b>	<b>8</b>
<b>A.</b>	<b>The Mine Site Marker Is An Integral Part Of The 1982 Map.....</b>	<b>8</b>
<b>B.</b>	<b>The Law Contemplates And Allows The Use Of Markers And Maps To Discern Permit Boundaries.....</b>	<b>10</b>
<b>1.</b>	<b>Current State Law. ....</b>	<b>10</b>
<b>2.</b>	<b>The Law In Effect In 1982--When The Boundary Was Established.....</b>	<b>12</b>
<b>3.</b>	<b>Common Law Principles Are Applicable To Questions of Statutory Interpretation .....</b>	<b>14</b>
<b>C.</b>	<b>CRMW Never Proved That The Proposed Silo Was Outside The 1982 Permit Boundary Or The Boundary Of The Approved Revision.....</b>	<b>15</b>
<b>D.</b>	<b>Miscellaneous Misconstruction By CRMW.....</b>	<b>16</b>
<b>1.</b>	<b>Role Of Federal Regulations.....</b>	<b>16</b>
<b>2.</b>	<b>Whether The CRMW's Approach Is Also "Consistent" With State Law Is Irrelevant.....</b>	<b>19</b>
<b>E.</b>	<b>CRMW's Arguments Fail From A Policy Perspective As Well .....</b>	<b>21</b>
<b>VI.</b>	<b>RELIEF PRAYED FOR.....</b>	<b>22</b>

## I. KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

### A. Introduction

Appellant Coal River Mountain Watch ("CRMW") seeks to overturn a decision of Judge Bloom of the Circuit Court of Kanawha County. That order in turn affirmed decisions below by both the State Surface Mine Board ("SMB") and the West Virginia Department of Environmental Protection ("WVDEP"). The decisions of those two agencies provided that a surface mining permit modification sought by Goals Coal Company ("Goals"), a UMWA-represented operation, properly demonstrated that a proposed coal silo was inside the original mining permit boundary.

The facts of this case generally are not in dispute; rather, the resolution of the appeal involves disputed interpretations of the State surface mining law administered by WVDEP. CRMW continues to pursue its strained construction of the law (that permit boundaries must be determined from unsurveyed lines hand drawn on a 25-year-old map with disregard to the boundary markers identified and relied upon in the map) for one reason—to reject the unanimous conclusions by the WVDEP, the SMB and the Circuit Court of Kanawha County that the western boundary of Surface Mine Permit D-66-82 is defined by an "end-of-mine-site marker" that was depicted in Goals' original 1982 permit map.

Their conclusions are important ones. If the proposed coal silo is inside the original permit boundary, then, as the SMB and the Circuit Court ruled, it is part of an "existing operation" exempted from a statutory prohibition on new operations within 300 feet of certain structures. *See* W.Va. Code § 22-3-22(d).<sup>1</sup> However, if it is outside the 1982 permit boundary,

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<sup>1</sup> CRMW has appealed only the issue of the permit boundary location. The Circuit Court's ruling that the coal silo is part of an "existing operation" exempted from the distance prohibitions of the State Surface Mining Act was not appealed by any party.

then Goals might not qualify for such an exemption, and may not be able to construct a silo that indisputably controls dust better than the historic open coal stockpiling used at this site.

## **B. Proceedings Below**

In 2005, the WVDEP approved a revision (Revision 8) to an existing surface mining permit held by Goals. Revision 8 authorized Goals to construct the second of two coal storage silos (Silo No. 2). The existing underlying permit already authorized Goals to construct and operate an UMWA-represented coal preparation and train loading facility in Raleigh County. The facility has been operated since the mid-1970s and obtained its initial surface mining permit in 1982.

The original 1982 permit included a map which delineated the unsurveyed "permit boundary" on a standard United States Geological Survey ("USGS") map. The unsurveyed permit boundaries were hand drawn and were intended to enclose the area in which mining operations were already taking place. The western edge of that hand-drawn boundary was delineated with a marker installed in the ground and identified on the 1982 map as an "end-of-mine-site marker." *See* Appendix A (copy of relevant portions of 1982 map).

In its application for the 2005 permit revision, Goals sought authority to construct the second of two coal silos inside the original 1982 permit boundary. The map that Goals relied upon in the 2005 application, however, was based on a different underlying or "base" map than was the original 1982 permit map, and neither identified nor relied upon the 1982 "end-of-mine-site marker" to delineate the western permit boundary in the location of the proposed coal silo.<sup>2</sup>

WVDEP initially approved the 2005 revision, but subsequently rescinded it when it determined that the 2005 maps did not sufficiently demonstrate that the proposed silo was inside the original 1982 permit boundary. Goals appealed the case to the SMB, and the CRMW

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<sup>2</sup> When Goals submitted the 2005 Revision 8 map, its employees no longer knew where the original 1982 end-of-mine-site marker was located because none of the 2005 employees were there when the original map was prepared in 1982 and because vegetation had entirely obscured the marker. SMB I, Tr., p. 103.

intervened to support the permit rescission. *See Goals Coal Co. v. WVDEP*, SMB No. 2005-23 (hearing conducted March 14-15, 2005) (“SMB I”).

After a *de novo* evidentiary hearing, by order—dated May 15, 2006, the SMB affirmed WVDEP’s rescission decision on the grounds that various maps submitted by Goals and its predecessors after the original 1982 permit were confusing and did not clearly demonstrate that the second silo was inside the permit boundary. SMB I Order, ¶7 (March 15, 2006).<sup>3</sup> The SMB’s order noted, however, that after WVDEP’s rescission, the parties had rediscovered the location of the 1982 “end-of-mine-site marker” and that this discovery was “significant.” SMB I order, ¶10. Accordingly, the SMB ordered Goals to submit a new map accurately locating the western boundary of the permit, to propose the installation of additional permit markers to signify the boundary, and ordered WVDEP to consider the location of the 1982 end-of-mine-site marker in reviewing the new map. *Id.*

Goals submitted the revised map required by the SMB as part of a new revision application to construct the silo. This revision (Revision No. 9) relied on the 1982 “end-of-mine-site marker” to establish the western permit boundary and demonstrated that the silo would fall inside the boundary. By Order of August 11, 2006, the WVDEP determined that Silo No. 2 was inside the original permit boundary, but denied Revision No. 9 based on a determination that it did not qualify for the “existing operations” exemption from location standards imposed on mines under W.Va. Code § 22-3-22(d).<sup>4</sup> Goals appealed the denial to the SMB. Petitioner, the CRMW, then initiated its

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<sup>3</sup> The SMB I order is attached as Appendix B to Goals’ Resp. in Opposition to WVDEP’s Br. of May 3, 2007 filed before the Circuit Court (June 4, 2007). That brief and its appendices organize the relevant exhibits, testimony and orders of the SMB and can be provided to this Court upon request.

<sup>4</sup> A copy of WVDEP’s order that triggered this case is attached as Appendix H to Goals’ Resp. in Opp. to WVDEP’s Br. of May 3, 2007 below.

own appeal to the SMB. Its appeal was limited to WVDEP's determination that the proposed silo fell inside the original permit boundary.

The SMB conducted a second *de novo* evidentiary hearing. *CRMW v. WVDEP*, SMB Nos. 2006-15 & -16 (hearing Nov. 14, 2006) ("SMB II"). By Order dated March 13, 2007, the SMB determined that: a) Revision 9 properly located and represented the original 1982 permit boundary; b) proposed Silo No. 2 fit inside that original boundary; and c) the revision qualified for the existing operations exemption. SMB II Order.<sup>5</sup> WVDEP appealed the SMB's "existing operations" exemption ruling to the Circuit Court of Kanawha County. CRMW appealed the mapping issue.

By order and opinion of September 25, 2007, Judge Bloom of that Court affirmed the SMB's decision both: a) as to the location of the permit boundary and the proposed silo; and b) as to the "existing operations" exemption. *See* Petitioners' Docketing Statement, Exhibit A. CRMW subsequently filed a petition for appeal to this Court on the mapping issue alone. On May 21, 2008, the Court granted CRMW's petition for appeal. CRMW filed its brief on June 30, 2008, which Goals Coal Co. received on July 2, 2008.

## II. STATEMENT OF FACTS

The Goals Coal Company facility dates back to 1974, when no surface mining permit was required.<sup>6</sup> Surface mining permits under the federally-approved state surface mining

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<sup>5</sup> A copy of the SMB II order is attached as Appendix A to Goals' Resp. in Opp. to WVDEP below. There were two SMB appeals heard in this matter: Case No. 2005-23 (March 14-15, 2005) ("SMB I") and Nos. 2006-15 & -16 (November 14, 2006) ("SMB II"). The second group of appeals (Nos. 06-15 & -16) included an appeal by the Coal River Mountain Watch on the boundary location issue. The appeal to this Court is from the second group of appeals. The SMB, however, adopted the transcript from the first group of appeals into the record of the second set—so both transcripts and sets of exhibits are part of the record before this Court. Citations to the SMB record or transcripts in this brief use the labels "SMB I" and "SMB II," respectively. The transcripts in the two SMB appeals were included as Appendices C and D in Goals' Resp. in Opp. to WVDEP below.

<sup>6</sup> *See* SMB I 3/14/06 Tr., p. 41.

program were not required for this type of facility until the early 1980s.<sup>7</sup> WVDEP issued the first surface mining permit for this site to Armco, a predecessor of Goal at the site, in 1982—after the facility had operated for 6 or 7 years. The boundaries of that initial permit were depicted on what is called a “proposal/drainage” map submitted by Armco to WVDEP in 1982. (Copy of relevant portions attached hereto as Appendix A.)

CRMW continues to argue that there are two separate and divisible components of the 1982 proposal/drainage permit map originally submitted by Armco: (1) the yellow “permit area,” and (2) a separate “end-of-mine-site marker” noted on the map as defining the edge of the yellow permit area. CRMW argues that the WVDEP, the SMB and the Circuit Court were required to discern precisely where the yellow permit area sits on the ground **without regard** to the on-site location of the marker expressly identified in that map as anchoring the western permit boundary. According to CRMW, when this is done, the proposed coal silo is outside the permit boundary.

CRMW’s argument fails on four levels. First, the “permit area” delineated on the original 1982 map cannot be, and from a practical and mapping matter should not be, divorced from the “end-of-mine-site marker.” Second, the current law contemplates that such markers will be used as an integral part of depicting the permit boundary on maps. Third, the law in existence when the map was submitted and approved even more clearly noted the importance of the mine site marker in delineating the exact spot of the permit boundary. And fourth, even without the end-of-mine-site marker, the CRMW failed to carry its burden of proof before the SMB and the Circuit Court to prove that the proposed silo is outside the boundary.<sup>8</sup>

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<sup>7</sup> *Id.* at pp. 22-23 (WVDEP’s counsel), and p. 42 (Mr. Waller).

<sup>8</sup> Additionally, CRMW has never had standing to pursue any of the appeals in this action. CRMW does **not** represent the interests of **any** schoolchildren at Marsh Fork Elementary School in this case. Indeed, it likely did not have standing even to advance an appeal before this Court—and for this reason alone its appeal should be dismissed. The sole witness called by CRMW in either of the two SMB appeals below is not the parent or guardian of any student. Rather, she is the grandmother of a single student, who conceded that a “large number of teachers and parents disagree with [her].” See SMB I 3/14/06 Tr., pp. 98-102 (Ms. Jarrell) (App. C to Goals’ opening brief

Some other important and uncontradicted facts, as documented in the record developed below, are that Goals constructed a similar coal silo in 2003 closer to a nearby school than the proposed coal silo at issue in this case which no one complained about in the hearings below; that enclosed silos such as those at Goals provide better dust control than the open stockpiles and loading facilities they replace; and that USEPA conducted unannounced dust monitoring while an entire train was loaded through the existing silo and concluded that the use of the original silo caused absolutely no increase in dust concentrations over ambient levels.<sup>9</sup>

### III. RESPONSE TO ASSIGNMENT OF ERROR

THE CIRCUIT COURT WAS CORRECT IN ITS FINDING THAT THE END-OF-MINE-SITE MARKER IS AN INTEGRAL PART OF THE ORIGINAL PERMIT MAP AND THAT THE MAP AND MARKER CANNOT BE DIVORCED FROM ONE ANOTHER.

### IV. POINTS AND AUTHORITIES

#### CASES

<i>American Canoe Ass'n v. Murphy Farms, Inc.</i> .....	6
326 F.3d 505 (4 <sup>th</sup> Cir. 2003)	
<i>Appalachian Power Co. v. State Tax Dept. of West Virginia</i> .....	20
195 W.Va. 573 (1995)	
<i>Auer v. Robbins</i> .....	19
519 U.S. 452 (1997)	
<i>Bragg v. West Virginia Coal Ass'n</i> .....	17
248 F.3d 275 (4 <sup>th</sup> Cir. 2001)	

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before the SMB). She likewise claimed no injury to herself from the permit activities. Having no standing herself, she could not confer standing on CRMW. See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (parent who is not legal guardian of child had no standing to challenge required pledge of allegiance in public school). A court has an obligation to dismiss a case for lack of standing at any stage in a proceeding. See generally *Zurich Ins. Co. v. Lugitrans, Inc.*, 297 F.3d 528, 536 (6<sup>th</sup> Cir. 2002) (lack of standing claim may be raised at any time and cannot be waived). See also *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4<sup>th</sup> Cir. 2003) (organization has standing to sue on behalf of members only when its members would otherwise have standing to sue in their own right).

<sup>9</sup> SMB I Tr., p. 69 (T. Waller); SMB II, Goals Ex. 7 (existing open stockpiles produce more dust than silos); SMB II Tr., p. 14 (McCombs); SMB II, Goals Ex. 11, pp. 8 & 12 (USEPA Report) & Goals Ex. 7 (internal WVDEP report).

<i>Chevron U.S.A., Inc. v. NRDC</i> .....	19
467 U.S. 837, 842-43 (1989)	
<i>Clonch v. Tabit</i> .....	14, 15
12 S.E. 2d 521 (W. Va. 1940)	
<i>Elk Grove Unified School District v. Newdow</i> .....	6
542 U.S. 1 (2004)	
<i>Kentuckians for the Commonwealth v. Rivenburgh</i> .....	19
317 F.3d 425 (4 <sup>th</sup> Cir. 2003)	
<i>Lincoln County Board of Education v. Adkins</i> .....	20
188 W.Va. 430 (1992)	
<i>Matheny v. Allen</i> .....	14
63 W.Va. 443 (1907)	
<i>Merchants Bank and Trust Co. v. Peoples Bank</i> .....	14
99 W.Va. 544 (1925)	
<i>Pauley v. BethEnergy Mines</i> .....	20
501 U.S. 680 (1991)	
<i>Scheidler v. National Organization for Women, Inc.</i> .....	14
537 U.S. 393 (2003)	
<i>State by Davis v. Hix</i> .....	20
141 W.Va. 385, 389 (1955)	
<i>Taylor-Hurley v. Mingo County Bd. of Educ.</i> .....	19
209 W.Va. 780, 787 (2001)	
<i>Thomas v. State Bd. of Health</i> .....	19
79 S.E. 725 (W. Va. 1913)	
<i>Vandetta v. Yanero</i> .....	14
157 W.Va. 220, 223 (1973)	
<i>Zurich Ins. Co. v. Lugitrans, Inc.</i> ,.....	6
297 F.3d 528 (6 <sup>th</sup> Cir. 2002)	
<b>STATUTES</b>	
30 U.S.C. § 1271.....	17
30 U.S.C. § 1291.....	11

W. Va. Code § 22-3-1, *et seq.*.....12

W. Va. Code § 22-3-3(q) .....11, 12, 14

W. Va. Code § 29A-5-4 .....15

W. Va. Code § 20-6-3 .....12

**REGULATIONS**

WVCSR 20-6-3C.01 .....13

WVCSR 20-6-3C.02 .....13

WVCSR 20-6A-6A.01.c2 .....13

WVCSR 20-6A-6A.01.c5 .....13

WVCSR 20-6A-6B.01.b .....13

WVCSR 38-2-14.1(b).....11

**FEDERAL REGISTER**

46 Fed. Reg. 5954 (Jan. 21, 1981).....12

44 Fed. Reg. 14,902 (Mar. 13, 1979).....18

**V. DISCUSSION OF LAW**

**A. The Mine Site Marker is an Integral Part of the 1982 Map.**

Clarence Waller, a surveyor and registered professional engineer who worked for Armco and then Peabody at the current Goals plant from 1974 through 1993, prepared the original map for the initial surface mining permit first required in 1982.<sup>10</sup> The mine site was already disturbed and in operation. Because the site pre-dated the current surface mining laws, Mr. Waller was seeking to depict already disturbed and currently used areas to include within the new permit so that they could continue to be used after implementation of the new permitting law. *Id.* at 45-46.

<sup>10</sup> See SMB I 3/14/06 Tr., pp. 39-43. Mr. Waller is not a Goals employee. He is an employee of an unrelated coal company that previously operated the facility and was subpoenaed to the hearing.

At the time Mr. Waller prepared the 1982 map, he had already installed the mine site marker noted as defining the western edge of the permit area.<sup>11</sup> When the map was created, neither the location of the marker nor any other part of the permit boundary had been surveyed.<sup>12</sup> Rather, the yellow area depicting the boundary and the location of the “end of mine site” were simply hand drawn by Mr. Waller in his office on a USGS topographic map—what he called a “picture map.”<sup>13</sup> That line was intended to be only a sketch of a boundary that was already anchored and marked by a pipe that he installed in 1982 for the express purpose of marking the extent of the already existing mine facility, and the pipe remains in the same place today—of this there is no dispute.<sup>14</sup>

Because the boundary on the 1982 map is only a sketch, because it does not connect surveyed points, and because of inaccuracies inherent in the underlying USGS topographic map on which it was drawn,<sup>15</sup> a person could not use the sketched line alone to paint an accurate line on the ground along the “mapped” boundary—except by locating the “end of mine site marker.”<sup>16</sup> In recognition of this fact, Mr. Waller first marked the edge of the on-going mining operation by installing a marker in the ground, and then he sketched the location of the marker and permit boundary on the map.

Thus, the only point along that sketched boundary that can be objectively located with precision on the ground using only the 1982 map is the mine site marker installed by Mr.

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<sup>11</sup> *Id.* at 45-46.

<sup>12</sup> *Id.* at 47 & 49.

<sup>13</sup> *Id.* at 45 & 48.

<sup>14</sup> *Id.* at 44-46, 99-96.

<sup>15</sup> The published USGS topographic “base” maps for this area in 1982 that the regulations required applicant to use were poor in terms of accuracy. *Id.* at 47 (Mr. Waller).

<sup>16</sup> *Id.* at 95-96. One can more easily understand this by looking at the 1982 map, attached as Appendix A. If one was to randomly draw a line that does not connect in-ground monuments or other objectively locatable objects, there would be no way for a person on the ground to duplicate that line.

Waller in 1982 and which he expressly identified and relied upon in drawing the map. The reliance on the location of such markers is also consistent with standard surveying practices.<sup>17</sup>

**That marker is not divisible from the map; rather, it existed first and is an integral part of it.**

For that reason, WVDEP historically and reasonably used the “end-of-mine-site marker” as the permit boundary,<sup>18</sup> the propriety of which was confirmed by both the SMB and Circuit Court.

The problem with CRMW’s position is that the end-of-mine-site marker is designated on the map as defining the boundary of the permit. Had there been a marker on the ground which was not identified in and relied upon by the map, and had it clearly been outside an otherwise objectively locatable and precisely mapped boundary, then CRMW’s argument might have some merit. Here, though, neither condition exists: 1) the hand-drawn line cannot be precisely duplicated on ground without reference to the marker because of the inherent imprecision in the base USGS map and because it does not connect surveyed or otherwise objectively locatable features; and 2) the marker is expressly relied upon by the map. Thus, the map does define the permit area as required by any construction of State or federal law, and the Court need not adopt CRMW’s statement and misplaced notion that a map cannot rely on a marker to locate a boundary.

**B. The Law Contemplates and Allows the Use of Markers and Maps to Discern Permit Boundaries.**

**1. Current State Law.**

The definition of “permit area” in the current approved state program contemplates the **integrated** use of maps and markers:

Permit area means that area of land shown on the approved proposed map submitted by the operator as part of the operator’s application **showing the location of perimeter markers and**

<sup>17</sup> *Id.* at 68 (Waller, who is a licensed surveyor). Mr. Waller re-examined the location of the marker in 2006 and verified that it remains today in the same place he installed it in 1982. See SMB I 3/14/07 Tr., pp. 44-49 (history of installation), 57-58 & 94-95 (still in same location).

<sup>18</sup> *Id.* at 64 (Waller).

**monuments** and shall be readily identifiable by appropriate markers on the site.

W. Va. Code § 22-3-3(q).<sup>19</sup> This definition does not, on its face, divorce maps from boundary markers. Rather, it contemplates and allows that they be used together to discern boundaries. This rather obvious fact dispels entirely CRMW's contention that the "plain language" of the State statute compels the Court to ignore the use of on-the-ground markers as part of the map. Indeed, if the statute clearly supported CRMW's construction, it would not take a 33-page brief to explain why that is true.

To bolster its bizarre contention that the original Armco map can be divorced from and "trumps" the end-of-mine-site marker, CRMW cites a modern regulation which provides that "[p]rior to initial disturbance, suitable markers made of durable material shall be established to permanently mark the perimeter of the area under permit."<sup>20</sup> This regulation, according to CRMW, somehow suggests that the perimeter markers are added only after the permit map is approved, but prior to actual mining. *Id.* While this practice is used for some new mines "[p]rior to initial disturbance,"<sup>21</sup> this was neither the practice nor the applicable law for a site such as Goals which was already disturbed before there was any obligation to obtain a surface mining permit.

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<sup>19</sup> The parallel federal provision is worded slightly differently, but even if it had any direct application here (which it does not—see discussion *infra*), it neither provides additional support for nor compels adoption of CRMW's arguments. See 30 U.S.C. § 1291(17) (defining permit area with reference to the "area of land indicated on the approved map . . . identifiable by appropriate markers. . ."). The problem with CRMW's position is that it assumes the 1982 permit boundary can be precisely drawn on the ground today using the 1982 map without referring to or relying on the mine site marker relied upon by the map. Given the inherent imprecision in the underlying USGS map and the absence of surveyed or fixed points on the mapped line (except the marker), this is impossible.

<sup>20</sup> See Appellant's Brief, p. 23 (citing CSR § 38-2-14.1(b) (2006)).

<sup>21</sup> Mr. Waller testified that at new mines, where there is no previous disturbance, **today** one would likely survey the line, depict the surveyed line on a map and mark it on the ground with markers. See SMB I 3/14/06 Tr., p. 50. Effectively, the SMB mandated the same result here. It found in its May 2006 opinion that location of the mine site marker was "significant" and ordered Goals to submit to WVDEP a "corrected map showing the location of the western boundary of the permit" along with a proposal of a system for the placement of multiple permanent boundary markers. See SMB I Order, ¶ 8-10 (included as App. B to Goals' SMB brief). In response, Goals submitted a map with a surveyed boundary anchored by the original 1982 mine site marker. See SMB II Certified Record, pp. 126-27 (letter) & 146 (map); 104-126 (letter).

In fact, the practice was reversed at locations which were disturbed and operated before permits, permit boundaries or permit maps were required, like the Goals' facility. The edge of the mine as it actually existed on the ground was physically marked with a 2" end-of-mine-site marker, and then these markers were sketched onto a map. SMB I, Tr., p. 45-46, 48-49. It is, therefore, foolish to view the practice at a mine which pre-existed the permitting program through the lens of practices and regulations that apply to new mines with no pre-existing disturbance. The law in effect when Goals obtained its permit required it to do nothing other than what it did.

**2. The Law in Effect in 1982—When the Boundary was Established.**

Indeed, CRMW fails altogether to examine the relevant law for discerning the permit area—the state regulatory program as it existed in 1981 and 1982 when the original permit boundary was established. The legal requirement for the Goals facility to secure a surface mine permit arose with the passage of the modern West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) on March 8, 1980,<sup>22</sup> and the subsequent approval of the fledgling state program in 1981 by OSM following the passage of the federal Surface Mining Control and Reclamation Act (“SMCRA”) in August 1977.<sup>23</sup> In that initial state program, the term “permit area” was defined by statute as it is today:

the area of land indicated on the approved proposal map submitted by the operator as part of his application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site.

W. Va. Code § 20-6-3(q) (1980) (re-codified as W. Va. Code § 22-3-3(q)).

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This was the map approved by WVDEP as part of the application approved by SMB. CRMW did not submit any evidence below to challenge the accuracy of that map, which is precisely the type of map that CRMW's counsel now says should control—a map with surveyed boundary lines.

<sup>22</sup> W. Va. Code § 20-6-1, *et seq.* (re-codified as W. Va. Code § 22-3-1, *et seq.*).

<sup>23</sup> See 46 Fed. Reg. 5954 (Jan. 21, 1981).

The 1982 implementing regulations, which became effective in June 1982, provided that:

- the scale for all **maps**, unless otherwise noted, was to be a USGS 7.5-minute quadrangle map enlarged to 500' or less to the inch, though lesser scales could be used for improved clarity. WVCSR § 20-6-3C.01, .02 & 6A.01.c.2 (June 16, 1982)
- application **maps** shall “[s]how by **appropriate markings** the boundaries of the area of land to be disturbed. . . .” WVCSR § 20-6A-6A.01.c.5. (1982)
- “A two-inch (2”) pipe or suitable substitute shall be driven into the earth . . . to permanently **mark the beginning and ending points of the area under permit**. It shall be identified by painting the exposed portion of the pipe red. WVCSR § 20-6A-6B.01.b. (1982)

These regulations thus contemplated the use of USGS quadrangle **maps and markers** to identify permit boundaries on the maps.

The map submitted by Armco in 1982 included, as one of the “appropriate markings,” the 2” pipe installed by Mr. Waller as the “end-of-mine-site marker.” Prior to preparing the 1982 map, Mr. Waller physically marked the eastern and western boundaries of the existing preparation plant with “end-of-mine-site” markers. He did this to delineate not only those areas that were already disturbed from those not disturbed, but also to define the limits of those areas Armco sought to permit from those it considered outside of its permit boundary.<sup>24</sup> At the western edge of the permit boundary, Mr. Waller installed the marker alongside a public road and above a highwall created by Armco for the purpose of constructing rail spurs into the preparation plant area. The marker was placed directly above the western edge of this wall. That wall and marker are still readily visible on the site and have not been disturbed since they were created, a fact that Mr. Waller confirmed in a visit to the site on March 10, 2006.<sup>25</sup> This

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<sup>24</sup> See SMB I 3/14/06 Tr., pp. 44-45 & 49.

<sup>25</sup> *Id.* at 57-59.

marker conforms to the “permanent marker” or “monument” identified by the definition of “permit area” at W. Va. Code § 22-3-3(q).

**3. Common Law Principles are Applicable to Questions of Statutory Interpretation.**

CRMW incorrectly asserts that common law principles are inapplicable to cases involving statutory interpretation. Appellant’s Brief at 28. “In determining the meaning of a statute, it will be presumed, in the absence of words therein specifically indicating the contrary, that the Legislature did not intend to innovate upon, unsettle, disregard, alter or violate (1) the common law; . . . .” See syl. pt. 27, *Merchants Bank and Trust Co. v. Peoples Bank*, 99 W.Va. 544, 566 (1925); see also *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 402 (2003)(“[a]bsent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.”). There is no clear indication from the legislature that SMCRA was intended to overrule all common law principles relating to boundary disputes. In the absence of such a directive, ambiguous terms or provisions should be interpreted consistently with the common law.

The common law has long recognized markers and monuments as controlling in boundary disputes. “It is a general rule that, in locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances.” *Vandetta v. Yanero*, 157 W.Va. 220, 223 (1973), citing *Matheny v. Allen*, 63 W.Va. 443 (1907). Moreover, contrary to CRMW’s contention, the intent of the cartographer must be considered in interpreting the map. CRMW cites *Clonch v. Tabit*, 12 S.E. 2d 521 (W. Va. 1940) for the proposition that “plats and maps control over other descriptions.” Appellant’s Brief at 32. That case provides no support to CRMW because neither WVDEP nor Goals seek to use “other descriptions” to trump the map. Rather, they rely upon the map, which

incorporates the end-of-site marker as an integral and indivisible component of the map. CRMW's discussion of the applicability and substance of the common law is inaccurate and, therefore, fails to support its ultimate conclusions. Moreover, in *Clonch*, this Court also went on to state: "if a plat is inconsistent with the calls in a deed and the latter reflect the evident intention of the grantor, the plat will be disregarded." *Id.* (emphasis added); *See also* SMB I, Tr., p. 179 (Lantz Rankin, a licensed surveyor, explaining that "intent" is an important factor in resolving boundary disputes).

**C. CRMW Never Proved That the Proposed Silo Was Outside the 1982 Permit Boundary or the Boundary of the Approved Revision.**

In reviewing administrative findings, a court shall reverse only if the findings are clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. W. Va. Code § 29A-5-4. The evidence before the SMB was that the proposed silo is inside the 1982 boundary as depicted by the 1982 map.<sup>26</sup> There is, accordingly, substantial evidence in the record to support the rulings of WVDEP, the SMB, and the Circuit Court of Kanawha County. Appellants failed to prove that reliance on the mine-site marker to delineate the original permit area was clearly wrong in view of the reliable evidence of record.

Indeed, CRMW did not prove that, even if the on-the-ground marker is disregarded, the 1982 map is otherwise accurate enough to conclude the proposed silo is outside the 1982 permit boundary. CRMW's argument hinges on its assertion that the boundary line should be established by superimposing a line sketched on the un-surveyed 1982 map onto a recent map drawn from a precise survey of the surface features. The credible evidence of record demonstrated that such an endeavor would be a misuse of the map. *See* SMB I, Tr., p. 263-64 (Lantz Rankin stating that such an overlay would be a "misuse" of the 1982 map). Thus, even if

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<sup>26</sup> *Id.* at 68 (Waller).

the end-of-site marker is discarded, CRMW provided no acceptable alternative method of discerning the permit boundary which showed the proposed silo to be outside of the permit area. Because CRMW cannot identify any evidence of record showing the SMB's findings to be clearly erroneous, the SMB's 3/19/07 order should be affirmed.

**D. Miscellaneous Misconstruction by CRMW.**

**1. Role of Federal Regulations.**

CRMW provides a long, somewhat confusing, and largely irrelevant description of federal, rather than state, surface mining regulations and misses several important points.<sup>27</sup> First, there is nothing in the federal program that prohibits states with their own mining programs from using an integrated approach for discerning permit boundaries—especially for sites that pre-date SMCRA. *See* note 21, *supra* (discussing federal SMCRA's definition of "permit area" and why it is consistent with West Virginia's regulations). CRMW downplays the significance of federal SMCRA's reference to physical markers in an effort to effectively read the term out of the statute. Allowing a map to refer to physical markers or monuments is not, in any way, inconsistent with the federal act. Regardless of whether the state and federal statutes referenced markers in their discussions of maps and permit areas—despite CRMW's obfuscation, they clearly do contemplate the use of such markers—the statutes do not specifically preclude the use of physical markers to aid in the illustration of the permit area for mapping purposes. They simply require that the permit area be shown on the map. Given that the map in question is an un-surveyed, pre-SMCRA map, it is only reasonable to allow the use of markers to illustrate boundaries. CRMW's argument is unfounded because (a) it ignores the statute's provision for

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<sup>27</sup> *See* Appellant's Brief, pp. 12-19.

the use of markers, then (b) it confuses the absence of a highly specific provision for the use of markers for the presence of an affirmative preclusion of their use.

Second, while discussions of federal law and regulations can provide relevant background, the federal statute and regulations have no direct application in West Virginia. CRMW contends, however, that if this Court perceives any inconsistency between the state and federal regulations, then the federal SMCRA requires this Court to ignore the state regulation or effectively re-write it to conform to federal law. The federal act, however, established a nationwide program for dealing with the various problems arising from surface mining in the United States. The Act provides that because of differing problems and conditions from state to state the “primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations ... should rest with the states...” 30 U.S.C. § 1201(f). However, before states are permitted to administer their own exclusive regulatory programs, the federal act requires each state to establish to the satisfaction of the Office of Surface Mining (OSM) that it has statutes that are in accordance with the requirements of the federal act and that state regulations are consistent with the regulations issued by the Secretary of the Interior pursuant to the federal act 30 U.S.C. 1253(a)(1) and (7).

OSM has already approved West Virginia’s surface mine statute and regulations as being consistent with their federal counterparts, and OSM has sole authority to re-visit that decision. See 30 C.F.R. Part 948 (OSM’s approval of State program; *Bragg v. West Virginia Coal Association*, 248 F.3d 275, 288-89 (4<sup>th</sup> Cir. 2001) (after federal OSM approval of State-issued statutes/regulations, the federal regulations “drop out” and can be re-engaged “only following the institution of a § 1271 [federal] enforcement action by the Secretary of Interior”). Despite CRMW’s attempts to show inconsistency through a tedious discussion of the

placement of a comma and a pronoun, West Virginia's statute need not be grammatically identical to the federal statute to be deemed consistent with it, as evidenced by OSM's approval. Indeed, to the extent there is any difference in the two programs, the use of markers and maps in West Virginia is arguably a stricter and more accurate method than is OSM's.

Third, CRMW's argument implies that Goals Coal is attempting to overrule the permit boundary shown in the 1982 map with a physical marker. As has been explained *ad nauseum* in the evidentiary record and throughout the briefing of this case, the marker is an indispensable part of the map. This blended approach to ascertaining the permit area is obviously much better than the approach urged by CRMW. Generally, this approach allows precise location of boundary lines depicted on un-surveyed maps, while CRMW's reading of the statutes would invariably lead to absurd results.

Allowing for reference to site-markers is obviously more consistent with OSM's interpretation of federal law in the instant case as well. "Permit area" was intended by OSM to be the area where coal mine and reclamation activities are authorized to be conducted under a permit. 44 Fed. Reg. 14,902, 14,920 (Mar. 13, 1979). As previously explained, surface mine activities were under way prior to implementation of SMCRA. The marker in question was placed at the end of a high-wall cut for the construction of the rail line into the preparation plant area to mark the end of the area where coal mine activities were taking place. SMB I, Tr., pp. 45-46, 58, 84, 94-95. The map was created after the placement of the marker. *Id.* at 45. The purpose behind the map's creation was to obtain a surface mining permit for the areas where mining was already taking place when SMCRA went into effect. *Id.* at 44-45. DEP's integrated approach to determining the permit area results in a logical boundary that encompasses the area for which a surface mine permit was sought and obtained.

CRMW's approach, on the other hand, would result in a western boundary on an undisturbed hillside, excluding area that has continuously been part of an ongoing mine operation since before SMCRA was enacted. As the SMB noted, this would be an absurd result. See 3/19/07 SMB Order, p. 10. This Court has long acknowledged the duty "to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results. *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W.Va. 780, 787 (2001) citing *State v. Kerns*, 183 W.Va. 130 (1990). While this doctrine does not allow the courts to substitute their own policy judgments for those of the legislature, no valid policy could support a reading of the statute which would render otherwise intelligible maps nonsensical. CRMW's proposed policy considerations fail for the reasons discussed *infra* at 21.

**2. Whether the CRMW's Approach is Also "Consistent" with State Law is Irrelevant.**

The CRMW says that WVDEP's interpretation of W. Va. Code 22-3-3 to allow an integrated use of maps and permit markers is "misplaced" because the CRMW's proposed construction does a better job of giving effect to every word in both statutes (even though CRMW concedes that the two are written differently).<sup>28</sup> This, however, is not the test. The only test is whether the statutes or regulations clearly prohibit WVDEP from exercising its discretion to utilize an integrated approach in determining permit boundaries at mine sites that straddle the pre- and post-SMCRA era. See, e.g., *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1989) (regulatory agency's construction of ambiguous statute entitled to deference; *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 439 (4<sup>th</sup> Cir. 2003) (emphasis added), citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an "agency is entitled to interpret its own regulation and the agency's interpretation is 'controlling unless plainly erroneous or inconsistent with the

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<sup>28</sup> See CRMW Petition, p. 20.

regulation”). See *Thomas v. State Bd. of Health*, 79 S.E. 725 pt. 4 syl. (W.Va. 1913) (the interpretation given by an agency “to a rule or regulation adopted by it will be followed by the court unless it appears to be clearly unreasonable and arbitrary”). An agency’s interpretation need only be reasonable; it “need not be the best or most natural one. . . .” *Pauley v. BethEnergy Mines*, 501 U.S. 680, 702 (1991) (emphasis added). Therefore, WVDEP’s position, reached after considering WVSCMRA and its implementing regulations, is entitled to deference and must be affirmed even if the Court either does not view it as the best construction of the law or views CRMW’s construction as also consistent with the law.

CRMW argues that, because no Legislative rules define the term “permit area,” DEP’s interpretation of the term is not entitled to any deference. CRMW asserts that an agency’s proposed interpretation of a statute is “treated no differently than any other parties’ argument as to how the Court should interpret a particular statute.” Appellant’s Brief at 15. CRMW erroneously cites this Court’s decision in *Appalachian Power* for the proposition that only agency interpretations set out in legislative rules are afforded any deference. The Court, in *Appalachian Power*, clarified that agency interpretations which only clarify existing law and have not been through the legislative process are entitled to some deference from the court; they simply do not have the force of law nor are they irrevocably binding. *Appalachian Power*, 195 W.Va. at 583. Clearly, where there is a gap in legislation, “an agency has authority to fill the gap and the agency is entitled to deference on the question.” *Appalachian Power Co.*, 195 W.Va. at 589; see also *Lincoln County Board of Education v. Adkins*, 188 W.Va. 430 (1992) syl. pt. 7 (“interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous”); see also *State by Davis v. Hix*, 141 W.Va. 385, 389 (1955) (“[w]here the language of a statute is . . . ambiguous . . . the construction of such statute by the person

charged with the duty of executing the same is accorded great weight”). While an agency’s interpretation may not be absolutely controlling on an issue, the agency’s position is not, as CRMW asserts, treated the same as any other party’s argument.

Strangely, after first arguing against deference to a government agency’s position and asserting that WVDEP’s positions are entitled to no deference regarding the interpretation of a West Virginia state statute, CRMW then argues this Court should defer to the Office of Surface Mining Reclamation and Enforcement’s (“OSMRE”) interpretation of the federal statute. Appellant’s brief at 17-19. As previously explained, West Virginia’s state statute—already deemed consistent with the federal statute by the OSM—is controlling. CRMW, nonetheless, attempts to persuade this Court to: (1) overrule the OSM’s prior finding of consistency between the state and federal statutes; (2) negate state law and implement federal law; and (3) give no deference to WVDEP’s interpretation of the laws it is charged with administering, but give absolute deference to OSMRE’s interpretations of inapplicable federal law. CRMW fails to offer any explanation for endorsing two diametrically opposing positions on the issue of agency deference or any compelling reason for this Court to rely on federal rather than state law.

**E. CRMW’s Arguments Fail from a Policy Perspective as Well.**

CRMW’s argument, that maps should control over actual markers on the ground, would lead to absurd and impractical results. Suppose, for example, that the hand-drawn permit boundary had mistakenly but clearly extended the boundary 260 feet past both the end-of-mine-site marker and the existing disturbed areas to within 5 feet of the school.

Applying CRMW’s argument, the previously undisturbed area outside the permit marker would today be considered inside the “mapped” permit and Goals could construct a silo 5 feet from the school. If that had been the case, the WVDEP permit decision and SMB ruling would

have looked to the mapped marker as moving the boundary away from the school and CRMW would have undoubtedly joined their conclusion. In enacting 30 U. S. C. §1272(e), Congress was concerned with providing a real-world buffer zone between coal mine operations and certain structures rather than a virtual one. If the real, on-the-ground location of the school would be given precedence over the mapped location (as it certainly would), it only makes sense for the real-world, end-of-site marker demarcating the original permit boundary to be similarly credited.

CRMW also argues its interpretation is consistent with Congress's intent to ensure opportunities for meaningful public participation. Appellant's Brief at 26. CRMW asserts "the public would never have the opportunity to assess the effects of surface mining operations in areas of land that are within markers and monuments on the ground, but not designated on the maps that are available for public inspection." *Id.* at 27. According to CRMW, the public does not have access to physical markers on the ground. *Id.*

CRMW's argument is confusing and demonstrates ignorance of basic map-making issues. Absent the objectively locatable end-of-mine-site marker, no member of the public could use the unsurveyed line drawn on the USGS map Armco was required to use and locate that line on the ground with any precision.<sup>29</sup> It is only the end-of-mine-site marker that provides this map with the accuracy necessary for the public to locate the permit boundary with absolute precision. Thus, the position reached by WVDEP, the SMB and the Circuit Court provide the public with a better way of protecting their interests.

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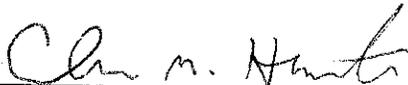
<sup>29</sup> See SMB Hearing I, Tr., p. 46-49 (Clarence Waller stating that none of the lines on the 1982 USGS maps were surveyed and affirming that one could not locate the permit boundary without the identified marker); see also *id.* at 185, 195 (Lantz Rankin explaining that the purpose of USGS maps is to provide only a general depiction of the mapped area); *id.* at 293 (Linda Torres explaining that USGS maps are good for a general depiction of mapped area); see also 3/19/07 SMB Order, p. 7 (finding that, at the required scale, it is difficult to precisely locate points on the ground using only a map).

## VI. RELIEF PRAYED FOR

The "conflict" with regard to the permit boundary in this case is a contrived one; not even CRMW argues that the end-of-mine-site marker was placed outside of the perimeter of the actual mine site as it existed on the ground. No one disputes the "real" mine site boundary. WVDEP, the SMB, and the Circuit Court of Kanawha County all found that when the original map contains a marker which is relied upon to establish the permit boundaries, the marker is a part of the map and cannot be disregarded. The CRMW has provided no compelling legal or factual basis for disturbing the findings of WVDEP, the SMB, or the Circuit Court in this regard. In fact, the marker, as well as the location of the proposed silo, have been more recently surveyed to show that the silo is inside the original permit boundary. Therefore, the SMB's March 19, 2007 Order should be affirmed.

Respectfully submitted,

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**RANDY HUFFMAN,  
Secretary, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellant/Cross-Appellee,**

**v.**

**Appeal No. 34318  
Civil Action No. 07-AA-27  
Judge Louis H. Bloom**

**GOALS COAL COMPANY,**

**Appellee,**

**and**

**COAL RIVER MOUNTAIN WATCH,**

**Appellee/Cross-Appellant.**

**CERTIFICATE OF SERVICE**

I, Robert G. McLusky, do hereby certify that a true and exact copy of the foregoing GOALS COAL COMPANY'S RESPONSE TO APPELLANT'S BRIEF was caused to be served upon the following via United States mail, postage pre-paid, this 1<sup>st</sup> day of August, 2008:

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